NOTE

JUDGE FRANK H. EASTERBROOK: A FAITHFUL ADHERENT OF THE LAW & ECONOMICS APPROACH ADVOCATED BY PROFESSOR FRANK H. EASTERBROOK

I

INTRODUCTION

In recent years, an influential group of scholars has argued that economic efficiency and wealth maximization provide the proper guides for how judges should decide cases.[1] The increasing influence of this law and economics approach has prompted a debate regarding its appropriateness and desirability. President Reagan's recent appointment of several law and economics scholars to the federal judiciary has raised a new aspect of this debate: How effectively can law and economics scholars apply their beliefs as law and economics judges?

In 1983, Professor Frank H. Easterbrook[2] wrote an article in the *Harvard Law Review*[3] critiquing the Supreme Court's use (or nonuse) of law and economics reasoning. Professor Easterbrook explicitly set forth three fundamental criteria for assessing a court's performance on economic issues: (1) a focus on ex ante (incentive creating), as opposed to ex post (fairness), considerations; (2) an understanding that how people respond to regulation depends on marginal, rather than average effects; and (3) an appreciation of the private-interest-group nature of legislation.[4]

In 1984, President Reagan appointed Professor Easterbrook to the Court of Appeals for the Seventh Circuit.[5] In his new role, Judge Easterbrook has authored fewer than 200 opinions;[6] nevertheless, he has already demonstrated a willingness and ability to follow the law and economics guidelines endorsed in his *Harvard Law Review* article. In fact, an examination

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1. R. POSNER, ECONOMIC ANALYSIS OF LAW 17 (2d ed. 1977).
2. Lee and Brenna Freeman Professor of Law, University of Chicago.
3. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).
4. *Id.* at 8-18.
5. Professor Easterbrook was appointed on April 10, 1985. THE AMERICAN BENCH (4th ed. 1987-88).
6. This paper covers Judge Easterbrook's opinions through November, 1986.

of Judge Easterbrook's judicial decisions reveals that he consistently uses his law and economics analysis as support.[7]

II

SCOPE OF THE INQUIRY

This note seeks to determine the extent to which Frank Easterbrook, as a federal court of appeals judge, has employed the law and economics philosophy he subscribed to while a law and economics professor. To achieve this end, it is not necessary to determine whether his economic beliefs are logical, consistent, or even desirable. A vigorous debate has already occurred on that issue and is best left to economists. Furthermore, other scholars committed to different economic perspectives will surely be appointed to the federal bench. Their ability to employ their economic beliefs will be equally germane. Finally, this note makes no attempt to compare and contrast Judge Easterbrook's conservative economic approach with that of other conservative economists, or to suggest that Judge Easterbrook's views are completely representative of the conservative school. Every law and economics scholar has distinct beliefs. The question asked here is whether a particular economist can effectively employ his beliefs as a law and economics judge.

III

APPLICATION OF PROFESSOR EASTERBROOK'S ECONOMIC ANALYSIS

As mentioned above, Professor Easterbrook's economic philosophy focuses on an understanding of incentives, marginal effects, and the private-interest-group nature of legislation. In order to facilitate a reading of the detailed sections to follow, a hypothetical case is presented to demonstrate how his economic analysis might be applied. Suppose that Congress passes a statute in 1987, with the purpose of increasing safety, that requires auto manufacturers to install airbags in every new car. The statute explicitly requires manufacturers to use the best airbag system technologically feasible as of 1987. The statute provides a detailed description of the required airbag system, but does not mention the use of subsequently discovered technology.

A. Incentive Creation

Ex ante (incentive creating) considerations might arise in the intellectual property context. If in 1990, an inventor patents an improved airbag system which increases safety without increasing price, the inventor will sell rights to use the system to those manufacturers who can afford the market price (for instance, General Motors and Ford), but not to manufacturers who cannot afford or are not willing to pay the market price (for instance, Chrysler). It will seem inefficient to some that Chrysler cars do not incorporate the

7. The cases used in this paper were chosen as the best examples of Judge Easterbrook's use of his economic beliefs to support his judicial decisions. He also applied his economics beliefs in his other opinions whenever possible.

