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FEATURES

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ECONOMIC REASONING AND JUDICIAL REVIEW*

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This article considers the use of the economics in the law in the context of the US Supreme Court, of which the author is one of the Justices. It focuses on three cases where he has dissented, the first considering whether the Environmental Protection Agency may consider economic costs, the second whether a bright line rule or a rule of reason should apply to resale price maintenance and the third on whether copyright protection should be extended by a further 20 years.

This article focuses upon the use of economics in the law, and in particular, at the US Supreme Court. Edmund Burke pointed out that such matters do not stir the soul. He said that 'the age of chivalry is dead'; 'that of sophists and calculators', i.e., lawyers and economists, 'is upon us'. And 'the glory of Europe is extinguished forever'. But there is no need for such pessimism. Men and women in our modern society seek prosperity; prosperity requires an economy that works well; that economy depends upon well-functioning governing rules of law; and to produce that law, at least sometimes, lawyers and economists must work together. In my view, their partnership is essential to a well-ordered democratic, mixed economy.

My object is to illustrate how that partnership functions at the Supreme Court of the US. I consider cases arising in legal fields where the law – if it is to work well – must draw upon insights provided by economists, namely, the law of economic regulation, the law of antitrust and the law of intellectual property. I have chosen cases where, dissenting, I disagreed with the majority as to whether or how the law should take account of those economic insights. By focusing upon three such cases, I hope to illustrate some of the institutional obstacles that make cooperation between our disciplines difficult. I encourage both economists and lawyers to look for ways to overcome those difficulties.

Let me begin with a brief description of the Supreme Court. We are nine judges, appointed for life by the President and confirmed by the Senate. Each of us, before appointment, was a federal court of appeals judge. Before that, three of us were academics, three have come from private practice and three were lawyers practising in the public sector.

Our Court decides only questions of federal law (the lion's share of American law is state law, not federal law). Like the Law Committee of the House of Lords, we have the last word as to the interpretation of statutes. Unlike the Law Lords, we also have a federal constitutional responsibility. We definitively interpret the Constitution of the US. Our jurisdiction is discretionary; we take cases primarily to resolve differences of legal interpretation arising among the lower courts.

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A word of relevant personal history: I was appointed a federal judge in 1980. Previously I was a law professor, specialising in antitrust law and in administrative law where I particularly emphasised economic regulation. I mention this personal background because one might have thought that it would make it easier for me to persuade my colleagues to my point of view in cases arising in economically-related fields of law. Yet I doubt that it does. By asking why that seems so, I have produced a list of institutional obstacles to a better use of economic insight at our Court. I turn now to that list.

I have found seven institutional factors that I believe help to explain why a judge with some background in economically-oriented areas of law might nonetheless find himself in dissent. Four primarily concern the ways in which we carry out our work at the Supreme Court; they touch upon economic reasoning only tangentially. Three others are more policy-oriented; they may help you to understand better what judges can, or cannot do, in respect to taking account of the economists' insights in their work.

First, unlike many European high courts, we do not divide decision-making authority among ourselves. We do not ask one Justice to specialise in respect to a particular case or to prepare a report on a case for use by the others. We do not try to develop different areas of expertise over time. We are generalists. We recognise that some of our members may have developed greater knowledge of a particular field but we also recognise that such knowledge can bring with it a perspective that, as generalists, we might find skewed. Thus any deference we may show to our other colleagues' expert knowledge is limited. We each participate fully in each judicial decision. We believe we are appointed to exercise our own judgment. And each of us takes full responsibility for his or her decision in each case. All this means that one Justice's expertise in a particular field, while not totally irrelevant, will rarely prove determinative.

Second, time is limited. At the Supreme Court, we review about 8,500 petitions for review each year. We grant about 80, each of which raises a legal question that different lower courts have answered differently. The difficulty of the case, the size of the petition docket, the need to decide, all create pressure to move on. And that pressure militates against a Justice, once having reached a decision, changing his or her mind. We are not obstinate but we recognise that, were we to change our minds too often, the work of the Supreme Court would not get done.

