The Journal of Private Enterprise 31(4), 2016, 43–63

The Pitfalls of Legislative and Executive Policymaking Compared to Judge-Made Law

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Abstract
This article uses insights from cognitive psychology to contrast judge-made law with legislative and executive policymaking. I argue that the predominant narrow conceptions of reason and rationality have led to overly optimistic views of deliberate policymaking at the expense of traditional judge-made law. However, alternative views of what constitutes rationality suggest that judge-made law may have some often overlooked advantages over deliberate policymaking.

JEL Codes: K1, D72, D80
Keywords: rules, judiciary, experts, heuristics, ecological rationality

I. Introduction

The literature on the putative economic advantages of common law over civil law is substantial. A number of authors have argued that the institutional advantages of common law stem from the different structures of government that are characteristic of different legal frameworks. The main source of the superior economic performance of common law systems, in this view, is the greater independence that common law judges enjoy (Hayek 1960; Merryman 1996; Glaeser and Shleifer 2002; Klerman and Mahoney 2007). While both common law and civil law judges may enjoy nominal independence from government in terms of security of appointment and salary, common law judges also have substantial behavioral independence associated with their lawmaking power. The weaker judicial protection in civil law countries translates into, on average, more interventionist government, more bureaucracy, heavier regulation, and less secure property rights—and, therefore, inferior economic performance.

A different kind of argument in favor of common law points to the nature of the law itself, and in particular the adaptability of common law on the one hand and the rigidity of civil law on the other. Posner (1973) makes the case for common law by arguing that

judges have a preference for efficiency. A precursor of this view is Coase (1960), who observed that in the absence of other criteria, common law judges are inclined to use economic efficiency as a criterion in dispute resolution. Similarly, Rubin (1977), Priest (1977), and Goodman (1978) argue that inefficient rules are more likely to be litigated than efficient ones are, which pushes common law in the direction of higher efficiency (see Zywicki and Stringham 2010 for a survey).

Despite all its alleged superiority, common law has been in retreat ever since the Enlightenment era. Not only has codified civil law spread over continental Europe, but in the remaining common law countries, case law has gradually yielded to statutory legislation. Rules created at the executive and legislative levels have become more substantial and more elaborate, while courts, at least when it comes to economic rules and institutions, have become more deferent to the other two branches of government.

In this article, I maintain that the intellectual background of the growth of statutory law is the rise of rationality's normative status. The elevated status of reason and rationality has consistently extolled deliberate policymaking at the expense of traditional judge-made law. I argue that the uncritical acceptance of the rationalistic attitude may not have left us better off in the institutional and policymaking sense. In particular, certain recent contributions from cognitive psychology call into question some widely accepted ideas about what constitutes rational policymaking. From this alternative cognitive standpoint, I will challenge the view that deliberate policymaking yields superior outcomes compared to decentralized judge-made rulings based on general constitutional principles.

II. Limited Knowledge in the Complex Economy

It is generally recognized that rule design in representative government is burdened with many incentive-related problems. Public choice scholars warned that rational maximization of political agents brings about regulatory distortions and inefficient rules (Buchanan and Tullock 1962; Olson 1965; Tullock 1967). Legal authors have also recognized difficulties with voters' representation that make legislation and the regulatory bureaucracy poor representatives of public preferences. Several of them have pointed out specifically that judiciary rulemaking has the capacity to alleviate these difficulties: Bruno Leoni's (1961) argument in favor of judge-made law is partly based on the claim that legislation does not

properly represent people's interests, and Richard Epstein (1985) sees rent-seeking as a reason why judicial review in the property-taking area should be substantive.

An alternative and less common view is that the main source of legislative and other regulatory error lies not in bad intentions or even in the self-interest of policymakers, but in the inherent unintelligibility of the market economy. A market economy is a nexus of a large number of causes and consequences that we are not able to entirely recognize and comprehend. The nature of economic complexity is such that no amount of economic, legal, or regulatory expertise may suffice to recognize all relevant causal relationships. Economic behavior is far too multifaceted for us to be able to design rules that will steer it in a predictable and desired direction, even if efforts are both well intentioned and well informed. Bounded rationally and the limited knowledge of policymakers hinder the optimism about the possibility of competent public policy.

Although often neglected, the argument about the complexity of economic order and the limits of our cognitive abilities to capture it has been present for a long time. Philosophers in the tradition of the Scottish Enlightenment, as well as some representatives of early conservatism and romanticism, understood very well the intricacy of not only the market but all social relationships. They argued that social order is far too complicated to be fully comprehended by reason, and they repeatedly pointed out that the market economy's success was not the result of a conscious design but rather came about spontaneously through decentralized human action. Rules of conduct in the social and market order developed gradually in the process of coordinating different individuals' interests, plans, and actions. We may try to institute some radically different rules of conduct, based on our understanding of the existing order, but that would be a sign of hubris. Our knowledge and understanding of the world are inferior to the knowledge accumulated in the long-surviving institutions. Instead of reason alone, we must therefore rely on experience, tradition, and some universal traits of human nature.

