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Conflicts among Rights: An Economic Approach

Conflictos entre Derechos: Un Enfoque Económico

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ABSTRACT: Sometimes rights conflict, as when the right to religion interferes with the right to equality. Often law does not prioritize rights, leaving judges to resolve conflicts among them based on their own intuitions and beliefs. This paper explores a new principle for resolving such cases: rule against the party that could have avoided the rights conflict more easily. This principle builds on "least cost avoidance," a theory of liability developed by scholars in law and economics. The main objective of this paper is to adapt least cost avoidance to questions of rights. The secondary objective is to demonstrate the potential of economics in constitutional law. Economics has illuminated and influenced many legal fields. To influence constitutional law, economists must address the questions of lawyers and judges, meaning questions about constitutional doctrine. This paper presents a modest step in that direction.

KEYWORDS: justice, legal reform, legal norm, constitution, political system.

RESUMEN: A veces los derechos entran en conflicto, como cuando el derecho a la religión interfiere con el derecho a la igualdad. A menudo, la ley no prioriza los derechos, dejando que los jueces resuelvan los conflictos entre ellos basándose en sus propias intuiciones y creencias. Este artículo explora un nuevo principio para resolver estos casos: gobernar contra la parte que podría haber evitado el conflicto de derechos más fácilmente.

Este principio se basa en "evitar el menor costo", una teoría de la responsabilidad desarrollada por académicos en derecho y economía. El principal objetivo de este documento es adaptar la evasión de menores costos a las cuestiones de derechos. El objetivo secundario es demostrar el potencial de la economía en el derecho constitucional. La economía ha iluminado e influido en muchos campos legales. Para influir en el derecho constitucional, los economistas deben abordar las cuestiones de abogados y jueces, es decir, cuestiones sobre la doctrina constitucional. Este artículo presenta un modesto paso en esa dirección.

PALABRAS CLAVE: justicia, reforma legal, norma legal, constitución, sistema político.

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INTRODUCTION

The City of Philadelphia sent children in need to Catholic Social Services (CSS), a religious non-profit organization. CSS identified suitable foster parents for the children. CSS accepted married and single adults as foster parents. However, it refused to accept unmarried, co-habitating adults as foster parents. This presented a problem for gay couples. CSS rejects same-sex marriage on religious grounds. Consequently, it classifies gay couples—including legally married couples—as unmarried, co-habitating adults. Philadelphia claimed that CSS discriminates unlawfully on the basis of sexual orientation. CSS argued that the U.S. Constitution protects its religious beliefs. In this dispute, the rights to equality and religion collide. Which right should prevail?

This case, Fulton v. City of Philadelphia (2021), presents a new instance of an old problem: conflicts among rights. For judges, such conflicts create many difficulties. Often the same legal source, typically the constitution, recognizes both rights

without prioritizing them. Consequently, judges must decide for themselves which right should prevail, a perilous task. Rights implicate justice, freedom, fairness, and morality.

Since Plato (and probably before) people have disagreed about these values. Without clear guidance from law or philosophy, judges must invent answers themselves. Many of their answers are or appear to be political.

This article explores[1] a principle, first introduced in Barzun and Gilbert (2021), for resolving conflicts between rights. The principle can be summarized in one sentence: rule against the party that could have avoided the conflict more easily. In the following pages I will explain and defend this principle.

The principle draws inspiration from economics, which might seem like a surprising source. Economists usually address topics like monopoly, trade, employment, and inflation. Efficiency supplies their guiding value. Critics call economics the "dismal science." In fact, the dismal science can illuminate burning questions of rights, as I will try to show.

1. ON CONSTITUTIONAL LAW AND ECONOMICS

To situate my argument, I will begin with a little intellectual history. Prior to the 1960s, law limited the use of economics to tax, antitrust, regulated industries, and topics like monetary damages. This changed dramatically in the 1960s following the publication of two germinal works, The Problem of Social Cost by Coase (1960), and Some Thoughts on Risk Distributions and the Law of Torts by Calabresi (1961). With these papers, economics began to expand into more traditional areas of law.

Sixty years later, law and economics has become an intellectual force. The field received the highest recognition when Nobel Prizes in Economics were awarded to Ronald Coase and Gary Becker, two scholars who helped found it.

