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## The choice of efficiencies and the necessity of politics

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### ABSTRACT

Efficiency requires legislative political institutions. There are many ways efficiency can be promoted, and so an ongoing legislative institution is necessary to resolve this choice in a politically sustainable and economically flexible way. This poses serious problems for classical liberal proposals to constitutionally protect markets from government intervention, as seen in the work of Ilya Somin, Guido Pincione & Fernando Tesón and others. The argument for the political nature of efficiency is set out in terms of both Pareto optimality and aggregate welfare maximisation, and similar arguments can be generalised to other social values.

**KEYWORDS** Efficiency; constitutionalism; circumstances of politics; markets; Ilya Somin; classical liberalism

Many marketization strategies in public policy try to put issues beyond the range of conflict and debate, and beyond the reach of difficult ethical choices. But these attempts must always fail, as it is not possible to put human life on a technocratic automatic pilot (Crouch, 2011, pp. 91–92).

This essay argues that the pursuit of social efficiency requires a legislative political institution. By this I mean some on-going process whereby some people are empowered to determine social rules. My argument is a comparative one, and there are two possible regimes one could compare to legislative institutions. One alternative is anarchist: abolishing government entirely. The other alternative is to retain government but have it enforce a stable legal order insulated from politics. That is the suggestion I will consider here, particularly in its classical liberal form as the proposal to replace the political process with a stable market order. I call these proposals for *constitutionalised marketisation*: marketized, because that is the nature of the legal order they wish to entrench; constitutionalised, because they wish to insulate that order from legislative change. Such proposals have a long history in political theory, and they have recently been well expressed in the work of Ilya Somin (2013) and Guido Pincione & Fernando Tesón (2006),

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among others (J. Brennan, 2014; Caplan, 2011; Pennington, 2011). In contemporary politics, these sorts of limits are occasionally to be found within constitutional law itself (Elster, 2013, pp. 79–81). However, a more important source of such limits is today in the pseudo-constitutional law of international investment treaties (Hufbauer, 2016; Ireland, 2018).

In the past, constitutionalised marketisation has been criticised either on the basis that it exaggerates the problems of democracy or that it underestimates the problems of the market (Christiano, 2012; Gaus, 2008; Kaye, 2015; Knight & Johnson, 2011; O'Neill, 1998). This article tries to do something different. Even if we grant that markets are largely efficient, this still leaves an important role for political institutions. I focus on the political nature of efficiency: what I call the choice of efficiencies problem. There are many ways efficiency can be promoted, and so a legislative institution is necessary to resolve this choice in a way that is both politically and ethically acceptable. Bryan Caplan (2011, p. 3) writes that, 'no matter what you believe about how well markets work in absolute terms, if democracy starts to look worse, markets start to look better by comparison'. I will argue that things are more complicated, because the two institutions perform quite different functions.

My standpoint for this argument is not a proceduralist argument that democracies have the right to rule even if they make poor choices (Christiano, 2010a, 2010b). Instead, I meet the pro-market critics of politics on their own ground. I make an instrumental argument: that attempts to circumvent politics will lead to worse outcomes than living with the pathologies of democracy. Not only that, but I make a further concession to my opponents by taking efficiency as my normative criterion. Pro-market anti-politics proposals are often formulated specifically in terms of efficiency. More generally efficiency is the preferred normative vocabulary of economics, the field from which both the critique of politics and the appreciation of markets primarily derives. If the necessity of politics can be shown even within this relatively sparse normative landscape, we can be confident it holds more generally.<sup>1</sup> I will also indicate how my argument about efficiency could be generalised when additional values are included.

The first section provides the background for my argument. The second section advances the main argument on an interpretation of efficiency as Pareto-optimality. The third section advances the argument on an interpretation of efficiency as aggregate welfare maximisation. The fourth section responds to some possible replies.

## Preliminaries

I begin with three preliminary points: first, why one might want to pursue an alternative to politics, second, what such an alternative would look like, third, an important distinction between first- and second-order institutions.

### ***Why not Politics***

The attraction of constitutionalised marketisation stems from dissatisfaction with democratic politics, combined with an appreciation for the market. Four arguments in particular link the two in an explicit comparison. First, F.A. Hayek (Hayek, 1945) argued that markets were better able to make use of dispersed knowledge than centralised decision-making.<sup>2</sup> Second, and closely related, decentralisation facilitates discovery by increasing the rate at which experimentation can take place (DeCanio, 2014; Muldoon, 2015; Pennington, 2011, pp. 45–46). I have discussed the limitations of this argument in other work (Bennett, 2016). Third, public choice theorists portray politics as a process of negative-sum struggle over the social surplus, in contrast to productive positive-sum exchanges in the market (Buchanan, 1987; Pennington, 2011).<sup>3</sup> Finally, mass politics incentivises voters to be rationally ignorant in casting their votes.