Until a dissenting view in a technical case – involving, say, complex economic analysis – is reduced to a draft in writing, its persuasive power is limited. It takes time to produce that writing. By the time the dissent circulates, a majority may have reached a contrary conclusion. And, because of the time pressures I mentioned, that consensus can prove resistant to change.

Third, we try to limit our separate writings – dissents or concurrences – to matters that we consider important in principle. We know that a single opinion provides clearer instruction to bench and bar and normally helps to avoid confusing the law. We know that no opinion is perfect and that we must search for agreement, even where we do not fully agree. Consequently we may join an opinion containing secondary statements with which we do not fully agree. But just when is a matter important enough to provoke written disagreement? I suspect that a Justice who is expert in a technical area is more likely than a non-expert to find a secondary statement important enough to provoke his written disagreement. And that fact may account for some of my written disagreement in technical, economically-oriented cases.

Fourth, cases involving economics are often cases in which the law instructs courts to defer to other governmental decision makers. They may, for example, arise where agencies have created economically-based public policy. And courts must decide, not whether that policy is wise, but whether it is so wrong as to be 'arbitrary', 'capricious' or an 'abuse of discretion'. It is particularly difficult to show that an agency decision, or a congressional decision, is *that* wrong. And courts are consequently tempted not to engage in economic reasoning themselves, or to examine the agency's economic reasoning that closely but simply to approve an agency's efforts to take account of economics as reasonable ones.

These factors explain why, institutionally, appellate courts sometimes seem inhospitable to economic reasoning. And with this institutional backdrop in mind, I discuss three additional policy-related factors that more directly explain why economic reasoning has not played a greater role in legal decision making. I shall discuss these three additional factors in greater detail. The first has to do with the law's need and preference for administrable rules. The second concerns a certain tunnel vision, present among both economists and lawyers, that inhibits each from taking full account of the other's discipline. The third involves the law's distrust of novelty – a fact that often requires new approaches, such as economic approaches, slowly to win acceptance in other institutions before a court will introduce them into the law. Three cases, in which I filed separate opinions, will help to explain these three considerations.

The first case, *Whitman v. American Trucking Associations*,[1] involved the Clean Air Act. The relevant statutory language instructed the US Environmental Protection Agency (EPA) to set ambient air standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety'.[2] The Court held that this language does not permit the EPA to consider economic costs. The majority reasoned as follows: First, the language says nothing about costs. Second, in other similar parts of the statute the language does mention economic costs. Third, absence of the language here, along with its presence there, means that here Congress intended to leave economic costs out. Fourth, the Court reached a similar conclusion in other similar cases, where it said that Congress did not want the EPA to consider economic costs unless there is a 'clear . . . textual commitment' to such consideration. Fifth, there is no such 'clear commitment' here.

I wrote separately to set forth different reasons for reaching a similar conclusion.[3] From a purely linguistic perspective, I thought that EPA might find that a standard that imposes huge costs but secures little, if any, added safety is not a standard that is 'requisite to the public health' with 'an adequate margin of safety'. But I nonetheless thought that the statute's legislative history made clear that Congress intended to force industry to create new, cheaper, more effective pollution control technologies. Congress also thought that any agency effort to weigh costs along with benefits would ordinarily prove too time-consuming. Thus, I agreed with the majority that the statute *ordinarily* forbids taking account of economic costs. And in the particular case before us nothing justified departing from that presumption.

[1] 531 U.S. 457(2001).
[2] 42 U.S.C. § 7409(b)(1).
[3] 531 U.S. at 490 – 96 (Breyer, J., concurring).

