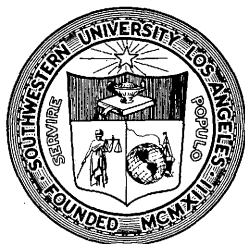


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FOREWORD

Norman Karlin†
Mark Cammack‡
Symposium Organizers

In the spring of 1944, the work for which F.A. Hayek is most known—*The Road to Serfdom*¹—was published. At the time, Hayek was at the London School of Economics where he was a technical economist. In shifting from technical economic analysis to political analysis in *The Road to Serfdom*, using economics as an explanatory tool, Hayek argued that western democracies may well be proceeding down the same road fascist Germany and Italy had taken.

For Hayek, increased government intervention inevitably meant greater coercion and a corresponding loss of individual freedom. In a 1944 lecture entitled *Individualism: True and False*² delivered at University College, Dublin, Hayek cited Adam Smith, with whom he strongly identified. Smith's main concern, Hayek believed, "was not so much with what man might occasionally achieve when he was at his best, but that he should have as little opportunity as possible to do harm when he was at his worst. It would scarcely be too much to claim that the main merit of individualism which Smith advocated is that it is a system under which bad men can do least harm."³ To Hayek, individual freedom could best be secured by a strong system of private property rights and voluntary cooperation. These would give rise to informal systems of order from which experimentation and innovation would flourish.

The source of Hayek's distrust of government intervention and his preference for decentralized decision making lies in his views about the nature and distribution of knowledge. The essence of his position is captured in what was no doubt a response to the United

† Irving D. and Florence Rosenberg Professor of Law, Southwestern University School of Law.

‡ Associate Professor of Law, Southwestern University School of Law.

1. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

2. FRIEDRICH A. HAYEK, *INDIVIDUALISM: TRUE AND FALSE* (1946).

3. *Id.* at 12.

States Supreme Court's reasoning in *Euclid v. Ambler Realty Co.*⁴ upholding the constitutionality of zoning laws. In his opinion for the Court majority, Justice Sutherland justified the decision as necessitated by the increasing complexity of modern society. "Until recent years, urban life was comparatively simple; but with the increase and concentration of population, problems have developed, and are constantly developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."⁵

Hayek's rejection of centralized urban planning was based on his belief in the impossibility of acquiring adequate information for informed prediction, and a related belief in the superiority of spontaneous forces over conscious decision making. He wrote in *The Road to Serfdom*:

There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a synoptic view of them that decentralization becomes imperative.⁶

This fiftieth anniversary of the publication of *Road to Serfdom* is an appropriate occasion to recognize Hayek's contribution to contemporary legal thought. Whether or not one agrees with him, Hayek offered compelling and provocative arguments on some of the central concerns of law and social theory, and his ideas continue to shape the current debate. Hayek's writings form the intellectual foundation for several strains of contemporary thinking about law. He is one of the foremost proponents of the rule of law and the role of clear legal standards and constitutions in promoting individual freedom. His ideas about order without design are to a large extent responsible for current interest in spontaneous systems of order. Related claims about the development of the common law and the superiority of evolutionary legal standards help shape thinking about the contemporary administrative state. His critique of socialism and central planning has particular currency today with the recent collapse of many of the world's planned economies and the world-wide movement toward privatization of state enterprises.

4. 272 U.S. 365 (1926).

5. *Id.* at 386-87.

6. HAYEK, *supra* note 1, at 48-49.

The articles published in this volume are the result of a symposium on Hayek held at Southwestern University School of Law in December of 1993. The contributors, leading figures in law, economics and history, address the salience of Hayek's ideas to current debates about the development of legal norms, the role of constitutions, economic regulation, and social theory. The final product is meant to begin to redress the neglect of this important thinker in legal scholarship.

The organizers of the symposium gratefully acknowledge the financial support of the Earhart Foundation.

ECHOES OF TOMORROW: THE ROAD TO SERFDOM REVISITED

Alex Kozinski and David M. Schizer†

Today, many of Friedrich A. Hayek's ideas have become familiar, so familiar they seem almost self-evident. We have to cast our minds back to the time Hayek was writing to appreciate just how prophetic and insightful his works really were. The world was a very different place in 1944, when Hayek published his most famous book, *The Road to Serfdom*.¹ History's bloodiest war was in full swing. While D-day and Stalingrad portended the triumph of the allies, Hitler's downfall was by no means assured.

America's relationship with communism was still unfolding. After an initial period of hostility toward the Soviet Union²—one that, in fact, motivated some to appease Hitler as a bulwark against the Bolshevik hordes—the West made a pact with the devil, cooperating with Stalin against their common Nazi enemy.³

But in 1944, if you think about it, communism was still a mystery to the West. At the time, the Soviet Union was the world's only communist power; it was not until after the war that communism engulfed Eastern Europe and later China, North Korea, Cuba, Vietnam, Nicaragua and, of course, Santa Monica.

And what did we really know about the Soviet Union? There were whispers about purges and mass starvation, particularly among

† Alex Kozinski is a Judge on the United States Court of Appeals for the Ninth Circuit. David Schizer is not.

Judge Kozinski delivered this essay (less the footnotes) on December 3, 1993, as the keynote address at Southwestern University School of Law's symposium on F. A. Hayek and Contemporary Legal Thought.

1. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

2. In fact, after the Russian Revolution, the United States joined a military operation to topple the Bolsheviks. See, e.g., Robin Wright, *Caution is Watchword as U.S. Faces a New Era*, L.A. TIMES, Sept. 2, 1991, at A1.

3. Perhaps Winston Churchill said it best when explaining why he was supporting Stalin: "If Hitler invaded hell, I would make at least a favorable reference to the devil in the House of Commons." Drew Middleton, *Hitler's Russian Blunder*, N.Y. TIMES, June 21, 1981, § 6 (Magazine), at 30, 65.

state department observers stationed in Riga.⁴ But many well-meaning people in the West—particularly folks on the Left—viewed the Soviet Union as an intriguing experiment.⁵ To enthusiasts, the U.S.S.R. was a worker's paradise, a shining example of what the world could be. In certain intellectual circles, it was almost surprising not to be a socialist.⁶ Remember that the Soviet Union was our ally at the time, so our government was churning out favorable propaganda about "Uncle Joe" and his hardy bands.

It is important to remember this context when we think about *The Road to Serfdom*: important because it shows how new—and how courageous—Hayek's scathing critique of state economic planning was; and important because it is absolutely extraordinary, given the small slice of history nourishing Hayek's insights, that he was right, dead right, about why collectivism is so very, very dangerous.

It is now half a century since Hayek published *The Road to Serfdom*. Much of our population was not even born when he wrote this terse, eloquent work—and a lot has happened since. A lifetime of conflict has raged over the ideas Hayek considered in his slender volume. Unimaginably destructive weapons have been aimed at the world's population centers, menacing the very survival of our species. Even under their shadow, we have seen revolutions reacting against the abuses Hayek identified. Millions have gained their freedom. Walls that seemed permanent came crashing down. We hope they stay down.

4. See generally DANIEL YERGIN, SHATTERED PEACE (1977) (describing "Riga axioms"—the suspicious view of the U.S.S.R. developed by State Department observers at Riga); see also Herbert E. Meyer, *A Trendy Cold War Fairy Tale*, FORTUNE, Nov. 1977, at 81 (faulting Yergin for questioning wisdom of "Riga axioms").

5. One such sympathizer, Benjamin Gitlow, is known to history for three achievements. First, he was a member of the Left Wing section of the Socialist Party. Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L.J. 59, 118 (1986). Second, he was convicted under New York's criminal anarchy statute for, among other things, "advocat[ing], advis[ing] and t[eaching] the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings . . . entitled 'The Left Wing Manifesto.'" *Gitlow v. New York*, 268 U.S. 652, 655 (1925). This case, incidentally, prompted a famous opinion holding that the First Amendment applies to the states, see *id.* at 666, and a renowned dissent by Oliver Wendell Holmes, see *id.* at 672-73 (Holmes, J., dissenting) (finding First Amendment violation). And Gitlow's final achievement—he is a distant cousin of one of the authors (the one who "is not").

For an interesting look at the attitudes of American socialists after the Soviet Union's collapse, see Donald Baer, *Leftists in the Wilderness*, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 26.

6. So it was, for example, in Irving Howe's circle of New York Jewish intellectuals during the '40s and '50s. See generally IRVING HOWE, *WORLD OF OUR FATHERS* 287-359 (1976) (describing Jewish socialist movement).

Our thesis though, is that today, after this frenetic rush of history, Hayek is not less relevant or less persuasive, but more so. In clear prose, he explains why collectivism—even the moderate, supposedly pro-democratic variety that is still popular in the West—can become the road to serfdom. As we read him, Hayek makes three arguments about why this is so. First, he tells us why collectivism cannot bring prosperity. Second, he tells us why a government that takes our economic liberties must surely come after our political rights as well. And finally, he tells us why collectivism's rhetoric about regularity and the common man is misleading—why, contrary to what many believe, it is collectivism that is elitist, while capitalism relies on the values and judgments of ordinary folks.

As we go through these arguments, we hope you will notice, as readers in 1944 could, how sensible they are as theories. But we also hope you will recognize something we can only know now—how faithfully history has confirmed Hayek's predictions.

There is one more thing we hope you'll remember. When Hayek criticized collectivism, he wasn't just worried about Stalin's or Hitler's variety. Rather, he was also concerned about what was then called "The Third Way,"⁷ and has since become known as welfare capitalism. Hayek believed that state economic planning was dangerous even in small doses. He thought this in 1944, when our government was a mere embryo of what it is today.⁸ Now, after we've created scores of new government agencies, printed millions of pages of regulations, and spent trillions of dollars⁹—often getting dubious returns for these efforts¹⁰—it is all the more useful to think about what Hayek said then, and, perhaps, what he would say now.

7. Kurt R. Leube, *Friedrich August von Hayek: A Biographical Introduction*, in HAYEK ON LIBERTY, at xvii, xxii (John Gray ed., 2d ed. 1986). In fact, Hayek dedicated the book "to the Socialists of All Parties." HAYEK, *supra* note 1, at ii.

8. To get a sense of how rapidly the size and budgets of our federal, state and local governments have exploded, compare the amount we spend today with what we spent in 1965—a massive \$2.3 trillion compared to \$678 billion, adjusted for inflation. Barry Asmus, *Private Sector Solutions to Public Sector Problems*, IMPRIMIS, Oct. 1993, at 2. And, of course, \$678 billion was far more than we spent in 1944.

9. Nor is this trend slowing. In fact, federal regulators have found a new target—the health care industry. Some experts predict the President's proposal will be three times as costly as social security, five times as large as medicare, and will consume 17.2% of the gross domestic product. See Paul C. Roberts, *Health-Care Reform: Have the Clintons Been Retouching the X-Rays?*, BUS. WK., Oct. 25, 1993, at 20.

10. Critics have noted how little the nation has benefitted from money spent in the last three decades to fight poverty. For example, if we had saved this money—a total of \$3.5 trillion—to invest it in real estate and stocks today, we could "buy every Fortune 500 company and every piece of farm land in America" and give them to the poor. Asmus, *supra* note 8, at 1.

I. THE THREAT TO PROSPERITY

Hayek understood that government planning could not bring the prosperity its advocates promised. But at the time he published *The Road to Serfdom*, his view was not widely shared. On the contrary, socialist economists believed that a government-directed economy would be far more efficient and productive than one governed by "anarchic" competition.¹¹ To this crowd, markets were wasteful. The lack of government regulation made them too prone to booms and busts. These cycles not only seemed untidy, but also put people out of work unnecessarily—or so the scientific socialists thought. Moreover, competition itself seemed wasteful. Why have more than one set of people tackling any given problem? Far better, these folks thought, for bright planners with sharp pencils and elite educations to take over: Would this not stabilize the gyrating business cycle? Would it not cut out competition's wasteful duplication of effort?

No way, said Hayek. Not only was it hard for him to imagine someone trustworthy enough to wield the enormous power governmental planning would require—a point we will return to later¹²—but he thought that even if you found such trustworthy souls (like the authors, for example), a centrally-directed economy would still starve for lack of one essential nutrient: information. No matter how gifted or hard-working the planners were—and Hayek would concede the brightest people you could imagine: Einstein, Plato, Tim Curry¹³—

Then, "what would the problem of poverty be like today? Would there be tens of thousands of Americans who are members of a 'permanent underclass' and millions more who qualify as 'working poor'?" *Id.* One has to wonder.

11. One of the most articulate socialist economists was Oskar Lange, who crossed swords with Hayek on a number of occasions. See Linda A. Schwartzstein, *Austrian Economics and the Current Debate Between Critical Legal Studies and Law and Economics*, 20 HOFSTRA L. REV. 1105, 1125 (1992). Lange is perhaps best known for claiming that government planners had enough information to allocate resources efficiently:

The economic problem is a problem of *choice* between alternatives. To solve the problem three data are needed: (1) a preference scale which guides the acts of choice; (2) knowledge of the "terms on which alternatives are offered"; and (3) knowledge of the amount of resources available. Those three data being given, the problem of choice is soluble.

OSKAR LANGE & FRED M. TAYLOR, ON THE ECONOMIC THEORY OF SOCIALISM 60 (Benjamin E. Lippincott ed. 1938). What a hoot! Needless to say, Hayek disagreed. See *infra* text accompanying notes 12-19; see also Friedrich A. von Hayek, *Two Pages of Fiction: The Impossibility of Socialist Calculation*, ECONOMIC AFFAIRS, Apr. 1982, reprinted in THE ESSENCE OF HAYEK 53-61 (Chiaki Nishiyama & Kurt R. Leube eds., 1984).

12. See discussion *infra* part II.

13. After all, do you think it's easy to play the same character in movie after movie?

they simply could never know enough to allocate productive resources sensibly, let alone to maximize total welfare.¹⁴

Think about the sheer volume of information needed to manage an entire industry, even a simple one like, say, making pencils.¹⁵ We are not talking about rocket science after all. But pencil planners would have to untangle some knotty supply problems:¹⁶ how forest fires might affect the supply of wood; whether a new supply of lead will become available; what toll tropical weather will have on the rubber crop needed for erasers; whether the truckers transporting raw materials will have enough fuel; how productive the workers making the pencils will be; and whether a better pencil-making technology exists, developed somewhere exotic like, say, Pasadena.

It is not just the amount of information planners would need that is daunting, but also the type. You will notice that so far we have only talked about information needed to *supply* the good. We have not talked about demand at all, what planners need to figure out how many of the darned things society will need.

As Hayek understood, that information is more important in determining price than the cost of producing a good. This insight is called the subjective theory of value, which is one of the most significant contributions of Hayek's Austrian School.¹⁷ The idea, though revolutionary at the time, is pretty simple: In deciding how much to pay for something, people don't say, "Well, I guess I should pay whatever some poor slob spent to produce it." They don't really care about the poor slob. Instead, they will pay what the item is worth to them—that is, how much it would enhance their welfare compared to other goods they could buy.

14. See HAYEK, *supra* note 1, at 58-59.

15. The informed reader is no doubt reminded of Leonard E. Read's excellent essay, "I, Pencil". Leonard E. Read, "I, Pencil", *IMPRIMIS*, June 1992, at 1.

16. As Leonard Read stated,

I, Pencil, am a complex combination of miracles; a tree, zinc, copper, graphite, and so on. But to these miracles which manifest themselves in Nature an even more extraordinary miracle has been added: the configuration of creative human energies—millions of tiny bits of know-how configuring naturally and spontaneously in response to human necessity and desire and in the absence of any human master-minding! Since only God can make a tree, I insist that only God could make me. Man can no more direct millions of bits of know-how so as to bring a pencil into being than he can put molecules together to create a tree.

Id. at 2-3.

