

## The Rules of Reason: COVID-19, Buchanan, and Hayek

ROSOLINO A. CANDELA  
Mercatus Center at George Mason University

PETER J. JACOBSEN  
Gwartney Institute at Ottawa University

**Abstract:** This paper presents a reassessment of the policy measures taken to combat the effects of COVID-19. It addresses the following question: does the threat of pandemic justify the sacrifice of legal and political principles for the sake of expediency? We do so by filtering the unintended consequences of price controls through the lens of constitutional political economy as understood by James Buchanan and F. A. Hayek. We argue that constitutional rules provide *rules for reason*. The reason for constitutional rules is not only to provide constraints on arbitrary discretion, but also to provide the *epistemic* preconditions that harness and guide the creative powers of individuals required for recovery from pandemic. We illustrate this point by reframing price controls as a violation of the U. S. Constitution, particularly the First Amendment. Thus, if prices are understood to be a form of communication across individuals, then upholding constitutional principles should not be abandoned but reinforced during times of crises.

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### INTRODUCTION

The COVID-19 pandemic ushered in an era of passing and utilizing already-existing “price gouging” laws to punish sellers of medical supplies, disinfectant wipes, food, and other commodities. On March 23<sup>rd</sup>, 2020, President Donald Trump issued the Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19 (Exec. Order No. 13910, 2019). Two days later, on March 25<sup>th</sup>, the Department of Health and Human Resources issued the Notice of Designation of Scarce Materials or Threatened Materials (2020). These new laws accompanied a large list of already-existing state-level regulations including those in 36 different states (Ondeck and Tarr 2020).

Economists are familiar with the consequences that these laws will have in the real world. Standard supply and demand analysis reveals that when there is a shock of increased demand or decreased supply, prices are bid up to economize on a good for which the relative scarcity has increased. While said analysis is invaluable for describing the prediction of increasing relative price, it does not communicate the importance of the process of moving from the old

price to the new price. An examination of the importance of this process is a key contribution of Hayek (1945) who points out that changing relative prices act as a form of communication. For example, if the supply of tin falls for some reason, the subsequent rise in price leads the users of tin to know “that some of the tin they used to consume is now more profitably employed elsewhere and that, in consequence, they must economize tin” (Hayek 1945, p. 526). Since prices serve this function, Hayek argues, “we must look at the price system as such a mechanism for *communicating* information if we want to understand its real function” Hayek (1945, p. 526, emphasis added).

Despite the insights of Hayek, the United States judicial branch remains seemingly unconvinced or unaware of this Hayekian interpretation regarding the communicative role that prices play. The First Amendment of the United States Constitution declares that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances” (U.S. Const. amend. I). In spite of this clear declaration that people should be able to communicate freely without legal repercussion, politicians have passed laws, like those enumerated above, which prevent individuals from communicating the knowledge embedded in prices.

If it is in fact true that price controls are effectively a violation of the First Amendment, what should be made of this? The main question we seek to answer is whether the threat of a global pandemic is a sufficient reason to ignore constitutional rules in the pursuit of mitigating the harm caused by the crisis. In order to answer this, we consider the role of rules and how undermining those rules can affect that role. We argue that rules play an important role in enabling individuals to use reason, aided by market prices, to generate plans and, therefore, violations of those rules inhibit the ability of individuals to solve the problems presented by the crisis.

In making our arguments we contribute to two distinct literatures. First, we contribute to the literature on the relationship between market interactions and communication as it relates to the law. We draw on various contributions to this literature including Alchian (2006 [1966]), Boettke (1998, 2018), Coase (1974, 1977), Lavoie (1986), and Sowell (1980) as well as legal cases in order to make a unique argument that price controls prohibit communication and, therefore, are in direct contradiction to the First Amendment. Similar to Lieberler and Alchian (2006 [1993]) we find incompleteness in the opinions of the Supreme Court which stem from incomplete definitions. Second, we contribute to the literature on the importance of rules from the lens of constitutional political economy, drawing from the work of Brennan and Buchanan (2000 [1985]) and Hayek (2011 [1960]). We do so by using the case of price controls during the COVID-19 crisis to illustrate how violations to constitutional rules can stymie attempts to plan and generate creative solutions to crises. In making this case, we are emphasizing the *epistemic* function of rules, specifically by generating the institutional precondition necessary for the context-specific knowledge that emerges only through voluntary exchange, and hence, the generation of exchange-ratios (i.e. prices) to facilitate plan coordination (see Boettke 2018). This also allows individuals to harness, guide, and adjust their creative powers in a manner that is effective for recovery from pandemic. The implication here is that following rules is *even more important* in the context of crisis when compared to “normal” times.

The paper will be structured as follows. In Section II we review the limited extent to which communication via prices is respected by the law, and we will argue that prices are, in fact, a form of communication which fall under the jurisdiction of the First Amendment. In Section III, we discuss the importance of having stable, predictable rules, especially in times of crisis, and apply this to our case of free communication via prices during the COVID-19 pandemic. Section IV concludes with implications surrounding the importance of freedom of expression in the marketplace for goods in future policy and research.

