

BRUNO LEONI IN RETROSPECT

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I. INTRODUCTION

Three decades have passed since Bruno Leoni delivered his Claremont Men's College (now Claremont-McKenna College) lectures, on which his volume, *Freedom and the Law*,¹ was based. That volume was first published in 1961, and Leoni died in 1967. Since the early 1960s, while Leoni's book lay dormant, two new intellectual disciplines have emerged that have reordered our thinking about man and social life: public choice, and law and economics. The first consists of the application of microeconomic analysis to political and governmental action.

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1. B. LEONI, *FREEDOM AND THE LAW* (2d ed. 1972).

Little has been written about Leoni, and my discussions with certain of his friends and colleagues have revealed little more than what Arthur Kemp stated in his Foreword to the second edition of *Freedom and the Law* (*id.* at vi-vii):

Born April 26, 1913, Bruno Leoni lived a dynamic, intense, vigorous and complex life as a scholar, lawyer, merchant, amateur architect, musician, art connoisseur linguist and—above all else—as a defender of the principles of individual freedom in which he so passionately believed. He was Professor of Legal Theory and the Theory of the State at the University of Pavia where he also served as Chairman of the Faculty of Political Science, as Director of the Institute of Political Science, and as founder-editor of the quarterly journal, *Il Politico*. As a distinguished visiting scholar, he traveled all over the world, delivering lectures at the Universities of Oxford and Manchester (in England), Virginia and Yale (in the United States), to mention only a few. As a practicing attorney, he maintained both his law office and his residence in Turin where he was also active in the Center of Methodological Studies. He found time, on occasion, to contribute columns to the economic and financial newspaper of Milan, *24 ore*. His successful efforts in saving the lives of many allied military personnel during the German occupation of northern Italy (1944) gained him not only a gold watch inscribed "To Bruno Leoni for Gallant Service to the Allies, 1945," but also the eternal gratitude of too many persons to mention. In September, 1967, he was elected President of The Mont Pèlerin Society at the Congress of that Society held in Vichy, France—the culmination of long years of service as Secretary of the Society to which he devoted a major portion of his time and energies.

Bruno Leoni died tragically on the night of November 21, 1967 . . .

A memorial volume of some of Leoni's works and testimonials, *OMMAGGIO A BRUNO LEONI* (P. Scaramozzino ed. 1969), is available, but has not been consulted in writing this article.

The second consists of the same application to the substance and procedures of law.

Each discipline has gone through a roughly comparable development.² Early works tried to model decision making in political and legal processes, respectively.³ Eventually, neoclassical concerns for efficiency emerged. Today, both disciplines grapple with the subjectivity of preferences and costs, and with the decentralized character of knowledge.⁴

What is striking to the reader who comes fresh to Leoni's writings is not just that he anticipated, nay, urged,⁵ the development of both disciplines. He also drew a straight line from the initial interdisciplinary connections between economics and politics and law, to the most contemporary information-related concerns of these newly-merged disciplines. Modern social scientists might not have followed his lead even had they been aware of his work. Had they done so, however, today they might be much further along in grasping the nature of, and connections among, the previously intellectually separated domains of markets, law, and politics.

Surely, some of the intervening work seems useful and at times necessary. We can appreciate its usefulness in contem-

2. Aranson, *Economic Explorers on Continents without Property Rights: Economics in Political Science and Law* (1985) (paper prepared for the Annual Meeting of the American Economic Association, New York City) (on file at the JLPP office).

3. The public choice literature is reviewed in P. ARANSON, *AMERICAN GOVERNMENT: STRATEGY AND CHOICE* (1981); A. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* (1984); D. MUELLER, *PUBLIC CHOICE* (1979); P. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY* (1986); W. RIKER & P. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* (1972). For reviews of law and economics, see C. GOETZ, *LAW AND ECONOMICS: CASES AND MATERIALS* (1984); A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). THE *ECONOMICS OF LEGAL RELATIONSHIPS: READINGS IN THE THEORY OF PROPERTY RIGHTS* (H. Manne ed. 1975), provides a good early compilation of writings in this area.

4. For public choice, see McKelvey & Ordeshook, *Elections with Limited Information: A Fulfilled Expectations Model Using Contemporaneous Poll and Endorsement Data as Information Sources*, 36 J. ECON. THEORY 55 (1985); McKelvey & Ordeshook, *Information, Electoral Equilibria, and the Democratic Ideal*, 48 J. POL. 909 (1986). See also P. Aranson, Risk, Uncertainty, and Retrospective Voting (1981) (paper prepared for the Annual Meeting of the American Political Science Association, New York City). A much earlier and more general discussion within the Austrian and London School of Economics framework is available in J. BUCHANAN, *COST AND CHOICE* (1969). See also L.S.E. *ESSAYS ON COST* (J. Buchanan & C. Thirby eds. 1973). For relevant contributions in law and economics, see Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980); Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980); P. Aranson, *The Common Law as Central Economic Planning* (1986) (paper prepared for a Liberty Fund, Inc., Conference on the Problems of Economic Calculation under Socialism, New York City). See also Muris, *Cost of Completion or Diminution in Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379 (1983).

5. B. LEONI, *supra* note 1, at 27, 50-51.

plating some of Leoni's "mistakes," errors that reflect the state of knowledge during his lifetime. For example, in his attack on Duncan Black's monograph,⁶ Leoni did not grasp the importance of political disequilibrium as a tool for analysis and criticism of electoral and legislative processes.⁷ Both processes exhibit a fundamental chaos⁸ and sometimes give way to dictatorial agenda control⁹ and manipulation through strategic voting.¹⁰ Electoral and legislative processes thus reflect no necessary connection between citizens' preferences and public-policy outcomes, unlike markets, which can reflect a parallel connection between consumers' preferences (marginal valuations) and prices and output.

Nor did Leoni have available to him important intervening work on the theory of the publicly traded corporation. At one point in his book¹¹ he cites approvingly writings that identify a problem in the separation of ownership and control in large, publicly traded corporations. At another point¹² he defends legislated disclosure laws governing new stock issues. In his view, legislation had merely incorporated older common law rules.¹³ But our current understanding of markets for corpo-

6. D. BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1963).

7. B. LEONI, *supra* note 1, at 108-10. For a fuller exposition of the problems that political disequilibrium poses for governmental decision making, see W. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982). See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, 20 AM. J. POL. SCI. 511 (1976).

8. See, e.g., W. RIKER, *supra* note 7; McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 *ECONOMETRICA* 1085 (1979); Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980); Schofield, *Instability of Simple Dynamic Games*, 45 R. ECON. STUD. 575 (1978).

9. See, e.g., R. FARQUHARSON, *THEORY OF VOTING* (1969); Levine & Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977); McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); Niemi, Bjurulf & Blewis, *The Power of the Chairman*, 40 *PUB. CHOICE* 293 (1983).

10. See, e.g., Denzau, Riker & Shepsle, *Farquharson and Feno: Sophisticated Voting and Home Style*, 79 AM. POL. SCI. REV. 1117 (1985); Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 *ECONOMETRICA* 587 (1973); Kramer, *Sophisticated Voting over Multidimensional Choice Spaces*, 2 J. MATH. SOC. 165 (1972); McKelvey & Niemi, *A Multistage Game Representation of Sophisticated Voting for Binary Procedures*, 18 J. ECON. THEORY 1 (1978); Satterthwaite, *Strategy Proofness and Arrow's Conditions: Existence and Corresponding Theorems for Voting Procedures and Social Choice*, 10 J. ECON. THEORY 187 (1975).

11. B. LEONI, *supra* note 1, at 123. For the principal statement of this orthodox position, see A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968).

12. B. LEONI, *supra* note 1, at 146.

13. On the common law background of disclosure laws, see H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* ch. 2 (1966).

rate control¹⁴ and of the publicly traded firm as a nexus of contracts based on comparative advantage and efficient risk-shifting,¹⁵ could have supported Leoni's more basic arguments in his comparisons of private and public choice.

Finally, although Leoni seems far more circumspect than do most other writers concerning the proper domain of legislation, he accepts its generic public-goods justification. That argument remains subject to severe theoretical restrictions, based on a comparison of the costs and benefits of public action, on a study of the appropriate methods of that action, on a regard for correct jurisdictional arrangements, and on the potential inventiveness of the private sector in solving (or ignoring) the problem of appropriability.¹⁶ Leoni also did not fully grasp the implications of the economic-calculation problem, with respect to the legislature's ability correctly to identify public goods.¹⁷ He subscribed to the idea that government should supply lighthouse services,¹⁸ as did most theorists before Coase's demonstration by way of historical record, that private supply is possible, and that public supply may grow out of private persons' legislative rent-seeking.¹⁹ But Leoni did anticipate the development of cable television²⁰ as a response to the appropriability problem. And he also anticipated Demsetz²¹ by nearly a decade on the importance of scarcity in the development of property rights beyond common pool arrangements.²²

14. See Easterbrook & Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395 (1983); Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Manne, *Our Two Corporate Systems: Law and Economics*, 53 VA. L. REV. 259 (1967); Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427 (1964).

15. A good summary is available in Wolfson, *A Critique of Corporate Law*, 34 U. MIAMI L. REV. 959 (1980). See also Jensen & Meckling, *Theory of the Firm: Management Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

16. For a review of these restrictions, see Aranson & Ordeshook, *Public Interest, Private Interest, and the Democratic Polity*, in *THE DEMOCRATIC STATE* 87, 98-106 (R. Benjamin & S. Elkin eds. 1985).

17. See J. BUCHANAN, *supra* note 4. See also I. KIRZNER, *DISCOVERY AND THE CAPITALIST PROCESS* (1985); Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J. L. & ECON. 124 (1959).

18. B. LEONI, *supra* note 1, at 171.

19. Coase, *The Lighthouse in Economics*, 17 J. L. & ECON. 357 (1974). For related research concerning the private supply of fire-fighting services and education, see McChesney, *Government Prohibitions on Volunteer Fire Fighting in Nineteenth-Century America: A Property Rights Perspective*, 15 J. LEGAL STUD. 69 (1986); West, *The Political Economy of American Public School Legislation*, 10 J. L. & ECON. 101 (1967).

20. B. LEONI, *supra* note 1, at 172.

21. Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV.: PAPERS & PROC. 347 (1967).

22. B. LEONI, *supra* note 1, at 54.

see Hoppe too!

These problems, and a few others as well,²³ pale in comparison to Leoni's insights and contributions. His errors were not errors in his day, although those who persist in making the same mistakes merit appropriate criticism.

This retrospective reviews Leoni's insights and contributions and then brings them "up to date," by tracing out various developments since 1961. Part II recapitulates Leoni's views on three issues: freedom, law, and legislation. Part III then reports on subsequent related developments in these areas. Part IV concludes this retrospective.

II. LEONI ON FREEDOM, LAW, AND LEGISLATION

A. Freedom

Bruno Leoni, like Hume,²⁴ Hayek,²⁵ and other liberal theorists, understands "freedom . . . as the absence of constraint exercised by other people, including the authorities, over the private life and business of each individual."²⁶ Here, we emphasize five aspects of Leoni's view of freedom: that it has a negative (liberal) and not a positive character; that it implies certain kinds of constraints; that negative and positive freedom remain irreconcilable; that liberal freedom reflects unanimous consent; and that its nature is both primary and instrumental.

Negative freedom and positive freedom. Freedom for Leoni is the absence of constraint,²⁷ or perhaps the greatest possible absence of constraint consistent with the absence of constraints on others. It is the Golden Rule in negative form: "Do not do unto others what you would not wish others to do unto you."²⁸ This formulation differs sharply from the positive injunction to

23. See Leoni's (*id.* at 160-67) lengthy attack on the expert billiard-player analogy that Milton Friedman uses to motivate the *as if*, metaphorical nature of microeconomic models. See M. FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 11 (1953). Leoni's criticism aimed at showing that an agent's choice set has an infinity of points (as does any segment of the real line), and therefore prediction remains impossible. While it represents a simple misunderstanding of the theoretical enterprise, Leoni's criticism of Friedman is more telling in its claim that economists cannot know what an agent is about to discover, and therefore they can predict only those choices that occur within a closed system. Of course, postdiction—that is, explanation—is another matter, for then some of the agent's new information has been revealed to the researcher.

24. D. HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* (C. Hendel ed. 1957).

25. F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (3 vols. 1973, 1976, 1979); F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1972) (hereinafter *CONSTITUTION OF LIBERTY*).

26. B. LEONI, *supra* note 1, at 90.

27. *Id.* at 3.

28. *Id.* at 14.

"do unto others." Instead, it requires merely that people do not intrude in the choices of others.

Freedom and constraint. Negative freedom, liberal freedom, as our discussion of common law systems reveals,²⁹ cannot exist apart from some kind of constraint. But that constraint is consistent with the idea of maximizing liberal freedom, the absence of constraint, for in certain "cases . . . people have to be constrained if one wants to preserve the freedom of other people."³⁰ That is, "the constraint that is linked inevitably to freedom is only a negative constraint . . . imposed solely . . . to make other people renounce constraining in their turn."³¹ Leoni has in mind constraints on those engaged in "misproductive" work, including "beggars, blackmailers, robbers, and thieves,"³² but the purpose of such constraints must be to minimize the constraints that such persons would impose on others. "A free market," for example, allows "those engaged in market transactions [to] have some power to constrain the enemies of a free market."³³

Negative and positive freedom irreconcilable. The idea of positive freedom is inconsistent with that of negative freedom. "Economic security" or "freedom from want," for example, is not within the compass of negative freedom, because it requires constraints on others.³⁴ Hence, an irreconcilable conflict remains between liberal freedom and socialist "freedom," because socialist freedom creates legal obligations, and therefore constraints on others that they would not accept *ex ante*.³⁵

Freedom and consent. An institution that maximizes freedom must rest on consent, which Leoni believes must be unanimous.³⁶ Positive freedom never can obtain unanimity, because it creates rights for some but obligations for others. But liberal freedom, because it imposes only those obligations that people *individually* agree to, reflects unanimous consent. In this sense Leoni finds himself concurring with Rousseau³⁷ in claiming

29. See *infra* at 669-72.

30. B. LEONI, *supra* note 1, at 3.

31. *Id.* at 49.

32. *Id.* at 50.

33. *Id.* at 49.

34. *Id.* at 4.

35. *Id.* at 104.

36. *Id.* at 138.

37. *Id.* See J. ROUSSEAU, DU CONTRAT SOCIAL (1943).

that institutions based on negative freedom will express the "common will."

Again, such institutions must constrain their enemies. But the laws that constrain would be agreed to *ex ante*, even by murderers and thieves, provided that they did not know that they would be murderers or thieves at the time the law is "discovered." Just as surely, these people would not consent to particularistic laws that allowed murder and theft by specific persons other than themselves.³⁸

Freedom as an instrumental and primary value. Though he describes both aspects of freedom, Leoni does not say explicitly whether he embraces freedom as a primary or instrumental goal. But Leoni implies that freedom is a primary goal, to be valued for itself. For example, he approvingly cites the words of Democritus, that "poverty under a democracy is as much to be preferred above what an oligarchy calls prosperity as is liberty above bondage."³⁹ That is, "[l]iberty and democracy come first in this scale of values; prosperity comes after."⁴⁰

Freedom also may engender tolerance. With the institutions that emerge under, and to protect, freedom, "all the members of the community appear to agree in principle that feelings, actions, forms of behavior, and so on . . . are perfectly admissible and permissible without disturbing anybody, regardless of the number of individuals who feel like behaving or acting in these ways."⁴¹ And as Leoni quotes from the Funeral Oration of Pericles,

The freedom which we enjoy in our government extends also to our ordinary life. There, far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbor for doing what he likes, or even to indulge in those injurious looks which cannot fail to be offensive, although they inflict no penalty.⁴²

But liberal freedom, Leoni finds, along with tolerance, is instrumental. Again from Pericles we learn that the soldiers of Athens, "judging happiness to be the fruit of freedom and freedom of valor, never would decline the dangers of war."⁴³ Free-

38. B. LEONI, *supra* note 1, at 63, 139.

39. *Id.* at 79.

40. *Id.*

41. *Id.* at 137.

42. *Id.* at 78.

