Special Issue: *Constitutional Reasoning*

Does Economic Analysis of Law Need Moral Foundations?: Comment on Chein

By Giovanni Tuzet[*]

Abstract

In this short paper commenting on Chein's contribution to the present and special issue of this Journal, I ask whether economic analysis of law, when understood as supporting, in particular, the state intervention in the market, needs moral foundations. This seems to be one of the claims made by Chein, and my answer is certainly "yes." Economic analysis of law and state intervention in the market certainly need some moral ground (utilitarian, Kantian, or else). What I resist is Chein's claim that they need the complex theoretical construction of Dworkin's idea of integrity plus Taylor's idea of identity and Bankowski's idea of living lawfully.

A. Introduction

In his contribution to the present issue of this Journal, Marcos Vinício Chein Feres asks whether the state intervention in the market, through public policies, and taking into account both ordinary regulations (statutory and administrative) and constitutional principles, is legitimate.[1] He answers in the positive and supports his view with a complex theoretical construction made of Dworkin's idea of integrity plus Taylor's idea of identity and Bankowski's idea of living lawfully.

I think that his question can be moved to a higher level of abstraction by asking whether economic analysis of law needs moral foundations. This seems to be the underlying concern of Chein's paper. If I understand him correctly, he would answer again in the positive: Economic analysis of law, not only when supporting the state intervention in the market but also in other guises,[2] needs moral foundations because of the moral concerns that stand in the back of it. Also my answer to that more abstract question is certainly

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[1] MARCOS VINÍCIO CHEIN FERES, *Law as Integrity and Law as Identity: Legal Reasoning, State Intervention, and Public Policies*, 14 GERMAN L.J. 1147 (2013).

[2] What guises? These especially include other normative guises supported by moral grounds. Explanatory guises are included when the analysis needs some moral concepts like (though different from one another) expected utility, social welfare, well-being, human flourishing, etc.

https://doi.org/10.1017/S2071832200002200 Published online by Cambridge University Press

"yes." Economic analysis of law and, in particular, state intervention in the market certainly need some moral ground (utilitarian, Kantian, or else). This is true of state intervention through statutory and administrative regulations, for these are (usually) given a justification in terms of what is morally good or appropriate to pursue and achieve through public policies.[3] And *a fortiori* it is true of state intervention according to constitutional principles, given that these (usually) incorporate a number of moral principles and try to protect or implement some moral rights. What I resist is Chein's claim that to justify his conclusion we need that complex theoretical construction of Dworkin's idea plus Taylor's and Bankowski's.

Moreover, I think that Chein's contribution is affected by a purposive overload, so to say. That makes it more eclectic than acceptable according to usual standards and more complex than needed to answer the starting question. So in the following I will try to point out its purposive overload (B), and its unnecessary complexity (C). I will conclude with some remarks on what I believe to be the real problem of implementing the variety of principles that are included in our constitutional documents (D).

Let me also clarify that I won't try to answer the question whether state intervention in the market is legitimate; it is too abstract a question in my opinion to receive an answer as such, without taking into consideration the contextual features that might encourage or discourage the state intervention.

B. The Purposive Overload

After putting the main question of the paper (on the legitimacy of state intervention in the market), Chein states that "the theoretical object of this research is to conciliate the idea of law as integrity, developed by Dworkin, with the idea of law as identity, complemented by Taylor's idea of moral identity and Bankowski's idea of living lawfully" and he adds that this "methodological approach consists of reconstructing a system of analytical concepts based on contemporary legal theory."[4] There seem to be two different issues at least in his work, one normative—the legitimacy of state intervention in the market—and the other analytical—the reconstruction of such "analytical concepts." Moreover, the latter is qualified both as "theoretical" and "methodological." Now, apart from labels, the reader may be puzzled by the cohabitation of those issues. Why put together the analytical issue with the normative question whether it is legitimate for the state to intervene in the market? Following the principle of charity, I would reconstruct Chein's argument like this: The (new) analytical framework he aims at gives (new) tools to answer the normative

[3] As I said, I use "morally" in a broad sense encompassing utility and efficiency concerns. *See*, *e.g.*, RICHARD POSNER, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); JULES COLEMAN, MARKETS, MORALS AND THE LAW (1988); RONALD M. DWORKIN, JUSTICE IN ROBES ch. 2-3 (2006).

