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Peter J. Hammer
University of Michigan Law School

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NOTES

Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment

Ardent advocates within the law and economics movement do not place any topic outside the potential scope of economic review. Consequently, there are few significant legal issues that have not been subject to economic interpretation. Now, even the "free-speech icon" has been subjected to the "acid bath of economics."[1]

Judge Richard A. Posner's article, *Free Speech in an Economic Perspective,*[2] takes seriously the marketplace of ideas metaphor invoked almost seventy years ago by Justice Holmes.[3] This Note is an evaluation and critique of the ideas embodied in Posner's article. The main objective is to use the first amendment as a forum from which to explore the potential role of "law and economics" in fields not traditionally thought of in economic terms. The Note is not intended to be an authoritative work on constitutional law.

An economic evaluation of free speech must be met with mixed reviews. There is much that a proper view of economics can bring to this field of constitutional law. Economics can be useful when it is viewed as a science which examines the decisionmaking process, the study of optimization behavior subject to constraints. Economics cannot be helpful if it is viewed as a precise tool that can mechanically and independently determine the outcomes of complex problems. As a method, economics can lend valuable insight to the technical process of constitutional decisionmaking. In this capacity it can be used to assist in the framing of issues and in isolating the appropriate factors for judicial consideration. Economics is not helpful, however, in the inherently subjective process of weighing and quantifying competing concerns. It is wrong not to recognize this limitation, and it is dangerous to assume that difficult, value-laden decisions in areas such as free speech can be decided mechanically by appealing to an economic formula. Difficult constitutional choices cannot be avoided by viewing first amendment issues through the lens of an economic perspective.

1. Posner, *Free Speech in an Economic Perspective,* 20 SUFFOLK U. L. REV. 1, 7 (1986).

2. *Id.*

3. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

Part I of this Note introduces the mechanics of the model Judge Posner has developed to determine whether restrictions upon speech should be upheld. Part II evaluates and critiques Posner's method from an internal perspective. This is first done by examining the theoretical foundations and assumptions of his economic perspective. This part then turns to testing the output and conclusions of the model to determine how successfully the theory can be turned into practice. Part III constitutes an external critique of Posner's model. This part addresses the question of whether the first amendment should be thought of in economic terms. After addressing the institutional problems associated with judicial adoption of the model, the limitations inherent in the economic methodology itself, and the potential dangers of implementing the method, the part concludes that an economic perspective can be a useful tool in the hands of the constitutional decisionmaker, but only when used in full recognition of its limitations. Part IV presents some final remarks on the costs and benefits of an economic perspective.

I. POSNER'S ECONOMIC MODEL FOR FIRST AMENDMENT DECISIONMAKING

In order to proceed with a thorough examination of Posner's arguments, it is necessary to have a comprehensive understanding of the mechanical workings of his formula. This part begins by presenting a broad overview of the formula in its entirety. It then proceeds to examine the roles of the different variables independently.

Posner sets forth a free speech formula the courts could use when deciding whether to uphold a restriction on speech.[4] Posner's decisionmaking model is a form of cost-benefit analysis grounded in Learned Hand's opinion in *United States v. Dennis*.[5] Hand's ap-

4. *See* Posner, *supra* note 1.

5. 183 F.2d 201, 206, 212 (2d Cir. 1950) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."), *affd.*, 341 U.S. 494 (1951). The Supreme Court explicitly adopted the Hand formulation of the clear-and-present-danger test. 341 U.S. at 510. Dennis was convicted of conspiring to organize the Communist Party of the United States as a group to teach and advocate the overthrow of the government of the United States by force and violence. The two decisions in *Dennis* played an important role in the evolution of first amendment standards. Even before Hand's decision in *Dennis*, the traditional clear-and-present-danger standard had been criticized as being too simplistic and consequently as being of no use in guiding specific decisions. There was a call for courts to conduct a greater degree of balancing and weighing of the competing factors. *See* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 24-28 (1951). For an analysis of the implications of the *Dennis* decision and its effects on the clear-and-present-danger test, see M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 62-66 (1966). The Court's action, or inaction, in *Dennis* has been sharply criticized. One of these critics has been Ronald Dworkin:

> Nor does the danger of wrong decisions lie entirely on the side of excess; the failure of the Court to act in the McCarthy period, epitomized by its shameful decision upholding the legality of the Smith Act in the *Dennis* case, may be thought to have done more damage to the nation than did the Court's conservative bias in the early Roosevelt period.

proach, similar to that of his tort negligence formula,[6] claims that a restriction on speech should be upheld if the costs associated with the regulation are less than the social cost that the regulation is designed to avoid, multiplied by the probability of the social cost coming to pass. In symbols this translates into upholding a regulation whenever $B < P \times L$, where B is the cost of the regulation, P is the probability that the speech in question will cause harm, and L is the magnitude of the social cost of the speech.

While still in the cost-benefit mode, Posner's version of the formula is slightly more complicated. Posner decomposes the cost of the regulation into two parts: the social loss from suppressing valuable information, V, and the legal-error costs that result from implementing the regulation, E. For Posner, $B = V + E$. On the harm side of the equation Posner advocates discounting future harm to its present value. These revisions produce the expanded *Dennis* formula: regulate if $V + E < P \times L/(1+i)^n$, where n is the number of periods between the time the speech occurs and the manifestation of the harm, and i is the rate of time preference that discounts the future cost of the harmful speech into its present value.[7]

R. DWORKIN, TAKING RIGHTS SERIOUSLY 148 (1977). Independent of the political wisdom of the specific decision, however, the formula used by Judge Hand merits consideration. For a comprehensive analysis of the *Dennis* formula, including applications to a variety of fact scenarios and graphical illustrations, see W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 19-40 (1984). For a discussion of later judicial treatment of the *Dennis* decision, see *infra* note 33.

6. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

7. Posner, *supra* note 1, at 8. The nontechnical reader should not be intimidated by Posner's formula. The formula is a symbolic way of stating that a regulation should be upheld if the costs of regulating are less than the benefits derived. The costs of regulating are found by adding the value of the speech lost due to the suppression, V, and the magnitude of the legal error resulting from implementing the restriction, E. The benefit of regulating is found by measuring the harm that is being avoided. The benefit, therefore, is equal to the magnitude of the harm, L, discounted to its present value and multiplied by the probability of the harm coming to pass, P. Discounting the harm is not a complicated concept. The discount rate i, is some small positive value, analogous to the interest rate for borrowing money. Just as the interest rate demonstrates that some people are willing to consume less in the future in order to consume more now, the discount rate reflects the greater weight that most people place upon present value; they would rather have their goods sooner as opposed to later. The ultimate influence that the discount rate has depends upon its magnitude, i, and upon the passage of time, n. The longer the period of time (the higher the value of n), the larger the effect of the discount. This is seen mathematically by the fact that $(1+i)^n$ gets larger as n gets larger. It is helpful to look at extreme situations to gain an understanding of this fact. When $n = 0$ (the harm is imminent) the discounting has no effect. This is seen by the fact that $(1+i)^0 = 1$, (mathematically, any value raised to the zero power is equal to one) and $L/1 = L$. Therefore, imminent harms are given maximum weight and the discounting has no effect. Conversely, as the value of n becomes very large (infinite) the value of $(1+i)^n$ becomes very large (infinite) and the value of $L/(1+i)^n$ approaches zero. In words, the harms on the infinite horizon are given no present weight. If the value of $i = 0$ (time is not discounted at all) then $(1+0)^n = 1$ for all values of n (time). This means that $L/(1+0)^n = L/1 = L$. The implication is that a zero-time discount rate means that all harms are treated as though they were imminent.

A. *The Value of Speech Lost Due to Suppression*

The variable V measures the worth of the information that is lost due to a proposed regulation. According to Posner:

> V depends on (1) the nature and value of the speech suppressed and (2), the amount of speech suppressed, which in turn depends on (a), the method, scope, and extent of the regulation, and (b), the market robustness (versus fragility) of the speech suppressed — more precisely, the degree to which the social benefits of the speech are externalized.[8]

Quantifying V is a two-step process. A judge must first determine the value or social worth of the speech.[9] Once this is done, the value of the speech is multiplied by the quantity of speech that is actually lost.

The weight assigned to V will be influenced by the type of regulation that is being questioned. A regulation that is narrowly tailored and that leaves avenues open for information to be disseminated will translate into a smaller V and hence will be more acceptable. Conversely, a broad, blanket restriction will produce a higher value for V and will be more likely to be struck down.[10] Consequently, this method of calculating V would treat time, place, and manner restrictions more leniently than absolute prohibitions.

The quantity of speech that is suppressed depends not only upon the type of restriction that is used, but also upon the nature of the speech that is being regulated. Some types of speech are more vulnerable to regulation than are other types of speech. One of the more valuable insights of Posner's economic perspective is his analysis of the market robustness of speech.[11] A regulation upon speech is analogous in many ways to a tax placed upon the sale of a commodity. The effect that a tax has upon a commodity depends upon its elasticities of supply and demand; these will vary greatly from product to product.[12] The more elastic supply and demand are, the greater will be the reduction in the quantity of speech in response to the regulation. One thing

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8. Posner, *supra* note 1, at 9.

9. There are many difficulties with this step of the calculation. *See infra* notes 53-57 and accompanying text.

10. This is similar to least restrictive means analysis, but Posner does not claim that judges must search for the smallest feasible V. All Posner's formula requires is that $V + E < P \times L/(1+i)^n$. If V_1 is the social loss due to a blanket restriction and V_2 is the social loss due to a narrowly tailored restriction such that $V_1 > V_2$, then both restrictions are acceptable so long as $V_1 + E_1 < P \times L/(1+i)^n$. This obviously does not guarantee the best result from a social perspective. If the judge were required to act efficiently and minimize loss to society, then she would be required to choose the V_2 method of restriction and reject V_1, even though V_1 does not violate the expanded *Dennis* formula.

11. *See* Posner, *supra* note 1, at 19-24.

12. The elasticity of demand describes the responsiveness of the demand for a product as the price changes. The higher the elasticity, the more responsive will be the changes in demand. A modest tax that results in a small increase in the price of a product whose elasticity of demand is high will lead to a substantial decrease in the quantity of the product that is demanded. Conversely, if demand is highly inelastic, then even substantial price changes will not significantly alter the quantities of the product demanded.

that affects the elasticity of demand is the availability of substitutes.[13] For example, Posner argues that the elasticity of demand for political information is very high. He claims that the public benefits of using the information for voting are not internalized by voting;[14] therefore, he reasons, people use political information primarily for entertainment. Since there are many substitutes for this type of entertainment, people will readily switch to different sources if the price of obtaining political information is increased.[15] This would result in a higher value for *V*. Demand for types of information where the social benefits are directly internalized by the parties, such as commercial speech or pornography, will be less elastic and thus less vulnerable to regulation.[16]

The elasticity of supply essentially measures a person's willingness to engage in the speech activity, and how that willingness changes in response to regulation or other costs. If the elasticity of supply is high, then a small increase in the cost of engaging in the activity will deter people from doing so. An individual may choose to engage in a protest if it is held downtown, whereas she may be unwilling to travel across the state to engage in a similar protest. At the other extreme, when supply is highly inelastic, increasing the costs will only have a small influence on a person's decision to engage in the activity.[17]

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13. Substitutes are products that, although not identical to the original product, satisfy substantially the same needs. For example, if color is not an important consideration, then blue and red pencils would be close substitutes for each other. If a regulation increased the price of red pencils, but did not affect the price of blue pencils, then consumers would substitute the blue for the red. The result would be that the demand for red pencils would be highly elastic, and consequently the quantity demanded would be very responsive to small changes in price.