17. Carl Menger, the founder of the Austrian School of Economics, is one of three economists credited with developing this idea, which led to the "Marginalist Revolution" in economics. See Schwartzstein, *supra* note 11, at 1123. The other two economists were William Stanley Jevons in England and Leon Walras in France. Christopher T. Wonnell, *Contract Law and the Austrian School of Economics*, 54 *FORDHAM L. REV.* 507, 510 n.24 (1986).

This idea—a departure from the way Marx and other classical economists thought about prices¹⁸—is absolutely crippling to our pencil planners because, though they might conceivably calculate costs of production, there is just no way they can figure out *ex ante* how much of a good people will want at a given price, let alone what the market clearing price would be. Nobody is that smart. Think about it. A really sharp pencil pusher—puns definitely intended—with a really big computer might conceivably figure out, say, the actuarially predicted weather and its influence on the rubber crop, the probable productivity of the factory workers, and so on. These quantities are knowable to a planner at least theoretically, because they are objective in some sense.

But not so with demand. Do people prefer pencils to pens? Do they like wooden pencils or the metal kind? Do they like the classic yellow pencil or brightly colored ones with cute cartoon characters on them? How do they feel about sharpeners? And of course, these are not really yes or no questions, though we have phrased some of them that way. The real inquiry is: At a given price, how will people react? How are our pencil pushers supposed to answer this question? With psychological experiments? With polling? Should they call in some collectivist version of the Gallup organization? Would they then plot their data on graphs to discern society's utility function? Maybe this could be done, but we have doubts—as, obviously, did Hayek. Our planners would more likely guess at a quantity and a price, and then wait and see if there is a surplus or a shortage. But that is an awfully clumsy way of doing things, particularly if they are slow to react—like most bureaucracies—and do not have competitors forcing them to be more accurate.

Remember, of course, that we have only thought about one industry, and a simple one at that. What if we told our cadre of pencil-planners to think bigger? "Plan more," we could say. "Plan America's vacuum cleaners. Plan America's antifreeze. Plan America's toothpaste. Plan America's curtains. Aw heck," we could say, "just plan it all." Could they do it? You bet they could—really, really, really, really badly. So badly, in fact, that our economy would grind to a halt.

"Well O.K., Mr. Hayek, that's fine," one could say. "You've made our pencil guys feel pretty bad, but do you have an alternative?" As a matter of fact, he did—market prices. No central planner can

18. Schwartzstein, *supra* note 11, at 1123 ("[C]lassical economists . . . believed that value was determined by resource costs in the past . . .").

process information nearly as well as a market price. A price, Hayek knew, is an aggregate of everybody's information—all their predictions, their preferences, their predictions about everyone else's preferences, etc. You name it, it's in there. And it all averages out; so the price tells us, better than any planner could, how much society values a certain good relative to others.¹⁹

So Hayek offered persuasive arguments about why collectivism could not bring prosperity. Even his readers in 1944 could have seen how coherent and logical his case was. But we can do better—we can see that history has proved him right. Like a wrecking ball, collectivism demolished every economy it has touched. When the Soviet Union collapsed, it was utterly bankrupt—its once proud agricultural system a joke, its consumer industries practically nonexistent, its housing cramped and decrepit.²⁰ How about Vietnam? Ho Chi Minh's socialist paradise is courting foreign investment and liberalizing its economy as quickly as possible.²¹ It is ironic that our goal years ago—keeping communism out of Vietnam—may finally be realized not because of our military might, but because communism is too flawed to survive. And how about Cuba? Now that they've lost their massive Soviet subsidy, they're tottering on the brink.²² Cubans have learned the hard way what Hayek knew before anyone heard of Fidel—centralized planning leads to national poverty.

II. THE THREAT TO LIBERTY

Collectivism does not just steal our prosperity. More important, it poisons our liberty. And this is perhaps the essence of Hayek's argument. He understood that some ideals transcend material well-being. Societies, he knew, can sensibly sacrifice prosperity in the name of a higher ideal—like freedom. But collectivism does not set people free; on the contrary, it is a short road to serfdom.

As Hayek understood, allowing government officials to plan our economic lives gives them an extraordinary capacity for tyranny. The state moves beyond controlling our lives in limited ways, like when it polices our streets and borders. Rather, collectivist states control it

19. See HAYEK, *supra* note 1, at 49-50.

20. For a powerful description of the Soviet economy in its death throes, see PAUL C. ROBERTS & KAREN LAFOLLETTE, *MELTDOWN: INSIDE THE SOVIET ECONOMY* (1990).

21. See, e.g., David Rogers, *Young and Restless: In the New Vietnam, Baby Boomers Strive for Fun and Money*, WALL ST. J., Jan. 7, 1994, at A1, A4.

22. See, e.g., David Asman, *The U.S. Should Punish Fidel by Granting His Wish*, WALL ST. J., Jan. 7, 1994, at A1.

all. Consumers fall under the smothering blanket of government fiat. It is not their preferences, but those of governmental planners, that determine resource allocation.²³ To get back to our example, if our pencil planners like red pencils—to pick a color not quite at random—pencils will be red even if consumers prefer yellow. Not so, obviously, in a free society, where it is the customer, not the bureaucrat, who is always right.²⁴

When the consumer in a collectivist state goes to work and becomes a producer, he is also under the thumb of—you know who—the government. Your capacity for professional advancement—and perhaps even your choice of profession to begin with—is captive to the state, or, more precisely, to the bureaucrats who act in its name. If you do not like them or they do not like you, tough luck. You cannot quit and go to work for anyone else.

Moreover, by controlling the means of production—that is, society's material wealth—the government has a stranglehold on the material means people can use to protest government action. For example, one of the first things Lenin and his gang of thugs did in 1917 was to seize all printing presses. As one of his underlings put it before the Council of People's Commissars: "The revolution which is now being accomplished has not hesitated to attack private property; and it is as private property that we must examine the question of the Press. . . ." ²⁵ From this premise, he concluded that, "We must . . . proceed to the confiscation of private printing plants and supplies of paper, which should become the property of the Soviets . . ." ²⁶ The rest is history.

The truth is, in a collectivist regime you are really stuck. The government tells you what you can buy, where you can work and even what resources, if any, you can use to protest its policies. Hayek saw, though, that government planning is dangerous for yet another reason. By directing the economy, the government not only gains greater control over our lives, it also frees itself of an extremely important constraint on its power—the rule of law. As Hayek understood this phrase, it "means that government in all its actions is bound by rules

23. HAYEK, *supra* note 1, at 65.

24. For a particularly thoughtful and eloquent exposition of this idea, see Malcolm S. Forbes, Jr., "Three Cheers for Capitalism", *IMPRIMIS*, Sept. 1993, at 1, 2-3 ("The market is *people*. All of us. We decide what to do and what not to do, where to shop and where not to shop, what to buy and what not to buy.").

25. JOHN REED, *TEN DAYS THAT SHOOK THE WORLD* 268 (International Publishers 1967) (1919) (quoting Avanessov).

26. *Id.*

fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."²⁷

This constraint is pretty important. It means you can figure out how to stay out of trouble with the government. It also gives us an independent standard for judging the state, and particularly the way it treats individuals. Favoritism and discrimination become easy to detect; as a result, the government is less likely to engage in such behavior.

Hayek realized, though, that the rule of law and the beneficent constraints it imposes on arbitrary state power can only be meaningful if rules constraining the state are clear and do not give its agents too much discretion.²⁸ Were it otherwise, government officials would not really be constrained. For example, think about two rules: the first says, "Officers of the state shall only execute those convicted of murder"; the second says, "Officers of the state shall only execute those they deem dangerous to the welfare of the state." The first rule is a pretty effective safeguard against arbitrary state action—state officials cannot take your life unless you do something pretty bad and pretty clearly defined. It is true, of course, that they could try to frame you or rig your trial, so this rule, by itself, does not offer absolute protection. But compare it to rule number two: All it really says is that a state officer can only kill you if he feels like it—all he has to do is say he thought he was acting to protect the state. This rule does not constrain the government at all.

Hayek used this insight—that only nondiscretionary rules constrain arbitrary governmental power—to show another reason why state economic planning endangers our liberty. Economic planning, he said, cannot be governed by nondiscretionary rules—the sort that prevent arbitrary government action. Those making economic judgments must have discretion about what goals to pursue and how to pursue them; otherwise, they simply cannot do their jobs.²⁹ But by giving such decisions the force of law, we grant decisionmakers enormous power—we cannot judge their commands by any precise external standard.³⁰ We cannot say, "You may only do this and this, and only under these narrow circumstances"—a mandate that is verifiable.

27. HAYEK, *supra* note 1, at 72 (footnote omitted).

28. *See id.* at 72-79.

29. *See id.* at 74-75.

30. *See id.* at 81-83.

Instead, we must say something like, "Do what you must, as long as it is in society's interest." Would anyone like to try prosecuting a violation of that rule? A bureaucrat could use that mandate to justify almost any behavior: playing favorites, tormenting his enemies, lining his pockets, or whatever else he feels like. State economic planning involves raw, unconstrained power and, as such, is extraordinarily dangerous.

But the peril, Hayek realized, is graver still. Not only does state planning create the *potential* for tyranny (as we have just seen), but also the *need* for it—at least in some people's minds. Economic planning, more than other government action, requires planners to impose their preferences on the general population, something which is not easily done through democratic processes.³¹

Why are economic decisions different? Think about other decisions a government may make, like outlawing murder—it is something we all can agree on in some sense. Or traffic lights. We are all willing to sacrifice some freedom—that is, the freedom to go when the light is red—to ensure that when we go, we will be safe. Contrast economic decisions. Economics, you will recall, has been called the "dismal science" because it is about trying to satisfy unlimited wants with limited means.³² We would all like everything, but we can't have it. Instead, we have to rank our preferences. The essential point, though, is that we do not all share the same priorities and tastes.³³ Some people, for example, actually fail to realize Jim Morrison was God's gift to the sixties.³⁴

So if everyone's preferences are different, whose priorities will guide state planners? They might ask the people, or at least their elected representatives, to vote on priorities, but that is awfully unwieldy. Think about how much trouble Congress has coming up with a budget; how easily could they come up with a rational, synoptic plan for our entire economy? Hayek certainly did not think they could—and that was 1944, before "gridlock" became a political cliché. "Parliaments come to be regarded as ineffective 'talking shops,' unable or incompetent to carry out the tasks for which they have been chosen.

31. See *id.* at 65-68.

32. See, e.g., Burton Y. Pines, *The Lessons of Reaganomics*, HERITAGE FOUND. REPS., Mar. 25, 1987, at 1, available in, LEXIS, EXEC Library, HFRPTS File (describing economics as a dismal science because it focuses on scarcity).

33. See HAYEK, *supra* note 1, at 57-58.

34. See, e.g., Alex Kozinski, *A Drummer Tries to Remember Jim Morrison*, WALL ST. J., June 14, 1991, at A8 (reviewing JOHN DENSMORE, *RIDERS ON THE STORM* (1990)).

The conviction grows that if efficient planning is to be done, the direction must be 'taken out of politics'"³⁵

The end result will be that we will need so-called "experts" to set priorities for us. In so doing, they will impose their values on us—something that is really impossible without a powerful state apparatus. This brings us awfully close to tyranny. Hayek was not exaggerating by much, if at all, when he said that "planning leads to dictatorship because dictatorship is the most effective instrument of coercion and the enforcement of ideals and, as such, essential if central planning on a large scale is to be possible."³⁶ And, of course, the end result can be tragic. "When [democracy] becomes dominated by a collectivist creed," Hayek said, "[it] will inevitably destroy itself."³⁷

History has affirmed Hayek's judgment here as well. Citizens of totally collectivist societies have lived at the mercy of the state—and the petty tyrants acting in its name—because they've had no choice but to buy its goods and work at the job they'd been given. Discrimination and harassment based on ethnicity, religion and gender have been all too common for workers in communist states. One of the authors first learned the extent of this problem during the early 1970s, on a trip back to Romania, where he was born. He struck up a conversation with a man in a small town near Timisoara, who had two grown children, a son and a daughter. When asked whether they were going to the university, the man said yes as to the daughter, but no as to the son—not because the daughter was a lot smarter than the son, but because, as he put it, "it's far better to step with your boot into cow manure than to take off your boot and fill it with manure." The author must have looked baffled because the man explained: The son could take care of himself, but the daughter, unless she was armed with a superior education, would be constantly harassed for sexual favors by her supervisors. How did he know? "Because," he said, "I was a supervisor."

History reveals that giving the state massive economic power not only leaves citizens without escape from abusive treatment, but also

35. HAYEK, *supra* note 1, at 62.

36. *Id.* at 70.

37. *Id.* This insight is particularly apt as to societies where the state controls virtually all economic activity. It is less true, of course, for societies with partial state ownership—as not all have descended into dictatorship. France, Germany and Israel, for example, have thriving democracies even though certain of their industries are under state control. Nor are free market societies immune to dictatorship. However, the trend is clear: economic and political liberties are intimately related. For a particularly insightful exploration of this phenomenon, see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

enables the state to insinuate itself into all aspects of their lives. In fact, the Soviet Union and its satellites were among the most repressive states in human history. They systematically denied citizens the most basic rights: to worship as they pleased; to say or write what they thought; to choose their own profession; to travel freely; to get a meaningful trial before incarceration, etc. Massive internal policing organizations robbed the people of their privacy and engaged in gruesome torture.

As Hayek predicted, these nations did not use democratic processes to decide how to allocate resources. On the contrary, they outlawed the opposition and made all decisions through elitist institutions. Those who did not agree were silenced, and sometimes imprisoned, tortured or even killed. There can be no doubt: The Soviet state and the pygmies it created in its own image—each of which had a chokehold on its citizens' economic and political lives—offer uniquely vivid proof of the proposition that absolute power corrupts absolutely.

III. THE FALSE PROMISE OF EQUALITY

Some true believers might surrender prosperity and individual liberty in exchange for virtues they find only in collectivism: true equality and respect for the dignity of the common citizen. Admittedly, at its core, collectivism has some very high sounding ideas—from each according to his ability, to each according to his need. A society of equals. The celebration of the common man and woman—and their common offspring.

Though Hayek could see the appeal of such rhetoric—as, no doubt, could anyone—he recognized that the massive power which state bureaucracies assume for economic planning necessarily leads to social stratification: There would be no society of equals as long as bureaucrats wielded so much power.³⁸ Instead, they would be masters and the rest would be slaves.

On this point, too, history has surely proved him right. In fact, few modern societies have been as stratified as those under collectivist rule. Behind the Iron Curtain, a powerful elite—the folks who wielded both society's political and economic power—demanded and enjoyed a high standard of living, leaving the rest of society in poverty. In the Soviet Union, for example, members of the party elite could claim various privileges, among them better food, schools and housing, in addition to the use of servants, cars and party-owned vaca-

38. See HAYEK *supra* note 1, at 101-03.

tion homes.³⁹ They shopped in special stores with higher quality food, scarce consumer goods and luxury items. This Soviet model was widely imitated in other collectivist economies.

One could say, of course, that this outcome is merely an abuse, a perversion of an otherwise sound idea. To make this case, one has to explain why the abuses are so utterly widespread. But more fundamentally, such defenses of collectivism must fail because—notwithstanding all the rhetoric—collectivism is an inherently elitist idea: It does not trust people to choose for themselves. Instead, it relies on a small sliver of society—those with the right connections, educations, ruthlessness and ideological fervor—to make decisions for everyone else.

The fundamental premise of free market societies is very different. It is that each of us—regardless of who our parents are, where we went to school, what our religion is, or what continent our ancestors came from—knows far better than anyone else what fulfills us. We know what we need and we are free, within the bounds of the law, to pursue our dreams. No one else is needed. No five year plan. No communist party. No oppressive state. Just us.