The point of my writing, however, was to say that the statute did not forbid consideration of costs in *unusual* cases. Its language, read in light of the history, is sufficiently flexible to permit the EPA to take account of costs where necessary to avoid counter-productive results. A world filled with standards 'requisite to the public health' is not a world without *any* risk. The safest possible football pads and helmets do not prevent every injury; and a degree of risk that falls well within any football injury 'margin of safety' may seem unreasonably dangerous in the context of safe drinking water. Hence, the EPA must have authority to decide, within limits, what counts as 'adequately safe' or what counts as 'requisite to the public health'. It must have authority to decide related matters, such as whether an anti-pollution standard poses greater health risks than it eliminates: for example, in setting ozone standards, the EPA can account for countervailing health benefits such as a reduction in the number of skin cancers.

And if so, the EPA must also have similar authority to determine whether, because of unusually high costs and unusually small benefits, a proposed standard will prove counter-productive – at least in unusual cases. Let me explain why: it may be that a regulation intended to address 90% of a given environmental risk may impose reasonable costs, but a regulation intended to address 100% of the same risk would impose truly prohibitive costs. If there were a blanket prohibition on the consideration of costs, the EPA might feel statutorily obligated to adopt the latter, more stringent regulation in the name of public health. But doing so could force companies to divert resources that would otherwise be used to address *other* environmental risks. Since resources available to combat environmental hazards are not limitless, addressing the 'last 10%' of one risk may, because of resource diversion, have the unintended and undesirable consequence of exposing the public to other more serious risks.

I thought that Congress would never have countenanced a scenario in which a regulatory action, because of its costs, would bring about more harm than good. Accordingly, I thought that, in respect to consideration of costs, the Clean Air Act could not possibly mean 'never'. And I thought it important to say so.

Now you can see the real difference of opinion in this case. If the majority means, 'never take costs into account', its interpretation risks counter-productive results – results that Congress could not have intended. Of course, my own view that 'sometimes an agency may take costs into account' is also open to objection. It invites the question, 'well, just when?' The argument, which on its face concerned the need for, and value of, considering economic costs in pollution cases has become an argument about the need for, and value of, bright-line rules in the law.

This fact explains some of the difficulty of judges' use of economic reasoning. Economic reasoning does not automatically welcome the use of bright-line rules. Economics often concerns gradations with consequences that flow from a little more or a little less. But the law, at least in a final appeals court, often seeks clear administrable distinctions of kind, not degree. This is understandable. Bright-line rules sometimes reduce the transactions costs of judging, as such rules are easier and simpler to administer. Additionally, bright-line rules can have the benefit of providing greater clarity to the public at large, thereby reducing compliance costs and even, perhaps, litigation costs, as well.

Antitrust law reveals this tension between economics' preference for flexible standards and law's preference for bright-line rules. A *per se* rule against price fixing, for

example, does not embody a judgment that price fixing is *never* economically justified. Rather the rule reflects a judgment that economic justifications for price fixing are so few, arise so infrequently and are so difficult to prove, while the enforcement advantages of a clear rule are so great, that a more complex, more economically sophisticated, legal rule is not worth the effort required to develop and to enforce it. Indeed, the difficulty the courts may have in applying a more sophisticated rule may create mistakes that outweigh the rule's benefits.

Could similar reasoning justify a *per se* Clean Air Act rule forbidding consideration of costs? I thought not because I believe that such a rule would sometimes bring about serious, counter-productive harm. The statute's language and purposes permit more open-ended interpretation. The upshot: such vague legal words as 'ordinarily' and 'unusual' would have to provide sufficient administrative guidance.

I am less interested in the merits of the particular conclusion, however, than in pointing out how the difference between my view and that of the majority in this case raises larger legal issues: How often is a bright-line justified? When will more open, less definite interpretations of statute prove workable? To what extent will a statute's language, including its statutory context, provide a definitive answer to a difficult interpretive question? Given Congress's purpose in enacting this statute, which would a reasonable Member of Congress likely have preferred: the harms flowing from an absolute rule forbidding administrators and judges to take account of costs or the uncertainties that accompany a vague standard implicit in a work like 'ordinarily?' The answer, the degree of 'brightness', 'absoluteness', or scope of a legal rule set forth in an opinion, should itself reflect a judicial weighing of relevant considerations – of legal costs and benefits.

