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METHOD, RESULT, AND AUTHORITY: A REPLY

Frank H. Easterbrook*

I.

ALL good things are scarce. Self-interested conduct is the handmaiden of scarcity. These are facts of life. Given scarcity, judicial decisions inevitably create, transfer, or destroy valuable things and affect people's decisions. Even justice is scarce. Disputes about attorneys' fees stem from the high costs of litigation, and rules about harmless error grow out of the costs of retrials (including the delay other litigants encounter when one case receives extra process).

Judges must respond to scarcity. The effects of a court's decision on who gets how much of what good things may or may not be what the judges anticipated. Private and public responses to the decision may or may not undercut what the judges sought to achieve.

The foundation of my Foreword¹ is the belief that knowledge of potential effects and responses is preferable to ignorance. The Foreword contains three principal normative propositions:

(1) judges should be aware that their decisions create incentives influencing conduct *ex ante*, and that attempts to divide the stakes fairly *ex post* will alter or reverse the signals that are desirable from an *ex ante* perspective;

(2) judges should be aware that marginal effects, and not average effects, influence the responses to their decisions, and that responses are pervasive; and

(3) judges should be aware of the interest-group nature of much legislation, for this influences its meaning.

Appreciation of each of these propositions is an essential ingredient in any intelligent response to the problem of scarcity.

The Foreword also offers two descriptive propositions:

(1) the Justices are better aware of these three principles and act on them more intelligently than they used to do; and

(2) their recognition and action cuts across many parts of the law.

Both of these propositions seem to me reasons to applaud the Justices.

A number of propositions do not appear in the Foreword. The following are among the missing:

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¹ Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

- (a) all human concerns can be monetized in practice and deployed by courts in a grand cost-benefit analysis;
- (b) an application of the three normative principles leads to a determinate outcome in all (or even most) cases; and
- (c) utilitarian principles should govern all kinds of disputes.

Professor Tribe's Article² largely agrees with the Foreword's descriptive propositions. He does not question my analysis of how the Court's thinking has changed, though he obviously would prefer that the Court follow a noninstrumental path. He also does not question much of the normative analysis, though his preference for noninstrumental values leads him to think that the analysis turns judges' heads in the wrong direction.

Most of the bite in Professor Tribe's Comment comes from his vigorous denial of propositions (a), (b), and (c). He believes, for example, that many human concerns cannot be (or ought not to be) monetized, that cost-benefit calculations may be indeterminate, and that the Constitution often instructs judges to disregard utilitarian calculations in favor of recognizing personal rights and reshaping preferences.

I am delighted to agree. My Foreword does not mention "cost-benefit analysis," for example; judges have neither the information nor the incentive to do such analysis well, and even a dispassionate analysis done by a team of superb economists is apt to be incomplete and misleading.³ Because I do not believe the other two propositions any more than Professor Tribe does,⁴ this has the makings of a boring debate. One wonders why he bothers to deny with such vigor propositions that cannot be found anywhere in the Foreword.

Indeed, the focus of his Comment is puzzling. My essay was about the Court and the economy. I asked how the Court addresses eco-

² Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985).

³ See Easterbrook, *supra* note 1, at 60 (it is "unlikely" that judges "could make wise economic decisions routinely"); see also Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4-14 (1984) (discussing inability of judges to determine effects of arrangements in the market). The most we can hope for is a tendency in the right direction, and then at the level of rules rather than applications in individual instances.

⁴ I have argued elsewhere, for example, that the Supreme Court has erred in turning the due process clause into a grant of power to invent and impose cost-justified procedures. See Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 88-100, 109-15, 125. Other constitutional provisions also instruct the government to put costs and benefits aside. The seventh and eleventh amendments enshrine historical treatments of important problems, though these solutions may be quite inefficient. The equal protection clause of the fourteenth amendment is designed to defeat preferences for discrimination. The fourth amendment, by contrast, invites balancing of costs and benefits (searches must be "reasonable"), though with a thumb on the scale in favor of the right of seclusion. Other provisions contain their own rules about the appropriate treatment of costs and benefits. My skepticism about the appropriate scope of economic treatment of constitutional rules is one reason why my Foreword spends so little space on the Constitution.

conomic issues, such as intellectual property, banks' sales of commercial paper, and the award of attorneys' fees. The Court must use economic analysis in these cases, if only because Congress has told it to. I concluded that the Court's understanding of the economic principles that govern economic issues has improved steadily over the last thirty years. I discussed but a few constitutional cases, and then only to illustrate the nature and general applicability of some of the lines of analysis. Yet Professor Tribe discusses *only* constitutional cases.