We realize what we say could seem surprising. Many, after all, have described collectivism as egalitarian and capitalism as elitist—hey, we've seen Oliver Stone's "Wall Street";⁴⁰ we know that capitalists are just pampered crooks who wear expensive suspenders. But free markets do not just serve corporate raiders—they serve us all. They ennoble each and every one of us by affirming our right to choose and by deferring to our choices. We speak through prices, and our voices count.

If the world has learned anything in the half century since Hayek published *The Road to Serfdom*, it is the wisdom of what Hayek said there. We have seen war. We have seen brutality and dictatorship. And we have seen an awakening of freedom in places where it had long been dormant. We hope our nation will remember the lessons Hayek understood so long ago, lessons others learned only through misery and bloodshed. Our liberty and our prosperity are precious. They are also fragile. We must remain forever vigilant—and forever grateful.

39. ROBERTS & LAFOLLETTE, *supra* note 20, at 67-74. See generally MICHAEL VOSELSKY, *NOMENKLATURA: THE SOVIET RULING CLASS* (Eric Mosbacher trans., 1984). There are, in fact, books that list members of the Soviet elite along with their ranks and the privileges they could claim. See, e.g., ALBERT L. WEEKS, *THE SOVIET NOMENKLATURA* (1987).

40. *WALL STREET* (Twentieth Century Fox 1987).

DECENTRALIZED LAW FOR A COMPLEX ECONOMY†

Robert D. Cooter‡

As the economy grows in complexity, the constraints of information and motivation tighten on centralized lawmaking. Specialized business communities develop their own norms, which I call the "new law merchant." Decentralized lawmaking involves selectively enforcing those norms. Selection should be based upon the incentive structure which caused the norm to evolve, which I call the "structural approach to adjudication." The structural approach to adjudication uses economics to revive and modernize the old conception that judges should find law, not make it. Norms evolve when players have incentives to signal that they are following a cooperative strategy which will increase the supply of local public goods. The obligations imposed by social norms are efficient in the absence of spill-overs, but the level of informal enforcement is deficient.

I. LEGAL CENTRISM

Central planning is a way of making law, as well as commodities. Officials must have the power to allocate resources to implement the central plan. To possess this power, the orders issued by planning officials at the top must trump the rights of property and contract enjoyed by people and enterprises at the bottom. Thus public law crowds out private law. The paradigm for centralized lawmaking is a decree, in

† A version of this article with a more detailed economics discussion will appear as Robert D. Cooter, *Structural Adjudication and the New Law Merchant*, in INTERNATIONAL REVIEW OF LAW AND ECONOMICS (forthcoming 1994). This Article draws upon a related paper of mine entitled *The Structural Approach to Adjudicating Social Norms: Evolution of the Common Law Reconsidered* (1990) (on file at Boalt Hall University of California, Berkeley, Working Papers in Law and Economics #90-5). I am grateful for the comments from Wolfgang Fikentscher, Paul Edwards, Judge Richard Posner, Dan Rubinfeld, Hans-Bernd Schafer, Claus Ott, and Goran Hagg, who participated in the Conference on European Corporate Law, Vitznau, Switzerland, September 1993; the participants in *F.A. Hayek and Contemporary Legal Thought Symposium*, Southwestern University School of Law, December 1993; and participants in a law faculty seminar, University of Michigan, Ann Arbor, November 1993.

‡ Professor of Law, Boalt Hall University of California, Berkeley.

which government officials formulate the state's goal, embody the goal in a rule, and force people to conform to it. Information and motivation move along a one-way street from the top to the bottom.

Only communist dictatorships have practiced central planning as a total system. However, democracies have at times adopted procedures similar to central planning to solve specific economic problems. To illustrate, when Professor Richard Stewart stepped down recently from his position as the highest ranking environmental lawyer in the United States Department of Justice, he remarked that "America's environmental laws are based upon Soviet style centralized planning."¹ He meant that America tries to control pollution by quotas imposed upon businesses by federal officials. Such procedures have been called "command-and-control regulations" or "legal centrism."²

Many scholars have detected movement in modern history towards centralized law.³ Many intellectuals believe that centralized law is inevitable, just as they once believed that socialism is inevitable. In fact, centralized law, like socialism, is not plausible for a technologically advanced society. The forces that reversed the trend towards socialism and destroyed central planning are also undermining legal centrism. An advanced economy involves the production of too many commodities for anyone to manage or regulate. As the economy develops, the information and incentive constraints tighten upon public policy. These facts suggest that, as economies become more complex, efficiency demands more decentralized lawmaking, not less.

Lawmaking can proceed from bottom to top rather than top to bottom. Decentralized lawmaking has several forms. One form of decentralized lawmaking is to induce people to create a market by assigning property rights to them. To illustrate, environmental officials in the United States are now creating tradable emission rights so that the market for emission rights will determine each firm's level of pol-

1. Personal communication with Professor Don Elliott of Yale University (1993).

2. See generally STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); CHARLES SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 7-8 (1977).

3. Salmond concluded that customary law is important in the early stages of legal development, but gradually cedes its place to statutes when "the state has grown to its full strength." JOHN W. SALMOND, *JURISPRUDENCE* 66-67, 189 (P.J. Fitzgerald ed., 12th ed. 1966). In a recent article, Claus Ott and Hans-Bernd Schafer point out that modern German Law has moved away from customary law and towards statutes. Claus Ott & Hans-Bernd Schafer, *Emergence and Construction of Efficient Rules in the Legal System of German Civil Law*, presented to the European Law and Economics Association Meeting (Aug. 1991). In making these remarks, they are describing history, not passing judgment upon it.

lution.⁴ The subject of this lecture is another form of decentralized lawmaking: enacting custom. For example, courts may determine fault and liability for accidents by applying the norms of the community in which the accident occurred.

II. NEW LAW MERCHANT

The modern economy creates many specialized business communities. These communities may form around a technology such as computer software, a body of knowledge such as accounting, or a particular product such as credit cards. People develop relationships with each other through repeated interactions in a community, and norms arise to coordinate their interaction. The formality of the norms varies from one business to another. Self-regulating professions, like law and accounting, and formal networks like Visa,⁵ promulgate their own rules. Voluntary associations, like the Association of Home Appliance Manufacturers, issue guidelines.⁶ Informal networks, such as computer software manufacturers, have inchoate ethical standards. I refer to all such norms of business communities as the "new law merchant."⁷

The new law merchant arises outside of the state's lawmaking apparatus. However, lawmakers are pulled into the affairs of business communities by insiders who look to the state to resolve their disputes and make their laws. Lawmakers are also pushed into the affairs of business communities by outsiders who seek to regulate private wealth and power. How should the state respond? The traditional account of the "law merchant," from which the phrase the "new law merchant" is adapted, provides a model. The merchants in the medieval trade fairs of England developed their own rules, and in some cases, their own courts. However, as the English legal system became stronger and more unified, English judges increasingly assumed jurisdiction over disputes among merchants. The English judges did not know enough about these specialized businesses to evaluate alterna-

4. For a review of theory and practice, see TOM TIETENBERG, *ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS* (3d ed. 1992). Other examples of law inducing markets are patent and copyright law.

5. The Visa payments network is actually divided into two corporations with different operating rules, one for American transactions and another for international transactions.

6. DAVID HEMENWAY, *INDUSTRYWIDE VOLUNTARY PRODUCER STANDARDS* (1975).

7. The term has also been applied more restrictively to norms of international trade invoked in arbitration and mediation.

tive rules.⁸ Instead of imposing rules, traditional history asserts that English judges tried to find out what practices already existed among the merchants and enforce them. By this process, the law merchant was allegedly absorbed into English common law. The pinnacle of this process was the development of the law of bills and notes in the eighteenth century by Judge Mansfield.⁹

III. STRUCTURAL APPROACH

According to this history, the English judges dictated conformity to merchant practices, not the practices to which merchants should conform. Modern lawmakers should respond to the new law merchant much like the English common law courts responded to the old law merchant. However, the process of discovering and enforcing social norms needs to be updated in light of modern economics. The adjudication of the new law merchant should typically involve three steps. First, lawmakers should identify the actual norms that have arisen in specialized business communities. Second, lawmakers should identify the incentive structures that produced the norms. Third, the efficiency of the incentive structures should be evaluated using analytical tools from economics. Those norms should be enforced that arise from an efficient incentive structure, as ascertained by tests that economists apply to games.

I call this procedure the "structural approach" to adjudicating social norms. The structural approach conflicts with the economic analysis of law in two respects. First, lawmakers following the structural approach infer the efficiency or inefficiency of a norm, rather than measuring it directly. In contrast, much of the economic analysis of law commends the evaluation of legal rules by cost/benefit techniques. For example, at the end of his classic article entitled *The Problem of*

8. Personal communication with Wolfgang Fikentscher (1993) ("The decisions of the Munich traffic court of appeals concerning motor vehicle accidents improved markedly after the judges learned to drive.").

9. The traditional theory was developed by J. Milnes Holden. See J. MILNES HOLDEN, *THE EARLY HISTORY OF NEGOTIABLE INSTRUMENTS* 1-44 (1955); see also John Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979) (criticizing Holden). A revised view, which stresses that Mansfield immersed himself in the minutiae of business practice in order to extract the best principles from it, is found in JIM ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW* (forthcoming 1994). I am grateful to Jim Rogers for discussing these points with me.

Social Cost,¹⁰ Ronald Coase recommends that judges choose among alternative liability rules by comparing their costs and benefits.¹¹

Second, my structural approach applies to norms, not regularities. To illustrate the difference, men take off their hats when they enter a furnace room or a church.¹² Taking off your hat to escape the heat is different from taking off your hat to satisfy an obligation. The former is a regularity and the latter is a norm. A regularity results from an inclination, whereas a norm imposes an obligation. Economic models seldom distinguish between an equilibrium sustained by inclination or obligation. However, people respond differently to changes in incentives, depending upon whether they are motivated by inclination or obligation. To explain why, I will sketch the theory of norms that underlies the structural approach to adjudication.

IV. EVOLUTION OF NORMS

A norm imposes an obligation on the people subject to it. For example, a formal law exists when the state imposes an obligation upon its citizens. Similarly, a custom exists when a community of people reaches an informal consensus about what its members ought to do. The existence of customs challenge theorists to explain why some games create or evoke a sense of obligation in the players concerning the strategies that they follow. I will sketch an answer to this question.

In many games the players can signal their intentions. The signal conveys information to others concerning the strategy being followed. Sometimes everyone has an incentive to transmit the same signal. To illustrate, imagine a sequential game involving two players and two moves. The first player chooses to invest or not. Subsequently, the second player cooperates or appropriates. Cooperation is productive, whereas appropriation redistributes the value of the investment. The first player will not invest unless he believes that the second player will cooperate. Therefore, the second player wants the first player to believe that he will cooperate, regardless of what he actually plans to do. Consequently, the second player will endeavor to signal "cooperation."

10. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

11. An exception to the enthusiasm for judicial cost/benefit analysis is Richard Epstein's view that judges should not have so much discretion. See Richard Epstein, *The Rule of Risk/Utility*, 48 OHIO ST. L.J. 469, 469-70 (1987).

12. Equivalently, men put on a hat in a snowstorm or a synagogue.

Now imbed this two person game in a market with many participants. The participants consist of many "first players" who want to invest, and "second players" who want to find an investor. After finding an investor some second players cooperate and others appropriate. However, all second players endeavor to signal cooperation. A game in which everyone follows the same strategy has a "pure equilibrium." In this game, everyone follows the same signalling strategy. Thus, my example concerns a game with a "pure signaling equilibrium."

The signal represents the player as following a particular strategy. A player who represents himself as following one strategy may actually follow another. Specifically, a player who represents himself as cooperating may actually appropriate. In a "mixed equilibrium," some players cooperate and others appropriate. Some people cooperate in order to form enduring relationships and secure a modest payoff in many rounds of the game. Some people appropriate in order to secure a large payoff in a few rounds of the game, even though their relationships continually break up and they receive no payoff in most rounds. In equilibrium, both strategies earn the same average rate of return.¹³ Thus my example concerns a game with a "pure signaling equilibrium" and a "mixed behavioral equilibrium." In other words, there is a consensus about what people ought to do, but some people do not do it.

Cooperation by one player in a game often conveys benefits that spill-over to the other players. To illustrate, more cooperation in the investment game will elicit more investment, which benefits all the players. These external benefits, which everyone who plays the game enjoys, can be called "local public goods." Thus, the investment game has an equilibrium in which the players signal that they will supply a local public good.

Since the community benefits from local public goods, people concerned with its welfare will want to increase their supply. These people will say that everyone ought to cooperate, and they will condemn those who appropriate. Saying that all people ought to cooperate, and condemning people who appropriate, can signal that the speaker will cooperate. If everyone follows this signaling strategy, a consensus will arise in the community that people who play the game

13. By definition, an evolutionary equilibrium exists when all strategies actively played earn the same average rate of return.

ought to follow a cooperative strategy.¹⁴ In other words, a norm will evolve.

To summarize, the fact that everyone has an incentive to signal the same strategy creates a consensus in the community of players. Following this strategy creates a local public good. Consequently, the consensus expresses itself as a judgment about what people want to do. Generalizing, I formulate the *alignment theorem*: *A social norm will evolve in a community when private incentives for signaling align with a local public good.*¹⁵

V. EFFICIENT SOCIAL NORMS

The person who supplies a public good does not capture the benefits that he conveys to others. Social norms try to correct for the under-supply of public goods. When a norm evolves, most people will conform to it and some people who violate it will suffer a social sanction. Insofar as the sanction discourages violations, the existence of the norm will increase the supply of local public goods. Viewed functionally, a social norm is a device for increasing the supply of local public goods.

The proposition that social norms contribute to efficiency belongs to the utilitarian tradition,¹⁶ which has recently received a forceful restatement from Robert Ellickson.¹⁷ After studying social norms concerning cows and whales, Ellickson offered this generalization:

14. Notice that if *all* players say that everyone ought to cooperate, the fact that one player says it provides no basis for distinguishing him from anyone else. In other words, the communication carries no information. Even so, denying that everyone ought to cooperate would convey information that no one wants to transmit about himself.

15. Robert D. Cooter, *Strucutral Adjudication and the New Law Merchant*, in INTERNATIONAL REVIEW OF LAW AND ECONOMICS (forthcoming 1994). The alignment theorem can be distinguished into weak, strong, and very strong forms, depending upon whether the alignment of private incentives for signaling with a local public good is a sufficient, necessary, or necessary and sufficient condition, respectively, for the evolution of a social norm.

16. Bentham, the first systematic utilitarian, asserted that people do what is socially efficient, and avoid doing what is socially inefficient. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1948).

17. ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) [hereinafter ELICKSON, ORDER WITHOUT LAW]. The author draws on his three prior articles: Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORGANIZATION 83 (1989). Ellickson's book shares its title with an article published by Jane Goodall in two sources. See Jane Goodall, *Order Without Law: How Neighbors Settle Disputes*, in LAW, BIOLOGY AND CULTURE: THE EVOLUTION OF LAW 50 (1983) and Jane Goodall, *Order Without Law: How Neighbors Settle Disputes*, 5 J. SOC. & BIOLOGICAL STRUCTURES 353 (1982).

"Members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workday affairs with one another."¹⁸

Game theory can provide a theoretical foundation for Ellickson's empirical generalization. Many games have a cooperative solution which is efficient, and a non-cooperative solution which is inefficient. The non-cooperative strategy often dominates when the game is played only once, whereas the cooperative strategy often dominates when the game is played repeatedly. When a game is repeated, the players can punish non-cooperators by using strategies such as "tit-for-tat" and exiting from the relationship. The alignment theorem adds that in order for a norm to evolve, most people must have an incentive to signal conformity with it.

VI. NORMATIVE FAILURE

So far I have discussed how social norms contribute to efficiency. There are circumstances, however, under which particular social norms harm society as a whole. The problem typically arises when a public good for one community is a public bad for another community. In other words, the problem arises when behavior creates an external benefit in one community and an external cost in another community. To illustrate, the members of a business cartel can benefit each other by keeping prices high. From the viewpoint of the cartel, discounting the price is "cheating." However, discounting benefits people outside the cartel more than it harms the members of it. Consequently, discounting is socially efficient, whereas the cartel is socially inefficient.

