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Law and Economics in the Civil Law World: The Case of Brazilian Courts

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Conventional wisdom holds that economic analysis of law is either embryonic or nonexistent outside of the United States generally, and in civil law jurisdictions in particular. Existing explanations for the assumed lack of interest in the application of economic reasoning to legal problems range from the different structure of legal education and academia outside of the United States to the peculiar characteristics of civilian legal systems. This Article challenges this view by documenting and explaining the growing use of economic reasoning by Brazilian courts. We suggest that the rise of economic reasoning in Brazilian legal practice is driven not by a supply push from scholars, but by a demand pull due to ideological, political, and legal factors, leading to greater judicial empowerment in the formulation of public policy. Given the ever greater role of courts in policy making, the application of legal principles and rules increasingly calls for a theory of human behavior (such as that provided by economics) to help foresee the likely aggregate consequences of different interpretations of the law. Consistent with the traditional role of civilian legal scholarship of providing guidance for the application of law by courts, the further development of law and economics in Brazil (as well as in other civil law jurisdictions) is therefore likely to be mostly driven by judicial demand.

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I. INTRODUCTION

It is difficult to overstate the influence of law and economics on U.S. law.¹ Yet, in contrast to numerous instances of U.S. legal imperialism during the twentieth century²—culminating in what is sometimes referred to as the “Americanization of law”³ around the globe—the diffusion of law and economics elsewhere has apparently proceeded at a far slower pace.⁴ Common and civil lawyers alike repeatedly portray civil law jurisdictions as the province of abstract, doctrinal scholarship, with law students being instructed early in their careers to reason about the law exclusively in terms of the broad principles that it presupposes, rather than in terms of the consequences that it entails.⁵

A large body of literature documents the rejection of law and economics in the civil law world and offers an extensive list of possible

1. Supporters and detractors alike widely acknowledge the prominence of law and economics in the United States. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 2 (Denise Clinton et al. eds., 5th ed. 2008) (“Economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law.”); Anthony T. Kronman, Dean, Yale Law Sch., Remarks at the Second Driker Forum for Excellence in the Law at Wayne State University Law School (Sept. 29, 1994), *in* 42 WAYNE L. REV. 115, 160 (1995) (“[Law and economics] continues and remains the single most influential jurisprudential school in this country.”). The importance of law and economics has also been documented quantitatively. See, e.g., William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 759-63 (1996).

2. Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994) (book review).

3. France’s prestigious *Archives de philosophie du droit* devoted its entire forty-fifth volume to this theme in 2001 because the phenomenon was so robust. See 45 ARCHIVES DE PHILOSOPHIE DU DROIT: L’AMÉRICANISATION DU DROIT (R. Sève et al. eds., 2001) (authors’ translation).

4. EJAN MACKAAY, LAW AND ECONOMICS FOR CIVIL LAW SYSTEMS 26 (2013) (“In continental Europe, reception [of law and economics] came later, no doubt because of differences in language and legal system.”). For an earlier survey reporting the slow pace of the diffusion of law and economics outside of the United States, see 1 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS 65 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

5. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 67 (3d ed. 2007).

reasons for this apparent incompatibility.⁶ The catalog of potential culprits includes the alleged singularity of American ideology,⁷ divergent “attitudes toward legal science” and practice in the civilian world,⁸ the lack of mathematical and economic skill among civilian legal scholars,⁹ language barriers and the “inertia of traditional legal education,”¹⁰ the comparatively greater power of U.S. courts,¹¹ the different incentives presented to law professors,¹² the degree of protectionism within the legal profession,¹³ misconceptions about the comparative method,¹⁴ the influence of legal realism,¹⁵ other cultural differences,¹⁶ and even Marxist domination of economics faculties.¹⁷

6. Nuno Garoupa, *The Law and Economics of Legal Parochialism*, 2011 U. ILL. L. REV. 1517, 1519.

7. See Catherine Valcke, *The French Response to the World Bank's Doing Business Reports*, 60 U. TORONTO L.J. 197, 200 (2010).

8. See Juan Javier del Granado & M.C. Mirow, *The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes*, 83 CHI.-KENT L. REV. 293, 293 (2008); Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INT'L REV. L. & ECON. 277, 277-79 (1991) (describing the mixed reception of law and economics analysis in Germany).

9. Dennis W.K. Khong, *On Training Law and Economics Scholarship in the Legal Academia*, 1 ASIAN J.L. & ECON. issue 2, art. 1, at 1 (2010), <http://www.degruyter.com/view/j/ajle.2010.1.2.1005/ajle.2010.1.2.1005.xml?format=INT> (select the “Full Text PDF” hyperlink) (subscription required).

10. R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 INT'L REV. L. & ECON. 261, 262 (1991).

11. Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 INT'L REV. L. & ECON. 3, 3 (1997).

12. Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1568-1607 (2008); Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 REV. L. & ECON. 485, 486-87 (2007); J. Mark Ramseyer, *Law and Economics in Japan*, 2011 U. ILL. L. REV. 1455, 1455.

13. Garoupa, *supra* note 6, at 1517.

14. See Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265, 266-70 (1991); see also Roberto Pardolesi & Giuseppe Bellantuono, *Law and Economics in Italy*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS, *supra* note 4, at 244 (“[T]he hindrances encountered by the economic analysis of law stemmed, above all, from a misconception of both the economic and the comparative method.”).

15. See Garoupa & Ulen, *supra* note 12, at 1557-1610 (advancing the hypothesis that law and economics is “attractive only to those who have experienced . . . legal realism”); Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008) (describing how the lack of legal realism in Germany negatively influenced receptivity to law and economics).

16. Kenneth G. Dau-Schmidt & Carmen L. Brun, Essay, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602, 616 (2006).

17. Ramseyer, *supra* note 12, at 1456.

Although existing works focus on the resistance to law and economics by civilian scholars (as opposed to judges), the potential influence of economics on civil law courts has been neglected as even more far-fetched. Even if the progress of law and economics scholarship in some civil law countries has been acknowledged from time to time,¹⁸ conventional wisdom still holds that the legal profession in civil law jurisdictions is impervious to economic reasoning.

At least in Brazil, however, the assumed insulation of legal practice from economic reasoning is plainly mistaken. Although law and economics scholarship in Brazil is rapidly gaining ground, it admittedly remains far from dominant. Perhaps surprisingly, most of the action in integrating economic and legal reasoning has not taken place within the ivory tower, but outside of it. Unbeknownst even to most educated observers,¹⁹ Brazilian courts are increasingly receptive

18. See, e.g., Erich Schanze, *What Is Law and Economics Today? A European View*, in *NEW FRONTIERS OF LAW AND ECONOMICS* 99, 107 (Peter Nobel ed., 2006) (stating that in German-speaking Europe, “[t]here are hundreds of dissertations . . . containing major chapters on law and economics”); Carole M. Billiet, *Formats for Law and Economics in Legal Scholarship: Views and Wishes from Europe*, 2011 U. ILL. L. REV. 1485, 1485-86 (“Europe’s internationally visible law and economics outputs do not give the full measure of its total law and economics production . . .”); Ben Depoorter & Jef Demot, *The Cross-Atlantic Law and Economics Divide: A Dissent*, 2011 U. ILL. L. REV. 1593, 1593 (“[T]he gap between the United States and Europe regarding the development of law and economics is greatly exaggerated.”); Hans-Bernd Schäfer, *The Third in the Series on the Development of Law and Economics in Germany: Law and Economics in Germany*, EUR. ASS’N L. & ECON. (May 30, 2009, 7:17 AM), <http://ealeorg.blogspot.com/2009/05/third-in-series-on-development-of-law.html> (“The authors write in their national language and publish in national law journals.”).

19. See, e.g., ARMANDO CASTELAR PINHEIRO & JAIRO SADDI, *DIREITO, ECONOMIA E MERCADOS*, at xxv (2006) (“The movement of Law & Economics, established in the United States and Europe, has always suffered great resistance in Brazil, especially due to the lack of understanding of some paradigms and because it is viewed as a ‘gringo thing,’ given that it comes from a common law regime, perpetuating the basic, but common, error that only countries with such type of legal system could do Law & Economics.” (authors’ translation)); Decio Zylbersztajn & Rachel Sztajn, *Preface* to *DIREITO & ECONOMIA*, at v, vii (Decio Zylbersztajn & Rachel Sztajn eds., 2005) (“The field of Economics of Law, whose scope has expanded to include the field of Organizations, is little developed in Brazil. Except for the area of competition, other topics . . . are mostly ignored.” (authors’ translation)); Luciano Benetti Timm, *Direito e Economia: Lições do Nobel de Economia para o Direito*, BLOG L. & ECON. (Nov. 29, 2009), <http://www.bloglawandeconomics.com/2009/11/licoes-do-nobel-de-economia-para-o.html> (“It is well known that our jurists [in Brazil], well-versed in Latin and French, solemnly refused to adopt the suggestions coming from the Anglo-American legal system (‘common law’), as well as the legal and economic theories originating in English language.” (authors’ translation)); see also Jose R. Rodriguez, *The Persistence of Formalism: Towards a Situated Critique Beyond the Classic Separation of Powers*, 3 L. & DEV. REV., no. 2, 2010, at 39, 41 (“Formalism persists everywhere despite 100 years of critical legal theory. . . . While this is a general phenomenon, it seems to be especially acute in Brazil . . .”).

to economic arguments. They have taken the lead in employing economic concepts to illuminate the application of the law and have repeatedly shown concern with incentives, cost-benefit analyses, and the aggregate consequences of different legal regimes. Those who decry the resistance to economic analysis in Brazil may simply have been looking in the wrong places.