In the present, literature on the limits of policymaking in the presence of political ignorance among voters has built on this tradition. Caplan (2007) argues that economic policymaking fails due to several voter biases. Voters' policy preferences differ from those of professional economists and are typically biased toward more government intervention in the economy. Literature on many particular cases of government failure has also pointed to the

problems of either voters' or policymakers' relative ignorance in comparison to the enormous complexity of problems they are trying to solve (Friedman and Kraus 2011; Somin 2013; Lucas 2014; Friedman forthcoming).

Still, both economic theory and practical public policy today are dominated by the explicit or more often implicit presumption of the possibility of rational and well-informed policymaking. For example, consider a statement by a leading political economist: "Unlike the generalist judges, regulators also tend to be specialized, and are expected to understand more. . . . Specialization of the regulators is the central efficiency argument in their favor, particularly in the areas, such as finance and environment, where the issues are enormously complex" (Shleifer 2010, p. 18).

Shleifer's analysis of regulation lacks any concern that the regulatory design might suffer from a lack of knowledge. Shleifer (2010) argues that regulation exists because it is an efficient solution in cases where the court system fails to resolve contract and tort disputes—and by making this claim, he effectively assumes away the possibility of a faulty, biased, insufficiently informed regulation. While the issues are "enormously complex" (Shleifer 2010, p. 18), they are apparently not too complex for the competent and specialized regulator. In a separate discussion, Shleifer (2005) specifically analyzes possible inefficiencies that may arise from imperfect regulation, pointing to the standard public choice and interest group arguments, as well as to the history of colonial transplantation of institutions that might be less than perfectly suitable for local conditions. He once again does not even consider the possibility of regulatory error as a potential cause of inefficiency. Whereas Shleifer uses interest group arguments to challenge the assumption of government benevolence, he nevertheless tacitly assumes regulatory omniscience.

It has been typical in standard economics and political economy to presume boundless rationality on the part of policymakers. The recent advance of behavioral economics has changed little in this regard. For one, behavioral economists typically disregard that the regulators within executive and legislative branches, who are supposed to correct markets' behavior, may themselves be prone to cognitive limits and biases. Moreover, behavioral economics is, at its core, a rationalistic enterprise. It is focused on marginally improving human behavior so that real-world decision makers better fit the external standards of rationality. Aimed at making people more

rational, it does not come close to the issue of our fundamental incapacity to comprehend and control the world in all its opacity. If anything, it is engaged in the opposite direction—toward the greater influence of knowledgeable and scientifically informed experts in society and the economy. In the words of a leading proponent of behavioral economics, "The executive is the most knowledgeable branch," which is why it should be given "considerable discretion in both domestic and foreign affairs" (Sunstein forthcoming).

The cognitive psychology standpoint opposed to rationality in the current predominant sense of the term is that of ecological rationality (Cosmides and Tooby 1994, Gigerenzer 2000, 2008; Smith 2003). Gigerenzer (2000) employs the concept of ecological rationality to account for the use of crude heuristics as an optimal cognitive strategy. Ecological rationality does not mean that each individual decision is rational, but rather that adopting a certain mode of behavior maximizes our returns over the long run. Any given heuristic is not better than a perfectly rational deliberation; however, the use of heuristics as a mode of behavior, given time and knowledge constraints, on the whole may trump rational cost-benefit analysis as a basis for decision-making.

The idea behind ecological rationality is that after a problem's difficulty reaches a certain level, ordinary rationality ceases to be the optimal tool for resolving the problem. That is why in everyday life, when confronted with problems that exceed our cognitive capacities, we use heuristics as cognitive shortcuts. Heuristics are cognitive tools that abstract from a large amount of noncrucial information and focus on only a few important elements.[1] We solve cognitive problems that require an enormous amount of information and analysis with the use of a few simple rules. In many ordinary situations, a rational cost-benefit analysis would be a failure, and we behave optimally when we rely on heuristics instead.

For example, we often quickly buy a product whose brand name we recognize, rather than trying to learn everything about the product and its alternatives. By choosing according to the brand name, not only do we save time and effort, but given our necessary ignorance of

[1] Under the influence of the research program led by Daniel Kahneman and Amos Tversky (see, generally, Kahneman 2011), the term "heuristic" is often used with a negative connotation and it is argued that relying on heuristics rather than fully informed rational deliberation leads to suboptimal ("irrational") decisions. In this article, I follow Gigerenzer's (2000, 2008) treatment of heuristics as usually helpful cognitive shortcuts.

all possible costs and benefits involved, following this simple heuristic may paradoxically yield a better decision than a deliberate choice based on our calculated costs and benefits. Similarly, we often use moral heuristics, our internal vague feelings of right or wrong, to give us some sense of direction. Voters, for instance, are interested in politicians' personal lives. While their past personal behavior is not a perfect predictor of their future policies, we are inclined to think that a person who is honorable in their private life will also try to serve the public virtuously. Heuristics are, therefore, double-edged swords: economizing on information, they may miss something important from time to time and lead us to a wrong answer. However, given our limited cognitive abilities and, therefore, our radical ignorance in front of complex issues with a number of unknown unknowns, the use of heuristics in such cases is a long-run rational strategy.