14. The policy implications of the inability of political speech to internalize its benefits will be examined in Part II.B.2.b. *infra.*

15. Many economic explanations necessarily begin with storytelling. Economists weave a tale that makes sense and then proceed empirically to verify the validity of their stories. This "casual empiricism," however, must not be mistaken for proven fact. Posner, the storyteller in this case, provides a more detailed account of this tale:

> The demand for some sorts of information probably is highly elastic, implying that a tax would curtail output substantially. This seems particularly true of political information, even if it is considered the category of highest social value. The main use to which that information is actually put is not, as one might suppose, as an input into voting, but as entertainment. Its private value as an input into voting is small because of the extremely limited private (not social) value of voting itself, which is due to the facts that no election in any but the tiniest political subdivisions is ever decided by one vote and that the voter votes for candidates rather than specific programs . . . . The modest value that most people attach to voting suggests that they probably attach little value to political information and hence will readily substitute other forms of news and entertainment if the price of political information rises because of a tax, whether directly or by regulation, on the sources of that information.

See Posner, *supra* note 1, at 23.

16. For analysis of the implications of the varying degrees to which different types of speech internalize their benefits, see *infra* Part II.B.2.

17. If the tax analogy is correct, then it may imply that courts which rigidly apply the formula will be likely to underestimate the long-term quantity of speech lost due to regulation. Because of the existence of many sunk costs, supply in the short term is more inelastic. In the long term, supply in most markets approaches perfect elasticity. This implies that there will be a

The main point to be distilled from this discussion is that the exact social cost of regulating speech will vary with the particular characteristics of those who engage in the activity (suppliers) and those to whom the message is addressed (demanders). The judge must examine the varying characteristics on a case-by-case basis when determining what value to attach to *V*.

Posner outlines many other factors that influence the magnitude of *V*. One of these is the geographic scope of the authority implementing the restriction: the greater the size of the jurisdiction, the higher the value of *V*.[18] Posner concludes that this implies that municipal and state governments should be given greater authority to suppress speech than the national government.[19] A related factor is the size of the actual and potential audience for the speech. Posner claims that the size of the audience can be used as a proxy for the value of the speech in question.[20] The larger the size of the audience, the higher the value of *V*. *V* also will be higher for viewpoint-specific restrictions than for viewpoint-neutral restrictions. Viewpoint-specific regulations interfere with the competitive operation of the marketplace by putting one isolated opinion in a disadvantageous position, whereas viewpoint-neutral regulations harm all points of view equally, and hence do not interfere with an opinion's relative ability to compete.[21] Similarly, Posner asserts that a restriction that is incidental to other goals and objectives will translate into a lower value of *V*.[22]

B. *The Costs Associated with Legal Error*

The other significant variable on the cost side of the equation is the legal error term, *E*. This term recognizes the difficulty of implementing any sort of restriction on speech.[23] Even carefully designed and well-intended regulations can suppress more than the types of speech that they were designed to address. These problems are magnified in a

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greater long-term reduction in speech in response to the regulation than judges might first predict. For an explanation of an industry's long-term economic reaction to a tax increase, see H. VARIAN, MICROECONOMIC ANALYSIS 90-91 (1984).

18. Posner, *supra* note 1, at 10, 19.

19. *Id.* The claim that localities should be afforded greater ability to restrict speech than the federal government is treated in depth in *infra* Part II.B.1.

20. Posner, *supra* note 1, at 8, 11-12.

21. *Id.* at 12. Blanket restrictions that influence all political viewpoints equally will increase the randomness of public opinion due to the decrease in overall information, but they will not systematically bias the outcome. Viewpoint-specific regulations, on the other hand, will cause certain opinions to be underrepresented, and hence will influence the outcome of the political process. *Id.* at 17.

22. Posner assumes that less speech is restricted if the suppression is unintentional than if the suppression is intentional. He claims that if the restriction is incidental to another goal, then the value for *V* will be lower because the authority's purpose is not to suppress speech. *Id.* at 17-19. This claim is not intuitive, and it is hard to believe that it would be true universally. There is also a potential for abuse, since speech restrictions could be tacked on to other agendas.

23. *Id.* at 24-29.

world of imperfection. Judges may be partial to political points of view that are supportive of the existing political structure. Judges are also predominantly conservative, white, and upper-middle class. This raises the possibility of bias in the implementation of regulations due to the inherent subjectivity of the decisions that must be made.[24]

Even if no bias existed, there would still be a large legal-error term, given the difficult nature of the task of determining the value of speech, the quantity of it lost due to the regulation, and the harms of inaction.[25] Even predicting the value of E is an imprecise science. The inclusion of a self-correcting error term, therefore, is essential for any realistic and workable model.[26] The inevitability of mistakes and abuses in the difficult field of government regulation of speech cannot be ignored. This is especially true because, as the facts of the *Dennis* case illustrate, these decisions are often made in charged political environments that are not immune from McCarthy-type mania.[27]

Conditions in the actual laboratory of the courtroom are far from ideal. Attaching significant weight to the legal-error term would lead to far-reaching protection for all types of speech, including those not thought of as having a high value of V. Recognizing the importance of this factor may help to explain the great deference traditionally afforded to freedom of speech. Posner's inclusion of a self-correcting error term makes his model much more pragmatic and useful.

C. *The Probability of Harm Occurring*

Numerous factors influence the probability of the feared harm coming to pass, P.[28] One of these is time. Generally speaking, the more distant in time the harm is, the less likely it is actually to occur. Time affords the marketplace a chance to test the validity of the idea, and provides the opportunity to take alternative measures, including counter-advocacy, in an effort to prevent any detrimental effects.[29]

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24. Posner explains: "As part of the government, of the 'system,' [judges] often are interested parties in the dispute they are called on to decide. Their impartiality is in question, and with it the accuracy of their judgments." *Id.* at 25.

25. The vast majority of first amendment decisions cannot be made with precision. Posner believes that the law's evidentiary methods "seem pretty hopeless for resolving difficult questions of political or scientific truth and consequence, or aesthetic value and consequence, either on the cost or benefit side." *Id.* at 26. It is important not to overestimate the accuracy of the tools with which constitutional decisionmakers are forced to work.

26. As a general principle of policy formulation, it is wise to consider the transaction costs associated with the regulation as part of the total costs of regulating. This should be done before advocating any sort of governmental intervention in an effort to ensure that the cure is not worse than the disease. *See* Dahlman, *The Problem of Externality,* 22 J.L. & ECON. 141 (1979).

27. *See supra* note 5.

28. Posner, *supra* note 1, at 29-34.

29. Posner's faith in the ability of the marketplace of ideas to produce truth is not universally shared. One commentator has written:

> Yet, the marketplace of ideas is as flawed as the economic market. Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technol-

Additionally, Posner claims that *P* will be higher when the speech is "emotive" because emotive speech is more likely to cause damage than speech that is more "intellectual."[30] *P* will also be higher if the structure of the communications media is such that rival ideas cannot get an adequate hearing. The inability of rival ideas to gain access would bias the working of the marketplace. Other factors that affect the value of *P* include the level of education of the population (the higher the education, the lower the probability of harm), the stability of the nation's political institutions (the more stable the political institutions are, the lower the probability of harm), the speaker's intent (intended results are presumed to be more likely), and the degree to which the speaker is appealing to the audience's self-interest (appeal to self-interest increases the effectiveness of speech, and hence the probability of harm).[31]

D. *The Harm Resulting from the Speech*

Posner advocates considering the magnitude of all harms that result from the speech in question.[32] This includes distant harms as well as imminent ones. Posner's approach is inconsistent with the current Supreme Court methodology found in *Brandenburg v. Ohio*[33] and its

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ogy, and unequal allocations of resources, ideas that support the entrenched power structure or ideology are the most likely to gain acceptance within our current market. Conversely, those ideas that threaten such structures or ideologies are largely ignored in the marketplace.

Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16-17. Other authors hold similar beliefs. "Because of monopoly control of the media, lack of access of disfavored or impoverished groups, techniques of behavior manipulation, irrational response to propaganda, and the nonexistence of value free, objective truth, the marketplace of ideas fails to achieve the desired results." Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 965-66 (1978). Baker conducts a comprehensive analysis of the theories used to support the marketplace justification, and claims that many of the assumptions that the market theory depends upon are false. *Id.* at 967-81.

30. Posner, *supra* note 1, at 31. Posner's contention is that emotive speech deserves less protection because it leads to the breakdown of the communications process. The use of pure intellect, however, does not hold a monopoly on the category of meaningful forms of communication. Just how far Posner advocates taking this distinction is unclear, however. The potential abuses of such a standard are manifold. How is a judge to decide what speech is emotive, and what speech is intellectual? Does a judge extend less first amendment protection to *USA Today* than to the *New York Times* because of the use of full color pictures?

31. Posner, *supra* note 1, at 32-34. The standards that Posner outlines to determine the probability of the feared harm coming to pass come very close to saying, "if the speech is effective, then it is not protected." Speech that is important and necessary will be likely to register very high on Posner's probability scale. Speeches given by the great advocates of civil rights in the 1950s and 1960s serve as an example. The speakers were calling for immediate action: they used a wide range of rhetorical tools including powerful emotional appeals as well as intellectual appeals; there was great fear of political instability; the speakers intended to produce results; and they were appealing to the self-interest of many members of the audience. The guarantees of the first amendment are not very meaningful if they only protect watered-down and ineffective forms of advocacy.

32. *See* Posner, *supra* note 1, at 34-36.

33. 395 U.S. 444, 447 (1969) (*per curiam*). The Court in *Brandenburg* overturned the conviction of a Ku Klux Klan leader who was convicted for advocating the necessity of violent and

progeny. *Brandenburg*, unlike Posner's theory, does not allow potential future harms to be used as a rationale for the suppression of present advocacy.

Posner's formula does not weigh the full magnitude of the future harm; it discounts the future harm to its present value.[34] A harm will be given less and less weight the further away it is in time. Discounting future harm must be distinguished from a decrease in the likelihood of the harmful occurrence. The former assumes that the harm will occur and discounts its magnitude. The latter challenges the probability of the harmful event occurring in the first place.

In making his final decision, the judge implementing Posner's formula must calculate the magnitude of the harm that will result from the speech, L, decide at what point in time the harm will occur, n, select the appropriate social discount rate, i, and then compute a value for $L/(1+i)^n$.

II. An Evaluation and Critique of Posner's Method

This part's main objective is to conduct an internal critique of Posner's model. This is done on two levels. The first section evaluates the procedural operation of the model. It identifies some of the assumptions involved in adopting an economic perspective and explores their validity in the constitutional setting. The second section examines the output of the model by testing the validity of specific conclusions Posner draws from his economic premises.