[4] CHEIN, *supra* note 1, at 1148.

https://doi.org/10.1017/S2071832200002200 Published online by Cambridge University Press

question. This is the most plausible way to make sense of the author's effort, in my view. Indeed he says that "the final intent is to suggest new means of interpreting legal economic regulations and finding new grounds for the legitimate evaluation of public policies."[5]

So the paper has more than one purpose: It has a normative intent—showing the legitimacy of public economic policies—and an analytical one—constructing a theoretical framework to that end, through the specified methodological approach. But this is not the end of it. Chein's purposes include "taking into consideration the legal procedures and the necessary legal interpretation."[6] What "legal procedures" are concerned is not specified, nor is it explained in what sense legal interpretation is "necessary." But Chein glosses that "the aim of this research is not to investigate how judges justify their decisions, but how public policies play an essential role in the construction of a specific reading of the Constitution."[7] So he is also interested in constitutional interpretation. Is this a third issue of the paper? How does it connect with the preceding two? Why engage in the issue of constitutional interpretation to answer a question about the legitimacy of state intervention in the market? Would it just give a contributory answer to the starting question, or an essential and sufficient one?

The author emphasizes the importance of that interpretive issue, stating that "the main objective here is to deconstruct the idea of a one-dimensional as well as an official interpretation of a Constitution," and he says that this "requires an inverted mechanism of analysis."[8] It is not clear to me in what sense it is "inverted"; however, it is clear that also this kind of analysis has a moral purpose: "[T]he purpose is, by deconstructing the way public policies are implemented, to apply a deeper sense of morality in the construction of legal procedures and legislative content."[9] Is this a fourth issue and a further purpose of the paper? It is clearly connected with the third one, but while the third is explanatory—investigate "how public policies play an essential role in the construction of a specific reading of the Constitution"—the fourth is normative—"to apply a deeper sense of morality" in legal interpretation.[10]

Still, we might think that there are a variety of sub-purposes serving the main purpose of the paper, as the following passage seems to suggest: "The main purpose of this paper is to

[5] *Id.* at 1149.

[6] *Id.* at 1147.

[7] *Id.*

[8] *Id.* at 1148.

[9] *Id.*

[10] *Id.* at 1147-8.

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reconstruct the meaning of public policies taking into account how effectively they can interact with a Constitution (counter-majority principle and fundamental rights), legislation and interpretation of norms as a means of reconfiguring the nature of state intervention."[11]

The "main purpose" is to justify state intervention in the market, and the various sub-purposes (normative, analytical, interpretive, and explanatory) are means to that end, which is achieved by "reconfiguring the nature of state intervention." Or, if you prefer, the "main purpose" is to provide an analytical framework that explains and justifies the moral reading of (constitutional) law.

In any case I am puzzled by the overload of purposes of Chein's paper, and I won't be surprised in learning that other readers feel the same. Furthermore, as I will argue in the next section, the complexity of the argument seems unnecessary for the main purpose of the paper, if there is one.

C. The Unnecessary Complexity

Chein tries to provide a new theoretical framework "considering similarities among Dworkin's, Taylor's, and Bankowski's theories."[12] So we have three different authors at stake and three different theories that allegedly throw some significant light on our bunch of economic, legal, and interpretive issues. One may suspect it is too much food for thought. Not to consider the fact that those issues concern not only constitutional interpretation but also administrative officials and (ordinary) judicial courts.[13]

I believe, generally speaking, that the eclecticism of a scholarly work is inversely proportional to its clarity and argumentative rigor. But here I would like to focus on a different question: Is all that stuff necessary to achieve the "main purpose" of the paper?

Dworkin's idea of law as integrity is inspiring as much as controversial.[14] This is not the place to discuss it in detail, but I would like to recall that his famous character, Judge Hercules, is a fiction that, as such, can only play an ideal or normative role (orientate real, flesh-and-blood judges towards the superhuman task of law as integrity).[15] The problem

[11] *Id.* at 1148.