Seen in the institutional context, the concept of ecological rationality is analogous to the earlier concept of rule utilitarianism. In both classic and modern accounts, rule rationality is broadly defined as maximization over rules rather than acts (Mill 1863, Harsanyi 1977, Aumann 2008). Rather than optimizing every individual act, people may optimize the rules, or modes of behavior, that are aimed at maximizing expected utility over a large number of acts in different situations.

In this framework, institutions that have evolved in the market economy tend to be rational on the level of rules, even though various exceptions and aberrations may well be rational if seen as isolated acts. For example, a bailout of an individual troubled bank may easily have a net positive welfare effect. Introduction of the practice of bank bailouts, however, would probably be inferior as a rule. An omniscient and benevolent government, aware of all the present and future costs and benefits of any given bailout, could in principle cherry-pick which banks are worth saving and which are not. But since omniscience on this issue is not an option, a government that has a longstanding "no bailouts" rule is taking an ecologically rational stance. A realistic view of our limited abilities to comprehend all the present and future costs and benefits, even leaving the question of government benevolence aside, entails reliance on general rules rather than on individual decisions.

Any argument in favor of following general rules as opposed to elaborate policymaking may be, broadly speaking, placed in the Hayekian tradition. Hayek's original argument in favor of general

rules and the common law rests on the evolution of rules, along with their survival, as evidence of their merit (Hayek 1960, 1973). Another well-known justification of general and simple rules comes from Epstein (1997). While also broadly within the same tradition, Epstein's argument for the most part relies on a sober cost-benefit analysis.

In what follows, this paper attempts to supplement such claims by invoking additional support from contemporary cognitive psychology, in particular from the evolutionary approach to reasoning and the findings about the constructive role of heuristics. The paper arrives at conclusions similar to those that that Hayek and Epstein, among others, have reached. The argument here, however, relies neither on the evolution of rules nor on the cost-benefit analysis of various rules, but rather on the comparison of competing concepts of rationality present in cognitive psychology today. Addressing the choice between judiciary rules and policy discretion from the viewpoint of limited rationality gives credence to the claim that the additional epistemological quality of judiciary decisions comes from their de facto role of fast and frugal heuristics.

III. Law As Heuristic

The emergence of statutory law in the nineteenth century was initially justified with the certainty and clarity of rules that the introduction of legal codification would bring. The codification movement signified a victory of the ideal of rationality and gained many proponents among liberal intellectuals. Instead of the previous chaotic, decentralized, and asymmetric common law rules, the new nation-states could now create well-designed systems of unified and coherent rules (see, e.g., Bentham 1822). During the twentieth century, the justification of statutory law gradually shifted from clarity, predictability, and rationality to democracy and the will of the electorate—but the possibility of rational and informed policymaking remained a widely accepted rationale for the rise of statutory law.

At the same time, growing evidence from cognitive psychology suggests that we tend to underestimate the complexity of certain phenomena and feel overconfident about our ability to understand and resolve complex issues (Tasic 2009). Attempts to consciously shape society through legislation are likely to fall under this general tendency. Not only is the market economy a complex order, but on the surface, it appears simpler than it really is. Its underlying complexity is why we are often surprised when attempts to direct the

market order toward a goal are in vain, or result in unintended consequences that could not have been predicted beforehand, easily or at all. In a survey of academic literature appraising different sorts of regulation, Winston (2006) reports an overwhelming failure of real-world regulation to achieve desired results. That calls for regulation continue in spite of widely reported failure indicates unwarranted optimism among voters and experts alike about the availability of knowledge and human abilities to direct a complex market economy toward desired outcomes.

The role that heuristics play in individual cognition is in social cognition played by the elementary rule of legal norms and principles. Evolved in societies that came to have an evolutionary advantage over alternative forms of organization, institutions such as property rights and voluntary contracting are efficient as rules of conduct—even if occasional policy deviations from them could be rational if viewed as isolated, individual acts. In the cognitive framework based on ecological rationality, the judiciary branch oriented toward general rules has an epistemological advantage over specialized agencies focused on outcomes.

Common law judges are not experts on economic policy, growth, or development, and with minor exceptions, judges practice general law rather than any specialty. As Justice Breyer of the US Supreme Court explains: "We do not try to develop different areas of expertise over time. We are generalists. . . . Thus, any deference we may show to our other colleagues' expert knowledge is limited" (Breyer 2004, p. 3). From the ecological rationality paradigm, it is precisely the generality of judges that makes their institutional design superior—contrary to Shleifer's (2010) and Sunstein's (forthcoming) aforementioned view that the specialization of regulators is the central efficiency argument in their favor. What makes judicial influence in institutional design efficient in the long run is not judges' policy competence but the fact that their decisions are based on general principles that support a liberal constitutional order. The key to building an environment conducive to economic growth lies not in deliberate growth-enhancing policies but in the rules that emerge by adherence to certain longstanding principles.

Notwithstanding the occasional highly visible excesses of judicial behavior, as well as the changes coming from the growing constraints imposed on courts by the mounting statutory legislation, judicial decision-making still rests on the principles that safeguard its distinct role in institutional design. Unlike statutory law, which exists

primarily for the implementation of goals set by parliaments, judge-made law is largely passive and nondeliberate when it comes to the accomplishment of broader social goals. It works by reacting to the individual claims and creates rules only as a byproduct of regular judicial decisions.