A. *Understanding the Model: Theoretical Objectives Through Mechanical Implementation*

Economics is essentially the study of making choices and striking tradeoffs between competing interests. Understood as such, it has a potential analogue in first amendment law, where difficult choices are commonplace. Its principles, however, cannot be blindly applied, because economic tools cannot be employed without making assumptions about the underlying nature of the problem that is being addressed. Deciding whether economic analysis is appropriate, then,

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unlawful means of political reform. In its decision, the Court did not use the balancing formula that it had adopted in *Dennis*. The concurring opinions of Justice Black and Justice Douglas, both of whom wrote strong dissents in *Dennis*, make it clear that the *Dennis* formula is no longer the guide for first amendment decisionmaking. The Court in *Brandenburg* established broad protection for first amendment rights, claiming that speech can only be regulated if the danger is serious, likely, and imminent. For a discussion of first amendment standards and the clear-and-present-danger standard as it evolved from its origins in the early 1900s through *Dennis*, and to *Brandenburg*, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg — and Beyond*, 1969 Sup. Ct. Rev. 41.

34. Discounting assumes that people are more concerned with ills that are immediate than with dangers that are distant. For a more detailed discussion, see *supra* note 7.

frequently centers on deciding whether the characteristics of the problem make the underlying assumptions reasonable.

This section outlines some of the explicit and implicit assumptions behind an economic perspective. Its purpose is to develop an understanding of the economic process and to identify some of the problems in its application to constitutional questions. Specific methodological problems arise in trying to quantify the various interests and in assuming that preferences concerning rights fit neatly into a neoclassical economic mold.

1. *The Theoretical Background and Assumptions Underlying an Economic Perspective*

Even in light of the breadth of the law and economics literature,[35] it appears incongruous to view the first amendment from an economic perspective. This incongruity is lessened when one adopts a proper understanding of the meaning of the term economics. Economics can be defined as "the science of choice under conditions of scarcity."[36] Its uniqueness and usefulness stem not from the topics it addresses, but from its process of decisionmaking. As one law and economics commentator explains, "[t]he general theory of choice that is at the core of economics, is a deductive mechanism whose structure and formal validity are independent of its specific applications."[37] The tools of the economist are valuable even when the issues at stake cannot be reduced to dollars and cents. When one views economics as the study of making optimal choices when faced with pragmatic constraints, its

35. "Law and economics" is a catch-all phrase that describes attempts to apply economic principles to legal issues. For a basic introduction to the various issues treated under the law and economics rubric, see P. BURROWS & C. VELJANOVSKI, THE ECONOMIC APPROACH TO LAW (1985); N. MERCURO & T. RYAN, LAW, ECONOMICS AND PUBLIC POLICY (1984); C. VELJANOVSKI, THE NEW LAW-AND-ECONOMICS: A RESEARCH REVIEW (1982) [hereinafter C. VELJANOVSKI, LAW AND ECONOMICS]; Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books,* 29 U.C.L.A. L. REV. 1260 (1982); Veljanovski, *The Economic Approach to Law: A Critical Introduction,* 7 BRIT. J. L. & SOC. 158 (1980). The number of topics that have been subjected to an economic interpretation is vast. Economics has been applied to issues ranging from traditional topics such as torts and contracts to more unconventional speculation about a marketplace for babies in the field of adoption. For a recent review of adoption and market theory, see, for example, Cass, *Coping with Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate,* 67 B.U. L. REV. 73 (1987); Cohen, *Posnerism, Pluralism, Pessimism,* 67 B.U. L. REV. 105 (1987); Frankel & Miller, *The Inapplicability of Market Theory to Adoptions,* 67 B.U. L. REV. 94 (1987); Posner, *The Regulation of the Market in Adoptions,* 67 B.U. L. REV. 59 (1987). For an insider's view of what mainstream law and economics is, and what it is trying to accomplish, see Kitch, *The Intellectual Foundations of "Law and Economics",* 33 J. LEGAL EDUC. 184 (1983). For a solid introduction to the economic principles most frequently used in the literature, see Comment, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench,* 133 U. PA. L. REV. 1117, 1118-26 (1985).

36. C. VELJANOVSKI, LAW AND ECONOMICS, *supra* note 35, at 18.

37. *Id.*

potential role in constitutional decisionmaking begins to emerge.[38]

The underlying premise of Posner's economic analysis is that free speech (under the first amendment) is not an absolute value.[39] If free speech were an absolute value, then the optimum choice for a judge to make when faced with a choice between it and a competing value would always be to uphold the free speech interest.[40] In reality, however, judges are frequently faced with explicit trade-offs between competing values and objectives. For example, judges have faced choices

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38. Posner is not the first one to envision a role for economics within constitutional theory. A pioneer in the field was Charles Beard who wrote:

> But enough has been said to show that the concept of the Constitution as a piece of abstract legislation reflecting no group interests and recognizing no economic antagonisms is entirely false. It was an economic document drawn with superb skill by men whose property interests were immediately at stake; and as such it appealed directly and unerringly to identical interests in the country at large.

C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 188 (1913). Beard argues for a historical analysis of the Constitution that appreciates the importance of the economic forces behind its writing and adoption. He does not, however, advocate a prospective economic application of its tenets, nor does he address the economics of "rights" such as freedom of speech. For an impressive symposium concerning the relationship between economics and constitutional law, with its central theme an evaluation of Beard's work, see *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 1 (1987). Other authors have suggested that economics should play a more active role in the application of the Constitution. *See, e.g.*, Director, *The Parity of the Economic Marketplace*, 7 J.L. & ECON. 1 (1964). Director discusses free speech in economic terms, noting its similarity to the marketplace for goods, and questioning its unique protected status. *Id.* at 3-7. He does not attempt any specific analysis such as Posner's, however. Pure economists have not been silent on the issue of the first amendment. *See, e.g.*, B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION (1975). This book examines, from an economist's perspective, court precedent concerning freedom of expression as it applies specifically to media. Owen emphasizes the need to adjust to changing market structures. *Id.* at 186-89. *See also* I. POOL, TECHNOLOGIES OF FREEDOM (1983). Pool examines the potential impacts that changing market structures and technologies may have on freedom of speech and the first amendment.

39. Although Posner argues that it is wrong to give freedom of speech absolute protection, and that a consideration of tradeoffs is necessary, many scholars would strongly disagree with the propriety of weighing the first amendment against some utilitarian concept of the general good. Dworkin has argued that "the government is not entitled to constrain liberty of speech, for example, whenever it thinks that would improve the general welfare." R. DWORKIN, *supra* note 5, at 270. Dworkin argues that strong rights will have no meaning if they can be outweighed by the general interest.

> In order to save them, we must recognize as competing rights only the rights of other members of the society as individuals. We must distinguish the "rights" of the majority as such. . . . The test we must use is this. Someone has a competing right to protection, which must be weighed against an individual right to act, if that person would be entitled to demand that protection from his government on his own title, as an individual, without regard to whether a majority of his fellow citizens joined in the demand.

Id. at 194. Dworkin illustrates his claim that balancing should not take place by examining antiriot laws versus rights to free speech in the context of the Chicago Seven trial. *Id.* at 197-204. For an interesting application of Dworkin's view that rights should be able to "trump" utilities, see Thompson, *The Trolley Problem*, 94 YALE L.J. 1395, 1404-06 (1985) (The trolley problem asks whether a person can switch a set of trolley tracks, killing one person, if the action would save five others.) The belief that some rights are not subject to trade-offs, and are in a sense inalienable, can have a firm basis in economic principles. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972).

40. Even if this were true, there would still be a potential role for economics if the judge had to choose between competing free speech values.

in the past between freedom of the press and national security,[41] freedom of speech and national pride,[42] and freedom of speech and individual privacy.[43] In many circumstances, free speech cannot be pursued without incurring some cost; therefore, the decision to uphold speech as a value necessarily entails sacrificing some other good.[44]

The realization that certain trade-offs cannot be avoided does not provide any guidance as to how the ultimate decisions are to be made. Posner advocates that courts adopt a cost-benefit analysis approach. In theory he claims that a restriction on speech should be upheld if the benefits of suppressing the speech outweigh the costs.[45] This is captured by the formulaic expression: regulate if $V + E < P \times L/(1+i)^n$. If one accepts the original premise that speech is not an absolute value and that the judge must consider the costs of upholding speech, then this is not an unreasonable way to frame the issue. As a general thesis, however, the cost-benefit statement is true by definition. It is little different from saying that the judge should always make the correct decision. The controversial step arises in the concrete application of the formula, when the variables are actually quantified.[46]

The process of quantifying variables necessitates making assumptions about the nature of the problem being addressed. All modeling involves some degree of abstraction. Ideally, all relevant factors would be considered; unfortunately, it is neither practical nor possible to be completely comprehensive.[47] Given this fact, no model can ever perfectly mirror reality. The real issue then becomes: Is the approxima-

41. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (the "Pentagon Papers" case).

42. *See* United States v. O'Brien, 391 U.S. 367 (1968).

43. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

44. The existence of trade-offs does not necessarily vindicate a Posnerian formula, but it does illustrate the need to have some consistent method of deciding which values to promote.

45. Implicit in this type of cost-benefit analysis, as well as in most economics theory, is the assumption that policymakers should use a wealth-maximization decision rule. This use of efficiency as a means to guide decisions is not uncontroversial. *See* Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative,* 95 HARV. L. REV. 1817, 1822 (1982); *see generally* Dworkin, *Is Wealth a Value?,* 9 J. LEGAL STUD. 191 (1980); Kronman, *Wealth Maximization as a Normative Principle,* 9 J. LEGAL STUD. 227, (1980); Posner, *The Value of Wealth: A Comment on Dworkin and Kronman,* 9 J. LEGAL STUD. 243 (1980).

46. This step of Posner's analysis must be closely examined; in later applications of the model he cannot be allowed to escape to the tautological safety of the general cost-benefit analysis thesis.

47. The impossibility of practicing complete rationality is explained by Charles Lindblom:

> Ideally, rational-comprehensive analysis leaves out nothing important. But it is impossible to take everything important into consideration unless "important" is so narrowly defined that analysis is, in fact, quite limited. Limits on human intellectual capacities and on available information set definite limits on man's capacity to be comprehensive. In actual fact, therefore, no one can practice the rational-comprehensive method for really complex problems, and every administrator faced with a sufficiently complex problem must find ways to simplify drastically.

Lindblom, *The Science of "Muddling Through,"* in POLICY-MAKING IN AMERICAN GOVERNMENT 31 (E. Schneider ed. 1969).

tion provided by the model close enough to reality to be instructive?[48] The criticism of most models centers upon the viability of the assumptions made during the abstraction process. In this criticism, the factors that are left out of the model are just as important as those included in it.

Frequently, however, the assumptions made during the abstraction process are forgotten when the model is later applied, and the simplified model is mistakenly viewed as a complete expression of reality. A pervasive problem in the law and economics literature is this type of unquestioning application of controversial and qualified economic principles. Too little attention is paid to identifying the implicit assumptions behind the economics and asking whether those assumptions are justified in the legal setting to which they are being applied.[49]

A rigorous evaluation of law and economics analysis, then, must begin by scrutinizing the underlying economic assumptions. Many conditions must be satisfied before any economic machinery can be employed. This Note will examine two of these conditions explicitly in an effort to illustrate some of the potential problems of applying economic analysis to the realm of first amendment law. The economic assumptions are those of "completeness" and "continuity." These assumptions constitute part of the underlying infrastructure of utility maximization theory. Utility maximization theory is used in assisting a decisionmaker in determining the necessary trade-offs between competing interests.