Making such a judgment is easier said then done. In general I believe that Congress would rarely intend a bright-line legal interpretation that would bring about seriously counter-productive results. I consequently tend to disfavour absolute legal lines, believing instead that life is normally too complex for absolute rules. Moreover, the more open, less definite approach to interpretation is likely to prove more compatible with the law's incorporation of knowledge drawn from other disciplines, particularly disciplines that themselves reason by way of 'a little more, a little less', such as economics.

The second case, *Leegin Creative Leather Products, Inc., v PSKS, Inc.*[4] is a case in which I reached just the opposite conclusion. I thought that administrative and other legal considerations carried the day in favour of a 'bright-line rule'.

The case involved resale price maintenance. Ever since the Court had decided *Dr. Miles Medical Co. v John D. Park & Sons Co.* in 1911, the Court applied a rule of *per se* unlawfulness to agreements fixing resale prices. The rule required that courts, without examining justifications for a particular agreement, assume that such agreements are always (or almost always) anticompetitive and consequently unlawful under the Sherman Act, a statute that forbids anticompetitive agreements among competitors.

In *Leegin* the Court overruled its earlier cases. It held instead that courts must apply a 'rule of reason', not a rule of *per se* unlawfulness, to resale price-fixing agreements. Such

[4] 551 U.S. ___, 127 S. Ct. 2705 (2007)

a 'rule of reason' permits defendants to produce evidence showing that an individual resale price maintenance agreement is justified, on the ground that the agreement's economic benefits outweigh anticompetitive harms. Four judges, including me, dissented. We thought that the proponents of a 'rule of reason' had not shown sufficient justification for overturning well-established existing law.

The case may interest you because American antitrust law blends both economic and administrative considerations. The particular case required us to consider

(1) potential anticompetitive effects,
(2) potential economic justifications, and
(3) concerns related to the ability of the courts to administer the resulting rule of law.

The three sets of considerations pointed in different directions. Economists helped considerably in respect to the first two sets of considerations. My question here, however, is could they not have shed light on the third set, those concerning administration, as well?

We judges had no difficulty in learning what economists thought. The parties and supporting groups set out their views in briefs filed with the Court and those briefs also referred to economic books and journal articles on the subject. The economists basically agreed that resale price maintenance agreements could have serious anticompetitive consequences. *In respect to dealers*: resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practised generally by manufacturers) among multi-brand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes in demand, say falling demand, by cutting prices; they can encourage dealers to substitute service, for price competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing and so forth.

In respect to producers: resale price maintenance agreements can help to reinforce the competition-inhibiting behaviour of firms in concentrated industries. In such industries firms may tacitly collude, i.e., observe each other's pricing behaviour, each understanding that price cutting by one firm is likely to trigger price competition by all. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. A producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from 'breaking out'; and they will thereby tend to stabilise producer prices.

There was also empirical evidence suggesting that, were resale price maintenance lawful, these anticompetitive consequences would prove important. In 1975 Congress repealed the Miller-Tydings Fair Trade Act and the McGuire Act. Those Acts had permitted (but not required) individual States to enact 'fair trade' laws authorising

minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. Empirical studies compared prices in the former States with prices in the latter States. The Department of Justice argued its empirical study of the matter showed that minimum resale price maintenance had raised prices by 19% to 27%.

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission staff, after studying numerous price surveys, wrote that collectively the surveys 'indicate[d] that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]'. Most economists today agree that, in the words of a prominent antitrust treatise, 'resale price maintenance tends to produce higher consumer prices than would otherwise be the case'.