Why? I think Professor Tribe's Comment is based on the belief that those interested in the economics of legal institutions *must* believe propositions (a), (b), and (c), even if they deny them. Why be interested in economic analysis if it does not give universal answers? Professor Tribe's reaction is common among those who see red whenever someone mentions economics. I therefore think it helpful briefly to explore why people ask economic questions even if they do not think the inquiry will yield dispositive answers to all legal disputes.

II.

Law is not a closed logical system. Every legal dispute worth having involves some propositions about the state of the world. These disputes have answers, though they may be very hard to find. Professor Tribe tells us, for example, that if people can sleep in the parks near the White House, the homeless will become better off because they likely will get some income transfers in their favor.⁵ This may or may not be true — whether it is true depends on the reactions of other, competing lobbyists, on the substitution among programs of income redistribution, and so forth. The effects of an increase in one group's public exposure are hard to calculate.⁶ We need some way to evaluate Professor Tribe's assertion, as we need a way to evaluate the other predictions that are the stuff of litigation.

No litigant argues before the Supreme Court without making predictions about how the decision will affect society. Few opinions omit predictions about effects. Litigants and judges alike believe that these effects are important in determining the outcome of the case. These predictions usually rest on a tacit economic analysis. Better to make the analysis express, to give more knowledge of these consequences.

It really does not matter that the *ex ante* perspective, attention to marginal effects, and recognition of the interest-group character of legislation are not *dispositive* in this search. No one insists that any single method or piece of evidence be dispositive. In litigation we call

⁵ See Tribe, *supra* note 2, at 599-601.

⁶ See Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (analyzing a few of the considerations — some quite counterintuitive — that go into determining the outcome of a general struggle for redistribution of resources).

evidence "relevant" if it makes the truth of a pertinent fact more or less likely; we do not demand that each piece of evidence be dispositive. In the design of aircraft, the principles of aerodynamics and fluid motion are important but not dispositive, because no computer is powerful enough to model all aspects of the flow of air over an airfoil. Some designs therefore lead to crashes. Yet only a fool would argue that because aerodynamics is not dispositive, it should be discounted as a useful source of knowledge in the design of aircraft.

It is the same with economic analysis. The consideration of marginal effects in deciding cases is not apt to be dispositive, but it is informative and in many instances will tip the balance. Because more knowledge is better than less, economic analysis is valuable. The alternative ways of predicting effects of decisions — often unfounded guesses, counterfactual beliefs, and superstition — do not become more attractive just because economic analysis is incomplete.

Professor Tribe appears to believe, however, that economic inquiry contains *misinformation* that imposes unwarranted costs on the legal process. (This weighing of the informative and misinformative effect may be a bit of cost-benefit analysis smuggled into Professor Tribe's approach, but who am I to complain?) He thinks that economic analysis directs attention toward what is monetizable and away from personal rights and the goal of changing values. Perhaps it does for some; any tool can be misused. Knives can kill people as well as cut the food at dinner. But economics need not mislead. Economics is about maximization subject to constraints. Economics is applied rationality. Someone can name the maximand (say, freedom of speech and the value of proposing new political arrangements) or the constraint (usually scarcity of some valuable thing) without affecting the nature of the analysis. True, there are formal models that have no room for personal relationships, but there is also an economics of the family in which altruism, concern for future generations, and the development of more fulfilling lives play the central role.⁷ Economists have no difficulty understanding education, although the role of education in changing the values of those being educated is an essential part of the venture. People often want to change their own preferences, and anything they want to do — even if they do not know where they will end up — can be evaluated. Nothing in the approach requires the exclusion of other values.

There is also a tendency in the writings of those who object to economics to exalt redistribution and demean the creation of new wealth. Professor Tribe's Article often refers to the value of assisting the poor and asserts that judges should pursue this value at the expense of new wealth. In order not to have their vision clouded, he

⁷ See, e.g., G. BECKER, A TREATISE ON THE FAMILY (1981).

implies, they should disregard economics. Sometimes this is so; the governing rule may discard considerations of cost.⁸ This does not happen frequently, however.

The rest of the time economic understanding is important. A judicial award of more hearings to the poor may lead to a reduction in benefits;⁹ the poor are entitled to know this economic relation and to protest when this happens. The antitrust laws refer to "competition"; the standard for the award of attorneys' fees in civil rights cases is the "market rate." Thousands of statutes require judicial attention to economic matters, and Professor Tribe does not argue otherwise.