improved technology, especially if the inventor already appears to be getting a "fair" price for his efforts. Under Professor Easterbrook's ex ante analysis, however, a judge would recognize the necessity to compensate today's inventors not only for their product, but to provide incentives (potential profits) for inventors to create new technology tomorrow.[8]

B. Marginal Effects

Now suppose that the new technology significantly increases the cost of cars. Professor Easterbrook would reject, on economic grounds, a petition from a consumer group to require manufacturers to use the improved (and more expensive) 1990 technology, instead of the cheaper 1987 technology explicitly required by the statute. He would recognize that the potential responses to such a judicial regulation would depend upon marginal effects. If auto manufacturers are required to spend more money on airbags, they may respond by reducing the quality of other parts of cars—perhaps the brakes—or by raising the price of cars. If the price of new cars is higher, then some consumers will respond by buying fewer new cars and keeping their old cars longer. In effect, they will substitute repair service for new cars. Because most older cars would have no airbags, a regulation requiring a more expensive airbag system might reduce actual overall safety.

C. Statutory Interpretations

Recognizing the interest group nature of the legislation, Professor Easterbrook would also refuse to interpret the statute as requiring the new 1990 technology. He would view the statute as a contract, brokered by Congress, between auto manufacturers and safety interest groups. As such, he would strictly enforce the explicit requirements of the statute—utilization of 1987 airbag technology—and reject petitions to enforce anything else. He would specifically reject the argument that because the statute was designed to increase safety; the statute must therefore implicitly require use of the new technology. Instead, Professor Easterbrook would interpret the statute as if the safety lobby won the fight over use of the 1987 airbag technology and the auto lobby won the fight regarding use of subsequently created technology.

IV

EX ANTE AND EX POST PERSPECTIVES

In his *Harvard Law Review* article, Professor Easterbrook argued that judges should take account of the ex ante (incentive creating) effects of judicial decisionmaking because the legal rules formulated today will influence the actions of other parties in similar situations tomorrow. He

8. Professor Easterbrook realizes that a system which yields optimal creation (strict royalty system) prevents optimal use, and vice versa. He does not assert that judges should always choose optimal incentive creation, but only that judges should recognize the trade-off between optimal use and creation. *See* Easterbrook, *supra* note 3, at 21-23 and accompanying notes.

asserted that judges who take an ex post approach in analyzing economic issues—treating the parties' circumstances as fixed and merely apportioning gains and losses on the basis of "fairness," instead of appreciating that the rules created by today's decisions produce incentives or disincentives for future conduct—invariably ensure that there will be fewer gains and more losses tomorrow.[9] In order to send the correct signals to the economic system, a judge must appreciate the consequences of legal decisions on future behavior.[10]

Professor Easterbrook specifically stressed the need for an ex ante perspective with respect to decisions involving intellectual property questions.

> Problems involving intellectual property present the dichotomy between ex post and ex ante perspectives especially starkly. Once someone has created information, the cost of using the information is small. . . . Because the marginal cost of using information is small or even zero, there is a strong [ex post] case for establishing a system of legal rules that makes the information freely available. . . . Yet from an ex ante perspective it is necessary to compensate the inventor . . . [because] the lower the rewards [for inventors today,] the fewer [inventions] there will be [in the future.][11]

Professor Easterbrook's ex ante views freely appear in Judge Easterbrook's intellectual property decisions. In *Rockford Map Publishers, Inc. v. Service Co. of Railroads,*[12] a copyright holder had organized information contained in public records to make a map template. The alleged infringer created an updated map by adding current information to the protected template. The alleged infringer failed to re-create from scratch the copyright holder's work on the original template. Although this work would have taken only forty-five hours, Judge Easterbrook upheld a finding of infringement and ordered the infringer to pay $22,000 in legal fees in addition to the $250 statutory penalty (the extent of actual damages).[13] Neither the absence of a marginal cost of using the original template information nor the paucity of actual damage factored in Judge Easterbrook's decision; instead he focused on the ex ante incentive considerations.

Judge Easterbrook employed similar ex ante reasoning in *Tolliver v. Northrop Corp.*[14] when rejecting a Federal Rules of Civil Procedure section 60(b) motion. In *Tolliver*, the plaintiff's Title VII claim was dismissed because her attorney failed to answer interrogatories in a timely fashion. Under an ex post analysis, a judge may have restored the plaintiff's action on fairness grounds—reasoning that a client should not be punished for the incompetence of her lawyer as long as the defendant had not been prejudiced. Judge Easterbrook, however, rejected this approach and instead strictly followed an ex ante approach. His reasoning focused on creating the proper incentives for future litigants.