The assumption of completeness is essential to the construction of a workable utility function. Utility functions provide a means of ordering preferences: Which item, X or Y, is more preferred? Before any ranking can take place, it must first be possible to compare item X and item Y. The requirement of completeness simply states that either X is preferred to Y, or Y is preferred to X, or both.[50] If X and Y cannot be compared and ranked for all relevant combinations under

48. Some authors question the possibility of ever constructing a model that could adequately encompass the complex reality underlying constitutional conflicts. *See* Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) ("The nature of social reality is too complex to expect that any single vision, value, or technique could meet the needs of society.").

49. Reasoning in law and economics is a multistep process. One begins with economic assumptions and premises. From these, economic conclusions are drawn. These economic conclusions then become the premises from which legal conclusions are derived. In determining whether such legal conclusions are valid, one must ask: What are the original economic assumptions? Are they valid? Do they entail the economic conclusions? Finally, do the economic conclusions imply the legal results? Frequently in reviewing law and economics analysis, some of these steps are omitted.

50. This concept is symbolically defined as follows: "(COMPLETENESS) For all x, y in X either $x \succsim y$ or $y \succsim x$ or both." H. VARIAN, *supra* note 17, at 111. The case of both X being preferred to Y and Y being preferred to X is just another way of saying that the individual is indifferent between the two options.

consideration, then there cannot be any rational economic guide to decisionmaking.

The assumption of continuity implies that small changes in X and Y will translate into proportionately small changes in the resulting value of utility.[51] A nonmathematical example of a discontinuous function is found in a literal interpretation of the rule of *Brandenburg v. Ohio*.[52] This rule does not allow potential future harm to serve as a justification for suppressing present advocacy. A small change in time from zero (immediate harm) to one time period into the future results in a discontinuous drop in outcomes, from the result that suppression of speech is acceptable to the result that suppression of speech is unacceptable.

The existence of continuity is a guarantee against the unexpected. If a relationship is continuous, then knowledge of the state of affairs at one point allows one to make fairly reliable approximations about the state of affairs at all points "close" to it. If a function is not continuous, however, then the unexpected can happen, and a minute change in the variables can translate into a drastic change in the outcome. Without continuity, it is difficult to make statements about the relationship between variables that will be valid under all relevant circumstances.

The assumptions of completeness and continuity underlie the fundamental economic principle that, at some level, all goods are substitutes for each other. If all goods are substitutes, then there will always exist a rate of exchange (price) at which a person will give up a certain amount of good X to get more of good Y. The central inquiry of economics then becomes: How much of good X is necessary in order to gain the desired quantity of Y?

The example of striking a compromise between freedom of the press and national security can serve as an illustration. To begin with, it must be possible to compare free press and national security before any meaningful "economic" discussion can take place. Next, it must be possible to rank in order of preference having X_1 amount of free press and Y_1 amount of national security versus having X_2 amount of free press and Y_2 amount of national security for all relevant values of X and Y. This is just a way of saying that the preferences are complete. If small changes in the quantity of free speech and national security produce proportionately small changes in the value of utility, then the utility function is said to be continuous. Finally, if the judge is able to quantify the variables accurately and decide how much national secur-

51. There are many formal ways to define what it means for a function, f, to be continuous at a given point x_0. "f is said to be *continuous* at x_0 if $\lim_{x \to x_0} f(x) = f(x_0)$; equivalently, given any $\epsilon > 0$ there is a $\delta > 0$ such that $|f(x) - f(x_0)| < \epsilon$ whenever $|x - x_0| < \delta$." W. PARZYNSKI & P. ZIPSE, INTRODUCTION TO MATHEMATICAL ANALYSIS 94 (1982) (emphasis in original).

52. 395 U.S. 444 (1969) *(per curiam)*.

ity society is willing to sacrifice in order to obtain an extra increment of free press (determining the price, or rate of exchange), then she will be able to decide what trade-offs should be made in any given case.

2. *The Mechanics of Implementation: Can Theory Be Turned into Practice?*

How realistic are these economic assumptions in the field of constitutional law? The exact calculations involved in implementing Posner's formula would be exceedingly difficult to perform.[53] Unfortunately, Posner does not explicitly deal with these mechanical problems. The values and principles inherent in the first amendment are not readily quantifiable. If an economic perspective is to make any sense, however, it must be possible to make exact comparisons. In order to make comparisons, each interest must be assigned a quantifiable value, and then that value must be translated into a common measure. The philosophical difficulties in comparing the value of free speech versus the need for public safety are not entirely different in kind from the difficulties of comparing the intrinsic worth of wheat versus the intrinsic worth of shoes. For wheat and shoes, however, aggregate preferences establish a price, and the market price of each, in common denominational terms, can serve as a proxy for their intrinsic worth. The market price can then be used as a basis for comparison. The difficulty with constitutional analysis comes from the fact that there is no similar marketplace for speech, and hence no similar common denominator or objective external measure of value.

The success or failure of an economic approach to constitutional law will ultimately lie in the ability to construct an accurate and objective external measure for hard-to-quantify values and interests. Without any type of traditional, observable market for the factors in question, scholars will have to look to other sources to evaluate their worth.[54]

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53. Most criticism of proposals such as Posner's stems not from disagreement over the desirability of constructing a rational, systematic approach to decisionmaking, but from the belief that such an approach is evasive and unrealistic. For example, in reflecting on models similar to those currently proposed by law and economics theorists, Professor Roscoe Pound once observed:

> Philosophical jurists have devoted much attention to deducing of some method of getting at the intrinsic importance of various interests so that an absolute formula may be reached in accordance with which it may be assured that the weightier interests shall prevail. If this were possible it would greatly simplify the task of legislators, judges, administrative officials and jurists and would conduce to greater stability, uniformity and certainty in the administration of justice. . . . But however common and natural it is for philosophers and jurists to seek such a method, we have come to think today that the quest is futile.

3 R. POUND, JURISPRUDENCE 330 (1959).

54. One area that is unlikely to produce an objective external measure is the amorphous concept of efficiency. Claiming that speech has value insofar as it is efficient, or promotes efficiency, begs the question. Efficiency as a concept is contextual. It has meaning only when it is spoken of relative to some underlying set of goals and values. The real problem is to articulate what the underlying set of goals and values is. In addressing this problem, efficiency can provide

Professor Aleinikoff has summarized the difficulty of finding an acceptable scale in the constitutional setting:

> Competing interests are not, by definition, incomparable. Apples and oranges can be placed on a fruit scale or assigned a price in dollars per pound. The problem for constitutional balancing is the derivation of the scale needed to translate the value of interests into a common currency for comparison. The balancer's scale cannot simply represent the personal preferences of the balancer, lest constitutional law become [an] arbitrary act of will . . . .[55]

The absence of a clear external guide opens the door to the potential danger of arbitrary personal preferences being interjected to fill the vacuum. Abstract values such as freedom of speech do not fit well into a rigid cost-benefit analysis.[56] There is also a danger that the judge will simply abdicate her responsibility, resolving the problem by avoiding it. Professor Tribe argues that decisionmakers frequently react in this fashion by de-emphasizing any variable that is hard to quantify:

> The appeal of utilitarian policy analysis, as well as its power, lies in its ability to reduce various dimensions of a problem to a common denominator. The inevitable result is not only that "soft" variables — such as the value of vindicating a fundamental right or preserving human dignity — tend to be ignored or understated, but also that entire problems are reduced to terms that misstate their structure and that ignore the nuances that give these problems their full character.[57]

The breakdown of utilitarian analysis described by Tribe can be traced in part to problems with traditional utility-maximization theory and, in particular, to a failure of the underlying assumptions of completeness and continuity. First amendment issues do not fit neatly into an objective, quantifiable format. The utility curves describing preferences and trade-offs relating to rights are very different from those

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no guidance. One economic commentator has described the bankruptcy of efficiency as a decision rule as follows:

> In the abstract, efficiency, that is the maximization principle, is an empty concept. It simply means achieving ends in the best possible way. Thus, the content of efficiency is arbitrary and flexible; one is only efficient with respect to a set of specified objectives maximized subject to a set of constraints . . . . [T]he content of efficiency outcomes depends crucially on the assumptions underlying the analysis.

C. VELJANOVSKI, LAW AND ECONOMICS, *supra* note 35, at 37.

55. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 973 (1987).

56. Professor Tribe noted that similar problems arise in the field of environmental law:

> Variously described as fragile, intangible, or unquantifiable, these values have been widely thought to possess particular features making them intrinsically resistant to inclusion along with such allegedly "hard" concerns as technical feasibility and economic efficiency. In particular, those dimensions of a choice for which market prices do not exist have seemed to pose intractable obstacles to "objective measurement."

Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1318 (1974) [hereinafter Tribe, *Ways Not To Think About Plastic Trees*].

57. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 596 (1985).

describing preferences for typical market commodities. As Professor Tribe describes, these differences are significant:

> The curves generated by this sort of analysis will at times have a more complex structure than those typically assumed by analysts, especially those trained primarily in neoclassical economics. For example, most individuals would probably not trade breathing rights below a certain point for even limitless rights to pollute. And many persons — far from regarding such human capacities as eyesight, hearing and physical mobility as all subject to continuous trade-offs to levels approaching zero — probably have preference orderings that display significant discontinuities, lexicalities, and nonzero thresholds which an adequate analysis would be forced to consider.[58]

The difficulty in rigorously describing the ordering of preferences for rights is a serious problem that must be confronted directly with new approaches. While Tribe characterizes current methods as being "too blunt to be of very great use in this endeavor,"[59] he concedes that theoretically there is nothing "which inherently precludes their intelligent use by a public decisionmaker in the service of these 'intangible,' or otherwise 'fuzzy,' concerns."[60] If constitutional law is to be rigorously subjected to an economic analysis, it will be necessary for economists to refine their tools to meet the special needs of the legal field and to pay special attention to the unique characteristics of rights-oriented problems. If economic theory is to be successfully turned into legal practice, it will require a level of sophistication that heretofore has not been exhibited by either the judge or the academic. Given the importance of the interests at stake, it is essential that economic theory relating to first amendment rights develops a new awareness. Bad balancing produces bad decisions and bad law. In discussing the need for all important factors to be included in the decisionmaking model, Professor Paul Kauper once expressed these fears: "It is important that the Court, in applying the balancing technique, adequately identify the various public and private interests which are involved and their relative importance. Otherwise the balancing process can easily become a method for rationalizing the dilution of important freedoms."[61]

The potential obstacles to a successful application of economic analysis are many. A traditional economic approach will have particular difficulty, for example, confronting the issue of "process." Many aspects of legal practice in general, and constitutional law in particu-

58. Tribe, *Ways Not To Think About Plastic Trees, supra* note 56, at 1321 (footnote omitted); *see also* C. VELJANOVSKI, LAW AND ECONOMICS, *supra* note 35, at 138-39; Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality,* 46 S. CAL. L. REV. 617, 629 (1973) [hereinafter Tribe, *Technology Assessment and the Fourth Discontinuity*].

59. Tribe, *Ways Not To Think About Plastic Trees, supra* note 56, at 1320.

60. *Id.* at 1319.

