CONTENTS

SYMPOSIUM ON SECOND-BEST THEORY AND LAW & ECONOMICS

Symposium Editor
Richard S. Markovits

INTRODUCTION
Richard S. Markovits

THE ALLOCATIVE EFFICIENCY OF SHIFTING FROM A “NEGLIGENCE” SYSTEM TO A “STRICT-LIABILITY” REGIME IN OUR HIGHLY-PARETO-IMPERFECT ECONOMY: A PARTIAL AND PRELIMINARY THIRD-BEST-ALLOCATIVE-EFFICIENCY ANALYSIS
Richard S. Markovits

This article delineates a framework for doing third-best-allocative efficiency (TBLE) analysis and uses this approach in a partial and preliminary way to analyze the allocative-efficiency of shifting from negligence to strict liability. Although some theoretical issues are not pursued and no data is collected or used, the article does explore the theoretical significance of a substantial number of different types of Pareto imperfections whose presence is clearly relevant to the resolution of this issue. The article concludes by demonstrating that two highly respected, atypically-economically-sophisticated analyses of related issues have still failed to give adequate attention to the General Theory of Second Best.

IMPLICATIONS OF SECOND-BEST THEORY FOR ADMINISTRATIVE AND REGULATORY LAW: A CASE STUDY OF PUBLIC UTILITY REGULATION
Andrew P. Morriss

Second-best theory applies directly to those forms of regulation that explicitly attempt to accomplish efficiency goals. In this article, Professor Morriss examines the intellectual and legal history of public utility regulation and the impact of second-best theory on both. He concludes that despite the policy goal of increasing efficiency, neither the theoretical tools nor the legal doctrines in this area are adequate to ensure that regulation results in efficiency. The article concludes with a call for a more modest regulatory agenda that recognizes inadequacies in both theory and law.

COURTS, LEGISLATURES, AND THE GENERAL THEORY OF SECOND BEST IN LAW AND ECONOMICS
Thomas S. Ulen

The prevailing conclusions of law and economics flow from a straightforward application of traditional welfare economic theory to a consideration of legal rules and
institutions. The economic analysis perceives the need for legal rules, both generally and in particular, as a corrective for market imperfections, such as monopoly, public goods, external costs and benefits, and severe informational asymmetries, or the presence of high transaction costs. The General Theory of Second Best, however, holds that correction for one market imperfection will not necessarily be efficiency-enhancing unless there is also simultaneous correction for all other market imperfections. Applying that theory to the analysis of legal rules suggests the possibility that, for instance, a contract rule correcting for an imperfection in the market for consensual agreements may induce welfare losses elsewhere in the legal system or economy. This article suggests that scholars working in law and economics should be aware of the implications of Second-Best Theory and should attempt to explore the possible ill effects that might arise elsewhere from an otherwise efficiency-enhancing rule. However, common law judges who seek to foster efficiency ought to resist the impulse to incorporate second-best concerns into their rulings. If the legal system is to correct for second-best problems systematically, it should do so through legislation.

ENVIRONMENTAL TAXES AND THE DOUBLE-DIVIDEND HYPOTHESIS: DID YOU REALLY EXPECT SOMETHING FOR NOTHING? Don Fullerton 221 & Gilbert E. Metcalf

The “double-dividend hypothesis” suggests that increased taxes on polluting activities can provide two kinds of benefits. The first dividend is an improvement in the environment, and the second dividend is an improvement in economic efficiency from the use of environmental tax revenues to reduce other taxes such as income taxes that distort labor supply and saving decisions. In this paper, Professors Fullerton and Metcalf make four main points. First, the validity of the double-dividend hypothesis cannot logically be settled as a general matter. Second, the focus on revenue in this literature is misplaced. The article demonstrates that three policies have equivalent impacts on the environment and on labor supply. One of those policies raises revenue from the environmental component of the reform, another loses revenue, and a third has no revenue associated with it. Third, what matters is the creation of privately held scarcity rents. Policies that raise product prices through some restriction on behavior may create scarcity rents. Unless those rents are captured by the government, such policies are less efficient at ameliorating an environmental problem than are policies that do not create rents. Finally, the article distinguishes between two types of command and control regulations on the basis of whether they create scarcity rents.