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9. *Id.* at 10-11.
10. *Id.* at 11.
11. *Id.* at 21.
12. 768 F.2d 145 (7th Cir. 1985).
13. *Id.*
14. 786 F.2d 316 (7th Cir. 1986).

> Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become . . . a free good. . . . The court's power to dismiss a case is designed both to elicit action from the parties in the case at hand and to induce litigants and lawyers in other cases to adhere to timetables.[15]

A static ex post view would have ignored the costs associated with creating disincentives for complying with future orders to answer interrogatories.[16]

Judge Easterbrook also applied a strict ex ante perspective in *Stevenson v. Board of Elections*.[17] This case involved a statute which required independent candidates seeking state office to file prior to the party primaries. Gubernatorial candidate Adlai Stevenson, who refused to run on the Democratic Party ticket after winning the primary because adherents of Lyndon LaRouche were also on the Democratic ticket, attempted to run as an independent candidate. Stevenson claimed that the statute requiring him to file prior to the primary unconstitutionally hindered his access to the ballot.

The court upheld that statute on the grounds that a state can regulate intraparty factionalism and squabbling in order to ensure an orderly and informed election process.[18] In his concurrence, Judge Easterbrook more explicitly stated the ex ante rationale for upholding the statute: The state may hinder access to the ballot for today's candidates in order to encourage tomorrow's candidates to settle intraparty disputes, abide by party primary results, and avoid the carrying of intraparty disputes through disputes before the general election.[19]

Judge Easterbrook further demonstrated his commitment to ex ante analysis in two opinions enforcing private contracts. One concerned a contract requiring the parties to arbitrate disputes; the other case involved a contract containing an agreement not to compete.

In *E.I. Dupont de Nemours & Co. v. Grasselli Employees Independent Association*,[20] an employee was discharged after a mental breakdown caused him to violently attack fellow workers and to damage company property. The labor contract provided that an employee could be discharged only for "just cause" as determined by an arbitrator.[21] The arbitrator reasoned that lack of fault must be considered in determining just cause, and concluded that since the employee's outburst resulted from an involuntary mental breakdown, just cause was not established.[22]

The majority accepted the argument that the arbitrator's decision should be overturned if it violated the public policy of ensuring a safe working

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15. *Id.* at 319.
16. It should be noted that Judge Easterbrook rejected the intermediate solution of restoring the plaintiff's claim on equity grounds while protecting the efficiency interest by using court-imposed sanctions on negligent attorneys.
17. 794 F.2d 1176, 1177 (7th Cir. 1986) (Easterbrook, J., concurring).
18. *Id.* at 1177.
19. *Id.* at 1179.
20. 790 F.2d 611, 617 (7th Cir. 1986) (Easterbrook, J., concurring).
21. *Id.* at 613.
22. *Id.*

environment.[23] However, the majority ultimately held that since the chance of a recurrence of the employee's outburst was remote, the reinstatement did not undermine that public policy.[24]

In his concurrence, Judge Easterbrook proved much more eager than the majority to uphold the arbitrator's decision. He asserted that an arbitration award cannot be overturned on public policy grounds unless the award violates some positive rule of law, not just an ambiguous public policy.[25] "Public policy in this loose sense is off limits to courts. . . ."[26] Judge Easterbrook's eagerness to strictly enforce arbitration agreements stems from his adherence to the ex ante principle. As stated in his *Harvard Law Review* article: "When a court declines to enforce the arbitration agreement, it makes others . . . worse off. These people no longer can strike one kind or bargain [in the future] because they can [no longer confidently] agree to arbitrate. . . ."[27]

Judge Easterbrook employed similar reasoning in *Polk Brothers v. Forrest City Enterprises.*[28] In *Polk*, two firms agreed to jointly build their two stores on a single tract of land. The attraction of the arrangement was the complementary nature of the two firms' products: one sold appliances and home furnishings; the other sold building materials, lumber, tools, and related products. Together, the two stores could offer a full line of products for the furnishing and maintenance of a home. To alleviate their concerns that cooperation would be replaced by competition, the two firms negotiated a contract that included a covenant restricting each from selling the other's products. This arrangement eventually broke down and led to an attempt to void the covenant.[29]