The rational ignorance argument is the one that Somin, Pincione & Tesón and others concentrate on. I will use it to illustrate the more general category of pro-market anti-democratic arguments in what follows, so it is worth briefly summarising here. Because the probability of an individual vote making a difference to the result is so small, voters will generally not spend much time or effort deciding how to vote. Whereas citizens deciding how to vote have only a tiny chance of affecting the result, a consumer deciding whether or not to buy something is decisive when it comes to their own purchases. In their capacity as market participants, people thus have a stronger incentive to gather and intelligently process the information necessary to make a good decision.

### ***Alternatives to Politics***

The nature of legislative power is its flexibility: legislative mechanisms empower some group of people to make decisions for society as they see fit. These mechanisms differ widely in terms of how decision-makers are chosen. Direct democracy, representative democracy, oligarchy and autocracy are all legislative mechanisms in this basic sense. The alternative to a legislative mechanism is to dispense with this flexibility and with the idea that anyone is empowered to change the basic rules of society. More modestly, the scope of legislative power could be restricted by topic. The substance of this stable legal order could of course take many different forms. For example, many constitutions disallow legislation that abridges basic civil liberties (of conscience, speech, assembly etc.). These are not the kind of constitutional restraints I have in mind here. Instead, my focus is on the economic realm. The stable legal order I am considering is a market

order, the efficiency benefits of which have frequently been argued for by classical liberals.

What follows is a sketch of the pure form or ideal type of such an order. Legally, this order is constituted by the basic laws of property, contract and tort. This regime is classical liberal rather than anarchist, and does not dispense with law and government. Instead, it dispenses with only one of the three branches of government: the legislative. Instead of anyone being empowered to create new legislation, the laws constituting the marketplace are held in place for perpetuity. The other two branches of government are retained, and particular emphasis is placed on the judicial branch. Since the activities of government have been reduced to the night-watchman state, the need for an executive branch is considerably diminished. The executive branch may remain under the supervision of elected officials, or it may be a purely technocratic professional body.

Pincione & Tesón's proposal for a 'Framework Contractarian Society' comes close to this pure form. They propose a system under which most current functions of government would be provided by Voluntary Communities (VCs), the central government existing only to enforce contracts and to guarantee a right of exit for individuals from VCs. Their proposal departs from the pure form sketched above insofar as they allow for the provision of public goods by the central government (Pincione & Tesón, 2006, p. 237). Although they primarily have in mind the public good of the market legal framework itself, they allow for the possibility of further public goods being provided for efficiency reasons.

Somin's proposal is much more moderate. He presents his argument as being for 'foot-voting' rather than 'ballot-voting'. Markets are only one of three venues where people can vote with their feet: the other two ways of voting with your feet are to migrate between jurisdictions in a federal system, and to move between private planned communities (See also Pennington, 2011, p. 59). Somin devotes the majority of his time to advocating federalism rather than the market. However, it seems clear that the logic of foot-voting is in favour of decentralisation in general, and the maximal possible level of decentralisation is down to the individuals in markets. Moreover, the more collective forms of foot-voting that Somin advocates (federalism and private planned communities) also have a quasi-market structure. The kind of federalism he favours is competitive, with jurisdictions competing to attract tax-paying migrants by offering the most attractive mixtures of policies (Somin, 2013, pp. 126–127). It thus differs from models of federalism based on self-determination for ethnic minorities, or that favour co-operation between different jurisdictions. Following Charles Tiebout's (1956) model of federalism, Somin's interest in quasi-market federalism rather than straightforward markets seems to be that it offers a way of determining public goods provision through a decentralised competitive process rather than a political

process. For all these reasons, we can fairly interpret Somin's advocacy of foot-voting as an injunction to greater marketisation in general, whether that takes the form of quasi-market federalism or of markets directly.

Somin argues that this decentralised order should be to some extent insulated from politics and entrenched in the constitution (Somin, 2013, p. 151). However, he is also clear that 'political ignorance does not by itself justify absolute libertarianism or any other theory of the appropriate size and scope of government' (Somin, 2013, p. 192). Somin's more cautious claim is that judges should worry less about the counter-majoritarian nature of decisions to invalidate federal legislation. And, in cases concerning federalism or limits on government power over the private sector, they should be even less deferential to the legislative branch.

The examples of Pincione & Tesón and of Somin show how the choice between a political mechanism and a stable market legal order is not a binary choice but a matter of degree. Starting from an unconstrained legislature, one can progress through steadily more constraining constitutional provisions before reaching the pure form of the non-political market order. Which aspects of the market legal order are more fundamental is of course also a matter for discussion. My question in this article is whether there is any efficiency case for constitutional restraints of this kind.