[12] *Id.*

[13] *Id.* at 1149.

[14] *See* RONALD M. DWORKIN, LAW'S EMPIRE (1986).

[15] On law and fictions, *cf.* GIOVANNI TUZET, *How Fictions are Credible*, *in* FICTIONS AND MODELS: NEW ESSAYS 389 (John Woods ed., 2010).

https://doi.org/10.1017/S2071832200002200 Published online by Cambridge University Press

with it, simply put, is that it is not a feasible task. Or, that it creates an amount of discretion greater than expected, given the variety of principles an interpreter could use to decide a case in hand.[16] Similarly, Chein says that "Dworkin does not explain how moral values can be objectively applied."[17] In addition I would like to suggest that the Dworkinian notion of a "personified community" may create, in a multicultural society, more problems than it solves.

In fact Chein wants to use not only Dworkin's idea, but also some insights from Taylor and Bankowski, to complement the deficiencies of Dworkin's picture. I am not familiar enough with Taylor's work, nor with Bankowski's. So I won't comment on them. But I don't see, from Chein's text, the reasons for making such an appeal to those authors. Chein seems to claim that the complex picture he aims at remediates the vacancies of their simpler, individual pictures: The idea is to put their theories together retaining their virtues and dropping their vices. But why refer to those authors in particular and not to others? I do not see the gain for Chein's overall argument.

Taylor would be useful in building up, for legal interpreters and officials, the idea of law as identity, that is, the moral conception of human identity in a society and its legal consequences.[18] The notions of full life, self-respect, and respect for others are essential ingredients of it.[19] But, for reasons that are not made explicit (perhaps because it does not directly address legal issues), also Taylor's picture is insufficient to achieve Chein's purpose. Therefore he turns to Bankowski.

Bankowski's idea of living lawfully starts from "an ethical and theological approach of the intertwining of social and legal theory" and constitutes a "theoretical proposal that reinforces the intertwining of identity and integrity"[20] providing some criteria for legal interpretation as well. One major topic of his work is the tension between law and love, legalism and legality (or, to put it as in the old days, the letter and the spirit of the law).[21] This brings us to reflect on "the huge influence morality may produce on legislation and adjudication"[22] and to conclude that "it is fundamental that officials should apply law

[16] *See* JOHN MACKIE, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3 (1977); *see also* HERBERT L. A. HART, THE CONCEPT OF LAW (1961). By the way, let me say that Hart's analysis leaves room for judicial discretion and is by no means "legalist" as Chein has it. *See* CHEIN, *supra* note 1, at 1159.

[17] *Id*. at 1151.

[18] CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 25 (1989).

[19] CHEIN, *supra* note 1, at 1152.

[20] *Id*. at 1154.

[21] ZENON BANKOWSKI, LIVING LAWFULLY: LOVE IN LAW AND LAW IN LOVE 33 (2001).

[22] CHEIN, *supra* note 1, at 1157.

https://doi.org/10.1017/S2071832200002200 Published online by Cambridge University Press

taking into account a necessary balance between legality and morality, law and love, in spite of the risks involved in this legal maneuver."[23] Fine, but one does not see what this precisely adds to Dworkin's and Taylor's views,[24] nor—and it is the most important point here—what is gained for the legitimacy of the state intervention in the market.

On the one hand, it is true that in constitutional states such an intervention should be in accordance with the constitution or, better, with the way the constitutional provisions are interpreted. But, on the other hand, I don't find any direct influence of such interpretive views on the general normative issue of whether a state intervention in the market is legitimate. Additionally, we have to understand that Chein is referring to the constitutional protection of social and economic rights. In this light "it is essential to think of the market as an institution that should be restrained and constituted according to legal limits and social needs."[25] Fine, but the *pars costruens* of the argument is very difficult to grasp and assess. Take the following passage: "As any other institution, the market tends to be self-referential, which may compromise social and economic rights constitutionally guaranteed. With respect to this, new practical information (explosion of acts of love) should interfere in the compact stabilized mass of old information and legal activity that constitute the market as an institution."[26]