The case is weak for enforcing social norms that create a benefit for one community at the expense of another. Rather than enforcing social norms blindly, judges would do better to enforce them selectively. The selection should be based upon the incentive structure in the underlying game. When applying the structural approach to adjudicating the new law merchant, a persistent problem is distinguishing between social norms that lubricate commerce by increasing the scope of cooperation, and social norms that inhibit commerce by imposing monopoly restrictions.

18. See ELICKSON, ORDER WITHOUT LAW, *supra* note 17, at 167.

VII. CONCLUSION

Many scholars regard customary law in post-industrial society as a vestigial organ, like the human appendix.¹⁹ This view misinterprets the path of social change. People can often create a surplus by cooperating together, provided they can agree upon its distribution. Although, business communities continually generate social norms to solve this problem, informal enforcement of social norms does not deter enough people from violating them. Thus, by enforcing social norms, judges typically increase the amount of cooperation within the community where it arose. However, some norms benefit one community at the expense of another. Accordingly, adjudicators should examine the incentive structure that caused a norm to evolve in order to distinguish local public goods from harmful spill-overs.

The structural approach can revive and modernize the old conception that judges should find law, not make it. Reviving and modernizing this conception grows more urgent as the economy's complexity increases and the information constraints tighten upon adjudication.

19. For example, Salmond thought that customary law, though originally important, naturally yields to statutes as the state acquires power. See SALMOND, *supra* note 3, at 189-212.

HAYEK AND COOTER ON CUSTOM AND REASON

Robert W. Gordon†

I came to the conference a little uncertain about how to handle the assignment of a commentator on a paper by a distinguished economist at a symposium on Hayek. I cannot claim any expertise either about Hayek's thought or about law and economics, other than an interested tourist's acquaintance with either. Yet, both Professor Cooter's paper¹ and much of Hayek's legal theory touch on an issue familiar to all legal historians. It is perhaps the oldest and most contested of all issues in legal thought and practice, that of the relations between law and custom, both as they are and as they should be. There are revealing differences on this issue between (what I understand to be) Cooter's approach and Hayek's approach.

Both Cooter and Hayek have a great regard for "spontaneous orders" — norms and conventions emerging over time from continuous practices of interaction.² For a legal system, consulting such spontaneously evolved orders helps to solve the awesome difficulties of obtaining enough information to come up with just and efficient rules for the resolution of disputes, just as the price signals emanating spontaneously from markets overcome the insuperable information barriers to rational central planning. The spontaneous order is presumptively efficient, or latently functional, as sociologists put it, even though individual participants themselves may be unaware of its functions and how their order serves it. It is rational at the system level, not at the individual level.

Yet, on closer inspection, I think Hayek's treatment of a particular set of spontaneous orders, that of customary communities, is quite different from Cooter's. Cooter is willing to accept any community's

† Adelbert H. Sweet Professor of Law, Stanford University. Thanks to Mark Kelman for talking over these ideas with me.

1. Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 Sw. U. L. REV. 443 (1994).

2. *See id.* at 447-49.

customary norms as presumptively good for adoption by the legal system.³ In other words, the law is likely to function best by tracking the customary norms. Under common law terminology, any custom, or at least any custom evolved from the "appropriate set of incentive structures," is presumptively *reasonable*. Cooter recognizes exceptions where there may be problems of spillovers, exploitation, or non-convexity.⁴ These exceptions are numerous, when you add them all up, and it is fair to ask whether having a court resolve in every case whether a customary norm fits into one of the exceptions does not vitiate many of the scheme's information-saving virtues.

In contrast, Hayek is decidedly more ambivalent about customary communities. Apparently, the kind of spontaneous order he most admires is the kind developed in the most abstract markets—markets not "embedded" in face-to-face relationships, kinship or religious ties, in craft guilds obeying a traditional regulatory order or in local customary practices. By analogy, he extends his admiration for the spontaneous order of markets to the "common law"—whose judges, like market actors, are constantly making interstitial adjustments to a dynamic ongoing system of practices that is not the deliberate rational construction of any single social agent. He refers with approval to the legal theorists of the evolutionary common-law mind, Mathew Hale, Blackstone, Burke, Savigny—all of whom locate the common law's genius in its tracking of social custom, at least "reasonable" custom: In its "English" or "bottom-up" character as opposed to "French" or "top-down" systems, what Hayek calls "constructivist" systems.⁵

However, the common law theorists have always had a tough time straddling the divide between custom and reason, trying to reconcile the particularistic, case-centered, precedent-oriented, local-jury reliant, local usage-respecting tendencies of the common law method, with the common law's generalizing and universalizing tendencies. Such generalizations include the ideal of common law as a science of principals of which the cases and particular judgments are only illustrations, and often mistaken illustrations at that, to be cast out to the extent they may mar the harmony and order of the general science and further as a *common* law, a law for the realm as a whole.

3. See generally *id.* at 446, 449.

4. See *id.* at 450.

5. See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 54-70 (1960) [hereinafter *CONSTITUTION OF LIBERTY*]; FRIEDRICH A. HAYEK, *1 LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 17-34, 72-74, 118-23 (1973) [hereinafter *RULES AND ORDER*].

On the whole, I believe that in these historical divisions there can be little doubt on which side Hayek is usually found. Despite bows to the common law's evolutionary particularism, he sides with the abstracters and generalizers. His legal ideal is that of a system of formal, gender-neutral "rules of just conduct," applying equally to all and not designed with the satisfaction in mind of any local community's or associations' purposes.⁶ A general legal order, if it remains general in application (a big "if" that I will come back to), cannot be a customary one, since custom is irreducibly local and particular. The lawyers of the classical period (approximately 1860-1920) tried to mediate the tension between custom and reason in many of the same ways as Hayek. First, Hayek argues that the law does not support every customary expectation, but only such as are reasonable, as those expectations are required to maintain an "ongoing order of actions."⁷ Second, Hayek ingeniously postulates that the law has gradually evolved towards its present tendency to approximate a system of general-abstract principles.

At this level of the debate, however, we can learn very little that is important about the tension between custom and reason in the law. For however general rules or standards may be in their formulation, at the moment of their application they are invariably concrete. For example, it makes a big difference whether, in the interpretation of contractual or testamentary intentions or in constructing the duties and capacity to foresee harms from conduct, the court relies on a lawyer's reading, a trade expert's reading, a hypothetical "reasonable man's" reading, or a lay jury's reading of facts and norms, and what procedures it chooses to ascertain these. Medieval law's claim to be "customary", which is the claim carried over into Hale, Burke and Hayek, rested on a specific procedure by which issues of customary norms and practices were resolved by local juries: They reported to the court the local customs they knew, and if the custom was ambiguous or contested, as it often was, they reported it as it should be, that is, as a negotiated consensus among themselves as to what it should be. As this procedure gradually fell into decay, judges began referring to the judgments of prior *courts* as the best evidence of custom; but this was clearly becoming a wholly fictional custom, and one that opened a great gulf in many fields between local or lay expectations and the

6. See CONSTITUTION OF LIBERTY, *supra* note 5, at 148-61; RULES AND ORDER, *supra* note 5, at 85-88; FRIEDRICH A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 11-30 (1976) [hereinafter MIRAGE].

7. RULES AND ORDER, *supra* note 5, at 98.

common lawyers.⁸ Thus the common law evolved, but in directions often entirely at odds with the communities it regulated. Sometimes, although rarely, the common law refreshed itself at the source by dipping back into custom. Cooter refers to Lord Mansfield's contributions to incorporating the law merchant into the common law. This was partly accomplished, of course, by Mansfield's empaneling of special juries of merchant experts, who debated among themselves about what commercial custom should be, and reported the results to the court.⁹ Karl Llewellyn had in mind a similar scheme for the Uniform Commercial Code. He proposed special merchant tribunals to infuse trade wisdom on both usages and norms into the decision of sales disputes. His special procedure was rejected, probably because the other lawyers involved in drafting the Code were reluctant to abandon the "legal" standards they were used to for the uncertainty—uncertainty for the lawyers, that is, not necessarily for the parties—of trade determined facts and norms.¹⁰

So at the moment of application, choices must be made among contending normative orders and interpretive communities. Choices between conflicting orders within communities, between those communities and the outside world, between the norms of local markets and customs and the norms of—actual or hypothesized—global markets and *their* customs, and between all of those customs and those of the law. If your general rules are open-ended standards, such as the Uniform Commercial Code's standards of "reasonableness" or "good faith," their generality is a formal shell. Any actual content must be filled in by local particulars or context-specific rules of thumb. If, on the other hand, the legal rules are formally-realizable bright-line rules, like a rule requiring a writing to make a contract enforceable, then the rule is bound to cut across the grain of custom—in this example, the custom of communities with informal modes of creating obligations.

For this reader, Hayek's legal theory is disappointingly unilluminating on these issues, because in the texts in which he has most to say about law—*Law Legislation and Liberty*¹¹ and *The Constitution*

8. See generally James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (discussing problems faced by legal scholars, jurists and lawyers in ascertaining local custom, which was the foundation of Medieval law).

9. See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* 99-121 (1989) (discussing Lord Chief Justice Mansfield's contributions to the development of the commercial law).

10. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 512-15, 527-29 (1987).

11. See RULES AND ORDER, *supra* note 5; MIRAGE, *supra* note 6.

of Liberty¹²—he says so little that would help one think through these matters. However, I think the reader may plainly infer a bias toward the global norms, that is, the norms of the spontaneous orders generated between trading communities of strangers, and against those of more particularistic relational obligations generated within local communities (Cooter's¹³ or Robert Ellickson's¹⁴ normative communities). Hayek has a similar bias toward the general in legal method—toward formality and uniformity in interpretation, toward the judge over the jury for the sake of consistency and abstract (status indifferent) justice, toward rules over standards.¹⁵ I suppose in turn these preferences have to do with his ambivalence toward customary communities. These communities sometimes appear in Hayek's work as good things, (e.g. voluntary associations), but much more often as reactionary ones—as “teleocratic” rather than “nomocratic” organizations, organized around the pursuit of specific purposes rather than general rules, as the “tribal horde” of face-to-face relationships whose atavistic instinct to satisfy the needs of known persons subverts market rationality and becomes the breeding ground of utopian-socialist fantasies, or as the protectionist craft or interest-group cartel that tries to use special legislation to confirm its privileges against competition or dynamic erosion.¹⁶

Hayek's priorities are in effect the reverse of Cooter's. Cooter says that for the settlement of intra-community disputes, local custom furnishes the efficient norm; and that the legal system's constructivist, or default norms, should be reserved for the disputes of strangers (members of different non-overlapping communities).¹⁷ This makes sense because it restates private law's familiar distinctions between norm-ascertainment methods appropriate to contracts and torts. It does not tell us, of course, how to identify the relevant community among nested communities, or how to treat the stranger or newcomer to a relational order on the community's home ground, but it is certainly inclined to recognize the latent efficiencies of customary communities.

12. See CONSTITUTION OF LIBERTY, *supra* note 5.

13. See, e.g., Cooter, *supra* note 1, at 449.

14. I refer here to ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (admiring study of normative order generated indifferently to formal legal rules by Shasta County, California cattle ranchers).

15. I extrapolate these biases entirely by inference. Hayek's concept of law is exclusively one of law as *rules*. In his principal works on law there are no references to any fact-finding or law-application procedures or agents, such as witnesses or juries.

16. See MIRAGE, *supra* note 6, at 133-52.

17. See Cooter, *supra* note 1, at 450-51.

To the extent he wants them at all, Hayek wants such community customs to prove their worth through their ability to survive in an ongoing order structured by formal-general rules, without being able to recruit the law's coercive power to the service of their collective purpose.¹⁸ But of course, the competition for survival is rigged by the legal order itself, by how the law decides at the moment of application to choose among competing sources of custom. Applications of the legal order's general rules may either underwrite or subvert the norms and practices of customary communities. The application of formal legal rules of the type that support an abstract market of interactions between strangers may wreak havoc upon customary communities, pulverizing the system of mutual restraints, loyalties, reciprocities and local sanctions that has made the community work.

Let me illustrate by providing an example from a place and period in which Hayek himself was intensely interested:¹⁹ The great alteration in English agrarian practices that preceded the Industrial Revolution. Two legal developments in particular profoundly affected customary practices in early modern England: The Parliamentary enclosure of common fields, and the gradual extinction of customary common use-rights. Such rights include property rights to graze beasts, gather wood, or take deer, and were vested in tenants or villagers and coexisting with the proprietary rights of farmers or landlords. This second movement is often described by social historians as the legal conversion of customs to crimes.

Hayek, looking at the history of the common law, saw in these developments a gradual evolution toward classical-general forms of property—especially the form of absolute ownership rights, agglomerated in a single owner to the exclusion of conflicting or co-existent rights not granted by contract. But to the villagers involved, these legal changes imposed by a distant central authority were experienced as violent intrusions upon *their* customary order. Where they once had gathered by right, they were now met with the spring-gun and the

18. See, e.g., RULES AND ORDER, *supra* note 5, at 99. "[T]he groups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order. The rules that will spread will be those governing the practice or customs existing in different groups which make some groups stronger than others." (citations omitted). *Id.*

19. See FRIEDRICH A. HAYEK, CAPITALISM AND THE HISTORIANS (1954) (compilation of papers which served as the basis for a meeting of the Mont Pelerin Society in France in 1951; one of the topics of the meeting was the treatment of capitalism by the historians).

gallows. They were made, as E.P. Thompson has said, "strangers in their own land."²⁰

The famous case of the Gleaners, *Steel v. Houghton*,²¹ will serve as my example. Gleaning is the custom by right of which the poor may enter the farmer's land after the harvest to gather any scattered corn left lying on the ground. In a test case decided in 1788, the Court of Common Pleas held that gleaning could not be a custom that common law could recognize as a right, because, said one of the judges, it was "inconsistent with the nature of property which imports exclusive enjoyment."²² Another said: "[n]o right can exist in common law, unless both the subject of it, and they who claim it, are certain. . . . The subject is the scattered corn which the farmer chooses to leave on the ground. . . . The soil is his, the seed is his, and in natural justice so are the profits."²³ To the gleaners, none of this had the sound of spontaneous order. It was as abstract, as ideological, as alien and as ruthless as any Socialist Central Plan.

In retrospect, some of these quaint regimes of common customary rights have come to be more appreciated for their latent functions. We have traveled a long way from Hardin's thesis of the "Tragedy of the Commons"²⁴ to realize that relational communities, if allowed to evolve their own norms and sanctions, may achieve by experiment quite efficient regimes: mutual-insurance schemes to allocate the risks of famines or shortages or seasonal employment, or the hidden efficiencies of trust, morale and motivation, social stability, and protection against opportunism that results from bonding people through relational rights and duties.²⁵ The pre-industrial English cottager's economy, as E.P. Thompson noted ironically in one of his last essays, is now recognized as a model "proto-industrial" economy of small producers associated through relational ties (like the small workshops of the modern North Italian "miracle"), and in some respects, under

20. E.P. THOMPSON, *CUSTOMS IN COMMON* 184 (1993).

21. *Steel v. Houghton*, 126 Eng. Rep. 32 (1788).

22. *Id.* at 33.

23. *Id.* at 38.

24. Garrett Hardin, *The Tragedy of the Commons*, in *MANAGING THE COMMONS* 16 (Garrett Hardin & John Baden eds., 1977) (ownership in common leads to overgrazing so as to lay waste to the commons).