43. *Id.* at 79.

dom in its institutional embodiments thus leads to happiness, perhaps as judged by standards of material wealth. Leoni finds evidence for "the strict connection between the free market and the free law-making process," in the observation "that the free market was at its height in the English-speaking countries when the common law was practically the only law of the land relating to private life and business."⁴⁴ And more to the point, "the socialistic solution of the so-called social problem" cannot "promot[e] public welfare and eliminat[e], as far as possible, poverty, ignorance, and squalor, for this end is not only perfectly compatible with individual freedom, but may also be considered as complementary to it."⁴⁵

B. Law and Other Spontaneous Orders

The Austrian school of economics (and especially the writings of Hayek) provides the strongest intellectual influence on Leoni's thought. The freedom that Leoni proposes embraces the right to engage in the widest possible variety of personal and economic actions and choices. The result of this freedom is the development of spontaneous orders in human institutions—science, fashions, taste, language, economic organization, and law.⁴⁶ From there, the entire corpus of Austrian economics becomes available as argument for the virtues of liberal freedom and for the proposition that any legislation or government regulation that resembles central economic planning must fail, with a consequent decline in the governed population's welfare.⁴⁷

But Leoni is no anarchist.⁴⁸ He acknowledges the occasional desirability of legislation and the virtues of judge-made, unwritten law. Four of Leoni's arguments concerning the common law process remain central: that it is a spontaneous process resulting in a spontaneous order that parallels the unconstrained market relation; that it rests on rights, and therefore protects liberal freedom; that it creates long-run certainty; and that nevertheless judges sometimes go astray.

Law as a spontaneous order. By "law" Leoni means judge-made

44. *Id.* at 91.

45. *Id.* at 177.

46. *Id.* at 154-55.

47. On the resemblance between regulation and central planning, see I. KIRZNER, *supra* note 17, at 119-49.

48. B. LEONI, *supra* note 1, at 131-32.

law, as in a common law process. He reports that much of Roman law, early continental (pre-codified) law, as well as Anglo-Saxon law was of this variety.⁴⁹ Law is "a sort of vast, continuous, and chiefly spontaneous collaboration between the judges and the judged . . . to discover what the people's will is in a series of definite instances—a collaboration that in many respects may be compared to that existing among all the participants in a free market."⁵⁰

Of Roman law Leoni writes that "[t]o a certain extent, it put juridicial relations among citizens on a plane very similar to that on which the free market put their economic relations. Law, as a whole, was no less free from constraint than the market itself."⁵¹ Comparing law-making to the development of language, economic transactions, and fashions, Leoni notes that "all of these processes . . . are performed through the voluntary collaboration of an enormous number of individuals each of whom has a share in the process itself according to his willingness and ability to maintain or even to modify the present condition . . ."⁵²

As in the market relation, so in law: "Common citizens were the real actors in this respect, just as they still are the real actors in the formation of the language and, at least partially, in economic transactions in the countries of the West."⁵³ In "discovering" what the law is, judges at common law are thus like "grammarians who epitomize the rules of a language or . . . statisticians who make records of prices or of quantities of goods exchanged in the market," because they are merely "simple spectators of what is happening around them," not "rulers of their fellow citizens as far as the language of the economy is concerned."⁵⁴

Freedom and the law. Leoni's insights⁵⁵ into how the common law process is consonant with, and indeed supports freedom is extraordinary, not the least because he was writing nearly three decades before the full flowering of law and economics. First,

49. *Id.* at 20-21. See Epstein, *supra* note 4 (developing the similarity between Roman private law and common law).

50. B. LEONI, *supra* note 1, at 21.

51. *Id.* at 85.

52. *Id.* at 149.

53. *Id.* at 87-88.

54. *Id.* at 88.

55. *Id.* at 21.

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legal action begins not with judges but with the instant parties to a dispute, who have failed to settle the matter between them. The implied limitation on the initiating power of judges at least partly constrains the law's domain.⁵⁶

Second, the judge's decision is "effective mainly in regard to the parties to the dispute, only occasionally in regard to third persons, and practically never in regard to people who have no connection with the parties concerned."⁵⁷ With respect to some common law cases, Leoni here is clearly wrong. Judges sometimes do consider third-party interests,⁵⁸ and one contemporary view of law and economics would have them do so explicitly.⁵⁹ But the common law process puts high transaction-cost barriers in the way of assembling such interests, thus making "vote-trading" or analogous activities among a variety of interests very difficult in the courts. Even if a judge's decision changes a preexisting rule, that was not its overt intent, and in large bodies of law (for example, contract law), subsequent parties sometimes may contract away from any provision in a new rule that they find unsatisfactory.⁶⁰

Third, change in the common law is a slow, incremental process, which makes use of the accumulated wisdom in the body of precedents.⁶¹ Hence, the judge's "power is further limited by the unavoidable reference of every decision to decisions issued in similar cases by other judges."⁶² The common law process, strictly construed, thus provides few judicial opportunities for the wholesale rearrangement of rights and obligations; and

56. Considering the large backlog of cases that confronts most American jurists today, the absence of formal initiating powers may not constrain them. They can choose almost at will the issues they want to consider. Inconsistent rulings and increasing amounts of legislation doubtless worsen the caseload problem. As most contemporary models of the common law process explain, see *infra* at 695-96, if potential litigants agree on the probability that each will prevail at trial, then they are more likely to settle than sue. Thus, increased caseloads and judicial discretion at least partly grow out of ambiguous legal precedents. See Adams, *Would We Rather Fight Than Settle?*, 51 FLA. B.J. 496 (1977) and references cited *infra* notes 208-10. The Supreme Court has decided to reconsider *Runyon v. McCrary*, 427 U.S. 160 (1976), a landmark case interpreting the extension of liability to private contracts under 42 U.S.C. § 1981 (1982), in light of these problems. See *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). *cert. granted*, 108 S. Ct. 65 (1987), *reargument ordered per curiam*, 108 S. Ct. 1419 (1988).

57. B. LEONI, *supra* note 1, at 21.

58. See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970).

59. See, e.g., R. POSNER, *supra* note 3, at 343-46. But cf. Jensen, Meckling & Holder-ness, *Analysis of Alternative Standing Doctrines*, 6 INT. REV. L. & ECON. 205 (1986).

60. See *infra* note 204.

61. B. Leoni, *supra* note 1, at 21.

62. *Id.*

because of the decentralized nature of the process at the trial level, the common law may not be a potent source of nonconsensual redistributions.

There is more to Leoni's claims for the common law than this list attributes to it. But other virtues of the common law remain implicit in the text of *Freedom and the Law*. Leoni understands the nature of legal conflict in "classical" common law to be thus. One party, the plaintiff, claims that an adverse nonconsensual rearrangement of rights (freedoms) has occurred because of the defendant's act of omission or commission. In property law he might allege a trespass, nuisance, or faulty conveyance. In contract law he might argue that the defendant has breached an agreement, the elements of which form a binding contract. In tort law he might state that another's actions have damaged his person or property.

Each claim's central element is the defendant's asserted failure to perform a generally (in tort law) or specifically (in contract law) cognizable and previously accepted obligation, to the plaintiff's (nonconsenting) detriment. In other words, the defendant has abridged the plaintiff's freedom. The plaintiff, then, asks the court to restore that freedom with an appropriate remedy.

That is all! There is no sense in this description that the judge must then "create" law that will apply to all parties in the future, in similar circumstances. That "creation" might seem to accompany the judge's decision. But that was not the judge's intent.⁶³ He merely sought to "discover" what the parties' rights and obligations had been, to confirm their legitimate expectations. Judges may engage in folly,⁶⁴ but their central mission remains solely to discover preexisting rights and obligations.

Usages, tacit rules, the implications of conventions, general criteria relating to the suitable solutions of particular legal problems also with reference to possible changes in the opinions of people at any given time and in the material

63. Even if the judge sought a wider effect, his ruling need not have a pervasive influence in the manner of legislation or regulation. For example, in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), Judge Learned Hand "defined" in algebraic terms the "reasonable man" standard that a potential tortfeasor must follow to avoid a finding of negligence against him. But Judge Hand did not intend to define negligence anew; he merely wrote down its preexisting elements as found in prior cases.

64. See *infra* at 673-74.

background of those opinions—all these are yet to be discovered. One may well say that this is an undeniably difficult, sometimes painful, and very often long process. It always was. According to the experience of our ancestors, the usual way of meeting this difficulty . . . not only in Anglo-Saxon countries but everywhere in the West, was to entrust the process to specially trained persons like lawyers or judges.⁶⁵

This search for pre-existing expectations of rights and obligations takes place against the vast background of previously discovered law (precedent) and a specific, limited dispute. Grand social or economic theory has no place in this search. It is not the judge's object of inquiry. As Leoni cites Sir Matthew Hale, "It is a reason for me to preferre a law by which a kingdome hath been happily governed four or five hundred years than to adventure the happiness and peace of a kingdome upon some new theory of my own."⁶⁶ Indeed, Neratius proscribes the search for such a theory itself: "*Rationes eorum quae constituuntur inquiri non oportet, alioquin multa quae certa sunt subvertuntur.*"⁶⁷

We close the circle by observing that if there be no law but common law, then that law applies to all people equally, and judges discover it behind a veil of ignorance.⁶⁸ There can be no special pleaders for the creation of special rights and obligations beyond those that already exist in law or remain to be discovered as (unanimously) preferred, *ex ante*, in the practices and expectations of the people.⁶⁹ Hence, the obligation that one person's "freedom from want" would impose on another would find no hearing at common law,⁷⁰ just as similar claims for special, previously unrecognized rights would fall on deaf ears.⁷¹ For such demands find no place in a consensual order.

Certainty and law. Leoni understands that freedom, and therefore prosperity, requires an irreducible core of institutional certainty.⁷² The common law provides for certainty in the same manner that it undergirds freedom. Its goal is to express a particular, limited aspect of the preexisting consensual order. Le-

65. B. LEONI, *supra* note 1, at 20.

66. *Id.* at 94.

67. Leoni's translation: "[W]e must avoid making inquiry about the rationale of our institutions, lest their certainty be lost and they be overthrown." *Id.*

68. *Id.* at 63.

69. *Id.* at 137.

70. *Id.*

71. *Id.* at 106.

72. *Id.* at 97.

oni describes at length the difference between written (legislated) codes and unwritten law. Legislation provides instantaneously certain language, but the process of its adoption makes real, long-run certainty a chimera. "All these rules are precisely worded in written formulae that . . . interpreters cannot change at their will. Nevertheless, all of them may go as soon and as abruptly as they came. The result is that . . . we are never certain that tomorrow we shall still have the rules we have today."⁷³

The unwritten law's certainty, by contrast, grows out of its appeal to precedent and its limits on the judge's decisions, which we previously have reviewed.⁷⁴ Change may occur in the common law, but it is always at the margin and often subject to private contractual revision. The body of unwritten law stands largely unchanged. The common law merely confirms ongoing expectations. "[P]rivate Roman law [for example] was something to be described or to be discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all Roman citizens."⁷⁵ Stated differently, "law is simply a complex of rules relating to the behavior of the common people."⁷⁶ The principles of that law appeared to Hale to be such that "one age and one tribunal may speake the same things and carry on the same thred of the law in one uniforme rule as neare as possible . . ."⁷⁷

Errant judges. Leoni acknowledges "that judiciary law may undergo some deviations the effect of which may be the reintroduction of the legislative process under a judiciary guise."⁷⁸ Judges in supreme courts especially, "may be in a position to impose their own personal will upon a great number of dissenters,"⁷⁹ which would disorder the common law foundation of liberal freedom. To the extent that supreme courts follow common law procedures, the limitations that Leoni identifies would confine them as well.⁸⁰ But if supreme courts exceed common law bounds, then Leoni would favor their use of super-majorities to change "long-established precedents" or "previous in-

73. *Id.* at 76 (emphasis in original).

74. *Id.* at 93. See *supra* at 669-72.

75. *Id.* at 84.

76. *Id.* at 88.

77. *Id.* at 93.

78. *Id.* at 184.

79. *Id.*

80. *Id.* at 185.

interpretations of the constitution."⁸¹ His principal concern, though, is with judicial acquiescence in administrative determinations. Bureaucrats enjoy broad delegated powers. So bureaus may impose capricious, arbitrary, freedom-destroying, and therefore lawless constraints.⁸²

C. Legislation

If one insight stands out in *Freedom and the Law*, it is that "there is more than an analogy between the market economy and a judiciary or lawyers' law, just as there is much more than an analogy between a planned economy and legislation."⁸³ For everything that the market economy and the common law represent, central economic planning and legislation represent their opposites. Here, we examine Bruno Leoni's analysis of legislation with respect to six characteristics. Like central economic planning, legislation does not fully allow a spontaneous order to emerge in private action; faces severe information problems; grows out of rent-seeking; imposes coercion beyond the legitimate constraints of the common law; creates long-run uncertainty; and possibly originated in an early (but perhaps innocent) intent to shift from unwritten to written law.

Legislation subverts the spontaneous order. Legislation "may be too quick to be efficacious" and "too unpredictably far-reaching to be wholly beneficial . . ." ⁸⁴ It is "the terminal point of a process in which authority always prevails, possibly against individual initiative and freedom."⁸⁵ Legislation is "incompatible with individual initiative and decision when it reaches a limit that contemporary society seems already to have gone far beyond."⁸⁶

Contrasted with a spontaneous order, in which law is "a result of a secular process," legislation expresses "what the law should be as a result of a completely new approach and of unprecedented decisions."⁸⁷ Arguing for restrictions on legislative action, Leoni recalls that under the liberal freedom of the common law, "all individual choices adjust themselves to one

another and no individual choice is ever overruled."⁸⁸ But because of legislation's widening domain, "the area in which spontaneous individual adjustments have been deemed necessary or suitable has been far more severely circumscribed"⁸⁹ than is compatible with liberal freedom. Legislation saps the social order of spontaneity. As Matthew Hale argues:

[T]hey that please themselves with a persuasion that they can with as much evidence and congruities make out an unerring system of laws and politiques [that is, we would say, written constitutions and legislation] equally applicable to all states [i.e., conditions] as Euclide demonstrates his conclusions, deceive themselves with notions which prove ineffectual when they come to particular application.⁹⁰

Legislation, central planning, and economic calculation. Leoni discerns that early writers understood the tradition of liberal freedom, spontaneous order, and judge-"discovered" law, as well as the legislative threat to these institutions. This threat is severe, because legislation itself, written law, suffers from the socialist-calculation problem: legislators cannot collect the requisite information, under any reasonable assumptions about its distribution, fragmentary nature, and often undiscovered importance. This problem grows directly from the decentralized, fragmentary character of knowledge.⁹¹ As Cicero paraphrased Cato, "there never was . . . a man so clever as to foresee everything and . . . even if we could concentrate all brains into . . . one man, [he could not] . . . provide for everything at one time without having the experience that comes from practice through a long period of history."⁹²

Leoni recognizes that legislation shares in the inability of central economic planning to solve the economic-calculation problem. "[A] legal system centered on legislation resembles . . . a centralized economy in which all the relevant decisions are made by a handful of directors, whose knowledge of the whole situation is fatally limited and whose respect, if any, for the people's wishes is subject to that limitation."⁹³

The legislative process thus suppresses the spontaneous or-

81. *Id.* at 186.

82. *Id.* at 72-73, 97-103.

83. *Id.* at 22 (emphasis in original).

84. *Id.* at 5.

85. *Id.* at 6.

86. *Id.* at 9.

87. *Id.* at 11 (emphasis in original).

88. *Id.* at 132.

89. *Id.*

90. *Id.* at 93 (Leoni's words in brackets) (emphasis added).

91. See J. BUCHANAN, *supra* note 4; Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); I. KIRZNER, *PERCEPTION, OPPORTUNITY, AND PROFIT* (1979).

92. B. LEONI, *supra* note 1, at 89.

93. *Id.* at 21-22 (emphasis in original).

der in private choice. Politics is not devoid of a spontaneous order growing out of the actions of those so engaged.⁹⁴ But the political process creates positive rights and obligations that distort and restrain the spontaneous orders of market and common law that otherwise would emerge.