61. Kauper, *Book Review,* 58 MICH. L. REV. 619, 627 (1960) (footnote omitted).

lar, are concerned with preserving the benefits that flow from a respect for the various aspects of process. The means used are often just as important and beneficial as the ends achieved. Traditional economists, on the other hand, have a preoccupation with ends. One commentator on law and economics observed, "[e]conomists often maintain a sharp distinction between means and ends, and tend to assume that means or process yield no value independent of the ends which they promote."[62]

Posner's formula, in many respects, typifies this problem. Why is speech valuable? The answer for Posner is that political speech is an input into voting and voting produces social benefits. This answer ignores the possibility that the speaker benefits, or that the mere act of engaging in political speech is intrinsically valuable.[63] In fact, Posner completely disregards the possibility that the benefit to the individual should be factored into the constitutional dimension of the formula.[64] Tribe warns that the failure to account accurately for "process," like the failure to account for any other important factors in a decision-making model, will distort the ultimate outcome. "By focusing all but exclusively on how to optimize some externally defined end state, policy-analytic methods distort thought, and sometimes action, to whatever extent process makes — or *ought* to make — an independent difference."[65] While this criticism is not necessarily fatal, it does highlight the importance of the economist being sensitive to the special needs and demands of the noneconomic field in which the economic analysis is being performed. One solution may be to factor process considerations directly into the cost-benefit formula.[66] There is no intrinsic reason why a careful economic evaluation could not be adjusted to pay more attention to the importance of means. Special care must be taken, however, so that attempts to consider process in the analysis do not destroy it as a value.[67]

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62. C. VELJANOVSKI, LAW AND ECONOMICS, *supra* note 35, at 139.

63. Under an economic formula, free speech rights are protected not for what they are, but rather for what they do. This is a potentially dangerous result of employing the economist's tools. "Recognizing individual rights which focus on achieving results (particularly imprecisely defined results such as having society reach the best or 'proper' decision) converts the right into a guaranteed adequate means to an end." Baker, *supra* note 29, at 987.

64. *See* Posner, *supra* note 1, at 49 ("But self-expression has no obvious connection with the first amendment."). Many scholars would disagree strongly with Posner's claim. *See, e.g.*, Baker, *supra* note 29, at 992 ("[I]ndividual self-fulfillment and participation in change are fundamental purposes of the first amendment."). For a summary of the views expressed by Baker, see Shiffrin, *supra* note 48, at 1239-51. This difference between Posner and other constitutional theorists underscores an important point. In assigning values to the interests at stake, the judge is forced to make final judgments on very controversial and unsettled issues. The existence of this subjective step undermines any claim that the economic perspective produces value-neutral or objective results.

65. Tribe, *Technology Assessment and the Fourth Discontinuity, supra* note 58, at 631 (emphasis in original).

66. *Id.* at 632-33.

67. Accounting for these interests is a delicate process. "[I]t may be that some 'processual' values are destroyed or at least distorted by the very *process* of being reduced to purely instru-

The analysis in this section barely scratches the surface of both the potential problems and unique challenges inherent in a rights-based economic perspective. Many of these methodological difficulties are not dealt with in Posner's article. It is important to recognize that economic principles should not be used unless both the nature of the legal problem and the internal policy choices which are made justify the assumptions, both explicit and implicit, of the economic theory. The field of first amendment law does not fit neatly into a neoclassical economic interpretation. There are substantial difficulties in measuring, classifying, and comparing the competing interests. These problems do not lead to the conclusion that an economic perspective cannot be helpful; they simply demonstrate the need for the economist to pay attention to the special characteristics of the legal problem. They also demonstrate the need for more work in developing a comprehensive theory of rights-based economics.

B. *Testing the Results of the Model*

The validity of the results which flow from Posner's economic method must also be examined. Posner applies his model to many different fields of first amendment law. There are general problems trying to distinguish what parts of the article are logical extensions of the reasoning implicit in the model, and what parts are Posner's own personal views of the first amendment. This Note will not attempt to evaluate all of Posner's conclusions and applications. It settles upon two specific conclusions that Posner claims are both unique and directly the product of an economic approach to free speech. These conclusions are (1) localities should be afforded greater ability to suppress speech than the federal government, and (2) externality analysis can guide government policies towards the regulation of speech.

1. *Claim: Localities Should Be Afforded Greater Authority To Suppress Speech Than the Federal Government*

Posner claims that the suppression of speech by state and local governments is more justified than similar actions by the federal government.[68] He bases this argument solely on the nature of the entity imposing the regulation and claims that the conclusion is valid independent of the type of regulation that is being questioned.[69] Posner's first major argument in support of this claim centers on the cost side of the equation; Posner maintains that "[t]he social costs from suppressing political speech are greater at the federal than at the state

mental status, much as 'rights' are flattened by any such treatment." *Id.* at 633 n.54 (emphasis in original). A high degree of sensitivity to the unique aspects of the given problem is needed.

68. Posner, *supra* note 1, at 37.

69. Posner's conclusion that state and local governments should be afforded more regulatory leeway than the federal government assumes that all other relevant factors are held constant.

level, and at the state than at the local level."[70] Posner reasons that the lower one descends the governmental scale, the greater the number of competitive checks on the potential abuse of power.[71] To illustrate this point he argues that if people are upset with the political environment of the city in which they live, then they can simply move to a different city. The same holds true for people upset with the policies of the state in which they reside, though even Posner concedes that such a move is made with greater difficulty. Finally, Posner concludes that since it is "only with very great difficulty"[72] that people can move to a different country, the federal government must be held to a higher standard.

Posner's second argument in support of giving local authorities more power to suppress speech concerns the assessment of the value of the speech lost due to the restriction, the *V* term in the expanded *Dennis* formula. Posner claims that the value of speech suppressed by a restriction imposed by an authority with only a small geographic area under its jurisdiction is less than the value of speech suppressed by an identical restriction imposed by an authority with a larger jurisdiction.[73] This argument assumes that the size of the geographic area corresponds positively with the size of the affected population. The conclusion that states and localities should be allowed greater authority to suppress speech is a natural outgrowth of his use of the size of the actual and potential audience as a proxy for the value of the speech in question.[74] A small actual and potential audience translates into a small value for *V* and hence a greater probability that the restriction will be upheld when the formula is mechanically applied. If this argument is valid, then it necessarily implies that speech expressed at the local level intrinsically has less social value.

A third argument, not specifically proposed by Posner, but consistent with the theories expressed in his article, is that the existence of substitute sources of speech in alternative localities significantly reduces the cost, in terms of damage to the national marketplace, of any particular local restriction on speech. When one views the restriction from an aggregate market perspective, a local regulation can be characterized as a partial limitation of access, while only a federal regulation can constitute a total ban. If the Constitution is concerned primarily with the effects of a given restriction on the national marketplace of ideas, then the main objective of the first amendment would be to guarantee the access of an idea to that marketplace. The specific avenue through which it is introduced would only be a secondary con-

70. Posner, *supra* note 1, at 10.

71. *Id.*

72. *Id.* at 11.

73. *Id.* at 19.

74. *Id.* at 12.

sideration. Assuming that speech in one locality is a close substitute for speech in another locality,[75] the actions of one locality in isolation cannot significantly impair the competitive operation of the national marketplace. For example, if Ann Arbor, Michigan, suppresses a given type of speech, but that type of speech is expressed in Spokane, Washington, and hence gains access to the national marketplace, then the aggregate harm of Ann Arbor's actions is reduced.[76]

a. Evaluating argument number one: intergovernmental competitive checks are greater at the local level. The first problem with this position is that Posner's calculation does not incorporate the costs to the individual and society of using "forced migration" as a means of preserving freedom. It is important not to trivialize the transaction costs of making an individual move in an effort to exercise her rights of free speech. These costs are not nonexistent or inconsequential. Their omission is inconsistent with one of the basic tenets of the law and economics movement. The costs associated with implementing a regulation must be a factor in the decisionmaking process. Unfortunately, as Posner's formula now stands, there is no variable that considers the transaction costs incurred by the individual who must relocate to exercise her rights as guaranteed under the first amendment. Posner's conclusion cannot be accepted until all of the transaction costs have been accounted for.

Additionally, in focusing on local checks, Posner ignores the existence of countervailing checks at the national level that argue for the reverse proposition. These checks may outweigh the influence of the intergovernmental competition factors isolated by Posner. Given the greater diversity of interests and the broader base of constituents, it is arguably more difficult to pass a speech restriction at the national level. The watchdog attention of the press is also more sharply focused on federal actions. In contrast, there may be a tendency for smaller towns to be more provincial, or for minority interests to be significantly underrepresented. The validity of any of these claims is enough to cast serious doubt on the wisdom of Posner's conclusion.[77]

In reality, a regulation that restricts an individual's access to local means of communication may be more disruptive to the ordinary per-

75. The gravity of this assumption and its many implications cannot be overlooked; its validity is questioned in *infra* Part II.B.1.c.

76. Nothing within this line of reasoning can mitigate the damage that a local restriction will cause to the local marketplace of ideas. Damage to the local marketplace, and its effects on local decisionmaking, will be just as great for the local citizens as it would be if the restriction were implemented on a nationwide basis.

77. It is equally premature to claim that the existence of these countervailing checks justifies a greater level of scrutiny as the size of the governmental authority imposing the restriction decreases. What is needed is a more careful evaluation of the relative influences of these checks and counter-checks. This type of careful, relative comparison is not conducted in Posner's article, and his conclusion that localities should be afforded greater ability to suppress should be met with skepticism.

son than a regulation that restricts her access to national means of communication. It is likely that local avenues of communication are intrinsically more valuable to the average citizen. These are the means that are most frequently used and most accessible. Suppression of these means removes more realistic options and hence has a greater detrimental effect than prohibiting the average person from using national means of communication. A theory that does not factor in this potentiality when calculating the value of speech lost due to suppression, *V,* will not foster the socially optimum level of free speech.

b. Evaluating argument number two: the smaller size of the affected population implies less harm due to suppression. Using the size of the actual and potential audience as a proxy for the value of the speech at issue raises some serious questions. Measuring the actual size of the audience is obviously not enough, but the seeming objectivity involved in calculating the size of the potential audience is a facade. The size of the potential audience is not an observable quantity. One of the primary elements that influences it is the worth or value of the speech, but this is the unobservable, unquantifiable element for which size is a proxy. The process is circular and assigning a value to either one is necessarily a subjective determination.

There are also examples where there exist large observable audiences where courts have determined that the speech has little or no value. It is possible to estimate accurately the size of the audience for various forms of pornography by examining the market demand, and yet courts have not imputed value based upon size alone.[78] Conversely, there are political points of view that are wholly objectionable to a vast majority of the population that are extended a high degree of protection.[79]

Posner's analysis of the *Skokie* decision,[80] where the court system allowed a group of Nazis to parade through a predominantly Jewish suburb of Chicago, illustrates the difficulty of predicting the size of the potential audience.[81] Posner claims that one of the factors leading to a small *V* was "the fact that the denial of a parade permit in one suburb restricted only one mode of expression in one small area of the country."[82] Were the only intended members of the audience the citizens of Skokie? Posner concludes yes, even though he concedes that it was

78. Decisions in this field can also be explained by analyzing the harm side of the equation. Even if judges imputed a *V* commensurate with the size of the observable audience, they could still uphold a restriction based upon a high magnitude of harm, *L.* This would especially be true in cases of exploitation such as child pornography.

79. An example of this can be found in the speech of the Ku Klux Klan. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); *supra* note 33.

80. Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd.,* 578 F.2d 1197 (7th Cir.), *cert. denied,* 439 U.S. 916 (1978).

81. *See* Posner, *supra* note 1, at 30-32.