## SECTION II: PRICES AS COMMUNICATION

**Review of Literature and Judicial Precedent**

At first blush, it may seem that our claim regarding the inherent relationship between the First Amendment and market pricing as a form of speech seems misplaced. However, by understanding first and foremost the *preconditions* of market pricing, our point will become clearer. Market prices are, first and foremost, an exchange ratio, or the terms in which two goods are exchanged. Such exchange ratios in a market economy take the form of money prices. However, the fundamental precondition for the emergence of such exchange ratios is private property, which is nothing more than a social relationship defining an individual's expected ability to exercise choices over goods and services in interaction with other individuals, including *the ability to exchange* (Alchian 1965). Implicitly, the formation of exchange ratios is protected by "the right of the people peaceably to assemble," since exchange behavior gives rise not only to communication in the form of prices, but its prerequisite, voluntary exchange, also embodies a peaceful form of social interaction. Though our claim seems to follow logically from a perusal of the First Amendment, we are not the first to observe an inconsistent application of the First Amendment.

Coase (1974) tries to explain a puzzle associated with two types of markets which he labels "the market for ideas" and "the markets for goods and services." The main point of interest in this paper relates to why the former market enjoys freedom from regulation under the First Amendment whereas the latter seems to be vulnerable to many different kinds of regulation efforts. Although Coase does not argue that the market for goods and services *should* fall under the First Amendment as communication, he does expand on his paper (1977) wherein the legal precedents surrounding the First Amendment and advertising are discussed extensively. These cases provide an important foundation for modern interpretations of the relationship between speech and prices, and, consequently, discussing them will be important for making our argument that prices are a protected form of speech.

Before we move into cases, it's important to note we are not the first to write on the epistemic role of prices as communication in the vein of Hayek. Horwitz (1992, p. 193, emphasis original) points out how the price system, "*extends* the range of social communication beyond the limits of language and the physical senses." Paniagua (2018) expands upon this point by arguing that money creates a new system of social relations which leads to the generation of complex, relational knowledge which acts as a guide for the generation of economic plans.<sup>1</sup> Likewise, we build off a growing literature which examines the relationship between institutions and disaster response. Pennington (2020) focuses on how the state has few systemic mechanisms to communicate the success of policies relative to the market. Candela and Geloso (2021) argue countries with more economically free institutions can more flexibly adapt to pandemics and illustrate this with 20<sup>th</sup> century influenza epidemics. Geloso and Murtazashvili (2020) examine how pandemic policies affect institutions and how this can change the effectiveness of pandemic response. We also build off of past literature which focuses on the difficulty of government institutions to respond to disasters such as Hurricane Katrina (Boettke et al 2007; Chamlee-Wright and Storr 2010; Sobel and Leeson 2006, 2007).

It's also important to point out that we are not arguing about the constitutionality of price controls based on the clause associated with compensation for regulatory takings. Drobak (1986) lays out that certain price controls, such as those associated with utility companies, have led to the judicial branch ruling that the regulated parties would need to be compensated under the regulatory takings clause of the Fifth Amendment. However due to variations in three conditions, "(1) the justification for the price regulation; (2) the duration of the regulation; and (3) the ability of a firm to withdraw from the regulated business" (p. 100), the judicial branch has argued most price regulations do not qualify as a regulatory taking. However, our argument centers more on speech than this related set of cases on regulatory takings.

The first case of significance is *Valentine v. Chrestensen* (1942), wherein the Supreme Court ruled that commercial speech was not protected speech and therefore could be prevented in public spaces. This precedent, if it had persisted, would be drawing a very clear line between the market for ideas and the market

for goods. Interpreted this way, there's certainly no clear case that price determination falls under First Amendment protections because *no commercial speech* would fall under its purview. In fact, Mr. Chrestensen even tried to avoid his prohibition by attaching an informational pamphlet to his advertisement. The Supreme Court ruled that although the information distribution would normally be protected, in this case it was not since the motive behind distributing it was to avoid the law against advertisement.

The precedent allowing regulation of commercial speech was chipped away over several cases. In *Bigelow v. Virginia* (1975), for example, the editor of a newspaper sold in Virginia advertised abortion services in New York. Virginia claimed this violated a law against encouraging procurement on abortion. The Supreme Court ruled against Virginia, claiming that, while it would not comment the extent to which advertising was protected by the First Amendment, it was a mistake for the Virginia Supreme Court to presume no advertising was protected. Since Bigelow was just making information available, the speech was protected.

The final case which struck down the precedent that commercial speech was an exception to First Amendment protections was *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* (1976). In this case the court ruled explicitly that commercial speech was indeed protected by the First Amendment. Justice Blackmun, writing the majority opinion argued against the “paternalistic” view of needing to regulate advertisement and offered an “alternative” view, which “is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication, rather than to close them” (*Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* 1976).

