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February 19, 1942 is considered one of the darkest days of Japanese civil liberties in the United States. Following the attack on Pearl Harbor, President Roosevelt ordered the mass evacuation of all individuals of Japanese descent from the West Coast and their relocation in internment camps. However, while many in the U.S. government failed to see the violation of the balance between civil liberties and national security, few individuals were in the front line of sparking dialogue on civil liberties. One of these individuals was a young Japanese-American named Fred Korematsu, whose lawsuit against the president’s executive order was heard before the Supreme Court. However, what has been considered the most significant aspect of Korematsu v. The United States is its demonstration of the U.S. governmental institutions’ inclination to sacrifice the civil liberties of the minority in order to protect the security of the majority at the time.

In order to understand the significance of Korematsu case, it is important to first analyze some of the main events that gradually affected the growing anti-Japanese climate in the United States and led up to the internment camps.

The surprise attack on Pearl Harbor was the main important factor in sparking the anti-Japanese climate in the United States. On December 7, 1941, Japan launched a surprise attack on Pearl Harbor, shocking and enraging Americans. One of the main effects that this attack had in the United States was to shift public opinion from isolationism and neutrality to international participation and intervention. But the attack also had internal effects inside the United States. One of these effects was a great fear of further enemy attacks, and more specifically in the West Coast, panic and anger mixed with anti-Asian and anti-Japanese racism. Such racism infiltrated all aspects of life, including the media. An example of such infiltration appeared in a San Francisco Examiner column titled “Why Treat Japs Well Here?” This specific article was also very significant in relation to the events that led to the internment camps and Korematsu v. The United States because it has been alleged to have been the place where the idea of Japanese relocation camps was indirectly introduced for the first time. An excerpt of this article reads as follows:

“...What does the Government do about the tens of thousands of Japanese in California? Nothing. The only Japanese apprehended have been the ones the FBI actually had something on. The rest of them, so help me, are free as birds. There isn't an airport in California that isn't flanked by Japanese farms. They clerk in stores. They clip lawns. They are here, there and everywhere. You walk up and down the streets and you bump into Japanese in every block. They take the parking positions. They get ahead of you in the stamp line at the post office. They have their share of seats on the bus and streetcar lines.... I know this is the melting pot of the world and all men are created equal and there must be no such thing as race or creed hatred, but do those things go when a country is fighting for its life? Not in my book. Personally, I hate the Japanese. And that goes for all of them. Let's quit worrying about hurting the enemy's feelings and start doing it.”

Several segments of this excerpt represent major aspects of the anti-Japanese climate, which led to the justification of internment camps. In the first few lines of the excerpt, the author questions the freedom of those Japanese-Americans who have not committed any crime. In the immediate aftermath of the attack on Pearl Harbor, this columnist and a vast majority of Americans felt panic and expressed grave concerns about individuals of Japanese descent in the United States enjoying the same freedoms that Americans did. But even a more tragic aspect of the anti-Japanese climate in America at the time was the propositions by individuals such as the writer of the above excerpt that the U.S. government must act on those
prevalent anti-Japanese sentiments through race-based policies. In the latter section of the excerpt, the author declares that the idea of U.S. being the “melting pot of the world and all men are created equal and there must be no such thing as race or creed hatred” does not apply to the times of war. This segment is an indication of the intensity of some Americans’ willingness at the time to violate the most basic equality rights and civil liberties of Japanese-Americans – including those such as Fred Korematsu who were innocent of any crime – in order to bring security to other Americans. Similar sentiments spread in the U.S. government when politicians from the West Coast began to demand that “something be done” about the Issei and Nisei living on the coast. Such sentiments among Americans, elected representatives and senators in Washington created a sense of national urgency to deal with the “Japanese threat.”

On February 19, 1942, under pressure from politicians, President Roosevelt issued Executive Order No. 9066 to mass evacuate Japanese Americans from the West Coast and other military areas and relocate them in internment camps. This order applied to approximately 120,000 citizens and non-citizens of Japanese origin. The stated justification of this order was to protect the United States “against espionage and against sabotage to national defense material, national defense premises, and national defense utilities.” Congress affirmed this order by making it a crime to refuse the order of evacuation. This Executive Order was the beginning point of Fred Korematsu’s fight for civil liberties.

Born of Japanese immigrant parents, Fred Korematsu was an American citizen living in Oakland, California. He was twenty-two years old when, along with other Japanese-Americans, he and his family were ordered to report to assembly centers. The Korematsu family reported to an assembly center, at which point, they were taken to Tanforan, a former racetrack in southern San Francisco, for processing. Fred, however, was in love with his Italian-American girlfriend and decided to stay in his home in Oakland. Following his refusal to report for internment, he changed his name and even underwent eye surgery to appear less Japanese. Nonetheless, the government found and arrested Korematsu on May 30, 1942. After a federal court handed down Korematsu’s conviction, the judge sentenced him to five years in probation. The military, however, took him into immediate custody and sent him to the relocation camp in Topaz, Utah. While in custody, the American Civil Liberties Union (ACLU) initiated contact with Korematsu and convinced him to appeal his case. Korematsu appealed the district court’s decision to the U.S. Circuit Court, but no change in his conviction was sustained. He continued to be held in custody in Utah while he appealed his case to the United States Supreme Court, which the court agreed to hear.

As the events that led to Korematsu v. United States demonstrate, prejudice against citizens of Japanese ancestry became extremely prevalent not just among the majority of citizens, but also in both the executive and legislative branches of the U.S. government. Although no one would know whether public officials in government supported such far-reaching and race-based internment due to their anti-Japanese sentiments or because of their honest desire to protect national security, it could certainly be asserted that both the president and congress used the state of war as a justification to violate the constitutional civil liberties of innocent citizens. When the framer of the constitution created the U.S. government, they based it on a system of checks and balances. One of the aspects of this system was the establishment of a judicial body to check the constitutionality of the actions and laws made and signed by the other two branches. Hence, they sought the institution of the U.S. Supreme Court, which would consist of lifetime appointed judges to take on the task of judicial check. The framers sought the Supreme Court judges to be unelected in order to protect the independence of the court so that it could make rulings based on the constitution and not public sentiment. Therefore, it is reasonable for one to assume that the Supreme Court would judge Korematsu based on the merits of the case and
make a ruling that would result in the protection of basic rights guaranteed to all in the constitution. However, the opinion of the majority on this case demonstrated the harsh reality that, under certain circumstances, even the Supreme Court is willing to sacrifice the civil liberties of the minority for the sake of protecting the security of the majority. Therefore, it is imperative to review the court majority’s opinion delivered Justice Black in order to understand the defects in a 6-3 ruling that upheld President Roosevelt’s Executive Order.

One of the segments of Justice Black’s opinion that shows the court’s willingness at the time to uphold the governmental actions that were in flat violation of basic and well-established civil liberties is the part concerning restrictions on individuals’ rights based on their race. Towards the beginning of the opinion, Justice Black states:

“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional... Pressing public necessity may sometimes justify the existence of such restrictions.”