1 This original article is an extended version of remarks delivered to the Be Latin International Seminars 2021-1. For helpful comments I thank seminar participants and Charles Barzun.

Much law and economics scholarship focuses on "private law," including property, contracts, corporations, and torts (the law of accidents). In addition, scholars in this tradition have studied regulations, administrative law, family law, criminal law, bankruptcy, and the list goes on. Economics supplies an influential perspective across legal fields. However, in one important corner of law economic analysis has had relatively little impact. I am referring to constitutional law.

Why has constitutional law resisted economics? The problem is not a shortage of scholarship. Many scholars have applied economics to constitutional issues, and much of this scholarship (in this author's opinion) is excellent. However, much of the scholarship is irrelevant to the work of lawyers. Consider The Calculus of Consent by Buchanan and Tullock (1962). Among other topics, this famous book addresses voting rules. For the legislature to enact a law, should the constitution require majority rule, unanimity rule, or some other voting threshold? This question is profoundly important for governance, but not for the practice of law. In court, lawyers are not asked, "What voting rule is best?" They are asked questions like, "Does the constitution authorize this statute?", and "Did the executive violate citizens' rights?"

For economics to matter more in constitutional law, it must address the questions of lawyers. Instead of constitutional design, it must address constitutional doctrine.[2]

2. ON LEAST COST AVOIDANCE

In private law, economics has long addressed the questions of lawyers. Consider the following example from tort law. A train crashes into a truck at a crossing, destroying the truck and damaging the train. Who is liable for the loss, the train company or the truck's owner? This kind of question gets resolved in court. Lawyers make arguments—about fault, negligence, and so on—and judges make decisions.

2 Robert Cooter and I are writing a book that applies economics to public law, including constitutional doctrine. For a preview of the book, see Cooter and Gilbert (forthcoming).

Here is one way to think about liability in this case. How could the parties have avoided the accident? The train could have stopped to let the truck pass, or the truck could have stopped to let the train pass. Either solution would have worked. However, stopping the train would have been very difficult—or "costly" in the language of economics. Trains take much time and track to stop, and many passengers and cargo get delayed. In contrast, trucks stop quickly, and relatively few people and products get interrupted. Similarly, restarting a train is difficult, whereas restarting a truck is not. All things considered, stopping the truck would have been "cheaper" than stopping the train. So, make the truck's owner liable for the accident. This prevents future accidents by encouraging truck drivers to stop at train crossings (they do not want to pay for accidents). And it prevents those accidents at relatively low cost.

This is the theory of "least cost avoidance" (Calabresi 1970). This theory energized the economic analysis of accidents, and it relates directly to legal doctrine. A judge puzzling over the crash between the train and the truck could use least cost avoidance to resolve the case.

Economics can help resolve cases in at least three ways. First, it can supplant legal doctrine, as when a court ignores law and lets economics guide her decisions. Economists who think law should maximize efficiency might like to supplant legal doctrine. Second, economics can inform law, as when it helps clarify or illuminate doctrine. Third, economics can supplement legal doctrine. To illustrate, suppose the law did not answer the question about liability among the train company and truck owner, or the judge could not find the answer. The judge could use least cost avoidance to break the impasse.

The remainder of this paper fits into the third category above. It shows how economics can be relevant to legal doctrine by applying least cost avoidance to a hard problem in constitutional law. When the law does not provide an answer to a conflict among rights, economics can break the impasse.

3. CONFLICT AVOIDANCE IN FULTON

Earlier I stated a principle for resolving cases in which rights collide: rule against the party that could have avoided the conflict more easily. This is the conflict avoidance principle (Barzun and Gilbert, 2021). This principle translates least cost avoidance from tort law to constitutional law. Making the translation requires several steps, which I will demonstrate by analyzing Fulton.

First, I will assume for the sake of argument that Fulton is a hard case. By "hard case" I mean a case in which reasonable, conscientious judges are deeply uncertain about its proper resolution. Judges might feel uncertain because different legal sources—text, precedent, original understandings—support different conclusions. They might feel uncertain because the demands of justice are unclear. Or they might feel uncertain because they lack essential information. Scholars disagree on when (if ever) cases are "hard" and why (Hart 2012; Dworkin 1986).