Even within Professor Tribe's framework one cannot escape economics. Take his analysis of *Clark v. Community for Creative Non-Violence*.¹⁰ He apparently believes that the Court should have used the case as an occasion to transfer valuable goods to poor people — granting them the right to sleep in the park would have led to greater redistribution of income in their favor. Let us suppose that sleep would have produced some increase in redistribution. Why is that a good argument in the plaintiffs' favor? To say that "decision X gives more of good Y to person Z" is not an argument at all. It is just an observation. Someone seizing my living room to hold a political rally also could say that this would advance the cause of the poor, but we would not accept this as an adequate reason to permit the seizure.

A court considering Professor Tribe's observation must continue with a series of questions. Why is person Z a good beneficiary? Other people compete both for park space and for the benefits of redistribution (the ill compete with the homeless, the homeless with other would-be users of the parks, and the poor with those who must pay the taxes). Why is good Y the right benefit for the poor? Why is an increase in the allocation of park space the right way to produce redistribution, when there are other ways at hand? The omission of these considerations — which would be included in a full economic analysis — is not likely to improve the quality of decisionmaking. We get nowhere by listing values unless we have both a metric by which to assess the claims the parties make and a legitimate rule of decision. Economic analysis sometimes suggests a metric and a rule of decision; a list of values along with an aspiration to improve life in all its fullness does not.

⁸ See, e.g., *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (holding that statute requires regulation of toxic substances without regard to cost-benefit analysis); Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981).

⁹ See *Califano v. Boles*, 443 U.S. 282, 284–85 (1979); cf. *Heckler v. Mathews*, 104 S. Ct. 1387 (1984) (sustaining decision by Congress to reduce spousal benefits for eligible widowers and husbands, a response to the enlargement of that class of recipients produced by earlier constitutional litigation).

¹⁰ 104 S. Ct. 3065 (1984), discussed in Tribe, *supra* note 2, at 599–601.

III.

Finally, we are entitled to ask why courts are authorized to pursue the path marked for them by Professor Tribe — marching off toward reconstituting society. Why is this a part of the judicial mission? Legislatures “reconstitute society” daily; they are the mechanism for aggregating preferences, setting change in motion, and expressing aspirations. The Civil Rights Act of 1964 is a profound and increasingly successful effort to overcome and reshape preferences. Judges have a different role. The argument for judicial review in *The Federalist*¹¹ and in *Marbury v. Madison*¹² is that judges serve as a brake on the other branches by insisting that they pursue their goals in ways that respect both the structure of government and the rights won in the Revolution and Civil War. The idea that judges should spur the other branches on to ever greater reconstitutions of society is alien to the original design.

It is here that Professor Tribe and I conclusively part company. The difference between us is not so much about the role of economics in judging as it is about the role of judges in society.¹³ Our differences could not be deeper if neither of us had heard of Adam Smith.

I have argued in earlier writings that the proper judicial role combines honest interpretation of decisions made elsewhere with careful discharge of powers expressly granted.¹⁴ Doubt and ambiguity about the authority granted by the Constitution and statutes should lead judges to let the decisions of private and political actors stand. This is hardly a novel view. It appears in *The Federalist*, in *Marbury*, and in almost everything written about the Constitution before 1950. It is not one that especially favors economics (often judges have no warrant for using economics), and economic assessment does not automatically produce this modest view of judicial power. They are logically independent. Certainly they are not at war. The Constitution is a text of the eighteenth century, one of the greatest products of liberal thought. Professor Tribe’s observation¹⁵ that economics uses the same liberal, individualist premises hardly shows incompatibility.

¹¹ THE FEDERALIST Nos. 78, 79 (A. Hamilton).

¹² 5 U.S. (1 Cranch) 137 (1803).

¹³ Professor Tribe concedes that economic analysis may be valuable, provided that it does not “obscure the distributive and other dimensions of choice” that he believes judges should pursue. Tribe, *supra* note 2, at 619 n.161.

¹⁴ See Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL’Y 87 (1984); Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); Easterbrook, *supra* note 4, at 90–95. Professor Tribe complains that I do not flesh out in *Legal Interpretation* all aspects of the judicial role. See Tribe, *supra* note 2, at 618–20. That is a big task for a career, let alone one article. My excuse is that the other articles cited here make a start, and I hope I have another forty years or so to keep trying. (Because developing the subtleties of interpretation takes too much space for this short reply, I resist the temptation to dispute Professor Tribe case by case and clause by clause.)