Moreover, we argue that the growing use of economic reasoning by Brazilian courts is not the product of blind imitation of foreign fads. Instead, it is the result of a profound transformation in the character and operation of the Brazilian legal system to the effect that courts are increasingly in the business of shaping and implementing core public policy. In other words, our hypothesis is that, conditioned on minimum levels of economic literacy, judicial involvement in policy making is the relevant variable to explain the rise of economic analysis in the practice of law.²⁰ This suggests that, contrary to prevailing assumptions in the literature, the spread of economic reasoning in Brazilian legal practice is driven not by a supply-side push by academics, but by a demand-side pull due to the changing structure of the law. While others have reflected on the new role for the common law in “the age of statutes,”²¹ we address the implications of what we term the civil law in “the age of judicial empowerment.”²² We leave it for future authors to determine the extent to which the Brazilian experience is representative of developments in other civil law jurisdictions.

20. Nuno Garoupa and Thomas Ulen link the rise of law and economics to the ascent of legal realism as “a skepticism of formalism and a concern for the actual effects of law on targeted behavior.” Garoupa & Ulen, *supra* note 12, at 1562. For an earlier articulation of a similar point, see Edmund W. Kitch, *The Intellectual Foundations of “Law and Economics,”* 33 J. LEGAL EDUC. 184, 184 (1983) (“[L]aw and economics evolved out of the agenda of legal realism.”). *But see* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 441-42 (1990) (“The relation between law and economics and legal realism . . . is equivocal. . . . Economic analysis of law resembles legal realism primarily in claiming that legal rules and institutions have functional, social, explanations and not just an internal, lawyer’s, logic; in this it is profoundly antiformalist. But in its emphasis on law’s functionality the law and economics movement is closer to the father of legal realism, Holmes, than to the legal realists themselves with their emphasis on liberal meliorism.”). While we agree that concern for the actual effects of law explains the growing interest in law and economics, we do not view such concern as synonymous with a rejection of formalism altogether, but rather as a result of the changing structure of the law. *See infra* Part III.C.

21. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

22. The recent trend toward ever greater judicial empowerment around the globe is well documented. *See, e.g.*, Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 71 (2004) (“[I]n numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.”).

This Article proceeds as follows. Part II defines what we mean by the use of economic reasoning in Brazilian courts. Part III outlines the ideological, political, and legal factors that are spurring judicial demand for economic insights in the adjudication of legal disputes. Part IV documents and analyzes the use of economic reasoning in paradigmatic judicial decisions by Brazil's higher courts. Part V concludes by suggesting possible implications of these developments for legal education and scholarship in civil law jurisdictions.

II. ECONOMIC REASONING IN COURT

Before proceeding to substantiate our claim that Brazilian judges have increasingly employed economic reasoning in their opinions, we should clarify what we mean by the use of economic reasoning by Brazilian courts. For these purposes, it is helpful to begin by clarifying what it is not.

First, the use of economic reasoning in court is not to be confused with the recognition that certain legal developments are at least partially influenced by economic considerations.²³ This should be a fairly uncontroversial proposition even in civil law jurisdictions. Prominent civil law scholars have long explained the evolution of key legal institutions and rules as practical responses to shifting economic needs.²⁴ Also, it is no secret that a number of legal rules (such as the legal restrictions on self-contracting and self-dealing under Brazil's civil and corporate law, among many others) are implicitly based on the behavioral assumption that an individual acts as a self-interested maximizer of their own utility (i.e., as a *homo economicus*)—a propensity that can at times clash with societal objectives. Moreover, economic concepts such as monopoly, markets, and competition are known to be an integral part of antitrust law.²⁵

Still, the fact that a legal rule is inspired by economic considerations does not necessarily entail the use of economic

23. 1 MAX WEBER, *ECONOMY AND SOCIETY* 654-55, 883 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968). "Economic factors can therefore be said to have had an indirect influence only." *Id.* at 654-55. "Economic conditions have . . . everywhere played an important role, but they have nowhere been decisive alone and by themselves." *Id.* at 883.

24. *See, e.g.*, TULLIO ASCARELLI, *PANORAMA DO DIREITO COMERCIAL* 22 (1947) (explaining the emergence of a separate body of commercial law to manage the inadequacy of Roman-canonic law to handle the economic exigencies of a capitalist system).

25. *See* Posner, *supra* note 11, at 4 (attributing the development of law and economics in the United States in large part to "the curious American fascination with monopoly"). The very field of antitrust law, however, was comparatively a latecomer in civil law jurisdictions.

reasoning by courts. When a judge applies the Brazilian Civil Code to declare void a nonauthorized sales contract entered into between an attorney (representing the principal) and the same attorney (acting for herself), economic reasoning will most likely be absent from her decision²⁶—and appropriately so. In most cases where economic considerations are embedded in legal rules, the usual tenets of legal reasoning and interpretation will still suffice in their application.

Second, it is also important to distinguish the use of economic reasoning by Brazilian courts from the original aspirations of the law and economics movement of U.S. lineage.²⁷ As articulated by Richard Posner, “[E]conomic analysis can illuminate, reveal as coherent, and in places improve [the law].”²⁸ These are academic ambitions of both descriptive and normative character—the chief idea being that economics can be used both to explain the underlying logic of the law and to evaluate whether the current legal regime is desirable from a cost-benefit standpoint. Accordingly, such a project has been widely criticized as subordinating the law to economics.²⁹

Conversely, the use of economic reasoning by Brazilian courts is the appropriation of key tenets and lessons from economics (especially microeconomics) as an instrument for the application of legal rules or

26. See CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 117 (Braz.) (“Except as authorized by law or by the principal, the contract that the attorney, in his interest or on behalf of someone else, celebrates with himself is annullable.” (authors’ translation)). The economic rationale for such a provision is straightforward: the underlying assumption is that a self-interested attorney would favor his own interests over those of the principal; as a result, the law offers as a default rule the regime that the parties presumably would have wanted—one that forbids the attorney from acting in a conflicted transaction.

27. This is emphatically not to suggest that the use of economic reasoning in courts as we describe it here does not exist in the United States. It certainly does, having in fact preceded the law and economics movement. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (laying out Judge Learned Hand’s famous formula that uses cost considerations to establish negligence); see also PAUL H. RUBIN, *BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES* (1983) (reviewing common law judges’ uses of economics). Since the inception of the law and economics movement, the use of economic arguments in court has flourished, decisively shaping the development of various areas of law. See, e.g., Landes & Posner, *supra* note 1, at 386 (“The impress of economics is strong on the calculation of damages in tort, contract, securities, and other types of cases and even on monetary relief in divorce cases. . . . Judges are increasingly receptive to economic arguments . . .”); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342 (2005) (describing the impact of finance and economic theory on the development of U.S. corporate and securities law).

28. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, at xix (6th ed. 2003).

29. See, e.g., Kronman, *supra* note 1, at 161 (decrying the “built-in imperial instinct” in law and economics, where “[t]he case is there to serve the theory, and not the other way around”).

principles.³⁰ Economic insights illuminate legal interpretation not only when the law implicates economic concepts (as is often the case in antitrust and monetary law), but also when the legal principles or rules in question call for a *forecast* of the likely consequences of certain events or legal regimes. Economics is thus at the service of the law, not the other way around. In this context, the use of economics to predict factual consequences of legal norms (positive law and economics) matters, but efficiency considerations (normative law and economics) carry comparatively little weight.³¹

For a simple illustration, consider the well-established rule that the victim of an unlawful act is entitled to recover lost profits (*lucrum cessans*).³² The rule requires monetary damages to be fixed so as to put the aggrieved party in the position it would have been but for the unlawful act.³³ The concrete application of this rule thus calls for a prediction of what the victim's profits would have been had the unlawful act not been committed.³⁴ And yet the law provides no theory of human behavior on which to ground such a prediction. Be it viewed as a science, an art, or a social practice, legal thinking is essentially normative in character: it speaks about what ought to be, but has comparatively little to say about how the social world works, which is precisely the province of economics, as well as of other social sciences.

In the Special Appeal 771.787, the issue before Brazil's Superior Court of Justice (*Superior Tribunal de Justiça*—STJ)³⁵ was whether the government's imposition of price ceilings on sugar cane derivatives

30. This one is a broader definition of the practice of law and economics than typically employed by the scholars investigating the reception of law and economics outside of the United States. For instance, in a widely cited article, Garoupa and Ulen consider law and economics as the application of economics to nonobvious areas of law. Garoupa & Ulen, *supra* note 12, at 1567 (“For our purposes we adopt a definition suggested to us informally by Professor Louis Kaplow: ‘law and economics’ is the application of economic analysis to any area of the law except those areas where its application would be obvious.”).