### ***First and Second-Order Institutions***

In thinking about the merits of constitutionalised marketisation, I rely on a distinction from Jack Knight and James Johnson (2011, p. 19) between first- and second-order institutions.<sup>4</sup> First-order institutions are those that directly co-ordinate social interactions. Second-order institutions, by contrast, are those that co-ordinate first-order institutions. For Knight and Johnson, markets are good first-order institutions, but democracy is preferable as a second-order institution, ensuring the conditions under which markets can perform well and setting the boundaries between markets and other first-order institutions.

Knight & Johnson's distinction is a simplification. Sometimes there are situations with more than two layers of institutions. Mark Pennington (2016) describes the market itself as a second-order institution in regard to the firms existing as first-order institutions within it. A democratic state on top setting the rules of the marketplace would therefore be a third layer. Moreover, it can be unclear where one institution ends and another begins. However, for our purposes, the important thing is that the institutions which perform well in co-ordinating social interactions at a more direct, lower-order level may not be the same as those that perform well in co-ordinating institutions at a higher-order level (and vice versa). We need to

pay careful attention to the level at which a criticism of an institution is directed.

Consider the lower-order level choice between democracy and the market. The Hayekian argument about dispersed knowledge seems to be situated at this level, along with most arguments about the relative merits of markets, central planning and regulation. To the extent that pro-market arguments succeed on this level, the implication is in favour of less government intervention in the marketplace. Arguments at this level are not the focus of this article. For the sake of the present argument, I can grant the merits of many of these points.

This article focuses on the choice between democracy and the market at a higher-order level. On the one side we have the option of a legislative political institution, here presumed to be democratic. Such an institution can monitor markets and set their boundaries relative to other institutions. The option on the other side is not really best described as the market as such. Instead, the alternative to a legislative political institution is a constitutional order which entrenches a particular set of first-order institutions; in this case, markets. This order of constitutionalised marketisation is necessarily more passive than an open-ended democratic legislative institution. However, it does require some institutional apparatus. In particular, where executive and legislative powers are forbidden from engaging in certain areas of society, what we observe is a greater political role for the judiciary. To summarise, the choice between markets and government intervention is a choice of lower-level institutions. The choice between a democracy with legislative power and a constitutional order that entrenches markets is a choice of higher-level institutions. In practice, as we have seen, this is not an all-or-nothing choice, and the it arises in real politics chiefly as a question of how far legislators should be constrained.

It's important to note that different arguments are required to justify constitutionalised marketisation at the second-order level than are required to justify smaller government at the first-order level. Justifying constitutionalised marketisation requires not only that markets are superior to central planning and regulation but that higher-order legislators are themselves unable to appreciate this superiority and legislate accordingly. Thus, Hayekian arguments about dispersed knowledge (for example), do not themselves suggest constitutionalised marketisation. For that, one also needs an argument why legislators cannot themselves appreciate the dispersed knowledge argument and adjust the activities of government accordingly. This is why the rent-seeking and particularly the rational ignorance argument are crucial in the case for constitutionalised marketisation. These arguments are necessary to show that a legislative mechanism is not merely unnecessary, but positively counter-productive.

This said, arguments for markets over democracy at the two different levels cannot be entirely separated. To the extent that market institutions at a lower-order level are simple, durable, and obviously superior, possible benefits of a legislative mechanism are much reduced. Thus, any counter-productivity at a higher-order level becomes a more decisive objection. On the other hand, to the extent that market institutions are complex, unstable and in need of supplementation, any incompetence in a higher-order legislative body is more easily borne. I will return to this topic in the Conclusion.

## **Pareto Optimality**

This section argues that politics is necessary even when the purpose of a constitutional order is understood to be Pareto-efficiency. Abstractly, the problem with attempts to circumvent politics is that Pareto optimality is a highly indeterminate normative criterion, and some further mechanism is needed to choose a more determinate outcome. I start by setting out the idea of the choice of efficiencies, before moving onto how this idea relates to the concept of market failure.

Pareto-optimality is a normatively parsimonious criterion that recommends those states of affairs where nobody can be benefited without making someone else worse off. However, the criterion gives no guidance in cases where someone can be better satisfied at the expense of someone else. It has nothing to say about distributive questions. The most obvious implication is that Pareto optimality is indeterminate when it comes to the distribution of property or redistributive taxation.

The indeterminacy of Pareto in this respect is well known. The decisions to prioritise the Pareto principle by authors like Pincione and Tesón is thus an explicit choice to show indifference towards distributive conflicts in order to focus solely on efficiency. Accordingly, I will not press the objection that a system built around the Pareto principle is indeterminate when it comes to the distribution of property. Advocates of constitutionalised marketisation are committed to de-emphasising the distribution of property in order to focus on efficiency gains.

My objection instead focuses on a type of indeterminacy that is much less well recognised. What often goes underappreciated that Pareto-undecidable distributive choices frequently arise in the context of institutions designed to enhance efficiency, and not merely in the explicitly distributive contexts of 'initial endowments' and taxation.