¹⁵ See Tribe, *supra* note 2, at 597.

Judges have no authority to reconstitute the values of the people or to exalt redistribution at the expense of competing objectives selected by the political branches. Our Constitution is based on the ideas of Locke and Montesquieu, not the view of Rousseau that the state should imbue its citizens with the "true" values they "ought" to hold. The framers were skeptical about both the existence of such values and the wisdom of trusting the government to choose among them. They rejected the arguments of the anti-Federalists, which were very similar to those of Rousseau and Professor Tribe.¹⁶ The choice made in 1789 was to separate powers, not to give judges the functions of both making and executing decisions about the fundamental values of society. As Hamilton quoted Montesquieu in *The Federalist* No. 78, "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers."¹⁷ The choice was to recognize and rely on the self-interest of factions — public and private — rather than to scorn faction and seek the instruction of Platonic guardians.¹⁸

The Constitution demands that all power be authorized. It is not enough to say that judicial decisions are about "how we define our society and specify much about what we stand for and what sort of country we wish to become."¹⁹ "We the People" speak through the Constitution itself, through representatives in the legislature, through the amending process. Judges are granted tenure to *insulate* them from the wishes of today's majorities, not to enable them to claim inspiration about the "true will" of the people. The passage of time cannot make Rousseau the courts' guiding star — not, at least, without another revolution.²⁰ The Court's drift from economic substantive due process to other forms of substantive intervention did not occur because of a new grant of legitimate authority.²¹ Judges applying the Constitution we have, rather than the one Professor Tribe wishes we had, must take their guidance and authority from decisions made

¹⁶ See H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981) (describing the views of those who lost during the debates over the Constitution).

¹⁷ *THE FEDERALIST* No. 78, at 491 (A. Hamilton) (B. Wright ed. 1961) (quoting 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. 11, ch. 6 (1st ed. Geneva 1748) (1st Eng. ed. London 1750)).

¹⁸ See *THE FEDERALIST* No. 10 (J. Madison) (arguing that attempts to eliminate the divergence of interests and opinions would lead to tyranny, and that the appropriate way to deal with faction is through representative government); *THE FEDERALIST* No. 51 (J. Madison) (same). Madison argued that representation separates interest from choice, and competing centers of public and private power reduce the influence of any one center.

¹⁹ Tribe, *supra* note 2, at 595.

²⁰ Even Bruce Ackerman, who maintains that there were revolutions ("conventions" of the people) in 1866 and 1936, denies that the Court possesses the power to be a continuing convention. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1049-72 (1984).

²¹ See Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5 (1978).

elsewhere. Otherwise they speak with the same authority they and Professor Tribe and I possess when we fill the law reviews with our speculations and desires: none. And the other branches owe no obedience to those who speak without authority.

This is not to say that the judicial process is mechanical. Far from it. The process involves the most delicate assessment of meaning. Knowledge is ephemeral, and doubts about both the meaning of words and the effects of rules tax the greatest interpreters. But none of this changes the source of the power to decide. Judges can legitimately demand to be obeyed only when their decisions stem from fair interpretations of commands laid down in the texts. This principle — the real source of the disagreement between Professor Tribe and myself, and between Tribe and the Court — has nothing to do with economics. Professor Tribe would be dismayed no matter why judges took a restricted view of the considerations they deemed to be appropriate in deciding cases. Professor Tribe would not be happy with a Court staffed by Justices with Felix Frankfurter's view of the role of judges, even though Justice Frankfurter thought ill of economics. An understanding of economics does not cause people to invent limits on the role of judges. Causation runs the other way. Those who believe that judges have but a limited role to play in government are also more likely to be comfortable using the liberal, individualist premises that Professor Tribe rightly sees as important parts of economic thought.

IV.

Determining how "we reaffirm and create, select and shape, the values and truths we hold sacred"²² is the most pressing task for the political society. But the execution of this task falls on the people and their representatives. The delicacy and indeterminacy of the task is no reason for judges to pretend that there is no scarcity.

Once they must deal with scarcity, they must deal with economics. They may discharge this obligation expressly or by implication, well or poorly, but deal with it they will. Utopian visions yield political aspiration, but aspiration and adjudication must be separated. Hopes for a better society do not justify unreflective treatment of the tradeoffs we must make in a world of scarcity.

²² Tribe, *supra* note 2, at 595.