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ENTERPRISE AND AMERICAN LAW: 1836-1937. By Herbert Hovenkamp (Book Review)

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REHABILITATING NINETEENTH-CENTURY LAW

ENTERPRISE AND AMERICAN LAW: 1836–1937. By Herbert Hovenkamp.[1] Cambridge: Harvard University Press. 1991. Pp. x, 443. $39.95.

Contemporary American legal historiography is divided into two antagonistic approaches. The "Chicago School" venerates the nineteenth-century common law for its enduring ability to attain politically neutral, wealth-maximizing results.[2] At the other extreme, a variety of radical and populist approaches emphasizes the redistributive — and, hence, inherently political — function of the law of the same period.[3] In *Enterprise and American Law: 1836–1937*, Professor Herbert Hovenkamp self-consciously attempts to position himself between these two approaches (pp. 5–7). In arguing that economic theory offers a more accurate account of nineteenth-century judicial decisionmaking than does interest group politics,[4] he hopes to restore to nineteenth-century law the logical consistency of which left-leaning legal historians have robbed it (p. 6). At the same time, he purports to stop short of embracing the Chicago School emphasis upon politically neutral wealth maximization.[5] Although Professor Hovenkamp's attempt at a centrist historiography proves futile, the result is an illuminating exploration of the relationship between dominant economic and jurisprudential models in the nineteenth century.

Professor Hovenkamp believes that classical economic theory dominated American economic thought through the tumultuous century that lasted from the Jacksonian Era to the New Deal. Its core precepts were astonishingly simple: first, markets work well when left to themselves (p. 4); and second, state intervention inevitably risks disrupting the smooth functioning of the market by favoring certain interests over others (p. 4). According to Professor Hovenkamp, this suggests that classical economic theory "purported to develop rules for evaluating a legal regime's justness or fairness without regard to how

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[2] *See, e.g.*, George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 66, 81–82 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977).

[3] For a summary of radical and populist historiographical approaches, see Robert Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, *in* THE HISTORIC TURN IN THE HUMAN SCIENCES (Terrence MacDonald ed., forthcoming 1992).

[4] *See infra* note 14.

[5] The Chicago School position is founded upon the political neutrality of wealth-maximizing law and economics. In contrast, Professor Hovenkamp asserts that "[t]here is no dichotomy between science and politics" (p. 7). Professor Hovenkamp also levels substantive criticisms at the Chicago School position elsewhere. *See infra* notes 14–16.

its wealth happened to be distributed" (p. 3). Because it pursued wealth maximization at the expense of redistributive concerns, classical economic theory protected itself from blatantly political manipulation by interest groups. Hence, although he acknowledges its political origins (p. 4), Professor Hovenkamp maintains that classical economic theory was — albeit in a highly limited sense — politically neutral.

Professor Hovenkamp offers several illustrations of the impact of classical economic theory upon judicial decisionmaking. In "The Classical Corporation and State Policy" (pp. 9–64), he describes how preclassical notions of the corporation as an entity created by the state for a special purpose (typically with monopoly privileges) succumbed to classical notions of the corporation as a device for assembling and controlling large amounts of capital.[6] In "The Economic Constitution" (pp. 65–101), Professor Hovenkamp identifies the relationship between classical economic theory's distaste for state regulation and the Taney Court's (1836–1864) narrow reading of the Commerce Clause[7] (p. 81). In "The Rise of Regulated Industry" (pp. 103–68), he provides a fascinating economic analysis of regulation in the context of the *Slaughter-House Cases*[8] (pp. 116–24) and the railroads (pp. 131–68) and argues that classical economic theory mandated the competition-preserving result in both cases. "The Political Economy of Substantive Due Process" (pp. 169–204) asserts that "the judges who developed substantive due process . . . separat[ed] those laws that they saw as tending to the production of wealth from those that they did not" (p. 176). Finally, "The Labor Combination in American Law" (pp. 205–38) suggests that classical economic theory's distrust of cartels explains the nineteenth-century judiciary's hostility toward labor unions. Throughout these illustrations, Professor Hovenkamp emphasizes that American judges were familiar with at least the rudiments of classical economic theory, which they consciously employed in their decisionmaking (pp. 96–99).

According to Professor Hovenkamp, classical economic theory reigned supreme in judicial decisionmaking only as long as it dictated results that tended to maximize wealth.[9] In "The Antitrust Movement

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[6] According to Professor Hovenkamp, this shift is clearly illustrated in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837), which he characterizes as "fundamentally a dispute about state policy toward natural monopoly" (p. 6).

[7] U.S. CONST. art. I, § 8.

[8] 83 U.S. (16 Wall.) 36 (1873).