In particular, "the more numerous the people are whom [legislators] . . . tr[y] to 'represent,' . . . and the more numerous the matters in which one tries to represent them, the less the word 'representation' has a meaning referable to the actual will of actual people other than that of the persons named as their 'representatives.'"⁹⁵ No real contract emerges between representatives and citizens, as "a consequence of the very extension of representation to as many individuals as possible in a political community."⁹⁶

The voter himself has no way to connect his vote to public-policy outcomes.⁹⁷ And "the issues at stake . . . are too many and too complicated and . . . very many of them are actually unknown both to the representatives and the people represented . . . [N]o instructions could be given in most cases."⁹⁸ Representatives cast their legislative votes under the same disadvantage, "since they vote without knowing the results of their vote until the group decision has been made."⁹⁹

Majority rule also contributes to the legislature's inability to reflect citizens' preferences, even if all of these information problems were to disappear. In the limit, says Leoni, quoting John Stuart Mill, the preferences of one-half of the population remain ignored as a consequence of the general election. The preferences of the remaining one-half are cleft in twain as a consequence of majority rule in the legislature.¹⁰⁰ Hence, legislation mirrors at best "the contingent views and interests of a handful of people ([one-half] the legislators), whoever they may be, . . . [as] a remedy for all concerned."¹⁰¹ Or worse, it "always reflects the will of a contingent majority within a com-

94. See F. HAYEK, *THE ROAD TO SERFDOM* (1944). See also Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AM. POL. SCI. REV. 1 (1984).

95. B. LEONI, *supra* note 1, at 18.

96. *Id.* at 123.

97. *Cf. id.* at 110.

98. *Id.* at 124.

99. *Id.* at 112.

100. *Cf. id.* at 125.

101. *Id.* at 5.

mittee of legislators . . ."¹⁰²

Legislative uncertainty, in turn, makes it "impossible for the authorities to make any calculation regarding the real needs and the real potentialities of the citizens," and "[t]he authorities can never be certain that what they do is actually what people would like them to do . . ."¹⁰³ Therefore, "the authorities are [not] better qualified to discover and even to satisfy individual 'needs' that private citizens would not be able or even might not want to satisfy if they were free to choose."¹⁰⁴

In a passage that finds unmistakable reflection in modern public-choice theory, Leoni ties together the incapacity of democratic legislatures and other social-choice mechanisms to reveal citizens' preferences for public goods, with the theoretical reason for a legislature's existence, to produce such goods. He thereby restores a symmetry of evaluation between public and private sectors that is often lacking in economic thought.

To contend that legislation is "necessary" whenever other means fail to "discover" the opinion of the people concerned would only be another way of evading the solution of the problem. If other means fail, this is no reason to infer that legislation does not. Either we assume that a "social opinion" on the matter concerned does not exist or that it exists but is very difficult to discover. In the first case, introducing legislation implies that this is a good alternative to the lack of a "social opinion"; in the latter case, introducing legislation implies that the legislators know how to discover the otherwise undiscoverable "social opinion."¹⁰⁵

3) *Rent-seeking.* Because of its majoritarian character, along with most voters' and many legislators' ignorance about many issues and the preferences of those whom their political actions might affect, people with special interests in particular issues can pursue benefits from the political process that they cannot secure under conditions of unanimity and perfect information, which is to say, in the market. That is, legislation remains "the expression of the particular will of certain individuals and groups who [are] lucky enough to have a contingent majority of legislators on their side at a given moment."¹⁰⁶ The political process thus provides an opportunity for persons and groups to demand,

102. *Id.* at 6.

103. *Id.* at 90.

104. *Id.* at 171.

105. *Id.* at 16.

106. *Id.* at 11.

and representatives to supply, rents through legislation.¹⁰⁷

Legislation thereby expresses the preferences of "vested interests," which are "ready to defend the inflation of the legislative process . . ." ¹⁰⁸ But because most citizens remain unconsulted and unconsenting in this process, the result is "a potential legal war of all against all, carried on by way of legislation and representation." ¹⁰⁹ As small, contingent majorities pursue positive rights, ¹¹⁰ an implicit prisoners' dilemma forms in the political process, since "[e]veryone probably has more to gain from a system in which his decisions would not be interfered with by the decisions of other people than he has to lose . . . [if] he could not interfere in turn with other people's decisions." ¹¹¹

Consequently, a multiplicity of laws emerges, "one for landlords, one for tenants, one for employers, one for employees, etc.," which destroys the consensual basis of "equality before the law." ¹¹² The manipulation of the money supply also becomes a means for establishing the positive freedom of special classes of persons, namely debtors. ¹¹³ Even the formerly spontaneous order of language becomes politicized, as various groups seek its debasement, to assert their positive claims on others. ¹¹⁴

Leoni is uncommonly modern in his appreciation of the mechanisms of political rent-seeking. For example, he refers to

107. A "rent" is a payment to the supplier of a good or service greater than that required to bring the good or service into existence. For a fuller discussion of rent-seeking, see *infra* at 703-05.

108. B. LEONI, *supra* note 1, at 14.

109. *Id.* at 20 (emphasis in original).

110. *Id.* at 136.

111. *Id.* at 167.

112. *Id.* at 69. This multiplicity of laws characterizes both statute and common law today. This practice is ancient, however, and Leoni may not have interpreted it correctly. Its common law forms might even be welfare-regarding. For example, some differentiation would occur between common law rules governing disputes arising from agricultural and residential leases when residential leases became unattached from leases on plots of agricultural land. Particular rules—for instance, that in the calculation of damage, if a tenant breaches a lease agreement the landlord has a duty to mitigate damages by trying to find another tenant—might be appropriate for residences, but not for agricultural plots. This is because there could be no mitigation if planting season passed, or if the landlord expected to receive payment in a share of the crops. See Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984). This example suggests that common law particularized to specific activities might reflect appropriate concerns, and is not merely the result of rent-seeking.

113. B. LEONI, *supra* note 1, at 144.

114. *Id.* at 88.

research on vote-trading, logrolling, which he interprets as the means by which small minorities coalesce to form legislative majorities. ¹¹⁵ Similarly, he discerns a difference between European and American variants of rent-seeking. In European politics, social and economic "cleavages" tend not to "cross-cut," ¹¹⁶ but instead are mutually reinforcing, so that two large, fairly permanent coalitions form on the left and right. But in the United States, cleavages tend to cross-cut, so each small group is on its own.

Those who bear the costs of legislatively enacted positive freedoms ordinarily suffer because of their pervasive lack of knowledge. Small groups, therefore, can press their legislative claims without fear of opposition. ¹¹⁷ Temporary legislative minorities then merely wait their turn and "adjust themselves to defeat only because they hope to become sooner or later a winning majority . . ." ¹¹⁸

Legislation, coercion, and constraint. Groups that assert their claims to positive rights need not do so because they oppose those whom those rights would obligate. The information and majoritarian problems alone might ensure that the preferences of those obligated remain unconsulted. The enactment of positive freedoms nevertheless implies a correlative imposition of obligations, constraints on others, which freedoms are inconsistent with liberal freedom. That is, "Legislation always implies a kind of coercion and unavoidable constraint of the individuals who are subject to it." ¹¹⁹

For example, consider the positive "freedom from want." A person may choose within the market relation to become a supplier of goods. His choice remains entirely voluntary, and he accepts within the market relation the principle that other peo-

115. *Id.* at 11-12.

116. Social and political cleavages may either "reinforce" or "cross-cut." For example, suppose that voters are either Catholic or Protestant, and are workers or capitalists. If all workers are Catholics, while all capitalists are Protestants, then these religious and economic cleavages are reinforcing. But if one-half of workers belong to each faith, and so too for capitalists, then the cleavages are cross-cutting. Cross-cutting cleavages are said to moderate political conflict, while reinforcing cleavages are said to intensify it. See W. KORNHAUSER, *THE POLITICS OF MASS SOCIETY* (1959); A. LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977); S. LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (1960); E. SCHATTSCHEIDER, *PARTY GOVERNMENT* (1942); D. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (1951).

117. B. LEONI, *supra* note 1, at 11-12, 140.

118. *Id.* at 11.

119. *Id.* at 12.

ple have a liberal freedom from constraint. They can buy his goods or not, as they see fit.¹²⁰ If the supplier fails, he has no recourse and expected none within the liberal freedom of market and common law. But legislation differs, "because the very attempt to introduce 'freedom from want' has to be made . . . through legislation and therefore through decisions on the basis of majority rule,"¹²¹ not unanimous consent.

Legislation also imposes uniformity, perhaps in prices or in enforced consumption.¹²² And "group decisions imply procedures like majority rule which are not compatible with individual freedom of choice of the type that any individual buyer or seller in the market enjoys as well as in any other choice he makes in his private life."¹²³ Paradoxically, then, the enforced consumption¹²⁴ produced by "[l]egislation may have and actually has in many cases today a negative effect on the very efficacy of the rules and on the homogeneity of the feelings and convictions *already prevailing* in a given society."¹²⁵ That is, "legislation may . . . deliberately or accidentally disrupt homogeneity by destroying established rules and by nullifying existing conventions and agreements *that have hitherto been voluntarily accepted* . . ."¹²⁶

For Leoni, "majority will is not the "common will,"¹²⁷ "the people" are not the individual, and individual freedom is not democracy.¹²⁸ Therefore, because of legislation's "violent empirical operation on the body politic,"¹²⁹ as Leoni quotes Pollock, its use should be limited.

[W]e should . . . reject the resort to legislation whenever it is used merely as a means of subjecting minorities in order to treat them as losers in the field. . . . [W]e should reject the legislative process whenever it is possible for the individuals involved to attain their objectives without depending upon the decision of a group and without actually constraining any other people to do what they would never do without constraint. [And] . . . whenever [there exists] any doubt . . . about the advisability of the legislative process as compared with

120. *Id.* at 54-55.

121. *Id.* at 105.

122. *Id.* at 121.

123. *Id.* at 124.

124. *Id.* at 13.

125. *Id.* at 17 (emphasis in original).

126. *Id.* (emphasis added).

127. *Id.* at 138.

128. *Id.* at 103.

129. *Id.* at 56.

*some other kind of process having for its objects the determination of the rules of our behavior, the adoption of the legislative process ought to be the result of a very accurate assessment.*¹³⁰

Legislation and uncertainty. We have reviewed Leoni's argument that unwritten law provides long-run certainty while written law does not.¹³¹ Because written law is the explicit product of legislation,¹³² we may carry forward the burden of that argument here. The "law" of legislation remains uncertain over time, which creates two related effects.

First, private calculating becomes very difficult, especially for those persons "who must plan for the future and who . . . [must] know, therefore, what the legal consequences of . . . decisions will be."¹³³ Private planning becomes tenuous under a legislative regime, because "[t]he legal system centered on legislation, while involving the possibility that other people (the legislators) may interfere with our actions every day, also involves the possibility that they may change their way of interfering every day."¹³⁴ Because of the instability of legislative coalitions, reflecting shifting contingent majorities,¹³⁵ "we are never certain that tomorrow we shall still have the rules we have today."¹³⁶

Second, this uncertainty, growing out of a continual process of rent-seeking, makes private contractual reliance risky.¹³⁷ "[T]he very possibility of nullifying agreements and conventions through supervening legislation tends in the long run to induce people to fail to rely on any existing conventions or to keep any accepted agreements."¹³⁷ Hence, contractual exchanges requiring temporally separated future performance become less attractive, leading the parties to develop costly alternatives, such as contractual hostages (if that is possible at all under the statute), otherwise unwarranted vertical integration

130. *Id.* at 13-14 (emphasis in original).

131. *See supra* at 672-73.

132. The continental codes even today have very definite common law-like, judge-determined origins. *See* Aranson, *Economic Efficiency and the Common Law: A Critical Survey*, in *LAW AND ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION* 51 (G. Skogh & M. von Schulenberg eds. 1986).

133. B. LEONI, *supra* note 1, at 8.

134. *Id.*

135. *Id.* at 11-12.

136. *Id.* at 76 (emphasis in original).

137. *Id.* at 17.

of production processes,¹³⁸ or the foregoing of such exchanges entirely.

These two effects grow with the domain and frequency of appeals to legislation. "The more intense and accelerated is the process of law-making, the more uncertain will it be that present legislation will last for any length of time," because "there is nothing to prevent a law, certain [in its written form] . . . , from being unpredictably changed by another law no less 'certain' than the previous one."¹³⁹

The early origins of legislation. How did the legislative process come to subvert the common law's liberal freedom, to become a source of rent-seeking and uncertainty? The historical process that Leoni traces out suggests a model of legislative aggrandizement. The process began with a simple desire and "very modest idea of reassessing and restating lawyers' law by rewriting it afresh in the codes, but not in the least by subverting it through them."¹⁴⁰ This activity "was intended chiefly as a compilation of past rulings, and its advocates . . . stress[ed] precisely its advantages as an unequivocal and clear-cut abridgement as compared with the rather chaotic mass of individual legal works on the part of lawyers."¹⁴¹

But legislative compilation turned an open system based on a spontaneous order into a closed system¹⁴² based on centralized control. Interested parties would consult the stark outlines of the code, instead of the richly detailed and explained fabric of case law.¹⁴³ One imagines that this change shifted comparative advantage away from those whose advocacy reflected the discipline of legal scholarship and toward those whose advocacy was merely imaginative and politically entrepreneurial. But for whatever reason, legal scholarship declined, and the force of common law diminished apace.¹⁴⁴ Soon it became natural "to conceiv[e] of the whole of the law as written law, . . . as a single series of enactments on the part of legislative bodies according to majority rule."¹⁴⁵

138. See Klein, Crawford & Alchian, *Vertical Integration, Appropriate Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

139. B. LEONI, *supra* note 1, at 81.

140. *Id.* at 10 (emphasis in original).

141. *Id.*

142. *Id.* at 145.

143. *Id.* at 148.

144. *Id.*

145. *Id.* (emphasis in original).

We do not know when rent-seeking entered the picture. More than likely it was there from the beginning.¹⁴⁶ Or, perhaps rent-seeking was the natural consequence of majority rule and the restricted information and partial preference revelation that accompany legislative processes.¹⁴⁷ It matters not. What does matter is the present substitution of the constraining results of the legislative process for the liberal consequences of the common law.

III. RECENT DEVELOPMENTS

This review of *Freedom and the Law*, except for a brief initial cataloging of some "mistakes" and an occasional footnote, takes Bruno Leoni's writing on its own terms. While prior references to subsequent contributions are few, the form of this review accommodates a recounting of later works, a matter to which we now turn.

A. Freedom

Many problems and misunderstandings result because most social scientists remain unprepared to reason about freedom and leave the subject to the philosophers. But neither philosophy nor any particular social science alone can capture freedom's full meaning and importance. Indeed, we require an analysis of freedom that combines both economics and philosophy, which analysis Leoni begins to sketch out.

Liberal freedom versus positive freedom. That economists and other social scientists commonly leave the study of freedom to the philosophers seems apparent in the recent proliferation of "great works" of political philosophy such as: Rawls's *A Theory of Justice*,¹⁴⁸ Nozick's *Anarchy, State, and Utopia*,¹⁴⁹ and a spate of writings by Marxists¹⁵⁰ and legal philosophers.¹⁵¹ But with the exception of the Austrians¹⁵² and of James M. Buchanan's¹⁵³

146. Claims persist in legal history that the early common law treatise writers were less than disinterested in the particular substance of their compilations.

147. See *supra* at 675-79.

148. J. RAWLS, *A THEORY OF JUSTICE* (1971).

149. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

150. See, e.g., Cohen, *Capitalism, Freedom, and the Proletariat*, in *THE IDEA OF FREEDOM 9* (A. Ryan ed. 1979).

151. For an excellent review, see Terrell, *Liberty: The Concept and its Constitutional Context*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 545 (1985).

152. See, e.g., F. HAYEK, *supra* note 25; *CONSTITUTION OF LIBERTY*, *supra* note 25.

153. J. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND UTOPIA* (1975).

constant and faithful attention to freedom, there are few writings on freedom itself by non-Marxist economists.

The philosophers have dominated the field in a manner that recapitulates Leoni's¹⁵⁴ (and Hayek's¹⁵⁵) reflections on the distinction between negative and positive freedom. On one side we find arrayed philosophers such as Nozick, who views property as the embodiment of freedom.¹⁵⁶ On the other we find political philosophers such as Christian Bay¹⁵⁷ and G. A. Cohen,¹⁵⁸ who deem the positive freedom of Marxism to be logically compelling but the negative freedom of classical liberalism to be empirically empty.