At the same time the economists agreed that sometimes resale price maintenance agreements could prove justified, for *sometimes* they might provide important consumer benefits. For example, resale price maintenance agreements can facilitate new entry. A newly entering producer wishing to build a product name might be able to convince dealers to help it to do so – if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer to succeed. The result might be increased competition at the producer level, i.e., greater *inter*-brand competition, that brings with it net consumer benefits.

Moreover, in the absence of resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call 'free riding'. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image and so forth. Without resale price maintenance, some dealers might take a 'free ride' on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services.

Finally, the economists agreed that, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. And that is so, even if the producer possesses sufficient market power to earn a super-normal profit. That is to say, other things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance and, in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilise wholesale prices), that special reason may well reflect the special circumstances just described: new entry, 'free riding', or variations on those themes.

A problem arises, however, because these economic answers, helpful though they are, by themselves cannot provide an answer to our legal question, namely whether to over-turn a near century-old line of cases setting forth a *per se* rule and substitute a 'rule of reason' instead. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. These circumstances mean that courts sometimes should apply rules of *per se* unlawfulness to business practices even when those practices sometimes produce economic benefits. As a judge, I must know whether resale price maintenance is such an instance. To help decide, I should like to know how often the various harms and benefits are likely to occur. I should like to know how easy it is for courts to separate the anticompetitive goats from the beneficial sheep.

On these crucial questions, however, many (not all) of the economists fell silent. We were left with economic analyses and some empirical studies indicating that resale price maintenance can cause harm, certainly when dealers are the driving force. We were left with some analyses (though little empirical evidence) indicating that *sometimes* resale price maintenance can produce benefits. But how often are those benefits likely to occur in practice? How easy is it for courts to identify their presence in individual cases? I could find no economic consensus on these points.

There is a consensus that 'free riding' takes place. But 'free riding' often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a 'free ride' on investments that others have made in building a product's name and reputation. But how often is the 'free riding' problem serious enough significantly to deter dealer investment? One can easily *imagine* a dealer who refuses to provide important pre-sale services, say a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that 'free' service (or enjoy the psychological benefit arising when a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. But are there really many such dealers? We do, after all, live in an economy where firms, despite *Dr. Miles*' *per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

How easy is it for courts to identify instances in which the benefits are likely to outweigh potential harms? The agreement is not likely justified where the dealers, not the producer, are the 'moving force'. But suppose several large multi-brand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favour (say, by allocating better shelf-space) the goods of other producers who practise resale price maintenance. Who 'initiated' this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find?

These questions are important because a shift from a bright-line rule to a 'rule of reason' itself has costs. A shift here upsets the settled expectations of those who have relied upon the prior rule, for example, investors in retail firms that engage in discounting, their customers, the mall operators or the computer service firms that have

offered them financial support. And as the courts develop the contours of a 'rule of reason', the resulting legal confusion generates costs. So does the presence of mistakes as courts or juries wrongly apply a more complicated rule. Indeed, without a bright-line rule, it is often unfair and, consequently, impractical for enforcement officials to bring criminal proceedings. Since enforcement resources are limited, that may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive, even where such agreements would not pass legal muster were they actually to be litigated.

Without much help from economists on these administrative matters, the Members of our Court split five to four in favour of changing the relevant legal rule from a rule of *per se* unlawfulness to a 'rule of reason'. The dissenters thought their administrative concerns made the issue a close one. They also asked what had changed since Congress thirty years ago repealed federal statutes authorising resale price maintenance and effectively applied a rule of *per se* unlawfulness to those agreements. They noted that the arguments had not changed since, even, earlier, the British scholar Sir Basil Yamey had listed those arguments in his book about resale price maintenance. We concluded that, for legal reasons, having to do with the law's reluctance to over-rule earlier case law upon which the public would likely have relied. In the absence of new information providing new reasons for change, we believed that the law in this area should not change.

I find both positions reasonable. But I want to ask whether the many economic experts participating in the case could not have given us more help. Could the economists who favoured a 'rule of reason', as most did, not have provided us with more information and analysis about the practical administrative concerns which, along with economics, must inform this area of the law?

