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Herbert Hovenkamp*

The main problem with Judge Richard Posner's new book, *The Economics of Justice,*[1] is that it addresses too many issues, including legal history. On the other hand, expansiveness has always been one of Posner's virtues. He began his academic career by creating a unified, internally consistent antitrust theory, which he urged against what he perceived as the politicized, incoherent, and economically ill-informed antitrust law of the 1950's and 1960's.[2] If the new merger guidelines of the United States Department of Justice are any indication,[3] Posner's approach to antitrust is winning out. A few years later Posner presented a general economic theory of law.[4] The legal economics and price theory that Posner and his associates had developed in the antitrust area became a provocative, if controversial, explanation for common law rules, although the theory is somewhat less convincing as applied to political and civil rights.[5] Now the legal literature is replete with discussions of the economics of property, contract, and torts.[6] Something approaching revolution in legal theory is on our hands.

The Economics of Justice[7] presents Judge Posner as both

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1. R. POSNER, THE ECONOMICS OF JUSTICE (1981).
2. *See* POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach,* 21 STAN. L. REV. 1562 (1969); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J.L. & ECON. 365 (1970). *See generally* Posner, *The Chicago School of Antitrust Analysis,* 127 U. PA. L. REV. 925 (1979).
3. *See Merger Guidelines of the Department of Justice,* 42 ANTITRUST & TRADE REG. REP. (BNA) ¶ 1069 (June 17, 1982).
4. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).
5. *See id.* at 525-45.
6. *See, e.g.,* B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975); A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979); R. POSNER & K. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1980). *But see* Epstein, *The Social Consequences of Common Law Rules,* 95 HARV. L. REV. 1717 (1982) (common law adjudication not responsible for major economic and social consequences); Rubin, *Common Law & Statute Law,* 11 J. LEGAL STUD. 205 (1982).
7. *See* R. POSNER, *supra* note 1.

jurisprudent and historian. It is not at all surprising to see Posner in the latter role.[8] For some time he has been arguing that legal commentators pay too much attention to normative economic analysis and too little to positive analysis.[9] Normative analysis develops a point of view about what legal rules ought to do. Positive analysis, however, is purely descriptive. It attempts to describe the operation or effect of a certain legal procedure or rule. At the same time, both positive economic analysis and legal historiography try to explain what makes legal rules change. This Article discusses some of the uses and abuses of normative and positive economic theories in the writing of legal history. In so doing, it focuses principally on Posner and Morton J. Horwitz, who has offered a different but equally comprehensive economic explanation of legal history.

Although the discipline of history has traditionally been understood as positive, few contemporary historians would think it actually to be so.[10] Today historians of every political and social persuasion use historiography to argue their point of view, and Leopold Von Ranke's insistence that historians stick to the facts "as they really occurred"[11] sounds a little naive. Nevertheless, in a very general sense most of us still think of history as positive, at least to the extent that we use it to explain how we arrived at where we are today. To argue that a certain rule ought to be the law is jurisprudence, but to argue that a certain rule was once the law, or that it changed for a certain reason, is legal history. Even those legal historians whose political commitments are the strongest and most explicit use descriptive language when they write legal history.[12]

A startling aspect of *The Economics of Justice* is that although Posner instructs law writers to write more positive and less normative analysis,[13] when he does both together, they

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8. *But see, e.g.,* Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,* 90 YALE L.J. 1717, 1721 (1981) (Posner's economic philosophy "so dominates his historical exposition as to render that exposition unsatisfactory.").

9. *See* Posner, *Some Uses and Abuses of Economics in Law,* 46 U. CHI. L. REV. 281 (1979) (distinguishing positive from normative economics) [hereinafter cited as Posner, *Uses and Abuses*].

10. *See* C. BECKER, EVERYMAN HIS OWN HISTORIAN (1935); J. HIGHAM, HISTORY 117-31 (1965); Becker, *What is Historiography?,* 44 AM. HIST. REV. 28 (1938). For an argument that history can be purely descriptive, see Lovejoy, *Present Standpoints and Past History,* 36 J. PHIL. 477 (1939).

11. "Wie es eigentlich gewesen . . . ." *See* B. LOEWENBERG, AMERICAN HISTORY IN AMERICAN THOUGHT 384-89 (1972).

12. *See, e.g.,* M. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860 (1981).

13. *See* R. POSNER, *supra* note 1, at 48-118. *See also* Posner, *Uses and*

point in the same direction. Posner's normative analysis argues that efficiency or "wealth maximization" ought to be the general goal of most legal rules, and his positive analysis generally argues that the law, particularly the common law, does and always has tended to adopt rules that maximize wealth.[14]

WEALTH MAXIMIZATION

Jurisprudential arguments that the law ought to be utilitarian or efficient are relatively commonplace.[15] Historical arguments that the law has actually been so are somewhat scarcer.[16] There now exists an extensive literature devoted to the question whether the development of the common law has been efficient, or wealth maximizing.[17] Wealth maximization is a theory about how resources can be allocated most efficiently. In general, a rule is wealth maximizing if those who are in favor of the rule are willing and able to pay more to have it adopted than those who are opposed to the rule are willing to pay to prevent its adoption. Stated differently, the adoption of a certain legal rule is wealth maximizing if those who gain from the rule gain more than those who are injured by it lose.[18]

Posner argues that the best way to determine whether a

Abuses, supra note 9, at 287-91. *See generally* Posner, *The Present Situation in Legal Scholarship,* 90 YALE L.J. 1113 (1981) (discussing three principal types of legal scholarship).

14. *See* R. POSNER, *supra* note 1, at 13-47, 119-230. *See also* R. POSNER, *supra* note 4, at 179-85; Landes & Posner, *The Positive Economic Theory of Tort Law,* 15 GA. L. REV. 851 (1981).

15. A leading example is H.L.A. HART, THE CONCEPT OF LAW (1961).

16. *But cf.* O. HOLMES, THE COMMON LAW 2 (1881) ("The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient."). *See also* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977), discussed *infra* notes 106-73 and accompanying text; authorities cited *infra* note 17. For an extended argument that law is efficient only in the short run, see J. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1964).

17. *See* Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History,* 9 J. LEGAL STUD. 335 (1980); Goodman, *An Economic Theory of the Evolution of the Common Law,* 7 J. LEGAL STUD. 393 (1978); Kennedy & Michelman, *Are Property and Contract Efficient?,* 8 HOFSTRA L. REV. 711 (1980); Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law,* 8 HOFSTRA L. REV. 591 (1980); Landes & Posner, *Saviors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism,* 7 J. LEGAL STUD. 83 (1978); Posner, *Uses and Abuses, supra* note 9, at 284-87; Priest, *The Common Law Process and the Selection of Efficient Rules,* 6 J. LEGAL STUD. 65 (1977); Rubin, *Why is the Common Law Efficient?,* 6 J. LEGAL STUD. 51 (1977). *See also* Rubin, *supra* note 6.

18. *See* Posner, *Utilitarianism, Economics and Legal Theory,* 8 J. LEGAL STUD. 103, 119 (1979).

particular transaction or rule is wealth maximizing is to view the transaction or the consequences of the rule in some market, whether real or hypothetical.[19] Voluntary market transactions are generally wealth maximizing.[20] For example, if Mark pays Mary $5 for a bag of oranges, both Mark and Mary are wealthier as a result of the transaction. Presumably, the oranges are worth at least $5 to Mark, or he would not purchase them. To the extent they are worth more than $5 to him he is wealthier for having bought them. Presumably, the oranges are worth less than $5 to Mary, so the sale makes her wealthier as well. If no one other than Mark or Mary is affected by this transaction, society is wealthier as a result. In Posner's paradigm a legal rule that facilitates such a transaction is a good one.[21]

Analysis of a simple transaction between Mark and Mary does not provide much of a theory of jurisprudence, however. It is incomplete in at least three respects. First, it fails to account for external costs or benefits. Second, it does not consider the vast number of nonvoluntary or nonmarket transactions which for the law are a daily concern. Finally, it fails to take account of transaction costs which may often force a nonmarket solution to a problem when a market solution would otherwise be wealth maximizing.

Every transaction, even the simple purchase of a bag of oranges, affects people who are not parties to the transaction. Mark's willingness to buy Mary's oranges may influence Mary to grow them rather than use her land for some other purpose, such as dumping garbage, which would have a less desirable effect on people other than Mark. Often the external costs or benefits that accrue to people other than the parties to the transaction are negligible, and a wealth maximizing rule will disregard them. But when externalities are substantial, they can determine which outcome will be wealth maximizing. For example, if *X* agrees to build a cement plant for *Y*, one would expect both *X* and *Y* to be wealthier as a result of the transaction: *X* because he agreed to build the plant at more than his cost (he expects to make a profit), and *Y*, because he values the cement plant more highly than he values any other use to which he could have put the same amount of money. If we con-

19. R. POSNER, *supra* note 1, at 60-64.

20. *Id.* at 61. Voluntary transactions are always wealth maximizing with respect to the two parties to the transaction.

21. *Id.*

sidered only effects on *X* and *Y*, we would conclude that the transaction increases wealth. In fact, however, other interests must be considered. Potential purchasers of cement may be better off because they will now have a more convenient source of supply than before. Potential employees in cement plants may be better off because they will have jobs. On the other hand, *Y*'s neighbors, who are injured by the pollution from the cement plant, may be significantly poorer as a result. All these gains and losses must be balanced before we can determine whether the transaction between *X* and *Y* increases or decreases social wealth.[22] For example, a common law rule of nuisance based on the principle of wealth maximization would take all of these relative effects into account in determining whether *Y*'s neighbors can enjoin construction or operation of the plant. There is, however, no actual market in which all those who gain from the construction of the plant and all those who lose can bargain for the relevant legal right, in this case the right to use of the ambient air.

The best way to measure gains and losses in the absence of a free market, according to Posner, is to imagine a market in which people can trade the right at issue.[23] This method is based on the premise that free markets are the best wealth maximizers and that hypothetical markets are the best approximation to a free market.[24] Consequently, when *Y*'s neighbors sue *Y* for maintaining a nuisance, a court using a nuisance rule aimed at wealth maximization will attempt to determine what a market transaction between *Y* and *Y*'s neighbors would be like. The court will determine the amount for which *Y* would be willing to buy or sell the right to the use of the ambient air, or the amount for which *Y*'s neighbors would buy from or sell to *Y* that right. If the court concludes that closing the plant would injure *Y* by $3,000,000, but that allowing the plant to operate would injure *Y*'s neighbors by only $2,000,000, the principle of wealth maximization suggests that the plant should be allowed to continue to operate.

In the absence of transaction costs, however, the principle of wealth maximization does not dictate a unique result in a suit by *Y*'s neighbors to enjoin operation of the cement plant. This is so because *Y* will ultimately own the right to pollute

22. *See* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 490 (1980).
23. R. POSNER, *supra* note 1, at 62.
24. *Id.*

even if the court grants an injunction. Since the value to *Y* of operating the plant is $3,000,000 and the value to *Y*'s neighbors of not being polluted is only $2,000,000, *Y* will purchase the right to the use of the ambient air from his neighbors for some price between $2,000,000 and $3,000,000. Thus, whether or not the court grants an injunction, the plant will continue to operate, and social wealth will be maximized.[25] Although a nuisance rule allowing the plant to operate and one granting an injunction are equally efficient, they nevertheless affect wealth distribution differently. If the court denies an injunction, *Y* will be $3,000,000 richer than if the injunction had issued, and *Y*'s neighbors will be $2,000,000 poorer. If the court reaches the opposite result, however, *Y* will be left with at best only $1,000,000, and *Y*'s neighbors will at least break even.

When transaction costs are taken into account the picture changes, and the principle of wealth maximization may prescribe a unique result in a nuisance suit by *Y*'s neighbors against *Y*.[26] If the right to pollute were assigned to *Y*'s neighbors via an injunction, *Y* would have to go through the expensive process of identifying and negotiating with them. Indeed, if the transaction costs exceed $1,000,000 then *Y* would stop operating the plant, for the price of buying the right to pollute plus the cost of the transactions would be more than *Y* would pay. As a result, $1,000,000 of net social wealth which would result from continued operation would be lost. On the other hand, if the right were initially assigned to *Y*, there would be no market transactions,[27] and the gain in social wealth would be the entire $1,000,000 by which the value of operating the plant exceeds the injury done to the neighbors.

In short, a complete theory of justice based on the principle of wealth maximization must take into account the cost of market transactions, and as a general rule wealth is maximized when transaction costs are minimized. The most efficient as-

25. *See* Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960); Demsetz, *When Does the Rule of Liability Matter?,* 1 J. LEGAL STUD. 13 (1972).

26. That is, in the presence of transaction costs, the original position of the parties can make a difference. *See, e.g.,* Demsetz, *supra* note 25, at 25-28; Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557 (1980).

27. Of course there might be negotiation and even litigation if one or both of the parties did not know what the value of the respective rights were to the other party. Both negotiation which did not eventuate in a market exchange and litigation could occasion substantial transaction costs. *See generally* Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations,* 22 J.L. & ECON. 233 (1979) (general discussion of transaction costs and contracting).

signment of a legal right is to the person who would end up with it as a result of voluntary market transactions in the absence of transaction costs, for by assigning it to that person initially, the rule eliminates the need for the transactions.[28] In the example of the cement plant the most efficient legal rule is one that assigns the right to the use of the ambient air to *Y*.[29]

Judge Posner distinguishes the wealth maximization principle from two alternatives which are sometimes confused with it, utilitarianism and Pareto optimality.[30] Utilitariansim as a jurisprudential theory requires that a judge adopt the legal rule that maximizes aggregate happiness or utility.[31] As critics have observed, no one has yet been able to derive a credible body of legal rules using utilitarianism as a foundation.[32] This is so for two reasons. First, unlike wealth, which can be measured in dollars, the happiness of different persons cannot be compared so directly: one person's joy at singing arias at midnight and another's misery at having to listen are not commensurable. The only way we can ever measure the relative "happiness" and "misery" that such a conflict creates is by assigning a price to them: how much is it worth to you if I stop singing? But then we are measuring wealth preferences, not happiness.[33]

Utilitarianism also has a tendency to create too many "monsters," instances that shock our consciences but nevertheless fit very well into the utilitarian paradigm. For example, utilitarianism cannot without qualification make moral distinctions among various kinds of happiness. As Posner notes, if Mark enjoys pulling wings off flies and Mary enjoys feeding pigeons, but Mark enjoys his activity more, then we would have to judge Mark a better person because he contributes more to

28. *See generally* R. POSNER, *supra* note 1, at 70-71; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (model to determine which among conflicting "entitlements" should prevail).

29. However, a rule that permitted *Y* to operate the plant but required him to compensate his neighbors for their injuries could be just as efficient, if one does not take transaction costs into consideration. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (injunction to be vacated upon payment by defendant of damages to plaintiffs); Calabresi & Melamed, *supra* note 28.

30. Posner argues that many jurisprudents and philosophers who use these terms actually have in mind a concept that is closer to wealth maximization. R. POSNER, *supra* note 1, at 106.

31. *Id.* at 33.