While commercial speech being protected is an important step towards prices also being protected, the Supreme Court still explicitly denies this possibility. The most relevant case for our discussion here is the case of *Expressions Hair Design v. Schneiderman* (2017). Expressions Hair Design challenged New York Attorney General Eric Schneiderman on, “law §518 [which] provides that ‘[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.’” The challenge was based on the premise that the law prohibited merchants from advertising their price in a specific form, in this case being the advertisement of the price as “price plus surcharge.” By preventing this, New York prevents a form of expression. The majority opinion written by Justice Roberts makes this clear in stating:

What the law does regulate is how sellers may communicate their prices. A merchant who wants to charge \$10 for cash and \$10.30 for credit may not convey that price any way he pleases. He is not free to say “\$10, with a 3% credit card surcharge” or “\$10, plus \$0.30 for credit” because both of those displays identify a single sticker price—\$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display \$10.30 as his sticker price.

Even though the Court is ruling in favor of freedom in pricing here, it is made clear that this is done *in spite of the fact* that price controls are acceptable forms of regulation. In making our case, we will focus on what we consider to be the problems with the arguments made in favor of price controls by both majority opinion writer Justice Roberts as well as a concurrence by Justice Breyer.<sup>2</sup> In order to do so effectively, we will first highlight how prices are forms of communication.

### Protection for Prices

Hayek’s aforementioned paper (1945) provides the basis for which we argue that prices are not only a form of communication, but, rather, prices are *the* form of communication for specific types of knowledge. Hayek rightly describes prices as:

[A] kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust their activities to changes of which they may never know more than is reflected in the price movement (Hayek 1945, p. 527).

The change in prices which occur throughout an economy convey the knowledge of buyers and sellers in the system. In fact, the telecommunication is so effective that the individuals in any given transaction need not even know all the information which the system itself communicates. That is, the explosion of an oil rig isn't information that consumers would have to know when filling their tank. The higher price communicates the additional importance of economizing the increase scarcity caused by the shock. However, unlike a text or a phone call, the price system is a means of communication with no obvious substitute. There are two reasons why this is the case.

First, the knowledge communicated by the price system does not exist absent the use of the price system. When a seller sells or a buyer buys, they are revealing their preference for what they receive from the transaction over what they gave up. If someone buys a bottle of hand sanitizer for \$20, they communicate that they value it at least more than the \$20 used—else the transaction would not occur. The knowledge of revealed preference cannot be communicated in any other fashion. Imagine, instead, a price control has forced stores to sell hand sanitizer for no more than \$5 a bottle. Assuming this price control is below the equilibrium price, there will be a shortage. You can imagine a scene of a manager deciding who among the several customers to sell the last bottle to. You could ask them to communicate what their willingness to pay would be, if there were no price control, but it seems clear this will not yield the same knowledge. Since customers pay \$5 regardless of their willingness to pay, it seems clear there would be an incentive to overstate what your willingness to pay would be. This makes our point clear. The knowledge of willingness to pay is created simultaneously with its communication during the process of a transaction. Preventing this process via price controls makes this communication illegal.

In response to the potential for price allocation to determine the distribution of 3M masks, an *Economist* article from April 2020 argues that, “there is no doubt now that [3M] masks are most essential for medical workers” (Many Economists Defend 2020). While it certainly seems true that medical workers will value masks more (and this will likely be reflected in hospital's willingness to pay for masks) it seems unclear, on the margin, whether a person who has a high risk for death from contracting COVID-19 would get less value from avoiding COVID-19 than a hypothetical medical worker with low mortality risk. It seems that for someone to have no doubt, they would need to be able to make interpersonal utility comparisons. The price system, however, avoids this issue by allowing individuals to communicate willingness to pay, rather than leave it up to speculation.

Second, as Hayek argues, market prices are important due to their ability to communicate, “the knowledge of the particular circumstances of time and place” (Hayek 1945, p. 521). There exists knowledge in the world, sometimes referred to as tacit knowledge, which is characterized by the fact that it is unable to be codified. For example, the knowledge needed to ride a bike is not something that is clearly transmittable. Although instructions can be written down for how to ride a bike, the actual riding involves knowledge beyond listing simple steps.<sup>3</sup>

To return to our previous example, exactly how could a store manager determine the weight of concern that the son or daughter has for an elderly parent when they seek to buy hand sanitizer? Insofar as this tacit knowledge exists, buyers and sellers account for it in their purchasing decisions. As such, the price of a good communicates the tacit information associated with thousands of buyers and sellers of the product. An individual who has tacit information which makes acquiring hand sanitizer more urgent can bid up the price, and in doing so they communicate the knowledge without having to codify it. Again, we see that price controls make communication of a specific form of knowledge illegal. Since this tacit knowledge cannot be codified, it cannot be communicated with language, spoken or otherwise. By preventing prices from adjusting, price control laws serve as a violation to the First Amendment.