Naturally, judges' ideological preferences and policy opinions will play some role in institutional design. But the importance of this fact is smaller than it might appear. In legal scholar Roscoe Pound's (1923) classic account, judicial decision-making is a triangle of legal doctrines, rules, and standards; of the techniques of reasoning methods for the application of these standards; and finally, of their individual social, ethical, or policy views. The first two factors in decision-making are largely external for judges. They are accumulated in the legal system and in the broader institutional order. Judges must explain their opinions, and this practice ensures that their decisions satisfy some standards of reasoning and have some anchor in constitutional provisions and the rest of relevant law. The reliance on these more or less permanent doctrines and unified techniques is what makes the judiciary, in a typical case, more politically restrained in either direction than other branches. The space for exertion of personal policy views is much smaller for judges than is the case with members of the other two, purely political branches (see also Epstein and George 1992; Segal 2008).

Even insofar as this space for personal preferences is open, judicial choices are based on relatively well-motivated individual decision-making, where career prospects and the avoidance of having a decision overturned serve as background incentives. As Posner (2008) points out, self-selection of judges should not be underestimated. The self-selection process indicates that those who decide to pursue judicial careers most likely share the goal of becoming, first of all, good judges. That also means that they are unlikely to have ardent ideological agendas, and certainly less so in comparison with professional politicians in the legislative and executive branches. If Posner's conjecture is correct, then even within the zone of freedom from the established doctrines that they have, judges will, on average, be more likely to think in terms of certain fundamental principles and make their decisions accordingly.

IV. Limits of Expertise

An objection to the argument for the cognitive contribution of judge-made law by way of heuristic could be that even if we take it for granted that, in general, heuristics may be smarter than carefully reasoned and calculated decisions, the same does not necessarily apply to economic decision-making on the macro level. However, it is uncertain on which side the burden of proof should lie in this tentative dispute. As pointed out earlier, economics and policy analysis operate with the implicit presumption of expert and regulatory knowledge, but this presumption is unwarranted, especially in light of the argument that the enormous complexity of the market order tends to be underestimated.

Meanwhile, there is no lack of evidence that our expert economic knowledge does not do well in comparison to some time-tested principles. Today, there is broad agreement about some common past mistakes even in some of the most basic questions of economics. To begin with, economists have long been led astray in the search for the policies that best promote economic prosperity. In just over half a century, economic growth was first seen as a question of the right combination of physical inputs such as labor, technology, and capital or its derivatives—investments and savings; with the rise of macroeconomics, economists have focused on managing macroeconomic aggregates, and the central task of experts has become finding the right aggregate magnitudes that would increase the national economy's performance. Other influential schools of thought pointed to the necessity of extensive industrial planning for achieving higher growth rates; most egregiously, top Western economists considered central economic planning a respectable policy until the very collapse of communism (see, e.g., Bergson et al. 1966).

At the same time, institutions such as legal rules, contracts, and property rights have been largely disregarded in academia. A great number of professional economists simply did not perceive that private ownership is in any substantive way different than collective ownership, or that an institutional order that allows for greater freedom of contracts and credibly guarantees their enforcement is itself a major source of economic prosperity. Economists largely failed to recognize that prosperity, on a level beyond macroeconomic management, depends on the protection of private property rights and the predictable rules that guarantee maximum freedom of action. Meanwhile, it was moral values and simple constitutional heuristics

that provided the basis for the protection of private property and freedom of contract—not the economists' and policymakers' explicit theoretical awareness of the economic utility of these institutions.

Accordingly, the role of judges in setting the rules and shaping institutions is not that of intentional policy expertise. Notwithstanding the increasing influence of the judicial policy analysis within the law and economics movement, policymaking is not what judges are or should be doing. The argument in favor of judge-made rules is not that judges are more competent, informed, or benevolent than regulators and policymakers, but rather that the decision-making functions of the judiciary differ from those of the legislative and executive branches. In fact, a potential peril in judicial lawmaking is precisely in the occasional proclivity of judges to act as experts and behave as if they were a policy-minded legislature. If judges consciously attempted to legislate in order to advance specific economic goals, they would fall into the same trap that the legislators and policymakers are already in. It is not the economic knowledge of judges that makes judge-made rules rational in the broader ecological sense. Judge-made rules anchored in a liberal constitution and emerging from the power of judicial review are advantageous because economic prosperity is most compatible with individuals' freedom to act in the market economy. The emergence of such rules implies not judges as experts, but judges who understand their mission as employing the basic principles of justice to decide on specific cases. Judicial rule-setting is ecologically rational only as long as judges base their decisions on simple principles, are aware of the limits of their own knowledge and understanding, and do not act overly ambitiously in a quest to consciously shape society according to whatever good intentions they might have.