In this segment, the court declares that under certain circumstances, restrictions which curtail the civil rights of individuals solely based on their race can be constitutional. However, such stance was inconsistent with the citizens’ rights enumerated in the constitution or the court’s own opinions with regards to this matter. The constitution guarantees every individual the right to a trial by jury before being convicted of a crime, and punishment cannot be imposed without conviction. The court’s statement that such race-based restrictions could be constitutional under certain circumstances is a clear indication of the court’s willingness at the time to depart from the most basic interpretations of the constitution and uphold even race-based procedures to accommodate security policies of the executive and legislative branches.

Another method which Justice Black used to justify the violation of Japanese-Americans’ civil liberties was to understate the nature of internment camps. He did so by likening president’s internment order to a simple curfew. Referring to a case decided by the court two years earlier, Justice Black notes, “We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.” He continues by writing, “True, exclusion from the area in which one’s home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. ... But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.” Justice Black acknowledges the difference between a simple curfew and internment. Nonetheless, he justifies Japanese internment camps by indicating the similarity between a curfew and internment in that they were both actions taken by the government to prevent sabotage. The court’s analysis in this part is illogical because it sets precedent for the government to take any unchecked action as long as it can prove the result of that action will result in protection from espionage and sabotage. The court failed to emphasize that along protection of security, government also has an equal responsibility to protect citizens’ civil liberties, even in times of war. In likening internments to a curfew, Justice Black continued his opinion by indicating that internments were the only possible method to employ;

“Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.”

He asserts that the president issued the order for evacuation of all Japanese-Americans because it was impossible to bring a rapid segregation of the loyal from the disloyal. However, there are two main problems with this analysis. The first problem
is the fact that Justice Black is making this assumption based on the information given by the military. However, the military is under the command of the executive, which was being challenged in court. Therefore, the military authorities had a strong incentive to present information regarding the logistics of their operations in a way that would help defend their actions. But even a more significant flaw in this analysis is the conclusion reached from the information that was provided for the court by military authorities. Assuming that there was no method by which the military could have separated the loyal Japanese from the disloyal, the court never explains why the best decision was to immediately apply the restrictions to all persons of Japanese descent rather than taking more time and making sure no innocent citizen was being arrested. In fact, the second choice was more reasonable for the court to make considering that “Korematsu’s attorneys showed that during the nearly four months between Pearl Harbor and General DeWitt’s first evacuation order, not one person of Japanese descent had been convicted of espionage or sabotage.” The court’s reliance on the information given by one side of the lawsuit, as well as a conclusion reached based on that information but out of context with the realities on the activities of Japanese-Americans at the time are two more important indications of the court’s failure to use sound legal judgment to protect the rights of innocent citizens.

Finally, the court used the “state of war” to justify the creation of Japanese internment camps. Having stated that the court was to uphold the Executive Order N. 9066, Justice Black explained the implications of the ruling:

“In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”

This segment of the court’s opinion is a clear indication of the fact that the justices reached the ruling that was based on the fact that the country was war. This shows that had the United States not been at war, the court would have reached a different ruling. Furthermore, Justice Black explains that internment camps were acceptable because during the times of war, “all” citizens were to feel the impact. However, he fails to recognize that in this case, all citizens were not feeling the impact; rather, the government had imposed a race-based policy that deprived a narrow racial group of their constitutional civil rights in order to protect the safety of the majority. In addition, towards the end of this excerpt, Justice Black Black admits that such compulsory relocation of innocent citizens to internment camps was “inconsistent with our basic government institutions.” However, he continues by explaining that in times of “modern warfare,” such inconsistent policies were acceptable. This segment is an evidence of the court’s willingness to disturb the balance between civil liberties and national security while in a state of war. Black emphasizes this tendency toward the end of the court’s opinion when he explains in clear terms why Fred Korematsu was ordered to evacuate:

“Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they
urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this.”

There are two important points with regards to this excerpt. First, the court clearly admits that the only reason Korematsu was arrested was because the country was at war with Japan. But even a more disturbing aspect of this excerpt is the court’s deference to the executive branch and executive’s judgment on maintaining the proper balance between civil liberties and national security. Justice Black explains that because military authorities decided that the military urgency of the situation demanded internment, or that the congress affirmed this policy, this executive order could be upheld. Such deference is inconsistent with what the framers intended the role of the Supreme Court to be. The framers intended the Supreme Court to serve as an independent constitutional check on the legislative and executive branch. If the court is to defer heavily to the actions of the other two branches even when the constitutionality of those actions have been challenged, then the court is failing to fulfill the role that the framers intended the court to fulfill.

Justice Robert’s dissenting opinion in this case confirms the fact that the majority in the court had interpreted the law in ways that would suit its end. As indicated before, although the president’s executive order was far different than a curfew, the court failed to recognize the significant difference. Towards the beginning of his opinion, Roberts affirms this assertion by highlighting the major difference between the two cases:

“This is not a case of keeping people off the streets at night… nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.”

In explaining the difference between the two cases, Roberts demonstrates the majority’s failure to reach a judgment based on the merits of this case rather than relying on an irrelevant court precedent concerning curfews that was not applicable to Korematsu v. United States. Roberts also emphasizes the fact that Korematsu was imprisoned solely based on his ancestry, rather than his actions. These two points are another indication of the court’s failure to defend Japanese-Americans’ civil liberties in the aftermath of the attack on Pearl Harbor. As Justice Roberts noted in his dissenting opinion, “guilt is personal and not inheritable,” a fact that the court failed to recognize in the case of Korematsu. This is the reason why Justice Murphy, another dissenting justice in the case, called the court’s ruling “legalization of racism.”

The U.S. government institutions’ actions in the aftermath of Korematsu have been signs of these institutions’ recognition that Japanese internment camps were unjust. Following the Supreme Court decision in Korematsu, the justices also decided another case that resulted in closing down the prison camps. “When the Japanese-Americans left the camps, the government granted them $25 per person, or $50 per family and train fare home.” In 1948, congress also took action by partially compensating those who were wrongly relocated for the loss of their businesses or property. Even over thirty years later in 1980, President Carter appointed a special commission to investigate the internment affair. This commission concluded that the decisions to remove those of Japanese ancestry from the West Coast into prison camps occurred because of “race prejudice, war hysteria, and a failure of political leadership.” In 1988, Congress officially apologized for supporting internment camps and granted personal compensation of $20,000 to each surviving prisoner. Fred Korematsu also received his own personal recognition for his fight for civil liberties. Government researchers discovered that the
government had withheld important facts relevant to the case at his trial. “Even in 1984, a federal judge agreed that Korematsu probably did not get a fair trial and set aside his conviction.” Finally, 1998, President Clinton awarded Fred Korematsu with a medal of freedom, while stating that to the distinguished list of civil right pioneers such as Plessy, Brown, Parks, “today we add the name of Fred Korematsu.” What all of these actions taken by the U.S. government in the aftermath of Korematsu signify is the fact that all three branches and institutions of the government that played an active role in creating, affirming and upholding Japanese internment camps recognized that in doing so, they had violated the civil liberties of innocent individuals in order to bring security to the majority.

