

Daily Journal

www.dailyjournal.com

FRIDAY, AUGUST 4, 2023

GUEST COLUMN

Long lines, heavy rocks – and sausages

By Mitchell Keiter

From crime to climate change to COVID, the U.S. Supreme Court is rejecting the view that the public must defer to expert weighing of incommensurate costs and benefits.

The two things, according to Otto von Bismarck, that one should not watch being made are sausages and laws, and the Supreme Court's recent *National Pork Producers Council* decision involved both.

After Californians voted to bar the sale of pork derived from pigs confined in stalls, out-of-state producers asked the Court to invalidate the law, contending it imposed substantial economic costs, which outweighed its benefits. But Justice Neil Gorsuch's plurality opinion held that courts cannot objectively balance such economic costs with noneconomic benefits (e.g. avoiding animal mistreatment), so such policymaking must "belong to the people ... They are entitled to weigh the relevant 'political and economic' costs for themselves." Gorsuch quoted his predecessor, Justice Antonin Scalia, who compared balancing such incommensurable interests to determining "whether a particular line is longer than a particular rock is heavy."

The challenge of balancing incommensurable interests reverberates beyond pork chops. The premise that expertise can optimize policy – "Follow the Science!" – has muted public debate on policy questions, but many involve multiple factors, which cannot be measured in "apples-to-apples" fashion. The pork case is just the latest of a string that have posthumously vindicated

Scalia's skepticism. From crime to climate change to COVID, the Court is rejecting the view that the public must defer to expert weighing of incommensurate costs and benefits.

Though it attracted little attention, the Supreme Court's 2018 decision in *McCoy v. Louisiana* planted the seeds of this new Tocquevillian moment. Prosecutors charged Robert McCoy with murdering three relatives. His counsel concluded his alibi was not credible and thus reasoned the best hope for avoiding execution was to admit McCoy killed the victims and emphasize his mental incapacity – which counsel did over McCoy's "furious" objection. The jury convicted McCoy and sentenced him to death anyway.

The Supreme Court reversed. It was not for counsel to prioritize avoiding the death penalty above all else; counsel might be the expert "about how to *achieve* a client's objectives," but not "what the client's objectives in fact *are*." McCoy could reasonably prefer to seek even a slim chance of exoneration than accept certain life imprisonment – and the shame entailed by confessing guilt. The majority posthumously quoted Scalia's observation that the law presumes a defendant "knows his own best interests and does not need them dictated by the State," a paraphrase of Tocqueville's maxim that "everyone is the best and sole judge of his own private interest."

The Court had not always followed this maxim, and its failure to do so in the 2005 *Kelo v. New London* case generated outrage – and legislative reactions in 45 states. Octogenarian Wilhelmina Dery had lived in her home her entire life,

but the city of New London used eminent domain to take her land (and that of other owners unwilling to sell), to use it for commercial development. The Court approved the taking, based on the promise that the development would increase tax revenues so much that everyone would benefit, which justified exiling Dery from the only home she had ever known. (In fact, as in *McCoy*, the plan failed; the project was never built.)

But in celebrating the plan's economic benefits, the Court failed to account for the *noneconomic* costs imposed on homeowners like the Derys. They reasonably could have preferred to stay in the home where they had built memories through 60 years of marriage rather than relocate – even if they could then afford a new home with a wider garage and thicker carpet. Not everything can be measured in dollars.

Tradeoffs between economic and noneconomic benefits remain hotly contested. Economic advantage was the rationale behind California's AB 5 law classifying almost all workers as employees, so they can obtain economic benefits like a minimum wage or overtime benefits. But Californians voted to limit the law's reach, and the Biden Administration has met opposition in trying to take this concept nationwide, because many workers prefer the noneconomic benefits derived from "independent contractor" status. The self-employed can be home to greet children when they return from school, attend (and enable) their extracurricular activities, observe religious holidays and sabbaths – and enjoy the autonomy of choosing how to do their work without being

tracked by headquarters. The enduring demand to work from home demonstrates just how much workers value flexibility.