I take no position on that issue. Instead, I simply assume the existence of some cases that the judges deciding them consider "hard." In such cases, judges would benefit from a default rule or "tiebreaker" to resolve the dispute. The conflict avoidance principle is a tiebreaker for hard cases involving aconflict among rights.[3]

Assuming Fulton is a hard case, we can proceed with the analysis. In the tort context, least cost avoidance assigns liability to prevent accidents. But cases like Fulton do not involve accidents. They involve conflicts among rights. Such conflicts create many problems. The parties are aggrieved, time and money go towards litigation, and judges decide cases (and make new precedents) with little to guide them. Some rights conflicts divide society. If the parties to the case could have avoided the conflict in the first place, they would have saved themselves and many others a lot of time and trouble. In the language of economics, the "social costs" of rights conflicts seem high, whereas the social costs of avoiding rights conflicts seem

3 In fact, the conflict avoidance principle might apply in a wider set of circumstances, but here I concentrate on rights conflicts.

relatively low. The conflict avoidance principle aims to reduce social costs by reducing rights conflicts. Instead of preventing collisions among vehicles, the principle prevents collisions among rights.

Some readers might object to this reasoning. They might argue that rights conflicts generate benefits, not costs, because they promote justice. In general, this might be true. But in hard cases I am not convinced. According to the definition above, a hard case is one in which the judge is uncertain what law and justice require. When judges face such uncertainty, their decisions might undermine justice rather than promote it. Given the uncertainty, judges will struggle to write convincing opinions, and their legitimacy may suffer. Meanwhile, the costs mentioned above will mount. In sum, rights conflict in general might be beneficial. However, I assume that rights conflict in hard cases are harmful.[4]

In the example involving the train and truck, we asked how the parties could have avoided the accident. We considered the possibilities (the train stops or the truck stops) and chose the cheaper option. In cases like Fulton, we must ask how the parties could have avoided the conflict. CSS could have avoided the conflict by referring children to gay couples. Alternatively, the side representing equality could have refrained from complaining about CSS's discrimination. Either approach would have prevented a conflict that generated a hard case. Which approach is cheaper? To answer we would have to assess the "cost" to CSS of sacrificing its religious beliefs and the "cost" to equality from tolerating discrimination. Of course, we cannot assess and quantify those "costs." If we could, the case would probably seem easy instead of hard, and judges would not need conflict avoidance to break a tie.

4 This assumption might be too broad. Perhaps rights conflicts are harmful in only a subset of hard cases. If we could identify that subset, then we could apply conflict avoidance there but not elsewhere. This paper concentrates on developing the conflict avoidance principle rather than identifying its precise domain.

The interests in religion and equality are important and admirable but too general. These interests existed before this case, and they will persist afterwards. To make conflict avoidance work, we must lower the level of abstraction. We must move away from amorphous, value-laden interests and towards more concrete matters that make the case manageable. To do this, focus on the particular interests of the parties that brought them into conflict. The particular interests are narrow: gay couples want children referred to them, and CSS does not want to refer children to gay couples.[5]

Again, some readers might object to this reasoning. They might argue that ignoring the general interests in religion and equality cuts the heart from the case. Here are two responses. First, if the general interests were manageable, then of course they should dominate the case. But we assume the case is hard, meaning the conflict between the interests is unmanageable. Second, courts often concentrate on particular instead of general interests in the way we describe. To illustrate, consider our accident. The train company might have a general interest in property rights (especially if it owns the tracks) and economic development. The truck owner might have a general interest in property rights (if, for example, he must cross the tracks to go home) and the right to travel. Both sides have interests in freedom and in living in a society safe from unnecessary risk. These interests are important and admirable. But courts usually ignore them. Judges set aside the broad issues and concentrate on specific, concrete questions, like "How hard would it have been to stop the truck?" Emphasizing particular instead of general interests is common in law—so common that we sometimes fail to perceive it.

5 Many rights conflicts involve the government as a party, as in Fulton v. City of Philadelphia. The conflict avoidance principle instructs courts to look beyond the government to the real parties in interest, meaning the people whose rights and interests the government is defending (see Barzun and Gilbert, 2021 pp. 32–34). In Fulton, the government is defending gay couples and children who seek foster care. For simplicity, I concentrate on the interest of gay couples only. Including the interests of the children would complicate the discussion without affecting the conclusion.