Over the years, Korematsu found that the Bill of Rights commonly becomes less important to Americans than national security in times of war. Over sixty years after the Supreme Court heard Korematsu, the outcome of that ruling is used constantly to prevent similar rulings from being handed down again. In the aftermath of September 11, the government claimed the authority to detain both citizens and non-citizens, indefinitely without charging them with a crime, just by labeling them as "enemy combatants." In 2004, Korematsu filed an amicus curiae brief in the case of Rumsfeld v. Padilla, in which he warned the court that “by allowing the Executive Branch to decide unilaterally who to detain, and for how long, our country will repeat the same mistakes of the past.” His brief could be attributed as one of the reasons that the court defended the right of “enemy combatants” to challenge the government’s claims. Although Fred Korematsu passed away in 2005, this recent court case is a demonstration of the everlasting importance of his efforts as well as the necessity of his example today.

As one looks over the past few decades, there are hopeful signs that the U.S. government regrets the internment policy in the immediate aftermath of the attack on Pearl Harbor. However, as long as there are wars, there will be questions about the proper balance between civil liberties and national security. Therefore, the citizens and government of this country shall constantly remember the example of the young Japanese-American, Fred Korematsu, who refused to accept a judgment that was based on his ancestry and illuminated the fact that although Americans are born into a system that protects their civil liberties, every citizen must perform his or her duties to defend those civil rights so that they could be preserved and passed on for generations to come.
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The purpose of this paper is to display the economic benefit of reforming the U.S. tort system. The reform of this system has become one of the most heated political debates in recent years as a result of the direction the system has taken. As the country has become more litigious, the state of the tort system has come to be regarded as a crisis. Frivolous law suits that result in large awards handed out by juries have caused the system to grow with large increases in the cost the system imposes upon the economy. This paper will explain just what the U.S. tort system is and how it is currently running into a trap. It will also explain the benefits that would arise from reforming the system and provides examples of this on the state level. Through statistical evidence and well researched information, this paper will show just how the reform will reduce costs and improve the economy in areas where it currently is lacking. As the country continues on its litigious path, tort reform will prove to be economically beneficial in different areas of both the private and public sector, and, as a result, will increase development and innovation in our nation’s economy.

“A tort is an injury to someone's person, reputation, or feelings or damage to real or personal property” (cbo, 2/26/05). A large amount of these types of injuries are usually a result of accidents or unintentional harm. As is clearly apparent to most Americans, accidents are a part of our human experience, and nearly 20% of Americans suffer some type of accidental injury each year (News Batch). There are also tort cases involving intentional harm that are not considered criminal acts, which are present in this system. In the case of the tort system, it is actually a system used for compensating victims of these accidental and intentional injuries. This type of law is generally a matter of “common law” and is performed at the state level where nearly 95% of tort cases are filed (cbo, 2/26/05).

“Economic analysis suggests that the primary reason for utilizing the tort system is to allow risk-creating activities to be carried out only if the social value of the activity justifies the risk created” (Matiacci, 3). When this risk is acted on, it is the job of the jury to determine who is liable. Tort liability is assigned using two basic standards: strict liability and negligence (Injury Board). Under these rules, the incentive to take precaution along with the standard of care under negligence varies. Strict liability is a situation in which the potential injurers take care and the potential victims don’t, resulting in full compensation of the injured with the injurer bearing the entire cost (Stull, 2/23/05). Negligence is used to determine just how much care should be taken into consideration by the potential injurers and help determine the cost and fault. Contributory negligence and comparative negligence are two different types that are used depending on the tort laws presiding over a particular jurisdiction or state. Contributory negligence is a modified negligence standard that does not place liability on an injurer if the injured party fails to take the proper precautions (Stull, 2/23/05). The contrary to this standard is contributory negligence which places the entire liability on the injurer without assessing any blame to the injured party (Stull, 2/23/05). These different standards and rules are all used in the decisions by juries to determine cases under the current tort reform system.

Many reasons support the increased litigiousness of our society. Over the past several years, law profession has undergone significant specialization and has benefited from technological advances particularly in the areas of medical malpractice and product liability (News Batch). This has also been affected by the “contributory negligence” rule which used to limit the number of persons who could claim damages. Today, all but a handful of states use “comparative negligence” rules which place no restrictions on the ability of people to claim tort damages (cbo, 2/26/05). Also the contingency fee system of compensating attorneys has greatly increased the ability of injured parties to claim damages. No longer is it necessary for individuals to front court costs because under contingency fee rules, the lawyers pay the full cost of trial preparation and are only paid in a case that results in a favorable verdict (cbo, 2/26/05). All three of these have greatly contributed to the increased ability to claim torts over the past 20 years.

Over the past 50 years, the total tort cost has raised a hundredfold (Towers Perrin 2004).
Over this time, the average annual tort system costs have grown at 9.7% (Towers Perrin, 2004). While this data has undisputedly grown and supports the litigiousness of our society as stated before, it does not grasp the detrimental effect on the nation’s economy. Since 1950, the total tort cost as a percentage of gross domestic product has grown from 0.62% to 2.23% in 2003 (Towers Perrin, 2004). This data shows that the average cost per citizen has undoubtedly grown along with the way our legal system operates within the U.S. economy. The cost of insurance for medical has grown as a result, costing a larger percentage of our incomes. This is money that is not placed into the economy where it could benefit companies and workers who are hurting for profits and jobs.

With the increased cost of the tort system and increase in damage awards, it is very difficult to not acknowledge the movement for tort reform. “Analysis suggests that tort law should be designed in such a way as to provide potential injurers and victims with appropriate incentives to avoid the accident by internalizing the externalities created by their activities” (Matiacci, 4). Currently there are three specific issues that illustrate this inefficiency of the tort system that has increased tort system costs. The three most popular issues regarding reform are through medical malpractice, auto-choice insurance, and product liability. While all different, the reform of all three of these areas intends to decongest the system. With the incredible expenses that the increased litigiousness has created, reform in these three areas would be economically beneficial.

While the number of cases involving medical malpractice claims has decreased, the system has seen steady increases in claims and premiums. Medical malpractice cases account for approximately 12% of all tort cases (Injury Board). With the increased specialization by attorneys, doctors are now dissected in front of juries across the country as a result of mistakes made on the operating table. As a result, doctors are forced to take out more malpractice insurance and as a result raise the cost of services. The willingness of patients to sue doctors has also increased, as well as the emergence of medical experts who are willing to testify against doctors. Doctors are currently forced to retire early because of the great cost of practicing and the cost of health insurance for citizens has increased. A Towers Perrin survey conducted last year predicts that health care costs will rise by eight percent in 2005. “This is on top of average annual increases during the period from 2000 to 2004 that ranged from 12 to 16 percent. Depending on a plaintiff’s age and degree of medical impairment, medical costs resulting from medical malpractice incidents may continue for decades” (iii, February 2005).