32. *See, e.g.*, Donagan, *Is There a Credible Form of Utilitarianism?*, in CONTEMPORARY UTILITARIANISM 187 (Bayles ed. 1968).

33. R. POSNER, *supra* note 1, at 51-60.

the sum total of happiness than Mary does.[34] Utilitarianism justifies too many activities that we find morally reprehensible, perhaps because we believe that people have certain rights in spite of the failure of such rights to create happiness. Posner cites Alan Donagan's example of someone who murders an old and unhappy grandfather, in the process eliminating the grandfather's misery and making all his heirs better off.[35] They no longer have to support him and tolerate his unhappiness, and they can have their inheritances immediately. The murder unquestionably increases the amount of happiness in the world. Most of us feel that it is wrong nevertheless.

The principle of wealth maximization differs from utilitarianism because wealth maximization is based on people's willingness to pay for something, not on the happiness they would enjoy from having it.[36] Social wealth is the sum of the satisfaction of people's preferences insofar as those preferences are supported by a desire and ability to pay for them. Desire and ability to pay must be determined by means of an actual market whenever feasible, otherwise by a hypothetical market that approximates an actual market as closely as possible.

The principle of wealth maximization also differs from Pareto optimality. A particular assignment of rights or entitlements is Pareto optimal if no other assignment would make someone better off without making someone else worse off. Since we will never live in a Pareto optimal society, the more relevant question is whether a particular assignment is Pareto superior to another, that is, whether the reassignment of the right or entitlement will make at least one person better off and no one worse off than they were under the existing distribution. A rule that favors Pareto superior changes in assignment is generally consistent with utilitarianism but is much easier to apply, because it requires information about marginal rather than total utilities. It measures the difference in utility experienced by an identified person or set of persons as a result of the change. For example, if one person is made worse off by a particular reassignment, then we know immediately that the reassignment is not Pareto superior.

Although Posner believes that Pareto superiority provides

34. *Id.* at 56-57. Of course, this ignores the question of the happiness of the flies and the pigeons. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA 39-41 (1974).

35. R. POSNER, *supra* note 1, at 56-57. *See* Donagan, *supra* note 32, at 187-88.

36. R. POSNER, *supra* note 1, at 60.

a better theory of jurisprudence than does utilitarianism,[37] he nevertheless rejects Pareto superiority in favor of wealth maximization. Posner raises two objections to Pareto superiority as a workable jurisprudential principle. First, the theory contains no mechanism for identifying who might be made worse off by a particular transaction.[38] On the other hand, the principle of wealth maximization permits people to vote their preferences with their dollars.[39] More fundamentally, Pareto superiority makes legal change virtually impossible. If 1,000,000 people were made better off by a change from situation *X* to situation *Y*, and one person were made worse off, the change would not be Pareto superior.[40] Because it is unlikely that any particular change will hurt no one, it is almost impossible to effect a Pareto superior change. The prerequisite for wealth maximization is far less stringent. If the value that the 1,000,000 gainers place on adopting *Y* is greater than the value that the one loser places on the retention of *X*, then the change will increase social wealth even though it is not Pareto superior.[41]

WEALTH MAXIMIZATION AS A HISTORICAL PRINCIPLE

Economic interpretations of legal history are relatively commonplace, although economic determinism has generally been the historical tool of the political left. In 1913, for example, Charles A. Beard wrote an influential book arguing that the United States Constitution was a product of nothing more sublime than the vested property interests of the social classes

37. *Id.*

38. *Id.* at 88.

39. *Id.*

40. For example, Posner observes, a change from monopoly to competition in a particular industry would increase output and increase the general welfare as measured by the value that each buyer and seller in that particular market receives as a result of participating in the market. The move would not be Pareto superior, however, because one person—the monopolist—would be poorer as a result. R. POSNER, *supra* note 1, at 91-92.

41. For this reason, Posner likens his theory of wealth maximization to Kaldor-Hicks efficiency, rather than Pareto optimality. A legal change is Kaldor-Hicks efficient if those who gain from the change gain enough so that they can fully compensate the losers—although they need not compensate them in fact. A move from monopoly to competition is Kaldor-Hicks efficient because consumers gain more in increased output and lower prices than the monopolist loses in monopoly profits. For a general analysis and critique of Kaldor-Hicks efficiency as a principle for legal rulemaking, see Coleman, *Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law,* 68 CALIF. L. REV. 221, 237-42 (1980); Coleman, *Efficiency, Utility and Wealth Maximization,* 8 HOFSTRA L. REV. 509 (1980).

represented by its drafters.[42] The ensuing debate divided constitutional historians into two camps: those who were horrified that the Constitution could ever be a concealed statement of anyone's vested property interests and those who believed that all documents drafted by human beings suffer from that general bias.[43]

Economic determinism has played an important role in the writing of leftist historians because they have been eager to demonstrate that the law is not above politics, that there is no such thing as a "rule of law" that can be said to represent all economic or social interests in some fair or neutral fashion.[44] Rather, they argue, the law is a product of constant struggle between conflicting economic groups, and what emerges is not some compromise that generally satisfies all sides but rather a reflection of the interests of the most powerful class at any given moment. Mark Tushnet puts it this way:

> Material benefits have never been equally distributed in American society, and the law serves as a partial explanation to those who receive less, of why they do. Put more bluntly, the legal order, both in its ordinary manifestations and in its higher rationalizations, may help to reconcile the oppressed with the system that oppresses them. Perhaps more important, the legal order helps the oppressors understand their actions as those of humane and reasonable people, by placing what they do in the comprehensive setting derived from a long tradition of ethical reasoning.[45]

Characteristically of Marxist historians, Tushnet builds his theory of legal history on the principle that all human beings, whether they know it or not, are motivated exclusively by distributive concerns: they want what is best for themselves. In the Marxist paradigm no one has the capacity to identify a legal rule that will make everyone better off; that is to say, no one is able to divorce his or her analysis of a legal rule from its dis-

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42. *See* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

43. For attacks on Beard, see R. BROWN, CHARLES BEARD AND THE CONSTITUTION (1956); F. MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958); for a defense, see Main, *Charles A. Beard and the Constitution: A Critical Review of Forrest McDonald's* We The People, 17 WM. & MARY Q., 3d Ser., 86 (1960).

44. For an analysis of the issues, see Horwitz, *The Conservative Tradition in the Writing of American Legal History,* 17 AM. J. LEGAL HIST. 275 (1973).

45. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WISC. L. REV. 81, 94. *See also* Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 205, 219-20 (1979) ("The goal of instrumental analysis is to show that the conscious or unconscious motive of the judge was to further some particular interest, either of a judge himself or of a group with whom he identified.").

tributive effects. This is the same as saying that law is nothing more than politics.

No one, not even Richard Posner, denies that every legal change has certain distributive consequences. Almost all legal changes work to at least the short term disadvantage of someone. If that were not the case, there would likely not be anyone on the losing side of legal disputes. Likewise, the invariable presence of winners suggests that every change works at least to the short term advantage of someone. Where the leftist historians and Posner differ sharply, however, is in the weight they assign to these distributional consequences. For the Marxists they are the only factor that counts. In the leftist paradigm all people are concerned exclusively with what will make them better off. To be sure, they might use utilitarianism or Pareto superiority or even wealth maximization as a rationalization for their support of a certain legal rule, but this is just self-serving pettifoggery. A lawyer will be utilitarian when it serves his or her interests but will quickly drop utilitarianism in favor of interpretivism or orthodoxy when self-interest so dictates. In fact, one prominent legal historian has argued that this is precisely what happened in the United States in the nineteenth century.[46] Professor Horwitz argues that certain entreprenurial classes in America during this period used "utilitarian" or wealth maximizing arguments to create a legal regime which may have maximized wealth, but which also had the effect of distributing a disproportionate amount of that increased wealth to themselves. Once technology and human need had changed in such a way that this set of legal rules was no longer wealth maximizing, however, the same entrepreneurial class created a regime of "legal formalism" which effectively prevented the courts from adopting wealth maximizing rules that would have had the effect of distributing wealth in the other direction.

Posner, on the other hand, believes that, even if lawyers cannot, jurisprudents and judges are able to set aside their personal or class preferences, at least long enough to formulate or identify rules that would be wealth maximizing.[47] In Posner's paradigm, "wealth maximization" is a nonpolitical concept be-

46. *See* M. Horwitz, *The Rise of Legal Formalism,* in M. HORWITZ, *supra* note 16, at 253-68.

47. *See* Posner, *Uses and Abuses, supra* note 9, at 288-89. *See also* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy,* 53 IND. L.J. 145, 201-06 (1977). For some interesting comments on the capacity of humans to bargain their way

cause it is not a function of wealth distribution. It identifies those who will be made better off by the adoption of a certain legal rule and those who will be made worse off only to determine if the net change in value is a gain or a loss. Generally absent from Posner's theory is any notion that a judge's own social or economic biases might determine his or her vote. At least, if such a thing happens, it is the exception rather than the rule. The history of the common law, argues Posner, shows that it has tended to adopt rules that maximize wealth.

One problem Posner faces is that individual applications of the principle of wealth maximization appear very definitely to have a political agenda.[48] For example, to those schooled in the aggressive antitrust of the 1950's and 1960's, Posner's Chicago-style antitrust has a distinctly right-wing flavor: it appears to favor big business over small;[49] it unquestionably argues for less rather than more antitrust liability in most substantive areas;[50] and it is unrelentingly critical of the antitrust policy of the Warren Court, whose liberal credentials are among the most impressive in United States history. In other areas the principle of wealth maximization is often seen by critics as dictating a smaller State rather than a larger one[51] because they perceive it as opposing certain kinds of public interference in the market process, such as minimum wage laws, public housing, strict liability in tort law, and price controls. Perhaps the most common criticism of the principle of wealth maximization is that while it may "maximize" wealth, it does so by heaping wealth upon those people who already have a great deal of it to

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to a wealth maximizing position in non-market situations, see Cooter, *The Cost of Coase,* 11 J. LEGAL STUD. 1, 16-20 (1982).

48. *See* Horwitz, *Law and Economics: Science or Politics?,* 8 HOFSTRA L. REV. 905 (1980); Tushnet, *Legal Scholarship: Its Causes and Cure,* 90 YALE L.J. 1205, 1220 (1981).

49. This criticism, however, generally overlooks the fact that Chicago-school antitrust advocates support maximization of consumer welfare as the underlying goal of the antitrust laws. To the extent that maximization of consumer welfare and preference of small business are inconsistent, they prefer the former. In at least a general way the goal of maximizing consumer welfare is consistent with efficient allocation of resources, and it has the added advantage that it distributes the gains from antitrust rather broadly. After all, not all of us are small businesspersons, but all of us at one time or another are consumers. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Posner, *The Chicago School of Antitrust Analysis, supra* note 2.

50. There are exceptions, however. For example, Posner is vehement about enforcement of the laws against cartels and would appear to prefer spending more enforcement dollars in that area. *See* R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS, 87-151 (1981).

51. *See* Cooter, *supra* note 47, at 16-18.

the neglect of others.[52]

Likewise, because the principle of wealth maximization deals with marginal and not total utilities, it seems inherently to resist broad social revolution. Wealth maximizers such as William Blackstone have tended to accept the legal system with all its complexities as a given. When a wealth maximizing judge is asked to change a single legal rule he or she is apt to look at the rule within the existing legal context and consider whether the change will increase or decrease net wealth.[53] By contrast, a utilitarian such as Jeremy Bentham could imagine that the sum total of human happiness occasioned by an entire political or legal revolution would be greater than the amount of happiness available under the prevailing system. It is plausible for a utilitarian to consider in some generalized sense whether human happiness would be greater if we killed all the lawyers and spent vast sums to raise a generation of minstrels. Although utilitarianism theoretically provides greater scope for revolutionary change than does wealth maximization, nevertheless, from Posner's historical thesis it appears that the distinction between the two tends to evaporate in practice. When utilitarians become specific, and attempt to measure something that is actually capable of measurement, argues Posner, it is the principle of wealth maximization that they rely on, and not

52. For the sharpest criticism along these lines see Horwitz, *supra* note 48. For a somewhat maudlin, similar critique, see Englard, *The Failure of Economic Justice,* 95 HARV. L. REV. 1162, 1176-78 (1982). *See also* Baker, *The Ideology of the Economic Analysis of Law,* 5 PHIL. & PUB. AFF. 3 (1975) (discussing biases resulting from initial assignment of wealth); Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?,* 8 HOFSTRA L. REV. 671 (1980) (nonneutrality of the wealth maximizing criterion); Kronman, *Wealth Maximization as a Normative Principle,* 9 J. LEGAL STUD. 227 (1980) (wealth maximization principle biased in favor of those already well off); Tushnet, *supra* note 48, at 1220 ("what the Chicagoans call allocative efficiency can equally well be called capitalist accumulation"). *See generally* Browne, Hoag & Ashiquzzaman, Book Review, 16 GA. L. REV. 767 (1982) (reviewing R. POSNER, THE ECONOMICS OF JUSTICE (1981)).

53. In this sense, the principle of wealth maximization may not even attempt to explain all of legal history. For example, the common law judge may indeed use wealth maximization as a principle when deciding whether negligence is a good rule in tort law, or just compensation a good rule in property law. The common law judge, however, will likely never even be presented with an opportunity to decide whether the institution of private property ought to be abolished, or whether the State should kill all the lawyers. The judge must apply the principle of wealth maximization within a very limited framework, and accept a great deal of history as simply given, and not to be tampered with. Of course, this rather antirevolutionary principle may itself be wealth maximizing—assuming that revolutions are socially costly. For a general discussion of these issues, see Kennedy & Michelman, *supra* note 17.

the more general and radical principle of utilitarianism.[54]

Posner's account of legal history, if accurate, also provides a general argument that legal rules are not necessarily the product of narrow self interest. Most legal historians of the left neglect the fact that all legal rules have certain allocative consequences as well as distributive ones: they are efficient or inefficient, whether measured by Pareto optimality, Kaldor-Hicks efficiency, or some other standard.[55] Some legal rules increase social wealth and others diminish it. To be sure, it might be completely fortuitous that a legal rule has certain allocative effects. A self-interested entrepreneur might be acting on the most distributive of motives in arguing for the adoption of a certain nonliability rule—he wants to be richer. In the process of adopting the rule, however, the judge might very well increase social wealth.[56] No historian or philosopher has ever demonstrated, however, that wealth maximization cannot be a product of disinterested human creativity, and many people have pointed to some convincing evidence that it can.[57] A demonstration that the common law generally maximizes wealth without consistently favoring a particular social or political class would suggest that there can be a nonpolitical basis for legal decisions.

WEALTH MAXIMIZATION, BLACKSTONE, AND THE COMMON LAW

Posner's positive argument that wealth maximization explains the development of the common law is potentially stronger than his normative argument that wealth maximization is preferable as a jurisprudential principle to Kantianism,[58]

54. *See* R. POSNER, *supra* note 1, at 106. For this very reason wealth maximization seems to be more convincing than utilitarianism as a principle of legal change. When judges try to decide whether strict liability or negligence ought to be the rule in a certain case, they seldom attempt to measure the change in the amount of "happiness" that the proposed rule will effect over all of society. Much more plausibly, judges try to identify gainers and losers whose interests are strong enough that the market can assign a value to them. Then they attempt to balance the gains against the losses. To be sure, both of these tasks may realistically be impossible, but the second is certainly more plausible than the first.

