Law, Legislation, Political Economy: Comment on Meiners and Morriss (2024)

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The argument put forth by Roger Meiners and Andrew Morriss in their article, "Law and Political Economy: Missing Markets, Missing Laws, and Missing Political Economy" (2024), represents an important contribution by not only engaging the Law & Political Economy (LPE) literature, highlighting what is, ironically, missing in LPE; it lacks a coherent account of markets, law, and political economy (2024, p. 2), all of which LPE claims to be resurrecting due to an alleged lack thereof in traditional Law & Economics. I agree with the fact that Meiners and Morriss identify this as the "central problem" (2024, p. 21) in LPE. However, by identifying the fact that "a central tenet of LPE appears to be that law shapes markets through embedded values in problematic ways" (2024, p. 2), what they conclude is that LPE actually provides a nonhistorical, atheoretical, and nonempirical nature account of law, an understanding of which is reduced to "little more than an expression of power" (2024, p.2). My comments, therefore, are meant to reinforce, not critique, the contributions of Meiners and Morriss in their paper, namely the nonhistorical, atheoretical, and nonempirical nature of LPE, the explication of which is indeed essential to understanding what is missing in Law & Political Economy.

Let me first comment on what Meiners and Morriss identify as the nonhistorical nature of LPE. I particularly appreciate that the authors are leveraging Rosenberg and Birdzell's 1986 classic, *How the West Grew Rich* (see p. 2, fn. 5). However, I would like to suggest an additional margin in which to leverage this book, particularly from Chapter 4, entitled "The Evolution of

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Institutions Favorable to Commerce." As Rosenberg and Birdzell argue, the basis for this unintended emergence of legal institutions conducive to capitalism was the political fragmentation of Medieval Europe, the basis for which established the conditions for interjurisdictional competition. Rosenberg and Birdzell argue that in the West, "individual centers of competing political power had a great deal to gain from introducing technological changes that promised commercial and industrial advantage and, hence, greater government revenues, and much to lose from allowing others to introduce them first" (1986, p. 137). Moreover, Rosenberg and Birdzell (emphasis added; 1986, p. 101) elaborate on this process as follows: "*economic growth was a force for democratization and eventually produced a society unmanageable by the old landed elite and their political devices*."

Building on this particular point, here is what I would like to emphasize from Meiners and Morriss (2024): if, as they point out (2024, p. 19), that LPE writers regard "law in western industrialized societies [as] merely an indistinguishable blur of power relationships," then what they cannot explain (and missing from their analysis), is how it could ever be in the self-interest of a non-democratic ruler to cede political authority and unintendedly sow the seeds for the emergence of the rule of law, within which economic freedom and democratic institutions are *embedded by-products*. Power relations may be embedded in political and legal institutions, but the missed opportunity by LPE scholars is to illustrate how those power relations can unintendedly become the very source, or at least an analytical starting point, for the erosion of power, through the emergence of credible constraints on political discretion and predation as well as competing legal institutions, highlighted not only in the accounts of Rosenberg and Birdzell (1986), but also other scholars working in the tradition of Law & Economics, such as Berman (1983), Benson

(1989) Stringham and Zywicki (2011). That is what the application of law ***and*** economics is all about.

Without having a proper theoretical foundation, LPE writers unfortunately fail to draw a distinction between the spontaneous emergence of law, as I've outlined above, and legislation, which is the use of power to deliberately make law. Law may have emerged from power relationships, but there's a difference between rules emerging unintendedly through competition for power and legislation emanating directly from power relationships. Drawing out this distinction between law and legislation, as Hayek outlines, is a great opportunity from which other legal scholars can engage LPE, as Meiners and Morriss imply. The very power relationships that LPE scholars wish to identify in markets and politics is misdirected by failing to distinguish between discretion and rules (or law and legislation).

This brings me to the second & third contributions of the paper (the atheoretical and nonempirical nature of LPE). Given their related nature, I will them address together. What Meiners and Morriss highlight of great importance is the fact that Law & Economic scholars have used historical evidence to illustrate the unintended and undesirable consequences of government regulation, and how such regulations are the cause of the very harm on marginalized individuals that LPE scholars wish to mitigate. Here is why the definition of "efficiency" matters. Morris and Meiners correctly point out that "economists use the term to mean maximizing social output" (2024, p. 8). They also quote Amy Kapcyznski stating that Law and Economics construes the term efficiency in a "manner that reproduces a constitutive priority for the privileged" (quoted in Meiners and Morriss 2024, p. 7). This claim by Kapcyznski is incorrect because the claim is based on a conflation between law, in which efficiency is an unintended by-product of social interaction within a set of legal arrangements, and legislation, which is a means to achieve a direct outcome.

But there's another way to define the concept of efficiency that is related to both definitions above, as highlighted by George Stigler (emphasis added; 1992, p. 459), "that efficiency is to be judged *only* with respect to the goals one seeks." Stigler, here, is alluding to means-ends analysis; in this respect, law or legislation can be "efficient" as alternative sets of means judged as "efficient" in terms of their coherence to a set of ends. What LPE scholars fail to point out, and needs to be highlighted, is the *institutionally-contingent* nature of efficiency. In other words, as Kapcyznski and LPE scholars point out, the use of legislation captured by a special interest group, such as sugar producers in the U.S., is "efficient" with respect to their goal of shielding themselves from foreign competition. However, this is true with respect to the use of legislation, NOT law in the sense that Hayek and other Law & Economics scholars understand the term.

The failure to associate "efficiency" only with the undesirable effects that result from political discretion and legislation highlights, fundamentally, what is missing in Law & Political Economy (and here again I am paraphrasing from Hayek): they believe, fundamentally, that their aim is to explain law, markets, and political economy ONLY in terms of conscious action. Therefore, if we have bad outcomes in the world, it is because the rules have been deliberated constructed by the wrong people, and if only the right people are in charge, it is simply a matter of deliberately reconstructing "the legal rules of the game." However, the social sciences are not about directly inferring motivations from outcomes. The problems which law, economics, and political economy are trying to answer arise only in so far as the conscious action of individuals produced undesigned results. If social phenomena showed no order except in so far as they were consciously designed, there would indeed be no room for theoretical sciences of society. This is what is missing from Law and Political Economy: by failing to account for the *indirect relationship between conscious action and social outcomes*, it fails to understand that undesirable and

unintended consequences that emerge from using discretion out of political expediency (Hayek, F.A. [1952] 1979, pp. 68-69).

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