Historically, economic prosperity did not come after a set of well-conceived policies established by judges, legislators, or any other source of authority, but was a rather unpredicted consequence of the political and social developments that resulted in the establishment of relatively secure property rights and the freedom of economic action. Prosperity-friendly institutions were, in fact, at their highest point when common law was the only law regulating private life and business, when government statutes were rare, and when judges did not think that they should be concerned with any general social goals. As Leoni (1961) puts it, law was initially about the rules of behavior, but then somewhere along the way it became about improving the world. The modern ideas of judges as policy experts are the

consequence of the same failure to realize the limits of our knowledge and reason that spurred the growth of statutory legislation. But the paradox is that the judges sticking to simple constitutional principles are unintentionally being more sophisticated economists than the judges trying to comprehend and predict all possible social consequences and tailor their decisions accordingly. The cognitive content of simple but time-tested rules, that is, the capacity of constitutional principles to act as heuristics, made judges who relied on them unwittingly more ecologically rational than their contemporary counterparts who double as policymakers. As Epstein (1996) points out, looking at some contemporary developments in countries such as the United States, most nineteenth-century common law judges that knew nothing about law and economics but understood their role as enforcers of the established rules and principles were more likely to create long-term-prosperity-friendly institutions than are today's judges, who try to act like policymaking experts.

V. Judges and Policymakers

Judicial policymaking, whether by applying constitutional principles or by claiming expertise, is commonly seen as an unwelcome aberration of democracy. The practice of judicial review has been in intellectual retreat, and even the limited defense that exists in the literature concentrates on purely constitutional aspects, such as the role of the constitutional judiciary in the protection of rights and liberties and the preservation of the separation of powers (see, e.g., Bork 1990; Dworkin 1996; Kramer 2004; Waldron 2006). As democracy has come to be considered not only a venerable system of governance but also a method of achieving shared social goals, the view that a judiciary, which is both countermajoritarian and limiting of the elected or appointed policymakers, could in fact enhance the quality of public decision-making is not easily accepted. The existing defense of an opinionated judiciary has therefore focused on constitutional issues, somewhat conceding that the insistence on the doctrine might affect the practice of democracy, but claiming that the constitution, represented by a series of landmark decisions starting with *Marbury v. Madison* (1803), is a higher law that ought to be complied with. A complementary libertarian argument puts forward that the judiciary is the last resort for the protection of individual rights, which makes its mandate to oppose legislation justified (Barnett 2004).

In a broader sense, the possibility of the beneficial judicial influence on rule creation has not been overly appreciated, perhaps for the same reason that economists were led astray from realizing the importance of property rights and freedom of contract, focusing instead on alternative sets of preconceived policies. The trust in deliberate, rational, and informed policy design is at odds with the reliance on crude and general rules, and in particular, the power of judicial review may be seen as an active obstacle to growth-promotion policies. However, once legislative, regulatory, and policymaking failure are allowed, it is conceivable that the judiciary could have a positive epistemic input if the rules it insists on are in line with the established principles conducive to growth and prosperity. The dilemma of institutional design may alternatively be described as a conflict between the collective wisdom in the present, expressed in policymaking, legislation, and regulation, and the accumulated wisdom of past generations, which is contained in some well-established principles acting as cognitive heuristics. As Hayek (1988) points out, some key constitutional principles have come about not as the result of human design, but as a result of human action in the long process of cultural evolution. Many of them we came to appreciate as moral values, but they survived also because of the beneficial consequences their application carried. Today, the legal and moral value of these institutions is as liberties or rights, but their parallel epistemic role is as heuristics, and their equivalent economic role is as being the essential conditions for economic growth. Hence the seeming coincidence that the principles of a liberal constitution are the very same principles that constitute sound economics, as seen by growth and development theories that have, after a long interlude, become fashionable again (see, e.g., Acemoglu and Robinson 2012).

In the normative analysis of judicial impact on institutional design, a distinction can be made between the judiciary oriented on rights and rules in a nonconsequentialist way, and the judiciary that consciously attempts to advance social goals (Zywicki and Sanders 2008). The first type of judge, who may be said to belong in the philosophical tradition of Hayek and Kant, sees his role as interpreting or creating rules based on certain principles and regardless of consequences. In the Hayekian view, a judge's task is not to improve society by creating better legal rules, but merely to apply the principles of justice in general, and to do so while looking at the existing and established customs for guidance (Hayek 1960, 1973; Posner 2005). Reason is an imperfect tool for deciding among

specific rules, and it is safer therefore for judges to stick to enforcing existing customs without being too concerned about the consequences because they are largely unknowable in any case. The second type, which may be placed within the legal philosophical tradition of Posner and, previously, Bentham, is in fact closer to the policymaker and deviates from the principle-based judicial behavior on which our argument for constitutional rules as heuristics relies. The epistemic case for judicial input in institutional design fails if judges purposefully engage in policy-driven constructivism.

VI. Examples and Cases

It is likely that the role that the original constitutional framework gave to the US judiciary is one reason why the United States by and large developed more market-friendly institutions than continental Europe did. Continental Europe was largely deprived of judicial influence by its tradition of civil law, parliamentarian sovereignty, and the more restricted practice of constitutional review in democracy. Legislative dominance in institutional design has resulted in the rules of the game being strongly influenced by the preferences of policymakers, presumably to a certain extent led by public opinion, but with a noticeable lack of principle-based constitutional input.