SOME THOUGHTS ON LAW AND ECONOMICS AND THE GENERAL THEORY OF SECOND BEST John J. Donohue III 257

Professor Donohue responds to the other articles in this Symposium. In his review, he finds that, although the General Theory of Second Best is a powerful assault on modern economic theory, it fails to offer a clear replacement for its target. One can think of the theory more positively as making the general point that the predictions of economic models often require qualification or reversal once all real-world factors are considered. The great challenge for the theory is to avoid the purist fallacy of making the perfect the enemy of the good. Professor Donohue notes that if the General Theory of Second Best succeeded in undermining traditional law and economics as an aid to policymakers, one must at least consider whether the vacuum might be filled by even less promising modes of analysis.

SECOND-BEST THEORY AND THE OBLIGATIONS OF ACADEMICS: A REPLY TO PROFESSOR DONOHUE Richard S. Markovits 267
THE CHARLES GREEN LECTURE

MACHINE INTELLIGENCE AND LEGAL REASONING

JC Smith 277

While the computer can outperform world chess masters, it cannot manage natural language as well as a two-year-old child. The manifest precision and Boolean logical structure which permits the computer to perform complex calculations plays an insignificant role in legal reasoning where ambiguity is often an important characteristic of much of legal language. The future of legal practice will not lie so much in the direction of computers taking over the functions of lawyers, but rather in a union between the lawyer and the machine made possible by new and innovative ways of representing and manipulating legal knowledge in the machine.

THE KENNETH M. PIPER LECTURE

THE BROKEN PROMISES OF THE NATIONAL LABOR RELATIONS ACT AND THE OCCUPATIONAL SAFETY AND HEALTH ACT: CONFLICTING VALUES AND CONCEPTIONS OF RIGHTS AND JUSTICE

James A. Gross 351

The promises made in the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (OSHA) have been broken, not by uncontrollable impersonal market forces but by deliberate policy choices. These policy choices are at their roots moral and ethical more than they are legal, economic, or political. Rather than revisit the debates over proposals to amend these laws, this paper identifies and discusses the conflicting values and conceptions of rights and justice underlying not only the promises of the NLRA and the OSHA, but also the choices made in breaking the promises of those statutes.

STUDENT NOTES AND COMMENTS

A PREGNANT PAUSE: ARE WOMEN WHO UNDERGO FERTILITY TREATMENT TO ACHIEVE PREGNANCY WITHIN THE SCOPE OF TITLE VII’S PREGNANCY DISCRIMINATION ACT?

Cintra D. Bentley 391

Title VII’s Pregnancy Discrimination Act (PDA) defines discrimination on the basis of potential pregnancy as discrimination on the basis of sex. Therefore, the PDA protects a woman’s choice to become pregnant while maintaining her position in the workplace, thereby ensuring Title VII’s goal of equal opportunity in employment. This note argues that the PDA’s guarantee of equal opportunity in employment includes women who attempt to achieve pregnancy through the use of Assisted Reproductive Technologies.

THE END JUSTIFIES THE MEANS?

MONTANA v. EGELOFF INTOXICATES THE RIGHT TO PRESENT A DEFENSE

Thomas Webster 425

In Montana v. Egelhoff, the United States Supreme Court upheld a statute prohibiting juries from considering evidence of criminal defendants’ intoxication. Thus, the state’s burden of proving every element of a crime beyond a reasonable doubt was lowered for the mens rea element. The Court held that improving the state’s conviction rate was a valid justification for the prohibition. This comment argues that the Egelhoff precedent violates a defendant’s right to a fair trial because the defendant is not allowed to defend himself with relevant exculpatory evidence.