Economists do write about freedom, and their work in this area is of great importance. But it lacks a concern for, not to say rejects, "doctrinaire" appeals to distinctly philosophical considerations. For example, economists might identify price controls or regulatory barriers to entry as reductions in (liberal) freedom. These policies then stand as proximate causes of reductions in human welfare. Economists have gone far in arguing the *case* for freedom with just such demonstrations.

But these examples do not build a compelling *theory* of freedom or its absence. Instead, they compile evidence about the *effects* of freedom or its absence. Without a theory of freedom, however, one cannot distinguish between freedom's presence and its effects. Indeed, economists sometimes call the effects by the name "freedom." And this confusion has been disabling for both theory and practice.

Stigler exemplifies this confusion by rejecting the Hayek-Leoni claimed difference between liberal and positive freedom.¹⁵⁹ He "share[s] Hayek's opposition to a host of modern public policies."¹⁶⁰ But he claims that they cannot be attacked on grounds that rely on this difference, which he regards as merely "moral," and therefore beyond the economist's compass. In-

154. See *supra* at 665-66.

155. CONSTITUTION OF LIBERTY, *supra* note 25, at 12.

156. R. NOZICK, *supra* note 149. I here rely on John Gray's assessment of what Nozick means to say. See Gray, *Marxian Freedom, Individual Liberty, and the End of Alienation*, 3 SOC. PHIL. & POL'Y 160 (1986).

157. C. BAY, *THE STRUCTURE OF FREEDOM* (1965).

158. Cohen, *supra* note 150.

159. Stigler, *Wealth, and Possibly Liberty*, 7 J. LEGAL STUD. 213 (1978). Stigler's argument appears in a more general and less combative form in Moore, *An Economic Analysis of the Concept of Freedom*, in H. Manne, *supra* note 3, at 108.

160. Stigler, *supra* note 159, at 217.

deed, one person's assertion of such grounds, for Stigler, is the moral equivalent of another's claim to the contrary.

Instead, Stigler identifies wealth-maximizing public policies with liberty. If such policies increase a person's earnings, then his opportunity set expands and he has more freedom than otherwise; but if his earnings decline, then he is less free. Accordingly, Stigler believes that economists *qua* economists cannot distinguish between liberal and positive freedom.

[W]hether the state forbids me (by a rationing system) to use more than ten gallons of gasoline a week, or whether I am prevented from doing so by its [gasoline's] high price (not including taxes) is of little direct significance to me: in either case my driving is limited by decisions (to ration or to buy gas) of my fellow citizens.¹⁶¹

Hence, we cannot "distinguish coercion by other men from other [market] limitations on our choice,"¹⁶² so "the purpose of a distinction between wealth and liberty is . . . elusive."¹⁶³

As a consequence of this reasoning, "[o]ne may [only] derive normative conclusions on public policy by recourse to [the] . . . criterion of individual utility maximization," because "[t]he concept of wealth is both broad and specific: it is the wealth of individual men, as judged by themselves, which measures their capacity to choose [their liberty]."¹⁶⁴

Then comes Stigler's necessary argument. "If a policy is demonstrably inefficient in achieving its goals, the more efficient policy ought to be preferred by members of the society," and "[u]nless the superior efficiency of a policy is shown, the prospects of influencing a rational society are negligible."¹⁶⁵ But, "if the society is irrational (it does not seek to maximize its members' utilities), then the source of influence over the society's policies—and knowledge of economic laws[—]will have no relevance to that influence."¹⁶⁶ Therefore, "[p]erhaps these policies cannot be effectively opposed on *any* ground, but surely that of efficiency offers more promise."¹⁶⁷

This asserted equivalence between political and market con-

161. *Id.* at 216.

162. *Id.* at 215.

163. *Id.* at 215-16.

164. *Id.* at 216-17.

165. *Id.* at 217.

166. *Id.*

167. *Id.* (emphasis in original).

straints, which argues for an equivalence between liberal and positive freedom, remains fully consistent with, and indeed identical to, the contemporary Marxist argument of alienation resulting from the market relation.¹⁶⁸ Alienation in Marxist interpretation views people—both workers and capitalists—as losing control over their lives and choices because of others' decisions. They cannot plan, they cannot achieve self-actualization, and their actions hold no meaning for them.

It is difficult to discern where Stigler's asserted identity between market- and collectivity-imposed constraints differs from this interpretation. But there is more here than the unpersuasive objection that Stigler's thought mirrors contemporary Marxist thought. That "something" is Stigler's (and the Marxists') studied ignoring of the rest of the Austrian argument, as well as Stigler's specific rejection of recent contributions in public-choice theory.

Stigler claims that restrictions on both liberal and positive freedom may reduce the domain of choice, which thereby diminishes wealth. (The opposite relation also can occur, in that some constraints may increase wealth.) And a reduction in wealth may reduce (undifferentiated) freedom in its turn. So wealth and freedom become equivalent. But suppose, with Leoni,¹⁶⁹ that we can assign particular freedoms to the category of "liberal" or "positive." Some difficult assignment problems might remain. But we ignore them, because Stigler's argument is not that; it is just that the distinction, even if clear, would make no difference.

Stigler would argue that sometimes there is a happy coincidence between a liberal freedom and increased wealth. In such cases Stigler and the Austrians do not differ in their policy preferences. Still, a positive freedom might coincide with Stigler's goal of increased wealth. At this point the issue is joined.

The Austrian argument, reflecting the economic-calculation problem, is that Stigler cannot know that any policy that enacts a positive freedom indeed will increase wealth. The policy certainly will subvert the spontaneous orders of market and common law, and there will be far less economized use of information. Stigler thus has claimed that economists can do an impossible thing. And even if the positive-freedom policy

168. See Gray, *supra* note 156, at 163-64.

169. See *supra* at 665-66.

"maximizes" wealth in strict neoclassical and static terms, there can be no claim for a more nearly global, dynamic wealth maximization growing out of invention and entrepreneurship. An expansion of liberal freedom may increase wealth. But policies designed solely to increase wealth may not increase liberal or even positive freedom.¹⁷⁰

The immediate attractiveness of public policies based on (wealth-maximizing) calculations alone threatens the broader "institutional efficiency"¹⁷¹ derived from the spontaneous orders of market and common law. Stigler thus ignores the function of rules that undergird liberal freedom. As Hayek notes:

The preservation of a free system is so difficult precisely because it requires a constant rejection of measures which appear to be required to secure particular results, on no stronger grounds than that they conflict with a general rule, and frequently without our knowing what will be the costs of not observing the rule in the particular instance. A successful defence of freedom must therefore be dogmatic and make no concessions to expediency, even where it is not possible to show that besides the known beneficial effects, some particular harmful result would also follow from its infringement. Freedom will prevail only if it is accepted as a general principle whose application to particular instances requires no justification¹⁷²

Stigler's argument, of course, is much simpler to dismiss. Suppose that both his budget and relative prices, on the one hand, and a government rationing scheme, on the other, would lead the consumer to purchase exactly the same amounts of gasoline. Negative freedom, though, concerns the right to change. So now suppose that the consumer discovers a new opportunity requiring considerably greater travel by automobile. A market relation allows the consumer to react to his now greater marginal valuation of travel by increasing his gasoline use. The government-imposed rationing system does not.

170. For example, a 1982 Supreme Court case overturned the California Supreme Court's judicial application of statutory language that nullified due-on-sale clauses in home-mortgage contracts. See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). Present mortgagors might benefit from the nullification, but future mortgagors, their right to alienate this provision thereby restricted, would not benefit. Thus, attempts to aid a class often produce only transitional gains for its pre-existing members. On *de la Cuesta*, see Haddock & Hall, *The Impact of Making Rights Inalienable*, 2 SUP. CT. ECON. REV. 1 (1983). On the problem of transitional gains, see Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671 (1975).

171. The term derives from Rizzo, *supra* note 4.

172. F. HAYEK, *supra* note 25, at 61.

Hence, the rationing system fails to incorporate altered decisions (except by trading off less-preferred travel), while rationing by market prices does not. Liberal freedom thus entails the ability to pursue unforeseen opportunities, a matter that Stigler wholly ignores.

Machlup, in precisely these terms, anticipates the Austrian argument against Stigler's asserted identity of negative and positive freedom.¹⁷³ He begins by criticizing "[t]his fusion of the idea of non-interference," a concept fully compatible with Leoni and Hayek's notion of liberal, negative freedom, "with the idea of effective power (which often means buying power)."¹⁷⁴ In Machlup's view, this combining "could not but spread confusion."¹⁷⁵ In particular:

A definition of freedom which negates the difference between non-interference and effective power (or welfare or want satisfaction) destroys the essential meaning of the word "freedom." If it is defined as the capacity or opportunity to get what one wants, we are barred from analyzing the important question whether the development of this capacity or opportunity is better served by restrictionism or by non-interference, by collective control or by individual freedom.¹⁷⁶

With respect to the claim that a concatenation of these two views of freedom cannot hold good in a dynamic economy with changing opportunities, Machlup points out that "certain freedoms may be of great importance for individuals and for societies when no knowledge, no opportunity, and no power exist as yet to make use of presumably 'empty' freedoms."¹⁷⁷ The constrained-consumer example is but a simplified instance of such opportunities. For, "[t]heir importance lies in the aspirations and ambitions which they arouse and which may lead to the search for the knowledge, opportunity, and power that are required to exercise the previously unused freedoms. In short, 'ineffective' freedoms can be highly effective."¹⁷⁸

Implicit in Stigler's argument is a second claim, which he

173. Machlup, *Liberalism and the Choice of Freedoms*, in *ROADS TO FREEDOM: ESSAYS IN HONOUR OF FRIEDRICH A. VON HAYEK* 117 (E. Streissler ed. 1960). I thank Israel Kirzner for informing me of this important essay.

174. *Id.* at 120.

175. *Id.*

176. *Id.* at 126.

177. *Id.* at 130.

178. *Id.*

presses elsewhere.¹⁷⁹ Many of his writings develop a "black-box" model of the political process, characterizing politics as a kind of market, in which people maximize wealth. The model does contribute to an understanding of the political process, and I have used it in arguing that constitutional sea changes, such as the American reapportionment revolution, have few public-policy consequences.¹⁸⁰ A kind of "constitutional Coase theorem" thus emerges, in which the only consequences of changes in rules are wealth effects, provided that transaction costs are low under alternative rules.

But this model proves too much. The structure of rules and rights does matter.¹⁸¹ The majority-rule relation is not a market relation, *even* under conditions of perfect information and low transaction costs. For example, Ordeshook and I have constructed a model of an n-person legislature, in which majority rule leads to unstable (disequilibrium) redistributions toward the (equally unstable) majority coalition, through the use of cost-benefit inefficient programs, even under conditions of zero transaction costs, perfect information, and a market for votes.¹⁸² Such redistributions rest on assertions of positive freedom, and not on the liberal freedom of the (unanimous) market relation. But the model applied to the market rule—unanimity—shows neoclassical efficiency.

Such models reveal a vast difference between individual rationality and "social rationality," even within a neoclassical structure. Individual rationality under majority rule can and does lead to "social irrationality,"¹⁸³ meaning at least incoherence (intransitivity) and probably Pareto-inferior policies. Adding imperfect information and high transaction costs to the

179. See, e.g., Stigler, *Economic Competition and Political Competition*, 13 *PUB. CHOICE* 91 (1972); Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

180. Aranson, *Political Inequality: An Economic Approach*, in *POLITICAL EQUILIBRIUM: A DELICATE BALANCE, ESSAYS IN HONOR OF WILLIAM H. RIKER* 133 (P. Ordeshook & K. Shepsle eds. 1982). See Riker, *Democracy and Representation: A Reconciliation of Ball v. James and Reynolds v. Sims*, 1 *SUP. CT. ECON. REV.* 39 (1982).

181. See McKelvey & Ordeshook, *An Experimental Study of the Effects of Procedural Rules on Committee Behavior*, 46 *J. POL.* 182 (1984); Shepsle & Weingast, *When Do Rules of Procedure Matter?*, 46 *J. POL.* 206 (1984). The correlative law-and-economics contributions are Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960), and Demsetz, *When Does the Rule of Liability Matter?*, 1 *J. LEGAL STUD.* 13 (1972).

182. The results are reported in Aranson & Ordeshook, *The Political Bases of Public-Sector Growth in a Representative Democracy* (1978) (paper prepared for the Annual Meeting of the American Political Science Association, New York City) (on file at the JLPP office). See also Aranson and Ordeshook, *supra* note 16, at 131-37.

183. See references cited *supra* notes 6-10.

model then recaptures the essence of Leoni's argument about legislation, his application of the economic-calculation problem, with its implications for the distinction between liberal and positive freedom.¹⁸⁴

Liberal freedom, positive freedom, and constitutional choice. A second body of literature seems more difficult to counter, because it claims that people might opt for positive freedom (and obligation) under a market-like, unanimous-decision rule, one designed to set the terms of a constitution.¹⁸⁵

The constitutional claim for positive freedom follows these lines. First, suppose that at the level of constitutional choice, only unanimous consent can express or be compatible with liberal freedom.¹⁸⁶ Second, assume that a veil of ignorance¹⁸⁷ deprives constitution choosers of information about their post-constitutional positions. Third, suppose that the choosers unanimously decide to adopt a constitution providing for either any kind of wealth redistribution or particular kinds of wealth redistributions (for example, following an insurance principle¹⁸⁸) in subsequent decisions by a majority-rule institution. That is, they constitutionally and unanimously recognize the legitimacy of legislative enactments of positive freedoms. Are these people then less free?

I cannot satisfactorily answer this question. Nor am I certain that others can do so. A response to the first possibility—unanimously consenting to any kind of majority-preferred wealth redistribution—must rely on a prior theory of whether freedom always should be inalienable. The Declaration of Independence declares "liberty" to be so, as it does "life" and the "pursuit of happiness." This, then, is an issue that is too lengthy and too complex to pursue here, although it is the subject of extensive legal commentary.¹⁸⁹

184. See *supra* at 675-77.

185. I have in mind Rawls's second principle of justice. See J. RAWLS, *supra* note 148.

186. See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* ch. 7 (1962); J. BUCHANAN, *supra* note 153.

187. See J. BUCHANAN & G. TULLOCK, *supra* note 186; J. RAWLS, *supra* note 148.

188. See, e.g., E. BROWNING & J. BROWNING, *PUBLIC FINANCE AND THE PRICE SYSTEM* 226-27 (2d ed. 1983).

189. See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). An excellent recent treatment is available in Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985). See also Haddock & Hall, *supra* note 170; Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321 (1985); Radin, *Market-Inalienability*, 100 HARV. L.

The second possibility—unanimously consenting, say, to majority-preferred wealth redistributions based on an insurance principle—remains subject to some clarification. For example, if private-sector agents can make a market in insurance, should a constitution prohibit public-sector agents from doing so? And if the constitution allows public-sector insurance, does that work a restriction on liberal freedom, with a concomitant growth in positive freedom and obligation? Is Stigler then right, that the supplier's legal identity may be a difference that makes no difference?

Deciding that these redistributions promote positive freedom returns us to the question of the alienability of liberal freedom. But suppose that these redistributions do not really create positive freedoms. Does our inquiry end? I think not. The question then becomes whether any majority-rule legislature is able to develop the kinds of programs that the unanimously chosen constitution intended. Leoni would argue that the task cannot be done.¹⁹⁰ Instead, the resulting legislation would resemble other legislation in its more general redistributionist, uncertain, and rent-seeking aspects. Legislators, voters, interest groups, and bureaucrats, after all, are not rational by parts.

Can further constitutional provisions constrain legislators to do what the constitution writers intended? Probably not. For such provisions, as we shall find,¹⁹¹ have offered but a weak defense against the very kinds of actions that Leoni and others complain of.¹⁹² Perhaps other forms of constraints on legislators might work better, but this possibility seems unlikely.¹⁹³

REV. 1849 (1987). For a discussion of alienability in constitutional argument, see Aranson, *Calculus and Consent*, in *DEMOCRACY AND PUBLIC CHOICE* 60 (C. Rowley ed. 1987).