55. Posner argues that even Marxist economists recognize that free markets maximize social wealth. R. POSNER, *supra* note 1, at 67. Some Marxist societies nevertheless object to free markets, on political grounds, and apparently at great social cost. *See* Ioffe, *Law and Economy in the USSR*, 95 HARV. L. REV. 1591 (1982).

56. *See* Landes & Posner, *supra* note 14, at 860.

57. *See* authorities cited *supra* note 17.

58. Posner uses "Kantianism" in a very general way to "refer to a family of

utilitarianism, or Pareto optimality.[59] It is virtually impossible to secure universal agreement that utilitarianism, Pareto optimality, or any other principle ought to guide legal rulemaking. Debate will undoubtedly persist indefinitely about the relative merits of natural law, wealth maximization, and the like.[60] The historical argument that common law judges have in fact been wealth maximizers is, on the other hand, much stronger. As an assertion which can be tested against historical data, it is more nearly "verifiable" than a normative theory, and in addition, the range of data to which it must be compared, American and British case law, is comparatively narrow.

The normative theory of wealth maximization seems to run afoul of one particularly strong criticism that simply does not apply to its positive counterpart. A prevailing objection to normative efficiency theories generally is that in any world with transaction costs, the initial distribution of wealth dictates what the socially efficient outcome will be. Efficiency analysis always accepts some initial distribution of wealth as a given and determines what outcome is efficient by working from that point. A different initial distribution may yield a different, but nevertheless efficient, ultimate distribution. As a result it is difficult to say that the goal of efficiency is "fair" or "just" unless one has already concluded that the initial assignment of wealth was fair as well. Someone who begins in society with nothing of exchangeable value may end up that way even though the free market society in which he or she lived was perfectly efficient.[61]

The positive historical argument that the common law has tended to maximize wealth is not susceptible to this criticism regarding initial distributions. First, as a historical thesis it claims only that common law judges attempted to maximize wealth, not that the result was actually fair. In addition, it

related ethical theories that subordinate social welfare to notions of human autonomy and self-respect as criteria of ethical conduct." R. POSNER, *supra* note 1, at 55. *See also* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 71-72 (1977) ("With some hesitation, I shall associate this developing line of non-Utilitarian political thought with the name of Immanuel Kant.").

59. For an argument that it is not stronger, however, see Kornhauser, *supra* note 17, at 610, 634.

60. *See, e.g.,* Coleman, Book Review, 66 CALIF. L. REV. 885 (1978) (reviewing R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977)).

61. *See* Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory,* 6 PHIL. & PUB. AFF. 317, 319-20 (1977); Samuels, Book Review, 60 TEX. L. REV. 147, 153-54 (1981) (reviewing R. POSNER, THE ECONOMICS OF JUSTICE (1981)). *See generally* J. GRAAFF, THEORETICAL WELFARE ECONOMICS 75-92 (1967).

would not have deterred common law judges that an unfair initial distribution would yield an unfair but wealth maximizing result. Historically, their function was not to reform society but to work within an established regime of wealth and power distribution. Common law judges did not ordinarily ask themselves whether the distribution of wealth underlying a particular legal dispute was fair; rather, they accepted the distribution of wealth and power they found and determined which rule would maximize wealth within that scheme.

Therefore, one could conceivably find Posner quite convincing as a historian, even though he is not particularly convincing as a jurisprudent.[62] Unfortunately, Posner gives away some of his credibility as a historian by not always taking his role very seriously. The legal history contained in *The Economics of Justice* is sometimes disjointed, highly selective, and concentrates too much on marginal historical questions.[63] For example, the book contains a chapter on "The Homeric Version of the Minimal State," designed to show that in the work of the Greek poet many activities, such as criminal punishment, which we generally believe are appropriate only for the State, can in fact be performed by private persons.[64] Likewise, Posner's "A Theory of Primitive Society"[65] gives the strong impression of superficiality when one considers the selectivity of the facts and the rather awesome conclusions that Posner draws from them, all in the space of less than thirty pages. Professional historians are not comfortable with this kind of legal history.

The marginality of some of Posner's choices of historical subject matter, or his treatment of them, should not detract from the plausibility of his theory of legal history, however. Posner undoubtedly never intended for anyone to treat *The Economics of Justice* as a critical study of the legal history of any particular period. Perhaps it should more appropriately be considered an invitation to legal historians to examine the data in a more detailed way and decide whether there is anything to

62. Although Posner does not concede that the positive economic theory of law is stronger than the normative theory, he does admit that the positive theory could be correct and the normative theory false. *See* Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law,* 9 HOFSTRA L. REV. 775, 776 (1981).

63. For a criticism of Posner's historical methodology see Schwartz, *supra* note 8, at 1721.

64. R. POSNER, *supra* note 1, at 119-45.

65. *Id.* at 146-73.

what Posner has to say.[66] Even so, when Posner does examine a historical document in detail, the results are revisionist, impressive, and fairly convincing. An example is his analysis of Blackstone's *Commentaries* and the vicious attack that Jeremy Bentham made on it.[67]

In 1941 Daniel Boorstin wrote a seminal work on Blackstone,[68] arguing that although Blackstone's *Commentaries* proposed merely to systematize the laws of England, Blackstone in fact used the eighteenth century's highly balanced and orderly Newtonian world view to justify the conservative legal and political institutions of England. Since then it has become consensus historiography to view the *Commentaries* more as a normative, conservative political tract than as a positive legal treatise.[69] Historians of the left in particular have been fond of displaying Blackstone as the supreme apologist for the English political hierarchy and for the distribution of wealth and power that existed in England in the mid-eighteenth century.[70]

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66. For a rather limited attempt to do this, see Schwartz, *supra* note 8. Most of Schwartz's criticism, however, is directed at the theory advocated in M. HORWITZ, *supra* note 16, and not at Posner. *See infra* notes 106-30 and accompanying text.

67. R. POSNER, *supra* note 1, at 13-47.

68. D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1941).

69. *See, e.g.*, H. COMMAGER, THE AMERICAN MIND 367-68 (1950); Kennedy, *supra* note 45; McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW. L.J. 399 (1959); Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976). For a contrary view, however, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 287-88 (5th ed. 1956). It seems to be generally true that American conservatives at the time of the revolution admired Blackstone, while liberals disliked him. For example, John Marshall almost worshiped him. Nolan, *supra*, at 757. Jeffersonians, however, were suspicious of the *Commentaries* and viewed them as excessively Tory, and hence pro-Federalist. *See* Waterman, *Thomas Jefferson and Blackstone's* Commentaries, 27 NW. U. L. REV. 629 (1933).

70. Kennedy, *supra* note 45. On the other hand, Jeremy Bentham, the legal outcast of the turn of the nineteenth century who popularized utilitarianism as a basis for legal theory, *see* J. BENTHAM, A FRAGMENT ON GOVERNMENT (1776); J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), has become a great hero among liberals. *See, e.g.*, H.L.A. HART, *supra* note 15.

Posner's comparison of Bentham and Blackstone in *The Economics of Justice*, *supra* note 1, at 39-47, suggests a certain unfairness in Boorstin's evaluation of the two men. Posner depicts Bentham as a philosopher who had scant knowledge of any existing legal system and who was instead intent on constructing a legal edifice from one very "spongy" principle, utilitarianism, which continually obsessed him. *See* R. POSNER, *supra* note 1, at 40-42. Unconstrained by the practical lessons of history, Bentham was, according to Posner, able to suggest various totalitarian practices, such as requiring everyone to have a name or other identifying mark tatooed on his body, compulsory self incrimination, and torture. *Id.* at 40-41. For an argument that Posner misrepresents Bentham and treats him unfairly, see Englard, *supra* note 52, at 1162 n.3.

Posner might concede that the *Commentaries* is substantially a normative and not a descriptive document. His own analysis reveals a much different Blackstone, however, who took as given a vast and complex legal system and attempted to derive an economic explanation of its intricacies. In Posner's view, Blackstone's historical analysis is a forerunner of Posner's own positive theory of wealth maximization.[71] In particular, Posner argues that Blackstone's notion of fundamental rights was grounded in a concept of maximization of social welfare.[72]

In reality Blackstone was an even better economist than Posner argues. In addition to his general account of how the common law operates to maximize the public good, Blackstone gave economic arguments for specific legal principles. A clear example is his capsule account of the development of English rights in property. Here Blackstone eschewed natural law theories and opted for a more persuasive explanation of the general structure of English land law—efficiency. His argument is too long to quote, but it bears paraphrasing.

Blackstone began his introduction to the law of property with two observations: first, that the "sole and despotic dominion" which one English person claims over a piece of land is extraordinary, and second, that few people ever try to understand the source of the right of private property, almost as if they are afraid of finding a defect in their title.[73] Then Blackstone, as he frequently did, turned to the Bible and found that in the book of Genesis God gave mankind dominion over everything on the earth. "The earth, therefore, and all things therein, are the general property of all mankind . . . ."[74] Such references were enough to convince critics such as Bentham that Blackstone derived his entire concept of legal rights from natural law, or, worse yet, from scripture.[75]

To conclude that Blackstone's argument is based primarily on natural law or theology is not to read him carefully, however. The reference to scripture was not meant to be a defense

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Blackstone, as a treatise writer, could not afford to be so expansive. The fact that Bentham and Blackstone set out to do two different things does not, however, justify praising one and heaping ridicule on the other.

71. R. POSNER, *supra* note 1, at 15.

72. *Id.* at 15-17.

73. 2 W. BLACKSTONE, COMMENTARIES *2 [hereinafter cited as COMMENTARIES].

74. 2 COMMENTARIES, *supra* note 73, at *3.

75. *See* J. BENTHAM, A FRAGMENT ON GOVERNMENT, *supra* note 70, at 58, 59, 82-93.

of private property rights. It was merely an embellishment of a kind that Blackstone frequently inserted into his *Commentaries*. He knew his audience. The only proposition that Blackstone derived from Holy Writ was the rather trivial one that mankind in general has dominion over all the world in general. There was no biblical right to private property. Quite the contrary, the Bible appeared to defend a theory of communal ownership. The "general notions of property" developed in the Bible may at one time have been "sufficient to answer all the purposes of human life," ruminated Blackstone, but the "communion of goods" suggested by the biblical description of property never worked very well in organized human society.[76]

So much for the Bible. Blackstone's entire argument for individual, as opposed to communal, property, is economic. Once people acquired a certain amount of social order, explained Blackstone, a certain concept of the right to exclude, broader than the mere fact of transient possession, became necessary. People would have no incentive to improve something over which they could have no long lasting claim:

> [N]o man would be at the trouble to provide [such valued goods as shelter and clothing] so long as he had only an usufructuary property in them, which was to cease the instant he quited possession; if, as soon as he walked out of his tent, or pulled off his garments, the next stranger who came by would have a right to inhabit the one, and to wear the other.[77]

Blackstone's economic argument becomes even more striking when he derives the concept of private real property more specifically from the development of agriculture. As long as real property was held in common, argued Blackstone, primitive people squatted on it, exhausted its resources, and then moved on to the next available parcel. The growth of population and the declining availability of untouched land eventually made such use highly inefficient, however:

> As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence. . . . It was clear that the earth would not

76. 2 COMMENTARIES, *supra* note 73, at *3. On the other hand, John Locke's argument for private rights in property is much more expressly biblical. *See* J. LOCKE, TWO TREATISES OF GOVERNMENT 129-40 (1690) (Cambridge Biblio. Ed. 1924).

77. 2 COMMENTARIES, *supra* note 73, at *4. *Cf.* Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243 (1968).

> produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not therefore a separate property in lands as well as movables been vested in some individuals, the world must have continued a forest. . . .[78]

Blackstone concluded that "[n]ecessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants, states, government, laws, punishments, and the public exercise of religious duties."[79] One is hard put to devise a more explicitly economic historical argument, first for the development of the institution of private property, and second for the development of all society as a device for protecting it.

Perhaps even more dramatic is Blackstone's economic explanation for a general rule of succession or inheritance, which parallels his theory of the origin of markets. He presumed that at one time society recognized an individual right of exclusive ownership, but had no mechanism of exchange or transfer. One person used property until he died or abandoned it, and then the first taker seized upon the "vacant possession."[80] Such a situation could not exist very long, however. As society became more complex, people's needs and values began to differ, and "it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another, who was ready to give in exchange for it some equivalent that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic . . . ."[81] Blackstone used the same argument to justify a general rule of succession or inheritance at the time of an owner's death.

Boorstin has pointed out that Blackstone was not a rigorous historian.[82] Most of his historical descriptions were pure speculation, and among his most frequently used historical sources was the Bible. Furthermore, critics have charged that most of his history was rationalization in its most outrageous sense: Blackstone used history to justify the existence of a particular English rule, and in the process he suggested that the current legal system was inevitable.[83] For this reason, Ben-

78. 2 COMMENTARIES, *supra* note 73, at *7. For an argument against Blackstone's theory that private property is more efficient than communal ownership, see Kennedy & Michelman, *supra* note 17.
79. 2 COMMENTARIES, *supra* note 73 at *8.
80. *Id.* at *9.
81. *Id.*
82. *See* D. BOORSTIN, *supra* note 68, at 50, 53-56.
83. 1 COMMENTARIES, *supra* note 73, at *39-44.

tham viewed Blackstone as nothing more than an apologist for the conservative status quo.[84]

Although there is an element of truth in these criticisms, they generally overstate the case. Blackstone freely admitted that many English rules were not inevitable products of history, and that there was no reason why a different rule could not have prevailed and been just as successful. His treatment of the rules of succession that obtain in any particular country or jurisdiction provides an example. Nothing, he noted, varies "more than the right of inheritance under different national establishments," and even within England there was extreme diversity from one part of the country to another.[85] None of these rules was dictated by natural law. On the contrary, "the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society."[86] Only the "positive law of society, which is with us the municipal law of England," dictates the laws of intestate succession and wills.

Even with respect to positive law, however, Blackstone was a determinist of sorts. He believed that positive law deviates from natural law only when economic efficiency dictates, and that legal rules are therefore necessarily a product of time and of the natural and social forces that a society experiences as it develops. For that reason, legal rules are, in an economic sense, inevitable.[87] For Blackstone an abundance of land explained common ownership, while its increasing scarcity ex-

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84. D. BOORSTIN, *supra* note 68, at 190. *See also* J. BENTHAM, A FRAGMENT ON GOVERNMENT, *supra* note 70, at 17. What both Bentham and Boorstin overlook is that in one respect Blackstone was truly radical, and his influence nothing short of revolutionary: he virtually ignored the writ system as a mechanism for classifying English law and adopted instead an eighteenth century theory of rights. No other English commentator had done this systematically, and one result of Blackstone's new classification scheme was a general reaction to the writ system in nineteenth century America. Kennedy recognizes this, but discounts its importance. *See* Kennedy, *supra* note 45, at 232-33. Blackstone's revolutionary genius exists not so much in the fact that he ignored the writ system but in the subtle way he did so: he simply pretended that the writ system did not exist, except in his chapters on pleading and procedure, and described the positive English common law as based on a structure of rights. In fact, however, the legal structure that he "described" was breathtakingly different from the one that actually existed. For Blackstone's treatment of writs and pleadings, see 3 COMMENTARIES, *supra* note 73, at *270-313.