Once we have identified the particular interests that prompted the conflict, we can ask this question: "How could a reasonable person in each party's position have secured its particular interest without making its demand on the other side?" To begin, focus on CSS. Its particular interest is in not referring children to gay couples. How could it have secured that interest without making its demand of the other side—in other words, without insisting that the City permit it to discriminate? The answer is not clear. If CSS were a for-profit company, and if one employee had a religious objection to same-sex marriage, then we might ask whether another, non-objecting employee could cover referrals involving gay parents. That would be a natural way to avoid the conflict. But CSS is not a for-profit company. It is a religious organization committed to a set of religious beliefs. It probably does not employ people who reject those beliefs, and even if it does, permitting such employees to handle referrals involving gay couples would frustrate CSS's interest, not secure it. In sum, CSS does not seem capable of securing its particular interest without making its demand on the City.

Now consider gay couples. Their interest is in having children referred to them. Can they secure that interest without making their demand on the other side—in other words, without insisting that CSS not discriminate? The answer depends on whether they have other ways to connect with and foster children. The City had contracts with 30 organizations, of which CSS was one. Twenty-eight of those organizations did not discriminate against gay parents. So, gay parents had many options for getting referrals and fostering children. They could secure their interest relatively easily, without demanding that CSS stop discriminating.

Loosely speaking, CSS resembles the train and gay couples resemble the truck. The latter could avoid the conflict at relatively low cost. According to the conflict avoidance principle, CSS should win the case.

Suppose the facts were different. Suppose that just one organization referred children, and it was a for-profit company with many employees, one of whom objected to same-sex marriage on religious grounds. In that case, the company could avoid the conflict easily by having a non-objecting employee handle cases with gay couples. With no other organizations to choose from, gay parents could not avoid the conflict easily. They could not secure their interest in fostering children without demanding that the company stop discriminating. In this scenario, the couples would resemble the train and the company would resemble the truck. The gay couples should win the case.

As this example shows, the conflict avoidance principle depends heavily on facts, and it does not favor one value or another. Equality trumps religion under some facts, and religion trumps equality under others. The principle generates case-by-case decisions based on relatively concrete considerations. Of course, the principle is not value neutral. It is committed to avoiding difficult conflicts among rights.

CONCLUSIONS

Economics could enrich constitutional law as it has enriched many other legal fields. To do so, economics must address the questions of lawyers, meaning questions about doctrine. This paper applies economics to one important issue in constitutional doctrine, the adjudication of rights. In some hard cases, judges cannot determine which of two competing rights should prevail. The conflict avoidance principle offers a method rooted in economics for breaking the impasse.

I have presented the conflict avoidance principle only briefly. The principle raises many questions that I have not addressed. One important question involves objectivity and discretion.[6] To apply the principle, judges must identify "particular" interests and compare the parties' costs of avoiding them. This is not necessarily easy, and judges must exercise

6 Barzun and Gilbert (2021) address this question and other challenges to conflict avoidance.

discretion. They might exploit that discretion and decide cases the way they prefer, not the way the principle demands. This concern is real but not fatal. A hallmark of economic analysis is its comparative character. When assessing something, scholars of law and economics ask, "Compared to what?" The conflict avoidance principle will not always be objective and determinate, but the question is, "Compared to what?" Often the alternative is for judges to engage in free-form reasoning about abstract values over which they have no special expertise. Compared to that alternative, conflict avoidance seems more objective and determinate.

In 2021, the Supreme Court decided Fulton v. City of Philadelphia, 593 U.S. The majority ruled in favor of Catholic Social Services on surprising grounds. In brief, the Court concluded that the City's anti-discrimination policy was not "generally applicable," triggering a careful review that the City could not overcome. In reaching this decision, the Court rejected the analysis of both the appellate and district courts below, and it relied on contestable interpretations of state and local law. Justice Gorsuch wrote, "From start to finish, [the opinion] is a dizzying series of maneuvers." Justice Alito argued that the decision "might as well be written on the dissolving paper sold in magic shops."

Perhaps this is simply rhetoric, or perhaps the criticism is accurate. Perhaps Fulton is a hard case as I assumed above. And perhaps economics offers a better approach to resolving hard cases.

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