## ***The Choice of Efficiencies***

Joseph Heath (2006b) provides a useful framework for seeing the diversity of ways of promoting efficiency, and the potential for conflicts between them.



For my purposes, the key upshot of Heath's analysis is that 'arrangements designed to facilitate the production of one form of cooperative benefit may simultaneously undermine the arrangements needed to secure some other' (Heath, 2006b, p. 337). Heath describes five primary mechanisms of cooperative benefit, or ways of promoting efficiency: economies of scale, gains from trade, risk pooling, self-binding and information transmission. Each of these represents a way people can achieve more together than they would alone. To avoid getting bogged down, I will illustrate the idea of a choice of efficiencies using only the first two, which are also the two that have received the most attention from economists.

Gains from trade refer to benefits that can be achieved by re-distributing goods and tasks amongst people in light of their different abilities and preferences. So, someone who is good at growing apples but does not like them personally can gain by trading them with someone else who has different abilities and preferences. Economies of scale occur when the product of a group working together would be larger than the sum of each of them producing as individuals. For example, a group of farmers working together can build barns for all of them in less time than it would take each of them to build a barn for themselves. Economies of scale can occur even when everyone has identical tastes and skills.

Conflicts arise between these different ways of promoting efficiency because government action to facilitate one type of efficiency can often impede other types of efficiency. A conflict between gains from trade and economies of scale regularly arises in the context of competition and monopolies policy. In a market, gains from trade are maximised when prices reach a level at which the market clears – everyone who wants to sell can find a buyer, and vice-versa. Competition is a device for pushing prices to this market-clearing level (Heath, 2006a). For this to work, we need a large number of buyers and sellers so that none of them are able to affect the market price as individuals. However, while gains from trade are maximised by a large number of firms in competition with one another, economies of scale are often maximised when there are very few firms in the market, or even a monopolist (Heath, 2006b, p. 338). This is most obvious in the case of 'natural monopolies' such as railway tracks and water pipes: a single operator is much more efficient than multiple operators, who would duplicate the same infrastructure. Electricity generation provides a less extreme case. Large power plants might be more internally efficient than small plants – for example, suppose that three large power plants produce the same amount of electricity as ten small power plants, but cost 20% less to operate. However, if we build large power plants, the market will only be able to sustain three firms, which is not enough to ensure competition that would bring prices down to the market-clearing level.

In such a case, there is a difficult choice between two options. First, we could prohibit mergers and break up big firms. By preserving competition, this would have the advantage of forcing companies to keep prices at market-clearing levels, maximising gains from trade. However, forcing the market to have more than three providers will necessitate using small rather than large power plants, forgoing economies of scale. Second, we could simply allow an oligopoly or even a monopoly provider to emerge. This would maximise economies of scale. However, monopoly or oligopoly providers will be able to charge a higher price than that which would prevail in the presence of competition. Charging a price above the market-clearing rate will discourage some consumers who would otherwise have been willing to buy more, and means that possible gains from trade are not being fully utilised. The state could regulate the monopoly or oligopoly providers to force them to lower prices. However, this will tempt them to cut costs elsewhere. The interests of providers are fundamentally different from those of regulators, and any system of regulation will come with costs of its own.

If the state's goal is to promote efficiency, it will have to face trade-offs like this between different ways of promoting efficiency. The adjudication of these trade-offs is subject to considerable disagreement. Politics rears its head again. This is just one example focusing on two ways of promoting efficiency, but there will be many more. If we understand efficiency in the sense of Pareto-optimality, the choice of efficiencies is a choice between different policies that will result in different situations which are all Pareto-optimal, but under which different people are better or worse off. This creates a distributive question about how to decide between efficiency-promoting interventions that benefit different groups of people. Since the principle of Pareto-optimality by itself is radically indeterminate, we will require some political mechanism to narrow down the range of possible Pareto-improving government actions.

### **Market Failure**

The choice of efficiencies problem is related to but distinct from the idea of market failure. Even without market failure there is a choice of efficiencies in which privileging the market is objectionably arbitrary. Where there are market failures, the need for a political mechanism is even more pressing. Ultimately, however, it is the underlying conceptual indeterminacy of the Pareto principle that generates the problem.

We should first note that the choice of efficiencies does not depend on a market failure, understood as a situation where markets produce a Pareto-suboptimal outcome. It might be that a pure classical liberal order represents one Pareto-optima, but that there are alternative policy orders (featuring, say, active competition policy), which represent alternative Pareto-optima. This is

possible for the reasons described above: different policy orders facilitate different kinds of efficiencies, benefiting different constituencies. Even without a market failure, there is still a choice of efficiencies, and privileging the classical liberal market order in such a situation is arbitrary.