85. 2 COMMENTARIES, *supra* note 73, at *12-13.

86. *Id.* at *13.

87. Boorstin acknowledged Blackstone's environmental determinism. *See* D. BOORSTIN, *supra* note 68, at 56-57.

plained the development of private property. The illiteracy of the Norman conquerors of England explained the development of the wax seal as a substitute for a signature on important legal documents, "which custom continued when learning made its way among them, though the reason for doing it had ceased . . . ."[88] Where the economic efficiency of a particular legal rule was not clear, it was generally because the economic theory upon which the rule was based was controversial. For example, with respect to the disputed rule that a person could not practice a certain trade unless he had served a seven year apprenticeship in it, Blackstone explained the conflicting opinions as a product of the "prevailing humour of the times," the opponents of the rule arguing that it tends "to introduce monopolies [which] are pernicious to trade," and the advocates arguing "that unskillfulness in trade is equally detrimental to the public as monopolies."[89] Blackstone declined to speculate whether the rule was a good one.

What should one make of the presence of an economic theory of legal change in a writer such as Blackstone?[90] In *The Transformation of American Law* Professor Horwitz regards Blackstone as predevelopmental, that is, as not influenced by economic considerations.[91] Consequently, Horwitz sees the ideology of the *Commentaries* as something against which the

88. 2 COMMENTARIES, *supra* note 73, at *306.

89. *Id.* at *427.

90. The *Commentaries* are replete with uses of basic economic principles to explain various common law rules. For example, Blackstone observed that the general rule with respect to tenancies at will was that either the landlord or the tenant could terminate the tenancy simply by giving notice to the other party. The common law had developed one exception, however, for the case in which the tenement was agricultural property upon which the tenant had already planted crops, but which had not been harvested. In this case although the tenancy could be terminated the tenant would retain ownership in the crops, and the right of free ingress and egress necessary to cultivate and eventually to harvest them. In explaining this rule, Blackstone noted that it existed

> for the same reason upon which all the cases of emblements [i.e., cultivated crops] turn; viz. the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

Id. at *146. This is not to say, of course, that Blackstone was a perfect, wealth maximizing economist. Occasionally his economic reasoning contained some flaws, such as when he defended a statute of King Charles II that required all dead to be dressed in wool before burial, because the law "encourages the staple trade." 1 COMMENTARIES, *supra* note 73, at *126.

91. *See* M. HORWITZ, *supra* note 16, at 19-25, 114-16.

more "utilitarian,"[92] procompetitive, and promarket law of early nineteenth century America reacted.[93] For example, argues Horwitz, Blackstone was very hostile to competition in some markets, such as transportation and milling. The vast explosion in the growth of mills, dams and transportation facilities in the United States was made possible only by the development of procompetitive legal rules that rejected Blackstone's paradigm.[94]

There is, however, another explanation for the difference between Blackstone and his procompetitive successors. Blackstone simply disagreed with early nineteenth century American jurists about the proper scope of "regulated" and competitive industries. To begin with, Blackstone was certainly not hostile to competition in all aspects of productive activity.[95] He merely distinguished certain activities that could generally be performed only by permission of the Crown as those in which regulated monopoly and not competition was in the public interest.[96] Justice Story and other prodevelopmental

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92. *Id.*

93. *Id.* at 116-22.

94. *Id.* at 114-16.

95. For example, see Blackstone's discussion of mills, trades and privately-run schools:

> [I]t is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighborhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria.*

3 COMMENTARIES, *supra* note 73, at *219. See also Blackstone's discussion of regrating, engrossing, and monopoly, 4 COMMENTARIES, *supra* note 73, at *158-60, and his discussion of apprenticeship as a form of professional licensing, 1 COMMENTARIES, *supra* note 73, at *427.

96. That debate went back at least as far as the seventeenth century, when Lord Hale wrote *De Portibus Maris,* which distinguished between competitive business entities, which could operate with little or no restriction and which were free to accept or refuse customers as they pleased, and those business entities which were "affected with the publick interest," could be operated only with the King's permission, were frequently regulated as to fees and hours of operation, and were required by law to serve all paying customers. *See* Lord C.J. Hale, *A Treatise in Three Parts,* in F. HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAWS OF ENGLAND 50, 77-78 (1787). Lord Hale wrote:

> A man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree . . . ; for he doeth no more than is lawful for any man to do, viz. makes the most of his one. . . . [However], [i]f the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, & neither can they be inhanced to an immoder-

Americans in the early nineteenth century disagreed with Blackstone only about a detail of economic theory: which regime, competition or regulated monopoly, is best for a particular activity and in a particular stage of a nation's economic development?[97] Today we are inclined to think that although

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> ate rate, but the duties must be reasonable and moderate, though settled by the king's licence or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only . . . .

Id. at 77-78.

In short, Lord Hale, and later, Blackstone, were making an early distinction between competitive and regulated industries. *See* M. DONALD, ELIZABETHAN MONOPOLIES (1961); De Roover, *Monopoly Theory Prior to Adam Smith: A Revision*, 65 Q.J. ECON. 492 (1951). Blackstone particularly singled out ferries and public markets as susceptible of monopoly regulation. 3 COMMENTARIES, *supra* note 73, at *218-19; 1 COMMENTARIES, *supra* note 73, at *273. *See also id.* at *324 (concerning regulation and licensing of coaches and hacks in London).

97. In the early nineteenth century most states singled out canals, turnpikes, ferries and railroads as being subject to regulation and as having at least limited monopoly rights. *See* 1 H. POOR, HISTORY OF THE RAILROADS AND CANALS OF THE UNITED STATES OF AMERICA (1860). It appeared to be the rule, however, that if a ferry was operating legally but without a special license or charter, then the operator of that ferry had no legal right to enjoin the operation of a second, competing ferry. Almy v. Harris, 5 Johns 175 (N.Y. 1809). For a general discussion of state power to give ferries exclusive licenses at this time, see Chancellor Kent's opinion in Livingston v. Van Ingen, 9 Johns 507 (N.Y. 1812). In 1854 Massachusetts Chief Justice Lemuel Shaw recognized both ferries and bridges as being susceptible of regulated monopoly. "Supposing ferries or bridges are obviously necessary over a long and broad river," he observed, "[i]t is . . . obvious that no public convenience would require them to be built parallel and close to each other." Then Shaw upheld "exclusive grants" with respect to such "works of public convenience." Boston & Lowell R.R. Corp. v. Salem & Lowell R.R. Co., 68 Mass. (2 Gray) 1, 33 (1854). On the other hand, in 1833 Attorney General Roger B. Taney, later Chief Justice of the United States Supreme Court, wrote an opinion declaring all state grants of monopoly power unconstitutional. *See* M. HORWITZ, *supra* note 16, at 134-36.

Even a staunchly laissez faire Supreme Court Justice such as Field appreciated the distinction between competing businesses and regulated monopolies. In Munn v. Illinois, 94 U.S. 113 (1876), Field dissented from a decision upholding an Illinois statute that turned the Illinois grain elevator business into a price-regulated industry. The legislation did not give the elevators a monopoly; however, because of their strategic location along the railroads they had acquired a de facto monopoly position. Field objected that historically such regulation was permissible only with respect to "property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred." 94 U.S. at 139. Among such industries, in which price regulation and restricted entry were considered permissible, Field included "public ferries, bridges, and turnpikes, . . . wharfingers, hackmen, and draymen, and . . . interest on money. . . . [N]o one . . . has ever contended that the State had not a right to prescribe the conditions upon which such a privilege should be enjoyed." 94 U.S. at 148-49. When state courts had to deal with the question whether a relatively new industry, such as gas lighting utilities, should be competitive or regulated monopolies, they came to different conclusions. *Compare* Norwich Gas Light Co. vs. Norwich City Gas Co., 25 Conn. 19 (1856) (striking down a state statute making municipal gas light utilities a regulated monopoly) *with* Sydney

Blackstone's list of industries that ought to be regulated monopolies was too long, the list created by Americans of the nineteenth century was, in the end, too short; witness the rate wars and bankruptcies in the American railroad industry under a regime of price competition in the 1890's.[98] It is noteworthy that the "legal formalism" that arose during the second half of the nineteenth century destroyed the economic fortunes not only of multitudes of American common laborers, but also of hundreds of investors whose businesses had grossly overdeveloped in a regime of unregulated competition and unrestrained growth.[99]

Like the differences between Blackstone and the early nineteenth century American jurists, the gap between these procompetitive judges and their Gilded Age successors reflected a difference in economic environment. Whether competition or regulated monopoly is wealth maximizing in a particular market depends heavily on the prevailing economic climate. As long as the United States was a vast open space with few people, large distances to be covered, and high economic and population growth rates, competition was wealth maximizing in much of the transportation industry. For example, competition and unrestrained entry in the railroad industry encouraged rapid development to meet needed markets.[100] Land was cheap, and for decades there was no problem that overdevelopment would drive railroad rates below costs. During that period the values created by a regime of unrestrained growth were substantial, and the economic injuries, although later publicized,[101] were relatively small. Once the supply of railroads was adequate to meet the demand, however, the addition of new track tended to drive rates below cost; the land

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Shepard v. Milwaukee Gas Light Co., 6 Wis. 539 (1857) (upholding a monopoly charter to a city gas light company). The Supreme Court faced the constitutional issue of state power to create regulated monopolies squarely in The Slaughter-House Cases, 83 U.S. 36 (1873), where it upheld a Louisiana special charter that turned the New Orleans butchering business into a price-regulated monopoly, in spite of the fact that butchering had previously been completely competitive with virtually no state-created barriers to entry.

98. *See* K.A. KERR, AMERICAN RAILROAD POLITICS, 1914-1920 (1968); G. KOLKO, RAILROADS AND REGULATION, 1877-1916, at 64-83 (1965); Vietor, *Businessmen and the Political Economy: The Railroad Rate Controversy,* 64 J. AM. HIST. 47 (1977); *infra* note 177.

99. G. KOLKO, *supra* note 98, at 80-83. For a rather one-sided but probably accurate picture of the effects of unregulated competition in the overdeveloped railroad industry in the 1890's, see Brief of the Union Pacific Railway, United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1877); *infra* note 177.

100. *See infra* text accompanying note 146.

101. *See, e.g.,* F. NORRIS, THE OCTOPUS (1910).

upon which railroads were built became more valuable; and the marginal utility created by additional track increased at a lesser rate.[102] By the mid-1870's it was clear that the overdevelopment of railroads was impoverishing the country and that scheduling, rate setting, and new entries could be regulated more efficiently by public agencies.[103].

In short, the difference between Blackstone and Story, and between Story's prodevelopment regime in the early nineteenth century and the growing regime of industry regulation in the late nineteenth century is not, as Horwitz argues, that Blackstone lived in an era of natural law, Story in a regime of utilitarianism, and the Interstate Commerce Commission in an age of formalism.[104] The jurisprudence of all three ages was dedicated to maximizing the wealth of society, but the problems were different. What worked in Blackstone's day and place would have impoverished American society in the early 1800's.[105] Therefore, Horwitz's explanation of the progression of these three eras does not, by itself, undermine Posner's thesis that the development of the common law was, in general, wealth maximizing.

THE HORWITZ THESIS AND THE WEALTH MAXIMIZATION PRINCIPLE

In *The Transformation of American Law*,[106] Professor Horwitz argues that the development of the common law during the first half of the nineteenth century effectively "subsidized" economic growth by a process amounting to transfer payments from the "inactive" to the "active" elements of society. Professor Horwitz's use of the word "subsidy" in this context has been frequently criticized,[107] but the notion that a change in a legal rule can "subsidize" a certain group is not entirely

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102. *See generally* G. KOLKO, *supra* note 98 (railroad efforts for creation of federal regulation).

103. *See* A. CHANDLER, JR., THE RAILROADS—THE NATION'S FIRST BIG BUSINESS 159-62 (1965).

104. This tripartite division of legal history is a simplistic and perhaps undeserved summary of the thesis advanced in Professor Horwitz's book, *The Transformation of American Law*, *supra* note 16.

105. The argument is superbly made in F. BOHLEN, STUDIES IN THE LAW OF TORTS 368-70 (1926).

106. M. HORWITZ, *supra* note 16.

107. *See* Epstein, *supra* note 6, at 1724-25; Schwartz, *supra* note 8, at 1718-19; Williams, Book Review, 25 U.C.L.A. L. REV. 1187, 1206-09 (1978) (reviewing M. HORWITZ, *supra* note 16). For support of Horwitz's theory see Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663, 678-79 (1982).

novel.[108] Horwitz means that certain changes in common law rules, from strict liability to negligence in personal injury cases or from property rules to liability rules in nuisance cases, for example, had the effect of transferring wealth away from groups such as laborers and consumers and toward entrepreneurs. To the extent one could become a beneficiary of such wealth transfers by engaging in entrepreneurial activities, these changes encouraged development.[109]

Critics of the "subsidy" theory of historical development have generally argued that to term such a change in a legal rule a "subsidy" virtually deprives the word "subsidy" of any meaning, for all legal rules have the effect of encouraging or discouraging certain activities through the application of legal rewards or sanctions.[110] Horwitz's answer to these critics appears to be that, while today we know that legal rules are designed to encourage or discourage certain kinds of activities, that was not the perception of the common law before the nineteenth century. Traditionally, the common law was seen as a "body of essentially fixed doctrine to be applied in order to achieve a fair result between private litigants in individual cases."[111] In the nineteenth century, however, American jurists began to per-

108. *See, e.g.,* Gregory, *Trespass to Negligence to Absolute Liability,* 37 VA. L. REV. 359, 368 (1951) (*Brown v. Kendall* a judicial subsidy to give incipient industries a chance to undertake low-cost operations); Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910,* 33 J. ECON. HIST. 232, 243 (1973) (extending the "subsidy" theory into the second half of the nineteenth century, arguing that business continued to benefit from state laws that virtually permitted them to injure others or take their property without paying compensation).

109. *See* M. HORWITZ, *supra* note 16, at 63-108.

110. *See, e.g.,* Williams, *supra* note 107, at 1206. Horwitz suggests that a legal rule amounts to a subsidy when it permits someone to engage in an activity without paying its full social costs. Under that rationale, a rule of negligence in railroading accidents, for example, constitutes a "subsidy" because accidents caused by non-negligent operation of railroads are a social cost of railroading. People would not be hit even by carefully operated trains if there were no trains. M. HORWITZ, *supra* note 16, at 100. Williams's criticism of this argument is that under this broad definition, rules that favor laborers or the poor or other non-entrepreneurs are also "subsidies." *See* Williams, *supra* note 107, at 1206. In other words, Horwitz's definition of "subsidy" implies that "rules [Horwitz] likes must also be classified as subsidies." *Id.* While true, that argument misses the point. It is not irrational for the state to subsidize two conflicting interest groups at the same time. For example, the Investment Tax Credit and the Food Stamp Program are both subsidies, but the beneficiaries are two rather different economic groups. Horwitz does not appear to be arguing that the nineteenth century state subsidized development to the exclusion of everything else, but he is arguing that the state did subsidize development. *But cf.* Epstein, *supra* note 6, at 1724-25 (argument that Horwitz's "subsidy" thesis is economically correct, but inconsequential).