The information should exist. For example, unlike the EU, which categorically bans resale price maintenance, the UK employs something of a 'rule of reason': Although the British Competition Act 1998 generally prohibits vertical price-fixing agreements, companies can nonetheless apply to the Office of Fair Trading (OFT) for exemptions from the general ban where resale price maintenance would not thwart economic competition and would either improve production or distribution or promote technical or economic progress. Has OFT found many instances of justified resale price maintenance or only a few? No one told us. Regardless, is it not possible to design a questionnaire or study that would shed light on, say *the extent* to which 'free riding' is a problem in various consumer goods industries?

Hence, my questions: Why did no one examine *quantities*? Could the courts themselves have made better use of economic experts? Could they directly have asked economic experts to examine the relevant administrative questions? It is not easy for our Court to do so because we receive expert views primarily in the form of arguments contained in legal briefs written by the parties' lawyers. But lower courts might retain their own experts – who could focus on questions to which the court, as well as the parties, seeks an answer.

I note that British courts have recently adopted rules that would encourage courts to appoint neutral experts.[5] Under the revised British Civil Procedure Rules, a trial court

[5] See Lord Woolf, *Final Report: Access to Justice*, Ch.13 (July 26, 1996).

can appoint a single expert when parties wish to submit expert evidence on the same issue.[6] Evaluative reports from the Lord Chancellor's Department have praised the increased use of single joint experts as creating a less adversarial culture and reducing both time and cost.[7] Britain based its experiments on practices that are fairly common in civil law countries, where a judge will select an expert from lists provided by scientific or technical institutions or maintained by the courts themselves. In France, for example, the courts maintain a 'regional' and a 'national' list of experts who meet certain criteria. The court appoints the expert (often though not exclusively from these lists) and sets the issues to be investigated. Upon completion of the assignment, the expert is required to file a written report with the court.[8]

I read with interest a recent French case, *La Ligue Contre Le Racisme Et L'Antisemitsme v. Yahoo!, Inc.*,[9] in which a French court forbade Yahoo.com from providing French internet users access to a service selling Nazi memorabilia as well as to other pro-Nazi websites. The key question concerned the practical ability of Yahoo to segregate search requests from users in France from those in other countries. In response, the judge commissioned a report from a panel of experts, while permitting Yahoo to criticise or object to portions of that report. The result was speed and agreement – not about the result – but about many of the technical facts that underlay it.

But here I drift away from my subject. In discussing the resale price maintenance case, I mean to illustrate how American courts have relied upon economic expertise while noting that experts might further help the courts were they to focus upon certain legal or administrative factors relevant to the ultimate legal conclusion. I leave you with a question: how can courts encourage those experts to do so?

The third case, *Eldred v. Ashcroft*,[10] concerns a statute that extends the copyright term by 20 years for both future and existing copyrights. For some works it extends the term from 50 to 70 years after the author's death; for others, from 75 years to 95 years. The question was whether the Constitution's Copyright Clause granted Congress the power to enact this extension. That Clause grants Congress the power to 'promote the progress of science', i.e. learning and knowledge, 'by securing for limited times to authors . . .the exclusive right to their respective writings'.[11] The Court held that this language covers the extension.

I dissented because I thought that the statute extending the term for 20 years fell outside the scope of the Clause.[12] It seemed to me that the extension amounted to an unjustified effort to create, not a limited, but a virtually perpetual, copyright term. As I understand the Clause, it requires copyright statutes to serve certain public, not private, ends, namely to 'promote the progress' of knowledge and learning by providing

[6] UK Dept for Constitutional Affairs, Civil Procedure Rules 35.7, 35.8 (2003).

[7] See The Lord Chancellor's Dept, Civil Justice Reform Evaluation, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001); The Lord Chancellor's Dept, Civil Justice Reform Evaluation, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (August 2002).

[8] See, e.g., M. Neil Browne *et al.*, *The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France*, 18 Conn. J. Int'l L. 55, 96 – 100 (2002).