Judge Easterbrook overturned a district court's holding that the covenant violated antitrust law. He found that the cooperation resulting from the covenant had promoted a productive enterprise because it played an important role in inducing the two retailers to build the stores. Without the covenant not to compete, the retailers would not have entered into the arrangement because of concerns of freeriding.[30]

As a remedy, Judge Easterbrook granted a permanent injunction enforcing the covenant.[31] He followed the ex ante view, writing: "A legal rule that enforces covenants not to compete . . . makes it easier for people to

23. *Id.* at 615.
24. *Id.* at 616-17.
25. *See id.* at 617-20.
26. *Id.* at 620.
27. Easterbrook, *supra* note 3, at 11.
28. 776 F.2d 185 (7th Cir. 1985).
29. *Id.* at 187-88.
30. *Id.* at 190. For example, if one store attracted customers by spending substantial sums advertising and demonstrating the products, the store next door could lure away those customers by quoting a lower price. The second store could afford this by keeping the products in boxes and letting the first store bear the costs of advertising and sales personnel.
31. *Id.* at 195.

cooperate productively in the first place."[32] By upholding the covenant, Judge Easterbrook preserved the ability of other firms similarly situated to make similar contracts in the future.

V

EFFECTS ON THE MARGIN

Professor Easterbrook warned that a judge's efforts to influence future conduct are doomed unless he understands how people respond to incentives. Because people respond to marginal rather than average effects, they substitute among opportunities until they receive approximately the same reward from the final increment of investment in each of their activities. They buy or do a little more of one thing and a little less of another until further changes are not worthwhile. At that point the marginal gains of each activity are approximately equal. Change the return on the margin and people alter their behavior; change the returns somewhere inside the margin and people are unlikely to alter their behavior in the desired way—if at all.[33]

One implication of substitution on the margin is that firms will alter their conduct to avoid the effects of regulation. For instance, if a court restricts the price a firm may charge, the firm will respond by changing the quality of its product, deferring delivery, or making various other adjustments. Therefore, according to Professor Easterbrook, in order to ensure that a regulation has its intended effect, a judge must not only enforce the initial regulation, but he must also create and enforce additional regulations which deal with, or prevent, the subsequent responses to the initial regulation.[34]

In his *Harvard Law Review* article, Professor Easterbrook analyzed *Allen v. Wright*[35] to demonstrate this point. *Allen* involved a claim that the IRS had not acted with sufficient vigor in investigating and terminating the tax exemptions of private schools that engaged in racial discrimination. Professor Easterbrook asserted that in such a case, a court should not attempt to regulate the IRS by ordering it to enforce more stringently the rules denying tax exemptions to those engaged in discrimination, because the decision of the IRS to enforce a certain rule more or less stringently depends on the marginal utility of all of the tasks assigned to the IRS.[36] The IRS might have been slack in enforcing antidiscrimination laws because it believed its limited resources were better spent collecting delinquent taxes.[37] Furthermore, any order requiring the IRS to more vigorously enforce the law would necessarily

32. *Id.* at 189.

33. Easterbrook, *supra* note 3, at 33; *see also id.* at 12-14.

34. *Id.* at 38-40.

35. 468 U.S. 737 (1984).

36. *Id.*

37. Professor Easterbrook's theory does not require a judge to decide whether money is better spent on collecting taxes than on enforcing antidiscrimination laws, but only to recognize that such a trade-off exists. He appears to assume that the IRS officials did recognize that trade, and is willing to defer to their judgment.

require a judge to compare the agency's actual performance against an abstract standard of diligence. Yet, as Professor Easterbrook explained:

> [C]omparing the facts of one case against a standard of decision directs attention in the wrong place [average effects]. This is not the margin on which an administrator works. The IRS . . . compares case against case. The prosecutor's resources are limited; Congress fixes the budget at the same time it lays down the tasks. The budget is no less important than the list of tasks, and the idea of "faithful execution" is that the executive will make the tradeoffs necessary to do the most with the resources at hand. It may accomplish more of its assigned mission by reallocating resources until they are equally productive at the margin. The judge, comparing [performance] against standard, cannot see the tradeoff because he cannot see the rest of the agency's menu and has no incentive to respond to [the restraints imposed by] the agency's budget.[38]

Thus, a judge who understands effects on the margin will not undertake such regulation of the IRS without being prepared to deal with or accept responsibility for the inevitable responses to the regulation.