111. M. HORWITZ, *supra* note 16, at 1.

ceive the common law as a mechanism for "bringing about social change."[112] To the extent this is true, Horwitz's use of the word "subsidy" has some merit, provided that his concept is broad enough to include all legal encouragement of certain kinds of behavior.[113]

Horwitz's critics also argue that the subsidy theory is defective because the common law is not an effective mechanism for transferring wealth from one identifiable class of persons to another.[114] For example, in comparison with a more orthodox kind of subsidy, such as taxation plus transfer payments, a negligence rule is a very poor way to "subsidize" the development of railroads or canals.

Horwitz never maintains, of course, that changes in private law rules were the best form of subsidy one could have. Rather, he argues that entrepreneurs attempted to use the common law to transfer wealth to themselves because the prevailing theory of the role of the state in the internal economy made wealth transfers by means of direct legislation impossible.[115] The state was not perceived as a suitable mechanism for financing the development of privately owned industries and utilities.[116] Thus, Horwitz is not arguing that the common law was in any way a better or more efficient mechanism for transferring wealth or encouraging development than a direct subsidy would have been. It was merely the only tool realistically available to the merchant and entrepreneurial classes in the early nineteenth century.

Further, Horwitz argues that the subsidy of economic growth came about by common law rulemaking rather than taxation plus transfer payments because "[c]hange brought about through technical legal doctrine can more easily disguise un-

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112. *Id.*

113. If the word "subsidy" is understood this broadly, Posner would appear to accept Horwitz's argument as well. For example, Posner argues that the chief difference between negligence and strict liability rules for tortious behavior is that strict liability encourages people to avoid liability by reducing the amount of activity, while negligence encourages them to take care as to how the activity is performed. In short, negligence can encourage a higher amount of activity than does strict liability. *See* Landes & Posner, *supra* note 14, at 875; Posner, *Strict Liability: A Comment,* 2 J. LEGAL STUD. 205 (1973); Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29 (1972).

114. *See* R. POSNER, *supra* note 1, at 105; Epstein, *supra* note 6, at 1724-40. *See also* Williams, *supra* note 107, at 1208-09 (rules adopted to remove a preexisting impediment do not rise to the level of a "subsidy").

115. *See* M. HORWITZ, *supra* note 16, at 101.

116. Professor Schwartz questions this theory, however, and cites several examples of nineteenth century state legislation that was designed to encourage development. Schwartz, *supra* note 8, at 1753-54.

derlying political choices."[117] The new legal rules really reflected the political ascendancy of the entrepreneurial class and their manipulation of the rules to their own profit. Although Professor Horwitz advances this conclusion very tentatively, he believes that "the tendency of subsidy through legal change during this period was to throw the burden of economic development dramatically on the weakest and least active elements in the population."[118]

Even if legislation had been used to transfer wealth more directly to entrepreneurs, it is reasonable to suppose that they might also have wanted favorable common law rules that would transfer even more wealth in their direction. Thus, Horwitz's argument that the common law transferred wealth is in no way dependent on any theory that the common law is an inherently better mechanism than legislation, or that it must be the exclusive mechanism, for transferring wealth.

Further, there is an important distinction to be made between the economic arguments about the ability of the common law to transfer wealth and the historical arguments. Suppose that one could conclusively prove today that the common law was incapable of transferring wealth in any significant way from one social class to another. That is not really the relevant issue. If nineteenth century entrepreneurs and their lawyers thought common law rules could transfer wealth, they might very well have attempted to use the common law to do so, even though they might have been absolutely wrong about its effectiveness.

The leftist element in Horwitz's views has been somewhat overstated.[119] He has been described as seeing something subversive or conspiratorial in the development of nineteenth century law, as if judges, lawyers, and entrepreneurs had decided to use the power of the bench to rob the poor.[120] Likewise, crit-

117. M. HORWITZ, *supra* note 16, at 100-01.

118. *Id. But see* McClain, *Legal Change and Class Interests: A Review Essay on Morton Horwitz's* The Transformation of American Law, 68 CAL. L. REV. 382, 392-94 (1980) (arguing that Horwitz's evidence really does not demonstrate the distributive consequences his thesis suggests).

119. *See* Dworkin, *Seven Critics,* 11 GA. L. REV. 1201, 1210 (1979); Reid, Book Review, 55 TEX. L. REV. 1307, 1317 (1977), both of which describe Horwitz as Marxist. The application of the term to Horwitz is discounted, however, in Schwartz, *supra* note 8, at 1773 n.409.

120. *See, e.g.,* Presser, *Revising the Conservative Tradition: Towards a New American Legal History,* 52 N.Y.U. L. REV. 700, 700 (1977) ("Dark and Doestoyevskyan is the world of Morton Horwitz"); Schwartz, *supra* note 8, at 1773 n.410 ("Horwitz' conspiracy theories even apply to styles of judicial opinion-writing.").

ics ascribe to him the belief that legal change is nothing more than the consequences of struggle between different social groups, with the stronger group prevailing at the expense of the weaker.[121] Although these views may be consistent with much of *The Transformation of American Law,* the book is not dedicated to these propositions. Unlike Marxist historians, Professor Horwitz knows a wealth maximizing rule when he sees one.[122] As a result, Horwitz's outrage at the allegedly invidious redistributions of wealth under the common law is often less than convincing.[123]

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121. *See, e.g.,* Schwartz, *supra* note 8, at 1773; Williams, *supra* note 107, at 1200.

122. Horwitz nowhere argues that the new subsidy-creating, liability-minimizing common law rules were not efficient. In fact, he suggests that they were. "Was legal subsidization socially efficient?" he asks, and then speculates that it may have created social benefits that "exceeded the costs, even though private costs were greater than private benefits." M. HORWITZ, *supra* note 16, at 100. *See also id.,* at xvi, where Horwitz concludes:

> If the sole criterion of the public interest is the maximization of economic growth, a case can be made for the fact that the American legal system after the Revolution was transformed successfully to promote developmental goals. But if we look at the resulting distribution of economic wealth and power—at the legal expropriation of wealth or at the forced subsidies to growth coerced from the victims of the process—it is difficult to characterize it as codifying some consensus on the objective needs of the society.

Although Horwitz uses the word "efficient" to describe certain changes in common law rules, he never clearly defines his meaning. He may mean "utilitarian," a word he frequently uses to describe the direction private law took in the first half of the nineteenth century. By "efficient" he certainly does not mean Pareto superior, for every legal change he describes produced losers as well as gainers, and by definition a Pareto superior change produces only gainers. Actually, Horwitz's suggestion that a legal change is efficient if "social benefits exceeded social costs even though private costs were greater than private benefits," *id.* at 100, suggests that he is using "efficient" in the Kaldor-Hicks or wealth maximization sense, precisely as Posner uses it.

123. There is an agonizing ambiguity in *The Transformation of American Law*—almost as if Professor Horwitz had a difficult time deciding whether the prodevelopmental legal revolution he described was good or bad. To read the first chapter alone is virtually to conclude that the emergence of an "instrumental" conception of American law was a good thing, for as a result judges at least superficially perceived a relationship between their role and the functioning of the American economy. Horwitz never argues that the formalistic and naturalistic common law of the eighteenth century, as he describes it, was good—except occasionally to suggest that in the eighteenth century and earlier judges tended to be more interested in the substantive morality of legal rules than in their allocative efficiency. Horwitz essentially gives an account of a developing law that ceased to be perceived as purely private and was beginning to take on a public character—that is, the State acquired a policy interest in substantive contract rules as much as in expressly public law questions, such as the scope of executive power under the Constitution. In the nineteenth century the emerging role of the State was to allocate resources efficiently. In the twentieth century, one could argue, the State has been concerned more with distributing them fairly. *See generally* Reich, *The New Property,* 73 YALE L.J.

One can plausibly view *The Transformation of American Law* in a slightly different way. Horwitz does not dispute that changes in the common law during the first half of the nineteenth century made America a very wealthy nation, even if that wealth was not distributed to everyone's satisfaction. Thus, his subsidy thesis is less in conflict with Posner's wealth maximization theory, both normatively and positively, than it might at first appear.

Horwitz's normative perspective on the procompetitive developments of the early 1800's is not entirely negative by any means. I see no evidence that he abhors the rise of negligence as he describes it,[124] or that he is revolted by the nineteenth century doctrine of competition. On the contrary, he presents many of the new prodevelopmental rules, such as Taney's rule in the *Charles River Bridge* case that monopoly rights will not be implied in grants from the state, as fundamentally a good thing.[125] To be sure, Horwitz does not ascribe sterling motives to his entrepreneurial class. They did not argue for prodevelopmental legal rules because they thought such rules were good for the country, but because they were developers. Perhaps they wanted the country to be richer, but most of all they wanted to be richer themselves. One does not have to be a Marxist to believe that, however. Even Richard Posner will accept the proposition that most people work principally for their own economic interest.[126]

If there is a set of legal rules or developments that Professor Horwitz can be said to abhor, it is not the prodevelopmental rules of the early nineteenth century but the "formalism" of the second half of the century. Horwitz argues that once entrepreneurs succeeded in acquiring a set of prodevelopmental rules that worked to their own interests, they began to revert to arguments that this set of rules was "natural" or a part of some per-

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733 (1964) (considering the rise of the public interest state and its effects on individualism).

124. Professor Epstein, however, sees it differently. *See* Epstein, *supra* note 6, at 1725.

125. *See infra* notes 132-49 and accompanying text. Horwitz believes that in general the rise of an instrumental conception of law led to a decline in the use of highly technical rules; judges were quicker to overlook imperfect pleadings in order to get to the merits. *See* M. HORWITZ, *supra* note 16, at 29. Likewise, he concludes that the rise of competition in America benefitted a broad political spectrum. *Id.* at 138-39. He is most critical of the effects of the newer, prodevelopmental law in his treatment of contracts, where he sees the new rules minimizing judicial inquiry into the substantive justness of contracts that were detrimental to the poor. *Id.* at 210.

126. *See* R. POSNER, *supra* note 1, at 105-06.

manent order, and ought to be preserved in spite of a shift in political power to the left, the rise of the labor movement, the increase in the number of American consumers, and the growing political isolation of the malefactors of great wealth. Legal rules that were efficient in the first half of the nineteenth century were no longer so in the second half, but legal formalism, expressed most strongly as judicial aversion to state legislation that abrogated the common law, prevented legal change from running its natural course.[127] Thus, Horwitz's objection to distributive changes in the common law must be tempered by his own recognition that many of these changes in fact created wealth.

A careful reading also reveals that Horwitz's positive theory of wealth-transferring "subsidies" is more compatible with Posner's historical explanations than it appears at first. Professor Horwitz never maintains that judges intended to use common law rules to transfer wealth. He argues merely that early nineteenth century jurists began to adopt certain "utilitarian" or "prodevelopmental" principles, and that the eventual effect of these principles was to make the active members of society wealthier than the inactive ones. When the process was working properly, a judge looked for the "best" legal rule, and in most instances the legal rule he or she thought best was the one whose total economic benefits exceeded total economic costs.[128] Far from documenting a conspiratorial effort by the judiciary to rob from the poor in order to subsidize the wealthy,[129] Professor Horwitz's book reveals exactly what common sense would lead one to expect—developers and entrepreneurs seeking their own interests, but judges looking for an interest they believed lay with the community as a whole.[130]

127. *See* M. HORWITZ, *supra* note 16, at 253-68.

128. *See id.* at 100.

129. Although Horwitz occasionally suggests that certain interests became wealthier as a result of the prodevelopmental legal changes he describes, *see, e.g., id.* at 108, he never documents that any particular social group was thereby impoverished.

130. Under the interpretation advanced here, Horwitz's thesis becomes more cogent because it makes possible a more plausible explanation for the behavior of early nineteenth century judges. The "conspiratorial" version of Horwitz's argument, *see supra* notes 120-23 and accompanying text, seems committed to the view that political pressures by the entrepreneurial class directly influenced judges of the period. Horwitz provides no documentation of this phenomenon, however; nor does he explain how the process of judges being captured by political pressure might occur. It is not prima facie plausible that judges adopted certain common law rules because those rules transferred wealth, or that they preferred the social or economic values of entrepreneurs as a class over those of laborers or consumers as a class. There is virtually no evi-

That interest lay not in forced redistribution of wealth, but in economic development.

In the nineteenth century opinions that Professor Horwitz discusses, when judges talked about economic policy, they talked about the allocative effects of certain legal rules, not about their distributive consequences.[131] To be sure, only a few great judges such as Story or Shaw often talked about economic policy in any generalized way. The vast majority of common law opinions ostensibly rested on precedent, with little discussion of economic consequences. When economics came up, however, the language that judges used most often was the language of wealth maximization, or, as Horwitz would call it, utilitarianism.

For example, Horwitz extensively discusses the *Charles River Bridge* case[132] as one of the preeminent instances of a legal change favoring development in America in the 1830's, and there is no question but that it is. The issue there was whether a Massachusetts charter given to the proprietors of the Charles River Bridge created a monopoly, even though the charter did not explicitly confer monopoly rights. Professor Horwitz dwells at some length on the debate between Justice Morton of the Supreme Judicial Court of Massachusetts and Justice Story of the U.S. Supreme Court concerning the economic consequences of holding that the charter did not implicitly confer a monopoly.[133] These two judges developed sophisticated economic arguments concerning the legal rule at issue. Both men, however, were much more concerned with the allocative efficiency of the implied monopoly right claimed by the proprietors of the Charles River Bridge than they were about the injury that would result from this rather sudden and dramatic transfer of wealth.[134]

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dence of this in the historical records. On the other hand, wealth maximization as a historical principle does judges the credit of giving them a moral vision. In the process it permits us to believe what they say.

For some attempts to explain how political influences can be brought to bear on the judiciary, see A. ALLEN, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (1974); B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942).

131. More precisely, they talked about allocative efficiency when they adopted a certain legal rule or approved a certain statute, but they talked about evil distributive consequences when they declared statutes unconstitutional. *See infra* notes 164-73 and accompanying text.

132. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

133. *See* M. HORWITZ, *supra* note 16, at 130-39.