The tort system is the foundation for the settlement of claims resulting from traffic accidents. While overall there has been a decrease in the accident rate, automobile insurance costs have increased dramatically throughout the country (News Batch). Insurance costs are about seven percent of household expenditures, and about of third of that expense is automobile insurance (News Batch). The problems that have arisen in the area of automobile liability are through the 16 states that use “no fault” insurance systems (News Batch). This no-fault system, which doesn’t award non-economic damages, compensates all injuries regardless of fault. This has led to fraudulent claims that are eventually paid for with the money people pay in to cover their automobiles. This system, if it were changed, would save the average family 28.6 percent off the average citizens’ insurance premium (Saxton, 3/96). It would also decrease the tax burden on lowest one-fifth of income earners 61.7 percent if reforms were made under this system (Saxton, 3/96).

Product liability has been one of the major developments within the tort system over the past half century. These suits are brought on by consumers who bought products that were defective and caused injury (News Batch). Today, nearly all states impose strict liability requirements in product liability cases, which are generally brought about through class-action suits (News Batch). Through the use of strict liability requirements and the fact that class-action suits are generally used, exorbitant awards have been handed out by juries in these types of cases. To date, nearly $54 billion has been passed as compensation in asbestos-related litigation alone (News Batch).

In 1995, the Texas Department of Insurance
adopted a reform of Texas Insurance Code that guaranteed yearly reductions in insurance that “requires that insurers pass through to policyholders the savings that accrue from the tort reform legislation on a prospective basis” (Texas Department of Insurance). This reduction has established across-the-board rate reductions as a result of tort reform legislation. The legislation that was considered by the state legislature focused on six pieces of tort reform legislation: changes in joint and several liability, changes in recovery of exemplary damages, penalties for frivolous lawsuits, changes in the Deceptive Trade Practices Act (DTPA), changes in venue requirement, and medical negligence reforms (Texas Department of Insurance). These reforms, which were created by the 73rd and 74th state legislatures of Texas, have led to nearly $2 billion in policy holder savings (Texas Department of Insurance). These changes made by the legislature and the Texas Department of Insurance have led to these billions of dollars worth of savings and have all come as a result of tort reform.

The tort reforms made by the Texas State Legislature placed caps on exemplary damages at $200,000 and placed limits on non-economic damages at $750,000 (Texas Department of Insurance). The legislature also chose to punish lawyers and civilians for filing frivolous law suits. As a result of these reforms that the Texas State Legislature made, the people of the state have done nothing but reap the benefits. “Thanks to the civil justice reform, the average Texas household has benefited $1.078 a year in reduced prices and increased personal income” (Perryman, 2/15/00). Having once been a considered a state with a widely imbalanced judicial system, the state has been able to increase its legal efficiency and, in the process, created nearly 300,000 new jobs, $15.6 billion in additional personal income, and $28.5 in gross state product (Perryman, 2/15/00). While all these numbers are certainly very impressive, the change in the legal system has revitalized Texas’ economy, enabling it to once again be competitive at the state level. With the reduced cost on both business and citizens, the economy is now capable of enhancing consumer choice, greater innovation, lower prices, and higher output. Overall, the state has had nearly $7.63 in savings and, as a result, separated themselves from other states (Perryman, 2/15/00).

The Bush Administration has made tort reform a top priority of the president’s second term agenda. While very interested in general reform, the administration is most interested in medical malpractice reform that would place caps of $250,000 on non-economic damages and limit punitive damage awards (iii, February 2005). Their agenda would also place limits on the time allowed to injured patients to file a lawsuit and establish a fee schedule for lawyers’ contingency fees. “A provision would also provide liability protection for pharmaceutical firms. In recent years the House has approved a bill limiting lawsuits on medical malpractice claims seven times; each was defeated in the Senate” (iii, February 2005).

Other proposals seen intend to do a better job of disciplining incompetent doctors. Currently in Florida there are processes to control the practice of doctors who have multiple claims against them. In Texas, changing the way rates are set on insurance has saved money and prevented increases. Attempts at legislation to do the same in other states are currently taking place. Also, reforms are being considered to emphasize risk management, which would likely regulate the risk of torts in the medical field. This would be done by making doctors study medical malpractice litigation and set standards for doctors in the profession, particularly new ones (iii, February 2005). Auto-choice standards have also been proposed which would limit the expenses of the current auto insurance system. Like the no-fault system mentioned above, other no-fault systems have been proposed to try and limit expenses in the medical field, and reform the system under auto insurance.

On February 18, 2005 President George W. Bush signed into law the Class-Action Fairness Act of 2005. This law enables class-action lawsuits to be heard at the federal level rather than at the state level. “This will prevent trial lawyers from shopping around for friendly local venues. The bill will keep out-of-state businesses, workers, and shareholders from being dragged before unfriendly local juries, or forced into unfair settlements.”
The bill also requires judges to consider the real monetary value of coupons and discounts. This enables victims of a tort to count on true compensation for their injuries through judges and not through juries that often over or undercompensate the true value of a particular claim. This bill is just one of several reforms that have been made at the national level in an effort to decrease the total cost of tort reform.

The passing of this legislation at the national level doesn’t stop insurance costs for doctors and drivers to continue to rise. It also doesn’t stop companies from going out of business as a result of product liability cases. These reforms, like the ones made in Texas, have become a part of a political agenda for both political parties. The tort costs are expected to rise in the following two years, and by 2007, will make up an even larger percentage of the gross domestic product (Towers Perrin, 2004). To stop this, the medical malpractice legislation must be signed, auto-choice reform must be passed into law to allow drivers more control over the money they pay to protect themselves in case of an emergency, and product liability reform must also be passed to prevent companies from having to close as a result of suits. All of this legislation will enable companies to lower prices, improve innovation, and higher output. This will prevent individuals from paying damages that they can not afford. It will also allow companies to be able to process more output and will push reform of tort liability in the future. All of these reforms will create a more competitive market and be economically beneficial.
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In 1903, Wilbur and Orville Wright of Dayton, Ohio, made the first successful flights, and manufactured well-controlled aircraft two years later (Heppenheimer). This initial success in the centuries-long dream of flight marked the beginning of the road to the emergence of the aircraft industry, the United States’ number one industry, having realized close to 140 billion dollars in sales in 1999, including 62 billion dollars in exports to other countries (ICAF). An important segment of this industry consists of commercial aircraft producers. Therefore, it is imperative to review the components and history of this industry in order to analyze the effects various public policies could have on the manufacturers as well as the buyers of aircrafts.