Judge Easterbrook has employed this reasoning in several cases where he has rejected pleas for court-imposed regulation. In *Camacho v. Ritz-Carlton Water Tower,*[39] Judge Easterbrook rejected a worker's claim that his union violated his right to fair representation by supplying him with an inferior advocate to pursue his grievance. Judge Easterbrook refused to regulate the union's grievance apparatus by setting a minimum standard. He stated:

> [Courts should not] interfere with employees' right to choose the level of care for which they are willing to pay. . . . A Union may choose to rely on part-time, untrained, overworked grievers—with the inevitable difference in the outcome of some cases—rather than purchase a higher quality of representation. A Union may conclude that its limited resources should [instead] go into a strike fund or toward negotiating the next contract.[40]

This holding, and the rationale supporting it, demonstrates Judge Easterbrook's adherence to his analysis of *Allen v. Wright.*

Judge Easterbrook employed similar reasoning in rejecting a Section 1983 claim in *Walker v. Rowe.*[41] In *Walker,* injured prison guards claimed that the prison warden had violated their civil rights by failing to take every conceivable safety measure (shakedowns and a constant lockdown) to prevent a riot. The judge recognized that the government sacrifices safety for other values—like personal liberty for prisoners—and that given its limited resources the government may choose between alternatives—such as building newer prisons, hiring more guards, or providing greater compensation to injured guards—to deal with the risks inherent in prisons. Judge Easterbrook also speculated that the guards similarly substituted on the margin between safety and other benefits: "Would-be guards, represented by their labor unions, may decide to accept a little less safety in exchange for a little higher pay."[42]

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38. Easterbrook, *supra* note 3, at 41-42.
39. 786 F.2d 242 (7th Cir. 1984).
40. *Id.* at 244-45.
41. 791 F.2d 507 (7th Cir. 1986).
42. *Id.* at 510.

In *Watkins v. Blinzinger*,[43] Judge Easterbrook again refused to regulate a governmental agency. There, an Aid to Families with Dependent Children (AFDC) recipient challenged the decision of Indiana state officials to characterize a lump-sum personal injury compensation award as "income" instead of as a "resource." The income classification prevents a recipient from receiving aid for a fixed time. Had the award been considered a resource, the recipient could have regained her AFDC benefits after spending the money.[44]

Judge Easterbrook refused to order the state officials to treat the compensation award as a resource because of the expected undesirable responses to such a judicial regulation. He was particularly concerned that, given its fixed AFDC budget, the state "might respond by reducing the payments to all recipients of AFDC."[45] He further stated: "A court should require such a revamping of the [AFDC] program only if the legislation at hand leaves no alternative."[46] Implicit in his holding was an assumption that the state officials had already balanced the marginal utility of their classification choice with the marginal utility of the other choices made in administering the AFDC program.

Judge Easterbrook also focused on the role of marginal effects in two opinions involving election regulations.[47] Election regulations are governed by the least restrictive alternative rule, which requires a state to utilize the least restrictive regulation possible in order to achieve certain legitimate objectives. In explaining this rule, the judge wrote:

> [The] least restrictive alternative could be a formula for consistent invalidation, because a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive. . . . The point of looking at alternate methods of regulation is that the state must justify each *incremental restriction* in light of its *incremental benefits*. . . . If 95% of the benefit of a rule is achieved by the first 5% of the restriction, this implies that the remaining 95% of the restriction—the real bite of the rule—achieves almost nothing. It is a familiar problem in regulation. . . . [Therefore], a comparison of marginal gains against marginal losses is necessary.[48]

While Judge Easterbrook does not necessarily break new ground in the passage above, he demonstrates his commitment to focusing attention on effects on the margin when evaluating judicial regulation.[49]

Finally, in the bankruptcy context, Judge Easterbrook based a decision on a variant of a basic tenet of the marginal utility analysis theory that unprofitable firms should continue to operate as long as marginal revenues