31. For discussion of this topic, see Mattei & Pardolesi, *supra* note 14, at 274 (predicting, correctly, that allocative efficiency would not necessarily be the “polar star” of the practice and study of law and economics within the civil law tradition).

32. 6 RONALD J. SCALISE JR., LOUISIANA CIVIL LAW TREATISE: LAW OF OBLIGATIONS § 4.5 (2d ed. 2014).

33. For the rule's current formulation under Brazilian law, see articles 402, 403, and 927 of the Brazilian Civil Code. C.C. arts. 402-403, 927 (Braz.).

34. John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 GEO. J. INT'L L. 61, 62 (2004).

35. S.T.J., Resp. No. 771.787, Relator: Ministro João Otávio de Noronha, 15.04.2008 (Braz.). The STJ is Brazil's court of last resort on the interpretation of federal law other than constitutional law. Federal law accounts for the lion's share of Brazil's legal system.

that were below the actual cost of production was unlawful and, if so, what the appropriate measure of damages payable to the aggrieved producers should be.³⁶ In approaching these issues, Justice Herman Benjamin, in his dissenting opinion, relied squarely on economic lessons.³⁷ Specifically, the opinion rejected the measure of damages claimed by the plaintiffs, which was calculated solely based on the difference between the price ceiling imposed by the government and the price that sugar cane derivatives would have been if the price ceiling had been duly fixed according to the actual costs of production.³⁸

Quoting elementary lessons from a Portuguese law and economics textbook on the concept of demand elasticity, Justice Benjamin concluded that the proposed formula would likely overestimate the amount of damages because the artificially low price likely increased the amount of the product sold.³⁹ As Justice Benjamin himself emphasized, such use of economic insights was instrumental in the application of the law.⁴⁰ In his words, although his analysis “resorted to economic tools and concepts in its interpretative effort,” it was “purely legal” in nature.⁴¹

This simple, almost trivial example is, however, illustrative of a broader trend.⁴² In this case, as in others, the use of economics explicitly replaces more intuitive forms of reasoning or rules of thumb. An important—and, as we shall argue, growing—number of legal norms in Brazil require adjudicators to ponder over the likely factual consequences of different events or legal regimes. Although the trend is partly driven by advancements in economic theory vis-à-vis the distant past (as is the case in the more nuanced application of the ancient legal concept of lost profits), it was significantly bolstered by a transformation in the underlying structure of the legal system, to which we now turn.

36. *Id.*

37. *Id.* (Benjamin, J., dissenting).

38. *Id.*

39. *Id.* (quoting VASCO RODRIGUES, ANÁLISE ECONÓMICA DO DIREITO 24 (2007)).

40. *Id.*

41. *Id.* (authors’ translation).

42. The trends we identify throughout the Article refer to the greater *degree* of judicial involvement in policy making and, therefore, the greater demand for tools (including those provided by economics) to assist in the forecast of the factual consequences of different legal regimes. There is no question that courts’ involvement in shaping public policy, as well as their resort to teleological modes of interpretation, has long historical pedigrees.

III. THE RISE OF ECONOMIC REASONING IN JUDICIAL ADJUDICATION: THE DRIVING FORCES

One could be tempted to view the greater use of economic reasoning in a Latin American country as the artificial transplant of foreign academic fads that have corrupted the cohesion and purity of the civil law tradition. We suggest that such an assumption is unwarranted because it places too much weight on the role of intellectual elites while failing to capture the broader societal and legal forces at play. Our basic hypothesis is that contemporary Brazilian law—a typical exemplar of a civil law jurisdiction⁴³—is particularly amenable to economic reasoning for related and mutually reinforcing (1) ideological, (2) political, and (3) legal factors, to which we now turn.⁴⁴

A. *The Ideological Factor: The Rise of Progressivism*

The first driving factor of the growing demand for economic reasoning is the ascent of progressive ideology as the intellectual underpinning of the modern Brazilian state. Progressivism—here, loosely understood as the antithesis of conservatism⁴⁵—is the ideology of advancement and development, which is based on a strong belief in human capacity to deliberately alter reality and ameliorate human condition. In Brazil, the rise to power of President Getulio Vargas in the early 1930s marked the triumph of progressivism as the dominant state ideology, which resorts to the “instrumental use of law” as a tool for “social engineering.”⁴⁶ While conservatism typically presupposes

43. Brazil is consistently classified as a civil law jurisdiction subject to strong French influence. See Mariana Pargendler, *Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil*, 60 AM. J. COMP. L. 805, 810 (2012). Nevertheless, as one of us has previously argued, Brazilian law has long incorporated influences from both civil and common law origins. See *id.*; see also Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043 (2012) (describing the historical evolution and contingency of legal family classifications).

44. We developed an earlier version of this argument in Mariana Pargendler & Bruno Meyerhof Salama, *Direito e consequência no Brasil: em busca de um discurso sobre o método*, REV. DE DIREITO ADMINISTRATIVO, Jan./Apr. 2013, at 95.

45. For present purposes, the term conservatism can be understood as a positional ideology against dismantling existing institutions, rather than an ideational one, which provides specific views about how society ought to be organized. See generally Samuel P. Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454, 455-57 (1957) (discussing characteristics of conservative ideology).

46. See José Reinaldo de Lima Lopes, *Raciocínio Jurídico e Economia*, REV. DE DIREITO PÚBLICO DA ECONOMIA, Oct./Dec. 2004, at 137, 149 (authors' translation).

the wisdom embedded in existing rules and institutions, progressive ideology constantly puts it to the test.

The state that embraces the mission of actively ordering and perfecting society—in short, the progressive state—is the institutional incarnation of progressive ideology. Brazil’s Constitution of 1988 is far from timid about its progressive ambitions. Article 3 explicitly articulates that “ensuring national development,” “eliminating poverty and marginalization, and reducing social and regional inequalities,” as well as “promoting the well-being of all,” are “fundamental objectives of the Federative Republic of Brazil.”⁴⁷

Brazil’s progressive state is significantly involved in the pursuit of a series of concrete public policy objectives—be they the elimination of illiteracy, the reduction of pollution, the promotion of industrialization, or the fight against domestic violence. The formulation and implementation of public policy, in turn, requires the tailoring of legal instruments and solutions to the goals of achieving concrete normative ends. In order to accomplish such a task, the traditional techniques of legal reasoning—based on grammar, history, logic, and internal coherence—no longer suffice. Once the legal *ends* are given, the legal debate turns to the question of the proper *means* to further such ends.⁴⁸

The legal controversy involving Law 11.340 of 2006 (“Lei Maria da Penha”), a statute designed to create “mechanisms for deterring domestic and familial violence against women,” is illustrative of the use of social science work to evaluate the effectiveness of certain legal means to achieve the desired ends.⁴⁹ The main legal debate surrounding the statute did not lie in the legitimacy of its objectives (which were fairly uncontroversial⁵⁰), but in whether the mechanisms provided by the statute were consistent with such goals. Accordingly, the Brazilian Supreme Court (*Supremo Tribunal Federal*—STF) needed to decide the constitutionality of the statutory provision that

47. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 3 (Braz.) (authors’ translation).

48. See Richard A. Epstein, *Positive and Normative Elements in Legal Education*, 8 HARV. J.L. & PUB. POL’Y 255, 257-58 (1985).

49. Lei No. 11.340, de 7 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 08.08.2006 (Braz.) (authors’ translation).

50. The exceptions prove the rule. A lower court judge who declared the statute unconstitutional for depriving men of their regular means of control of women—arguing that “the world is, and shall continue to be, masculine”—was sanctioned by Brazil’s judicial oversight body, the National Council of Justice (*Conselho Nacional de Justiça*—CNJ). S.T.F., MS 30.320, Relator: Ministro Marco Aurélio, 20.02.2011 (Braz.). The conviction was later reversed by the STF. *Id.*

conditioned the criminal prosecution of wrongdoers on the “representation” (request) of the victim.⁵¹

In a split decision, the court ultimately decided to grant an interpretation “in accordance with the constitution,” permitting the criminal prosecution of offenders notwithstanding the absence of a representation by the victim.⁵² The court’s majority considered domestic violence victims’ well-known reluctance to file representations against their spouses, as documented in sociological studies presented to the court, and concluded that the imposition of such a requirement would effectively “eliminate the protection” afforded to women under the constitution,⁵³ rendering the statute particularly inept to accomplish its desired objective of curbing domestic violence.⁵⁴ Tellingly, the disagreement expressed by Justice Cezar Peluso in his dissent hinged at least partially on the presumed *concrete factual consequences* of mandating or dispensing with the victim’s representation—the type of inference typical of social sciences such as economics, but foreign to the deductive mode of legal reasoning that is said to characterize the civilian tradition.⁵⁵ A behavioral theory—such as that offered by economics and other social sciences—about how actors respond to different rules and policies is therefore badly needed.

Portraying progressivism as a propeller of law and economics may sound oxymoronic, especially for American audiences.⁵⁶ The law and economics movement that flourished in the United States in the 1960s was premised on a *laissez faire* agenda that is still routinely labeled as “conservative.”⁵⁷ In the Brazilian legal context, however, the

51. *Id.* (authors’ translation).