**A Brief History**

In 1903, the Wright brothers succeeded in flying the first plane named “Kitty Hawk” in Carolina, marking the beginning of the aviation industry (Boyd 2000). Initially, the public did not embrace aircraft as a trustable means of transportation due to the perception that it was dangerous. However, this perception was changed when in 1927, Charles Lindbergh successfully flew across the Atlantic Ocean, creating a massive interest in flying (Boyd 2000).

The Wright brothers set up the Wright Company in 1909, which started by building airplanes before it lost in a bitter rivalry to another airplane manufacturer named Glenn Curtiss of New York (Heppenheimer). Curtiss’s firm which Curtiss Aeroplane Company built such high quality planes that the Wright Company could not compete, leading it to change its name to Wright Aeronautical Company and turning to building aircraft engines.

The industry suffered a decrease in demand with the break out of World War I, and this low demand continued throughout some years following the war. But one of the biggest factors in the growth of the air transportation industry in the post-war period was the development of the mail transport system by the U.S. Postal Service (Boyd 2000). The Kelly Airmail Act of 1925 allowed private airlines to function as mail carriers through competitive bids. The airmail revenue helped private carriers to expand into carrying other forms of cargo, including passengers. Prospects for new profits also led to the growth of already new manufacturers such as Donald Douglas, William Boeing and Alan Loughead to go into business (Boyd 2000).

A holding company by Boeing, United Aircraft and Transportation Corporation, gained a significant advantage over other manufacturers in 1926 by building a single-engine plane that was capable of carrying mail and passengers over the Rocky Mountains (Heppenheimer). Following this success, both airline companies and aircraft manufacturers targeted passengers to expand the income from the airmail system (Boyd 2000). The demand for commercial planes continued to increase steadily throughout the 1930s, but suffered another decrease in demand when World War II broke out. But the war helped generate support for military aircraft research and development, which extended to commercial aviation (Boyd 2000).

The end of war brought a collapse to the aircraft industry as a substantial number of army orders were cancelled (Heppenheimer). But the capacity and comfort of commercial aircrafts improved substantially in the 1950s as planes were modernized, and in 1959 jet service was introduced, enabling faster cross-country flight service. During this period, Boeing introduced Boeing 707 while Douglas produced its DC models, DC-8 being the latest model in that decade (Heppenheimer).

In the following years, Boeing and Douglas competed heavily to sell their planes by offering custom variations of a basic design that would serve airlines’ specific needs such as larger wing for long range. These customizations were costly, which helped Boeing win an important advantage over Douglas since the former was capable of making larger investment for it was selling planes to the Air Force in large numbers. In the 1960s, Boeing introduced 727 while Douglas also stayed in the game by bringing its DC-9 to the market. As the Vietnam War began reaching its conclusion, Boeing, Douglas and Loughead all suffered economic troubles (Heppenheimer).

Slowly recovering from post-war economic conditions, Boeing introduced airliner 747. However, this model was too large, which gave Loughead and Douglas the opportunity to produce a smaller airliner. Loughead produced L-1011 while McDonnell Douglas offered DC-10.
However, this was a mistake since there was only room for one model of small airliner in the market (Heppenheimer). This resulted in both companies losing money and pushed Loughead to leave the commercial aircraft manufacturing, becoming a purely military builder. Douglas stayed in the industry but was financially weak from rivalry with Loughead and could not fund the research and development of new planes.

These developments raised the possibility of Boeing to become a near monopoly in the aircraft industry. Although this prospect made Airline executives temporarily worried, during the late 1970s, European plane manufacturers completely changed the nature of the industry. France and Great Britain, which had a strong aviation industry, had built the Concorde, the world's only supersonic airliner (Boyd 2000). These countries combined with West Germany to create Airbus Industrie. During the 1980s, Airbus competed vigorously with Boeing, winning a large number of orders and becoming a powerful competitor to Boeing in the industry.

Some mergers made the aircraft industry even more concentrated. Boeing eventually bought McDonnell Douglas and another aircraft manufacturer, Rockwell International, becoming the only major commercial aircraft manufacturer in the United States. Today, the Boeing Commercial Aircraft Company and Airbus Industrie dominate the commercial aircraft industry, followed by McDonnell Douglas as a distant third (Shokralla 1997).

Costs in the Commercial Aircraft Industry

As the historical as well as current data on the commercial aircraft industry demonstrate, the entire industry is dominated by two major firms: Boeing, which owned 55% of the dollar value of the market in 2005, and Airbus owning slightly over 40% (Landler 2006). Based on this data, it is apparent that this industry is a very tight and highly concentrated oligopoly. Therefore, like most oligopolies, the industry is expected to have high financial and logistic costs associated with it that make entry of new firms rather difficult. Hence, it is important to analyze some of the costs associated with this industry in order to explain the high concentration in this market.

One of the factors which make entry to the commercial aircraft industry very difficult is the high set-up costs. Production of commercial aircrafts requires a great amount of initial investment in equipment, staff, labor, training and legal procedures. In addition to these preliminary set-up costs, a great amount of research and development is required to develop the aircrafts before any product could be produced and sold. A British aircraft producer reported that the research and development costs of a model of aircraft could amount to about twenty times the price of the completed aircraft (Sturmey 1964). A similar figure has been used to estimate the costs of research and development for a commercial airliner. These high set-up costs make entry to the industry rather difficult as few individuals or firms are financially able to make such large investment before being able to produce any revenue. Hence, high set-up costs result in an industry with a few large firms, such as Boeing.

Another reason which makes it more efficient to have larger firms in this industry is the idea of specialization. As Adam Smith demonstrated, specialization in production substantially increases the efficiency of production. But in order to have specialization, the producer needs to reach a minimum size required. For instance, a Boeing 777 contains about 132,500 engineered, unique parts and 3,000,000 fasteners (Shokralla 1997). Therefore, based on Adam Smith’s specialization theory, a very large production facility is required in order to create efficiency through specialization in the production of a product that contains such high number of highly-specialized engineered parts. Hence, this is another reason that explains why the commercial aircraft industry consists of only two major players.

The theory of learning curve is used to explain why it is more efficient for an aircraft manufacturer to produce at high volumes. The theory in the aircraft industry states that direct labor learns as it works, and the more a worker repeats a given task, the more efficient the worker will become (Hartley 1965). The first time, the learning theory was applied to the aircraft industry when it was discovered that the rate of output of a given
type of aircraft was increased, direct labor per unit declined. Therefore, based on the aircraft learning theory, the time required to complete each task in the chain of production of an airplane decreases each time a task is repeated. In 1965, Hartley developed a learning curve for the British aircraft industry. He demonstrated the relationship between worker hours – “man hours” – and cumulative aircraft output with the following graph.