25. For a sampling of the enormous literature on this point, see, e.g., GEORGE A. AKERLOF, *AN ECONOMIC THEORIST'S BOOK OF TALES* (1984); Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (discussing public and private property, and explaining why some property should remain public and not reduced to exclusive control); ALAN FOX, *BEYOND CONTRACT: WORK, TRUST AND POWER RELATIONS* (1974); IAN MACNEIL, *THE NEW SOCIAL CONTRACT* (1980).

appropriate market conditions, is considerably more "efficient" than the factories that superseded them.²⁶

A final word on the relation between law and custom, also drawn from the history of the gleaners and their hapless claims to community property. The case was decided in 1788. Yet as we know from a series of close-up studies by the historian Peter King, it took many years before the new central-legal regime had much actual effect on agrarian practices. Localism was also a strong legal tradition; and in this case the weight of local custom and opinion fell against the landowners. Gleaners, usually women, continued to enter land after the harvest to pick up the scattered grain, although considered trespassers at common law. Local custom, which could be specially pleaded in local courts, still supported their claim of right. When a farmer had a gleaner physically thrown off the land, she would return with thirty or forty fellow villagers. Farmers who laid violent hands on the gleaners were sometimes prosecuted in local courts, and often fined. The local Justices of the Peace felt no tenderness toward farmers who beat up on women. Of course, the farmers had their own informal sanctions, like denying access to job networks, that they could and did deploy against gleaners' families.²⁷

The point is that the "spontaneous order" of community customs is tough, and not easily penetrated or altered by outside decrees. Law can not be seen as a system of rules that acts directly on individuals. It is one order amid a plurality of normative orders, a rival of local law and custom. And custom itself, like law, is not a unitary order but a dynamic process, not just of adaptation, but of ongoing conflict and shifting power alignments.

This Comment is not intended as a paean to customary communities and their customary orders. Such orders can be terrible and oppressive orders, for all the reasons that Hayek gives for distrusting organizations and tribes, and that Cooter gives in his catalogue of exceptions to presumptively-valid customs. Yet social orders that evolved in the shadow and under the compulsions of the Rule of Law, the common-law *Rechtstaat*, can be oppressive orders as well. Everything, in these matters, depends on how the interactions between law and custom are played out in detail.

26. See THOMPSON, *supra* note 20, at 176.

27. Peter King, *Gleaners, Farmers, and the Failure of Legal Sanctions in England, 1750-1850*, in 125 PAST & PRESENT 116-50 (1989).

POSITIVE THEORIES AND GROWN ORDER CONCEPTIONS OF THE LAW

Mark F. Grady†

I. HAYEK'S CONCEPT OF THE GROWN ORDER

Friedrich Hayek distinguished between grown orders and made orders.¹ A made order originates from the design of its creator. In contrast, a grown order, or spontaneous order, such as a market or a common law system, arises without a plan. It has orderly features, but these result from equilibrium rather than from someone's design. For instance, biological systems, natural languages (for instance English), and the common law all possess grown order attributes. Hayek argued that each type of order has its own appropriate explanatory technique.² Made orders are appropriately explained by inquiring into the intent of the designer. For instance, what did the condominium association intend when it prohibited large animals? Conversely, grown orders cannot be explained in this manner. The appropriate method for explaining grown orders is positive theory.

According to Hayek, people can make a mistake if they try to explain grown orders in the same way as made orders.³ Some of these mistakes are so obvious that only a child would make them: "Why do they call it 'green'?"

Hayek's friend and colleague, Karl Popper, devised a theory of science to explain when a body of knowledge will grow, instead of stagnate.⁴ Popper believed that positive theories arise from "bold guesses" rather than from careful unbiased inductions from empirical

† Professor of Law, University of California, Los Angeles School of Law.

1. See F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER* 35-54 (1973).

2. *Id.*

3. *Id.*

4. See KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (1959).

evidence.⁵ Moreover, theories in progressive areas of knowledge are falsifiable.⁶ Popper thought that a theory which can not be proven false has no "truth content"; such a theory approximates a tautology.⁷

A theory can be unfalsifiable if it is immunized by so many conditions and qualifications—through so much complexity—that it "predicts" virtually every possible observation. The most falsifiable theories will have a "reduced form." They will be simple theories that seek to explain much with little. From Popper's point of view, the virtue of simple theories is twofold: (1) they hold the promise of producing fresh insight,⁸ and (2) they can be falsified and replaced by better theories.⁹ A complicated theory tailored to a complicated reality is unlikely to yield a new idea. Moreover, if an area of study is to progress, its theories must be replaceable. Yet, how can prevailing theories be replaced when their authors have made them so complicated and descriptive—or so subjective—that they yield no testable predictions? Therefore, a reduced form theory containing little truth will be easy to falsify.

Cooter's theory of custom¹⁰ satisfies Popper's conditions—it is a falsifiable, reduced form theory. Moreover, since custom is obviously a grown order, rather than a made one, the appropriate explanation is through a positive theory, such as Cooter's.

Nevertheless, Cooter's type of theory—positive theory—remains controversial in traditional legal circles. The next section explains how his theory departs from the theoretical ideals of Legal Realists. I wish to examine the epistemological claims of the Legal Realists, and set them against the contrary claims made implicitly by Cooter.

II. LEGAL REALISM'S THEORY OF KNOWLEDGE

Traditional legal scholars in the United States derive from the Legal Realist movement, which is now quite old. Indeed, Legal Realism is so old that the prior generation of legal scholars has completely died out, so it sometimes appears that Legal Realism is a timeless orthodoxy. Nevertheless, the Legal Realists only acquired their dominant position by overthrowing the older Legal Scientists, who were

5. *Id.* at 93-111.

6. *Id.* at 78-92.

7. *Id.*

8. *Id.* at 136-45.

9. *Id.*

10. Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 Sw. U. L. Rev. 443 (1994).

sometimes disparagingly called formalists or Langdellians.¹¹ Indeed, Legal Realism routed Legal Science, and this victory shaped Legal Realism, especially its epistemological claims. Many Legal Realists see a theory, such as Cooter's, as a throwback to Legal Science, which has already been overthrown.¹²

An early and typical Legal Realist theory was Leon Green's theory of duty in negligence cases.¹³ Green reviewed a number of duty cases, and found the deciding judges enthralled by Legal Science or formalism.¹⁴ His introduction claimed: "We can scarcely realize the part which sacred words, taboo words, magic words, continue to play in our law."¹⁵ His case review purported to bear out this conclusion. Having found the cases to be inadequate guides, Green proposed five policy factors for courts to balance in each case, thereby achieving sensible results grounded in public policy, rather than in magic words.¹⁶ These five factors include: the administrative factor; the ethical or moral factor; the economic factor; the prophylactic factor; and the justice factor.¹⁷

11. The early Legal Realists were sometimes vituperative in their criticism of the Legal Scientists. The great Legal Realist, Jerome Frank, theorized that Legal Scientists were like children seeking a father figure. Here is Frank's critique of the great Harvard Legal Scientist, Joseph Beale:

Beale, you see, repudiates the notion that law consists of past decisions and predictions as to future decisions. Why? Why does he assert that all the particular judgments, rendered or ever hereafter to be rendered by the courts, are not law? Because, he answers, such judgment or decisions fail to correspond to the correct definition of law. Whatever the practical effect on the person or property of the litigants—although it may mean hanging for the defendant in a criminal action or the loss of all his worldly goods to the defendant in a civil suit—Beale seems to consider that the judgments of any court is too finite, too lowly, of too little real import, to be worthy the name Law. Law, by definition, must apparently have a noble aspect, a breath-taking sweep. Law must be, Beale asserts, UNIFORM, GENERAL, CONTINUOUS, EQUAL, CERTAIN, PURE. . . .

And this Bealish Law can approximate perfection. . . . From the point of view of the ordinary human being that kind of Absolutist law is meaningless. For the ordinary human being is interested, legitimately, in what happens in court. . . .

What explains the hold of Bealism or Absolutism on a large majority of the legal profession?

. . . [T]he child is (1) a *wishful* thinker who, (2) in the interest of his desires for *harmony, chancelessness, security and certainty*, builds for himself an over-simplified, over-unified, novelty-less world to conform to his desires, heedless of the lack of correspondence of this construction with the world of actual experience, and (3) who is aided in contriving this world by his implicit *belief in the magic efficacy of words*.

JEROME FRANK, *LAW AND THE MODERN MIND* 48, 54-56, 81 (1930).

12. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 50-53 (1983).

13. Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928).

14. *Id.*

15. *Id.* at 1016.

16. *Id.* at 1033-35.

17. *Id.*

Because of its normative orientation, Green's theory is a paradigmatic example of Legal Realist theory. It proposes to reform judicial behavior, and does not try to explain the common law. The Legal Realists conceived the common law to be a made order handcrafted by judges. From their point of view, policy was inevitably central to common-law decision-making, and the question was: "Which policy?" Should it be the policy of the conservatives and retrogrades, or should it be the policy of more reformed thinkers? Although Legal Realists did not actually produce a viable positive theory, they imagined that such a theory would take the form of translating the politics of judges into predictions of the judges' decisions. For instance, the Legal Realist Felix Cohen hoped that a positive theory of the common law would allow future Legal Realists to predict case results based on the nature of the panel deciding the case.¹⁸ In particular, Cohen hoped that legal scholars would someday be able to predict case results based on their scientific assessments of judges' "inertia, conservatism, knowledge of the past, or intelligence sufficient to acquire such knowledge, respect for predecessors, superiors or brothers on the bench, a habit of deference to the established expectations of the bar or the public . . ."¹⁹ This hoped-for theory was so complicated that it could never yield testable predictions; therefore, it amounted to an impossible positive theory. Moreover, Cohen's "ideal" theory could explain virtually any observation and, thus, would have zero truth content. Perhaps because the Legal Realists never learned the key to successful positive theories—simplicity—Legal Realist theories became more and more

18. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

19. *Id.* at 839.

[A]ny answer to the question "Is there a contract" must be in the nature of a prophecy, based, like other prophecies, upon past and present facts. So conceived, the question "Is there a contract?" or for that matter any other legal question, may be broken up into a number of subordinate questions, each of which refers to the actual behavior of courts; (1) What courts are likely to pass upon a given transaction and its consequences? (2) What elements in this transaction will be viewed as relevant and important by these courts? (3) How have these courts dealt with transactions in the past which are *similar* to the given transaction, that is, *identical in those respects which the court will regard as important*? (4) What forces will tend to compel judicial conformity to the precedents that appear to be in point (*e.g.* inertia, conservatism, knowledge of the past, or intelligence sufficient to acquire such knowledge, respect for predecessors, superiors or brothers on the bench, a habit of deference to the established expectations of the bar or the public) and how strong are these forces? (5) What factors will tend to evoke new judicial treatment for the transaction in question (*e.g.* changing public opinion, judicial idiosyncrasies and prejudices, newly accepted theories of law, society or economics, or the changing social context of the case) and how powerful are these factors?

Id.

normative—advice to judges about how they should decide cases differently.

Besides having a pre-modern concept of an ideal positive theory, the Legal Realists also had self-defeating ideas about the proper methodology for developing such a theory. The great Legal Realist, Karl Llewellyn, argued that a person who attempts to explain the actual should approach her task with as few preconceptions as possible. Llewellyn wrote:

[D]uring the inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be. More particularly, this involves during the study of what courts are doing the effort to disregard the question what they ought to do.²⁰

Of course, Llewellyn was right in asserting that an empiricist should not bias the data to fit her theory. Nevertheless, he seems to have underestimated the difficulty of noticing relevant facts if one is innocent of a strong theory.

III. LEGAL REALISM'S CRITIQUE OF MODERN POSITIVE THEORIES

The Legal Realist's critique of modern theories, such as Cooter's theory of custom,²¹ is that it lacks the presuppositions and form of a successful Legal Realist theory.

Cooter's theory differs from a Legal Realist theory in two ways. First, Cooter's theory is a positive theory, not a normative one. Never having themselves produced many successful positive theories, modern Legal Realists seem now almost to disbelieve in the concept. Although they believe in detailed value-free empirical investigations (if these are possible), they almost do not believe in positive theories. For instance, one frequent Legal Realist argument is that supposedly positive theories are inevitably normative. Legal Realists view the social world as laden with policy choices, either ethical or political. Hence, any theory that seeks to explain actual practice can be seen as affirming the ethics or politics of the practice under investigation. Indeed, as the Legal Realists quite accurately charged of them, the

20. Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

21. Cooter, *supra* note 10.

Legal Scientists often made unannounced switches between the positive and normative frames.²²

Second, Cooter's theory possesses a strongly reduced form. It does not take the multiplex form of Green's Legal Realist theory. Cooter's theory models the evolution of custom as cooperation emerging from a Prisoner's Dilemma.²³ Although Cooter's reductionism renders his theory more falsifiable, Legal Realists might object to it for several related reasons. First, Cooter's theory imposes a strong preconception upon a complicated reality. For Legal Realists, who sometimes seem to think that knowledge is built without preconceptions,²⁴ this is the first deadly sin. Second, because in reality custom is so complicated, and the theory so simple, Legal Realists might tend to view Cooter's theory as a form of political extremism. According to Legal Realists, since the practice that Cooter seeks to explain is laden with ethical and political choices, a theorist could hope to explain this practice only if the theorist himself has simple, and therefore extreme, political and ethical views. Finally, since Cooter's theory may not be positive—but merely a cloaked normative theory—perhaps Cooter is seeking to use his theory to promote extreme political views. As I have said, I believe Cooter's objectives are different from these. Doubtless the Legal Realists are right that custom embodies political and ethical choices; nevertheless, the best way to reveal them might be through a simple theory that yields unsolved puzzles for future theorists. I think that most Legal Realists underestimate how confidently positive theorists predict that their theories will be replaced by future theories. If custom is best explained by the self-interest of a dominant class, ultimately this should be the most successful positive theory about it. I doubt that Cooter believes that his theory will absolutely govern thought 20 years from now. I assume that Cooter hopes that his theory will be a provocative beginning. Indeed, making this type of beginning is the most ambitious theoretical undertaking possible.

22. In his Realist manifesto, Karl Llewellyn quite accurately criticized the scientists for making unannounced switches between normative and positive reasoning. He wrote that Legal Realists believe in:

The *temporary* divorce of Is an Ought for purposes of study. By this I mean that whereas value judgments must always be appealed to in order to set objectives for inquiry, yet during the inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be.

Llewellyn, *supra* note 20, at 1236.

23. Cooter, *supra* note 10, at 447-49.

24. See Grey, *supra* note 12.

IV. CONCLUSION

From one point of view, the Legal Realists are right that positive theory about grown orders is inevitably political. Without successful positive theories to explain them, grown orders often appear inferior to utopians and others who can imagine better made orders to replace them. Some people who theorize about grown orders believe that they embed knowledge to which it would be useful to have better access. For instance, a major theme of Hayek's work is the extent to which a market embeds knowledge that a made order, such as socialism, could not hope to acquire. That custom and common law might embed novel and surprising knowledge is one aspiration that guides some positive research. Indeed, this idea comes from antiquity, as well as from Hayek. Roman law first arose through a common law process similar to the one in England, and only later was it codified. As reported by Cicero, Cato, the champion of traditional Roman institutions against Greek importations, once said:

Our [Roman] state . . . is not due to the personal creation of one man, but of very many; it has not been founded during the lifetime of any particular individual, but through a series of centuries and generations. For he [i.e., Cato] said that there was never in the world a man so clever as to foresee everything and that even if we could concentrate all brains into the head of one man, it would be impossible for him to provide for everything at one time without having the experience that comes from practice through a long period of history.²⁵

25. BRUNO LEONI, *FREEDOM AND THE LAW* 89 (1961) (quoting CICERO, *DE REPUBLICA* ii 1, 2).

HAYEK AND THE UNITED STATES CONSTITUTION

Bernard H. Siegan†

I. INTRODUCTION

In his 1960 book, *The Constitution of Liberty*, Friedrich Hayek asserts that the United States Constitution is an enormous contribution to the ideal of free government.¹ He regarded this Constitution as still an experiment in a new way of ordering government, but one that accomplished much of what he believed essential to freedom. For him, the Constitution's major achievement was the establishment of a legislature bound by general rules. Unlike the English system which accorded the Parliament absolute rule, the United States Congress had to deal with particular problems in such a manner that the underlying principles were also applicable in other cases.²

Hayek's enthusiasm about the United States Constitution did not extend to the separation of powers between the President and Congress. He was critical of this provision for two reasons: First, he regarded it as an obstacle to the efficiency of the executive,³ and second, the President in fulfilling the executive duties would not necessarily be carrying out the will of the Congress with respect to administrative problems.⁴

Hayek's optimism about the American system faded by 1979, when he wrote that its serious defects could no longer be overlooked by saying that the system "worked," since it "hardly do[es] so any longer."⁵ A chief executive and a representative assembly elected at different times and on different principles frequently worked "at log-

† Distinguished Professor of Law, University of San Diego School of Law.

1. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 176-92 (1960) [hereinafter HAYEK 1960].

2. *Id.*

3. *Id.* at 186, 190.

4. F.A. HAYEK, *THE POLITICAL ORDER OF A FREE PEOPLE* 179 n.10 (1979) [hereinafter HAYEK 1979].

5. *Id.*

gerheads with each other."⁶ Judicial review apparently did not save the system from these problems.

II. HAYEK'S CONSTITUTIONAL OBJECTIVES

The introduction briefly describes Hayek's thinking about the United States Constitution over a twenty-year period. In this paper, I shall compare Hayek's ideas on constitutionalism with the relevant portions of the Constitution. Hayek's constitutional objectives are comparable to those that motivated the framers of the United States Constitution, ratified in 1788, the Bill of Rights, and Section 1 of the Fourteenth Amendment. All three afford substantial protection for individual activity. Both Hayek and the framers of the original Constitution sought to provide maximum security for liberty, but differed on the structure needed to achieve this goal. I shall discuss the Framers' perspectives subsequently. Initially, let us focus on Hayek's thinking.

A. *The Protection of Liberty*

For Hayek liberty is the foremost concern of constitutionalism. He regards liberty as beneficial to the individual and the community, and as essential to the advancement and progress of society. He believes that the benefits an individual derives from freedom are largely the result of the uses of freedom by others, mostly those uses of freedom that the individual could never avail himself of.⁷

It is therefore not necessarily freedom that I can exercise myself that is most important for me. . . . What is important is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society. This freedom we can assure to the unknown person only by giving it to all.⁸

Maximizing liberty will lead to the greatest societal gains and advances:

Most scientists realize that we cannot plan the advance of knowledge, that in the voyage into the unknown—which is what research is—we are in great measure dependent on the vagaries of individual genius and of circumstance, and that scientific advance, like a new idea that will spring up in a single mind, will be the result of a combination of conceptions, habits, and circumstances brought to one

6. *Id.* at 105-06.

7. HAYEK 1960, *supra* note 1, at 32.

8. *Id.*

person by society, the result as much of lucky accidents as of systematic effort.⁹

History strongly supports Hayek's thesis. Because of fewer regulations, the number and variety of products and services are much more plentiful in capitalist than in communist nations. All the current and former communist states are materially very backward because of restrictions on liberty. Under communism, all firms are government-owned, and the operation of each is directed by a nation's planners and bureaucrats. A firm's managers are supposed to do little more than follow orders. Neither they nor other government officials had much incentive to innovate or improve the firm's products or operations.

As a result, communist companies continued to make the same products year after year, while producers in the non-communist world possessing capitalist incentives were continually improving the quality of their output. Thus, converting from communism to capitalism is very difficult. With the planning systems demolished, managers must now abide by the rules of a competitive world—and they have had no training or experience preparing for it.¹⁰

Studies show that the more freedom there is in a marketplace, the more likely it will better provide for the people.¹¹ The United States Supreme Court has accepted this conclusion for the intellectual marketplace but not for the material one. In denying protection for economic liberties, the Court has not only compromised its constitutional mission,¹² but also the nation's economic welfare. Contemporary economic studies show that in the United States, government regulation of economic markets often operates negatively.¹³ The advantages of regulation are outweighed by the disadvantages.¹⁴ The legal restraints on economic activity do more harm than good.

In my book, *Economic Liberties and the Constitution*, I have summarized fifty-three studies of government regulation, conducted by more than sixty individual and institutional researchers, and which

9. *Id.* at 33.

10. See generally Bernard H. Siegan, *Constitutional Protection of Property and Economic Rights*, 29 SAN DIEGO L. REV. 161 (1992).

11. See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 287-303 (1980) [hereinafter *ECONOMIC LIBERTIES*] (reviewing studies of the effects of regulation in various industries).

12. See generally Bernard H. Siegan, *Majorities May Limit the People's Liberties Only When Authorized To Do So by the Constitution*, 27 SAN DIEGO L. REV. 309 (1990) [hereinafter *Majorities May Limit*] (discussing the interpretation of constitutional text).

13. *ECONOMIC LIBERTIES*, *supra* note 11.

14. *Id.* at 302.

have appeared in the most prestigious scholarly literature.¹⁵ These studies show that although every regulation accomplishes some purpose, the great majority fail a cost/benefit analysis.¹⁶ As indicated by their conclusions, the vast bulk of these scholars favor either total or substantial deregulation of the area under study.¹⁷

These studies reveal that much regulation has resulted in the "reduction of economic efficiency, misallocation of resources, and the redistribution of income from consumers to the regulated group."¹⁸ Economic regulations diminish freedom, thus seriously limit a nation's productivity and output. A common finding in these studies is that the regulation of concern raises prices, first, by restricting competition, and second, by imposing a variety of unnecessary requirements on producers and sellers that increase cost.¹⁹ People "of average and lesser incomes, those least likely to afford higher prices, are the most adversely affected."²⁰

Consider the comments on regulation made by Professor Ronald Coase, 1991 Nobel Prize winner in economics, who was for a long time the editor of the very highly respected *Journal of Law & Economics*. Over the years, the Journal published numerous studies on economic regulation, and Coase has concluded:

The main lesson to be drawn from these studies is clear: they all tend to suggest that the regulation is either ineffective or that when it has a noticeable impact, on balance the effect is bad, so that consumers obtain a worse product or a higher-priced product or both as a result of the regulation. Indeed, this result is found so uniformly as to create a puzzle; one would expect to find, in all these studies, at least some government programs that do more good than harm.²¹

Hayek considers liberty to be a negative concept; it describes the absence of coercion by others, assuring an individual of the right to pursue one's own aims on the basis of one's own knowledge. "It becomes positive only through what we make of it. It does not assure us of any particular opportunities, but leaves it to us to decide what use we shall make of the circumstances in which we find ourselves."²²

15. *See id.* at 287-303.

16. *See id.* at 301-03.

17. *See id.* at 301.

18. *Id.* at 302.

19. *Id.*

20. *Id.*

21. RONALD COASE, *ECONOMISTS AND PUBLIC POLICY IN LARGE CORPORATIONS IN A CHANGING SOCIETY* 184 (J. Fred Weston ed., 1974).

22. HAYEK 1960, *supra* note 1, at 19.

B. *Eliminating Coercion*

Society must have some coercive powers because the only way to prevent coercion is by the threat of coercion. A Constitution should otherwise preserve and encourage freedom.

The coercion which a government must still use for this end is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced. . . . Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others.²³

Hayek rejected the idea that all decisions should be made by the majority.

If we proceeded on the assumption that only the exercises of freedom that the majority will practice are important, we would be certain to create a stagnant society with all the characteristics of unfreedom.²⁴

Hayek believed that there were definite limits to the range of questions which should be left to majority decisions. There are limits beyond which majority action ceases to be beneficial.

[T]he authority of democratic decision rests in its being made by the majority of a community which is held together by certain beliefs common to most members; and it is necessary that the majority submit to these common principles even when it may be in its immediate interest to violate them. . . . There can clearly be no moral justification for any majority granting its members privileges by laying down rules which discriminate in their favor.²⁵

Civilization largely rests on the fact that the individuals have learnt [sic] to restrain their desires for particular objects and to submit to generally recognized rules of just conduct. Majorities, however, have not yet been civilized in this manner because they do not have to obey rules.²⁶

According to Hayek, not every enactment of the legislative authority should be considered a law. The term should be restricted to "laws regulating the relations between private persons or between

23. *Id.* at 21.

24. *Id.*

25. *Id.* at 106-07.

26. HAYEK 1979, *supra* note 4, at 7.

such persons and the state.”²⁷ Most legislative measures are instead “instructions issued by the state to its servants concerning the manner in which they are to direct the apparatus of government and the means which are at their disposal.”²⁸ Laws are “essentially long-term measures, referring to yet unknown cases and containing no references to particular persons, places, or objects.”²⁹ Accordingly, Hayek would have government treat the two kinds of measures differently, as will be explained subsequently.

C. *Limits of Judicial Review*

Hayek saw judicial review as an institution as old as constitutional law, without which constitutionalism can never be attained. This view is echoed throughout the world these days as nations emerging from communism write new constitutions and many other countries revise their constitutions. It seems that the constitution of every emerging nation will provide for judicial review. But as it turns out, this outcome is not an entirely desirable one. Most of these nations will, in addition to securing traditional individual rights, also establish in their constitutions, entitlements to particular benefits. The proposed Ukrainian Constitution provides an example. It secures not only the traditional liberties—speech, press, religion, property, and protections for an accused or convicted person—but also entitlements to education, medical assistance, and a safe environment.³⁰ The proposed constitution states that “[a]ll who work conscientiously have the right to fair and satisfactory remuneration that ensures living conditions worthy of them and their families” and that “[e]very person, without any discrimination, has the right to equal pay for the same amount of work in accordance with its quality and quantity.”³¹

Hayek writes about the contemporary trend to include such entitlement or benefits as “social and economic rights,” rights that require positive action by the state to fulfill them. Hayek rejects this formulation on the basis that justice does not impose a general duty to provide for people. Furthermore:

[T]he old civil rights and the new social and economic rights cannot be achieved at the same time but are in fact incompatible; the new

27. HAYEK 1960, *supra* note 1, at 207.

28. *Id.*

29. *Id.* at 208.

30. Constitutional Commission of the Parliament of the Ukraine, Proposed Constitution of the Ukraine chs. 3-14 (June 10, 1992) (on file with author).

31. *Id.* ch. 4, art. 39

rights could not be enforced by law without at the same time destroying that liberal order at which the old civil rights aim.³²

In a recent book, I have explained the serious problems raised by constitutional entitlement provisions.³³ When coupled with the power of judicial review, entitlement provisions accord the judiciary enormous power over the political process and the private economy. These are matters of legislative concern which the judiciary is not competent to regulate. Such judicial review power would enable dictatorial control to be exercised by an unelected branch of government.³⁴

Hayek's reply to those who support constitutionally guaranteed entitlements and benefits reveals his own position on achieving social justice:

The fundamental fact which these illusions disregard is that the availability of all those benefits which we wish as many people as possible to have depends on these same people using for their production their own best knowledge. To establish enforceable rights to the benefits is not likely to produce them. If we wish everybody to be well off, we shall get closest to our goal, not by commanding by law that this should be achieved, or giving everybody a legal claim to what we think he ought to have, but by providing inducements for all to do as much as they can that will benefit others.³⁵

III. HAYEK'S MODEL CONSTITUTION

In *The Political Order of a Free People*, Hayek sets forth a model constitution that would best achieve what he states are the two major tasks of government: Laying down rules of just conduct for the private citizen and directing or controlling government administration.³⁶ It would create a government consisting of four different authorities: The Legislative Assembly, the Governmental Assembly, the executive committee of the Governmental Assembly—which would be the government, and a Constitutional court.³⁷

32. F.A. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* 103 (1976) [hereinafter HAYEK 1976].

33. See BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM* 83-88 (1992) [hereinafter DRAFTING A CONSTITUTION].

34. *Id.* at 84.

35. HAYEK 1976, *supra* note 32, at 106.

36. See HAYEK 1979, *supra* note 4, at 105-06.

37. *Id.* at 109-27.

A. *Provisions of Hayek's Model Constitution*

1. The basic clause of this constitution would provide that men could be restrained from doing what they wished, or coerced to do particular things. However, only in accordance with recognized rules of just conduct designed to protect individual autonomy.³⁸

2. These rules could be established or altered by the Legislative Assembly, an elected body, whose function would be to enact laws governing the relations between persons and between persons and government. All enforceable rules of conduct would require the sanction of this assembly.³⁹

3. Providing governmental services and facilities would be the responsibility of the Governmental Assembly, another body which would be separately elected.⁴⁰

Whether to build a road along one route or another one, whether to give a building one design or a different one, how to organize the police or the removal of rubbish, and so on, are all not questions of justice which can be decided by the application of a general rule, but questions of effective organization for satisfying the needs of various groups of people, which can be decided only in the light of the relative importance attached to the compelling purposes. If such questions are to be decided democratically, the decisions will be about whose interests are to prevail over those of others.⁴¹

The Governmental Assembly would be bound by the rules of just conduct laid down by the Legislative Assembly. It could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter.⁴² The Governmental Assembly would be responsible for organizing expenditures for use in providing facilities and services to citizens.⁴³ The tax code, however, would be the responsibility of the Legislative Assembly.⁴⁴

4. A Constitutional Court would settle conflicts of authority between the two assemblies. It would also have the authority to decide that neither is entitled to "take certain kinds of coercive measures," thereby protecting liberty.⁴⁵ In addition to professional judges, its membership should include former members of the Legislative and

38. *Id.* at 109.

39. *Id.*

40. *Id.* at 119-20.

41. *Id.*

42. HAYEK 1979, *supra* note 4, at 119.

43. *Id.* at 126.

44. *Id.*

45. *Id.* at 121.

perhaps also the Governmental Assembly.⁴⁶ The appointment of the judges should be made by a committee of former members of the Legislative Assembly.⁴⁷

5. The constitution would define the limits of the government's coercive powers and would restrict the means government could employ in rendering services to the citizens.⁴⁸ Government would be used only to "enforce the universal rules of just conduct [that are] protecting the individual domains, . . . to raise means to support the services rendered by government," and to render those services.⁴⁹ There would be no special enumeration of protected rights inasmuch as government would have no authority to engage in arbitrary coercion.⁵⁰

6. Because democratic governments have not been able to stop the enormous power that special interest groups have over legislative bodies, the Constitution would deprive the governing majority of the power to grant discriminatory benefits to groups or individuals.⁵¹

Legislation . . . should not be governed by interests but by opinion, i.e. by views about what *kind* of action is right or wrong—not as an instrument for the achievement of particular ends but as a permanent rule and irrespective of the effect on particular individuals or groups.⁵²

7. Membership of the Legislative Assembly and Constitutional Court would be limited to selected portions of the population to ensure that the citizens most qualified to implement these responsibilities would be eligible for service on these bodies. To provide an effective check on the Governmental Assembly, the Legislative Assembly would not be composed in the same way; nor would the two assemblies be chosen in the same manner, or for the same period.

Members of the Legislative Assembly would be between forty-five and sixty years of age and elected for long periods such as fifteen years; one fifteenth of whom would be replaced every year.⁵³ Persons under forty-five would not be members, and all newcomers would be forty-five. To ensure their independence, members would not be re-eligible for election nor forced to earn a living in the market after the

46. *Id.*

47. *Id.*

48. *Id.* at 109-10.

49. *Id.*

50. *Id.*

51. *See id.* at 109.

52. *Id.* at 112.