52. *Id.* (authors’ translation).

53. S.T.F., ADI No. 4.424, Relator: Ministro Marco Aurélio, 09.02.2012 (Braz.) (authors’ translation).

54. *Id.*

55. *See id.* (Peluso, J., dissenting) (authors’ translation). Noticeably, Justice Peluso’s dissenting opinion specifically referred to “studies of several entities of civil society and the Applied Economic Research Institute (IPEA)” and to “several elements brought by people from the fields of sociology and human relations,” including “public hearings that presented data justifying the [relevant] conception of the criminal lawsuit.” *Id.* (authors’ translation).

56. *See* Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805, 810 (2000) (“Progressive legal thought from roughly 1925 to 1960 [in the United States] is characterized by an unprecedented separation of law and economics.”); *see also* Herbert Hovenkamp, Essay, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149 (1995) (explaining that progressive legal thought outpaced American progressivism).

57. *See, e.g.*, STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 90-134 (Ira Katznelson et al. eds., 2008); *see also* RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 280 (2003) (arguing that Friedrich

rise of progressivism has gradually undermined the strong legal formalism that conceived legal categories as exclusively derived from history, logic, or reason.⁵⁸ The advancement of progressive ideology in Brazil opened space for the type of policy-based reasoning that so distinctively characterizes U.S. law to the present day and that is often deemed a catalyst of forward-looking approaches within law.

B. The Political Factor: The Ascent of the Judiciary

The growing demand by lawyers and judges for theories of human behavior and social interaction is due not only to the widespread pursuit of public policy objectives by the Brazilian progressive state, but also and especially to the ever greater role of courts in the formulation and implementation of such policy. Since 1988, the judiciary has shifted from the periphery to the center of political power in Brazil.⁵⁹ Following redemocratization, the STF took on the role of arbiter of the country's great institutional and political conflicts, a function previously exercised by the armed forces. Oscar Vilhena Vieira aptly termed the country's current regime as a "supremocracy."⁶⁰

The worldwide trend toward the expansion of judicial power assumed a particularly extreme configuration in Brazil. The avenues for judicial review of legislation, arguably the main mechanism for courts' interference in policy making, are exceptionally broad. Whereas the vast majority of jurisdictions adopt either concentrated or

Hayek's position, in requiring judges to enforce custom without regard to consequences, is antithetical to economic analysis). *But see* Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919, 919 ("Coase's insights can yield some left-leaning implications for the understanding of law and its relation to economics."); Pierre Schlag, *Four Conceptualizations of the Relations of Law to Economics (Tribulations of a Positivist Social Science)*, 33 CARDOZO L. REV. 2357 (2012) (comparing the approaches of Frank Knight, Ronald Coase, Richard Posner, and Cass Sunstein).

58. MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 91 ("While common lawyers tend to think of the division of the law as conventional, i.e., as the product of some mixture of history, convenience, and habit, the influence of scholars and particularly of legal science has led civil lawyers to treat the matter of division of the law in more normative terms. . . . [D]efinitions and categories are thought to be scientifically derivable from objective legal reality.").

59. *See* MATTHEW M. TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL 161-63 (2008); Marcos Paulo Verissimo, *A constituição de 1988, vinte anos depois: Suprema Corte e ativismo judicial "à brasileira"*, 4 REV. DIREITO GV 407 (2008) (stating that the Constitution of 1988 "has transformed [the STF] into one of the country's major political actors" (authors' translation)).

60. Oscar Vilhena Vieira, *Supremocracia*, 4 REV. DIREITO GV 441 (2008) (authors' translation).

diffuse modes of judicial review (that is, when they do not fail to recognize *ex post* judicial review altogether),⁶¹ Brazilian law contemplates both forms of constitutional challenges to legislation.⁶² This hybrid system, combined with a long, detailed, and ambitious constitution,⁶³ creates enormous leeway for judicial protagonism.

This new prominence of the judicial branch in public policy making has triggered related innovations in institutional design. Law 9.868 of 1999, which regulates the procedure for concentrated judicial review, innovates by permitting the STF to call public hearings (*audiências públicas*) for “the testimonies of persons with experience and expertise on the subject.”⁶⁴ By admitting public hearings before the Court, the statute both underscores and reinforces the Court’s role in shaping public policy.

This function, indeed, is more explicit. Breaking with the classical separation of powers⁶⁵ and the archetypical conceptions of the role of courts in civil law jurisdictions,⁶⁶ the STF is presently constitutionally empowered both to issue “binding statements” (*súmulas vinculantes*) that must be followed by lower courts and other branches of government and to pick its cases based on what it deems to be their “general repercussion.”⁶⁷ Law 11.418 of 2006 defines

61. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 7-8 (2003).

62. For an overview in the English language, see, for example, Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUD. L. REV. 99 (2006), and Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J.L. & TRADE AM. 291 (2000).

63. Carlos Portugal Gouvêa, *The Managerial Constitution: The Convergence of Constitutional and Corporate Governance Models* (July 2, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2288315>.

64. Lei No. 9.868, de 10 de Novembro de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.11.1999 (Braz.) (authors’ translation).

65. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (discussing whether an American-style separation of powers is an appropriate model for civil law countries).

66. See Rodriguez, *supra* note 19, at 52 (“The [civilian] judge subsumes [facts to legal provisions] because the political discussion is supposed to have been resolved in the Parliament: society has already decided on its differences and adopted a rule of conduct—the general and abstract law—that will serve as a reference for settling potential conflicts on that particular subject.”).

67. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 543-A, §§ 3, 7 (Braz.) (effective Mar. 2016) (authors’ translation). Articles 976-985 of Brazil’s newly enacted Code of Civil Procedure create the “incident for the settlement of repetitive claims” (*incidente de resolução de demandas repetitivas*), which aims to provide a uniform solution whenever the same legal question arises in several lawsuits. The decisions in such incidents are binding on all future cases. Interestingly, the new Code also expressly permits the

“general repercussion” as the “relevant questions from an *economic*, political, social and legal standpoint that transcend the subjective interests of the case.”⁶⁸ It should come as no surprise that, having been asked explicitly by the legislature to factor economic considerations into their decisions, the STF has obliged.

Indeed, the STF has expressly asserted that correcting a “forecast error by the legislator” is a legitimate ground for judicial review.⁶⁹ But then again, the business of forecasting falls outside the scope of the law’s essentially normative enterprise. In order to accomplish such a task, judges face a choice between resorting to common sense or personal experience on how the world works⁷⁰ or employing more systematic knowledge generated by the social sciences, such as economics.

C. *The Legal Factor: The Changing Structure of Law*

Finally, the greater judicial role in policy making does not operate in a legal vacuum. On the contrary, under a system that purports to uphold the rule of law, changes in the structure of legal rules accompanied growth in the power of the judiciary.⁷¹ These changes, in turn, create increasing demand for economic reasoning in two ways: by directly incorporating economic consequences into the content of legal rules and by rendering the application of a given legal regime conditional on the desirability of its consequences.

In its canonical form, a legal rule contains both a description of a (past) fact and its legal consequences. Article 121 of Brazil’s Criminal Code offers a representative example: “To kill someone. Penalty: imprisonment from six to twenty years.”⁷² Economic reasoning might

participation of amici curiae and allows them to appeal decisions involving repetitive claims. *Id.* art. 138.

68. Lei No. 11.418, art. 2, de 19 de Dezembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.2006 (Braz.) (authors’ translation) (introducing article 543-A to the current Code of Civil Procedure) (emphasis added); C.P.C. art. 1.035, § 1 (Braz.) (effective Mar. 2016).

69. S.T.F., ADI No. 1.194-4, Relatora: Ministra Cármen Lúcia, 20.05.2009 (Braz.) (authors’ translation).

70. *See, e.g., id.* (stating Justice Mendes’ conclusion that because the requirement that an attorney review a legal person’s constitutional documents did not decrease the number of errors, such a mandate was unconstitutional).

71. For an early recognition of these changes, see 1 WEBER, *supra* note 23, at 882-89 (analyzing the antiformalistic tendencies of modern legal development); *see also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 94-98 (laying out several reasons for the “crisis” in the crucial distinction within the civil law between public and private law).

72. Although the statutory range from six to twenty years appears to give courts excessive discretion, the Criminal Code specifies several aggravating and attenuating

be useful in determining whether such a rule is desirable *before* its enactment by the legislature, but economic reasoning plays essentially no role in the rule's concrete adjudication. The main tasks before the decision maker are interpretative and evidentiary in nature: circumscribing the meaning of the rule's wording (i.e.: What is the meaning of *killing*? What is the meaning of *someone*?) and determining whether the *fact* described in abstract form therein has in fact materialized (by resorting to standard evidentiary procedures). Although legal rules adhering to such a structure continue to exist—and, indeed, should continue to exist—a growing number of legal commands follow a different model that is far more conducive to economic thinking.