82. *Id.* at 30.

obvious that the parade would not persuade many members of the community. Yet, arguably, the audience for the march was the entire nation. Posner does not adequately explore the possibility that an activity, suppressed because of a small actual audience size, may (by design) draw national media attention if allowed to take place. Does the judge calculate the value of *V* based on those physically present, those within reach of the local news, or those within reach of national media coverage? This is an important unanswered question if the value of the speech is to be measured by the size of the audience.

A very serious structural criticism of Posner's analysis on this point is that he factors a smaller audience size only into the calculation of the value of the speech lost through suppression. A basic principle in all of mathematics is that what is done on one side of an equation must be done on the other, if the integrity of the relationship is to be maintained. The size of the actual and potential audience is also relevant to the calculation of the magnitude of the anticipated harm and the probability of its occurrence. A smaller audience significantly scales down the harm side of the equation. Posner never considers this fact. *None of the conclusions stemming from his analysis of the audience size can be upheld unless it can be demonstrated that the proportionate decrease in the value of the speech, V, due to a smaller audience size is greater than the corresponding decrease in the magnitude and probability of harm.* No attempt is made to do this. This omission should prove fatal to any of Posner's mathematically based arguments in support of affording localities greater authority to suppress speech. There are many substantial obstacles to any theory that attempts to give localities greater authority to suppress speech based upon the fact that fewer people are affected.

c. Evaluating argument number three: the availability of substitute speech implies less harm due to the suppression. Are local regulations only partial restrictions on the national marketplace which should be afforded greater tolerance? One problem with this argument is that it assumes that the only, or primary, goal of the first amendment is to preserve a national marketplace of ideas. To the extent that there are other goals and objectives, the argument is weakened.[83]

83. The marketplace rationale does not hold a monopoly on acceptable goals and values to be upheld under the first amendment. First amendment theorists have identified other values. Baker, for example, describes those identified by Professor Emerson:

> Emerson finds first amendment freedom essential for four values: 1) individual self-fulfillment, 2) advancement of knowledge and discovery of truth, 3) participation in decisionmaking by all members of the society (which embraces the right to participate in the building of the whole culture), and 4) achievement of a 'more adaptable and hence stable community.'

Baker, *supra* note 29, at 990-91 (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1971)). The legal literature and the judiciary have managed to compile a list much more extensive than Emerson's:

> [T]he Court has been unwilling to confine the first amendment to a single value, or even a few values. In recent years, the first amendment literature has exploded with commentary finding first amendment values involving liberty, self realization, the marketplace of ideas,

The argument's focus on aggregate effects illustrates one of the dangers of using a market-based analysis in the field of constitutional law. Market analysis shifts attention away from the individual and towards socially aggregated sums where the individual can become an expendable victim of marginal analysis.[84] A market view of the first amendment transforms the Constitution into a document, the purpose of which is to protect an idea's right of access and right to compete in the marketplace, instead of a document designed to protect all persons' right to express the idea.

The principal reason that a partial restriction does not do substantial damage to the market is that it is assumed that speech in one locality can closely substitute for speech in another. What does this assumption imply? Alternative sources of speech will be close substitutes only if there is a very high degree of homogeneity in the national population. If communities are significantly different from each other and generate different inputs into the national marketplace, then the suppression of ideas in one community cannot be compensated by shifting to ideas created in another community. Likewise, if there is a unique voice within the suppressed community that could be heard nowhere else, then there would be no substitutes, and hence a discrete loss.

Problems would also result if the quantity of speech was important to a message being successful within the marketplace. This would be the case if an idea needed broad-based support to be successful, or if it required some critical mass to meet a minimum threshold of credibility in the marketplace. If either of these were the case, then local sup-

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> equality, self government, checking government and more. . . . The Court has been generous about the range of values relevant in first amendment theory, and unreceptive to those who ask it to confine first amendment values to a particular favorite.

Shiffrin, *supra* note 48, at 1252.

84. There is a perverse logic at work here that is deceptively easy to accept if it is not dwelled on too long. The argument goes like this: Speech is protected so we can find truth. Truth is a product of competing ideas. Therefore, it is important for ideas to be expressed, but it is not relevant who expresses them. Similar reasoning was at work when Chief Justice Burger wrote for the Court, "With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor Alexander Meiklejohn that '[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said' is particularly appropriate." Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm. 412 U.S. 94, 122 (1973) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1948)). If this reasoning is accepted, however, it becomes possible to justify the suppression of individual speech once the threshold of socially optimum idea expression has been crossed. When the first amendment is a means to an end and not an end in itself, then the rights of the individual can be lost on the margin. As one writer has noted:

> Courts usually articulate constitutional rights as "individual rights" that are justified because of the protection they afford to the person exercising the right. But courts that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit. Courts that focus their concern on the audience rather than the speaker relegate free expression to an instrumental value, a means towards some goal, rather than a value unto itself.

Ingber, *supra* note 29, at 4 (footnotes omitted).

pression would cause significant harm even if the exact same idea were being expressed in another community.

d. The market failure implicit in Posner's rule. Ironically, the logical extension of Posner's thesis that the suppression of speech at the local level is more justified than on the federal level produces an economically and socially inefficient result. Posner's reasoning creates a classic market failure by failing to force localities to internalize all of the costs of their decisions.[85] Each of the arguments in support of allowing greater local suppression depends for its persuasiveness on the existence of a safe haven where there is no similar suppression. Local suppression is not that dangerous because an individual can always move somewhere without suppression, the size of the affected population is small because someplace else is not suppressing speech, or local suppression is only a partial ban because there are alternative sources of substitute speech. Unfortunately, there is no check within the system because none of the localities are forced to internalize the ramifications of their decisions or to consider the effects of their actions on other localities before acting. Each locality in succession could choose to suppress, and there is nothing within the formula as interpreted by Posner to stop them.

This market failure is analogous to allowing a jurisdiction to pollute the environment because there will be clean air in another jurisdiction. Even if the surplus of pollution in one locality creates less than a socially unacceptable level of pollution in the aggregate, there is no guarantee that other jurisdictions will not act in a similar manner. Every other jurisdiction can perform the exact same decisionmaking process to produce a level of pollution that is detrimental in the aggregate. A series of logical decisions at the micro-level under this system can produce a socially unacceptable level of damage.

Each locality individually has an incentive to adopt a level of suppression that is greater than desirable, because it does not have to bear all of the costs associated with its actions. Additionally, since no locality is required to stop once the aggregate level exceeds that which is socially optimum, it is very possible that this system would produce a network of regulations, through incremental steps, that would be rejected out of hand if proposed by the federal government.

In summary, the hypothesis that economic analysis justifies greater suppression of speech at the local level must be rejected. Such a hypothesis is neither economically mandated nor even economically wise. This fact illustrates that labeling the analysis as economic and making reference to formulas is no guarantee of a sound result.

85. For a thorough explanation of the concept of market failures and externalities, see *infra* Part II.B.2.a.

2. *Claim: Externality Analysis Can Guide Government Policies Towards the Regulation of Speech*

The concept of market failures such as externalities can lend helpful insight into first amendment theory. In economics, an externality exists when market mechanisms are unable to incorporate all of the costs or benefits of a commodity in its price. When this occurs, the quantity of the commodity generated by the interaction of market forces will differ from the quantity that is socially optimal.[86]

a. The theory of externalities explained: spillover costs and benefits. There are both external harms and external benefits. The classic example of an external harm is that of pollution. Pollution harms individuals who are not party to the market transaction. Because of this fact, the producer does not include the costs of pollution into the calculation of the private costs of production. This means that the producer is able to charge a lower price, and hence produce a higher quantity of the commodity. The level of final production will be higher than socially desirable. The government may respond by regulating polluters in an effort to decrease the harms that unrestricted market forces would create.

An example of an external benefit is that of vaccination against diseases. Vaccinations benefit individuals not party to the market transaction. Not only does the person who gets vaccinated not contract the disease, but all of the people that she would have infected, had she contracted the disease, do not become ill. Since not all of the benefits are internalized by the individuals making the market decisions, the quantity of vaccinations supplied and demanded will be below the level that is socially desirable. In this case the government may want to provide subsidies in an effort to increase the amount of vaccinations.

b. The implications of external benefits of speech. The concept of externalities creates the basis for a powerful theory of regulation. When market structures break down and fail to internalize all of the costs and benefits of engaging in an activity, then some type of govern-

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86. For an exploration of externality theory, see Dahlman, *supra* note 26; N. MERCURO & T. RYAN, *supra* note 35, at 43-68. Externality theory can be summarized as follows:

> The conventional approach to externalities rests upon the recognition that this perfectly competitive market, by taking into account all costs and benefits, equates marginal social benefits (MBs) with marginal social costs (MCs) and thereby produces an efficient allocation of resources. However, it also recognizes that some activities of the economic actors in the economy, for a variety of reasons, can drive a wedge into the perfectly functioning markets which tends to result in some costs or benefits . . . going unaccounted for in market transactions. The existence of externalities will cause a divergence between the marginal social benefits and the marginal social costs. The problem then is to find a mechanism to communicate any heretofore unaccounted external benefits or costs to the market participants. In doing so, externalities are said to be "internalized" thereby restoring an efficient allocation of resources to society (*i.e.*, MBs = MCs).

Id. at 44.

ment intervention may be justified.[87]

Posner claims that political speech is one such example. He argues that information is a communal good and that "the investment [that individuals] make in producing information will benefit others as well as themselves. As a result the producers will fail to carry the production of the information to the point where marginal social cost and marginal social benefit are equated."[88] This is especially true in the case where the information is political. The primary benefits of disseminating political information are external. The benefits are derived from improved political competition and democratic decisionmaking. The original speaker is able to capture only a small fraction of this for individual private profit. Just as in the case of vaccinations, externality theory indicates that there is a tendency for the marketplace to produce a level of information that is well below that which would be socially optimal.

Faced with this state of affairs, the government could either take affirmative steps to correct the failure, or it could respond more conservatively by being careful not to take steps which make the problem worse. A positive response would be to subsidize the speech activity. This has not been an option that has been widely followed in the United States.[89] The negative response is embodied in the ethic, "at least do no harm." Posner draws the analogy to the policy of not taxing charities.[90] Given the fragile nature of political speech and the possibility that society is already operating at a suboptimal level of production, at a minimum the government should not do anything that restricts speech any further. The latter is the mandate derived directly from the words of the Constitution, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[91]

Posner's formula accounts for the existence of external benefits by assigning a higher quantity to the value of the speech lost due to suppression, *V*. This is done in part through a quantity compensation. *V* depends both on the intrinsic worth of the speech and the quantity of the speech that is lost. External benefits are associated both with high value and with a large quantity of speech lost due to its fragile standing in the market. Posner is quick to point out, however, that a higher value for *V* does not translate into absolute immunity for the speech in

87. It should be remembered that before any decision to act is made, the actor should consider the transaction costs of the proposed regulation. *See supra* note 26.

88. Posner, *supra* note 1, at 20.

89. Reasons for not adopting specific subsidies for speech include a strong *laissez-faire* ethic and a fear of governmental bias and manipulation of the marketplace of ideas. For additional criticisms of a subsidies-based approach to correcting market failures in the marketplace for ideas, see Baker, *supra* note 29, at 988-89.

90. *See* Posner, *supra* note 1, at 20.

91. U.S. CONST. amend. I.

question.[92] A higher value for *V* makes it harder to regulate, but even a high *V* can be outweighed by a very significant harm, *L*, and a strong probability, *P*.