53. *Id.* at 113.

end of their service "but be assured of continued public employment in honorific but neutral positions [such] as lay judges."⁵⁴ The Governmental Assembly would consist of members elected under rules generally in force for existing parliamentary bodies. Since the Governmental Assembly would create and direct public projects affecting civil servants, old age pensioners, and the unemployed, it would seem to be reasonable not to allow these groups to vote for its members.⁵⁵

IV. OBJECTIVES OF THE UNITED STATES FRAMERS

The framers of the United States Constitution were no less hostile to an unlimited legislature than Hayek. They sought to achieve a just society by a separation and limitation of government powers. However, their separation did not distinguish between legislation and administration, subjecting every "Order, Resolution, or Vote" by the Congress to the checks and balances of the system.⁵⁶

James Madison and his colleagues believed that the legislatures harbored serious threats to freedom. (In my opinion, Madison was both the most influential framer and the most persuasive theoretician at the Constitutional Convention of 1787). Consider, for example, his observations in *Federalist No. 48*: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."⁵⁷

Other leading Framers were no less apprehensive about lawmakers. Alexander Hamilton condemned the state legislatures for failing to safeguard commercial rights.⁵⁸ Gouverneur Morris found in every state legislative department "excesses [against] personal liberty[,], private property[, and] personal safety,"⁵⁹ and Edmund Randolph presented the Virginia Plan to the Convention to overcome the "turbulence and follies of democracy."⁶⁰

According to Charles Grove Haines, in his authoritative work on judicial review, a commonly held belief in 1787 was that the greatest peril to liberty comes from the expanding powers of legislative bodies:

54. *Id.*

55. *See id.* at 120.

56. U.S. CONST. art. I, § 7.

57. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

58. 25 THE PAPERS OF ALEXANDER HAMILTON 478-79 (Harold C. Syrett ed., 1977).

59. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 512 (Max Farrand ed., rev. ed. 1966).

60. *Id.* at 51.

[T]here was more concern as to the restrictions under which governments should operate than as to the functions to be performed. Governments were to be prohibited from interfering with freedom of person, security of property, freedom of speech and of religion. The guaranty of liberty was, therefore, to give the rulers as little power as possible and then to surround them with numerous restrictions—to balance power against power.⁶¹

The framers of the United States Constitution dealt with the problem of an arbitrary and capricious legislature in three ways. First, they required separation of powers, rejecting the parliamentary system since it vested absolute governmental powers in one body. They believed that when unlimited power is lodged either in a king or a parliament regardless how well-intentioned either may be, there is considerable risk that it will be exercised tyrannically.

Instead, the framers of the Constitution chose a system that fractionalized government power into legislative, executive and judicial branches. If governmental power is divided so that a particular policy can be implemented only by a combination of *legislative* enactment, *executive* implementation, and *judicial* interpretation, it will be difficult to enact laws and no group of persons will be able to impose its unchecked will. As Madison explained: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁶² Madison rejected majority rule as a matter of principle. "In fact, it is only re-establishing, under another name and more specious form, force as a measure of right"⁶³

In addition to functioning separately, each of the branches of the United States Government has certain powers to restrain the others. The purpose is to create substantial checks and balances again to prevent the three branches from acting in unison as a single authority. Each department should have "the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."⁶⁴ Thus, the Senate must consent by majority vote to major appointments (including Supreme

61. CHARLES G. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 209-10 (2d ed. 1959).

62. *THE FEDERALIST* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

63. *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON* 45 (Saul K. Padover ed., 1965) [hereinafter *THE COMPLETE MADISON*]. Madison expressed his beliefs on separation of powers in *Federalist Papers* No. 47, 48, 49, 50, and 51.

64. *THE FEDERALIST* No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

Court and other federal judges) made by the President, and must by two-thirds vote agree to treaties negotiated by the President. The Supreme Court monitors compliance with the Constitution. Congress establishes courts of lesser authority than the Supreme Court and has power to control the judicial appeals process.

The President has the power of veto over Congressional legislation which can only be overridden by a two-thirds vote of Congress. The President appoints the Supreme Court and all federal judges, but again only with the consent of the Senate. Congress has the power to declare war and fund it, but the President is Commander-in-Chief. In short, the Constitutional objective is to diffuse and disperse authority for the purpose of restricting government's powers. On a candid examination of history, Madison said:

[W]e shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority have produced factions and commotions, which, in republics, have more frequently than other causes, produced despotism.⁶⁵

Second, the Framers limited the powers of each branch of government. Congress, the President, and the judiciary could exercise no powers other than those authorized in the Constitution. Third, the original Constitution, prior to the addition of the Bill of Rights, protected a small number of rights. With the ratification of the bill three years later, the Constitution contained a substantial number of specific restraints on the legislature.

To make sure that the legislature operated within the framework established by the Constitution, it was necessary that the judiciary have the power of review. Hayek wrote that "it must indeed seem curious that the need for courts which could declare laws unconstitutional should ever have been questioned."⁶⁶ But, as we shall see, Hayek was not amenable to the kind of review that the Supreme Court applied under the doctrine of substantive due process. The other device for limiting the legislature is the presidential veto. As previously indicated, Hayek did not favor the separation of powers between Congress and the President.

V. THE RECORD OF THE UNITED STATES SUPREME COURT

The record of the United States Supreme Court has been far from perfect in carrying out the Framers' intentions of a limited govern-

65. THE COMPLETE MADISON, *supra* note 63, at 46-47.

66. HAYEK 1960, *supra* note 1, at 187.

ment. As a result of the Court's decisions, Congress has much more authority than the Framers desired. Nor has the Court always confined itself to the judicial role. However, it generally observes the separation of powers and secures a wide variety of liberties. With the ratification of the Fourteenth Amendment in 1868, the Court acquired jurisdiction to monitor state restraints on liberties. It has utilized this authority to greatly expand liberty in the nation. In this section, I shall discuss judicial rulings affecting the three structural limitations the Framers employed to maintain a limited government.

A. Separation of Powers

The Supreme Court usually upholds the separation of powers requirement in cases involving attempted usurpations by the two other branches.⁶⁷ The Court's record is far less impressive when it comes to restraining itself. It has on numerous occasions usurped legislative powers. Consider the Court's holdings relating to negative and positive rights. The separation of powers doctrine would strictly confine the judiciary to a negative role. This is set forth in the 1970 case of *Dandridge v. Williams*,⁶⁸ which rejected judicial intervention into welfare spending allocations. The Court explained that:

the intractable economic, social, and even philosophical problems presented by public welfare assistance program are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.⁶⁹

In contemporary years, the Court has wavered on this position. It has invalidated laws which denied welfare or nonemergency medical care to persons who lived in the District of Columbia or in a state for less than a year.⁷⁰ But it has also rejected pleas to force state legislatures or Congress to pay for nontherapeutic abortions for indigent women.⁷¹ Nonetheless, in the area of education, on the theory that a

67. For a discussion, see Bernard H. Siegan, *Separation of Powers and Other Divisions of Authority Under the Constitution*, 23 SUFFOLK U. L. REV. 1 (1989).

68. 397 U.S. 471 (1970).

69. *Id.* at 487.

70. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state and federal governments cannot deny welfare payments to persons residing less than one year); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (state cannot require one year's residence to qualify for nonemergency medical care).

71. See *Maher v. Roe*, 432 U.S. 464 (1977) (failure of state to pay for abortions of indigents not unconstitutional); *Harris v. McRae*, 448 U.S. 297 (1980) (failure of Federal Government to pay for abortions of indigents not unconstitutional).

school board's segregation policies violated the Constitution, the Court has ordered and monitored the desegregation and integration of schools.⁷² It has also required free public school education for children of illegal aliens.⁷³ Furthermore, it has struck down congressional expenditures on the basis that they discriminated against women.⁷⁴ Yet, it refused to require a North Dakota school district to provide free bus transportation for its students.⁷⁵

B. *Limitation of Powers*

Article I, Section 8 of the Constitution sets forth the specific powers of Congress.⁷⁶ After their enumeration, a clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."⁷⁷ While accounts of the Constitutional Convention are silent as to the meaning of "necessary and proper," the Federalists minimized its scope in the ratification debates. The only purpose of this clause, they claimed, was to enable Congress to implement its explicitly stated powers, for otherwise Congress could not fulfill its responsibilities. They argued that the federal government had little more than those powers that were identified in the Constitution.

In *McCulloch v. Maryland*,⁷⁸ Chief Justice Marshall expanded on behalf of a unanimous Court the meaning of the necessary and proper clause in a manner completely contrary to what the Federalists had represented in the ratification debates. At issue was whether Congress had authority to charter a corporation, the United States National Bank, in spite of the fact that no such power appears in the Constitution.⁷⁹ In upholding the corporate charter, Marshall asserted that the Constitution allowed Congress to exercise powers vastly greater than those specifically enumerated. Congress is allowed to adopt legislation that is not specifically prohibited and that "is really

72. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (a federal court has authority to require school board to levy property taxes to fund desegregation remedy); *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

73. *Plyler v. Doe*, 457 U.S. 202 (1982) (state may not deny free schooling to children of illegal aliens).

74. *Califano v. Wescott*, 443 U.S. 76 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

75. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988).

76. U.S. CONST. art. I, § 8.

77. *Id.*

78. 17 U.S. (4 Wheat.) 316 (1819).

79. *Id.*

calculated to effect any of the objects entrusted to the government.”⁸⁰ The determination of necessity is largely a matter for Congress to decide, with only a very limited role for the courts. Thus, in this one decision, the Court eliminated a core understanding of the Constitution that held that Congress was limited essentially to the power enumerated to it in that document.

C. *Protection of Liberties*

In its function of securing liberties, the contemporary Supreme Court has applied the Constitution with a very discriminating hand. Regardless of constitutional language and purpose, the Court has its own preferences on liberties, giving some very high, and others very low priority. Economic liberties are accorded minimum scrutiny,⁸¹ property rights mid-level scrutiny,⁸² and speech, press, travel and privacy the highest level of scrutiny.⁸³ The Court strongly protects a wide variety of procedural rights in criminal proceedings.

Free expression is probably more protected in the United States than in any other nation in the world, and to a greater degree than the Framers would have ever imagined. Although given far less protection than expression, the right of property is probably secured to a greater degree than in other Western nations.⁸⁴ While economic liberties are ignored, entrepreneurs receive protection under the Commerce Clause against laws that discriminate against or burden interstate commerce.⁸⁵ The Court protects commercial speech⁸⁶—again something early Americans probably never even considered.

80. *Id.* at 423.

81. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

82. *See, e.g.*, *Lucas v. South Carolina Coastal Comm’n*, 112 S. Ct. 2886, 2894 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

83. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (speech); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (press); *Near v. Minnesota*, 283 U.S. 697 (1931) (press).

84. *See, e.g.*, *Lucas*, 112 S. Ct. 2886; *Nollan*, 483 U.S. 825; *First English Evangelical Lutheran Church*, 482 U.S. 304. I believe the theory of inverse condemnation was first accepted by the American judiciary. *See generally* *United States v. Causby*, 328 U.S. 256 (1946) (individual constitutionally entitled to compensation for use of the private air space above his property); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (individual entitled to sue for compensation of land made unusable by the overflow of water).

85. *See, e.g.*, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

86. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759-70 (1976).

The Supreme Court's record in protecting accused and convicted persons clearly stands out as among the best in the world. To be sure, the Court's commitment to freedom for some have at times proven to be very harmful to others. Securing a woman's desire for abortion requires terminating the life of the unborn. Securing religious freedom by denying public support for religion prevents many from practicing their religion.⁸⁷

VI. HAYEK'S CRITICISMS OF THE U.S. SYSTEM

Hayek has criticized the United States Supreme Court for securing substantive due process. He also attacked the power of the President to veto congressional legislation. Both positions are worthy of discussion:

A. *Substantive Due Process*

Despite his great support for judicial review, Hayek was critical of the United States Supreme Court's interpretation of the due process clause during the early part of the Twentieth Century that protected economic liberties. He rejected the character of the inquiry carried out by the Court in determining whether due process was violated. He also believed due process was a procedural and not a substantive rule.

Hayek states that under substantive due process, the United States Supreme Court sought to determine whether the ends for which the legislature used its powers was desirable. According to him, the inquiry became one of determining reasonableness; whether there was sufficient justification for the restraint. Hayek objected to this policy on the basis that it made judges legislators. They should have instead determined if the legislature had exceeded its powers or if the legislation impinged protected rights.

Hayek's description is not accurate; the Supreme Court did not limit its inquiry to a single consideration. The tests for validity were much more complex as set forth in the celebrated case of *Lochner v. New York*.⁸⁸

The mere assertion that the subject [of the law] relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legiti-

87. See generally BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION* 113-33 (1987).

88. 198 U.S. 45 (1905).

mate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and his power to contract in relation to his own labor.⁸⁹

In addition, the Court also utilized the less restrictive alternative test to determine if the same legislative end could be accomplished with a measure less onerous to liberty.⁹⁰ Contrary to Hayek's assertions, all these tests had been long employed to determine constitutional validity, whether for economic or other legislation proscribing individual liberties.⁹¹

To be sure, part of these tests relates to legislative purposes. But there is no problem with such analyses; not all legislative objectives are legitimate. Thus, prohibiting a right for no other reason than antagonism toward it is deprivation of the right for its own sake. Likewise, legislation seeking to advance the interests of a private person or group at the expense of the individual rights of others cannot be regarded as a legitimate legislative purpose. Government has a duty to govern impartially.⁹² It must not deprive one person of liberty solely for the benefit of another person.

Hayek refers to early judicial interpretations of the due process provisions, defining the term as meaning "due process for the enforcement of the law."⁹³ However, this interpretation is contrary to plain meaning. The due process clause in both the Fifth and Fourteenth Amendments reads as a very broad protection for freedom. Each clause forbids government from depriving any person of life liberty or property without due process of law; that is, without engaging in a fair and proper inquiry as to whether wrongdoing has occurred. Since the legislature has no power to determine wrongdoing and impose punishment, the due process clauses prohibit it from depriving any person of life, liberty or property. Indeed, only a jury or judge can strip a person of his or her life, liberty or property. The clauses are accordingly strong proscriptions on the legislature.

The historical record substantiates the conclusion that due process is not confined to procedure. The origin of the Fifth Amend-

89. *Id.* at 57-58.

90. *See Weaver v. Palmer Bros.*, 270 U.S. 402 (1926).

91. *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121-22 (1979).

92. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

93. HAYEK 1960, *supra* note 1, at 189.

ment's due process clause is Chapter 39 of the Magna Carta.⁹⁴ Executed in 1215, it provided its beneficiaries with more than just procedural protection. Due process, or as it was initially known "the law of the land," placed a substantial check on the king's legislative powers.⁹⁵ Otherwise, "if by 'law of the land' was meant any law which the King might enact, the provision was a nullity."⁹⁶ At the outset, the Chapter applied only to the king, but in time it became a general protection against government oppression.

The great English legal commentator, William Blackstone (1723-1780), interpreted Chapter 39 as protecting "every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."⁹⁷ Blackstone viewed this protection as containing both procedural and substantive elements. Hence, in his discussion on property rights, Blackstone stated that an individual is protected in the "free use, enjoyment, and disposal of all . . . acquisitions, without any control or diminution, save only by the laws of the land."⁹⁸

"Laws of the land" included liberties secured under the common law which government could not rightfully limit. Thus, Blackstone writes that the laws of the land protected the landowner from the government's power of eminent domain, by requiring the legislature to compensate the landowner for any taking of them.⁹⁹

Sir Edward Coke (1552-1634), another highly celebrated English authority on the common law, also construed Chapter 39 and its successors as securing both procedural and substantive rights. He opined that the adoption of a law under the required formalities did not make it the law of the land if it was arbitrary or capricious.¹⁰⁰ In his *Institutes of the Laws of England*, Coke presented examples which indicated that laws of the land or due process of law embodied substantive protections.¹⁰¹ According to Coke, the economic liberty to pursue one's livelihood and to purchase goods were secured under subse-

94. J.C. HOLT, *MAGNA CARTA* 327 (1965). Chapter 39 reads: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land." *Id.*

95. See generally *Wynehamer v. People*, 13 N.Y. 378 (1856).

96. *Id.* at 435.