In what sense is "new practical information" equal to "explosion of acts of love"? And in what sense is "the market as an institution" constituted by "the compact stabilized mass of old information and legal activity"? Or take a statement like this: "An institution becomes legitimate only, and only if, there is space in its structuration for critical and reflective legal reconstruction through explosions of acts of love."[27]

It is hard to say whether this statement is true or false. Perhaps one should read Bankowski to grasp the meaning of such expressions like "explosions of acts of love." But in any case I remain doubtful as to the need of Chein's complex picture in order to show that it is necessary to intervene in the market "so as to fulfill social needs and the redistribution of wealth."[28] Is this an end that could not be achieved unless we read, understand and apply

[23] *Id*.

[24] Notwithstanding some hardly intelligible phrases like this, referring implicitly to Taylor, I guess: "Identity in law is a means of providing this continuous explosion of love in legal practice." *Id*. On Dworkin, instead, it is said that according to Bankowski we should "replace the chain novel metaphor with soap opera narratives," since the latter give the interpreter more creativity. *Id.* at 1158. So far so good; but, is it necessary for Chein's purpose?

[25] *Id.* at 1159.

[26] *Id*.

[27] *Id.*

[28] *Id.* at 1160.

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such theories of Dworkin, Taylor, and Bankowski? Given that economic analysis of law has moral foundations, what is the advantage of Chein's picture over another moral argument to the same purpose? In principle we could build a lot of such arguments, for instance a utilitarian one, or alternatively a Kantian one. According to the former, simply put, the state intervention in given circumstances would provide the greatest utility for the greatest number. According to the latter, the state intervention would protect the fundamental rights of the individuals. Do we really need such a complex picture of integrity, identity, and "explosion of acts of love"?

D. The Real Problem

Both from a utilitarian and a Kantian perspective the state intervention in the market could provide us with some significant advantages, but it could also have some important drawbacks.[29] In Chein's paper there is no mention of the possible drawbacks of state intervention. But in the real world there certainly is a tradeoff between the costs and benefits of it.

Moreover, the promotion of certain rights may hinder or reduce the promotion of others. For example, the right to health may be in conflict with the principle of economic liberty, and the right to a clear environment may be in conflict with the right to work.[30] All of our constitutional theory of balancing principles and rights stems from this fact. Why balance if constitutional principles and rights were compatible? This is in my view the real problem of promoting social and economic rights: They cannot be realized all together and for free. Every right is in tension with some other and sometimes the tension becomes an open conflict; every amount of money or other resources used for one thing is not used for another. Therefore we have to make choices one way or another[31] and I venture to think (but cannot argue here) that a case-by-case evaluation, considering every aspect of specific situations, is in this matter preferable to a general policy of promoting one kind of right over another.

To conclude on a theoretical note, I point out that the tradeoff of state intervention and that of constitutional balancing stem from the same basic problem. The root of it lies in the impossibility of achieving incompatible goals and the necessity of striking a balance between them. We cannot have the cake and eat it too. This is a general feature of our practical life, both individually and in society. When Chein concludes that public policies can be construed "as the well-measured effects of a legal practice consciously applied in the context of universally elaborated legal principles in a personified community," and

[29] *See* COLEMAN, *supra* note 3.

[30] As it happens, while I'm writing this paper, with the Italian case of the "Ilva" factory in Taranto.

[31] *See* GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978).

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wishes "the implementation of a systematic rational process of state intervention whose limits are institutionally conceived taking into account the intertwining of integrity and identity, the universal and the particular, legality and morality, and, above all, law and love,"[32] he seems to disregard that conflicting dimension. State intervention can promote certain principles and at the same time be detrimental to others; constitutional balancing can promote certain rights and be detrimental to others. Tough-minded philosophers cannot but recognize it and point it out to tender-minded thinkers.[33]

[32] CHEIN, *supra* note 1, at 1162.

[33] I borrow this distinction from William James' *Pragmatism*, where one of the distinguishing marks is that tender-minded philosophers are rationalistic and go by principles, while tough-minded are empiricist and go by facts. *See* WILLIAM JAMES, THE MEANING OF TRUTH: A SEQUEL TO 'PRAGMATISM' 13 (1975).

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