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43. 787 F.2d 474 (7th Cir. 1986).
44. *Id.* at 475.
45. *Id.* at 478.
46. *Id.*
47. Stevenson v. Board of Elections, 794 F.2d 1176, 1177 (7th Cir. 1986) (Easterbrook, J., concurring); Citizens for John W. Moore Party v. Board of Election Comm'r, 794 F.2d 1259 (7th Cir. 1986).
48. *Citizens for John W. Moore Party*, 794 F.2d at 1258-59 (citations and quotations omitted) (emphasis added).
49. The same basic argument also appears in 794 F.2d at 1177-82.

exceed marginal costs.[50] *Boston & Maine Corp. v. Chicago Pacific Corp.*[51] involved a bankrupt railroad. The plaintiff had asked the court to offset a $180,000 post-bankruptcy debt it owed the railroad with a $180,000 pre-bankruptcy claim it had against the railroad. The plaintiff otherwise would receive ten cents on the dollar ($18,000) for its pre-bankruptcy claim while paying $180,000 for its post-bankruptcy debt. The district court labeled such an outcome "fundamentally unfair."[52]

On appeal, Judge Easterbrook reversed the court's decision and refused to offset the pre-bankruptcy claim with the post-bankruptcy debt. He asserted that the bankruptcy effectively created two firms—a pre-bankruptcy and a post-bankruptcy firm—and the post-bankruptcy firm should be allowed to succeed or fail on its own merits.[53]

The judge explained his reasoning with an example:

> Suppose a post-bankruptcy firm has monthly accounts receivable of $100,000 and monthly accounts payable of $95,000. . . . This firm should survive, notwithstanding its prior bankruptcy. Bygones are bygones, and the future of this firm is profitable. Suppose, however, $10,000 of the receivables are owed by someone who was a creditor of a pre-bankruptcy firm. If the creditor can offset the new obligations against the old debt, the post-bankruptcy firm will fail. It cannot go on collecting $90,000 and paying $95,000 monthly. The setoff produces the failure of a firm that should succeed.[54]

In effect, Judge Easterbrook treated the pre-bankruptcy debts as sunk costs, treated the post-bankruptcy balances as marginal costs, and found that marginal revenues exceeded marginal costs. He focused his attention on costs on the margin instead of simply observing, as the district court had, that a $180,000 pre-bankruptcy debt is equivalent to a $180,000 post-bankruptcy asset.

VI

STATUTORY INTERPRETATION AND THE DYNAMICS OF THE LEGISLATIVE PROCESS

Professor Easterbrook identified and contrasted two schools of statutory construction. The first school believes that laws are designed to serve public interests by identifying certain evils to be redressed and by leaving to judges the task of combatting those evils through any means available. The statute's reach expands continuously so long as objectionable results persist. Omissions and vague terms in the statute are interpreted as evidence of lack of time or foresight on the part of the legislature. The judge should rectify the legislature's shortcomings by filling in the gaps of the statute until the

50. For a discussion of this theory, see Easterbrook, *supra* note 3, at 12-13.

51. 785 F.2d 562 (7th Cir. 1986).

52. *See id.* at 564.

53. *Id.* at 565.

54. *Id.* at 565-66.

identified evil is completely redressed. The maxim "Remedial statutes are to be liberally construed" sums up this (incorrect) approach.[55]

Professor Easterbrook rejected the notion that statutes represent an attempt by the legislature to redress certain evils. Instead, he views laws as compromises or deals between private interest groups. He believes that interest groups, through their lobbying efforts, negotiate laws in a fashion similar to two firms negotiating the terms of a contract. Therefore, he believes that laws should be treated just like private contracts. To interpret or enforce the statute, a judge must first identify the contracting parties and then determine what they resolved and what they left unresolved. Judges should strictly enforce the bargain struck by the parties—giving each party to the contract exactly what it bargained for but no more and no less—and refuse to extend the supposed public interest aims of the statute to benefit groups which were not parties to the contract.[56]

Judge Easterbrook demonstrated his adherence to this private contract theory of statutes in *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees.*[57] *Burlington* presented the question of whether railroad employees could be enjoined from secondary picketing. The Rail Labor Act (RLA)[58] does not prohibit secondary picketing. However, after enactment of the RLA, Congress enacted the National Labor Relations Act of 1935 (NLRA) and the Taft-Hartley Amendments of 1947, which do prohibit most secondary boycotts.[59] The NLRA does not, however, apply to railroads and its employees.[60]