First, there is a greater incidence of legal rules that prescribe sanctions that, instead of invariably applying to past facts, will apply or will not apply depending on the expected *consequences* of the facts. This latter technique has become the hallmark of modern antitrust law, which originated in the United States and then quickly spread to other jurisdictions, including Brazil. In lieu of so-called *per se* rules (which followed the classic legal rule structure of assigning sanctions to certain predetermined factual descriptions), virtually all conduct that receives competition law scrutiny is now subject to what is known in the United States as “the rule of reason” standard and in Europe by the more eloquent label of “effects-based analysis.”⁷³

The recent change in the legal treatment of the commercial practice of minimum “resale price maintenance” in distribution agreements in the United States illustrates this point. While the practice was previously illegal in all circumstances, it is now subject to the rule of reason, which means that the restriction will be permitted or prohibited based on a case-specific analysis of whether its likely effects are pro- or anticompetitive.⁷⁴ Economic analysis therefore

circumstances that serve as sentencing guidelines. CÓDIGO PENAL [C.P.] [Criminal Code] art. 121 (Braz.) (authors' translation).

73. See Damien Geradin & Caio Mario da Silva Pereira Neto, *For a Rigorous “Effects-Based” Analysis of Vertical Restraints Adopted by Dominant Firms: A Comparison of EU and Brazilian Competition Law*, COMPETITION POL'Y INT'L, Spring 2013, at 30, <https://www.competitionpolicyinternational.com/for-a-rigorous-effects-based-analysis-of-vertical-restraints-adopted-by-dominant-firms-a-comparison-of-eu-and-brazilian-competition-law/> (subscription required) (comparing effects-based analysis of vertical restraints in the EU and Brazil).

74. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling the long-standing precedent of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), according to which minimum vertical price restraints were unlawful *per se*).

becomes essential for the application of such rules because traditional legal methods of interpretation are of little help in ascertaining the actual market effects of any given conduct.

Second, the contours and methods for the application of legal principles also depart from those of a canonical legal rule. It is a well-known fact that legal principles, as opposed to legal rules, have become increasingly influential in the adjudication of legal disputes in Brazil and elsewhere.⁷⁵ But legal rules and legal principles have markedly different structures. While legal rules are norms that “immediately describe behavior,” legal principles are norms that “establish an ‘ideal state of affairs’ (that is, an objective) whose realization implies the adoption of certain behaviors.”⁷⁶ Under Robert Alexy’s influential definition, legal principles are “optimization requirements,” that is, norms that direct the realization of a value or objective “to the greatest extent possible given the legal and factual” constraints.⁷⁷

Following the German tradition, the most popular test for deciding conflicts between various legal principles in Brazil is the “proportionality” test.⁷⁸ The application of the proportionality test, in turn, incorporates into legal decision-making elements traditionally viewed as “nonlegal” because they pertain to the possible factual consequences of different regimes. In its conventional formulation, the proportionality test requires the decision maker to scrutinize different dimensions of the regime in question: (1) its *suitability* (do the means promote the end?), (2) its *necessity* (are there other equally apt, available means that are less restrictive?), and (3) its *proportionality in the narrow sense* (do the advantages in promoting the end outweigh the disadvantages caused by the adoption of the

75. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72 (2008); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 687-98 (2005); HUMBERTO ÁVILA, *TEORIA DOS PRINCÍPIOS* 15-16 (4th ed. 2005); see also Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 463 (2011) (explaining the increased use of proportionality tests worldwide as a “shift from a culture of authority to a culture of justification”).

76. 1 PONTES DE MIRANDA, *TRATADO DE DIREITO PRIVADO* 9, 80 (2012) (authors’ translation).

77. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 47 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

78. See Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT’L L. 291, 296 (2012) (“In comparative constitutional law, the principle of proportionality is often traced back to German roots. . . . But there is nothing inherently German about the roots of the principle of proportionality It is a response to a universal legal problem.”).

means in question?).⁷⁹ In a significant number of cases, answering the questions posed by the proportionality test requires a style of reasoning fundamentally different from the deductive endeavor that historically distinguishes the civilian method of “syllogism” or “subsumption.” It often becomes necessary to employ a theory of human behavior to predict whether a certain measure is adequate or necessary to promote the ends.

In sum, the application of a canonical legal rule requires the determination of whether a fact occurred, leaving generally little room for economic analysis in its enforcement. Effects-based rules, by contrast, condition the application of legal sanctions on a finding of the likely factual consequences of a given fact or conduct—an inference for which economic reasoning is very helpful, if not utterly indispensable. The application of legal principles, in turn, depends on the evaluation of the likely factual consequences, not of a fact, but of the application of the norm itself.

As a result, the distinctive trait of the legal system vis-à-vis other systems—the focus on discerning between what is lawful and what is unlawful⁸⁰—can no longer be readily addressed by appealing to purely abstract and conceptual interpretations of legal norms. Probabilistic judgments about the likely effects of different legal regimes are increasingly indispensable. These, in turn, are empirical questions for which the traditional analytical methods provide no ready answer—but with respect to which the social sciences can be of considerable assistance. In other words, the presumed consequences of one or another legal regime will ultimately determine the weight afforded to different principles in a given case. In this context, it is particularly useful to resort to lessons from the social sciences—including, but not limited to, economics—in order to evaluate the probable effects of different legal regimes with a minimum degree of rationality.

IV. THE USE OF ECONOMICS BY BRAZILIAN COURTS

Having laid out factors that have increased demand for economic reasoning in legal adjudication, we now turn to an overview of the most common forms by which economic reasoning has made an

79. For a description of the proportionality test, see Sweet & Mathews, *supra* note 75, at 75-76.

80. Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 139 (1989) (“Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system’s future operations.”).

appearance in Brazilian judicial decisions. Our aim is not to scrutinize whether any specific argument was sound from an economic or legal standpoint: economics, like law, only seldom provides definitive or uncontroversial answers to any given problem. Nor do we make an attempt to systematically quantify the incidence of economic arguments in Brazilian judicial decisions, though the fact that the opinions described below come from important cases decided by Brazil's most prominent courts suggests that they are not mere rarities or aberrations.⁸¹ Evidently, most court opinions, in Brazil as elsewhere, do not resort to economic arguments, and for good reasons.

Moreover, in referring to specific cases where judges employed economic reasoning, we do not wish to deny that some judges are completely oblivious to economic thinking. Yet the decisions documented below, which implicitly or explicitly rely on economic lessons to solve legal problems, are surprising, not only in light of conventional wisdom, but also because of the hurdles that had to be overcome for these arguments to surface: namely, the lack of in-depth economic training by the vast majority of Brazilian judges,⁸² the dearth of instruction in law and economics in law schools, the relative scarcity of law and economics scholarship in the Portuguese language, and the rarity of studies applying economic insights to problems specific to Brazilian law. The cases described below, however, reveal that economic reasoning is no stranger to at least a part of Brazil's judiciary and that Brazilian judges are not nearly as hostile to economic reasoning as the prototype of a civil law judge would suggest.

A. *The Application of Constitutional Principles*

A particularly fertile, yet surprising, area for the use of economic reasoning in Brazil has been the application of constitutional principles by the STF. The STF's 2003 decision in Direct Action of

81. See Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT L. REV. 521, 536-37 (2004) (arguing that economic considerations are not completely absent from legal science as practiced in the civilian world but are limited to difficult cases).

82. This is so even though an introductory course in economics is a mandatory part of Brazilian law schools' curriculum. See Resolução CNE/CES No. 9, art. 5, § 1, de 29 de Setembro de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.10.2004 (Braz.). In fact, a course on political economy has been part of law schools' curriculum since the mid-nineteenth century in Brazil. See Parecer No. 211/2004, de 08 de Junho de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.09.2004 (Braz.). Anecdotal evidence, however, suggests that there has always been great variance in the quality and coverage of such courses, ranging from fairly structured introductory discussions of political economy to shallow, pseudo-philosophical discussions of the relationship between law and ideology.

Unconstitutionality (*Ação Direta de Inconstitucionalidade*—ADI) 1.946 is illustrative in this regard.⁸³ First, the decision concerned the rare, delicate case of a constitutional challenge raised against a constitutional amendment. Second, the Court's bold decision to restrict the scope of a literal interpretation of the amendment was critically motivated by the use of economic reasoning.