![Learning Curve Graph](image)

As the graph demonstrates, 1,000 worker hours are needed to build the first aircraft. But at unit two, the number decreases to 800 hours. Consequently, the one hundredth unit is expected to take one fourth of the labor hours that were required to build the first unit. Therefore, as this graph demonstrates, there is a very strong learning curve in the industry which makes it much more efficient for the manufacturer to produce at high volumes.

Finally, the theory of economies of scale is another factor which explains why firms that produce commercial aircrafts tend to be very large. Based on this theory, large firms could be more efficient if with the increase of production, their average total costs decrease dramatically. The aircraft industry has very large economies of scale due to very high set-up costs for plants, research and development and specialization. Furthermore, learning curves make it more efficient for a single manufacturer to produce at a high enough volume to reach the peak of learning and production-per-worker. Due to all these factors, the commercial aircraft industry has very high economies of scale, which is the main factor in explaining the high market concentration in the industry.

**Public Policies and Their Effects on Oligopolistic Competition**

As most other monopolies and oligopolies, public policies have a major role in the performance of the manufacturers of commercial aircrafts. Especially, some of the policies that the European countries have undertaken toward Airbus have affected the nature of the competition between Boeing and Airbus. Therefore, it is imperative to review some of these policies in order to understand their impact on this industry.

One of the main factors which have helped Airbus, the European aircraft manufacturer, in competition with Boeing is the great amount of technological collaboration which has taken place among the European countries (Hayward 1988). Over the years following World War II, technological collaboration increased dramatically among European countries to accommodate important national interests of several states. Although such collaborations have not been perfect and competitive and cooperative forces coexist, collaboration has become a routine for most European firms. Collaboration has been practiced as a natural industrial strategy to help European countries deal with large development costs for products and endure international market pressure. This has especially been true in the aerospace industry where key technologies are very closely linked to military and economic security. At times, such collaborations have sparked criticisms that countries were sacrificing efficiency in certain cases for the sake of working in a certain program with other Europeans. For instance, France received one such criticism when it insisted on the development of two versions of Concorde and the allocation of Tornado equipment contracts to German companies despite their inadequate experience (Hayward 1988). However, European economists have responded by asserting that just like the production of aircrafts, learning curves are also applicable to collaboration; in other words, by “practicing” collaborations, countries are capable of gradually moving toward more efficient collaborative projects. Airbus Industrie has been
considered the European organization that has come closest to this integrated approach to collaborative programs. The Airbus collaboration is unique in that it has united the three major European countries in the aerospace industry, France, Germany and Great Britain, to a significant degree on a large-scale program. This integrated collaboration is one of the reasons why the relatively young European aircraft manufacturer quickly became a major competitor to Boeing.

Another factor which has had a major impact on the nature of the competition between Boeing and Airbus has been European government subsidies which have allowed Airbus to develop new technologies (Shokralla 1997). The Airbus Industrie came into being with the generous financial help of EU governments (Pavcnik 2002). Europeans justified the subsidies that covered the launching costs of the first Airbus model, the A-300, by relying on the “infant industry” argument and the monopoly of the United States in the industry. However, while Airbus has grown from a small firm into a powerful manufacturer effectively competing with Boeing, subsidies have continued. These subsidies have caused Airbus to enjoy from a long-term competitive advantage which enables them to afford research and development without having to pass on the costs to the customers.

Trade Disputes in the Aircraft Industry

Major European countries’ constant subsidization of Airbus has been a major factor that has put Boeing at a disadvantage to compete in the world market. Often in cases of disputes involving major firms in a concentrated industry in the same country, the government may have a small interest in the outcome of the disputes. But the commercial aircraft industry is an international industry with its two major firms located in two different continents. In this context, international trade plays a major role in this industry (Pavcnik 2002). Large economies of scale as well as the learning curves in the industry require producers to look beyond domestic markets, relying on export markets to lower their average production costs. However, the world demand for aircrafts is rather limited, making the competition in the industry very difficult. In such circumstances, the U.S. and the E.U. have an active interest in putting their forces behind their national aircraft manufacturers to capture or win over the world market. Such incentives have resulted in trade disputes that have involved American and European governments.

U.S. and E.U. governments have often affected competition in the aircraft industry between Airbus and Boeing through domestic and trade policies. Through such efforts, governments have tried to alter the strategic interaction between domestic firm and foreign rivals to shift the market share from a foreign to a domestic producer (Pavcnik 2002). When European subsidies to Airbus became more permanent, Boeing threatened to file a complaint to WTO. However, the American manufacturer has avoided retaliation because it fears that it may lose most of the European market. Instead the two sides have attempted to resolve conflicts through negotiations (Pavcnik 2002). Sometimes these efforts, such as the 1979 GATT agreement on trade in civil aircraft have failed to put at end to European subsidies. But other efforts such as the US-EU agreement on trade in civil aircrafts that limits government subsidies and financing have been relatively more effective in settling disputes.

Common Challenges in the Industry

While European and American commercial aircraft manufacturers have endured many disputes and disagreements in their competition to maximize their international market share, there are some challenges which they both have to overcome in order to remain successful in the industry. Therefore, it is important to review some of these challenges in order to understand the direction in which this industry is headed.

The first major challenge which the industry faces is creating profits. Boeing has to compete with a manufacturer that receives government subsidies while Airbus has to struggle against a firm that owns 55% of the market share. These conditions have resulted in ultra-competition which has made profit making rather difficult. Despite lower anticipated revenues, Boeing is striving to create larger operating margins and greater profits (ICAF). It continues to increase
productivity by reducing square footage and overhead costs. Both firms need to continue increasing efficiency and promotion of their products to increase profitability.

Another challenge facing all aircraft manufacturers is large-scale strikes which can jeopardize stability in the industry. An example of how such strikes could have a lasting impact on the industry is the strike against Boeing by the Society of Professional Engineering Employees in Aerospace (SPEEA) in 2005 (Bailey 2005). This forty-day walk-out by 18,000 SPEEA members substantially slowed down aircraft production. But strikes are more damaging to the society when they occur in monopolistic or oligopolistic industries, because they could have a significant impact on the total supply of a specific product in the market. Hence, the CEOs and boards of directors of these firms need to constantly work with union leaders to ensure that production would continue without jeopardizing revenue or employees’ working conditions.

Finally, increasing jet fuel costs and inadequate infrastructure development in less-developed countries are serious obstacles to continued growth (ICAF). World markets are critical to both Boeing and Airbus, and aircraft manufacturers need to penetrate these markets in order to increase sales as well as making air travel more accessible to a larger population. Furthermore, governments as well as aircraft manufacturers need to throw their weight behind the research and development of alternative fuel, such as the production of jet fuel from agricultural products or through clean coal technology in order to reduce fuel costs. These investments will not only benefit the firms in the industry, making aircrafts more attractive in the market, but their investments will also be beneficial in other sectors such as automotive industry. Accordingly, both companies will continue to pursue emerging technologies that provide cost savings and greater operational efficiency. Development of aircrafts that use cheaper fuel is expected to instantly gain substantial favor in the world market due to high worldwide oil prices. Hence, aircraft manufacturers have a real incentive in the development of alternative fuel and aircrafts with the technology to use such fuel.