The Railroad contended that because secondary picketing has been subject to injunction in every business since 1947, and because the railroad industry was the subject of the earliest comprehensive labor relations legislation, Congress must have enunciated through both the RLA and the NLRA a public interest goal of enjoining secondary picketing in the railroad industry.[61]

Judge Easterbrook rejected this claim by treating both statutes as private interest contracts rather than public interest laws. Thus, he refused to extend the NLRA to cover railroads. "That secondary picketing is unlawful and enjoinable today in almost every other industry is none of [this court's] business. The Railroads are governed by the compromise Congress made in [the RLA]."[62] Because the railroads were not parties to the bargain struck in the NLRA, they were not entitled to any of its benefits.

Even though an objective of the RLA was to prevent industrial strife, Judge Easterbrook was willing to pursue that objective only as far as provided

55. *See* Easterbrook, *supra* note 3, at 14.
56. *See id.* at 15-18, 45-46.
57. 793 F.2d 795 (7th Cir. 1982).
58. 45 U.S.C. §§ 151-163 (1982).
59. 29 U.S.C. § 158(b)(4) (1982).
60. 29 U.S.C. §§ 152(2), (3) (1982).
61. 793 F.2d at 801.
62. *Id.* at 802.

for in the RLA "contract." He recognized that the RLA had placed limits on the pursuit of its objectives, and he strictly enforced those limits. Professor Easterbrook's law and economics approach mandated such a result. In his *Harvard Law Review* article, he stated:

> If legislation grows out of compromises among special interests . . . a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise, not the objective of the contending interests. . . . [A statute's] stopping points are as important as the other provisions. If the statute gave group X twenty-five percent of what it wanted, it probably meant contending groups to keep the rest. A court cannot observe that the statute gave group X more than it had before and then keep moving in the same direction . . . without undoing the structure of the deal.[63]

Judge Easterbrook recognized that the RLA provided the rule that employees may resort to secondary pressures, and he viewed that rule as the point where judges must stop pursuing the broader objectives of the Act. In his opinion, the judge wrote:

> Some statutes prescribe goals such as safety or competition and require courts to devise the rules that will achieve those goals; others prescribe rules that will lead to more or less of the goal. When Congress writes the rule, courts may not transmute the statute into the other form by inventing new rules to pursue the goal Congress had in mind.[64]

By refusing to invent new rules, Judge Easterbrook preserved the bargain struck in the RLA.[65]

VII

CONCLUSION

Even though Judge Easterbrook has written fewer than 200 opinions, he has already demonstrated an ability to utilize his law and economics beliefs to provide support for his judicial decisions. The rationales supporting his decisions closely mirror the arguments he made in the *Harvard Law Review* article he wrote prior to becoming a judge. Passages that appear in his decisions could just as easily have appeared in his article.

The extent to which Judge Easterbrook's adherence to his law and economics approach affects the outcomes of cases remains an open question. Economic analysis is an inexact science which can yield different results, even from economists with similar beliefs and ideologies.[66] Furthermore, it is impossible to determine whether Judge Easterbrook lets his economic analysis of a case dictate his decision, or whether he initially decides the case on some other ground and then uses economic reasoning to provide a rationale for his decision.

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63. Easterbrook, *supra* note 3, at 46-47.

64. 793 F.2d at 802-03.

65. Judge Easterbrook employs the same reasoning in two other cases: Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 271-72 (7th Cir. 1985); United States v. Medico Indus., 784 F.2d 840, 844 (7th Cir. 1986).

66. For example, see Professor Easterbrook's discussion of the Supreme Court's opinion in NLRB v. Exchange Parts Co., 375 U.S. 180 (1963). Easterbrook, *supra* note 3, at 36-37 n.79.

Whatever Judge Easterbrook's decisionmaking process is, his appointment to the bench, as well as the appointment of other law and economics scholars, should have one predictable effect; it should focus the attention of litigants on the economic aspects of their cases and the attention of judges on the economic consequences of their decisions. When litigants come before law and economics judges, they will probably rely more on economic analysis to support their arguments; and when judges must interpret and apply precedents written by law and economics judges, they too will likely increase their consideration of the economic issues presented.