190. See *supra* at 674-81; Aranson, *supra* note 189.

191. See *infra* at 706-09.

192. See, e.g., Aranson, *Procedural and Substantive Constitutional Protection of Economic Liberties*, 7 CATO J. 345 (1987); Aranson, *Judicial Control of the Political Branches: Public Purpose and Public Law*, 4 CATO J. 719 (1985); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

193. Aranson, *Public Deficits in Normative Economics and Positive Political Theory*, in *THE ECONOMIC CONSEQUENCES OF GOVERNMENT DEFICITS* 157 (L. Meyer ed. 1983); Aranson & Ordeshook, *Alternative Theories of the Growth of Government and Their Implications for Constitutional Tax and Spending Limits*, in *TAX AND EXPENDITURE LIMITATIONS* 143 (H. Ladd & T. Tideman eds. 1981); Shepsle, *Overgrazing the Budgetary Commons: Incentive-Compatible Solutions to the Problem of Deficits*, in *THE ECONOMIC CONSEQUENCES OF GOVERNMENT DEFICITS* 211 (L. Meyer ed. 1983).

B. Law

Current literature in law and economics, especially with respect to common law, often recapitulates the debate between Stigler and the Austrians. There is another view in this debate, however, with distinctly ideological roots in claims for positive rights and obligations, of the sort referred to earlier under the category of "errant judges."¹⁹⁴ The three views of the legal process, then, can take three explanatory or predictive forms:

1. Leoni—judges at common law (will) decide cases before them according to precedent and common law processes of legal reasoning and "discovery," with the intent of preserving the liberal freedom of the parties to the dispute;

2. Posner¹⁹⁵—judges at common law (will) decide cases before them with the intent of increasing the wealth of society;

3. Wright¹⁹⁶ and Dworkin¹⁹⁷—judges at common law (will) decide cases before them with the intent of incorporating their personal ideologies into law.

Each of these positive forms has an associated normative form, in which the words "ought to" substitute for the word "will." We label these normative forms as 1', 2', and 3', respectively. Judges under 2 or 2' and 3 or 3' act like legislators, except that the first (operating under 2 or 2') might claim to be "instructed" delegates, while the second (operating under 3 or 3') do not necessarily do so.

Within the law and economics community today, the debate is between those who take positions 1 or 1' and 2 or 2'. Those who assert position 3 or 3' generally oppose any economic analysis of law—Austrian or neoclassical—because they view law as apart from the market relation. But in asserting ideologically devised, rights-based theories, their claims sometimes resemble those of scholars at positions 1 or 1'. This resemblance, of course, is more apparent than real.

In extending the review of legal scholarship beyond Leoni's day, it is useful to follow historical order. With important exceptions, there came first an attention to the development of rules by examining actual case law and changes in precedent.

194. See *supra* at 673-74.

195. See R. POSNER, *supra* note 3.

196. See letter of Judge J. Skelly Wright, *infra* at 710, as quoted in Rabin, *supra* note 112, at 549.

197. See R. DWORGIN, *TAKING RIGHTS SERIOUSLY* (1978).

Next, several scholars turned their attention to creating mathematical models of the common law process, with some specialized work on the incentive effects of particular rules. Finally, because both of these bodies of research ordinarily claim that the common law process tends to converge on wealth-maximizing rules, the present stage of the debate emerged, concerning whether judges explicitly should try to adopt such rules.

Empirical work. Judge Posner dominates the first two stages of this development. His early work on negligence,¹⁹⁸ followed by his compilation across all areas of law, in *Economic Analysis of Law*,¹⁹⁹ set the prevailing research agenda. Posner's work, and that of scholars who follow in this tradition,²⁰⁰ adopts this format. First, the writer describes an area of common law and the alternative rules that judges might apply in it. Second, he provides a verbal economic model, discerning the efficient (wealth-maximizing) rule. Third, he reviews cases to decide whether judges choose as the model predicts (form 2). Finally, he sometimes exhorts judges to adopt such rules (form 2').

Posner's early study of the rule of negligence provides a good example of this research.²⁰¹ From an implicit economic model, he reasons that in tort law such a rule would be wealth-maximizing under greater industrialization, while a strict-liability rule would not. He then examines nineteenth century appellate decisions in the United States and finds the pervasive adoption of the negligence standard, which his model had predicted. Posner then advocates the negligence rule.²⁰²

Goetz's remarks on landlord-tenant law provide a second example.²⁰³ When most residential rental property consisted of single-family dwellings, imposing liability in tort on the tenant (and not on the landlord) for injuries to visitors made sense, because the (relatively permanent) tenant was better able to detect potentially dangerous conditions. But with today's large

198. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 24 (1972).

199. R. POSNER, *supra* note 3.

200. See, e.g., Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175 (1986); Holderness, *supra* note 189.

201. Posner, *supra* note 198.

202. The incentive effects of a negligence rule subsequently were shown to be equivalent to those of a rule of strict liability with contributory negligence, a result that Posner recognizes. See Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973).

203. Goetz, *Wherefore the Landlord-Tenant Law "Revolution"?: Some Comments*, 69 CORNELL L. REV. 592 (1984).

apartment developments and rapid tenant turnover, the landlord is better able to detect such conditions. So it makes sense (minimizes information costs) to shift liability to him.²⁰⁴

*Dynamic models of the common law process.*²⁰⁵ Before Posner's early work, there had been attempts to discern some economic characteristics of the legal process. Coase's essay, *The Problem of Social Cost*,²⁰⁶ first alerted scholars that precedent—rules of rights and obligations—might have allocative consequences, the stuff of neoclassical microeconomic analysis. Coase showed that in the absence of transaction costs, and under conditions allowing for the alienability of a prior common law right, subsequent contracting would allow the parties to assign the right to its highest valued use. That is, the prevailing common law rule itself would have no allocative consequences. Coase then examined several nuisance cases where transaction costs were high, and he found (mistakenly, I believe), in the manner of Posner's later work, that judges tend to adopt wealth-maximizing rules.

Calabresi and Melamed,²⁰⁷ at about the same time that Posner's essay on negligence appeared (1972), then sought to distinguish conditions under which courts would adopt property rules or liability rules. Property rules give one party a defensible right to be secure in his person, property, or contractual expectations, and courts ordinarily (though not always) protect them with injunctive relief if possible, along with whatever damages are due from the defendant's actions before the injunction has issued. Within the structure of the Calabresi-Melamed theory, courts tend to adopt such rules under low transaction-cost conditions. But they tend to impose liability rules, awarding damages only, under high transaction-cost conditions.

If there was agreement all around (which, in truth, there was not) that judges adopt wealth-maximizing rules (as measured by the standards of neoclassical theory), it was not clear how they could do so. Classical common law courts approach the cases before them more nearly in the manner that Leoni de-

204. And in any event, the landlord and tenant's ability to contract away from such a rule should be sufficient to reduce the costs of imposing it. See Coase, *supra* note 181. See also Aranson, *supra* notes 4, 132.

205. This section relies in large part on Aranson, *supra* note 132.

206. Coase, *supra* note 181.

207. Calabresi & Melamed, *supra* note 189.

scribes (form 1) and far less in the manner of economists (form 2).

The solution to this puzzle appeared at hand with some general models of the common law process, beginning with the work of Rubin.²⁰⁸ His model, building on Gould's earlier work,²⁰⁹ is the essence of simplicity. Suppose that an accident occurs, that tortfeasor and victim both have continuing interests in precedent, that the law of the case clearly places liability on one of them, and that both parties agree on the stakes and on the probability that the plaintiff (defendant) will prevail at trial. Rubin shows that if the rule is efficient, then the parties prefer settlement to suit; but if it is inefficient, then they may go to trial, depending on the level of legal costs. Each time a trial occurs under a putatively inefficient rule, there is a nonzero probability that the court will reverse the rule, so each subsequent trial gives a court the opportunity to adopt the efficient rule. Hence, under the assumptions stated the law of the case tends toward efficiency over time.

This model, and others like it,²¹⁰ does not rely on judges' motivations to reach efficient rules. Rubin's "invisible-hand" theorem thereby comports with Leoni's description of the common law process as creating a spontaneous order.²¹¹ Indeed, Rubin later defends his theory of the common law's efficiency thus: because common law rules tend toward efficiency, each person can take any action that appears "reasonable," with little fear that he has placed himself in danger of a suit. He need not know the law, but only what is "reasonable" (customary). If the prevailing rule is inefficient, then "reasonable" actions will animate the legal process until the rule changes to embrace the "reasonable" (that is, "efficient") form.²¹²

Elsewhere,²¹³ I survey these models, and the burden of that review is less sanguine for efficiency claims than Rubin at first

208. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

209. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

210. See, e.g., Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978); Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981).

211. See *supra* at 668-69.

212. Rubin, *Predictability and the Economic Approach to Law: A Comment on Rizzo*, 9 J. LEGAL STUD. 319, 329 (1980).

213. See Aranson, *supra* note 132.

argued. First, the models reflect only modest agreement about the appropriateness of various assumptions. One counts among the models literally millions of possible combinations and permutations of systems of assumptions about conditions under which the common law operates. A few lead to efficiency; many do not; and the vast majority remain unexplored.

Second, Rubin²¹⁴ argues more recently that, because of today's litigants' increasingly asymmetric interests and high transaction costs, the common law process has become subject to the same forces as the legislative process. He then provides several examples showing judges acting more in accord with form 3 than with form 1 or 2.

Third, even if these models predict an efficiency-seeking common law process, it remains unclear whether that result implies a choice of form 1 or 2, or even of form 1 or 2. Here, we close this circle by considering the common law battlefield between the Austrians and the neoclassical economists.

The common law and economic calculation. Some things that people do naturally, they might not do as well, or would not do at all, if they thought about how or why they do them.²¹⁵ I recall once speaking with a former construction worker who had made his living by riveting I-beams on skyscrapers. One day, while standing on a naked girder forty stories above the ground, he suddenly thought about his peril, had to be carried from the girder, and became a clothing salesman.²¹⁶

The parallel between this worker's predicament and that of a judge at common law trying to adopt wealth-maximizing rules seems far from exact, but it will do. A classical common law judge, like Leoni's "grammarian" or "statistician,"²¹⁷ by searching to discover the parties' liberal freedoms, may simply replicate the wisdom of the market and thus adopt rules that, by postdiction, might be deemed efficient. That is, a judge acting in accordance with form 1 appears in retrospect to have

214. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 216-19 (1982).

215. See B. LEONI, *supra* note 1, at 94.

216. F. HAYEK, *supra* note 25, at 74, states the matter in a different connection: "[I]ndividuals had learned to observe (and enforce) rules of conduct long before such rules could be expressed in words . . ." Heiner has pursued the connection between imperfect information and the emergence of rules in an important series of papers. See Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986); Heiner, *The Origins of Predictable Behavior*, 73 AM. ECON. REV. 560 (1983).

217. See *supra* at 669.

acted in accordance with form 2. Perhaps Rubin's description of what Leoni interprets to be a spontaneous order is a central part of this process, though surely it is not the only part.

But could it go the other way? Could a judge who adopts form 2 do as well at maximizing wealth as could a judge who adopts form 1? Manifestly, it is far from apparent that a "Posnerian" judge, operating under form 2 rather than form 1, could replicate the classical judge's product.

All of Leoni's (and the Austrians') observations on law and legislation combine to deny that such a replication is possible.²¹⁸ But today we can say far more. In analyzing the ordinary common law case in the traditional areas of contract, property, and tort, efficiency theorists base their models on a simple equation: Total cost = Damage costs + Avoidance costs. "Damage costs" in a tort case, for instance, refer to the expected number of accidents that would occur under a particular rule times the expected cost of each accident; avoidance costs refer to the cost of avoidance itself (added safety measures, for example), as well as to the reduction in beneficial activities that avoidance might imply. Suppose that under any particular rule each party maximizes his utility subject to the rule. An "efficient" rule, compared with its alternatives, minimizes the sum of these two costs.

Here, the economic-calculation problem reappears.²¹⁹ If the judge seeks to impose a wealth-maximizing rule, how will he gain a knowledge of these costs? Recall that Leoni's judge is concerned at most only with the expectations of these costs as they should have appeared to the instant litigants at the penultimate moment of choice. The "Posnerian" judge, by contrast, must form a prediction of how these costs (or expectations of them) will appear to all subsequent parties who might possibly find themselves in the same positions as did the instant litigants.

These costs, however, existed only at the penultimate moment of choice and only for the instant litigants. Knowledge of such costs, then, exists only *ex hypothesis* for future parties, and that knowledge, at best, would be widely disseminated in fragmentary form throughout the economy. Hence, the judge who would pursue the explicit imposition of efficient rules *perforce* simultaneously would face the same information problems as a

218. See, e.g., *supra* at 674-77.

219. For a full discussion of the problem, see Aranson, *supra* note 4.

central economic planner.²²⁰ What is worse, such a judge's span of knowledge must be less than a legislator's, because the judge's knowledge at most reflects only the information that the two litigants are willing and able to provide.

Freedom and the choice of legal rules. The debate over wealth-maximizing versus classical judges crystallizes in the choice of legal rules. As a general proposition, Austrians prefer property rules to liability rules; and if they must choose a liability rule (as in most tort law), then they prefer strict liability to negligence.²²¹

These preferences grow out of a high regard for the rights-based, spontaneous order of the market. But such an order works best, and sometimes may only be possible, if rights are defined and defended. The Austrians' economy, then, relies on a rights-based consensus, as Leoni describes it.²²² It is not merely that the economic-calculation problem makes it impossible for a judge operating under a liability rule to assess damages, say, to "make the plaintiff whole." More important, a liability rule makes rights at least contingent on the forbearance (or care) of others. But a property rule sends decisions back to the market, where the information resides, while it simultaneously uncouples rights from a judicially contingent liability determination.²²³

A similar reasoning applies to the choice of strict liability over negligence, once one adopts a liability rule in a particular area of law. The judge's problem seems almost entirely informational. He would face insuperable difficulties in discerning, say, the values of the variables that go into the "Hand formula" or into any of its modern variants, because the costs, benefits, and probabilities involved in the determination of negligence seem beyond *ex post* recapture (or *ex ante* prediction).²²⁴ Hence, Austrians would prefer to approach the problem of harm as they would any other external cost, by shifting that cost back to its source.

The difference between Austrians and neoclassical "Posneri-

220. *Id.* For the intellectual source of this criticism, see J. BUCHANAN, *supra* note 4; see also J. Buchanan & G. Thirlby, *supra* note 4.

221. See, e.g., Epstein, *supra* note 4; Rizzo, *supra* note 4.

222. See *supra* at 666-67; 669-72.

223. See Epstein, *supra* note 4.

224. See, e.g., *supra* note 63; Brown, *supra* note 202 (developing modern variant of the Hand formula); Rizzo, *supra* note 4.

ans" appears here in stark outline, with few details. The comparison doubtless is unfair when applied to individual scholars. Posner himself remains acutely aware of the information problem, and he has so stated in his preference to return disputes to the market if transaction costs are low.²²⁵ Epstein, by contrast, whose writings place him within the Austrian tradition,²²⁶ does not recommend applying property rules uniformly to all claims of nuisance.²²⁷

But the difference between Austrians and Posnerians²²⁸ remains very real, as a 1981 Louisiana case might illustrate. In *J. Weingarten, Inc. v. Northgate Mall, Inc.*,²²⁹ the plaintiff Weingarten had subleased from the defendant space in a mall, to operate a grocery store. The lease provided that Northgate would not "erect any additional buildings in the parking area . . . except within the space shown on a plat . . ." ²³⁰ Northgate "also promised to maintain a ratio of six car parking spaces for each 1,000 [square] feet of floor space . . ." ²³¹ The lease granted plaintiff an "irrevocable non-exclusive easement" over all parking areas shown on the plat, [and it gave him] "the right to obtain an injunction specifically enforcing such rights and interests without the necessity of proving inadequacy of legal remedies or irreparable harm." ²³²

Defendant Northgate breached by building an addition to the mall exceeding in square feet that allowed by the lease. Plaintiff sued for specific performance. The trial court, notwithstanding the terms of the lease, awarded damages but not specific performance, on the grounds, *inter alia*, of a potential \$4 million loss to defendant (from destroying much of the added building). The Louisiana Court of Appeal reversed and issued an injunction calling for specific performance within six

225. See, e.g., R. POSNER, *supra* note 3. See also Judge Posner's "Solomonic" but much maligned and incorrectly reported decision returning a dispute to the parties' private forum, in *Menora v. Illinois High School Ass'n*, 683 F.2d 1030 (7th Cir. 1982).

226. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *supra* note 4.

227. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979). See also Epstein, *supra* note 200.

228. The set of "Posnerians" need not include Judge Posner in all matters. Charles J. Goetz has informed me, for example, that Judge Posner regards the case reviewed here as wrongly decided. See also *supra* note 225.

229. 404 So. 2d 896 (La. 1981).

230. *Id.* at 898.

231. *Id.*

232. *Id.*

months.²³³ The Supreme Court of Louisiana, on a liberal reading of the Louisiana statutes, then reversed the Court of Appeal and remanded the case to the trial court for assessment of damages against Northgate.²³⁴

It seems beyond peradventure that an "Austrian" judge faced with these facts would adopt a property rule and award specific performance. A "Posnerian" judge might not do so but instead might rely on a liability rule and award money damages. The wealth-maximizing judge surely would be aware of the suppression of contractual reliance that his decision would foster. (If you want to breach a contract, do it in a big way!²³⁵) But he would balance that cost against the waste of a building, along with defendant's claim that his mall's (and therefore Weingarten's) competitive position would decline without the addition.²³⁶

The *Weingarten* decision involves a myopic appeal to wealth-maximizing, as compared with an appeal to common law principle. The Louisiana Supreme Court denied the plaintiff its right to enforce the contract, which the defendant voluntarily had entered into. Therefore, the court denied plaintiff its rights under the contract, and *inter alia* diminished the efficacy of similar future contractual exchanges. But the court also denied this defendant and all subsequent persons in similar situations their right to alienate property under contractual guarantees.²³⁷

Stated differently, in Hayek's language the court substituted "expediency" (a judgment based on cost/benefit comparisons) for principle (a judgment based on long standing legal principles, which would have sent the plaintiff and defendant's decisions back to the market, where correct information resides).

[W]hen we decide each issue solely on what appear to be its individual merits, we always over-estimate the advantages of central direction [now in the hands of the court]. Our choice will regularly appear to be one between a certain known and tangible gain [the \$4 million building] and the mere probability of the prevention of some unknown beneficial action by unknown persons [the decline of contractual reliance]. If the choice between freedom and coercion is thus treated as a matter of expediency, freedom is bound to be

233. *J. Weingarten Inc. v. Northgate Mall*, 390 So. 2d 527, 538 (La. App. 1980).

234. *Weingarten*, 404 So. 2d at 902.

235. See *Weingarten*, 390 So. 2d at 535.

236. *Weingarten*, 404 So. 2d at 901. See also Muris, *supra* note 4.

237. See Haddock & Hall, *supra* note 170.

sacrificed in almost every instance.²³⁸

C. Legislation

Three approaches to legislation. Beyond the contributions of Leoni²³⁹ and the Austrians,²⁴⁰ research over the last quarter century into the legislative process reflects three overlapping and reinforcing traditions. There is, first, the work on rent-seeking, growing out of Tullock's²⁴¹ and Krueger's²⁴² writing, which is a principal concern of scholars at the Center for Study of Public Choice.²⁴³ This work explores the origins and characteristics of, and incentives for, rent-seeking.²⁴⁴

The second research tradition, centered in the law and economics faculties of the University of Chicago, reflects Stigler's "black-box" model of the political process.²⁴⁵ This work's central concern is the demand for regulation (as a source of rents) among regulated firms. In places this work blends into the first tradition, although it is far less concerned with rights and inefficiency. In most respects it has formalized and translated into economics some much older contributions of political scientists.²⁴⁶

This second approach also complements the third, an institution-by-institution study of rules and incentives. Its practitioners, economists and political scientists, are mostly graduates of the doctoral programs at the University of Rochester and California Institute of Technology. Here, I review developments in this third area, not to disparage the other two, but because its concentration on institutions parallels Leoni's concerns.

238. F. HAYEK, *supra* note 25, at 57.

239. See *supra* at 674-83.

240. See F. HAYEK, *supra* note 25; CONSTITUTION OF LIBERTY, *supra* note 25.

241. Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 WEST. ECON. J. 224 (1967).

242. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

243. See THE THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1980), which provides a good survey of this tradition.

244. For a good review of recent problems, see Tullock, *Back to the Bog (Efficient Rents)*, 46 PUB. CHOICE 259 (1986).

245. See Stigler, *supra* note 179, and more recently Jordan, *Producer Protection, Prior Market Structure, and the Effects of Government Regulation*, 15 J. L. & ECON. 151 (1972); Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976); Posner, *Taxation by Regulation*, 19 BELL J. ECON. & MGMT. SCI. 22 (1971); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

246. See, e.g., A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); E. SCHATTSCHNEIDER, *POLITICS, PRESSURES, AND THE TARIFF* (1935); T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

Rational ignorance. Many of the models developed with this third approach do not rely on imperfect information, as does Leoni's critique of legislation.²⁴⁷ The condition of imperfect information nevertheless requires explanation, because it remains central to the rest of these models, and at least partly central to their initial development. Downs²⁴⁸ was the first systematically to explore the citizen's information problem. In a large electorate, he observed, the citizen's expected utility from voting, minus that from abstaining, is probably negative. The citizen's instrumental reason for allocating time and other scarce resources to acquiring more information about public-policy issues or candidates' positions on those issues would be to increase the likelihood of casting a vote in his own interest. But because the value of the vote is nil, allocating additional resources to acquire more information would not be rational. Hence, most citizens remain (rationally) ignorant about most public-policy issues, most of the time.

There are two exceptions to this prediction. First, and not of great importance, some citizens collect political information because of the activity's entertainment (consumption) value. Second, and of greater importance, some citizens have paid a sunk cost of acquiring information about specific public policies in connection with an activity that directly affects them.

Those old enough to collect Social Security payments provide a good example of this exception. Such persons may receive several hundred dollars monthly, and each had to go through the process of qualifying for these payments. In doing so each acquired substantial information about the program and thereby can assess any proposal for a change in the system. Such changes may affect a young nonrecipient's monthly payments into the system by a few dollars. But the effect lies below his perceptual threshold both because the additional amount of money involved is relatively small and because he has not yet acquired enough information to assess the post-retirement impact of these changes on him.

From this informational asymmetry, it is but a modest step to infer that legislators will be able to assemble and represent the

247. See *supra* at 675-77.

248. A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). See also Buchanan, Individual Choice in Voting and the Market, 62 J. Pol. Econ. 334 (1954); P. Aranson, Rational Ignorance in Politics, Economics, and Law (1987) (paper prepared for l'Universite' d'Ete' de la Nouvelle Economie, l'Universite' d'Aix-en-Provence).

preferences of recipients and their interest-group intermediaries far better than the preferences of those who now pay into the system. Even "altruistic" recipients or "welfare-regarding" legislators would find it difficult to know the preferences of non-recipients and probably impossible to vote on or represent their interests.

Downs hypothesized that people in their specialized roles as producers will have more information about, and would be better able to express their preferences concerning, associated public-policy issues than they will in their more general role as consumers. The Social-Security example leads one to broaden Downs's proposition, because consumer groups may be specialized as well.

Interest-group politics. Interest groups reinforce these informational asymmetries. Compared with unorganized citizens, group members have substantial political advantages. Groups enjoy large scale economies in collecting, processing, and disseminating political information to their specialized memberships. And they face significantly lower costs of bargaining with legislators, and in monitoring, sanctioning, and enforcing any bargain struck.²⁴⁹

Olson²⁵⁰ points out that an interest group may confront a serious free-rider problem. But the resolution of this problem conditions the nature of the groups that succeed in forming and in maintaining their existence.²⁵¹ First, groups formed for other purposes will capture the full benefits of their political activities, *provided that those benefits are appropriable*. Such groups include government agencies themselves with respect to the legislatures that fund them; lower levels of government (for example, cities, counties, and states) with respect to legislatures at higher levels (for example, the federal government); and monopolies or industries with dominant firms. Such groups allocate resources for political activities just as they do private-sector expenditures, setting each expenditure where another dollar in each category would produce the same marginal benefit.

For groups without an independent existence, which might experience free-rider problems, the legislature can provide

249. Aranson & Ordeshook, *supra* note 16, at 118-21.

250. M. OLSON, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971).

251. See Aranson & Ordeshook, *supra* note 16, at 118-21, 135-37.

such statutory terms as compulsory union membership or regulatory cartelization.²⁵² Direct government grants in the form of "research contracts" with high overhead payments often provide the required funds.²⁵³ As we shall discover,²⁵⁴ legislators provide these benefits to groups, because the value added to each group's income stream allows the legislator a part of the rent created.

Given (asymmetric) rational ignorance and group dominance in assembling and conveying citizens' preferences to legislators, one might conclude that Leoni's view of the legislative process has been confirmed. But the demonstration requires additional steps. First, we must investigate the nature of interest groups' political demands. Under rational ignorance the problem is straightforward. If a group member (and therefore a legislator) does not know about anyone else's preferences save his own, then he cannot enter those preferences into his calculations, no matter what his intentions might be.

But suppose that both group members and legislators do have this kind of information about others' preferences. Ordeshook and I have modeled the resulting game.²⁵⁵ We found that with or without the possibility of coalitions among interest groups, and provided only that the equivalent of roughly equal additional tax shares will be imposed on the members of all groups, each group will pursue politically a program that provides its members with a private, divisible (among groups) good, and not for a program that provides all citizens with a public good. We also discovered that groups will tend to use their budgets to buy cost-benefit "efficient" programs in the private sector but will seek to purchase "inefficient" programs in the public sector, by using the fisc as a "common pool."²⁵⁶ "Political services" such as legislators provide, moreover, often may be inferior goods.²⁵⁷ Finally, if the costs or

252. See Wagner, *Pressure Groups and Political Entrepreneurs: A Review Essay*, 1 PAPERS ON NON-MARKET DECISION MAKING 161 (1969); see also N. FROHLICH, J. OPPENHEIMER & O. YOUNG, *POLITICAL LEADERSHIP AND COLLECTIVE GOODS* (1971).

253. See J. BERRY, *LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS* (1977); Downing & Brady, *Constrained Self Interest and the Formation of Public Policy*, 34 PUB. CHOICE 15 (1979).

254. See *infra* at 705.

255. Aranson and Ordeshook, *supra* notes 16, 182. See also Aranson & Ordeshook, *A Prolegomenon to a Theory of the Failure of Representative Democracy*, in *AMERICAN RE-EVOLUTION: PAPERS AND PROCEEDINGS* 23 (R. Auster & B. Sears eds. 1977).

256. Aranson & Ordeshook, *supra* note 182.

257. Aranson & Ordeshook, *supra* note 193.

"tax shares" of the demanded programs are concentrated in one or a few other groups, then each legislator will prefer to grant each such group its publicly supplied benefit in the form of regulation.²⁵⁸ Restoring asymmetric information to the model merely serves to make the analysis of coalition possibilities (the cooperative game) unnecessary.

The legislative process. Most of the findings about interest-group decision making carry forward into a consideration of the legislative process.²⁵⁹ Thus, our discussion can be far briefer than the subject would seem to require. Ordeshook and I have extended these interest-group models to examine legislatures.²⁶⁰ We find that legislators' incentives coincide with those of interest groups. (We ignore legislator shirking²⁶¹ and the problem of dividing rents between legislator and constituent.²⁶²)

Simply stated, there are few obvious and reasonable ways for legislators to "make a market" in the political supply of public goods. Legislators thus face the same problem of public-goods production as do private-sector decision makers. So, "market failure" and "political failure" are the same phenomenon, occurring in different institutional settings. Empirical research reinforces these conclusions.²⁶³ Theoretical and empirical work, in sum, reveals that legislatures are complex organizations (in both their leadership and committee structures²⁶⁴) for creating private benefits at collective cost.

The executive and the electoral process. Can a popularly elected chief executive understand (register) and correct the welfare-degrading nature of the legislature's public-policy game? To

258. See Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process*, 39 PUB. CHOICE 33 (1982).

259. See Shepsle & Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417 (1984); Shepsle & Weingast, *Political Preferences for the Pork Barrel*, 25 AM. J. POL. SCI. 96 (1981); Weingast, Shepsle & Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1981).

260. Aranson & Ordeshook, *supra* notes 16, 182.

261. Nelson and Silberberg, *Ideology and Legislator Shirking*, 25 ECON. INQUIRY 15 (1987).

262. Tullock, *supra* note 244.

263. See, e.g., J. FERREJOHN, *PORK BARREL POLITICS* (1974); M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

264. See, e.g., Shepsle & Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987); Weingast and Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

explore this possibility Ordeshook and I²⁶⁵ developed an election model in which candidates for office or incumbents seeking re-election might campaign on a platform promising to add or delete the private-benefit programs that various groups demand or now receive. The model predicts occasional net declines in public-sector size (that is, more programs deleted than added) under very unusual conditions (citizens with perfect information about, and sensitivity to, changes in their wealth, and incremental choice—deciding on programs to add or delete one at a time—among candidates). But under more plausible conditions (citizens with asymmetric information and incremental choice by candidates), the model predicts net additions of private-benefit programs.

The bureaucracy. Earlier, we cast bureaus and agencies as interest groups.²⁶⁶ Indeed, one model of bureaucracy—the monopoly-bureau model—suggests the appropriateness of that formulation.²⁶⁷ It hypothesizes that bureaus merely add themselves to the set of interest groups. An alternative view casts bureaus and agencies as more or less perfect agents of their legislative oversight committees.²⁶⁸ The results of that formulation obviously are not more promising for the character of legislation or of its execution.

The courts. Finally we consider the role of the courts. We suggest earlier that constitutional provisions appear not to constrain the output of the political process in the manner that the constitution writers intended.²⁶⁹ There is considerable legal writing on this subject. Epstein, for example, has decried the

265. Aranson & Ordeshook, *Incrementalism, the Fiscal Illusion, and the Growth of Government in Representative Democracies* (1977) (paper prepared for the Annual Meeting of the Southern Economic Association, New Orleans). The results are reported in Aranson & Ordeshook, *supra* note 16, at 149-64.

266. See *supra* at 703.

267. W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). For a critical but constructive review of this literature, see Orzechowski, *Economic Models of Bureaucracy*, in *BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH* 229 (T. Borcherding ed. 1977).

268. See Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relations*, 44 LAW & CONTEMP. PROBS. 247 (1981); Weingast *The Congressional-Bureaucratic System: A Principal-Agent Perspective (With Applications to the SEC)*, 44 PUB. CHOICE 147 (1984). Cf. Jarrell, *Change at the Exchange: The Causes and Effects of Deregulation*, 27 J.L. & ECON. 273 (1984). See also Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213 (1988).

269. See *supra* at 691.

decline in the courts of the Contract Clause,²⁷⁰ of the Fifth Amendment's Takings Clause,²⁷¹ and of other provisions in the United States Constitution²⁷² whose purpose it was to limit the use of government for rent-seeking ends. I have reviewed elsewhere²⁷³ the recent Supreme Court history of cases challenging governmental attacks on patently obvious constitutional rights in economic areas. I found the Supreme Court to be no friend of liberal freedom.

Sunstein,²⁷⁴ Easterbrook,²⁷⁵ and Macey²⁷⁶ acknowledge the presence of these protective (against rent-seeking) purposes and goals in the Constitution's language. But Sunstein believes that all rights are governmental creations, contingent on the legislature's decisions; Easterbrook encourages the judiciary to enforce whatever bargains interest groups have struck with the legislature (but nothing more); and Macey would have judicial review assume a public-regarding purpose for all legislation.

Most judicially eschewed constitutional provisions are *substantive* limitations on governmental actions. Certainly, the United States Supreme Court jealously has guarded the lawmaking *process*, as specified in Article One of the Constitution.²⁷⁷ But it has blinked at the broadest delegations of lawmaking power to the administrative agencies²⁷⁸ and has done little to confine congressional enactments or agency activities, even when they trample on constitutionally protected rights.²⁷⁹

Landes and Posner²⁸⁰ have developed a model to explain judicial acquiescence in legislative action. In their view, both legislators and interest groups prefer private-benefit programs

270. Epstein, *supra* note 192.

271. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

272. Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOODE HALL L.J. 433 (1982).