The difference between the two approaches was historically larger than it is today, and it was the most salient when the changes toward a more deferent judiciary in common law countries were about to occur. In the United States, the substantive due process doctrine gave to freedom of economic action the equal treatment that other individual freedoms had. *Lochner v. New York* (1905) provides a good example as perhaps the most prominent case of the judiciary's attempt to safeguard individual economic action from legislative intervention. In *Lochner,* the US Supreme Court invalidated a state law limiting the working hours of bakery workers on the grounds that under the Fifth Amendment's "due process" clause, the law exceeded the state's legitimate police powers and unduly interfered with the freedom of contract. It asserted that by limiting working hours, the legislature prevented workers and employers from entering mutually agreeable contracts and therefore struck down the act.

Lochner was the highlight of the era of the relatively activist courts, which invalidated much of the progressive legislation. This legislation aimed at achieving what its proponents considered to represent economic and social progress, but the means it proposed typically involved attenuations of property rights and infringements

on freedom of contract and other voluntary economic action. Not only did the Supreme Court of the Lochner era not hesitate to use the power of judicial review to strike down legislative acts that collided with constitutional principles, but unlike any later court, it readily included freedom of contract in its conception of constitutionally protected individual liberties.[2] From 1905 to the mid-1930s, the Supreme Court invalidated approximately 200 economic regulations (Stone et al. 1996). Waldron (2006) counts 170 statutes pertaining only to labor that were struck down by state and federal courts during the 1880–1935 period.

The term "Lochner era" is today commonly used to designate a disreputable period in Supreme Court history. But common for the critiques of these and other decisions of the era is that they are focusing solely on the court's apparent intentions, with little or no regard for the practical consequences of the decisions. The decision in *Lochner,* as well as the entire Lochner-era court, is essentially criticized for obstructing some well-intentioned legislative initiatives. However, many economists would say today—or it so follows from standard microeconomics textbooks—that freedom of contract in the labor market in fact enabled more workers to gain employment in the open market and thus increased total welfare. By simply following the principle of freedom of contract, justices in Lochner unwittingly decided what sound economics would have told them to do. In view of the argument presented here, their decision was based not on the rational deliberation of causes and effects but on a constitutionally derived principle whose epistemic role was, regardless of the judicial argument or judges' intentions, that of a fast and frugal heuristic. Furthermore, the simple judicial rule was, per standard microeconomics, better aligned with the long-term interests of the workers themselves than specifically intended labor legislation would have been.

Other court decisions of the era included striking down entry restrictions, price limitations, or state-sponsored cartel agreements enacted by various states' legislatures and the federal government. The rise of progressive ideas brought about the growth of legislation meant both to improve the economy according to some external criteria of efficiency and to structure society according to certain presumed ideals of justice. Besides labor laws and market entry

[2] I set aside the issue of federal power versus state rights present in *Lochner* and related cases because my goal is to discuss the content of legislative as opposed to judicial decisions in the abstract and, at any level, not to justify particular outcomes.

restrictions, the newly minted antitrust laws were probably the most evident case of legislative intervention that hindered the development of entrepreneurship. However, courts—still operating on the old formalist principles of the nineteenth century—were able to counteract those tendencies for a considerable period. The relative preservation of economic freedoms was achieved by way of the judiciary invoking the fundamental principles of property and contract against what was generally thought of as rationally considered and scientifically informed legislation.

At the same time, in continental Europe, the rise of statutory lawmaking went largely unchecked, as European governments did not have strong judicial review. In German states through the nineteenth century, the freedom of economic action was permanently under attack by the complicated system of state-protected guilds and occupational rights, and there was no basis in a constitutional judiciary parallel to that of the United States to challenge these provisions. The gradual rise of democracy did not result in the abolition of privileges and other regulations. On the contrary, in 1878, the previous short-lived liberalization was reversed again and the legislation supporting the guilds was introduced and subsequently amended. By 1886, no fewer than 9,185 guilds existed in Germany (Dawson 1890). Bismarck instituted a number of welfare and regulatory reforms with clear parallels to the proposals that US courts were thwarting at about the same time. A number of social security statutes were introduced from the late 1870s onward, including compulsory sick-relief insurance, old age insurance, accident insurance, and working hour restrictions, as well as usury laws and a state monopoly on tobacco. It is difficult to imagine many of these regulations, nationalizations, compulsions, or special privileges passing strict judicial scrutiny under substantive due process.

One contemporary parallel, still noticeable despite the waning of constitutional protection in the economic sphere in common law, is with antitrust law in Europe and the United States. Even though these two antitrust regimes share doctrinal and intellectual bases, antitrust law is noticeably more lenient in the United States than in Europe, including national competition policies and antimonopoly at the EU level. Only vaguely based on several general statutes, the definition of antitrust law in the United States has been mainly left to ordinary courts. The European antimonopoly, on the other hand, is largely based in the executive branch and led by experts in the discipline. At least for the proponents of free market economy, a

judiciary relying on a few crude heuristics appears to be a wiser adjudicator of competition disputes in the long term than expert executives are.

A prominent counterexample of the judicial failure to use its ordinary rules and principles as heuristics and to engage in policymaking instead is the now famous case of *Kelo v. New London* (2005), in which the Supreme Court ruled in favor of a city government and against the protection of private property rights. In *Kelo*, the Supreme Court decided not to invalidate the city of New London's decision to use eminent domain to transfer a property from one private party to another. After the city government proposed a policy initiative to boost local economic development, courts had a choice to either strictly stick to property rights protection and not try to second guess the consequences, or to allow the two other branches of government to do what they thought best for overall economic development—which, in this case, unprecedentedly included property takings in favor of other private parties for "public use." The Supreme Court eventually chose the latter. In addition to the concession regarding the legitimacy of government property takings for economic development purposes, the Supreme Court's majority opinion in *Kelo* implicitly assumed the epistemic superiority of policymakers and their unquestionable ability to determine what the best development policies are.