With these two examples in mind, we can consider the shortcomings of the written opinions of the Supreme Court Justices to argue that price controls are not violations of freedom of speech. In Justice Roberts's argument in *Expressions Hair Design v. Schneiderman* (2017, p. 8-9), he states:

§518 is not like a typical price regulation. Such a regulation—for example, a law requiring all New York delis to charge \$10 for their sandwiches—would simply regulate the amount that a store could collect. In other words, it would regulate the sandwich seller's conduct. To be sure, in order to actually collect that money, a store would likely have to put "\$10" on its menus or have its employees tell customers that price. Those written or oral communications would be speech, and the law—by determining the amount charged—would indirectly dictate the content of that speech. But the law's effect on speech would be only incidental to its primary effect on conduct.

However, Justice Roberts does not contend with the fact that such a price control would directly regulate communication. This is because, as mentioned above, conduct and communication via the market telecommunication system dovetail. Both communication of revealed preference and the tacit knowledge embedded in that revelation are directly regulated by price controls. Justice Roberts's argument falls short because it views market conduct not as a form of telecommunication device, but as no more than the conduct associated with goods and money changing hands. Yet, even under this stricter interpretation, conduct associated with exchange is nevertheless protected by the First Amendment under the right of the people to peaceably assemble. Ironically, earlier in his opinion Justice Roberts cites the District Court which ruled in the favor of the merchants saying, "draw[ing a] line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities" (581 U. S. \_\_\_\_ [2017], p. 4). Whether or not Justice Roberts appears to be labeling the market process as conduct rather than acknowledging the economic reality of its communicative nature, both interpretations would still fall under the protection of the First Amendment.

Interestingly, this conduct verses speech dichotomy problem was also addressed indirectly by Alchian (2006 [1966]), where Alchian argues that government cannot protect a person's right to say something without some reference to property rights. That is, in order to guarantee the right to communicate in a place, individuals must have property rights associated with that place. In a public space, that means granting individuals the exclusive right to use public property in some manner (conduct) for communication to be possible. Alchian points out public authority "can always declare some particular speech to be an inappropriate use of its property" (1966 [2006], p. 597). Sowell makes a similar point to distinguish what the First Amendment can grant in saying that "[f]ree speech' in the sense of speech free of governmental control does not imply *inexpensive* message transmission, any more than the right of privacy implies subsidized window shades" (1980, p. 241, emphasis original). Since speaking requires certain conduct with reference to property, Alchian continues out succinctly that the only true denial of free speech is allowing, "no restriction against individuals using resources *other than their own* for the purposes of communication" (p. 595, emphasis original). Like Alchian, our argument points out that communication requires conduct of a certain type, and in this unique case such communication emerges out of context of exchangeable private property.

The conduct vs. speech dichotomy, however, is not the only bases by which Justices argued against First Amendment protections for pricing in *Expressions Hair Designs v. Schneiderman*. Justice Breyer concurs with Justice Roberts, but for explicitly different reasons. Justice Breyer argues that regulations of speech should avoid being made on the basis of the conduct versus speech dichotomy. Instead, he argues in his opinion that regulations should be judged according to how closely they interfere with the interests primarily protected by the First Amendment. Justice Breyer makes this clearer by arguing, "[if] a challenged government regulation negatively affects the processes through which political discourse or public opinion is formed or expressed (interests close to the First Amendment's protective core), courts normally scrutinize that regulation with great care" (581 U. S. \_\_\_\_ [2017], p. 14). On the other hand, Justice Breyer points

out that, since legislation about commercial transactions “does not significantly affect the interests that the First Amendment protects, we normally look only for assurance that the legislation ‘rests upon some rational basis’” (581 U. S. \_\_\_\_ [2017], 15).

However, it is clear from previous discussion that price controls do, in fact, negatively affect the process through which public opinion is formed or expressed. The opinion of American citizens about how they desire resources to be allocated is transmitted through the price system. Further, the price system is not just a communicative tool that is chosen among many. It is *the* tool through which the citizens communicate their tacit knowledge in the market process. In that respect, it could perhaps be argued that protection from pricing regulations is even more important than protection of some other form of speech, such as picketing, because the process which is impacted by price controls has less substitutes. Protests communicating dissatisfaction with politicians can often take spoken, written, or even silent forms. Communication about tacit knowledge relevant for resource allocation does not have these alternative channels, since it is *only* in the context of exchangeable private property rights that such knowledge can emerge and be communicated via the creation of exchange ratios (i.e. market prices).

It’s important to point out that this argument has both a positive and normative element. We contend that, given a proper understanding of the communicative role of prices and the comments made by Justices in previous cases, that *consistent* interpretation of the Constitution implies that price controls are a violation of free speech. This is a positive claim. It’s possible that someone who does not understand or agree that prices are a form of communication could disagree with this positive claim. However, we recognize that attached to this positive claim is a normative assumption that Justices should apply their logic consistently from case-to-case. As such, our argument is a positive case resting on this normative foundation.

Taking now, as our point of departure, that price controls are, in fact, violations of the First Amendment of the U.S. Constitution, we turn to the primary question of importance of the paper. Given that price controls are violations of legal principles, are violations of this nature desirable for expediency’s sake when crises occur?