Posner advocates using external benefits as a means of distinguishing among different categories of speech in order to create a hierarchy of protected classes.[93] While political speech is characterized by the existence of many external benefits, Posner believes that other types of speech are not. "Most of the benefits of advertising a particular brand of good or service . . . are captured by the producer of that brand . . . . The consumer benefits of pornography are captured by the pornographer in the price of the pornographic work. There are no external benefits."[94] If, in fact, there are no externalities involved, then the level of commercial speech and pornography produced by the marketplace will coincide with the socially optimum level. Under Posner's formula, this fact would translate into a smaller value for *V*. This type of speech is also more robust and less vulnerable to regulation. There would be a lower probability of a restriction causing the level of speech to deviate significantly from the socially optimum level. Both of these factors would result in the extension of less first amendment protection to pornography and commercial speech as a class.[95] Conversely, the existence of many external benefits flowing from political speech bolsters its uniquely protected status.

c. The implications of the external costs of speech. Just as the existence of external benefits provides arguments against regulating certain types of speech, the existence of external costs provides a rationale in support of the regulation of other types of speech. A basic premise behind this claim is the assumption that the regulator should be particularly concerned with costs associated with speech that fall upon third parties.[96] The participants in an activity are in a relatively better position to judge for themselves the consequences of their actions and conduct themselves accordingly. Individuals not party to the communication are completely unable to anticipate potential dangers and protect themselves.

Posner's treatment of the potential implications of the external costs of speech is not extensive. What follows is an examination of some of the ramifications of Posner's hypothesis coupled with traditional economic market failure theory. Viewing regulation from the perspective of external costs provides a mechanism for understanding many principles of first amendment law. One cannot yell fire in a

92. Posner, *supra* note 1, at 24.

93. *Id.* at 22-23.

94. *Id.* at 22.

95. For a general treatment of the issue of commercial speech and how it fits into the broader scheme of first amendment theory, see generally Shiffrin, *supra* note 48.

96. Posner, *supra* note 1, at 29-30.

crowded theater, since the costs associated with such an action fall primarily upon persons other than the speaker. Commercial advertisers are not free to make false claims about their products. Such fraud and misrepresentation create classic spillover harms because they undermine the ability of the advertised price to communicate the true value of the commodity.

A theory of external costs might also be employed to justify greater regulation of pornography. If one accepts the theory that pornography causes serious long-term problems such as inciting sex-based crimes, then it logically follows that the price of pornography established by the marketplace does not reflect all of the social costs of production. Just as with the example of pollution, there is a level of production, and hence a level of harm, that is above the socially optimum result. In essence, the failure to internalize all of the costs associated with pornography results in the production of surplus pornographic materials. Faced with such an externality, resorting to some type of regulation which forces the internalization of all costs of production makes sense. The sticky issue is establishing adequate proof of the existence of harm, especially causation. If this threshold determination can be made, however, externality theory advocates action. In this sense, Posner's economic approach to the first amendment lends support to a tort-based cause of action against pornographers. If external harms in fact exist, then the surplus should be eliminated. Regulation would be supported, however, only to the extent that it internalizes the costs of the external harms. With pornography, given the speculative nature of the harm, an after-the-fact remedy would be superior to censorship because it would reduce significantly the cost of legal error.

The existence of spillover costs leads the judge to attach a zero, or potentially negative quantity, to the value of the speech lost due to suppression, *V*. In these instances, the case for regulation is strongest. If the judge upholds a restriction, there is less danger of the speech falling below the socially optimum level. Inaction in the face of external costs, on the other hand, has the same effect as providing a subsidy for the activity causing the harm.

There is one very important *caveat*. Based on Posner's formula, a judge may justifiably strike down a regulation even if she attaches a zero (or potentially negative) value to *V*. This would happen if there was a large legal error, *E*, involved. If the potential for error is great enough to outweigh the harm side of the equation, then the judge must strike down the regulation, even in the face of external costs. A large *E* value would result if it were difficult to distinguish between the regulated speech and other types of valuable speech or if there was a serious chance that the precedent would snowball and affect other types of communication. *E* would also be large if the evidence supporting the

existence of the externality was speculative or subjective. The significance of the error term, *E*, should not be underestimated; it may well be the most important term in the formula. Given the subjective nature of most first amendment issues, its value will usually be quite large. The potential magnitude of the legal-error term goes far in explaining this great deference traditionally given to free speech by the courts.

Part II's examination of Posner's method from an internal perspective illustrates the mixed potential of economics as applied to the first amendment. An economic approach to constitutional law will not be successful if it attempts to treat rights-based issues in a traditional neoclassical fashion. The traditional tools of the economist are not directly transferable to this field. Difficulties arise in the form of complicated utility curves and preferences and the lack of any external objective measure of value. These difficulties reflect the challenge that this new endeavor entails, because many valuable economic concepts potentially can be transplanted if the economist respects the unique demands imposed by the legal setting.

The testing of two of Posner's results illustrates, again, both the problems and the promise of his approach. His treatment of externalities demonstrates how economic concepts can be used successfully to provide a descriptive analysis of existing practices, and guidance as to the future direction of governmental policies. His claim that economics justifies affording localities greater ability to suppress speech, however, illustrates the potential dangers of sloppy economic analysis.

III. Should the First Amendment Be Subjected to an Economic Interpretation?

The discussion has until now suspended the question of whether or not the first amendment *should* be subjected to an economic interpretation and has concentrated on examining the operation and results of Posner's method. It is now necessary to focus on the issue of whether the "super rationality" and mechanical nature of the economic perspective is appropriate in the realm of constitutional freedom of speech theory.

A. *The Economic Perspective and the Courts' Traditional Institutional Role*

There are many areas of tension between the economic perspective and the judiciary's traditional procedures and practices. An ideal decisionmaking model tries to be as comprehensive as possible. The objective is to consider all relevant issues before reaching any conclusion. Any economic analysis conducted by the judiciary is going to be performed under serious procedural and institutional constraints.

Each of these constraints will take its toll on the accuracy and viability of an economic interpretation of the first amendment.

Courts have limited resources, time, and expertise. Under current physical pressures and limitations they may not be able to perform extensive cost-benefit analysis.[97] Some authors have also questioned whether the use of a broad-based economic approach is consistent with the courts' institutional role and a proper understanding of the doctrine of separation of powers.[98]

Additionally, there are procedural constraints on the types of issues that can be addressed in a courtroom. For example, no party can assert a claim without fulfilling the proper standing requirements. What happens when a factor relevant to the economic evaluation cannot be asserted because the affected party lacks standing? This would be a particular problem when dealing with the externalities of speech. By definition, external benefits and costs fall upon nebulous groups who are not party to the communication, or who may not be readily identifiable. In addition, courts must also have proper jurisdiction, there must be a real case and controversy, the issue cannot involve a political question, and so on. There are many reasons why a court may not consider a factor otherwise relevant to an economic decision-making process. These constraints are foreign to the rational, comprehensive utility-maximizer. This fact places limitations on the court's ability to apply optimization theory. While these criticisms are not necessarily fatal, nor even unique to the economic perspective, they do illustrate that there will be pragmatic difficulties in implementing an economic perspective that must be examined. The difficulties and constraints cannot be assumed away or ignored.

An economic perspective may also be inconsistent with the courts' role as an arbitrator of disputes between specific individuals. Tribe criticizes the application of economic theory in the field of constitutional law because, in his view, economics inherently entails an *ex ante* perspective, while law traditionally adopts an *ex post* perspective:

> From one side, the nature of litigation invites judges to apply an ex post approach to dispute resolution, an approach that requires a court to take the position of the parties as given and to apportion losses and profits fairly among them. From the other side, sophisticated judges who "appreciate" the economic system are pulled toward an ex ante approach, in which a court is interested less in doing justice in the case at hand than

97. Professor Aleinikoff argues that as an empirical matter, the Supreme Court has taken shortcuts when faced with decisions which have called for balancing. "[I]n making balancing work, the Court has adopted a truncated form that ought not to be acceptable to the conscientious balancer." Aleinikoff, *supra* note 55, at 978-79.

98. *See, e.g., id.* at 984-86. Similar reservations have been expressed about courts basing first amendment decisions on the clear-and-present-danger standard, or a *Dennis*-type formula. Critics of these traditional first amendment standards claim that such methods involve determinations that are inappropriate for the judicial branch to make. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 33-34 (1971).

in creating sound rules to govern the behavior of the world at large.[99] Are judges grand social planners, or is their primary purpose to resolve specific conflicts?

This tension underlies the problems created when a body that is designed to resolve disputes between individuals tries to use a theory which is premised upon identifying socially optimum levels and which assumes, for statistical accuracy, the existence of a large number of cases and theoretical averages.[100] Economists do not make decisions based upon one isolated observation. They try to extract what is common to a large group of observations and act according to those averages. Judges, on the other hand, are confined to the facts of a particular case, and the skill of lawyering is frequently to find what is unique about the facts of a particular case and to fashion specific rules accordingly.

The role of social planner and individual dispute resolver will coincide only when the optimal solution on the micro-level is the same as that which is true in the aggregate. In reality, it is doubtful that the fit will be perfect. The pragmatic challenge to integrating an economic perspective into first amendment law will be to glean what is useful from an *ex ante* social theory and to implement it while still doing justice to the individual facts. Striking this delicate balance will not be different in kind from the Supreme Court's current challenge of fashioning decisions that are proper for the individual case, but still serve as valuable precedent for a broader range of cases.[101]

B. *Potential Dangers in Applying Economics to Constitutional Law*

Advocating an active role for economics in constitutional analysis is not without potential undesirable consequences. Dangers take the form both of problems inherent in the economic perspective and problems which stem from how the economic analysis is conducted.

1. *The Dangers of Thinkability and Lowering the Threshold of Regulation*

Creating a formula that enables a judge to determine mechanically whether or not a restriction is valid may increase the impetus to regulate more strictly. An imprecise or fuzzy line may cause officials to keep their distance and think twice before imposing a restriction. The

99. Tribe, *supra* note 57, at 593 (footnotes omitted).

100. Economics as a discipline is very dependent upon the weak law of large numbers (the law of averages). If the economist deals with enough observations, then no single abnormal observation can distort the analysis. No individual case carries that much weight. Courts are not in a similar position. They must deal with each case individually on its merits.

101. The use of test cases, or careful selection of proper fact scenarios upon which to base important decisions, illustrates some ways in which courts might integrate both approaches.

finer the line becomes, the more likely officials may be to regulate.[102] Economists would counter that a fuzzy line is inefficient and allows speech that creates net levels of harm to be perpetuated. The problem is that the economic method is more precise in theory than in practice. Currently, the instruments are still rather blunt, and they become even more dull as the determination becomes more subjective.

The legal-error term in Posner's formula can limit some of the potential for abuse. Theorists who believe the value of E is inherently large in all attempts to restrict speech would reject most regulations out of hand. Their formalistic claim would be that the value of E is so great that even if V is small, $E > P \times L/(1 + i)^n$ for most potential harms. These "risk averse" judges would choose to accept greater amounts of harm due to speech, even given a high probability of harm, than risk the potential abuses of regulation. It is possible to view the first amendment, as well as most other sections of the Bill of Rights, as the product of "risk averse" preferences. It is a national insurance policy against the abuses of governmental power. It is odd that Posner never examines the potential consequences of risk aversion in his analysis. If the Constitution is viewed as a risk-averse document, then the tremendous degree of latitude given to free speech can be explained without having to assume that first amendment values are absolute. Evaluating risk preferences in the area of free speech and the exercise of governmental authority would be essential before any economic model could be implemented. If Posner is wrongly operating under the assumption of risk-neutrality, then all of his results would be skewed in favor of greater restrictions of speech and would produce a higher than optimum level of suppression.