The case dealt with the funding of the social right to maternity leave provided by the Brazilian constitution. Prior to the amendment, employers were constitutionally and legally required to grant eligible women 120 days of maternity leave, but were at the same time entitled to obtain reimbursement of the salaries paid during the leave period from Brazil's social security system.⁸⁴ In 1998, the newly-enacted Constitutional Amendment No. 20—widely known as the “social security reform” (*reforma da previdência*)—capped all social security payments at the amount of R\$1,200 (approximately US\$1,000 at the time).⁸⁵ If the new limit were to apply to maternity leave, any difference between the new ceiling and a woman's actual salary would be required to be funded by the employer.⁸⁶ The Brazilian Socialist Party (*Partido Socialista Brasileiro*—PSB) filed suit, arguing that the application of the cap to maternity leave payments violated the constitution, in view of its explicit provision requiring the “protection of [the] women's labor market.”⁸⁷

The Court's unanimous opinion, written by Justice Sydney Sanches, posited that shifting the financial burden of maternity leave onto employers would “facilitate and stimulate their option for male, instead of female, workers,” and thus the ceiling would precisely “foster the discrimination that the Constitution sought to undercut.”⁸⁸ The outcome of the case was clearly driven by the Court's *forecast* of the effects that a literal interpretation of the constitutional amendment would have had on the rate and form of women's participation in the workforce. Justice Sanches further emphasized the “perceived lack of adequacy between the legal means (a limitation on payments by the social security system and the transfer of the burden to the employer) and the normative and established principle under the Constitution to

83. S.T.F., ADI No. 1.946, Relator: Ministro Sydney Sanches, 03.04.2003 (Braz.).

84. *Id.*

85. C.F. art. 7, § XXX.

86. S.T.F., ADI No. 1.946, Relator: Ministro Sydney Sanches, 03.04.2003 (Braz.).

87. C.F. art. 7, § XX (Braz.) (authors' translation)

88. S.T.F., ADI No. 1.946, Relator: Ministro Sydney Sanches, 03.04.2003 (Braz.) (authors' translation).

combat the discrimination of women in the labor market.”⁸⁹ Although the decision makes no formal reference to economics, its reasoning is evidently based on a key tenet of price theory, driven by the law of supply and demand, namely, an increase in the price of a production input will trigger a reduction in its demand.

Notice that at no point did the Court ponder the economic *efficiency* of encouraging women’s participation in the workforce—a theme on which economists’ views can and do differ.⁹⁰ The promotion of women’s workforce participation is a given; it is a prior political choice inscribed in the constitution itself.⁹¹ The role of economics was to aid in the attainment of a legal objective by providing a theory of the concrete effects of different legal regimes.

Another paradigmatic case involving social rights dealt with the scope of the Brazilian statute providing a homestead exemption for the so-called “family home” (*bem de família*), which prohibits a foreclosure on the personal residence of a debtor.⁹² The same statute specifies a number of exceptions to this exemption, including one that authorizes a foreclosure on the home of a lease guarantor.⁹³ The constitutionality of the guarantor exception was challenged before the STF based on the argument that it violated the constitutional right to housing (*direito à moradia*) inserted by Constitutional Amendment No. 26 of 2000.

In affirming the constitutionality of the exception, the majority opinion, written by Justice Cezar Peluso, argued that the right to housing was not synonymous with home ownership.⁹⁴ Instead, the fact that “there are few property owners in Brazil” justified, in his view, the “stimulus to lease arrangements” that was presumably achieved by the challenged exception.⁹⁵ Justice Peluso’s opinion concluded that eliminating the exception “would disrupt market equilibrium, systematically requiring costlier kinds of guarantees for residential

89. *Id.* (authors’ translation).

90. *Compare* GARY S. BECKER, A TREATISE ON THE FAMILY 22 (1981) (positing that married women’s specialization in domestic work can be efficient), *with* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993) (advancing an efficiency argument in favor of women’s labor force participation).

91. C.F. art. 7, § XX (Braz.).

92. Lei No. 8.009 de 29 de Março de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.03.1990 (Braz.) (authors’ translation).

93. *Id.* art. 3.

94. S.T.F., RE No. 407.688-8, Relator: Ministro Cezar Peluso, 08.02.2006 (Braz.).

95. *Id.* (authors’ translation).

leases, thereby harming the constitutional right to housing.”⁹⁶ The opinion not only alludes to facts that are apparently outside the scope of the legal rule in question (such as the proportion of Brazilians that do not own real property), but also implicitly employs a standard model of supply and demand to infer causality between the interpretation of the law by the STF and the available supply of residential homes and their respective prices.

The use of economic reasoning in the decisions above—with a particular focus on the incentive structures generated by different rules—was by no means exceptional in STF jurisprudence. In its 2013 decision in *Reclamação* 4.374, the STF reversed its prior ruling and deemed unconstitutional the statutory provision that prohibited welfare payments to the elderly if their family earned more than one-fourth of a minimum salary per month.⁹⁷ The majority opinion, written by Justice Mendes, acknowledged that “it was not up to the Federal Supreme Court to assess the political and economic convenience of the sums that can or should serve as the basis for measuring poverty.”⁹⁸ Nevertheless, in deeming the existing threshold unconstitutional, the decision not only referred to the changes in legal and economic conditions since the Court’s original ruling but also referred to the fact that the current system “ends up discouraging contributions to the social security system, further increasing informality.”⁹⁹

An even more explicit use of incentives rhetoric took place in the decision of ADI 4.425, in which the STF found a number of provisions of Constitutional Amendment No. 62 of 2009, which addressed the system of enforcement of monetary judgments against the state (*precatórios*), unconstitutional.¹⁰⁰ The amendment gave the government the ability to institute a reverse auction, which would permit private parties to escape the lengthy line to receive payment by agreeing to receive a “haircut.” The majority opinion, written by Justice Luiz Fux, maintained: “[T]he existence of a reverse auction system would represent an *incentive* for the State not to perform its obligations, aggravating the illiquidity of the judgments and increasing the discount In other words: the *system of incentives* generated by the auction model promoted opposite results to those desired by the

96. *Id.* (authors’ translation).

97. S.T.F., Rcl. No. 4.374, Relator: Ministro Gilmar Mendes, 18.04.2013 (Braz.).

98. *Id.* (authors’ translation).

99. *Id.* (authors’ translation).

100. S.T.F., ADI No. 4.425, Relator: Ministro Ayres Britto, 14.03.2013 (Braz.).

Constitution.”¹⁰¹ Similar decisions employing the language of incentives to reach constitutional law conclusions abound and are far too numerous to be described in full.

In other cases, the STF went so far as to draw specific inferences about the implications of certain legal institutions for Brazil’s economic development more generally. In the AgReg 5.206-7, decided in 2001, the Court faced the question of whether Brazil’s Arbitration Law of 1996—which sought to regulate and enforce contractual parties’ agreements to submit their disputes to arbitration—was valid under the constitutional provision requiring that “the law shall not exclude from judicial appraisal any violation or threat to a right.”¹⁰² Concluding that the Arbitration Law passed constitutional muster, Justice Ilmar Galvão explicitly reasoned that the observed “avalanche of lawsuits” in the judiciary, combined with a “slowness that surpassed maximum tolerable limits,” constituted a “serious disincentive to business, precisely in a moment in which one expects a sharp increase in business activities among us, especially due to the celebrated flows of foreign capital in view of exploring new enterprises of an economic nature.”¹⁰³ In this context, he argued, “[T]he Brazilian legislator came up with the alternative of an *Arbitral Tribunal* as a solution for this serious problem, aiming to ensure the country’s economic development.”¹⁰⁴

Justice Joaquim Barbosa followed that same vein in his opinion in ADI 1.194, which challenged, inter alia, the provision of the Statute of the Brazilian Bar Association (*Estatuto da OAB*) that granted the lawyer of the winning party of a lawsuit attorney’s fees.¹⁰⁵ Justice Barbosa concluded that the question of which party receives attorney’s fees shall be a matter of freedom of contract, a solution that “not only unlocks the access channels to the Judiciary, but also permits the essential imperatives of economic rationality, which are fundamental for the country’s growth, to apply, without discrimination, to lawyers, in the same way that they apply to other categories of professionals.”¹⁰⁶ Similarly, in the Extraordinary Appeal 422.941, the reporting Justice Carlos Velloso claimed that the government’s imposition of price

101. *Id.* (authors’ translation).

102. C.F. art. 5, § XXXV (Braz.); S.T.F., AgRg No. 5.206, Relator: Ministro Sepúlveda Pertence, 12.12.2001 (Braz.) (authors’ translation).

103. S.T.F., AgRg No. 5.206, Relator: Ministro Sepúlveda Pertence, 12.12.2001 (Braz.) (authors’ translation).

104. *Id.* (authors’ translation).

105. S.T.F., ADI No. 1.194, Relator: Ministro Joaquim Barbosa, 20.05.2009 (Braz.).

106. *Id.* (authors’ translation).

ceilings below the cost of production “constituted a serious obstacle to the exercise of economic activity, in violation of the principle of free enterprise.”¹⁰⁷ He added, “[E]stablishment of well-defined rules of state intervention in the economy, and their compliance, are fundamental for the maturation of Brazilian institutions and the market, ensuring the necessary economic stability conducive to national development.”¹⁰⁸

Moreover, different Justices in different decisions employ economic reasoning to reach disparate conclusions. In ADI 4.167, the Court considered the scope of the expression “salary *floor*” as it related to elementary school teachers, which was specified in a new federal statute applicable to all Brazilian states.¹⁰⁹ Justice Joaquim Barbosa argued that the term floor “can be interpreted in accordance with the intention of strengthening and improving public education services.”¹¹⁰ He then argued, “[A]dequate compensation of teachers and other education professionals is one of the useful mechanisms for the attainment of such an objective.”¹¹¹ In his view, “if the floor comprises the teacher’s global remuneration, the additional payments (*gratificação*) may equal or exceed the minimum, so as to annul or mitigate the incentives for the diligent professional,”¹¹² resulting in “perceptible deterrence to the incentive and responsibility policies that are necessary for the provision of quality educational services by the State based on a most relevant criterion: merit.”¹¹³

Conversely, Justice Gilmar Mendes contended that the interpretation of “floor” as synonymous with a basic salary, as advocated by Justice Barbosa, could lead to the “impossibility of expansion of education services”¹¹⁴ because of a substantial increase in teacher compensation. Moreover, he reasoned, such an interpretation would create an incentive for the states to restructure existing compensation packages so as to eliminate any bonus payments made, in addition to the basic salary—a conclusion that, in his words, derived from “pure game theory.”¹¹⁵

107. S.T.F., RE No. 422.941, Relator: Ministro Carlos Velloso, 06.12.2005 (Braz.) (authors’ translation).

108. *Id.* (authors’ translation).