While there may be something to be said for arbitrary choices which circumvent protracted disagreements, arbitrarily committing to a classical liberal order raises both political and moral problems.

First, as I noted above, the choice between Pareto-optima is underlined by a distributive conflict between those groups who are better off under different optima. Because of this distributive conflict, a purely arbitrary solution is unlikely to be acceptable to those involved. If the outcome chosen is one that benefits very few people and immiserates very many (compared with alternative possibilities), we cannot expect people to acquiesce to it. There is a serious danger that the distributive conflict will lead to an actual violent conflict. Such a violent conflict would be a negative-sum struggle over the social surplus, and would thus lead to a Pareto-inferior outcome. Public choice theorists present politics as a negative-sum conflict in contrast to positive-sum productive exchanges in the marketplace. But if the market is founded on an unpopular arbitrary distributive division, the costs of violent conflict likely to arise will far exceed the more moderate transactional costs that attend democratic politics.

Second, the idea that Pareto optima are indifferent is also morally problematic. The political problem noted above is not simply something that requires pragmatic adjustment to human weakness. Rather, the appeal to arms in the face of an arbitrary and otherwise unchangeable distributive settlement would in many cases be quite justified. This is because the idea that all Pareto optima are genuinely indifferent from a moral point of view is appalling. Some situations are clearly better than others, but they may not qualify as Pareto improvements merely because a handful of well-off people are made slightly less well-off.

I will not push these two objections further, not because they can be easily dismissed, but because the whole premise of this scenario is rather implausible. Imagining a Pareto-optimal pure classical liberal order helps us to see that there is no necessary connection between market failure and the choice of efficiencies. However, it is much more likely that Pareto improvements are possible from a pure classical liberal order. This is accepted by advocates of constitutionalised marketisation: Somin certainly does not defend the optimality of a pure classical liberal order, and even Pincione & Tesón accept the need for government provision of public goods.

The important point for our purposes is that it is highly likely that there are multiple possible policy orders which Pareto-dominate the pure classical liberal order, but that the choice between them is not Pareto-decidable. Pareto recommends moving away from a pure classical liberal order, but it does not tell us which alternative to choose. Market failure thus makes the

choice of efficiencies problem impossible to ignore, and drives home the need for some political mechanism to settle the question.

Moreover, the more market failures we see, the more this will tend to widen the scope of indeterminacy. The further we need to move away from a purely classical liberal system in order to promote efficiency, the more questions will arise about which efficiencies to prioritise.

At the same time, it should still be stressed that the sheer extent of market failure is only of secondary importance at the higher-order level. In theory, a stable legal order could simply be modified to take advantage of any additional government activities recommended by the economics of market failure. For example, even if governments need to adjust the money supply in the economy to ensure macroeconomic stability, this can be accomplished by a central bank charged with pursuing a constitutionally mandated inflation target. This seems to be both Pincione & Tesón and Somin's vision: the executive functions of government will be limited to closely enumerated powers concerning those activities which are most clearly necessary for efficiency.

It is thus not the extent of market failure per se that causes problems for constitutionalised marketisation. Instead, it is that the complications required in law and government action to secure these Pareto-improvements greatly expands the tendency towards indeterminacy inherent in the Pareto principle. Attempting to remedy market failures requires making further choices, and these choices are unavoidably political. Once we accept that some interventions are necessary to remedy market failures, we need a way of deciding which interventions the state should make. The choice between different efficiency-improving interventions cannot be made by the market itself; it requires a legislative decision.

While it is well known that the Pareto criterion cannot decide distributive questions, it is often underappreciated how much such choices arise even in the context of policies focused purely on efficiency. There are different ways of promoting efficiency; they come into conflict with one another, and their benefits are distributed differently. The need for an additional mechanism to decide these choices is ultimately driven by the indeterminacy built into the concept of the Pareto criterion itself. It is therefore naturally to wonder whether the problem could be solved by a conceptually more determinate criterion of efficiency.

## **Maximising Aggregate Welfare**

This section reassesses the choice of efficiencies under a more determinate conception of efficiency, aggregate welfare maximisation. As I use the terms here, a conception of efficiency as maximised aggregate welfare sums the

welfare of different people and recommends the state of affairs with the highest total welfare across the population.<sup>5</sup>

The concept of Pareto-optimality is very difficult to apply outside of formal economic models in the real world. In public policy, genuine Pareto improvements are rare. Even things that seem clearly inefficient often turn out to persist at least in part because at least some people stand to lose if the problem is solved. In theory, we can imagine the beneficiaries of such a policy being in a position to more than compensate the few losers. In practice, such compensation attempts are fraught with difficulties and are rarely attempted. Consequently, the concept of efficiency used in practice is more likely to be an aggregate welfare notion. Indeed, one way of representing the idea of aggregate welfare maximisation – the Kaldor-Hicks criterion – is to recommend improvements in which beneficiaries could afford to compensate losers (with no expectation that they will actually do so).