[9] High Court of Paris, May 22, 2000, Interim Court Order No. 00105308 (cited in *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitsme*, 169 F. Supp.2d 1181 (N. D. Cal. 2001)).

[10] 123 S. Ct. 769 (2003).

[11] US Constitution, Art. I, § 8, cl. 8.

[12] 123 S. Ct. at 801 – 814 (Breyer, J., dissenting).

incentives for authors to create works and by removing the related restrictions on a work's dissemination after a 'limited' time.

The 20-year extension would serve private ends. It would transfer billions of dollars of income from consumers of existing works, e.g., readers or movie-goers, to the heirs of the long-dead producers of those works (or connected corporations). But from the public's standpoint, it would bring about considerable harm: it would unnecessarily block dissemination of works that, with a shorter term, would sooner fall into the public domain. The extension, for example, would require those who wish to use century-old, often commercially valueless, works to find, and to obtain permission from, difficult-to-locate current holders of those copyrights.

Consider the teachers who wish their students to see albums of Depression Era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper's heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun. Consider the historian, writer, artist, database operator, film preservationist, researchers of all kinds, who wish to make the past accessible for their own use or for that of others. Requiring them to obtain a copyright holder's permission for an additional 20 years – starting 75 years after the work was created – would often fatally impede their efforts.

I could find no justification for the extension that might offset this harm. No one could reasonably conclude that copyright's traditional justification – providing an incentive to create – could apply to this extension. Past works, say Mickey Mouse films, by definition need no incentive, for they already exist. And any added incentive to create works in the future is insignificant.

To understand why that is so requires reference to undisputed data that interested groups submitted to the Court; and it requires reference to the economic analysis that other groups provided (including Nobel Prize winning economists). They made clear that no potential author could reasonably believe that he or she has more than a tiny chance of writing a classic that will survive long enough for a copyright extension (of 20 years beginning 75 years in the future) to matter. Indeed fewer than 2% of all copyrighted works retain any commercial value after 75 years. And any remaining monetary incentive is diminished radically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. A 1% likelihood of earning $100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today.

What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? Regardless, that added present value does not significantly differ from the present value added by a perpetual copyright. Indeed, the 20-year extension produces a copyright term that generates more than 98% of the value of perpetual protection.

Neither could I find other copyright-related justifications for the extension. It did not produce significant international uniformity. It had no other significant copyright-related international commercial effect. It did benefit several publishers, shareholders, and various entertainment companies, including Walt Disney and AOL Time Warner (the current holder of the copyright on the 'Happy Birthday to You' melody, first published in 1893 and copyrighted after litigation in 1935). But this kind of private

commercial benefit, in my view, falls outside the Copyright Clause. My conclusion was that the copyright extension was unconstitutional.

For present purposes, I want to focus, not upon the substance of my copyright conclusion but upon the fact that seven of my colleagues disagreed with it and with the empirical and logical arguments that supported it. Putting aside the possibility that the disagreement just means I was wrong on the merits, and knowing, as I do, that my colleagues are not in any sense benighted, I would ask why my arguments were unconvincing. There may be an interesting answer to this question.

In saying this I am not referring to the technical, specialised and complex subject matter, to the need for time to write the dissent, or to the legal fact that we courts must defer heavily in this area to the judgment of Congress. I point to another factor that I believe is more important. That factor consists of the novelty of the approach I accepted, an approach that depends heavily upon an economic-type weighing of costs and benefits. The approach is not completely novel. It finds support in the literature and in prior case law. But, in its heavy reliance upon economic and commercial factors, it departs from the style, if not the substance, of most previous copyright opinions.

The law is a conservative institution. Courts must protect those who have relied upon prior law and prior approaches. Thus, courts ordinarily will rightly hesitate to adopt a new approach to an important body of law – at least until the relevant members of the public, acting through other institutions, themselves seem to have found the new approach acceptable. Here those groups and other institutions include Congress, the copyright bar, publishers, authors, schools, libraries, research institutions, and many others beside. A critical mass has not embraced the approach that my dissenting opinion reflects – at least not yet.