109. *See* S.T.F., ADI No. 4.167, Relator: Ministro Joaquim Barbosa, 27.04.2011 (Braz.).

110. *Id.* (authors’ translation).

111. *Id.* (authors’ translation).

112. *Id.* (authors’ translation).

113. *Id.* (authors’ translation).

114. *Id.* (Mendes, J., dissenting) (authors’ translation).

115. *Id.* (authors’ translation).

B. Teleological or Purposive Interpretation of Statutes

The STF is, however, not alone in resorting to economic lessons in its opinions. Economic reasoning is also prevalent in the decisions of the STJ. The use of economic insight is particularly noticeable when the court employs a teleological or purposive method of statutory interpretation, a method with a long history in the Western tradition.¹¹⁶

For instance, in the early 2000s, the STJ had to determine the scope of a statute regulating the provision of public services.¹¹⁷ The rule in question expressly allowed public service providers to suspend the provision of public services to clients in default. The court needed to answer the question of whether the rule applied to the provision of “essential services,” such as water, gas, and energy, given that article 22 of the Brazilian Consumer Protection Code¹¹⁸ requires utilities to provide essential services in a “continuous” fashion. The majority opinion, written by Justice Gomes de Barros, repudiated the interpretation that prevented public service providers from suspending the provision of essential services.¹¹⁹ Such a regime, in his view, would generate a “domino effect.”¹²⁰ Indeed, he maintained, “[I]n finding out that a neighbor is receiving energy for free, the citizen will tend to bestow on himself such tempting benefit.”¹²¹ The result would be that “soon enough, nobody will honor the electricity bill.”¹²²

The STJ has also recently resorted to economic reasoning in interpreting Brazil’s consumer protection law so as to not hurt the people the law is ostensibly trying to help—a familiar argument in the law and economics literature.¹²³ In Special Appeal 1.232.795, the court needed to determine whether a company operating a private parking lot was liable for the armed robbery of a client inside its facilities.¹²⁴

116. Lopes, *supra* note 46, at 146-47.

117. Lei No. 8.987, de 13 de Fevereiro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.09.1998 (Braz.) (reissue version).

118. Lei No. 8.078, de 11 de Setembro de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.09.1990 (Braz.) (authors’ translation).

119. S.T.J., Resp. No. 363.943, Relator: Ministro Humberto Gomes de Barros, 10.12.2003 (Braz.).

120. *Id.* (authors’ translation).

121. *Id.* (authors’ translation).

122. *Id.* (authors’ translation).

123. See, e.g., Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991) (discussing economic reasoning as it relates to consumer protection law).

124. S.T.J., Resp. No. 1.232.795, Relatora: Ministra Nancy Andriighi, 02.04.2013 (Braz.).

The unanimous opinion, written by Justice Nancy Andriahi, stated that no such liability existed because, among other reasons, assigning this burden to private parking lots would be detrimental to consumers because the parking lots would require investment that “would certainly reflect upon the price of the [parking] service, which is already high.”¹²⁵

In its recent decision in Special Appeal 1.163.283, the STJ resorted to economic analysis in interpreting that the creditor-friendly rules of a 2004 statute regulating real estate financing¹²⁶ applied to contracts governed by Brazil’s special system for housing finance (*Sistema Financeiro de Habitação*—SFH), a program aimed at promoting the acquisition of homes by low- and middle-income households.¹²⁷ The relevant provision of the statute requires debtors’ suits against creditors to state the specific amounts in dispute and requires debtors to continue to pay any undisputed amounts. In support of its ruling that debtors have a duty to indicate the undisputed amounts in their complaints, Justice Luis Felipe Salomão argued that real estate financing contracts constitute “fertile grounds for the application of economic analysis of law” because it reveals “the institutional and social roles that contract law can offer to the market.”¹²⁸ Accordingly, the “doctrine [of Economic Analysis of Law] prescribes the increase in the degree of predictability and efficiency within intersubjective relationships . . . based on the use of economic postulates for the application and interpretation of legal principles and paradigms.”¹²⁹ This decision also cited Ronald Coase,¹³⁰ the Chicago School of Law and Economics, and a handful of Brazilian scholars who have employed economic reasoning in their writings to ultimately conclude that the application of the pleading requirements provided by special legislation to SFH contracts was consistent with the role of the law in reducing transaction costs.¹³¹

125. *Id.* (authors’ translation).

126. Lei No. 10.931, de 2 de Agosto de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 03.08.2004 (Braz.).

127. S.T.J., Resp. No. 1.163.283, Relator: Ministro Luis Felipe Salomão, 07.04.2015 (Braz.).

128. *Id.* (authors’ translation).

129. *Id.* (authors’ translation).

130. Curiously, the decision inaccurately referred to Coase as a “U.S. lawyer.” *Id.* (authors’ translation). Although Coase is certainly one of the intellectual fathers of the law and economics movement, he was an economist, not a lawyer. *See* Posner, *supra* note 11, at 4.

131. S.T.J., Resp. No. 1.163.283, Relator: Ministro Luis Felipe Salomão, 07.04.2015 (Braz.).

C. Citations to Academic Works

While most uses of economic reasoning by Brazilian courts are implicit in nature, as we have seen, this is not always the case. Indeed, numerous court decisions—from all levels of the judiciary—explicitly cite works by economists or law and economics scholars.¹³² For instance, in ruling in ADI 2.340 that a state law could not obligate municipalities to provide water in water trunks whenever the regular provision of water was suspended, STF Justice Gilmar Mendes reasoned that “the service of basic sanitation is a natural monopoly . . . rendering interstate competition not only impracticable, but also suggesting that the consolidation of demand from neighbor cities can reduce costs and render the service more attractive to private concessionaires.”¹³³ That same opinion expressly relied on the concept of a natural monopoly as described in the books *Law & Economics*, by Robert Cooter and Thomas Ulen, and *Economic Analysis of Law*, by Posner.¹³⁴ In another case, Justice Mendes also cited Cooter and Ulen’s celebrated handbook in discussing the possible effects of disparate tax regimes “on the offer of products on the spare parts market, with a relevant impact on market equilibrium, internal consumption and inflation.”¹³⁵

In citing a bibliography of economic sources, Justice Gilmar Mendes—who, before joining the Court, was a distinguished constitutional law scholar who obtained his PhD in law in Germany¹³⁶—is not an outlier. Economic lessons also made their way into the STF decision in ADI 3.510, the high-profile constitutional challenge against Brazil’s biosecurity law, which regulates stem cell research.¹³⁷ In his dissenting opinion on the unconstitutionality of stem cell research, Justice Cezar Peluso underscored what he viewed as flaws in the enforcement devices outlined by the statute. He argued that the mechanism for the appointment of members to a certain Committee of Ethics and Research was deficient because the committee’s composition was to be determined by the respective

132. See, e.g., S.T.F., ADI No. 2.340, Relator: Ministro Ricardo Lewandowski, 06.03.2013 (Braz.).

133. *Id.* (authors’ translation).

134. *Id.*

135. S.T.F., RE 405.579, Relator: Ministro Joaquim Barbosa, 01.12.2010 (Braz.) (authors’ translation).

136. Gilmar Mendes, *New Challenges of Constitutional Adjudication in Brazil*, WILSON CTR. 7 (Nov. 2008), https://www.wilsoncenter.org/sites/default/files/brazil.gilmar_mendes.constitution.pdf.

137. S.T.F., ADI No. 3.510, Relator: Ministro Ayres Britto, 29.05.2008 (Braz.).

research institution. In his view, “This rule entails, at least, a serious risk of what economic theory calls an agency problem, that is, a critical conflict of interest that harms the independence of the entity immediately responsible for ensuring the zealous adherence of the grave constitutional and legal restrictions of the authorized research.”¹³⁸ He quotes a definition of the principle-agent problem from Joseph Stiglitz’s book, *Economics of the Public Sector*.¹³⁹

State courts have also directly cited law and economics scholarship.¹⁴⁰ In a recent decision by the Court of Appeals of the State of São Paulo, the issue was whether a shop had recourse against a credit card company for a purchase later cancelled due to fraud.¹⁴¹ Specifically, an appliance store sold an air conditioner unit to a client who paid with a cloned credit card. The true holder of the credit card requested the cancellation of the purchase, with which the credit card company complied, subsequently denying payment to the appliance store. The store sued the credit card company for the amount due, arguing that the contract clause excluding liability of the credit card company in such instances was “abusive” and, therefore, void.¹⁴²

In upholding the contractual exclusion of liability and effectively assigning the loss to the shop, Judge Andrade Marques used law and economics scholarship to shed light on the rationale behind the contract clause. He argued that, at least with respect to face-to-face sales: “[I]n comparison with the credit card company, the merchant has greater capacity to control and prevent the risk of trickery by customers. In other words, the seller is the superior risk bearer in this contractual relationship.”¹⁴³ After a short digression about the concept of good faith in the Brazilian Civil Code, the opinion directly quoted a passage from George Triantis’s entry on “Risk Allocation in Contracts” from the *Encyclopedia of Law & Economics*, which describes in detail the concept of a “superior risk bearer.”¹⁴⁴ The opinion concluded that “the assignment of risks to the superior risk bearer is more efficient

138. *Id.* (Peluso, J., dissenting) (authors’ translation).