However, subsequent developments turned out to favor the earlier constitutional principle. After eminent domain was used to transfer the property to the developer, the development plans never came into being and the site remains unused (McGeehan 2009). Undoubtedly, a number or events, from the decision backlash to the bursting of the real estate bubble and the financial crisis that ensued, may be invoked to explain the lack of subsequent development. But that such events may thwart the plan merely confirms that policymakers operate under the condition of radical ignorance, which drastically limits their ability to consciously direct economic development. Following the simple and imperfect property rights rule in the face of the conceivably superior *ad hoc* decision to condemn the property would have, in this case, been better aligned with the city's own economic development goals. Like all heuristics, constitutional or rights-based heuristics used in policymaking decisions are imperfect, rough, and imprecise. But a skeptical view of purportedly rational policymaking and conscious institutional design makes such simple heuristics wise in comparison.

VII. Conclusion

Alexander Hamilton (1787) famously wrote that the judiciary is, from the nature of its functions, the least dangerous branch of government. In the age of the dominance of statutory legislation, this view has an additional dimension. The constitutional judiciary has, through the twentieth century, become increasingly unpopular, and its legitimacy to participate in defining the rules of the game has never been weaker. Its defense, furthermore, has been limited to arguments such as constitutional protection of liberties, amounting to a silent admittance that deliberate policymaking is, by default, epistemically superior. Other defenses of common law, such as those addressing judicial independence or efficiency of legal rules, equally neglect the possibility proposed in this article: that judge-made law may in fact be epistemically superior to statutory and executive rule-making.

The gradual demise of judge-made law and the popularity of statutory law coincide with the rise of rationalism and an optimistic view of the possibility of expert policymaking. However, more recent findings from cognitive psychology, decision-making, and to some extent economics cast a different light on human rationality. Psychological evidence on the neglected wisdom contained in simple heuristics, accompanied by the Hayekian argument about the limits of expert policy knowledge, invokes skepticism of rational rulemaking while giving rise to the idea of a positive epistemic content of constitutional and judicial principles, and constitutionally based judge-made law in general. Market relationships are far too intricate for us to be able to design the rules that will steer them in predictable and desired directions, even if legislative and regulatory efforts are honest and well-intentioned. The recognition of the limits of conscious legislative design calls for a reconsideration of the predominantly critical view of the judiciary as an alternative rule-setting mechanism.

References

Acemoglu, Daron, and James Robinson. 2012. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. New York: Crown Publishers.

Aumann, Robert J. 2008. "Rule-Rationality versus Act-Rationality." The Center for the Study of Rationality Discussion Paper dp497.

Barnett, Randy. 2004. *Restoring the Lost Constitution*. Princeton, NJ: Princeton University Press.

Bentham, Jeremy. 1822. *Codification Proposal: Addressed by Jeremy Bentham to All Nations Professing Liberal Opinions; Or, Idea of a Proposed All-Comprehensive Body of Law, with an Accompaniment of Reasons, Applying All Along to the Several Proposed Arrangements*. London: J. McCreery.

Bergson, Abram, Alexander Erlich, Herbert S. Levine, Warren G. Nutter, Stanislaw Wellisz, and Henry L. Roberts. 1966. "Soviet Economic Performance and Reform: Some Problems of Analysis and Prognosis: A Round-Table Discussion." *Slavic Review*, 25(2): 222–46.

Bork, Robert. 1990. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press.

Breyer, Stephen. 2004. *Economic Reasoning and Judicial Review*. Washington DC: AEI-Brookings Joint Center for Regulatory Studies.

Buchanan, James, and Gordon Tullock. 1962. *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. Ann Arbor: University of Michigan Press.

Caplan, Bryan. 2007. *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. Princeton, NJ: Princeton University Press.

Coase, Ronald. 1960. "The Problem of Social Cost." *Journal of Law and Economics*, 3(1): 1–44.

Cosmides, Leda, and John Tooby. 1994. "Better Than Rational: Evolutionary Psychology and the Invisible Hand. *American Economic Review*, 84(2): 327–32.

Dawson, William H. 1890. *Bismarck and State Socialism*. London: Swan Sonnenschein & Co.

Dworkin, Ronald. 1996. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, MA: Harvard University Press.

Epstein, Lee, and Tracey George. 1992. "On the Nature of Supreme Court Decision Making." *American Political Science Review*, 86(2): 323–37.

Epstein, Richard. 1985. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, MA: Harvard University Press.

Epstein, Richard. 1996. *Economics and the Judges: The Case for Simple Rules and Boring Courts*. Wellington, New Zealand: New Zealand Business Roundtable.

Epstein, Richard. 1997. *Simple Rules for a Complex World*. Cambridge, MA: Harvard University Press.

Friedman, Jeffrey. Forthcoming. *No Exit: The Problem with Politics*.