134. But see the dissent of Justice Putnam on the Supreme Judicial Court

Justice Story in his dissent opted for the older pre-Adam Smith view. In certain areas where privately financed economic activity was desirable, entrepreneurs would not be encouraged to invest unless they were guaranteed fair profits, and monopoly rights were the best such guarantee. Like Blackstone,[135] Story believed that in most areas competition and not monopoly should prevail,[136] but for Story the common law of franchise monopolies dictated that in particular areas of public necessity and convenience a regulated monopoly was important because entrepreneurial risks were very high, but public necessity was very large.[137] Story included in this category bridges, turnpikes, and ferries,[138] and explicitly excluded banks, insurance companies, and manufacturing companies.[139] In Story's paradigm the entrepreneur who accepted a franchise was expected to bear the entire loss himself if the bridge or railroad should eventually prove unprofitable.[140] On the other hand, under the terms of the franchise, the facility was expected to be open continuously to serve the public, the operators were prohibited from turning away any paying customer,

of Massachusetts, Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344, 505 (1829). Putnam noted that when the Warren Bridge was opened, the immediate effect was to take three-fourths of the tolls away from the Charles River Bridge. Under the terms of their franchise, the proprietors of the Warren Bridge were to be compensated for their outlay, plus interest, out of the tolls collected. Eventually the bridge would revert to the state and become toll-free. The effect of this, argued Justice Putnam, was "to compel [the owners of the Charles River Bridge] to pay for the new bridge." *Id.* In other words, Putnam viewed granting the franchise to the more economically operated Warren Bridge, and the resulting loss of revenues to the Charles River Bridge, as a kind of forced transfer payment: the owners of the Charles River Bridge were effectively being forced to finance the very competing institution that was driving them out of business.

135. *See supra* note 95. Although Story's theory of regulated industry was more sophisticated than Blackstone's, Story attempted valiantly to deduce his entire doctrine from British common law.

136. *See* 36 U.S. (11 Pet.) at 606-07, 618-19.

137. Like most early nineteenth century jurisprudents, Story distinguished between "monopolies" and "franchises," even when the latter were given express monopoly power. Both involved express grants of exclusive privileges from the King or the State. However, a monopoly was "an exclusive right granted to a few, of something which was before of common right, such as the right to manufacture a certain commodity." *Id.* at 607. This is essentially the distinction that Blackstone had adopted seventy years earlier. *See* 4 COMMENTARIES, *supra* note 73, at *159. In Story's mind, recognition of an exclusive right in the proprietors of the Charles River Bridge did not amount to creation of a "monopoly," because bridge operators had had exclusive rights since time immemorial.

138. *See* 36 U.S. (11 Pet.) at 606, 619.

139. *See id.* at 638-39.

140. *See id.* at 614.

and they were under an obligation to charge just and reasonable fares. In Story's mind, as a matter of pure economics, "from the nature of such a franchise it can have no permanent value, unless it is exclusive . . . ."[141] For Story the very fact that the newly created Warren Bridge effectively put the Charles River Bridge out of business was sufficient evidence that no reasonable entrepreneur would have undertaken to build the first bridge without a guarantee of freedom from competition.[142]

Justice Morton, in his opinion for the Supreme Judicial Court of Massachusetts, generally agreed with Story about the distinction between regulated and competitive industries. As a rule, noted Morton, franchise monopolies were heavily regulated. In the case of ferries these regulations covered "the management of the ferry . . . , the number of boats to be employed, . . . [and] the rate of toll."[143] To Morton such regulation was the sine qua non for monopoly right: no one would suppose, he suggested, that the proprietors of the Charles River Bridge should have both the monopoly right and the power to fix the rate of toll themselves.[144]

Morton's theory of growth, even in regulated areas, was eminently free market, however. When the state wanted a bridge or turnpike or ferry constructed, it bargained with private entrepreneurs for the project. Both sides evaluated the risks and the potential profits, and the resulting charter or franchise memorialized their speculation. If the grantees failed to bargain a suitable monopoly right for themselves, they could not come back later to claim a benefit never given to them.[145] In an insightful passage Justice Morton commented on the protection that even the unrestrained market gave entrepreneurs:

> If I am asked what security [the proprietors] have that their reasonable expectations of remuneration will not be destroyed by the establishment of rival institutions, I answer, that they have security in the self-interest of individuals, who will never engage in expensive works without a prospect of remuneration. Unless it is believed that a new [i.e., second] bridge or turnpike will be profitable to the proprietors, it will never be made to the injury of the old one. They have security in their confidence in the legislature; that, in consulting the good of the whole, they will not sacrifice or injure the property of one portion of the community for the benefit of another. And they have still

141. *Id.* at 620.
142. *Id.* at 636.
143. Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344, 447 (1829).
144. *Id.* at 448.
145. *Id.* at 465.

higher security in the constitutional provision, that private property shall not be taken for public uses without a reasonable compensation. No new bridge, turnpike or common highway can be expected to be established without the taking of private property, and therefore no such new channel of communication can be opened, except where public convenience and necessity shall require it. If all these are not sufficient security against injurious or destructive competition, then I say that it was the fault of the grantees that they did not make a more favourable bargain, or that they acceded to an injurious compact.[146]

Once the first bridge was in place, a second bridge would not be a reasonable investment unless there was sufficient traffic to make both bridges profitable or unless the first bridge was inefficient. Furthermore, the requirement that just compensation be paid for any property taken by the builders of the second bridge meant that the demand for the second bridge would have to be sufficient to cover most of the costs of producing it. Forcing an entrepreneur to internalize as many of its costs as possible is one way to ensure that the social value of a new project exceeds social costs. Although the just compensation requirement certainly would not mean that the builders of the second bridge would have to assume all its social costs, it does mean that they would have to assume most of the costs that the law and the marketplace recognized as falling on developers. There is good evidence today that the gross overdevelopment of railroads in the late nineteenth century was caused in large part by a government policy of giving railroads free land, or permitting them to take it at a price far below its fair market value.[147] Early in their development railroads were subsidized

146. *Id.* at 464-65.

147. *See* J. BERNHARDT, THE INTERSTATE COMMERCE COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 2-5 (1923). Railroad subsidies in the nineteenth century included publicly issued bonds, tax exemptions, and public provision of terminals. The largest subsidy, however, came from the federal government in the form of immense land grants which not only gave the railroads free rights of way but also gave them valuable property on both sides of the tracks that could be sold in order to generate development capital. *See* R. ROBERTSON, HISTORY OF THE AMERICAN ECONOMY 276-81 (1973). For a detailed description of some of the devices by which federal and state governments subsidized railroad development, see W. RIPLEY, RAILROADS: RATES AND REGULATION 35-43 (1912 & reprint ed. 1923). Even when railroads condemned private property and paid just compensation they benefitted from legal rules that kept damages assessments low. For example, in Bohm v. Metropolitan Elevated Rwy. Co., 129 N.Y. 576, 29 N.E. 802 (1892), Justice Peckham, then on the New York Court of Appeals, held that when a railroad condemned a right-of-way easement the loss in value of the landowner's property as a result of the taking must be offset by the gain in value that would occur because of the presence of the railroad. For an excellent discussion of these developments, see Scheiber, *supra* note 108, at 237-40. For a somewhat different view, see Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Developments,* 1981 WIS. L. REV. 1263.

by legal rules and governmental policies that encouraged them to overinvest. To be sure, the overdevelopment was still caused by their own miscalculation, but it was a miscalculation in which the law played an important part. The express policy of statutes that gave land virtually free to railroads was to encourage railroads to build in areas where they may not have built had they been required to pay the full cost themselves.

However different the viewpoints of Justice Morton and Justice Story on the issue of whether monopoly protection for certain works of public improvement was a good thing, they did not differ about the principle of wealth maximization. Story believed monopoly protection was necessary for the proprietors of the Charles River Bridge because a contrary rule would "arrest all public improvements, founded on private capital and enterprise" by making "the outlay of that capital uncertain, and questionable both as to security, and as to productiveness."[148] On the other hand, Justice Morton believed that long-term monopoly rights, such as the right the proprietors of the Charles River Bridge were claiming, would "impede the march of public improvement"[149] by prohibiting new development even when that development was socially efficient. Both Justices accepted the encouragement of "public improvement" as a legitimate rationale for the legal rule at issue; they merely differed about which economic policy would encourage public improvement more. This was not a debate about utilitarianism or wealth maximization as a value—both accepted it—but about the economic theory that would best achieve it.

The early nineteenth century development of the just compensation principle in state law provides another example of a change in a legal rule that aimed at wealth maximization rather than subsidization of the entrepreneurial class. Today we are generally inclined to regard the just compensation principle as eminently distributive. Its purpose is to ensure that when the State makes some improvement for the benefit of the public it does not load too much of the cost on one individual but rather distributes it across the society that benefits from the improvement. Just compensation requires society to pay for the things it wants.[150] Indeed, it is because of the distributive effects of

148. 36 U.S. (11 Pet.) at 608.

149. 24 Mass. (7 Pick.) at 462. *See* M. HORWITZ, *supra* note 16, at 134.

150. *See, e.g.,* Armstrong v. United States, 364 U.S. 40, 49 (1959). *See also* Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893):

> [The just compensation clause] prevents the public from loading upon one individual more than his just share of the burdens of government,

the just compensation principle that its rise during the early nineteenth century[151] challenges the Horwitz subsidy thesis. The chief beneficiaries of state adoption of the just compensation principle were farmers and other relatively nonindustrial landowners, whereas its chief opponents were entrepreneurs who believed that the requirement was "a threat to low cost economic development."[152]

> and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Id. at 325. For an insightful discussion of the state's obligation to balance economic efficiency and distributive justice, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967). *See also* Munch, *An Economic Analysis of Eminent Domain,* 84 J. POL. ECON. 473 (1976) (eminent domain not efficient in that high-valued properties receive more than market value, and low-valued properties receive less than market value).

151. Horwitz observes that the development of just compensation as a state law requirement was largely a product of the early nineteenth century. M. HORWITZ, *supra* note 16, at 63-65. Blackstone had argued vehemently for it, however. 1 COMMENTARIES, *supra* note 73, at *139. The movement for just compensation in the early nineteenth century was largely a legislative one—it was inserted into most state constitutions. Horwitz argues, however, that state courts began eroding the just compensation principle almost immediately. For example, courts began to appoint appraisers to evaluate taken properties, rather than relying on juries, whose awards were unpredictable and often excessive. Furthermore, when the Erie Canal was being built in the 1820's, the New York courts gravitated to the view that riparian landowners did not own the beds of streams even though the tide in the streams did not ebb and flow. The English rule had been that riparian landowners owned to the middle of nonnavigable streams, and a stream was nonnavigable if it was too small to have a measurable ebbing and flowing tide. M. HORWITZ, *supra* note 16, at 67-68. As Horwitz observes, the English rule seemed somewhat inappropriate in America, because America, unlike England, contained many freshwater rivers that were in fact navigable even though they did not have a measurable tide. *Id.* Thus, considering the lay of the American land, the question in New York was ripe for a new, American common law rule. Similarly, argues Horwitz, New York and Massachusetts courts began to hold that certain kinds of injuries to property, such as erosion or flooding caused by adjacent construction, were not compensable, although the monetary injury was substantial. *Id.* at 72. Horwitz assigns these judicial refusals to pay compensation for consequential damages to a notion that " 'the general good' could prevail over 'partial individual convenience' without compensation . . . ." *Id.* at 73. With respect to such consequential injuries, however, Horwitz notes that "since most consequential injuries to land were, in fact, entirely predictable . . . the question invariably returned to which party was to bear the cost of economic improvement." *Id.* at 73. In short, the liability rule for consequential damages to adjacent real property as a result of works of public improvement became not negligence but virtual nonliability. As Horwitz then details, this nonliability rule, although originally applying only to works undertaken by the state itself, was eventually applied to private developers as well. *Id.* at 77-78. The result was the development of what amounted to a private nuisance rule according to which development was not a nuisance if the public benefit created by the project was greater than the loss suffered by the individual landowners.

152. M. HORWITZ, *supra* note 16, at 66.

There are, however, arguments that the just compensation principle was adopted not just because it spread the costs of development but because it was wealth maximizing as well. Requiring the State to compensate those whose property it takes maximizes wealth for the same reasons that markets in general are wealth maximizing. When coupled with the just compensation requirements, the power of eminent domain allows the State to force a property owner to engage in a nonvoluntary market transaction for the sale of some of his property. Even a forced market transaction, however, is more efficient than no market transaction at all. The requirement that the State pay "just" compensation for the property it takes helps ensure that the use to which the State intends to put the property is as efficient as the use to which an alternative buyer or the original owner would put it.

The just compensation requirement was an especially efficient legal rule in the rapidly expanding early nineteenth century American economy, even though its overall effect was probably to transfer wealth in the opposite direction than the Horwitz thesis generally suggests.[153] During a period of rapid development of canals, railroads, turnpikes, and other public utilities that were able to take advantage of the eminent domain power, a requirement of just compensation helped to ensure that land was not put to inefficient uses. As Professor Horwitz notes, during the 1820's and 1830's entrepreneurs became almost fanatical about building canals, railroads, and turnpikes.[154] They often complained that the damages paid for land condemnation were so high that the resulting project was not able to amortize its costs, an indication, it seems, of overdevelopment and inefficient decisions to build. If a railroad or canal cannot pay its own development costs, that is good evidence that building that railroad or canal is not wealth maximizing, and therefore not in the public interest.[155]

153. For evidence of this, see Freyer, *supra* note 147.

154. *See* M. HORWITZ, *supra* note 16, at 67-69.

155. Horwitz sees campaigns by developers to transfer damages assessment authority in eminent domain cases to professional appraisers, or to make damages a question of law, as weakening the just compensation principle. It is likely, however, that such procedures probably maximized wealth if one assumes that juries consistently overvalued taken property and that appraisors or judges assessed its market value more accurately. *See* M. HORWITZ, *supra* note 16, at 67. The just compensation principle was a mechanism for forcing entrepreneurs to internalize more of the costs of development; the most efficient way to do that was to force them to pay damages that accurately reflected the market value of the injuries that their activity caused. If damages were assessed at a higher rate, then certain works of improvement would not be built,

The just compensation principle is wealth maximizing for another reason: it enhances the value of land by reducing uncertainty costs. A landowner would be quite reluctant to improve real property substantially if he or she knew that the state could take it away at any time without payment of its fair market value, especially since the more valuable one made one's property the greater the risk that the state would want to take it. The just compensation principle permits people to put their land to its most valuable use without fear that the state may someday deprive them of its value. If the state condemns the land, the landowner will be compensated for the improvements.

THE HORWITZ THESIS AND THE RISE OF NEGLIGENCE

One of the more controversial uses of Horwitz's "subsidy" thesis has been its application to the mid-nineteenth century transformation of American tort law from a regime of strict liability to one of negligence. Although Horwitz's general theory that a change in a common law rule can "subsidize" a certain economic interest is plausible, he does not document that the shift from strict liability to negligence in fact subsidized economic development; moreover, his description of that transition is controversial.[156] Furthermore, the general criticism that com-

even though their construction would be wealth maximizing. On the other hand, if damages were assessed at too low a rate, then certain works would be built even though they did not reflect the most efficient use of the resources that they consumed.

The question of why the developers of railroads, canals and other works of public improvement could not simply negotiate with individual landowners and buy their property rights in completely voluntary market transactions is well answered in Calabresi & Melamed, *supra* note 28. Once a railroad has begun development or has begun to acquire parcels of land through voluntary transactions, the marginal value to it of a parcel in its right of way becomes very high: it might cost the railroad $1,000,000 if it cannot acquire a right of way across a certain piece of agricultural property, even though to almost any other user the value of the right of way is very small. A smart landowner (and every right of way has at least one) would be able to hold out for a very large sum of money because she would know that the railroad would be willing to pay, even if the value of the land to the landowner were very small. The eminent domain power actually distorts the market by forcing the landowner to accept not the price that the railroad is willing to pay, but the price that an alternative buyer would be willing to pay—that is, the price at which the landowner would probably be willing to sell the right of way in a market in which the railroad was not a "captive" customer.