139. *Id.* (“[The] big risk is that the Committees of Ethics and Research would be subordinated and would become agents of the institutions, instead of keeping the necessary self-reliance and independence. The alignment of interests, in this case, is ostensibly deleterious for the whole system.” (authors’ translation)).

140. *See, e.g.*, T.J.S.P., Ap. Civ. No. 0202965-46.2009.8.26.0100, Relator: Des. Andrade Marques, 31.01.2013 (Braz.).

141. *Id.*

142. *Id.* (authors’ translation).

143. *Id.* (authors’ translation).

144. *Id.*

from an economic standpoint because [the superior risk bearer] is the party that can avoid and mitigate the risk at a lower cost.”¹⁴⁵

In another decision concerning a damages claim against a company that had outsourced its transportation services, Judge Marcelo Benacchio of the Court of Appeals of the State of São Paulo cited the famous opus by Cooter and Ulen to ground his observation that in its business activities, a company

constantly balances costs against means to seek profits, of which outsourcing some of its crucial activities are an example, and in so doing it considers marginal costs, among which lies the payment of damages, it being understood that the optimal activity level will take place whenever precautionary costs are lower than the [expected] payment of caused damages.¹⁴⁶

He then concluded that a company “cannot act in the market as if third parties did not exist, so it must consider the possibility of damages and their internalization within the productive process, meaning that if the outsourced activity such as the one at hand generates more losses than profits it will certainly . . . be discarded [by the company].”¹⁴⁷ Likewise, in a dissenting opinion that deemed valid an administrative proceeding that summoned only the legal representative of a company (and not all of its partners, as defended by the plaintiffs), Judge Beretta da Silveira from the Court of Appeals of the State of São Paulo stated, “It is worth recalling the doctrine of prominent Law & Economics scholar Richard Posner, according to which one should consider the balance of costs/benefits involved in judicial decisions.”¹⁴⁸

Brazilian judges have also expressly referred to prominent figures in the law and economics literature. In ruling on the value of damages to be paid by a news company, Justice Nancy Andrichi of the STJ cited Posner and Robert Bork in support of the proposition that “in deciding on whether to publish a defamation, [a news company] takes into account, on one hand, the damages established in court and, on the other hand, the expected income that such publication will bring.”¹⁴⁹ Justice Andrichi then concluded, “In establishing the damages the judge shall take into account the income of the news

145. *Id.* (authors’ translation).

146. T.J.S.P., Ap. Civ. No. 954.795-0/3, Relator: Marcelo Benacchio, 13.02.2007 (Braz.) (authors’ translation).

147. *Id.* (authors’ translation).

148. T.J.S.P., Ap. Civ. No. 629.521-4/9-00, Relator: Beretta da Silveira, 28.04.2009 (Braz.) (da Silveira, J., dissenting) (authors’ translation).

149. S.T.J., Resp. No. 355.392, Relatora: Ministra Nancy Andrichi, 26.03.2002 (Braz.) (authors’ translation).

company with the unlawful act, for otherwise it will stimulate those that seek to maximize their profit to the detriment of society as a whole.”¹⁵⁰ Nothing could be closer to the familiar notion within law and economics literature that a company’s calculation for profit maximization is influenced by the prospects of legal sanctions and rewards¹⁵¹ and that a judge should be forward looking while calibrating her decisions.¹⁵²

Several other court decisions cite Posner.¹⁵³ In finding that the exclusivity requirement imposed by a doctors’ cooperative was unlawful under Brazil’s competition law, STJ Justice Humberto Martins examined the concept of entry barriers by quoting a long passage in English from Posner’s classic, *Economic Analysis of Law*.¹⁵⁴ In rejecting the filing of a “rescissory action” (*ação rescisória*),¹⁵⁵ Judge Osvaldo Cruz of the Court of Appeals of the State of Rio Grande do Norte referred to the works of Coase and Posner to argue that “the judge must pay attention to the economic incentives and disincentives produced by court precedents.”¹⁵⁶ In striking down local content legislation relating to television programming, Judge Marcelo Guerra cited Posner, along with other law and economics scholars.¹⁵⁷ All of the preceding cases are merely illustrative, rather than exhaustive. It is possible to find various other court decisions citing law and economics scholars or containing sparse references to “economic analysis of law” or the “law and economics” movement.¹⁵⁸

150. *Id.* (authors’ translation). Justice Andriighi also cited the United States Supreme Court case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in her opinion. S.T.J., Resp. No. 355.392, Relatora: Minstra Nancy Andriighi, 26.03.2002 (Braz.).

151. *See, e.g.*, Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 293 (1992).

152. *See, e.g.*, RICHARD A. POSNER, *OVERCOMING LAW* 4 (1995).

153. S.T.J., Resp. No. 1.172.603, Relator: Ministro Humberto Martins, 04.03.2010 (Braz.).

154. *Id.*

155. *Id.* Under Brazilian law, an “*ação rescisória*” is a lawsuit that in exceptional circumstances can be filed to challenge an unappealable, final judgment. *See* C.P.C. art. 485 (Braz.); *id.* art. 966 (Braz.) (effective Mar. 2016).

156. T.J.R.N. Ag. Rg. No. 2010.008686-7/0001.00, Relator: Osvaldo Cruz, 02.03.2011 (Braz.) (authors’ translation).

157. Seventeenth Federal Civil Court of São Paulo, Ordinary Lawsuit No. 0019796-05.2011.403.6100, Relator: Marcelo Guerra, 16.04.2015 (Braz.).

158. *See, e.g.*, T.J.P.R., RI No. 2012.0001633-0/0, Relator: Juiz Gustavo Tinoco de Almeida, 26.07.2012 (Braz.); T.J.S.P., ED. No. 0112359-50.2008.8.26.0053/50000, Relator: Fermio Magnani Filho, 17.09.2012 (Braz.); T.J.S.P., Ap. Civ. No. 450.057-4/1-00, Relator: Elcio Trujillo, 13.09.2006 (Braz.).

V. CONCLUSION: THE PROSPECTS FOR LAW AND ECONOMICS IN THE CIVIL LAW

The preceding analysis of Brazilian cases suggests that the conventional assumption that economic reasoning is absent from legal practice in the civil law world is flawed. Brazilian judges habitually employ concepts borrowed from economics to forecast the likely consequences of events or rules when such a prediction is called for by the relevant legal norms. Because Brazilian judges are not abandoning the time-honored practice of formally grounding their decisions on a preexisting legal provision that purports to control the relevant set of facts, economics seems to be at the service of law, not the other way around. Consequently, the Brazilian court system cannot be deemed to be undergoing the much-feared process of intellectual “colonization” by economics in any meaningful way.

Neither are Brazilian courts undergoing a process of ideological colonization. Whatever the merits of the claim that law and economics has a conservative bias, the Brazilian example highlights the potential of using economics to further progressive legal objectives as well. At least in the Brazilian context, economics works more like a knife (that can cut both ways) than as a rhetorical platform that is inexorably linked to a certain political agenda.

Admittedly, we make no attempt to articulate the precise place of economic reasoning in legal discourse—a deep philosophical issue that is outside the scope of this Article. Neither do we delve into the intricate relationship between the use of economic reasoning and the resulting quality of legal adjudication. Rather, we conclude by briefly reflecting on the implications of our findings for legal education and scholarship.

If, as suggested above, the use of economic reasoning as part of legal analysis is a function of the broader transformation in the character and operation of the Brazilian legal system, demand for law and economics scholarship in Brazil seems to be here to stay. And, given that the traditional role of legal scholarship in civil law countries is both to explain and to assist in the application of the law,¹⁵⁹ we expect to see a corresponding rise in the pursuit of law and economics studies by the legal academy, both in terms of research and teaching.

159. See James Gordley, *The State's Private Law and Legal Academia*, 56 AM. J. COMP. L. 639, 639 (2008) (describing the “symbiotic relationship between the law as promulgated by state authority and law as understood by jurists”).

Finally, we have no reason to believe that the ideological, political, and legal factors that have increased demand for economic knowledge by courts are unique to Brazil, though we leave this line of inquiry for future work. For now, we can only speculate that it is not only in Brazil that commentators have been looking to the wrong places in their apparently fruitless search for integration of economic analysis with the law. This suggests that the future of law and economics scholarship in civil law jurisdictions more generally rests on the understanding that this type of work is increasingly consistent with the traditional vocation of civilian jurists of producing work that is instrumental in the application of the law.