Friedman, Jeffrey, and Wladimir Kraus. 2011. *Engineering the Financial Crisis: Systemic Risk and the Failure of Regulation*. Philadelphia: University of Pennsylvania Press.

Gigerenzer, Gerd. 2000. *Adaptive Thinking: Rationality in the Real World*. New York: Oxford University Press.

Gigerenzer, Gerd. 2008. *Rationality for Mortals: How People Cope with Uncertainty*. New York: Oxford University Press.

Glaeser, Edward, and Andrei Shleifer. 2002. "Legal Origins." *Quarterly Journal of Economics,* 117(4): 1193–229.

Goodman, John. 1978. "An Economic Theory of the Evolution of the Common Law." *Journal of Legal Studies*, 7(2): 393–406.

Hamilton, Alexander. 1787. *Federalist No. 78*.

Harsanyi, John. 1977. "Rule Utilitarianism and Decision Theory." *Erkenntnis*, 11(1): 25–53.

Hayek, F. A. 1960. *The Constitution of Liberty*. Chicago: University of Chicago Press.

Hayek, F. A. 1973. *Law, Legislation, and Liberty. Vol. 1: Rules and Order*. Chicago: University of Chicago Press.

Hayek, F. A. 1988. *The Fatal Conceit: The Errors of Socialism*. Chicago: University of Chicago Press.

Kahneman, Daniel. 2011. *Thinking, Fast and Slow*. New York: Farrar, Straus and Giroux.

Kelo v. New London. 2005. 545 U.S. 469.

Klerman, Daniel, and Paul Mahoney. 2007. "Legal Origin?" *Journal of Comparative Economics*, 35(2): 278–93.

Kramer, Larry. 2004. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press.

Leoni, Bruno. 1961. *Freedom and the Law*. Princeton, NJ: D. Van Norstrand.

Lochner v. New York. 1905. 198 U.S. 45.

Lucas, Gary M. 2014. "Out of Sight, Out of Mind: How Opportunity Cost Neglect Undermines Democracy." *New York University Journal of Law & Liberty*, 9(1): 239–338.

Marbury v. Madison. 1803. 5 U.S. 137.

McGeehan, Patrick. 2009. "Pfizer to Leave City That Won Land-Use Suit." *New York Times*, November 12, A1.

Merryman, John Henry. 1996. "The French Deviation." *American Journal of Comparative Law*, 44(1): 109–19.

Mill, John Stuart. 1863. *Utilitarianism*. London: Parker, Son & Bourn, West Strand.

Olson, Mancur. 1965. *The Logic of Collective Action*. Cambridge, MA: Harvard University Press.

Posner, Richard. 1973. *Economic Analysis of Law*. Boston: Little Brown.

Posner, Richard. 2005. "Hayek, Law, and Cognition." *New York University Journal of Law and Liberty*, 1: 147–66.

Posner, Richard. 2008. *How Judges Think*. Cambridge, MA: Harvard University Press.

Pound, Roscoe. 1923. "The Theory of Judicial Decision." *Harvard Law Review* 36(6): 641–62.

Priest, George. 1977. "The Common Law Process and the Selection of Efficient Rules." *Journal of Legal Studies*, 6(1): 65–82.

Rubin, Paul. 1977. "Why Is the Common Law Efficient?" *Journal of Legal Studies*, 6(1): 51–63.

Segal, Jeffrey. 2008. "Judicial Behavior." In *The Oxford Handbook of Law and Politics*, ed. Keith Whittington, Daniel Kelemen, and Gregory Caldeira, 19–33. Oxford: Oxford University Press.

Shleifer, Andrei. 2005. "Understanding Regulation." *European Financial Management*, 11(4): 439–51.

Shleifer, Andrei. 2010. "Efficient Regulation." NBER Working Paper No. 15651.

Smith, Vernon. 2003. "Constructivist and Ecological Rationality in Economics." *American Economic Review*, 93(3): 465–508.

Somin, Ilya. 2013. *Democracy and Political Ignorance: Why Smaller Government Is Smarter*. Stanford, CA: Stanford University Press.

Stone, Geoffrey, Louis Seidman, Cass Sunstein, and Mark Tushnet. 1996. *Constitutional Law*. Boston: Little Brown Law & Business.

Sunstein, Cass. Forthcoming. "The Most Knowledgeable Branch." *University of Pennsylvania Law Review*.

Tasic, Slavisa. 2009. "The Illusion of Regulatory Competence." *Critical Review*, 21(4): 423–36.

Tullock, Gordon. 1967. "The Welfare Costs of Tariffs, Monopolies and Theft." *Western Economic Journal*, 5(3): 224–32.

Waldron, Jeremy. 2006. "The Core of the Case against Judicial Review." *Yale Law Journal*, 115(6): 1346–406.

Winston, Clifford. 2006. *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance*. Washington, DC: AEI–Brookings Institution.

Zywicki, Todd, and Anthony Sanders. 2008. "Posner, Hayek and the Economic Analysis of Law." *Iowa Law Review* 93(2): 559–603.

Zywicki, Todd, and Edward Stringham. 2010. "Common Law and Economic Efficiency." George Mason Law and Economics Research Paper No. 10-43.