I do not mean to say that courts, in applying or developing copyright law or any other branch of law, follow public opinion. But I do mean to point out that the shaping of law in America is a highly democratic process. New law is less often decreed from on high by a court or a legislature than it 'bubbles up' from below. Often the law-making process resembles a kind of conversation among many interested groups, including experts, specialists, commercial enterprises, labour unions, various interest groups, and ordinary citizens. That conversation takes place in journals, at seminars, in newspapers, at hearings, and in court proceedings. The decision of one institution is taken as a datum by another. It may be embodied in administrative rules, statutes, even constitutional interpretations; but none of these is permanent; all are subject to change or gradual evolution.

Michael Oakeshott, in describing liberal education, better explained what I have in mind.

> 'The pursuit of learning', he said, 'is not a race in which the competitors jockey for the best place, it is not even an argument or a symposium; it is a conversation. . . . [E]ach study appear[s] as a voice whose tone is neither tyrannous nor plangent, but humble and conversable. . . . [Its integration is not superimposed but springs from the quality of the voices which speak, and its value lies in the relics it leaves behind in the mind of those who participate.'[13]

[13] Michael Oakeshott, *The Voice of Liberal Learning*, pp. 109–110, New Haven: Yale University Press (1989).

Similarly, the development of legal methods and analysis is a collaborative, evolving process. The law is continuously renewed. To steal a philosophical metaphor, we renew it plank by plank while, like a ship, it floats upon the sea.

So viewed, a dissent continues to play a role in an ongoing policy debate. Even though it is not the law, others may find its arguments or approaches persuasive; they may adapt or adopt them for use in different forums; and if there is sufficiently widespread acceptance, even judicial approaches may change. So seen, a dissent will be judged in terms of its persuasive force, which, despite the majority to the contrary, is not irretrievably lost. With this larger process in mind, I have hope that my lonely dissent, invoking economic reasoning, will not be so lonely in the future.

I have used the three dissenting opinions to illustrate three features of the law, features relevant to its use of economic policy. The first concerns the law's need to interpret statutes with, what I might call, an open-textured approach – an approach that finds greater value in the consideration of underlying human purposes than in the proliferation of strict legal categories. Bright-line rules, while sometimes useful, are not always a preferred alternative, particularly when such a rule brings about results that, in terms of a statute's basic purpose, prove counterproductive.

The second concerns the need to provide economic information and insight in a form that incorporates basic legal considerations likely of interest to the judge – in particular considerations of the administrability of a legal rule. I intend it to illustrate the need for experts to understand the role that administrative considerations, such as the need for rules, play in the law.

The third concerns the need, given the law's reluctance to rely upon novel approaches, for institutions outside the judiciary to debate and eventually to adopt approaches that will permit judicial intellectual property decisions to incorporate economic considerations.

Overall, I hope to have encouraged those interested in economics and law not to take legal decisions as a given. They must understand the importance of institutional factors, including the need for rules that judges and lawyers can administer. But they cannot assume that only judges or lawyers are experts on questions of administration. The shape of a legal rule, the extent to which it ought to be a 'bright-line' rule, is itself open to study. Those who are intellectually comfortable with concepts of equilibrium, who see virtues in considering a little more, a little less, might have something to contribute in this area as well.

Clearly I favour participation in the judicial process by those with economic or regulatory policy-making expertise. The more you are aware of judicial decision making and willing to undertake informed criticism, the better. Whether serving as experts in individual cases, or more generally as informed court watchers and critics, you can make more accessible to lawyers and judges the tools of economic analysis and encourage their use.

That kind of participation is consistent with my own view of the legal process – that it is too important to be left simply to the legal specialists, to the lawyers, or even to the judges.

Justice, United States Supreme Court