### SECTION III: THE RULES OF REASON

#### **Rules’ Role in Reasoning**

In order to decide if violation of rules can be warranted, we must first have a good understanding of the purposes and benefits of rules to those who live under them. As Hayek (1958, p. 241) states, the “intelligent use of reason in the ordering of human affairs is that we learn to understand what role it does in fact play and can play in the working of any society based on the co-operation of many separate minds.” This requires us not only to understand the reason for rules, but more importantly for our purposes here, the rules that aid and facilitate the use of reason in a peaceful and productive manner. Brennan and Buchanan (2000 [1985], p. 17) offer two different reasons to have rules. The first reason is that rules allow individuals not only to act without intentionally harming each other, but also “provide to each actor *predictability* about the behavior of others” (emphasis original; 2000 [1985], p. 10). The rules of the road are a good example here. A world where everyone drove on both sides of the road as they saw fit would be chaotic. In such a place, individuals would have neither the incentive nor the knowledge necessary to avoid accidents. Even if someone, for some reason, prefers a world where the rule is to drive on the left side of the road, that person will still be better off with a right-side rule when compared to no rule. The rule gives information about the behavior of others which is used in making plans. Hayek (1960 [2011]) echoes this sentiment in saying:

The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place. The law tells him what facts

he may count on and thereby extends the range within which he can predict the consequences of his action (pp. 224-225).

The second reason pointed out by Brennan and Buchanan is that rules enable individuals to harness their creativity to their benefit as well as to the benefit of those around them. Imagine, for example, a road characterized by driving on the right side of the road where someone turning left must yield to oncoming traffic. In such a world, left turns are slower and more dangerous. Frequent drivers who are in vehicles especially prone to tipping, such as mail carriers, may experience significantly higher cost in turning left. In this case, it may be valuable for mail carriers to plot their routes such that they only engage in taking right turns rather than taking left turns. If these routes are successful, not only do the mail carriers' lives improve due to saving on medical and mechanical issues, their customers also experience the benefit of their packages being delivered on an optimized route. Without rules concerning the right of way, for example, the benefits of this creativity are never unleashed. Hayek (1960 [2011], p. 62) also echoes this sentiment. "Freedom" Hayek explains, "presupposes that the individual has some assured private sphere, that there is some set of circumstances in his environment with which others cannot interfere." In other words, freedom rests on assured rules. Hayek goes on to argue that freedom has enabled individuals to utilize their unique knowledge to make achievements possible which are, "greater than any single mind can foresee" (Hayek 1960 [2011], p. 82).

Rules, then, serve the important function of providing members of society with information. They aid individuals in their use of their reason through the formation of plans using that information. Therefore, as Buchanan and Brennan (2000 [1985], p. 13) point out, "it follows that any change in the rules *destroys* information" (emphasis original). Any rule subject to frequent and arbitrary change will obviously cease to be a rule at all, mitigating the purpose of rules. More importantly, however, since freedom of action is predicated on the ability to adapt and adjust to unforeseen circumstances, this also implies that "we will rarely know what we lose through a particular restriction of freedom" (Hayek 1973, p. 56) that results from a violation of rules.

### Constitutional Rules

Despite the clear benefit of rules, what is the nature of political decision-making that creates a bias towards expediency over rules? First, the fact that rules must be created and are not automatically adopted seems to imply an accompanying cost of enforcement as well as pre-commitment to enforcement of such rules. This represents a concentrated cost upon political officials, the benefits of which are dispersed across the masses of the population, applied without any foresight as to which particular individuals or which particular groups of individuals will benefit from such rules. As highlighted by Olson (1965), the nature of political decision-making, however, is to pass legislation that creates concentrated benefits among well-organized and well-informed special interest groups, the costs of which are dispersed and, therefore, remain largely unknown to the ill-organized and ill-informed masses of the population. The logic of political decision-making, therefore, creates a tendency towards expediency, since the "direct effects of any interference with the market order will be near and clearly visible in most cases, while the more indirect and remote effects will be mostly unknown and will therefore be disregarded" (Hayek 1973, p. 57). Moreover, because political officials are not residual claimants in their use of discretion, "[w]e shall never be aware of all of the costs of achieving particular results by such interference" (Hayek 1973, p. 57).

Because of the benefits associated with the expediency gained by breaking the rules, Brennan and Buchanan (2000 [1985], p. 82) illustrate the need to pre-commit to behaving a certain way in the future. They do this with the illustration of Ulysses having himself bound to the mast of his ship. He knows he will be unable to resist the urge to break the rule of not jumping off the ship to go to the sirens, so he creates a sort of "constitution" which binds him to follow his rule.

Another way to think of the issue is with a sort of two period game. In this game a student has the ability to take a difficult class (Class A) which will be valuable to any future employer but could result in failure, or an easy class (Class B) which will provide less additional value but will be impossible to fail. In the first period the Student must choose between A and B. If the student chooses B, the class is guaranteed a payoff of 20, because the student is guaranteed to pass no matter how many hours are spent studying. Class A, on the other hand, is more complicated. If the student chooses to take Class A and study, a payout of 100 can be received. However, it's also possible that the student will choose Class A but will then spend studying time watching Netflix instead. The student, realizing weakness of will, can perhaps only succeed at obtaining the payout of 100 by allowing his or her parents to temporarily change the Netflix password, for example. The more certain the student is that taking and passing Class A is possible, the more likely it is that "investment" (in the form of taking the more difficult class) will take place.