Commercial aircraft industry has become one of the major international industries over the decades after World War II. Its high concentration is an indication of the economies of scale involved in the industry. As Boeing and Airbus continue their vigorous competition to dominate the world market, they have challenges that they need to overcome, both in terms of competition with one another, but also in terms of common problems. Governments also need to work together in making policies that would help the growth of the industry as a whole and promote competition. Only by overcoming these challenges will the industry have sustained growth and increased demands for their products in the world market.
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Two men, presumably assistants, carefully place already purchased portraits into crates. One of the men spreads his arms wide around a framed piece as he removes it from its perch on a wall in a room filled floor to ceiling with oil paintings, arranged snugly together so as to cover the entire interior of the room – no wasted space. The other man gently places another portrait into a wooden crate, carefully handling only the frame so as not to disturb the valuable picture within. Across the room, men in powdered wigs showcase paintings to alabaster skinned ladies attired in elegant dresses while a store girl sells fine goods and other refined, presumably wealthy, customers peruse the merchandise. Such is the scene of one of French artist Jean-Antoine Watteau’s remarkable painting, originally intended as a sign for his dealer’s shop. The work, painted in 1720, is a clue that by the early 18th century, and likely earlier, art had clearly become a commodity, an object to be bought and sold, and Watteau’s painting depicts it as a commodity associated with wealth and good taste (Siegel, 164).

Two hundred years later, in the early twentieth century, German economists began applying economic ideas to the valuation of art, ideas that didn’t emerge in the United States until the 1960s, when cultural economics began developing on the notion of securing public support for the performing arts, which were struggling to make profits (Frey and Werner, 1). Economic theory has not only continued to develop strategies for public support of the arts, but also offers important insights into better understanding the interaction between art and commerce, an idea that can be described as the economics of art. Economics can define art in terms of profitability and, therefore, help determine the economic efficiency and social value of art and its power through market forces; furthermore, intellectual property law explains how economic forces promote the creation of art. This analysis will begin by describing the supply and demand sides of the art industry, investigating the value of art as an investment and defining two different kinds of ownership of art. Secondly, a demographic approach to art consumption can help determine how society values art. Finally, intellectual property law can provide a social framework to understanding the incentives to creating artworks.

In order to define the economics of art, “art” must first be classified, in a general sense. Art is any creative work of expression, and, for the purpose of this analysis is divided into three main categories: visual arts, which includes painting, sculpture, photography, and film; performance arts, which includes music and theater; and literature, which includes fiction, non-fiction, poetry and any other written creative work. Although there are differences in the way the economy affects these differing art forms, this analysis includes all three to create a unified economic theory of creative expression, or art.

Why apply economics to art? Economics focuses on decisions people make, decisions based on rationality. People reveal their preferences; they choose to buy and create art because they value it, because there is some utility in the existence of art in society. This creates a market, and, like any competitive market, supply and demand determine the price of art. Identifying the socially rational reasons for the desire to buy and sell is the basis of economic analysis that determines how society values art. Once the value is identified, art, one of the haziest of the humanities, may begin to be economically defined. Economics in the arts, and other non-traditional areas of economic intrusion, is useful because it “raises new issues, analyzes new aspects and brings new insights to problems” (Frey and Werner, 4). The arts, like any other desirable good, are subject to scarcity because “they do not constitute free goods which are available in abundance” (Frey and Werner, 6). So, what is the rationality behind supplying and demanding art?

Artists are willing to spend the time, energy, and materials, as well as more abstract costs such as inventiveness and originality to create artworks, as long as they get something in return. Esoterically, some artists claim to create art for art’s sake, an idea that implies art is created for the pure intention of creating something beautiful, whether it is useful or not. There are, of course, problems with this idealism. Artists, like anyone else, need to eat and sleep under a roof, and ignoring the market for their work is likely to put them and their art in the gutter, or make them pick a
new career. Individual artists “systematically take into account the benefits and costs of alternative actions” (Frey and Werner, 11).

Secondly, art for the sake of art is economically inefficient, meaning that, without some societal benefit in exchange for the costs of creating the art, there is a net loss to society. This idea may also lead to inefficiency even if an art institute is bringing in revenue. For example, producers and performers strive for performance excellence, a standard that, while enjoyed by spectators, may be beyond the expectation that viewers have when they decide to pay to see a show, creating extra effort that is uncompensated, which becomes very much a part of determining whether or not to create government subsidy for art institutions.

This does not imply that an artist must sell-out in order to make a living, it only means that an artist must create art that can be held against a standard, a standard of what art consumers are willing to buy. Graphically, supply curves differ depending on the nature of the product. For example, the performing arts and literature operate on a standard upward sloping supply curve, with an optimal price per ticket or book. However, a painting is a unique piece of art, meaning there is only one piece (ignoring the market for posters or other such copies). The market for visual artwork is monopolistic, due to the uniqueness of a piece, which changes the supply into a vertical line. For an artist, “the number of works produced depends on the input cost of an additional unit (of equal quality and size) required; but it is also influenced by the future selling prices that the artists/gallery owners expect” (Frey and Werner, 85). Therefore, a price change by a gallery, acting in both its own and the artists interest, changes the entire market, as shown in the following graph:

Monopoly is not an efficient form of supply. However, certain pieces of art, such as paintings, can only exist in monopolistic form. Since the supplier has sunk costs into producing the piece, and people are willing to pay monopoly prices, there is a net gain, and the piece of art is efficient. Why would someone pay monopoly prices for art?

People are willing to pay money for theater tickets, or spend thousands of dollars on a painting, or go to the movie theater. Additionally, these art consumers also pay opportunity costs to enjoy art, such as the time it takes to watch a Puccini opera or Titanic. This willingness to pay creates demand for art, a demand based on consumer enjoyment and, as will become apparent, other valuations of art. The demand for art is more important than supply for determining the value of art in society. Art, as defined above, is a very wide variety of products. Ticket sales for performing arts, movies and book prices are all similar to ordinary goods consumed daily as opposed to thousand dollar paintings, which sell to different consumers for much steeper, monopoly prices. Consumption is as varied as the products, because, although “almost everybody displays interest in the symbolic expressions conveyed by some creative good and services, but consumers differ in both the types of expression
that attract them and the intensity of their attraction” (Caves, 185).