[9] Professor Hovenkamp argues that economic — and, more generally, scientific — models become dominant when they convince those who apply them (p. 7). At the same time, he maintains that common law judges "accepted the distribution of wealth and power they found and determined which rule would maximize wealth within that scheme." Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 660 (1983). Taken together, these

and the Theory of the Firm" (pp. 239–347), he explores the mounting tension between classical economic theory's abhorrence of redistributive state regulation and late nineteenth-century economic phenomena that urgently demanded state regulation, such as the rise of the giant corporation (pp. 241–67), the problems posed by monopolies (pp. 268–347), and a recalcitrant labor movement (pp. 207–08). By the 1930s, the imperfect competition models of Joan Robinson[10] (p. 356) and the institutional theories of Berle and Means[11] (pp. 357–62) seemed more capable of producing wealth-maximizing results than did classical economic theory. Hence, according to Professor Hovenkamp, classical economic theory lost its paradigmatic status and was subsequently abandoned by the judiciary.[12]

Professor Hovenkamp's account of the fortunes of classical political economy reveals his vision of economic and jurisprudential change in the nineteenth century. His position can be distilled to the following propositions: courts incorporated dominant economic models into judicial decisionmaking as long as these models maximized wealth under existing economic conditions; when these models — as a result of changes in these economic conditions — could no longer maximize wealth, courts shifted to emerging models that could. In other words, by employing different economic models over time, courts were continually involved in wealth maximization.[13]

Professor Hovenkamp's vision of economic and jurisprudential change is consistent with his assertion that judicial decisionmaking cannot be reduced to interest group conflict.[14] However, Professor

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ideas suggest that an economic model would be incorporated into judicial decisionmaking only as long as it was wealth-maximizing.

[10] *See* JOAN ROBINSON, ECONOMICS OF IMPERFECT COMPETITION (1933).

[11] *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[12] Although Professor Hovenkamp never explicitly argues as much, presumably he would illustrate the judiciary's abandonment of classical economic theory by pointing to its deference to New Deal legislation based on concepts of imperfect competition. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[13] Professor Hovenkamp's treatment of pre-classical or mercantilist economic theory suggests that he entertains a general vision of economic and jurisprudential change driven by wealth maximization, not merely one unique to classical economic theory. According to Professor Hovenkamp, pre-classical economic theory dominated American political economy only as long as its emphasis on monopoly privileges was perceived as "essential to economic development" (p. 18). When pre-classical theory was unable to legitimize the strongly competitive market that wealth maximization seemed to dictate, it was abandoned by the judiciary that, in the context of the Contract Clause, "responded [to vestiges of pre-Classical business subsidies] by developing a set of doctrines designed to limit state power to subsidize new business" (p. 28).

[14] Asserting that "[t]heory has always been an essential part of state policy," Professor Hovenkamp argues that "look[ing] exclusively at political concerns in economic policymaking results in a misleading and limited perspective on American legal development" (p. 6). This is reinforced by his assertion that classical economic theory insulated itself from interest group capture.

Hovenkamp appears to harbor a far more ambitious claim to political neutrality. He seems to argue that all wealth-maximizing judicial decisionmaking is politically neutral, not merely because it is above crass interest group politics, but also because wealth maximization is itself politically neutral. Both the timelessness of wealth maximization in Professor Hovenkamp's analysis and his restrained criticism of the political neutrality claimed for wealth maximization by the Chicago School[15] suggest such a conclusion.

Unfortunately, Professor Hovenkamp's apparent belief in the political neutrality of wealth maximization is irreconcilable with his espousal of a centrist position in the historiographical debate. To be sure, Professor Hovenkamp has energetically criticized the Chicago School for applying wealth maximization to areas of human experience, such as human rights in which he believes it should not be applied.[16] Furthermore, unlike the Chicago School, he displays little reverence for the common law.[17] Nonetheless, at least in the context of this book, the differences between Professor Hovenkamp and the Chicago School seem peripheral: both deem central the idea that wealth-maximizing judicial decisionmaking is politically neutral. Consequently, both are vulnerable to the general criticism that the political neutrality of wealth maximization is illusory.[18]

Neither Professor Hovenkamp nor the Chicago School can escape the fact that courts differ critically from theoretical economic models that focus only upon allocative efficiency and purport to leave redistributive choices to the political sphere.[19] Unlike economic models, courts construct — and then perpetuate — the initial set of entitlements by making unavoidably redistributive choices between compet-

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[15] Professor Hovenkamp disputes the Chicago School argument that both "efficiency [wealth maximization] and welfare refer to how big the pie is, but say nothing about how to divide it." Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 848 (1990). In contrast to the Chicago School, Professor Hovenkamp does not equate welfare maximization with wealth maximization; he asserts instead that welfare-maximizing decisions must be made once wealth-maximizing results have been attained. However, like the Chicago School, he never questions the political neutrality of wealth maximization itself.

[16] *See id.* at 833–35.

[17] Professor Hovenkamp rejects the Chicago School attachment to neoclassical economics as a timeless mechanism for achieving wealth maximization. This is evident in his view that "[w]hat is important is whether one model seems to work better [than another] in a given *context*." *Id.* at 827 (emphasis added). This does not, however, detract from his view that the goal of wealth maximization is itself a timeless and politically neutral one.