The importance of committing to constitutional rules in collective decision-making becomes even more clear when we consider the last example. In the example, the decision to take on beneficial long term plans was dependent on the likelihood that the individual would succeed once Class A was selected. And, although the probability of succeeding at A is certainly less than the 100% chance of succeeding at B, the student still ultimately has some degree of control which allows them to make passing likely enough that the long term planning is worth it. However, with regards to public choices, the same does not hold. As Brennan and Buchanan (2000 [1985], p. 90) point out, individuals are "less capable of predicting the collective response to the choice options predicted to be confronted in future periods than of predicting private, personal reactions."

This same principle can be extended even one step further to answer our paper's ultimate question. Brennan and Buchanan continue on to say, "as a general principle, rationality precepts should dictate an inverse relationship between the predictability of future period 'choices' and the desirability of constraining the set of future-period options" (Ibid). This is simply an extension of the previous logic. As uncertainty about the future increases, the value of assurance that constitutional rules will be followed also increases. Following the rules allows for the clear communication of how the game will be played in the future, helping individuals plan and unleash their creativity. It's difficult to imagine something that contributes to an increase in unpredictability more than a global pandemic. The fear and heightened calls for expediency threaten the information about the patterns of social interaction that are generated by rules. However, it is during an uncertain time like a pandemic when individuals need the ability to plan more than ever. Stability in rules leaves individuals free to adapt and adjust to such unforeseen circumstances according to their own particularized knowledge of time and place. As our aforementioned inverse relationship dictates, not only should we uphold constitutional rules when a crisis increases unpredictability, reliance on rules should also be reinforced even more clearly than before.

In the case of the United States during the COVID-19 pandemic, upholding our constitutional rules means literally upholding our rules framed in the U.S. Constitution—namely the First Amendment. Prices transmit knowledge, which individuals use to economize on scarce resources. The conduct of buying and selling is a form of communication that transmits knowledge that can only be transmitted in the process of exchange itself. Individuals rely on this knowledge to not "crash into" one another. They participate in the system where each person communicates the urgency of their wants such that others don't take goods they more urgently desire. Access to prices also allows individuals to be creative. If a particular food or resource is becoming more heavily demanded, the increase in scarcity (and therefore price) will signal to others that they need to create alternatives by adjusting within their budget.

But this system of rules requires adherence to the rule of law. If U.S. legislatures and judiciaries are granted the privilege of arbitrarily enforcing of rules at their whim, or ignoring them altogether for the sake of expediency, the ability of individuals to form plans and reliable expectations about the behavior of other individuals is called into question. In this case, it would make sense for rational choosers to substitute from longer term decision-making into shorter term decision-making. Hayek (2011 [1960], p. 337) goes further than claiming price controls violate a particular constitution and argues that price controls cannot permit

a functioning free society while maintaining the rule of law. He gives two reasons. First, prices cannot be fixed to a long-term rule, which will guide production in an everchanging world. Second, the shortage created by price controls involves choosing another method to supply goods, which would be necessarily ad hoc. As such, limiting the damage caused price controls requires a deviation from the rule of law. Powell (2020) shows an example of this with reference to the federal government's use of the Defense Protection Act. In order to make up for local governments' closing of meat processing plants, President Trump used executive power to keep them open. However, this blanket order does not use the economic knowledge firm owners have on whether or not to stay open. Legislators must choose between unadaptable clumsy rules or arbitrary deviations.

Another way this could be conceptualized is by considering the externalities generated by these policies. When constitutional rules are in danger of being changed, this uncertainty can lead individuals to substitute into a plan they would prefer less than the plan they would select with no uncertainty. In this way, the potential for interference with the rule of law imposes a cost on individuals in the form of causing them to substitute away from their preferred longer-term plans. Beyond just the potential for violation of rule of law, the implementation of a policy which violates the rule of law leads a failure of plans to dovetail. If the central authority declares that driving can occur on either side of the road, it seems likely this grant could lead to more accidents as some try to live by the new rule while others maintain their old plans. The cost of these accidents can be thought of as an externality imposed by interference with the knowledge generated by the now-violated rule of law.

In order to make the loss from deviating from constitutional rules in times of crisis clearer, we'll highlight a thought experiment of an individual facing uncertainty over rules during the COVID-19 pandemic. We'll demonstrate how allowing First Amendment violating price controls disrupts the ability of individuals to obtain the highest possible payoff.