Who are these consumers? Demographic data, taken from Heilbrun and Gray, divided the American population into income brackets and measured what percentage of each income bracket attended classical musical concerts, nonmusical plays and museums. This analysis averages the percent attendance of each of these performance sectors to create visual representations of the demographics. The general trend of all the data indicates a positive correlation between income and arts participation:

\[ y = 0.0006x + 5.4567 \]

![Figure 2: Average participation by income](image)

![Figure 3: Average Participation by Education](image)

Education also shows a positive correlation. Related, occupation makes an impact on participation:

\[ y = 3.0355x - 20.246 \]

![Figure 4: Average Participation by Occupation](image)

These graphs make sense related to income. Higher income people can afford more years of education, which secures a higher income-earning job. The equations in the graphs can be used to calculate the amount of money someone is likely to spend on the arts, or participate, based on their income and years of education.

The data offers other interesting statistics, including age:

\[ y = 3.0355x - 20.246 \]

![Figure 5: Average Participation by Age](image)

The graph reveals that the performing arts participation peaks around the age of 35 and drops to the lowest after age 55 or so, which insinuates that ten-year-old children are more interested than their grandparents. In addition, women participate 3% more than men (Heilburn and Gray, 43).

Based on this data, the most likely American art consumer is a 35-year-old, highly educated woman in a professional career. How much does this woman spend on her art participation? In 1990, consumer spending on performing arts and motion pictures was 0.208% of
disposable income, which was 4.77% of total income spent on recreational activities (Heilburn and Gray, 14). These numbers seem very small, and, indeed, that the arts sector was only 0.133 % of GDP, which, in 1990, was $5,513.8 billion (Heilbrun 1993, p. 9). It is likely figures have shrunk in the last 15 years, as they continually shrunk throughout the twentieth century as other options, such as spectator sports, became available. Therefore, it is apparent that examining the economics of art is not important because art drives the economy, but rather because art is affected by the economy.

Now that who is consuming art and how much they are spending is evident, factors of demand may help explain why consumers spend in the arts sector. First, and most obvious, people spend on the arts because they enjoy them, that is, they value seeing a film or a play, or reading a book, or going to a museum more than the price to do those things. “Some art seeks to criticize or shock its audience” (Siegel, 164), which may sell as a thrill to audiences. Furthermore, a consumer may choose to buy a piece to hang on the wall and impress visitors, to act as a status symbol, subtly displaying a person’s wealth. Similarly, people will pay for the opera because it is prestigious to attend. These ideas give art “prestige value” (Frey and Werner, 19).

In addition to prestige value and entertainment value, art can also be a very lucrative investment. From 1975 to 1990, the annual rate of return on paintings was, on average, 19%, which was higher than AAA corporate bonds, gold, three year treasury notes and the Dow-Jones industrials (Frey and Werner, 165). Similarly, many investors put money in Broadway shows, or other such royalties. Of course, like any investment, art is risky, perhaps more so than other investments, which are protected by financial institutions, art is highly prone to theft and careless damage – it’s fragile. However, this risk is important to promoting the growth of new artists:

The risk sharing policy introduces new and creative impulses into art. The expectation or hope that an unknown artist will later become recognized, and that his or her painting will rise in value, constitutes an important motive for investment in modern art, and therewith identifying and supporting painters and sculptors who are not recognized. (Frey and Werner, 17)

Investing in new artists is risky, but investing in a famous artist is less risky, if an investor has enough money to buy a multi-thousand piece, as well as cover the cost to protect against theft will be expensive.

Ownership of art, then, can be either purchased or created. First, an owner can be an investor, or the patron who bought a painting. Secondly, an owner can be the artist who created the work. Either way, art is property and needs protection, which leads to the importance the interactions between art and the law.

Weil describes the sequence perfectly: “a growing interest in art creates a market, the market churns up activity, activity leads to abuses and contention, and the law must be called upon to remedy the abuses and resolve the contention” (Weil, 193). Since art is property, or rather a bundle or rights attached to the commercial and private use of art, and, often, very valuable property, “it was money – or, rather, disputes over money – that first began to bring art into the embraces of the law” (Weil, 193). The sector of law most closely related to the arts is copyright law. Copyright law establishes a “baseline for establishing what rights regarding duplicating and imitation intrinsically belong to the artist” (Caves, 281) as well as “providing both a way of deciding who gets to use what when and an incentive for creating things” (Friedman, 138). Since it protects expression rather than ideas, it does not limit creativity, but rather allows the crucial interaction between artists and society as they respond to ideas in society with artwork that offers commentary on societal ideals, which cannot be copyrighted. Copyright also provides an economic incentive to create. The rights to a creative work can be very valuable, and can be created without monetary input. Judge Richard Posner addresses this issue: A fundamental task of copyright law viewed economically is to determine the terms of this hypothetical contract, or in other words to strike the optimal balance between the effect of copyright protections in encouraging the creating of new works by reducing copying and its effect in
discouraging the creation of new works by raising the cost of creating them. (Landes and Posner, 69)

Copyright is, essentially, legal granting of a temporary monopoly. The second a writer writes anything, it becomes copyrighted, and is protected for the writer’s lifetime plus seventy years. This is a long amount of time to allow a monopoly. A recent article in the *Stanford Law Review* accused the length of the protection to be based in “concrete political considerations,” which infringe on First Amendment Rights (Sprigman, 534). The premise of the argument is that society benefits greater if works are publicly available – basically a much less limited fair use policy. Copyright length may be inefficient if it limits the reach of a copyrighted work which is beneficial to society. Of course, the rights of the creator must be protected, but is it inefficient to grant a lifetime of copyright to an individual who then controls whether or not the work is used to benefit society?

Art, in all forms, is not necessary to sustain life, but “expresses a social, collective experience as well as the personal thoughts and feelings that make each of the artists unique” (Siegel, 168). It creates an element of a societies culture, and, therefore, should not be hidden away behind a copyright holder. Art, perhaps, holds more value for society than individuals. This is, of course, an impossible assumption to make, but an important concept to consider when defining how economic analysis benefits art.

Art is impossible to define, although it can be described in economic terms, which is as close as a quantitative, rather than qualitative, definition dare exists. Because “art is an abstract concept, similar to beauty, freedom or justice, and is not amenable to direct measurements, existing as it does in the eyes of the beholder…economists analyze the preferences of individuals with respect to the arts without judging what constitutes ‘art’” (Frey and Werner, 6-7). However, economics uncovers the values that consumers and producers place on art, values such prestige, cultural, educational and value to future generations. “Ultimately, all art illuminates the ways in which contemporary society affects not only objects, but the people who belong to that society” (Siegel, 164), which is an important mirror for society to be able to cautiously look into, discovering truths that only artistic expression can tap. Economics offers suggestions to the arts in order to keep them thriving and in contact with the people of society, because, as useful and beneficial as art is, it is nothing without a beholder.
Bibliography


Editors and Columnists

Sam Sedaei
Lux Esto Editor-In-Chief
Columnist on
Law, Politics, and Civil Liberties
Saman.Sedaei@kzoo.edu

Caroline Grossholz
Columnist on
European Law
CarolynGrossholz@aol.com

Contributors to this issue

Sam Sedaei
David Baxter
Tyler Pray