

The irrelevance of normative considerations for founding an Austrian law and economics:

Reply to Marciano\*

Peter T. Leeson

### Abstract

In a comment on my paper, “An Austrian approach to law and economics, with special reference to superstition (Leeson 2012), Marciano contends that Posnerian foundations may be problematic for an Austrian approach to law and economics. In this reply I argue that the differences between Posner and Austrians that Marciano uses as the basis for his contention are normative. If, as Austrians claim, Austrian economics is purely positive, those differences are irrelevant to the appropriate foundations for an Austrian law and economics. They pose no problem for a Posnerian founding.

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\* Email: pleeson@gmu.edu. Address: Department of Economics, George Mason University, MS 3G4, Fairfax, VA 22030, USA.

## 1 Introduction

In a recent paper I argue that Posnerian foundations are the appropriate foundations on which to build an Austrian law and economics (Leeson 2012). In a thoughtful comment on that paper, Alain Marciano contends that “Richard Posner’s conception of law and of the role of judges in a legal system” differs from Austrians’. Thus Posnerian foundations “might be problematic for an Austrian approach to law and economics” (Marciano 2012: 1).

In this reply I argue that the differences between Posner and Austrians that Marciano uses as the basis for his contention are normative. If, as Austrians claim, Austrian economics is purely positive, those differences are irrelevant to the appropriate foundations for an Austrian law and economics. They pose no problem for a Posnerian founding.

## 2 Positive claims, normative claims, and Austrian economics

Austrian economics conceives of economics as purely positive. Whether economics is applied to markets, law, or something else, it delivers positive claims, not normative ones. Famously, Mises (1949) was adamant about this distinction.

Of course Austrians, like other economists, or indeed anyone else for that matter, may use the positive claims of economics to inform their normative claims. And they do so frequently. Thus one could claim that society should repeal minimum wage laws on the grounds that economics tells us that minimum wage laws tend to create unemployment. Alternatively, one could claim that society should enhance minimum wage laws on the same grounds. In both cases the *economic claim* that minimum wage laws tend to create unemployment is positive. What leads to different normative claims in these two cases are differences in goals—the normative purposes of the claim makers.

### 3 The irrelevance of normative differences for Austrian law and economics

The important differences between Posner and Hayek that Marciano uses as the basis of his contention that Posnerian foundations may pose a problem for an Austrian law and economics are differences in those thinkers' positions on the role that judges and, closely related, law, *should* play in legal systems. Note my emphasis on the word *should*.

Posner doesn't deny that social rules can emerge organically from the "ground up." He questions the desirability of such social rules and the idea that judges shouldn't actively seek to change them. Hayek doesn't deny that social rules can be the product of rationalist judge decision making. He questions the desirability of such social rules and the idea that judges should seek to "invent" them. The differences between Posner and Hayek that Marciano highlights are normative.

As such, they should have no bearing on Austrians' evaluation of the appropriateness of Posnerian foundations for an Austrian law and economics. If Austrian economics is purely positive, as Austrians maintain, the relevant criterion for evaluating the appropriateness of alternative foundations for an Austrian law and economics is the sympathy between the strictly positive aspects of such foundations and the approach to economic science taken in the Austrian perspective. Normative differences between Posner and (many) Austrians are irrelevant.

### 4 Concluding remarks

My comments above bear on the irrelevance of normative considerations for the appropriateness of Posnerian foundations for an Austrian law and economics *given that Austrian economics is*, according to Austrian economists, *strictly positive*. However, there may be reason to suspect the

sincerity of some Austrian economists' professed conviction to the purely positive nature of economics. Not coincidentally, the reason for my suspicion in part stems from such economists' reaction to my suggestion that Posnerian foundations are more suitable for an Austrian law and economics than Coasean ones. The reaction I have most frequently encountered objects to a Posnerian founding on the grounds that some of Posner's normative positions are quite far from those held by most Austrians, whereas some of Coase's normative positions are much closer. This is true. If economics is purely positive, it's also irrelevant.

## References

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