### Thought Experiment

A simple thought experiment can be used to illustrate the importance of rules for planning during the pandemic. Let's imagine a single, working mother during the pandemic. Let's say she lives in a rural area, somewhat far from the convenience of frequent grocery store trips. In order to have a successful trip to the grocery store that fits in the hours she isn't scheduled to work; she must hire a babysitter to watch her kids. As a result, it makes sense for her to take trips to the grocery store on a monthly basis rather than more frequently. Given that free pricing allows for market clearing of goods and services, taking larger, more infrequent trips provides the largest payoff. The upfront planning for a month's worth of groceries can be thought of as longer term decision-making behavior which requires a significant amount of planning but results in a lower cost of food over the course of a year (due to less babysitter charges, the savings from planning meals with bulk-buying, etc.) This can be thought of as a simple decision tree. Planning for monthly grocery trips provides an overall payoff of 500 if followed through on, whereas going weekly provides a final payoff of 50. Figure 1 summarizes the situation.

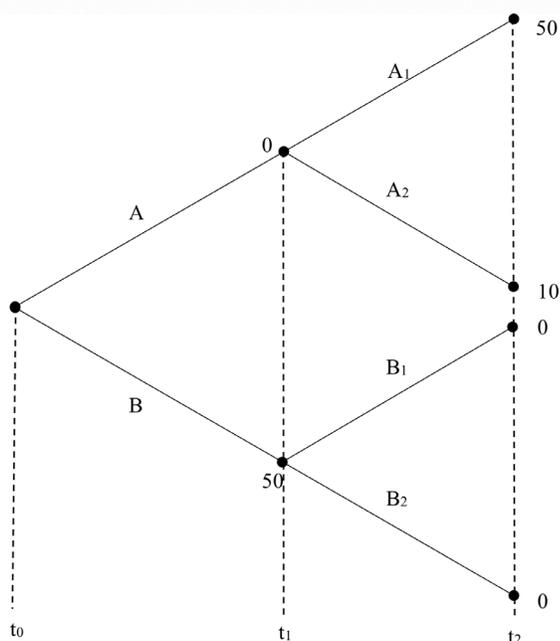


Figure 1

Figure 1, modeled in a similar way to Brennan and Buchanan (2000 [1985], p. 88), shows our decision-maker facing two options over two time periods. Decision A is planning a month's worth of groceries and B is not planning.<sup>4</sup> However, at the grocery store, she always has the option to take it easy and only buy one week of groceries. This is represented by  $A_2$  in the decision tree, whereas carrying out the plan is represented by  $A_1$ . On the other hand, not planning at all yields a guaranteed payoff, because it is assumed buying one week of groceries will be executed either way.

To this point, we've assumed in our discussions that markets tend to clear. But the reliability of market pricing is based on the fact that individuals can plan ahead and *expect* that prevailing market prices are communicating not only the scarcity, but also the *availability* of goods and services being demanded, given that sellers will tend to hold inventories as a buffer against unexpected demand shocks (Alchian 1969). This is represented by the fact that the decision at  $t_1$  is whether or not to follow through on the plan to buy one month of groceries. Given the inability for sellers to predict the decision at  $t_1$ , priced into the good and service being sold is the cost of holding inventories, leaving the mother (or anyone for that matter) free to decide how to pursue and adjust their plans.

If, on the other hand, there is a shortage (or several shortages) for goods at the grocery store, it is conceivable that whatever meal plan our decision-maker originally created is no longer feasible. The absence of a single staple good, milk for example, could potentially disrupt the entire month's meal plan. In this case, if our working mother chose to spend time planning for a month-long meal plan, it's possible to imagine her being forced to follow through with only getting one week of groceries (path  $A_2$ ), despite this being the lowest possible payoff. As the probability of this outcome increases, the benefit for our decision-maker to take on the activity of long-term meal planning falls.

When an exogenous shock, such as a global pandemic, occurs, it's reasonable to suspect other individuals will go to the grocery store to stock up on essentials. In this case, it's possible that the grocery store won't have enough inventory to handle this increase in demand without raising prices. However, so long as economic actors receive a net benefit from following path  $A_1$  which exceeds the cost of the higher prices, they

will be able to maintain their plans. The uncertainty of the pandemic is mitigated by the market rules which enable communication. In other words, the rules of the market and the ability to communicate urgency of want become even more important in the face of the pandemic.

However, the ability for prices to adjust and markets to clear is not a given. As has been pointed out, a large collection of laws have been passed or activated during the COVID-19 pandemic, which legislate that markets not be allowed to clear. If individuals could rely on the Supreme Court to uphold the First Amendment and declare price controls to be unconstitutional, this would decrease uncertainty associated with being able to successfully accomplish  $A_1$  instead of being forced to abandon the previously made monthly plan and accept  $A_2$ . Since the Supreme Court cannot, in fact, be trusted by individuals to do so, they will be more likely to substitute from longer-term plan-based decisions like decision A into shorter term plan-based decisions like decision B. By prioritizing expediency over rules, lawmakers actually exacerbate the uncertainty individuals face, causing them to take on second-best plans.