With Pareto optimality, the choice of efficiencies problem is derived from the theoretical indeterminacy of the Pareto criterion itself when faced with a distributive conflict between different options. When it comes to aggregate welfare maximisation, the choice of efficiencies problem remains, but its nature is different. The aggregate welfare maximisation criterion is, theoretically, much more determinate – perhaps even to the point of generating a complete social preference ordering. However, there is a great deal of practical disagreement about how different policy options actually compare in terms of aggregate welfare. These disagreements are based on different causal beliefs about the consequences of public policy. Here, the choice of efficiencies problem derives from epistemic uncertainty about which efficiency-promoting state actions will best promote aggregate welfare.

This disagreement is also riddled with distributive conflict. Some options favour certain groups more than others. As a result of self-serving biases, even well-intentioned people are more likely to over-estimate the aggregate welfare generated by those policies which benefit them personally.

Although aggregate welfare maximisation is theoretically determinate, the choice of efficiencies argument from the previous section follows in a very similar fashion. Even in a pure market order there are still disagreements about how the distribution of property and the details of property, contract and tort law affect aggregate welfare. Once we allow that further government interventions can improve aggregate welfare, a massive space of possibility opens up about how exactly this should be done. This is particularly the case since, as we saw in the previous section, interventions to promote one source of efficiency often impede other sources of efficiency. Thus, once again, some legislative mechanism is necessary to resolve disagreement in a way that is both politically palatable and ethically justifiable.

I have only analysed the necessity of political mechanisms in terms of efficiency. A natural extension is to ask how this analysis would apply to other

values. One thing that seems clear is that trying to incorporate further normative goals in addition to efficiency will only strengthen the dynamic I have set out. As we have seen, there is considerable political disagreement motivated by different causal beliefs about the aggregate welfare effects of different laws and policies. Allowing for additional normative considerations will lead to additional disagreement motivated by different moral beliefs about the correct goals of policy. People will disagree on whether a given normative goal (e.g. solidarity) should be pursued at all, and if so how it should be weighed (what priority it should be given) in relation to other values like efficiency. Thus, relaxing the assumption that aggregate welfare maximisation is the relevant criterion means contending with political disagreements rooted in different beliefs about both causal effects and moral imperatives. Because it expands the range of disagreement, allowing for additional values in public policy strengthens the case for a legislative political mechanism to deal with these disagreements. This also makes it clearer that proposals for alternatives to politics are really just proposals to constitutionally entrench the policy positions that an author personally believes are optimal given their own moral and causal beliefs.

A separate question is whether *all* values, considered singly, give rise to something analogous to the choice of efficiencies problem. This question is difficult to answer in the abstract, and here I only venture a few tentative comments. Any consequentialist moral principle will generate some epistemic disagreement rooted in different causal beliefs about what actions will bring about the desired consequences. This is the basic template I described in the case of aggregate welfare maximisation. It seems possible that some deontological moral systems might give recommendations which are both theoretically determinate and epistemically clear enough to avoid disagreement, even if this comes at the expense of generating some counter-intuitive recommendations. At first glance, it might seem like the best candidate here would be something like Robert Nozick's (1975) historical account of justice. However, on further reflection it becomes apparent such an approach generates its own epistemic disagreements when it comes to facts of historical injustice that underlie claims to justice in rectification. These questions may be interesting topics for future research, but I will not consider them further here.

## Replies and Rejoinders

Instead, I return to the context with which we began, proposals for constitutionalised marketisation. Faced with the choice of efficiencies problem, an advocate of constitutionalised marketisation might simply deny that the question of which legal framework maximises aggregate welfare is as epistemically difficult as I have made out. If we are confident that some broadly classical liberal framework will perform best, we should institute that

framework as a permanent order insulated from politics – especially if we have a very pessimistic interpretation of democratic politics. As we saw above, this is compatible with continuing widespread government activity. It is just that these activities will be closely enumerated in the constitution, and executive agencies will not be allowed to stray beyond them.

This section responds by setting out the significant practical problems with a constitutionalised market order. These problems arise both at the level of ordinary operation, and at the level of establishing the order in the first place.

The operation of a constitutionalised market order faces a dilemma. On the one hand, constitutional restraints can be tightly specified and inflexible – but this is very likely to be inefficient. On the other, judges and executives can be given more discretion – but this destroys the distinctiveness of constitutionalised marketisation, turning it into a form of political elitism.