273. Aranson, *supra* note 192.

274. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

275. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

276. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

277. U.S. CONST. art. I, § 7, cls. 2-3. See, e.g., *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (invalidating the "legislative veto"); *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (overturning that part of Gramm-Rudman-Hollings Act providing for congressional appointment of executive-branch personnel).

278. Aranson, Gellhorn & Robinson, *supra* note 258.

279. See citations *supra* notes 192, 271-72.

280. Landes & Posner, *The Independent Judiciary in an Interest-group Perspective*, 18 J.L. & ECON. 875 (1975). But see Macey, *supra* note 276; Aranson, *supra* note 192.

whose "payments" flow in perpetuity, to those programs covering only one or a few years. Long-run programs reduce transaction costs and allow the successful initiating legislator to capitalize immediately his share of the rents, even if he retires at the end of the session.

This structure places all legislators in a prisoners' dilemma. A single legislator might prefer to kill a long-term program, but such action would (expectationally) diminish the value of in-perpetuity grants for all other legislators (and interest groups). The entire legislature "solves" this dilemma by creating institutional rules and practices (the committee structure²⁸¹ and the filibuster, for example) that make passing new (including rescinding) legislation difficult. The legislature then passes fewer bills, but those passed enjoy far greater permanence.

The courts could threaten this "solution," because a legislator might use them to make an "end run" around the legislative process, to rescind a long-term program adopted earlier. In Landes and Posner's view, the accommodation struck between the legislature and the courts provides that the legislature will defend the judiciary's independence, while the courts will avoid overturning the legislature's enactments.²⁸²

The problem of judicial control of the political branches confronts us with both discerning the interactions between and among institutions and the problem of judicial review in a democracy. My own view on this subject, which I press elsewhere,²⁸³ is that Attorney General Meese²⁸⁴ and others who adopt his highly specialized position of original intent (or original meaning) have not developed an argument that can withstand close scrutiny.

A reading of the preceding pages might lead one to conclude that my preference for "judicial activism" grows not out of a concern for the Constitution's plain meaning, but out of a results-oriented approach not grounded in principled legal rea-

281. See Shepsle & Weingast, *supra* note 264; Weingast and Marshall, *supra* note 264; Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979).

282. See, e.g., National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); Kent v. Dulles, 357 U.S. 116 (1958). Easterbrook takes this positive model and enshrines it as a normative one for judicial decision making. See *supra* note 275.

283. See Aranson, *supra* note 192.

284. See, e.g., Speech by Edwin W. Meese, III, before the American Bar Association (July 9, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION I (1986).

soning. That reading, however, would be superficial. Leoni's work, and that of other authors cited here, suggests the presence of rent-seeking, a profound failure of representative democracy. Landes and Posner,²⁸⁵ indeed, invoke the presence of that failure to help explain judicial acquiescence in legislative determinations. It seems apparent, then, that the political system does not "self-correct" through judicial control. But is that result constitutionally infirm?

I believe that it is. Rent-seeking remains such a strong force, with so profound theoretical and empirical credentials, that it seems plain that the Framers were aware of it and crafted the Constitution to suppress it. Indeed, a reading of the *Federalist Papers*²⁸⁶ not to mention the Constitution itself, in strong clauses such as the contracts clause,²⁸⁷ the takings clause,²⁸⁸ and the privileges and immunities clauses²⁸⁹ leaves little doubt that the Constitution requires a principled judicial activism to control the political branches.

Where original-intent theorists go wrong, I believe, is in discerning that *all* judicial activism is unprincipled. A closer reading of the constitutional history and the Constitution itself helps to clarify the matter. Surely, the self-animating judicial process in the production of positive freedom appears to be constitutionally infirm. But a judiciary responsive to the constitutional protection of negative freedom remains on far firmer ground.

IV. FURTHER REFLECTIONS

Earlier, in exploring positive and normative models of judges' decision making, I pointed out that some would have judges decide cases according to their own ideologies.²⁹⁰ Present judicial activity provides several examples of this phenomenon, but none better reflects its essence than Judge J. Skelly Wright's explanation for his decision in *Javins v. First National Realty Corp.*,²⁹¹ in which he "read into" all residential lease con-

285. Landes & Posner, *supra* note 280.

286. See THE FEDERALIST Nos. 10, 62 (J. Madison).

287. U.S. CONST. art. I, § 10, cl. 1. See R. EPSTEIN, *supra* note 192.

288. U.S. CONST. amend. V. See R. EPSTEIN, *supra* note 271.

289. U.S. CONST. art. IV, § 11, cl. 1; *id.* at amend XIV, § 1. See Aranson, *supra* note 192.

290. See *supra* at 692, *passim*.

291. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

tracts in the District of Columbia an "implied warrant of habitability," which the reader will recognize, with Leoni, as a positive freedom that the common law had not provided. Judge Wright said of *Javins*:

Why the revolution in land-lord tenant law is traceable to the 1960's rather than the decades before I really cannot say with any degree of certainty.

Unquestionably the Vietnam War and the civil rights movement of the 1960's did cause people to question existing institutions and authorities. And perhaps this inquisition reached the judiciary itself. Obviously, judges cannot be unaware of what all people know and feel. . . .

I was indeed influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord and tenant decisions. . . .

[*Javins*] was my first exposure to landlord and tenant cases I didn't like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital.

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.²⁹²

Perhaps Professor Stigler would try to explain to Judge Wright, that such a ruling as that in *Javins* would reduce the housing stock available to poor people, black and white. Both Bruno Leoni and Professor Hayek certainly would concur, but they would go on to explain the nature of the market process and point out that Judge Wright's admittedly limited information did not allow him to rearrange rights with any confidence in the outcome. I doubt that either claim alone would sway the author of *Javins*.

But Judge Wright's comments also reveal that while the debate between liberal freedom and the economist's version of utilitarianism has gone on, another player, ideologically driven to impose his view of a "just" society, has taken the field and appears to be winning the day. We appreciate Bruno Leoni

partly because he bequeathed to our "new" understanding a very old pedigree. But we appreciate him all the more because his work now directs us toward the task of constructing an economic theory of freedom, not wealth. I can appropriately close with Leoni's own words: "I think there is a lesson in this. But I have finished mine."²⁹³

292. Rabin, *supra* note 112, at 549.

293. B. LEONI, *supra* note 1, at 175.

COMMENT
FREEDOM AND THE LAW: A COMMENT ON
PROFESSOR ARANSON'S ARTICLE

LEONARD P. LIGGIO*
TOM G. PALMER**

Analysis of Bruno Leoni's work is integral for an understanding of recent developments in jurisprudence, especially in law and economics. Professor Leoni's work is one of the fountain-heads of this movement. Legal scholars of today should refresh themselves from the source, for Professor Leoni did far more than merely anticipate later developments; he offered cogent reasons for the incompatibility of legislation with the very free market preferred by exponents of the law and economics movement. Professor Leoni's deep knowledge of jurisprudence and of legal, political, and economic history informed his work and offers insights into the proper relationship between law, legislation, and liberty.

In his contribution to this volume Professor Aranson offers a provocative and helpful reintroduction to Professor Leoni's scholarship in light of its continuation by other law and economics scholars. This essay intends to complement Professor Aranson's work by illuminating and emphasizing the importance of certain central features of Professor Leoni's thought. Two topics are particularly relevant to a proper understanding of Professor Leoni's work. First, we shall recapitulate and apply Professor Leoni's arguments about the importance of an understanding of economics for legal scholars, including his warnings about the incompatibility of the free market economy with legislation. Second, an examination of his view of legal evolution reveals a concept of law and its role in society different from that offered by advocates of legislation. In this comment, we show the interrelationships between Professor Leoni and the current law and economics movement, and his impact on that movement.

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1988

The Relationship Between Economics and Law

In his principal English language work, *Freedom and the Law*,¹ Professor Leoni argues that there is an analogy between, on the one hand, the workings of the market economy and the spontaneous evolution of a common law legal system, or system of "lawyer's law,"² and, on the other, between a centralized command economy and legislation.³ Professor Leoni is careful to note, however, that "there is more than an analogy" in the two cases.⁴ Special emphasis should be placed on the word "more." Ultimately, legislation is incompatible with the requirements of the free market economy. Legislation is also a source of rent-seeking, in a way that lawyers' law is not.⁵ The crucial question that Professor Leoni addresses is whether legislation and the market economy (and hence the free society) can in the long run coexist. As Professor Leoni remarked:

ML: the opposite point

It is . . . paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation. The fact is that economists are very rarely lawyers, and vice versa, and this probably explains why economic systems, on the one hand, and legal systems, on the other, are usually separated and seldom put into relation to each other.⁶

A good example of the differences between legislation and the common law is how these two systems approach the development and assignment of property rights under new eco-

1. B. LEONI, *FREEDOM AND THE LAW* (2d ed. 1972).

2. *Id.* at 22.

3. *Id.* at 21.

4. *Id.* at 22 (emphasis in original). See also *id.* at 90: "Even those economists who have most brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really compatible with a law-making process centralized by the authorities."

5. It is worth emphasizing that rent-seeking is not a newly discovered phenomenon. Indeed, it was a central focus of study in the Italian tradition of economic thinking in which Professor Leoni was steeped. See Buchanan, "La Scienza delle Finanze": *The Italian Tradition in Fiscal Theory*, in J. BUCHANAN, *FISCAL THEORY AND POLITICAL ECONOMY* 24 (1960) for a treatment of such figures as Maffeo Pantaleoni, Vilfredo Pareto, Giovanni Montemartini, and others. See also Montemartini, *The Fundamental Principles of a Pure Theory of Public Finance*, in *CLASSICS IN THE THEORY OF PUBLIC FINANCE* 137 (R. Musgrave & A. Peacock eds. 1967), V. PARETO, *MANUAL OF POLITICAL ECONOMY* 17-22, 25-27, 31-36 (A. Schwier trans. 1971); V. PARETO, *SOCIOLOGICAL WRITINGS* 114-20, 137-42, 162-64, 270 (S.E. Finer ed. 1966). Professor Leoni refers also in *Freedom and the Law* to his compatriots Gaetano Mosca, author of *THE RULING CLASS* (1939), a study of class conflict, and Roberto Michels, author of the classic study *POLITICAL PARTIES* (1959), and formulator of the "Iron Law of Oligarchy." See B. LEONI, *supra* note 1, at 102, 126.

6. B. LEONI, *supra* note 1, at 22.

omic conditions, including technological advances.⁷ Three cases deserve mention: the allocation of property rights in electro-magnetic broadcasting, the allocation of rights to groundwater and surface water flows, and the delineation and enforcement of "intellectual property rights."

In the first case, legislation actively preempted the system of property rights to broadcasting that was already emerging through the court system⁸ in the manner described by Professor Leoni—that is, by parties to a dispute making claims before a court. While a system of property rights was emerging through a common law process, Congress seized control of "spectrum allocation" and asserted federal regulation of broadcasting, with its attendant rent-seeking and economic inefficiencies. We are still suffering from the results.

In the case of property rights to water, a similar process has occurred. Congress and state legislatures have seized control of water resources and precluded the further development of common law private property rights. This has led to problems of groundwater overmining in western states, pollution, and political conflict and rent-seeking.⁹

Similarly, the reliance on legislative protection of "intellectual property rights" through state-enforced monopolies (patents and copyrights) generally has been based on explicitly utilitarian claims. Consequently, common law forms of protection—bailments, trade secrecy, and other contractually specifiable agreements—have atrophied, generating substantial rent-seeking and political conflict, as well as numerous restraints on the market process, including restrictions on the introduction of new technologies.¹⁰

7. The approach here is informed by the theory of property rights advanced by another pioneer in the law and economics movement, Harold Demsetz. See Demsetz, *Toward a Theory of Property Rights*, in *THE ECONOMICS OF PROPERTY RIGHTS* 31 (E. Furubotn & S. Pejovich eds. 1974).

8. See Mueller, *Reforming Telecommunications Regulation*, in E. DIAMOND, N. SANDLER & M. MUELLER, *TELECOMMUNICATIONS IN CRISIS: THE FIRST AMENDMENT, TECHNOLOGY, AND DEREGULATION* (1983); Coase, *The Federal Communications Commission*, 2 *J.L. & ECON.* 1 (1959) (describing developments in radio and television regulation since the turn of the century).

9. See T. ANDERSON, *WATER CRISIS: ENDING THE POLICY DROUGHT* (1983); *WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT* (T. Anderson ed. 1983).

10. See Plant, *The Economic Theory Concerning Patents for Inventions* in A. PLANT, *SELECTED ECONOMIC ESSAYS AND ADDRESSES* 35 (1974); Plant, *The Economic Aspects of Copyright* in Books, *id.* at 57; Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 *WAYNE L. REV.* 1119 (1983); Breyer, *The*

In all three cases there can be little doubt that reliance on legislation rather than common law has undermined the market economy and precluded its efficient and equitable functioning. The relationship between the free market and common law is, as Professor Leoni insists, far more than analogical. The expansion of legislation is demonstrably incompatible with the spontaneous order of the market system.

But there is more at work than simply opportunities for rent-seeking opened up by reliance on legislation rather than common law. Legislation is inherently based on policy—the pursuit of specifically intended outcomes. Common law, in contrast, addresses the needs of parties coming before judges to seek resolution of specific conflicts, or redress of specified grievances. As Professor Leoni's colleague F. A. Hayek¹¹ has argued, the spontaneous order of the market economy and of the extended society generally rests on abstract principles aimed at no particular outcomes. As Professor Hayek argues, by adhering to the principles of a common law liberal order "we shall have power only over the abstract character but not over the concrete details of that order."¹² In Professor Hayek's view, there need not be any

agreement on the concrete results it will produce in order to agree on the desirability of such an order[. . .] Being independent of any particular purpose, it can be used for, and will assist in the pursuit of, a great many different, divergent and even conflicting individual purposes. Thus the order of the

Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970); Machlup & Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950).

11. In a sense, Professor Hayek paved the way for the development of Professor Leoni's own ideas, which in turn influenced Professor Hayek's later writings (especially his three-volume work *LAW, LEGISLATION, LIBERTY* (1973, 1976, 1979)). Professor Leoni's *Freedom and the Law* was based on lectures given at the Fifth Institute on Freedom and Competitive Enterprise at Claremont Men's College (now Claremont-McKenna College) on June 15-28, 1958, which many leaders of the emerging law and economics movement attended. Professor Hayek encountered Professor Leoni's ideas as he was completing *CONSTITUTION OF LIBERTY* (1960) and discussed Professor Leoni's work in his lectures at an interdisciplinary seminar at the University of North Carolina at Chapel Hill in June 1959, along with James Buchanan, a pioneer in the development of public choice economics. One of the connecting threads in the development of public choice economics, law and economics, and the work of Professors Leoni and Hayek is the William Volker Fund, which supported all three through funding and through contacts initiated by Dr. F. A. Harper, a senior economist at the Volker Fund who later founded the Institute for Humane Studies. The Volker Fund sponsored Professor Leoni's lectures and later published them, after Dr. Harper transcribed Professor Leoni's handwritten notes and the tape of the lectures.

12. F. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS* 163 (1967).

market, in particular, rests not on common purposes but on reciprocity, that is on the reconciliation of different purposes for the mutual benefit of the participants.¹³

Thus, specific claims of law generate abstract principles of general applicability.¹⁴

The modern law and economics movement includes scholars who are familiar with the work of both Professor Leoni and Professor Hayek, including members of the Virginia School of Property Rights economics,¹⁵ the University of Chicago Law School, the Austrian School of Economics, and participants in the various programs of the Law and Economics Center directed by Henry G. Manne (now Dean of the George Mason University School of Law).

Judge Richard Posner has stressed the importance of efficiency in the development of the common law, and has suggested that judges should base their decisions on considerations of efficiency and maximization of wealth.¹⁶ Although this approach has contributed to an understanding of the economic efficiency of the common law, it has also narrowed the focus of the law and economics movement, and has obscured Professor Hayek's insights regarding the general nature of rules governing a spontaneous order. By focusing on desirable *specific* outcomes (efficiency and wealth maximization), the "Posnerian" approach ignores the broader economic understanding of the legal system as an order derived from the adjudication of individual claims rather than from a public pol-

13. *Id.*

14. Law thus emerges out of a process and is characterized as "horizontal," rather than "vertical." See L. FULLER, *THE MORALITY OF LAW* 204 (2nd ed. 1969). Professor Fuller criticizes legal positivism for assuming that "law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself upon the citizen." *Id.*

15. The term "Virginia School" refers to the ideas and contributions of a group of scholars who taught at the University of Virginia, including Ronald Coase, James Buchanan, and Gordon Tullock.

16. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 98-99 (1972);

The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities. . . . In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomic resource use.

See also Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980); Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980).

icy blueprint.¹⁷ Recently, however, another generation of law and economics has returned to the mainstream approach pioneered by Professors Hayek and Leoni, and by Milton Friedman, Aaron Director, and Ronald Coase at the University of Chicago after World War II.

Law and Legal Evolution

Professor Leoni noted:

[T]he connection between economics and the law is implied, but it is rarely regarded by economists as a special object worthy of their research. They consider, for instance, the exchange of goods, but not the behavioral exchange that makes possible an exchange of goods, regulated and occasionally enforced for that purpose by the law of all countries.¹⁸

While he encouraged economists to study the connection with law, Professor Leoni also warned of the dangers of an economics that too closely emulates the methods of the physical sciences.¹⁹ As Professor Leoni cautioned, "the attempts so frequently made in our time by economists to play the role of physicists are probably much more damaging than useful in inducing people to make their choices according to the results of that science."²⁰

Social relations exemplify what Professor Hayek has termed organized structures of "essential complexity."²¹ Echoing Pro-

17. See Leoni, *The Law as Claim of the Individual*, 40 ARCH. FOR PHIL. L. & SOC. PHIL. 45, 58 (1964):

Individuals make the law insofar as they make successful claims. They not only make provisions and predictions but try to have these predictions succeed by their own intervention in the process. Judges, juriconsults and above all legislators, are just individuals who find themselves in a particular position to influence the whole process through their own intervention.

18. B. LEONI, *supra* note 1, at 50.

19. *Id.* at 159-68.

20. *Id.* at 160.

21. F. Hayek, 1974 Nobel Memorial Lecture, in *THE ESSENCE OF HAYEK* (C. Nishiyama & K. Leube eds. 1984). Professor Hayek explained:

Organized complexity here means that the character of the structures showing it depends not only on the properties of the individual elements of which they are composed, and the relative frequency with which they occur, but also on the manner in which the individual elements are connected with each other. In the explanation of the working of such structures we can for this reason not replace the information about the individual elements by statistical information, but require full information about each element if from our theory we are to derive specific predictions about individual events. Without such specific information about the individual elements we shall be confined to what on another occasion I have called mere pattern predictions—predictions

fessor Leoni's warning against a social science modelled on the physical sciences, Professor Hayek concludes:

If man is not to do more harm than good in his efforts to improve the social order, he will have to learn that in this, as in all other fields where essential complexity of an organized kind prevails, he cannot acquire the full knowledge which would make mastery of the events possible.²²

Professor Leoni's and Professor Hayek's approach to law and legal evolution is premised upon a commitment to historical study, and a broad conception of what constitutes human reason and knowledge. Tradition, custom, the division of labor, general rules, and the other elements of what we call civilization can be seen as instantiations of reason, rather than as irrational or arational obstacles to reason. They are—at a minimum—devices for economizing knowledge. As Professor Thomas Sowell states in *Knowledge and Decisions*,²³ "Civilization is an enormous device for economizing on knowledge."²⁴ The division of labor and the market process allow individuals to use knowledge possessed by others, without personally acquiring that knowledge. The market obviates the need to reinvent the wheel. Similarly, the customs and traditions that characterize a civilization allow us to use the experiences of previous generations.

Thus, knowledge and reason are "embodied" in institutions and practices; the dictates of reason need not be explicitly formulated in language to be reasonable. They may be tacit as well—"implicit" within the practices or institutions of a community—but that does not make them any less "rational." Thus, as Professor Sowell argues:

Given the imperfections of language and the limitations of specific evidence, it is by no means a foregone conclusion that the more formally logical articulation is in fact more ra-

of some of the general attributes of the structures that will form themselves, but not containing specific statements about the individual elements of which the structures will be made up.

Id. at 270.

22. *Id.* at 276.

23. T. SOWELL, *KNOWLEDGE AND DECISIONS* (1980). Professor Sowell acknowledges at the start of this book that "If one writing contributed more than any other to the framework within which this work developed, it would be an essay entitled, *The Use of Knowledge in Society*, published in the *American Economic Review* of September 1945, and written by F. A. Hayek . . ." *Id.* at ix. Professor Sowell presented portions of the book at a 1978 conference organized by the Center for Law and Economics.

24. *Id.* at 7.

tional, much less empirically correct . . . This is not an argument for mysticism rather than logic. It is simply a recognition that the weight of generalized but unrecorded experience—of the individual or of the culture—may be greater than the weight of other experience which happens to have been written down or spelled out.²⁵

Thus, reason and knowledge can be embodied in practices as well as in statements.²⁶ Professor Hayek further argues:

In this sense a rule not yet existing in any sense may yet appear to be 'implicit' in the body of the existing rules, not in the sense that it is logically derivable from them, but in the sense that if the other rules are to achieve their aim, an additional rule is required.²⁷

The role of the judge is, therefore, to discover and make explicit the rule that is implicit in the practices, customs, and institutions of the people. His job is not to create the rule, but to discover it, formulate it—to the extent possible—in explicit terms, and apply it to the specific case before him.²⁸ Such a claim need not degenerate into historicism; the critical function of reason is not anaesthetized by reliance on practice, tradition, and custom. Rather, these sources of knowledge provide the material on which reason operates.²⁹ The judge does not enter the court stripped of his powers of reason. Rather, reason determines both the choice of the rule and the moment of its ap-

25. *Id.* at 102.

26. See 1 F. HAYEK, LAW, LEGISLATION AND LIBERTY 76-77 (1973):

Although still an unfamiliar conception, the fact that language is often insufficient to express what the mind is fully capable of taking into account in determining action, or that we will often not be able to communicate in words what we well know how to practise, has been clearly established in many fields.

Professor Hayek supports this proposition by citation to the work of Michael Polanyi, in M. POLANYI, PERSONAL KNOWLEDGE (1958) and his own essay *Rules, Perception and Intelligibility*, in F. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS (1967). See also M. POLANYI, THE LOGIC OF LIBERTY (1951); M. POLANYI, THE TACIT DIMENSION (1980). Cf. ARISTOTLE, METAPHYSICS 980b28-981a24 on the relationship between *empeiria* (experience), *dynamis* (ability), and *logos* (speech or the giving of an account).

27. *Id.* at 78.

28. *Id.* at 115-18. Cf. N. BARRY, HAYEK'S SOCIAL AND ECONOMIC PHILOSOPHY 76-102 (1979) (describing Professor Hayek's theory of law).

29. See Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 281-90 (1987) for a discussion of the relationship between tradition and reason in the formation of law. Professor Barnett identifies an "electorate of law" that includes "judges, scholars, lawyers, clerks, law students, and philosophers, living and dead." *Id.* at 286. To this list we would add plaintiffs—as well as those who resolve disputes without resorting to the courts. Further, the almost universal recognition of the principle of "*meum*" and "*tuum*" (recognized in the breach as well as in the practice) indicates the existence of a universal core principle of law that is not relativized and that provides a foundation for the universalistic claims of reason.

plication. Law then develops through the application of the rule to new situations.³⁰

It is thus the parties to a dispute who frame the scope of the judge's decision, its range of application, and the nature of the rule he is to apply:

By the time the judge is called upon to decide a case, the parties in the dispute will already have acted in the pursuit of their own ends and mostly in particular circumstances unknown to any authority; and the expectations which have guided their actions and in which one of them has been disappointed will have been based on what they regarded as established practices. The task of the judge will be to tell them what ought to have guided their expectations, not because anyone had told them before that this was the legal rule, but because this was the established custom which they ought to have known . . . What must guide his decision is not any knowledge of what the whole of society requires at the particular moment, but solely what is demanded by general principles on which the going order of society is based.³¹

It is therefore a misnomer to speak of "judge-made" law. Judges do not make the law out of thin air; rather, in conjunction with other legal scholars and with the parties to disputes, they discover it. As Professor Leoni writes:

The Roman jurist was a sort of scientist: the objects of his research were the solutions to cases that citizens submitted to him for study, just as industrialists might today submit to a physicist or to an engineer a technical problem concerning their plants or their production. Hence, private Roman law was something to be described or to be discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all Roman citizens.³²

Law thereby follows and validates common practice. It evolves alongside practice; it does not dictate it. Writing again of Ro-

30. This process reveals another analogy with the decentralized market process, for the decision of a judge in a particular case is subject to review by other participants in the legal process. One judge cannot impose his personal will or idiosyncratic interpretation of the law on the entire legal system; similarly, innovations in the market process arise through the decentralized activities of entrepreneurs and firms and are then subject to the review of consumers, investors, and other market participants. In both the market process and the common law process there is little danger of having "all your eggs in one basket," as is the case with both socialism and legislation.

31. F. HAYEK, *supra* note 26, at 86-87.

32. B. LEONI, *supra* note 1, at 84.

man law, Professor Leoni states, "When changes occurred, they were recognized by the jurists as having already happened in their environment rather than being introduced by the jurists themselves."³³

The spontaneous evolution of the law merchant also supports this interpretation of the law-making process. As Leon Trakman writes, "Custom, not law, has been the fulcrum of commerce since the origins of exchange. From the earliest times, merchants have devised their own business practices and regulated their own conduct. International trade law has been fostered by merchant custom."³⁴ Business practice and custom, rather than strict legalism, informed the law merchant: "The Law Merchant sought to integrate custom into its decision-making process."³⁵ Thus, "Business practice and the extensive history of international trade . . . serve as the basis of legal development; they are not peripheral thereto."³⁶

This spontaneous emergence of international commercial law was intimately related to the fragmentation of political authority in Europe; law was needed to govern trade practices across cultural, religious, and geographical divides. Commercial law was also a competitive process, involving selection of judges from the scholarly legal community as well as from among the business community itself.³⁷

For these reasons Professor Leoni can describe the spontaneous process of law-making in voluntaristic terms as

a sort of vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people's will is in a series of definite instances—a collaboration that in many respects may be compared to that existing among all the participants in a free market.³⁸

Thus, law making is described as analogous to the competitive market process, which Professor Hayek has termed a "discov-

33. *Id.* at 94.

34. L. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 7-8 (1983).

35. *Id.* at 18.

36. *Id.* at 97.

37. *Id.* at 15: "The use of 'merchant' judges was a further feature of the Law Merchant era. Adjudicators were generally selected from among the ranks of the merchant class on the basis of their commercial experience, their objectivity and their seniority within the community of merchants."

38. *Id.* at 21.

ery process."³⁹ Through many individual and localized acts information about what the law is is revealed through the legal process, just as information about supply and demand conditions is revealed through the myriad localized acts of buying and selling that constitute the market process.⁴⁰

Professor Leoni underlined the theme in other lectures delivered in America but never published: "The legal process always traces back in the end to individual claim. Individuals make the law, insofar as they make claims."⁴¹

The West's plurality of legal institutions permitted the evolution of legal orders that maximized individual freedom and limited coercive institutions. In R. W. Southern's words, "Law was not the enemy of freedom: on the contrary, the outline of liberty was traced by the bewildering variety of law which was evolved during the period [that is, the Middle Ages]."⁴² The role of polycentric political authority and multiple legal jurisdictions in the development of the Western legal tradition has been carefully revealed by the legal historian H. J. Berman,⁴³ while the parallel dependence of economic development on political fragmentation has recently been highlighted by eco-

39. Hayek, *Competition as a Discovery Process*, in F. HAYEK, *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* (1978).

40. Barry, *The Tradition of Spontaneous Order*, 5 *LIT. OF LIBERTY* 7, 44 (1982):

[Bruno Leoni's *Freedom and the Law*] is perhaps the most sophisticated expression of the evolutionary theory of law; for Leoni does not rely merely on the "wisdom of history" but constructs a direct analogy between law and the market. Law develops in a case by case manner during which judges fit and adapt existing law to circumstances so as to produce an overall order which, although it may not be "efficient" in a technical, rationalistic sense, any more than competitive markets are "perfect," is more stable than that created by statute . . . statute law is in fact much more capricious [than common law] precisely because, in the modern world especially, statutes change frequently according to the whims of legislatures . . . A structure of law which is not the result of will and cannot be known in its entirety, paradoxically, displays more regularities than a written code.

41. B. Leoni, Lectures given December 2-6, 1963, Freedom School Phrontistery, Colorado Springs, Colorado.

42. Cited in Hayek, *supra* note 39, at 123.

43. See H. BERMAN, *LAW AND REVOLUTION* 38-39 (1983):

The Source of the supremacy of law in the plurality of legal jurisdictions and legal systems within the same legal order is threatened in the twentieth century by the tendency within each country to swallow up all the jurisdictions and systems in a single central program of legislation and administrative regulation.

Competition among legal systems and jurisdictions was central to the development of Western liberty, as Professor Berman notes: "Given plural legal systems, victims of unjust laws could run from one jurisdiction to another for relief in the name of reason and conscience." *Id.* at 146.

conomic historians Nathan Rosenberg and L. E. Birdzell, Jr.⁴⁴ The historical evidence holds clear implications for the current debate over federalism, as well as for the advantages of a spontaneous common law process over coercive legislation.

The spontaneous process of law-making is preferable to legislation because the law that is discovered by such process will have proved its value in competition with other practices and customs.⁴⁵ The decentralized character of the common law means that it is an open system of legal innovation in which new ideas are accepted only after a long probationary period. Just as the market process coordinates the plans of innumerable individuals and tests innovations in production and economic exchange, the decentralized legal process reinforces the certainty of "grown" customs and practices. Importantly, this means that both practice and law are not static; they evolve.⁴⁶ This is why Professor Hayek, as a classical liberal, distanced himself from the conservatives in his famous postscript to *The Constitution of Liberty, Why I am Not a Conservative*.⁴⁷ As Professor Hayek wrote:

[O]ne of the fundamental traits of the conservative attitude is a fear of change, a timid distrust of the new as such, while the liberal position is based on courage and confidence, on a preparedness to let change run its course even if we cannot predict where it will lead. There would not be much to object to if the conservatives merely disliked too rapid change

44. See N. ROSENBERG & L. BIRDZELL, JR., HOW THE WEST GREW RICH 136-37 (1986):

[I]t seems certain that the development of capitalism in the West owed a great deal to the fragmentation of Europe into a multitude of states and principalities. Competition among the political leaders of the newly emerging nation-states . . . was an important factor in overcoming the inherited distaste of the rural military aristocracy for the new merchant class. Had the merchants been dealing with a political monopoly, they might not have been able to purchase the required freedom of action at a price compatible with the development of trade.

45. See Radnitzky, *An Economic Theory of the Rise of Civilization and Its Policy Implications: Hayek's Theory Generalized*, 38 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 47 (1987); M. Vihanto, *The Evolutionary Theory of Rules and the Spontaneous Order*, Monograph, Turku School of Economics and Business Administration, Turku, Finland (1987) (on file with the authors).

46. To say this is not necessarily to descend into relativism; the evolution of law is consistent with certain core principles that remain invariant over time. See R. SUGDEN, *THE EVOLUTION OF RIGHTS, CO-OPERATION AND WELFARE* (1986) on the spontaneous emergence of property and cooperation, and Sugden, *Labour, Property and the Morality of Markets*, in *THE MARKET IN HISTORY* 9 (B. Anderson & A. Latham eds. 1986) for a treatment rooted in game theory of inalienable Lockean "self-ownership" and the genesis and acceptance of alienable titles to property. On the spontaneous emergence of cooperation, see R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

47. F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

in institutions and public policy; here the case for caution and slow progress is indeed strong. But the conservatives are inclined to use the powers of government to prevent change or to limit its rate to whatever appeals to the more timid mind The conservative feels safe and content only if he is assured that some higher wisdom watches and supervises change, only if he knows that some authority is charged with keeping the change "orderly."⁴⁸

It is only when men are free that tradition retains its force as a "living" thing. To attempt to "freeze" tradition through legislation is to kill it, to reduce it to rote. Liberalism, tradition, freedom, and law walk hand in hand; one cannot pick and choose among them. Professor Leoni in his work opened the eyes of countless scholars to this important truth.

48. *Id.* at 400.