By ignoring rules, we lose the two advantages associated with them. First, they cause individuals' plans to "run into" each other more frequently, analogous to the disruption of traffic signals at a road intersection and the subsequent car accidents that would follow from such disruption. For example, grocery stores may, in light of their inability to raise prices, enforce quantity limits in order that they minimize the number of customers who go home angry with zero food items. However, these sort of quantity limits are overly simplistic and run into plans which involve a longer time horizon. A limit of five cans of corn per visit, for example, disrupts grocery store trips meant to get food for more weeks. If person A wants to get 10 cans of corn per month, while person B plans on getting five cans per week, it's clear that person B contributes to the clearing of more items off the shelves than person A. However, because the plans of person A cannot be communicated with urgency via the price system, they are ignored by more blunt means of communicating scarcity—quantity limitations.

Since some plans now are more likely to fail due to these new regulations, we also lose the advantages associated with human creativity. Our single mother, in the face of increased scarcity and higher prices, may be able to lower the family's consumption of milk by creatively planning (through use of substitutes, freezing premade meals, etc.) to use three gallons of milk over a month rather than four. However, a quantity restriction of two milks per trip renders this creativity useless. If she judges that her family should have at least three gallons of milk in a month, she'll have to make a second trip to the store regardless. If the price remains unchanged relative to before the pandemic due to price controls, the quantity limit is two, and she must make two trips to get her desired amount, there is no need to think of a way to economize into using only three milks. The non-price restriction on milk causes the advantage of creatively limiting consumption to be stifled. Ultimately, any uncertainty over the rules associated with pricing is going to disadvantage long term planners. As plans become longer-term and more complex, it is necessary to be able to rely on stable rules. Thus, replacing rules with discretion punishes long-term planners.

Although shortages have manifested in quantity limits in our discussion, this isn't a necessary feature of our argument. A shortage where quantity is distributed on a first-come-first-serve basis will still fall short of the price system's communicative abilities. Where quantity limits bias against plans which involve large quantities of groceries to be used over large time periods, a first-come-first-served system may be biased against plans which involve shopping on days other than the day suppliers deliver groceries. Regardless of the way the shortage is distributed among individual planners, the unwillingness to enforce Constitutional rules during emergencies stymies the benefits associated with planning which enable behavior which has a longer time horizon. While disrupting the grocery plans of a single individual may seem like a relatively small cost, this is only one example of how a single individual can be impacted. Price controls disrupt the communication and plans of every individual involved in the markets where they are imposed. When considering the thousands or millions of small plans invisibly interrupted by favoring expediency over rules, the potential downside of price controls becomes clear.

## CONCLUSION

In this paper, we've argued that since rules provide the conditions necessary for individuals to plan, their importance increases in times of uncertainty and crisis. We've argued this specifically with reference to the First Amendment and the COVID-19 crisis. In order to do so, we first highlighted the fundamental communicative role of prices. Our analysis leads to three conclusions worthy of consideration.

First, judges and politicians interested in making economic regulations that do not violate the rule of law would be benefitted if they better understood the reason for rules, but also how such rules aid individuals in the use of their reason. In our case, if Justice Roberts or Breyer understood the price mechanism's function in the economy, it would seem their arguments in favor of the constitutionality of price controls would bring them to exactly the opposite conclusion of what they have come to on the basis of their misunderstanding of the market process. If a technology is not recognized as a communication device, it seems an obvious conclusion that destroying it does not violate freedom of communication. Such is the case with market prices.

Second, international crises like COVID-19 increase uncertainty and therefore increase the returns to predictability. Constitutional rules and laws which guarantee the ability to communicate allow for better long-term planning and unleash the human creativity necessary to handle unpredictable crises. Recognition of the importance of the rules of reason makes a strong case that rules should be favorable over expediency in times of crisis.

Third, during the time in which this article was written, governments around the world have taken measures, such as lockdowns, business closures, and travel restrictions to mitigate the spread of COVID-19. But a true reopening of the economy would require that government officials commit themselves to rules, which also serve as the preconditions of a market economy, including private property and freedom of contract under the rule of law. Such a reopening of the economy would imply a freeing of markets from price gouging laws and other controls that predated the outbreak of the pandemic. This requires, fundamentally, placing the protection of market exchange and market pricing under the purview of constitutional constraints embodied in the First Amendment of the U.S. Constitution, which restrict impediments to freedom of expression and freedom of speech.

## NOTES

- 1 This relates to work by Ganssman (1988) which also suggests the role of money and prices in society involves, but is not limited to, its communicative role.
- 2 This is done because it appears Justice Breyer agrees with the decision made by Justice Roberts although explicitly disagrees with the reasoning.
- 3 OĞUZ (2010) argues that Hayek uses both the ideas of tacit knowledge and “knowing how” indiscriminately. “Knowing how” is the conception of tacit knowledge communicated by the example of riding a bike above. This stands in contrast to Polanyi (1969, p. 147) who argues that tacit knowledge is fundamentally about the “power of the mind, which creates explicit knowledge, lends meaning to it and controls its use”. On this point, see also Lavoie (1986).
- 4 We assume, for the sake of simplicity, that buying a week's worth of groceries require no planning.

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