[18] *See, e.g.*, Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 627–33 (1980).

[19] The allocative-redistributive distinction central to the Chicago School argument is based upon the difference between politically neutral allocative efficiency (or wealth maximization) and politically nonneutral redistributive efficiency. *See, e.g.*, MILTON FRIEDMAN, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 5–6 (1953) (arguing that wealth-maximizing results may be derived from nonpolitical postulates).

ing entitlement claims. Because this initial set of entitlements dictates which of a given number of results is wealth-maximizing, the judicial pursuit of wealth maximization is — albeit in a limited sense — also redistributive. Furthermore, it is absurd to suggest that courts can pursue a politically neutral allocative efficiency while relying upon legislatures to make the appropriate redistributive choices. As courts are well aware, because legislatures fail all too often to perform the task of wealth redistribution, the adverse redistributive consequences of wealth-maximizing judicial decisionmaking are never corrected. Hence, Professor Hovenkamp has not established the political neutrality of nineteenth-century judicial decisionmaking simply by arguing that it opted for allocative efficiency. At times, he appears to admit as much. For example, his discussion of the "The Labor Combination in American Law" notes that late nineteenth-century courts consistently arrived at anti-labor decisions that — although perhaps allocatively efficient — had "devastating" redistributive consequences (p. 208).

Moreover, the politics inherent in judicial decisionmaking are inescapable even if wealth maximization could somehow be separated from wealth redistribution. Claiming that law *is* politics, critical legal studies scholarship postulates that because law is indeterminate, judges can give it specific content in the adjudication of cases only by invoking independent political commitments.[20] Wealth maximization — certainly at the level of generality at which Professor Hovenkamp describes it — seems similarly indeterminate and hence similarly susceptible to infinite judicial interpretation.[21] For instance, wealth maximization could dictate several different outcomes — more or less hostile toward labor — depending upon how one assesses the economic costs and benefits of different sets of entitlements.

The indeterminacy of wealth maximization is underscored by the fact that Professor Hovenkamp's claim that economic theory and judicial decisionmaking are linked in a one-way causal relationship is ultimately unverifiable. Professor Hovenkamp demonstrates only that dominant economic and jurisprudential models are *correlated*, and not — as he promises[22] — that the former *caused* the latter. However, it is possible to establish other, completely different correlations that are at least as persuasive as Professor Hovenkamp's argument. For

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[20] *See* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1677–79 (1982).

[21] *See, e.g.*, Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 990–91 (1985) (arguing that economic theory serves to imbue a system with objectivity and thus conceal its actual malleability).

[22] At the beginning of his book, Professor Hovenkamp argues that, in the realm of judicial decisionmaking, "theory was the dog and politics but the tail" (p. 6). This suggests a one-way causal relationship between economic theory and judicial decisionmaking.

example, when Professor Hovenkamp's identification of the Protestant roots of classical economic theory (p. 68) is combined with the widely accepted sociological nexus between Protestantism and capitalism,[23] it is equally convincing to identify Protestantism as the "cause" of economic and jurisprudential change.

More significantly, and more damagingly for Professor Hovenkamp's argument, it is often the case that statutory impulses, originating independently of and even counter to dominant economic models, influence the structure of the economy, which in turn generates dominant economic models. Recognizing this reverse relationship,[24] Professor Hovenkamp observes that the Sherman Antitrust Act of 1890,[25] with its overtly redistributive motivations, was passed during the dominance of classical economic theory (p. 242). As a result, it was part of judicial decisionmaking almost forty years before imperfect competition models became dominant (pp. 244–49). This suggests that law often influences and reorders the real world for reasons that have little to do with economics, which responds to this reordering by rethinking its own internal precepts.

These alternatives to Professor Hovenkamp's position point toward precisely the conclusion that he attempts so energetically to overcome. Explicitly political factors — such as the redistributive impulses of statutory law or Protestantism — imbue the law with the "taint" of full-blown interest group politics, often overriding the more neutral mandate of economic theory. Professor Hovenkamp's postulated one-way relationship between economic theory and judicial decisionmaking is no more than an intriguing, but ultimately unsuccessful, attempt to introduce order into a whirlpool of political cross-currents. By attempting to demonstrate that economic theory placed judicial decisionmaking above crass interest group politics, his analysis facilitates our understanding of the logical relationship between economic theory and judicial decisionmaking, but does little more.

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[23] The best known example of this thesis is MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., Scribner 1958) (1905).

[24] At the end of his discussion of the antitrust movement, Professor Hovenkamp notes that many of economic theory's notions of imperfect competition "were really borrowed from the law" (p. 347). However, immediately thereafter, he restates his thesis that nineteenth-century American lawyers "borrowed their ideas wholesale from classical political economy" (p. 347).

[25] 15 U.S.C. §§ 1, 2 (1988).