Constitutional restraints that simply forbid the state from intervening in specified (or non-specified) areas of life are very blunt instruments. Which government activities are more or less conducive to efficiency is something that is likely to change over time. One major reason for this is technological change. Consider transportation. The advent of railways in the nineteenth century required a whole set of legal and public policy changes in order to utilise the technology efficiently. In the twentieth century, the railways were eclipsed by the motor car, once again prompting sweeping changes in law and policy. Today, electric cars are already making inroads, self-driving cars appear just around the corner, and the more distant future will doubtless surprise us again. Firmly entrenching the legal and policy infrastructure most efficient for any one of these technological moments would fetter the efficient usage of new technologies in the future. It is very difficult to specify the efficient role of government in the economy with any precision in a constitutional document. Given that conditions are likely to change, it would be dangerous to permanently lock society into a particular legal order that is efficient at one historical moment.

The natural response to the problem of inflexibility is to phrase constitutional restrictions more openly and allow the judiciary and the executive greater interpretive latitude. But this leads to the other horn of a dilemma. The choice of efficiencies is a deeply political question, and unless the constitution specifies permitted activities of government in great detail (leading to the problem of inflexibility), judges will inevitably end up playing a major role in deciding these questions. Especially if it is to avoid the problem of inflexibility, constitutionalised marketisation will have the consequence of increasing the power and politicisation of the judiciary. This is already clear in countries today where public policy is more determined by constitutional restraints, such as the United States of America. The USA affords an example of how constitutionally restricting government activities merely channels political disagreements into a judicial forum.

The more powerful the judiciary becomes, the more courts would lose their distinctive social rule and become more generalised political bodies (Knight & Johnson, 2011, p. 175). Ideally, a judiciary is distinguished from a legislative or executive body primarily by its mode of operation – adjudicating cases that appear before it and building up a body of precedents. However, the more powerful and politicised a judicial body becomes, the less important this specific mode of operation becomes. Instead, it comes to distinguished from a representative assembly increasingly by its selection procedure, which is supposed to reward knowledge and credentials rather than responding to the popular demands. Such a regime has recently been described as ‘epistocratic’ (Estlund, 2009) (rule by knowers), although to my mind that implicitly concedes too much to elitism; the older terminology of ‘technocracy’ or indeed ‘aristocracy’ seems preferable.

This marks the point at which the project of abolishing the legislative starts to be abandoned, and legislative power is merely transferred from a representative assembly to other institutions. If we accept the necessity of some degree of legislative power, then we need to consider the question on its own terms of how we should select those who are to exercise it. It seems naïve to think that the enormous power of determining what the state should do is best left with unaccountable officials like judges. The most successful remedy for concerns about arbitrary power has been to make officials accountable to the population, which leads us back to democracy (Berman, 2017). Moreover, there are reasons to think even well-intentioned elite bodies are epistemically inferior to representative alternatives (Landa & Pevnick, 2020; Goodin & Spiekermann, 2018; Landemore & Elster, 2013)

I am not claiming to have settled the choice between democratic and elitist legislative bodies here; I have barely touched on it.<sup>6</sup> My point is rather that grappling with the problem of inflexibility squeezes constitutionalised marketisation into the shape of elitist technocracy rather than remaining a distinctive alternative.

Practical problems also appear on the level of instituting a constitutionalised market order in the first place. These deficiencies are more excusable, in that political theorists often focus on the merits of their proposals were they to be enacted rather than the process of enacting them. However, the lack of attention to transition in this case is suggestive of a deeper problem. At the first-order level, one can argue for the merits of particular institutions on the understanding that the actual decision will be taken by a second-order institution, generally presumed to be representative democracy. But this cannot be presumed when the proposal itself is at a second-order level.

Charitably, we can imagine the envisaged constitutional constraints being adopted by some kind of extraordinary constitutional convention or technocratic elite body. But if this is the case, we need to hear why an extraordinary convention or technocratic body would tend to make more competent



decisions than ordinary elected legislatures. Ultimately, the need for legislative power has not be circumvented. Instead, it is concentrated at the moments where constitutional restraints are adopted. This merely raises the stakes of politics at those moments and removes the opportunity for learning and adjustment over time, neither of which seem desirable. Of course, the procedures of representative democracy in ordinary politics also have to be decided in higher-order moments of constitutional politics. But democratic politics has a potential for reflexive self-amendment that is impossible by definition in a constitutionally entrenched order (Knight & Johnson, 2011; Elster, 2000).

Less charitably, constitutionalised marketisation advocates tend to duck the higher-order question of how society should choose laws and public policies. Instead, they re-iterate an answer to the first-order question of which laws and policies should be adopted, combined with some criticism of democracy as a second-order institution. The second-order alternative of a constitutionalised market order receives much less attention. When we reconstruct it, as I have attempted here, we raise a host of problems.

Any proposal for constitutionalised marketisation needs to contend with widespread disagreement and uncertainty about what legal order best promotes efficiency. Some kind of principled basis is needed for deciding how such decisions should be taken. But if such a legislative mechanism exists, the dangers of inflexibility over time suggest that it should be ongoing rather than only existing at special constitutional moments.