The 2022 *West Virginia v. Environmental Protection Agency* decision furthered McCoy's recognition that experts can decide how to achieve objectives, but not *which* ones to pursue. The 1970 Clean Air Act authorized the EPA to select technologies and practices that minimize pollution and enable power "plants to operate more cleanly." In 2015, the EPA devised a policy of shifting energy sources from coal and natural gas to wind and solar. The shift would cost tens of thousands of jobs, raise electricity prices, and reduce GDP by a trillion dollars by 2040.

The high Court held the EPA lacked authority to impose this shift. Though EPA officials' technical expertise qualified them to

Mitchell Keiter is a certified appellate law specialist at Keiter Appellate Law, www.CaliforniaAppellateAttorney.com.



select the optimum technologies, Congress did not give it exclusive authority to “balanc[e] the many vital considerations of national policy implicated in deciding how Americans will get their energy.” Canceling coal and gas could dramatically undermine not just America’s economy but our foreign policy. America’s natural gas has helped Europe resist Vladimir Putin’s attempted energy coercion, and limiting domestic production will give adversaries like Russia, Iran, and Venezuela more leverage. Are CO2 emissions a line longer than the “rocks” of Putin’s aggression and Iran’s human rights violations are heavy? It is a debate in which not just scientists, but everyone in a self-governing democracy may (and should) participate.

These judicial decisions have moved to check an elite political culture that is moving in the other direction. Political leaders delegated pandemic policymaking to scientific experts, demanding deference to their knowledge. Even if these experts could have balanced the *medical* effects of strict lockdowns, weighing the benefits of slower transmission against the costs of missed preventive treatment and reduced exercise, the experts had

no special insight into other costs, including those affecting education, the economy, civil liberties, or interpersonal connections, so they failed to account for them. As a recent Johns Hopkins study concluded, “The science of lockdowns is clear; the data are in: the deaths saved were a drop in the bucket compared to the staggering collateral costs imposed.”

And those costs were rarely borne by the expert class. Families with backyards and pools didn’t mind shuttered playgrounds and beaches, but families in cramped apartments suffered. Public school closures did not affect families whose private schools remained open. And almost 70% of the workforce with a post-graduate degree could work from home, so they avoided a commute, but only 17% of those who never went to college could, so they lost their jobs. Where one stood on lockdowns depended on where one sat.

As in *West Virginia*, the Court declined to defer administrative agencies’ policies that were not directly related to their mission. The Court rejected both the CDC’s free rent (“eviction moratorium”) policy and OSHA’s vaccine mandate, adopted outside the democratic process, with Gorsuch again quoting Scalia to op-

pose “government by bureaucracy supplanting government by the people.” To a large extent, COVID exposed not just a class bias but a viewpoint bias, as experts opined it was too dangerous to attend protests against lockdowns – or go to church – but highly desirable to attend protests against police misconduct.

Another form of lockdown – imprisonment – similarly distributes costs and benefits asymmetrically. How long should we confine violent offenders who might (or might not) continue to pose a public safety risk? Over-confinement imposes economic costs on the wealthy, whose taxes pay for it, but under-confinement imposes non-economic costs on the poor, who are most vulnerable to criminals’ recidivism. With the top one percent of California earners paying half the taxes (and the bottom half of earners paying one percent), the divergence of interests is stark.

A state sentencing commission framed the question: “Is it better to err on the side of overpredicting ... or underpredicting [recidivism]? How much better? That is, how many false positives [non-dangerous inmates who stay confined] equal one false negative [dangerous inmates who are released and reoffend]?”

One’s answer might well depend on whether one travels in a Saab or subway. In the 2015 *Glossip* case, Justice Stephen Breyer expressed concern about over-punishment, and Scalia’s counterargument differed, not on the proper ratio between false positives and false negatives, but on who should strike it.

“We federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans’ everyday lives. The suggestion that the incremental [preventive] effect of ... punishment does not seem “significant” reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental [prevention] is appropriate.”

As in Bismarck’s day, political and scientific leaders have interests that diverge from the general public’s. The Supreme Court is now following Scalia’s admonition to “Let the People decide” rather than demanding deference to elite decisionmakers. That, more than any belated concern about travel disclosures, is why they are so set on delegitimizing it.