156. *See, e.g.,* G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980) (arguing that the law of negligence arose somewhat later than Horwitz describes, and that it was largely a product of intellectual and not economic influences). For other criticism to the effect that the distinction between eighteenth century strict liability and nineteenth century negligence is not nearly as

mon law rules are not effective mechanisms for transferring wealth seems to apply particularly strongly to a change from strict liability to negligence.

Arguably, the evolution of the just compensation principle operated to transfer wealth from one identifiable class of people to another. For example, a rule that railroads must pay just compensation for their rights of way perhaps transferred some wealth away from railroad companies and to farmers, although it is unclear what the long-range effect of such a transfer would be if the principal customers of the railroads were farmers.[157] On the other hand, it is difficult to see how a rule like the one developed in *Brown v. Kendall*[158] operated to transfer wealth from one economic class to another. In that case Chief Justice Shaw held for the Supreme Judicial Court of Massachusetts that the plaintiff, who was injured when the defendant hit him with a stick while striking a dog, could not prevail unless he could show negligence. As a result of that particular case one could never predict any general direction in which wealth might be transferred. For example, there is no reason to believe that farmers are relatively more likely to strike dogs with sticks, while bankers are more likely to stand behind and watch.[159] Even with respect to transportation and industrial accidents, plaintiffs' classes and defendants' classes do not line up clearly.[160] Furthermore, there is little evidence that nineteenth century railroads actually won more personal injury cases because of a negligence requirement. In fact, one recent writer has argued that even as the law of negligence was devel-

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sharp as Horwitz suggests, see Schwartz, *supra* note 8, at 1728-30; Williams, *supra* note 107, at 1188-93.

157. *See* R. POSNER, *supra* note 1, at 104-05.

158. 60 Mass. (6 Cush.) 292 (1850).

159. Professor Horwitz minimizes the influence of *Brown v. Kendall* because it was an action in trespass. He argues that the real development of modern negligence in an industrial setting occurred in actions on the case. In fact, however, the development of a negligence theory is even more startling in trespass than in case, for in case one would ordinarily expect to find language resembling negligence. *See* Roberts, *Negligence: Blackstone to Shaw to ?*, 50 CORNELL L. REV. 191 (1965) (arguing that negligence had been an important element in actions on the case long before the nineteenth century). In fact, in *Brown v. Kendall* Chief Justice Shaw telescopes the distinction between trespass and case and concludes that whether the injury is direct (trespass) or indirect (case), the law nevertheless requires that the plaintiff must show that the defendant's actions were either intentional or negligent.

160. If the effect of a negligence rule is not to distribute wealth systematically from one social class to another, but only to cause random transfers in both directions, then both classes would argue for negligence, assuming that negligence is the wealth maximizing rule, for each class would reap some of the benefits of the increased wealth. *See* Landes & Posner, *supra* note 14, at 860.

oping, the courts were fastidious in the protection of personal injury plaintiffs.[161]

Of course, the validity of the Horwitz thesis as a description of the rise of negligence does not depend entirely on evidence that the switch from strict liability actually transferred wealth.[162] Nevertheless, one who reads the case law and the jurisprudence of negligence in nineteenth century America is immediately struck by two patterns. First, the judicial rationales in support of negligence are arguments based on allocative efficiency. Second, judges who attacked legislation that abolished negligence in certain kinds of personal injury cases, such as workers' compensation, focused heavily on the distributive consequences of the new statutes.

One of the clearest and most direct nineteenth century arguments that negligence is wealth maximizing came from Holmes, who wrote in *The Common Law*:

> A man need not, it is true, do this or that act,—the term act implies a choice,—but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.[163]

For Holmes, the effect of a negligence rule on the distribution of wealth was inconsequential. What was important was that society as a whole profited from economic activity.

In his entire discussion of the law of negligence Horwitz does not mention a single case in which a judge recognized the role of the law of negligence in transferring wealth from one segment of society to another. Rather, the opinions that discuss economic or social theory at all argue that society ought to encourage "activity" or "productivity" even at the expense of forcing certain outsiders to bear a part of the costs.

For example, *Losee v. Buchanan*,[164] decided fifteen years after the period covered by Horwitz's book, held that a plaintiff

161. *See* Schwartz, *supra* note 8, at 1770-71. Schwartz limits his study to the case law of New Hampshire and California, and admits that these two jurisdictions may be nonrepresentative. *Id.* at 1774 n.412. To the extent that they are nonrepresentative, they may be more favorable to plaintiffs. For example, both jurisdictions rejected the proximate cause limitation of Ryan v. New York Cent. R.R., 35 N.Y. 210 (1866) (injury must be the immediate and not remote result of negligence of defendants). *See* Schwartz, *supra* note 8, at 1747-48. Furthermore, California never used the writ system, and thus was exempt from most of the confusion caused by parallel lines of actions in trespass and actions on the case. *Id.* at 1732 n.123.

162. *See supra* notes 128-31 and accompanying text.

163. O. HOLMES, *supra* note 16, at 95.

164. 51 N.Y. 476 (1873).

must prove negligence in order to be compensated for the explosion of a steam boiler on the defendant's nearby land. Judge Earl concluded that society

> must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands.[165]

In light of cases like *Losee,* the most reasonable economic explanation for the rise of negligence in the nineteenth century is that the negligence rule gave entrepreneurs a mechanism for avoiding liability without lowering the level or amount of their activity. One can avoid negligence liability for a certain activity by performing the activity more carefully. As a general rule, however, one can avoid strict liability only by reducing the amount of the activity.[166] In this sense the rise of negligence did in fact encourage economic development.

For historians who are squeamish about attributing such an economic explanation to the nineteenth century judiciary it should suffice to reexamine Judge Earl's conclusion in *Losee v. Buchanan* that the "public must have factories, machinery, dams, canals and railroads," and that this public necessity required the negligence rule.[167] Judge Earl perceived the economic difference between strict liability and negligence, even if that perception was somewhat less technical than the one economists or lawyers trained in economics have today. He deduced his negligence rule from the public necessity of having transportation and technology. Implicit in his statement is the premise that a certain risk of accidents is one of the shared costs of development, a price of modern society, and one can avoid the cost only by avoiding the benefit as well. A negligence rule would encourage factory owners to operate carefully. A strict liability rule would encourage them not to operate at all.

In contrast to their treatment of negligence in terms of "de-

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165. *Id.* at 484-85. The *Losee* opinion went on to reject explicitly the strict liability-trespass rule of Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (1868) as "in direct conflict with the law as settled in this country." 51 N.Y. at 487. For a more general discussion of the diverging rules with respect to liability for injuries to land, see Fridman, *The Rise and Fall of Rylands v. Fletcher,* 34 CAN. B. REV. 810 (1956).

166. *See infra* note 179.

167. *See supra* notes 164-65 and accompanying text.

velopment," or wealth maximization, early twentieth century judges' attacks on workers' compensation statutes focused almost entirely on the effect of the statutes as forced transfers of wealth away from entrepreneurs and toward their employees. For example, when the New York Court of Appeals declared New York's first workers' compensation statute unconstitutional in *Ives v. South Buffalo Railway,*[168] Judge Werner observed:

> If the legislature can say to an employer, "You must compensate your employe for an injury not caused by you or by your fault," why can it not go further and say to the man of wealth, "you have more property than you need and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor, so that he and his dependents shall not become a charge upon the state"? . . . In its final and simple analysis [the workers' compensation statute] is taking the property of A and giving it to B, and that cannot be done under our Constitutions.[169]

These judicial attitudes appear to lend some plausibility to Posner's argument that the common law is not a very effective mechanism for effecting wealth transfers.[170] Even nineteenth century judges did not generally regard common law rules that way. On the other hand, they were quite conscious of the role of "social legislation" in transferring wealth from the rich to the poor and laboring classes.[171] That awareness developed into virtual paranoia by the time of such decisions as *Lochner v. New York* in 1905,[172] and *Adkins v. Children's Hospital* in 1923.[173]

LEGAL SUBSIDIES AND COMPETITIVE MARKETS

The theory that a change in a common law rule, a change

168. 201 N.Y. 271, 94 N.E. 431 (1911).

169. *Id.* at 295-96, 94 N.E. at 440.

170. *See* R. POSNER, *supra* note 1, at 105. *See also* Epstein, *supra* note 6, at 1724-40 (lack of distributional consequences of common law negligence).

171. One can argue, of course, that judges used arguments from allocative efficiency when they were registering their approval of certain statutes or rules, because the efficiency argument would disguise the distributive consequences of the statute or rule at issue. On the other hand, judges intent on declaring a statute unconstitutional would focus on that part of the statute which they found to be bad, and such arguments were generally distributive: the rule took property from one person and gave it to another. Even at the height of the substantive due process era there was no constitutional right to efficient legislation; however, there was a constitutional right not to be deprived of one's property without due process of law.

172. 198 U.S. 45 (1905) (striking down a New York statute limiting the number of hours that bakers could work).

173. 261 U.S. 525 (1923) (striking down a congressional minimum wage statute applicable to women and children).

from strict liability to negligence in tort law, for example, systematically transferred wealth from one group to another is plausible only if the beneficiaries of the transfer were able to pocket the gains. In a competitive market, however, where prices will be driven to marginal cost, that generally will not be the case. Assuming that the rise of negligence in fact lowered the cost of doing business to the railroads and that the railroads were in competition with each other and with other forms of transportation,[174] the general effect of such a liability-limiting rule would be to lower consumer prices. In short, in a competitive market the adoption of a rule of negligence would be most likely to shift wealth away from the class of people injured by railroad accidents and toward the class of people who purchase railroad services. To a large extent, it seems, these two classes of people were the same. Farmers or their real or personal property were commonly injured by railroads, but farmers were also among the most important customers of the railroads.[175] Within such a paradigm it is difficult to see how the common law change from strict liability to negligence could effectively have transferred wealth from one political or social group to another.

In a price regulated market in which an industry was for some reason permitted to keep its savings from reduced tort liability, such savings might be retained by the entrepreneurs themselves. The persistent hostility of the late nineteenth century laissez faire Supreme Court to price regulation suggests, however, that the legal "formalism" so often criticized by the progressive legal tradition as anti-labor and anti-consumer,[176] was not something that accrued to the benefit of entrepreneurs.[177]

174. By the 1890's railroads were in intensive competition. *See* Northern Securities Co. v. United States, 193 U.S. 197 (1904); United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897).

175. *See* G. TAYLOR, THE TRANSPORTATION REVOLUTION 1815-1860, at 74-103 (1951).

176. *See, e.g.,* H. FAULKNER, THE DECLINE OF LAISSEZ FAIRE 366-82 (1951); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960).

177. For example, in United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897), the Supreme Court found that an association of railroads, designed to regulate rates, synchronize schedules and facilitate the transfer of cargo from one railroad to the next, was a violation of the Sherman Act. By the time of that decision the Interstate Commerce Commission was of the opinion that overdevelopment of track required railroad rate regulation for the protection of the railroads themselves, and that the regulation must come from one of three sources: the federal government acting through the Interstate Commerce Commission, the states, or the railroads themselves. For example, in its second annual report, the ICC recommended that the railroads could save themselves

In competitive markets the chief beneficiaries of negligence rules were American consumers, not the entrepreneurs themselves. In fact, not only would consumers receive goods at lower prices in a regime of negligence, but the products they received would likely to be no less safe as a result. The Coase theorem[178] suggests that if transaction costs are disregarded, the market and not the relevant liability rule will determine the safety of commercial activities. Whether or not an entrepreneur or manufacturer employed a particular safety device or procedure depended on whether the cost of the device or procedure was greater than or less than the expected cost of the accidents the entrepreneur could foresee. A safety device that was not cost effective under a rule of negligence would be no more cost effective under a rule of strict liability.[179]

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from "ruinous competition" only by establishing a "common authority" with the power "to fix rates, and to provide for their steady maintenance." 2 ICC ANN. REP. 25-26 (1889). The Supreme Court had already decided that states did not have the power to regulate rates in interstate commerce, Wabash, St. L. & Pac. Rwy. Co. v. Illinois, 118 U.S. 557 (1886); and a year before *Trans-Missouri* the Court decided that the Interstate Commerce Commission lacked the power to assess rates, Cincinnati, New Orleans & Tex. Pac. Rwy. Co. v. I.C.C, 162 U.S. 184 (1896). The rate-setting agreement at issue in *Trans-Missouri* was an attempt at self-regulation undertaken with the apparent approval of the ICC. *See* 12 ICC ANN. REP. 10-16 (1898) (criticizing the *Trans-Missouri* decision). One effect of the lack of regulation was that the overdeveloped railroads were forced to cut costs to levels insufficient to service their large debts. In 1893 railroads owning more than one-tenth of the total track mileage in the country had been forced into bankruptcy. G. KOLKO, *supra* note 98, at 64. By 1895 almost one fourth of United States railroad capital was in receivership. *See* Brief for Appellee Union Pacific Railway at 52, United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897). The evidence suggests that, at least in the 1890's, the strongest supporters of railroad rate regulation were the railroads themselves. Of course, this conclusion strikes at the heart of a debate that has been going on for years—whether rate regulation as it developed in America in the late nineteenth century was in the "public interest," i.e., to keep big business, such as railroads, from gouging consumers, or whether it was designed to protect the regulated industries from competition. For the former viewpoint, see H. FAULKNER, *supra* note 176; R. HOFSTADTER, THE AGE OF REFORM (1955). For the latter viewpoint, see G. KOLKO, *supra* note 98, at 77. For interesting discussions of the two points of view, see Martin, *The Troubled Subject of Railroad Regulation in the Gilded Age—A Reappraisal,* 61 J. AM. HIST. 339 (1974); McCraw, *Regulation in America: A Review Article,* 49 BUS. HIS. REV. 159 (1975). *See generally* T. MCCRAW, REGULATION IN PERSPECTIVE (1981).

178. *See* Coase, *supra* note 25.

179. The theory as it applies to negligence and strict liability is illustrated by the following example: A farmer owns land adjoining a railroad track. Cattle graze on the parcel adjacent to the track, and a more remote parcel is planted in corn. The cost to the railroad of installing a cow-catcher, which will deflect most, but not all, cattle without injury, is $1 per train trip. The expected costs of accidents in injuries to the cattle, and thus to the farmer, are $.80 per train trip if the trains are equipped with cow catchers, but $2.00 per trip if they are not so equipped. Assume further that the railroad could install a fence

CONCLUSION: IS THERE A PLAUSIBLE ECONOMIC THEORY OF LEGAL HISTORY?