## Conclusion

Even on a parsimonious conception of the role of government as being to promote efficiency, politics is unavoidable. The pursuit of efficiency is much more political than is commonly assumed. I argued that when efficiency is interpreted as Pareto-optimality, the choice of an efficient legal regime is massively indeterminate. This indeterminacy needs to be resolved by a legislative process designed to be both politically palatable and morally defensible. When efficiency is interpreted as aggregate welfare maximisation, the choice of efficient first-order institutions is theoretically determinate but subject to widespread epistemic uncertainty and disagreement. Once again, legislative power is necessary to make a choice. Moreover, it is highly likely that the optimal legal framework will change over time in response to technological and other developments, making a stable and inflexible legal order unlikely to be efficient.

My argument focused the political nature of efficiency and the difficulties involved in the transition from first-order to second-order institutional prescriptions. It avoided entering into empirical disputes about the relative quantitative severity of market or government failure. However, my argument cannot be

entirely separated from these debates. The problems I have identified can be made to fade into the background if one adopts a sufficiently apocalyptic view of politics and a sufficiently starry-eyed view of the market. Nonetheless, my contribution here has been to set out the burden that such an argument for constitutionalised marketisation must take on. Flexible legislative institutions make a significant contribution to efficiency which cannot be easily set aside.

Faced with the political obstacles to thoroughgoing marketisation, advocates can be tempted to resort to cynical political tactics that one would never want to see generalised.<sup>7</sup> Against such suggestions, this article has tried to indicate the importance of having principled political mechanisms and forums for dealing with disagreement. However, I recognise that an adequate argument in this direction has only been hinted at here. The full argument to be made is that instrumentalists about political institutions have strong pragmatic reasons to behave more like proceduralists. Despite having different causal beliefs and moral goals concerning first-order policy, partisans nonetheless have strong reasons to create and sustain second-order political institutions of a certain sort within which to conduct their disputes. Setting out this argument more rigorously is a larger project. This is one of two main directions for future research which flow from this analysis.

The second is to ask what political pathologies such as rational ignorance actually imply for politics, if they do not imply constitutionalised marketisation. Answering this question will require much more detailed attention to the pathologies themselves, but I see three basic possibilities.

First, rational ignorance and other pathologies might simply be a counsel of humility and caution for political actors. Knowing that democracy is subject to these problems, citizens and politicians should be less keen on government intervention and more supportive of markets and decentralisation than they otherwise would be.<sup>8</sup> Second, these pathologies might be ameliorated by better constitutional design. Minimally, a Westminster-style system that tends to deliver clear governing majorities makes it easier for voters to ascribe responsibility to elected officials. Ironically, US-style constitutional checks and balances are likely to be counterproductive in this regard because they make it harder for voters to accurately ascribe responsibility.<sup>9</sup> More ambitiously, we might turn to lotteries rather than elections to select political decision-makers. Both Claudio López-Guerra (2011) and Alexander Guerrero (2014) frame their sortition proposals as responses to the problem of rational ignorance. Third, it may be that rational ignorance is something we simply have to bear with for the sake of the other advantages of democratic politics. This is suggested by Geoffrey Brennan's (1989) observation that the lack of individual decisiveness that makes ignorance rational is also the very thing that makes people vote for the public good rather than their own self-interest.

All three of these possibilities are compatible to some extent. Pathologies of politics might imply different policy choices and constitutional reforms as well as some unavoidable remainder. My argument here has been that attempting to escape politics altogether would be a cure much worse than the disease.

## Notes

1. There is of course an alternative, non-instrumental way of arguing for restricting democratic interventions in the marketplace: the natural rights tradition exemplified by Nozick, 1975. I do not claim to rebut this non-instrumental argument here; however, I note that this version of classical liberalism has receded from prominence in recent decades.
2. See also Pennington, 2003; These arguments are briefly mentioned in Somin, 2013, p. 185.
3. For critique see O'Neill, 1998.
4. Waldron 1999 makes a closely related distinction between two tasks for political theory: 'theorizing about justice (and rights and the common good etc.), and theorizing about politics.' p. 3.
5. The historical shift in welfare economics was in the opposite direction, from aggregate welfare to Pareto-optimality. The classic text is Robbins, 1935. This shift was motivated by the problem of interpersonal comparisons of utility, which I set aside here.
6. See among others J. Brennan, 2016; Caplan, 2011, pp. 197–199; Estlund, 2009, Chapter 11; Landemore, 2013.
7. Caplan 2011 heads in this direction, pp. 199–201.
8. This is the implication Somin 2013 begins by considering, before he moves on to constitutionalised restraint, pp. 150–151.
9. Somin shows some recognition of this problem, e.g. 2013, p. 124. However, he does not explore it further.

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