2. *Dangers Behind Creating an Illusion of Objectivity and Value-Neutrality*

There are grave dangers in assuming that economics by itself offers a complete and comprehensive method of first amendment analysis.[103] No economic view of the Constitution can ever be completely objective or value-neutral. Weighing constitutional interests and values, according to Tribe, is necessarily a subjective process:

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102. The concept of "thinkability" postulates a positive correlation between the planning of an event and its occurrence. Thinkability also links the refinement of the tools necessary to act and their actual use. It is most frequently connected with criticisms of the formation of strategic nuclear warfighting plans.

103. There is no one theory that can capture the whole complexity of the first amendment. Attempts to formulate such grand constructs have not met with success.

> Scholar after scholar has set out to produce a different but more successful *general* theory. All of these attempts, in my judgment, have been thwarted by the complexity of social reality. . . . In trying to move toward general theory, scholars have too often built abstractions without sufficient regard for the diverse contexts in which speech regulation exists. . . . It is time to move *away from* a general theory of the first amendment.

Shiffrin, *supra* note 48, at 1283 (emphasis in original) (footnote omitted).

> One final flaw in the utilitarian approach . . . is its embrace of one of the most persistent myths of policy analysis: that analytical techniques *in themselves* lack significant substantive bias or controversial content — that the techniques are neutral in regard to matters of value precisely because such matters may simply be inserted into the analysis.[104]

It is wrong to read objectivity that does not exist into formulas such as Posner's, or to believe that appealing to such formulas will avoid the need to make difficult, subjective determinations. Tribe has strongly criticized courts for abdicating their responsibility in favor of utilitarian determinism:

> Part of the allure of efficiency curves and cost-benefit calculations is the illusion that these hard constitutional choices can be avoided, by courts if not by other political branches, through the inexorable analytic magic of such equations. Perhaps this analytic escape hatch is simply the latest in a series of accountability-avoiding devices.[105]

There will always be choices which no economic system can dictate. Economics provides a method of analysis; seldom is the method outcome-determinative. Economics can provide no answers independent of the inputs introduced.

As a tool, economics can provide helpful insights, an organized method of framing the discussion, and a means to help isolate relevant decisionmaking factors; economics cannot replace the element of human judgment.

> So perceived, the aim of policy-analytic techniques is not to "substitute for the experience, the intuition, and the judgment of the decision maker," but to "sharpen that intuition and judgment by stating problems more precisely, by discovering new alternatives, and by making explicit the comparisons among alternatives."[106]

A real danger exists when an illusion of objectivity is created. If this happens, then people may start to accept the conclusions produced by the formula, without strictly examining the controversial subjective process of weighing the inputs. This danger is magnified when the economic method is combined with legal advocacy.[107] There is also a danger that becoming overly technical in the process of decisionmaking will alienate people from constitutional discussion.[108]

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104. Tribe, *supra* note 57, at 597 (footnote omitted) (emphasis in original).

105. *Id.* at 620 (footnote omitted).

106. Tribe, *Technology Assessment and the Fourth Discontinuity*, *supra* note 58, at 626 (quoting Rowen, *Objectives, Alternatives, Costs and Effectiveness*, in PROGRAM BUDGETING AND BENEFIT-COST ANALYSIS (H. Hinrichs & G. Taylor eds. 1969)).

107. An economic conclusion is only as valid as its assumptions are credible. Objective academic writing is careful to identify what these assumptions are and explain their limitations. The advocate, on the other hand, tries her best to minimize the limitations of the analysis and sell the conclusions. This basic difference in approaches is certain to cause problems in all elements of law that attempt to draw upon the harder sciences.

108. *See* Aleinikoff, *supra* note 55, at 993.

3. *Tarnishing the First Amendment's Unique Symbolic Status*

The law and economics movement has a profound effect upon the form as well as the substance of constitutional discourse. The form and substance of the constitutional discourse, in turn, directly affect the way the first amendment is perceived. Applying economic theory, with its strict utilitarian emphasis, to the value of free speech may tarnish the document's unique symbolic status. The problem is exacerbated when traditional economic principles are carelessly transplanted into the foreign setting of the courtroom. The role of the economist and that of the advocate do not naturally complement each other. The tools of social science can easily be manipulated to serve the ends of the partisan. The line between what is normative and what is positive is difficult enough to keep straight in a purely academic realm.[109] Given this fact, it is important to examine what effect the use of economic principles in this sensitive noneconomic forum will have on the way people think about the first amendment.

Adopting an economic perspective will have an impact on the way constitutional values are perceived. The Constitution enjoys a status of super symbolism in our society. The document and the rights that it enshrines are of mythic proportion. The economic perspective, however, lacks this symbolic dimension. It treats freedom of speech no differently than any other commodity, such as wheat. The theory that all goods are substitutes for each other literally does imply that a given amount of free speech is worth only X bushels of wheat. Aleinikoff fears that this may erode the uniqueness of the values protected by the Constitution:

> But our eyes are no longer focused on the Constitution. If each constitutional provision, every constitutional value is understood simply as an invitation for a discussion of good social policy, it means little to talk of constitutional "theory."
>
> Ultimately, the notion of constitutional supremacy hangs in the balance. For under a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit.[110]

The symbolic virtues of the first amendment are lost when freedom of

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109. Many of these problems are not inherent to the application of economic theory and can be avoided if the writer has a proper understanding of the rhetorical effects of the prose. There are many competing obligations placed upon the objective interdisciplinary writer. There is a duty to introduce and explain unfamiliar concepts to a lay audience and at the same time maintain the integrity of the economic analysis. There is a duty to identify and not understate the limitations of the analysis and the economic theories. The writer should flag simplifying assumptions and explain their implications. The writer must be sensitive to the special and unique characteristics of the noneconomic field to which the theories are being applied. The application of economics to constitutional law has the potential both to alienate some audiences and to be overly persuasive to others. These problems can be minimized if writers are careful to signal when they are changing hats from objective positive economic evaluation to normative economic evaluation, as well as from academic expert to legal advocate.

110. Aleinikoff, *supra* note 55, at 992.

speech is reduced to just another factor to be weighed along with others upon an economic scale.

C. *The Inability of Economics To Make World-Shaping Decisions*

Economic analysis is by its nature system-preserving. Cost-benefit analysis can produce the optimum decision relative to a given set of underlying constraints, $X_1, X_2, X_3 \ldots X_n$. It does not provide a means of evaluating or changing the set of goals and objectives on which the given optimization problem is premised. For example, economics can determine the best policy, given a certain distribution of income, but it cannot determine whether the distribution of income is itself just.[111] Economics is incapable of handling complex issues of distributive justice. It can provide necessary, but not sufficient, criteria for decisionmaking when confronted with constitutive, world-shaping decisions.[112]

If the world were a closed system in which there existed only one correct answer to a given question, then economic analysis (which determines whether, given conditions $X_1, X_2, X_3 \ldots X_n$, course Y is the optimum solution) could dictate whether course Y is "right." Such a closed system would contain one objectively definable set of values, standards, goals, ends, and purposes. These factors would be constant, would transcend time, and would remain invariant. In a closed system, the decisions made do not influence or change the underlying set of goals and objectives, and hence do not alter future points of optimization. Within this type of static world, economics could provide both a necessary and sufficient criterion for decisionmaking.

Fortunately, the world is not a closed system, and there is no single, invariant set of objectively defined ends. As society progresses, it evolves, and as it evolves over time the "right" answer, or point of maximization, changes. The decisions made along the way influence the underlying constraint set of societal goals and objectives. The choices we make today determine what type of world we enter tomorrow, and what the future points of optimization will be. Under such dynamic conditions, economics alone cannot dictate whether a given course is "right."

The judge is faced not with one invariant "real" world, but with a future filled with many different and competing possible worlds. The issue then becomes, Which possible world does the judge choose? Economics can only dictate the correctness of choices within a given pos-

111. *See* C. VELJANOVSKI, LAW AND ECONOMICS, *supra* note 35, at 42-44; Tribe, *supra* note 57, at 594-95, 597.

112. Professor Tribe develops a related criticism of the application of economic principles to constitutional analysis. He speaks of the inability of economics to deal with the "constitutive" dimension of constitutional decisionmaking. *See* Tribe, *supra* note 57, at 606-14; Tribe, *Technology Assessment and the Fourth Discontinuity*, *supra* note 58, at 635-41.

sible world. Given conditions X_1, X_2, X_3 . . . X_n and a defined set of goals and constraints, cost-benefit analysis can be used to derive a point of optimization.

It is logical to require, as a necessary condition, that any choice made be the best possible choice (maximum) relative to the world in which it is chosen. This is to say that any choice made should reflect the point of optimization given the defined underlying goals and constraints. If the judge is confronted with alternatives in two different possible worlds, however, each one representing the point of optimization relative to the underlying values and factors that constitute it, then economics can provide no insight as to which choice should be made.

The fact that economics cannot, by itself, provide a framework to make *all* important constitutional decisions does not mean that it cannot play a valuable role. It can provide meaningful insight and a helpful framework as one of the tools used by the decisionmaker. Demonstrating the inability of economics to make world-shaping decisions simply serves to caution that no economic perspective of the first amendment can or should be embraced with ideological zeal as the final solution.

IV. Conclusion: The Costs and Benefits of an Economic Perspective

When examining Posner's economic approach to the first amendment, it is difficult to generalize. Given the complex and abstract nature of the first amendment, it is inappropriate to assume that the marketplace of ideas shares the same underlying economic structure as traditional economic markets, such as the marketplace for used cars. This means that traditional economic assumptions must be reexamined and reshaped to reflect the unique needs and demands of this particular legal setting. This does not mean that an economic perspective has nothing to offer. It simply means that any economic analysis must be conducted carefully. Much of the law and economics work to date has not reflected this degree of sensitivity. Posner's is no exception.

In the field of first amendment theory, a successful economic approach will require a more rigorous development of a rights-based economic theory. This work would include a closer examination of individual and social preferences for rights. Traditional assumptions such as completeness and continuity will have to be rethought and should not be blindly assumed. It is also necessary to articulate carefully why rights are valuable, and why society chooses to protect them. An economic perspective does not displace the need to ask these questions, and it cannot by itself provide the necessary answers. The answers to such questions must come from all sectors of legal

thought as the inputs for the construction of accurate utility analysis. Economics can provide a valuable framework in which to organize divergent theories and conduct more precise examination. This fact underlies the claim that economics, properly applied, is a process, and as a process it should not be outcome-determinative.

It is wise to recognize the potential dangers and limitations associated with an economic perspective. Most of these dangers stem from how the concepts are used, and do not necessitate the total rejection of an economic approach. When used with full recognition of its limitations, an economic perspective can provide valuable insights into first amendment issues.

Posner's article constitutes an important and innovative contribution to the extension of economic analysis to the field of constitutional decisionmaking, but as he would probably be the first to admit, much more needs to be done.

— *Peter J. Hammer*