Both historians of the right, such as Posner, and of the left, such as Horwitz, make reasonable historical arguments that le-

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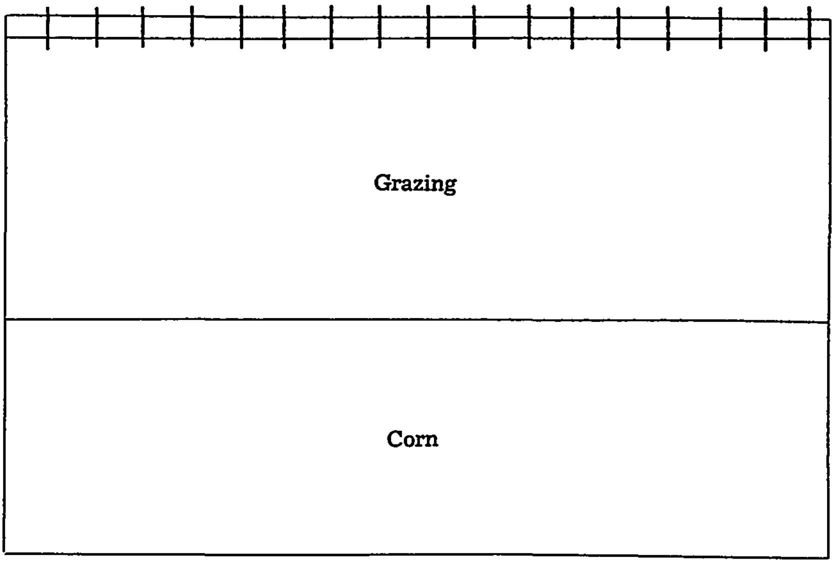
along its track which would reduce the expected accident costs to zero but which would cost $3.00 per train trip.

Railroad Track



Under the formula developed by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), failure to take a precaution is negligent if $B < PL$, where B is the burden of taking the precaution, P the probability of injury without precaution, and L the cost of the injury without precaution. As applied to this example, PL would equal the cost of accidents per trip without precautions ($2.00), and B would equal the cost of the precaution plus the cost of accidents that precaution could not prevent ($1.80 in the case of the cow catcher). Thus, it would be negligent for the railroad not to install the catcher, because the cost of installation, $1.00, plus the cost of accidents not prevented, $.80, is less than the cost of accidents without the cow catcher. It would not be negligent, however, for the railroad not to install the fence, for the cost of installing it (plus zero accident costs) is much greater than the cost of accidents without it. Therefore the railroad would not install the fence, and it would be liable to the farmer only if a cow was hit by a train not equipped with a cow catcher. The railroad would thus install the catcher rather than the fence.

Under a regime of strict liability the railroad would be liable for all injuries to the cattle, whether or not there was a catcher. There would be no accidents if the railroad would install a fence. In this situation the railroad still would not install the fence, however, because the cost per trip of installing a fence ($3) is significantly greater than the expected accident costs. Yet the railroad would install the catcher, because the cost of the catcher plus remaining liability gal rights are in large measure a product of economic self-inter-

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would be $1.80 ($1 for the catcher and $.80 expected accident liability), while the cost of not installing the catcher would be $2.00 per trip.

In short, regardless of whether the railroad operated under a negligence rule or a strict liability rule, it would install the same safety device. This conclusion does not depend on the particular figures used in this example and therefore holds generally:

Let CC = cost of cow catcher,
A_1 = cost of accidents without cow catcher,
A_2 = cost of accidents with cow catcher, and
F = cost of fence

If failure to install the cow catcher, but not the failure to install the fence, is negligent, then

(1) $CC + A_2 < A_1$, and
(2) $A_1 < F$

Under a negligence rule, the railroad will install a cow catcher because $CC + A_2 < A_1$. Under strict liability the railroad would install the fence rather than the cow catcher only if $CC + A_2 > F$, but from (1) and (2) it follows that $CC + A_2 < F$. The same result will hold if lack of a fence is also negligent, if lack of fence but not lack of cow catcher is negligent and if neither is negligent; in all cases the railroad will adopt the same safety measure under a regime of negligence or of strict liability.

The above illustration overlooks one point, however: the negligence rule gives the farmer incentives that the strict liability rule does not. Under the strict liability rule the farmer has no economic incentive to do anything, because he will be compensated when his cattle are injured, whether or not there is a cow catcher. Under a negligence rule, however, the farmer must absorb the cost of accidents that occur if the railroad is operating with a cow catcher. This expected cost to the farmer is $.80 per train trip. If the farmer can take an avoidance action of his own—for example, moving the cows to the corn field and growing corn along the tracks—for less than $.80 per train trip, then the farmer will be better off. In short, the negligence rule is generally a better one for parcelling out various avoidance actions to the person who is the lowest cost avoider. The efficiency advantages of the negligence rule are considerably less, however, if the strict liability rule is coupled with a rule of contributory negligence. For a more general discussion of the impact of negligence and strict liability rules on wealth maximization, see Landes & Posner, *supra* note 14, at 904-16; Posner, *Strict Liability: A Comment*, *supra* note 113; Posner, *A Theory of Negligence*, *supra* note 113; Shavell, *Strict Liability v. Negligence*, 9 J. LEGAL STUD. 1 (1980).

Of course, the above argument depends in part on the general adoption of the Hand formula developed in *Carroll Towing*, that a person is negligent if the costs of the untaken preventive measure are less than expected accident costs. As Professor Horwitz notes, most nineteenth century negligence cases were decided by juries, and they received instructions that in no way approximated Judge Learned Hand's economic formula. *See* Horwitz, *supra* note 48, at 909. *See also* Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811, 829-35 (1980) (general critique of the descriptive claim that courts apply the Hand formula in negligence cases). Justice Hand's formula is itself a descriptive claim, not a normative one. Hand's formula was an attempt to generalize a large number of apparently conflicting common law notions of negligence. For example, Posner argues that the "reasonable man" standard for determining negligence is really a simplification of the Hand formula: a reasonable person would take cost-justified precautions, not all conceivable precautions (which would include halting the liability-creating activity), and not no precautions at all. *See* R. POSNER, *supra* note 4, at 125.

est. Posner's view is more optimistic and more Hamiltonian: self-interest as expressed in the free market generates a distribution of goods and entitlements that maximizes overall wealth. The best legal system is therefore one that facilitates this distribution. Horwitz's view is, at least superficially, somewhat darker: clashes between groups with conflicting economic interests generally yield a set of rules that work to the benefit of the most powerful group, and to the detriment of weaker members of society. It turns out, however, that Posner's and Horwitz's theories are more compatible than might at first appear. Many of the differences Horwitz sees between successive legal eras in the eighteenth and nineteenth centuries can be explained in terms of wealth maximization. In addition, Horwitz's "subsidy" thesis is consistent with Posner's wealth maximization principle. Although Horwitz argues that entrepreneurs attempted to influence the development of nineteenth century law in a way which would transfer wealth in their direction, he neither maintains nor shows that judges intended to effect such transfers. In fact, many of his examples support Posner's claim that judges generally attempted to maximize wealth.

Despite the at least partial compatibility of their approaches, however, neither writer has developed an economic theory which plausibly explains legal changes in general. Horwitz's historical thesis is confined to those areas of the law in which economic interests are explicit: contracts, property and the relationship between technology and tort law. He makes no attempt to argue that the law of race discrimination or freedom of religion or speech evolved along similar lines. When Posner turns to the law of race discrimination, he abandons his theory of wealth maximization and opts for a distributive explanation: although discrimination by a majority against a minority might increase net wealth, anti-discrimination laws have arisen because the losses, although smaller in the aggregate, are proportionately greater as assessed upon each member of the injured minority, than the gains as distributed to each member of the benefitted majority.[180]

In short, one is left with the view that although economics may explain some aspects of legal change,[181] it does not ex-

180. *See* R. POSNER, *supra* note 1, at 385-86. The same argument applied in other areas of the law would subvert the entire theory of wealth maximization. Posner does not justify—at least, not economically—his conclusion that the principle of wealth maximization should not be applied to race discrimination.

181. *But see* Epstein, *supra* note 6 (arguing that Posner and Horwitz are

plain everything. At least, it does not explain everything very well.[182] One is inevitably drawn back to an argument like Ronald Dworkin's,[183] that individuals have some rights that they are entitled to assert even though the protection of those rights is not the best public policy as measured by utilitarianism, Pareto optimality, wealth maximization, or any other criterion of efficiency.

Once one accepts the view that some legal rights ought to be protected in spite of their inefficiency, then a gap has been opened in both the normative and the positive economic analysis of law. Just as economics cannot be a complete theory of jurisprudence, so too it probably cannot offer a complete description of legal history. In fact, just as one is impressed with the language of efficiency or wealth maximization that continually appears in common law decisionmaking, one must be equally impressed by the extent to which judges ignore efficiency and concentrate on distributive justice in civil rights cases.

Posner argues for the legitimacy of wealth maximization as a jurisprudential principle in both real and hypothetical market situations by relying heavily on the principle of consent.[184] Voluntary markets are wealth maximizing because people acting freely always consent to market transactions. Any free market exchange increases the wealth of the two parties to the

both wrong and that neither allocative efficiency nor the social struggle for scarce resources explains the development of common law rules). Professor Epstein's argument goes more to the effect of common law rules than to the intent that inspired them. For example, he argues that negligence could never effectively and predictably distribute wealth from one social class to another, *id.* at 1724-40, and that the impact of negligence rules on efficiency is too slight to be measured, *id.* at 1740-44. Epstein does not deal extensively with the question whether nineteenth century judges intended to redistribute wealth or to increase allocative efficiency when they were formulating the negligence rule. On the other hand, Horwitz's evidence is mostly of intent, not effect. Epstein's criticisms therefore apply more to economists than to historians, at least when the historians are arguing about why a particular legal rule was adopted, rather than whether the rule had its intended effect. Even with respect to the question of judicial intent, however, Epstein makes some arguments very convincingly: first, that judicial motivation was much more complex than either Horwitz or Posner suggest, *id.* at 1729; second, that common law judges were extraordinarily deferential to state legislatures, and that there was more legislative activity affecting the common law than Horwitz implies, *id.* at 1731; and third, that even during the nineteenth century, legislation had a much greater actual and perceived effect on wealth distribution than any change in a common law rule ever did, *id.* at 1732-38. *See generally* Rubin, *supra* note 6.

182. *But see* M. TUSHNET, *supra* note 12, at 18-44 (attempt at an economic explanation of one aspect of the American law of race relations).

183. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977).

184. *See* R. POSNER, *supra* note 1, at 94.

transactions, external effects notwithstanding. In addition, argues Posner, hypothetical market transactions as created by the common law are wealth maximizing because people operating in conditions of uncertainty would opt for them.[185] For example, if a rule of negligence for automobile accidents is more efficient than a rule of strict liability, then assuming that all drivers are identical and no one knows who will have an accident, most reasonable drivers would opt for the negligence rule. Future victims of automobile accidents have been compensated "ex ante" because at the time they made their choice it appeared to be favorable, in spite of the fact that after an accident has occurred they may become losers. In general, if one does not know which of two legal rules will accrue to his own benefit, he will opt for the wealth maximizing rule, for that rule stands a better chance of making him richer. In Posner's paradigm, this means that the common law can infer a kind of implicit consent to negligence rules for automobile accident cases.[186]

The problem with Posner's consent principle, as both a normative and a positive theory, even as modified by the doctrine of ex ante compensation,[187] is that it cannot explain long established doctrines of individual constitutional rights in the United States. The American doctrine of judicial review and the guarantees of the fourteenth amendment and the Bill of Rights are dedicated to the proposition that certain rights need to be protected even if the overwhelming majority of affected Americans have consented to the statute or practice that denies the right. Posner admits as much in his discussion of race discrimination. Perhaps in a state of uncertainty about what race I will be, I know only that there is a 20% chance that I will be a member of an unfavored race, and an 80% chance that I will be a member of a favored race. A discriminatory rule—for example, that members of the unfavored race may not be educated at public expense[188]—will injure minority members by $1,000 each, but it will benefit majority members by $500 each.[189] Adoption of the

185. *See id.* at 94-95.

186. *See id.* at 97-98. For a critique of Posner's theory of ex ante compensation as justifying consent in hypothetical market situations, see Coleman, *supra* note 41, at 534-40; Sager, *Pareto Superiority, Consent, and Justice,* 8 HOFSTRA L. REV. 913 (1980).

187. For an elaborate version of an argument similar to Posner's theory of ex ante compensation, see J. RAWLS, A THEORY OF JUSTICE, 136-83 (1971).

188. *See* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).

189. One alternative hypothesis is that in the state of uncertainty I may be ignorant not only about what race I will be, but also about what the relative

discriminatory rule is wealth maximizing in the Kaldor-Hicks sense, and the expected return to any person making his or her choice in this condition of uncertainty would be greater if the rule were adopted. In a condition of uncertainty it would be reasonable for me to vote for the rule. Nevertheless, the rule is unconstitutional even though it is wealth maximizing and even though the majority of Americans might consent to it. The principle of wealth maximization cannot justify an acceptable theory of race discrimination, and it cannot explain the development of the law of race relations after *Brown v. Board of Education*.[190]

Ever since Justice Stone's famous footnote in *United States v. Carolene Products*[191] it has been a principle of American human rights jurisprudence that the function of the courts in civil liberties cases is to isolate certain value claims from the political process—that is, to make irrelevant the principle of consent as manifested in the political process. People have certain rights in spite of the fact that recognition of those rights is not the most efficient public policy.

To some of Posner's critics, recognition of this fact has justified rejection of the entire economic theory of law.[192] Eco-

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proportions of the races will be and the respective amounts of injury or benefit that the discriminatory rule will impose on each race. In such a situation, it seems, it would be reasonable to opt for the wealth maximizing rule as well, although I might not know which rule would be wealth maximizing. *But cf.* J. RAWLS, *supra* note 187, at 161-66 (persons situated under "veil of ignorance" would choose principle of average utility). Posner argues as much when he develops his theory of ex ante compensation for drivers choosing under uncertainty whether to vote for a rule of strict liability or negligence. The problem of just how much "uncertainty" the state of uncertainty should contain is discussed in J. RAWLS, *supra* note 187, at 136-42.

190. 347 U.S. 483 (1954). The principle of wealth maximization may, however, explain some of the race relations case law before *Brown*. For example, a court upholding a statute that segregated schools might have concluded that the losses that would accrue to whites as a result of forced integration were greater than the gains that would accrue to blacks—or, even worse, that both whites and blacks would be losers. For example, in the *Berea College* case the Kentucky Court of Appeals found that integrated college education would lead to racial intermarriage, and that the results of the latter would be damaging to all of society. Berea College v. Commonwealth, 123 Ky. 209, 221-26, 94 S.W. 623, 627-29 (1906), *aff'd*, 211 U.S. 45 (1908).

191. 304 U.S. 144, 152 n.4 (1938). For superb recent discussions of the tension between the political process and the law of civil rights, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980).

192. *See generally* Englard, *supra* note 52, at 1168 ("My conclusion is that Posner has completely failed in his endeavor to establish an alternative moral system based upon an economic principle. [His] preferences for efficiency over equality and for wealth over happiness remain no more than his personal value judgments.").

nomics must either explain everything, or else the positive economic theory of legal explanation is so flawed that it is worthless. That is decidedly not the case. Ours is a society in which values are multiple and sometimes conflicting, and economic efficiency is only one of them. But indeed, it is one value and a very important one. Jurisprudents and historians must take its values seriously as well as recognize its limitations.