97. 4 BLACKSTONE, *supra* note 91, at 417. Blackstone wrote that this provision "alone would have merited the title that the [Magna Carta] bears, of the great charter." *Id.*

98. *Id.* at 134.

99. *Id.* at 134-35.

100. 1 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 46-47 (1817).

101. See *id.*

quent issues of Chapter 39.¹⁰² Among other things, he asserted that “[g]enerally all monopolies are against this great charter, because they are against the liberty and freedom of the subject, and against the law of the land.”¹⁰³

Blackstone and Coke were the leading authorities for the legal community at the time of the framing of the Constitution and Bill of Rights. Given the great importance of their views, it is difficult to conclude that the First Congress, which framed the due process clause of the Fifth Amendment, considered the clause as confined to procedural protections. Moreover, the framers of the due process clause of the Fourteenth Amendment regarded it as a substantive guarantee.¹⁰⁴

Hayek has asserted that no liberty is absolute, but there must always be a legal basis for limiting it. For much of its history, the United States Supreme Court has interpreted the due process clause as a substantive guarantee under this assumption, using mostly the various tests applied in *Lochner v. New York*.¹⁰⁵ During the substantive due process period when the United States Supreme Court applied this concept to protect the production and distribution of goods and services, it was fulfilling its obligations under the Constitution.

There seems to be some confusion in Hayek’s writings about this matter. Elsewhere, he states that “[i]f bills or rights are to remain in any way meaningful, it must be recognized early that their intention was certainly to protect the individual against all vital infringements of his liberty.”¹⁰⁶ Accordingly, the United States Constitution contains the Ninth Amendment and due process clauses, both very general in terminology and consistent with this purpose, and consequently, likely, sources for guaranteeing economic liberties.

B. *The President’s Power of Veto*

Hayek objects to the American separation of powers as it applies to the separation of the legislative and executive functions.¹⁰⁷ As previously set forth, Hayek defines legislation and administration differently and would separate these powers on the basis of his definition.

The objective of the United States separation doctrine is to disperse government in order to limit its powers. The goal of liberty was

102. *Id.*

103. *Id.*

104. See *Majorities May Limit*, *supra* note 12, at 343-49.

105. 198 U.S. 45 (1905).

106. HAYEK 1960, *supra* note 1, at 216.

107. See discussion *supra* part I.

paramount and the burdens it imposed on governmental processes "often seem," as Justice Burger noted in *I.N.S. v. Chadha*,¹⁰⁸ "clumsy, inefficient, even unworkable."¹⁰⁹ But those hard choices, Burger continued "were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."¹¹⁰

Unlike the British Parliament, Congress shares power with the other branches. Not only did the Constitution remove the implementation powers from the legislature but it also gave the executive an important check over the legislature. The purpose of the Presidential veto is threefold: First, to protect the Presidency from invasion by the Congress; second, to encourage greater and wider deliberation for proposed legislation; and third, to require that super majorities of the legislature pass important measures.

From a Hayekian perspective, the third reason should be the most important. It limits law making potential and diminishes the power of special interest groups.

"Every person's vote should be worth the same" is a universally accepted idea in democratic societies but one very difficult to achieve. Obviously, voting districts should be equal in population, yet this result does not ensure that the boundary lines have not created minorities in the district by dividing up large voting blocs or even majorities. Thus American civil rights litigation has shown that the drawing of the boundary lines between districts may make several smaller blocs out of one racial or ethnic bloc.¹¹¹

The two-thirds vote required by the President's veto under the United States Constitution seeks to make certain that the Congress' vote on a particular measure truly represents the will of the people.

A president is not likely to exercise the veto unless the matter is of major importance. Nor is he or she likely to incur the legislature's displeasure by vetoing a measure unless the issue warrants it. Thus, the executive veto is consistent with the highest aspirations of democratic decision-making, requiring that in major matters a clear majority of the people's representatives determine the nation's destiny.

108. 462 U.S. 919 (1983).

109. *Id.* at 959.

110. *Id.*

111. See DRAFTING A CONSTITUTION, *supra* note 33, at 20.

VII. COMPARING HAYEK'S CONSTITUTION AND THE UNITED STATES CONSTITUTION

For Hayek and the American Framers, there was no more important Constitutional goal than limiting the power of government. The United States Constitution protects liberty by way of the veto powers of the Supreme Court and to some extent those of the President. Hayek, in his model Constitution relies on the Legislative Assembly and Constitutional Court for this protection. His Legislative Assembly would be a "dream" legislature selected only from those portions of the population most likely to be dedicated to the protection and preservation of a just state.

Hayek's model Constitution has not advanced past the paper stage unlike the United States Constitution which has been in force for over 200 years. Time has shown the enormous difficulty of maintaining Hayekian principles in the United States Constitution, but to a large extent this has been accomplished. As far as I am aware, the United States Constitution has been the most successful in achieving the limited state espoused by Hayek. And, although the Supreme Court has not implemented all of the Framers' libertarian ideas, the United States Constitution, on the whole, still provides for liberty a great measure of protection—more probably than any existing Constitution.

Hayek's model Constitution is doomed to failure. The age and term requirements for the Legislative Assembly are not politically feasible. That any society would subscribe to the limitations it imposes on voters and office holders is in my view most doubtful.

Hayek's Constitution would rely principally on the Legislative Assembly to ensure a fair and just society. His Constitutional Court would seem of secondary importance in this regard. He presents a detailed formula for selecting people for service on these bodies. People who would be virtuous enough always to seek "public" as distinguished from the private welfare.

I agree that under Hayek's rules the Legislative Assembly would be spared the pressures from many special interest groups. However, there is little basis for believing that its members will perform as Hayek envisions and maintain a minimal state. After all, many "virtuous" and "intelligent" people between the ages of forty-five and sixty favor a socialist or welfare state for purely philosophical reasons. Special interests will still be able to influence the Governmental Assembly, the spending branch, except as the Legislative Assembly and Constitutional Court limit its discretion.

Hayek apparently believed he could devise a "perfect" legislative body. But even in the absence of many special interest influences, its members will still be acting quite frequently in their own self interest which, as public choice theory confirms,¹¹² will often not be the same as that of the public.

Hayek charges the Legislative Assembly to be both legislators, in protecting majority concerns, and constitutional interpreters, in securing minority concerns. However, these two parts of government are different in function. Under the United States Constitution, the legislature is the protector of the governors and the judiciary of the governees. The legislature equates the public interest with the creation of laws; the judiciary, with the preservation of liberty. Each must look to its constituency in the exercise of its responsibility.

Different abilities are necessary for the making, judging, and executing of laws. They require the exercise of different powers, faculties, and knowledge. No one man ever had a sufficient extent of abilities, or versatility of genius, to attend to the duties of all, at one time, or in a quick succession. Such a union must frequently occasion a confusion of principles, and remediless violation of rights.¹¹³

Indeed, Madison warned that "[a]mbition must be made to counteract ambition."¹¹⁴ Hayek imposes on his Legislative Assembly a dual responsibility which is difficult to fulfill.

The American Framers' solution is far more preferable. To quote Thomas Jefferson: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."¹¹⁵ Because political bodies have great difficulty in maintaining a limited state, Hayek's Constitutional Court would in time assume the major responsibility for effectuating it. The result might not differ appreciably from what occurs under the United States Constitution.

112. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243 (1987).

113. Nathaniel Chipman, *Sketches of the Principles of Government* 120-27 (1793) in, 1 THE FOUNDERS' CONSTITUTION 332 (Philip B. Kurland & Ralph Lerner eds., 1987).

114. THE FEDERALIST NO. 51, *supra* note 64, at 322.

115. HAYEK 1960, *supra* note 1, at 246 (quoting THOMAS JEFFERSON, THE KENTUCKY RESOLUTIONS OF 1799, at 157-58 (2d ed. 1894)).

COMMENTS ON BERNARD H. SIEGAN'S "HAYEK AND THE UNITED STATES CONSTITUTION"

Joyce Appleby†

Professor Siegan has presented an interesting comparison between the constitutional thinking of the Founding Fathers and Frederick Hayek, stressing the similarities in their emphasis upon the provision of maximum security for liberty.¹ At the end of his paper, Professor Siegan reaffirms this point, indicating that there is "no more important Constitutional goal than limiting the power of government."² However events subsequent to the Constitution suggest that the Framers were not of one mind on this goal. The Framers sought many things, as the preamble of their Constitution records: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."³ I will return to the Founders' thinking, but first I would like to explore Professor Siegan's understanding of the benefits of liberty.

As both an expositor and appreciator of Hayek's thought, Professor Siegan has highlighted an instrumental justification of liberty. Professor Siegan does not ignore the social good, but claims its achievement is the triumph of unintended consequences over rational planning—an accomplishment not of officers of the state, but of individuals using ingenuity and common sense to seek their own betterment. Thus, individual liberty serves the common good by promoting human inventiveness. Since the sources of future progress are always unpredictable, protecting everyone's liberty will maximize the possi-

† Professor of History, University of California, Los Angeles. Ph.D., Claremont Graduate School, 1966; M.A., University of California, Santa Barbara, 1959; B.A., Stanford University, 1950.

1. See Bernard H. Siegan, *Hayek and the United States Constitution*, 23 Sw. U. L. REV. 469 (1994).

2. *Id.* at 489.

3. U.S. CONST. pmbl.

bility that whoever has new ideas will be free to pursue them. Moreover, individual liberty acts as an antidote to the deficiencies in majority will.

I certainly endorse the wisdom contained in these points, as well as Professor Siegan's conclusion that they have been vindicated in practice, as far as the invention and production of goods is concerned.⁴ In fact we have seen a little too much success with these economic principles. These tenets prevail today not only in international trade but also in domestic politics. There is hardly anything that cannot be bought, including a reputation. It is, in fact, the very success of the entrepreneurial spirit that points out the limitations of a political system which makes protecting individual liberty its principal goal. We have had incessant technological advances and dazzling breakthroughs in production. In terms of the range and price of goods, Americans have benefitted enormously from the ability of other individuals to mobilize their own resources. However, society, as our recent ills have taught us, is too densely interdependent a phenomenon to yield to the simple efficiencies of individual self-determination.

This brings me to my critique of the argument for the primacy of liberty. I would like to start with a brief parable relating to our times. Imagine that it was ten years ago and the friends of liberty were asked to make a wish list for the United States. What would it include? Certainly, the list would feature the spread of democracy to old and new nations, the defeat of communism as a credible ideology, and a wider ambit for free trade throughout the world. An incredible optimist might also have asked for an end to the menacing arms race, the tearing down of the Berlin Wall, the embrace of capitalist principles by China, and replacement of the world's command economies by free enterprise.

Well, here we are ten years later and even these wildest wishes have come true. Yet there is a stunning irony to it all. Despite the triumph of the United States in the Cold War, we find ourselves deeply troubled about our society at a time when our ideas and institutions are most admired abroad. We have beaten the Communist regimes hands down, but we have never been more uncertain about our own internal strength or our underlying resiliency. The feeling is not of roads not taken, but of maps that have been misplaced. The elan of American nationalism is viewed as a thing of the past, over-

4. Siegan, *supra* note 1, at 471-72.

taken by worries about violent teenagers, decaying cities, neglected schools, fractured families, shifting patterns of employment, and persistent racial tensions.

My students are fascinated when I talk about the impact of the Enlightenment upon the American Revolution. What an astounding notion they find it that once our leaders faced the future with optimism, believed in the universality of reason, and thought that society had its own natural, harmonizing principles.

The idea proposed by Professor Siegan that "[m]aximizing liberty will lead to the greatest societal gains and advances"⁵ seems doubtful. This is not to say that the expansion of liberty has not brought some success; its successes are indisputable. However, liberty does not exist in a social vacuum; its benefits are dependent upon the general health of the nation. To secure the blessings of liberty, this country must itself be secure. During the past twenty years, the people of the United States have been thrown back to the two most basic functions of a society: reproducing its members and establishing order.

One of the things that historic liberalism took for granted was the acculturation process, the forming of successive generations through a home life that promoted self-discipline, economic skills, and personal responsibility. As a result, little attention was paid in liberal theory to the strategic years between birth and adulthood when children learn how to become members of their society. Indeed, it was a premise of eighteenth-century liberals that what we know as the cultural traits of liberal capitalism inhered in human nature. Like the externalities of economic theory, families and their capacity to create the incentives essential to membership in a free society lay outside theorizing about liberty. Today, the family no longer appears as a benign private institution. Its strategic importance in shaping those whose liberty is to be maximized is now quite visible. We are now more aware of the complex skills involved in child-rearing, not to mention the necessary material underpinnings to effective parenting. Politically speaking, it is not a matter of indifference that half of the children in the Los Angeles Unified School District come from families with incomes below the poverty line.⁶

Closely connected to the challenges we face in reproducing successive generations of citizens is the problem of order. I read in the

5. *Id.* at 470.

6. See Barbara Vobejda, *L.A. Swept by Decade of Social, Economic Change*, WASH. POST, May 11, 1992, at A1, A8 (discussing the effects of the rise in poverty, unemployment, and immigration in Los Angeles).

paper recently that the City of Los Angeles is going to provide bus service for a group of elementary school children whose lives are deemed at risk because they must walk to school.⁷ Speaking in territorial terms, violent people are steadily encroaching on what we might call our free land, evoking images of an earlier national struggle. This news item is but another sad report from the war zone of our cities. A police problem has become a political problem—for ultimately, sovereign authority is only as good as the reach of its law, and police are no substitute for a polis.

It is interesting that reports of violence in newspapers and on television have increasingly focused upon children, even though a far greater proportion of victims are adults, many of them elderly. This sentimentalization of violent crime can be attributed indirectly to the hold of the liberal tradition in America. It is as if the press was searching for facts and images that will arouse the concern of even the most ardent votaries of liberty.

Let me now bring these observations about contemporary reality to bear directly on Professor Siegan's assessment of the centrality of liberty to the public good. Hayek presupposes a social order of undifferentiated adults—interchangeable participants in a free society whose understanding of the purposes of individual autonomy can be taken for granted. As I have attempted to demonstrate, the political problems that confront us go much deeper than the protection of individualism. They also address the question of how personal autonomy is formed in the first place. The strength of Hayek's observations about liberty lies in two places—his recognition that mature adults know what is better for them than anyone else; and that social problems are solved with local knowledge rather than the dictates of a distant authority. Neither of these observations addresses the more basic challenges we face of learning how to nurture children until they become mature adults capable of using their freedom wisely, or of recovering a collective sense of responsibility for this task.

I would like to conclude by looking back to the era when the Constitution was first written. The differences in the social institutions of the United States between the Framers' time and ours is instructive. The liberty to be secured by the Constitution in 1789 pertained to a highly restricted group—white, property-owning men. The Constitution structured power in deference to liberty, but far more pervasive as a regulator of personal liberty was the common law.

7. Hugo Martin, *Children on Gang-Plagued Blythe Street to Get Bus Service*, L.A. TIMES, Nov. 27, 1993, at B3.

Common law rules and procedures which spelled out the meaning of liberty in the everyday lives of early Americans dramatically circumscribed the freedom of women, children, servants, apprentices, and employees of all kinds. Slave codes took care of the freedom of another quarter of the population.

I am not making a tendentious argument about the moral lapses of the Founding Fathers. These legal arrangements predated the Constitution; they reflected the highest wisdom of the day. What is critical to understand is how the control of dependents—the very category of dependents—took care of the political fundamentals of reproduction and order. The structuring of personal and economic relations by the common law was not an adventitious and irrelevant feature of early American life. Roughly twelve percent of the population had legal control over the dependent eighty-eight percent of society.⁸ Adult white males exercised their constitutionally-protected liberties while simultaneously supervising the remainder of society, made up of their workers, children, and wives. The reproduction and ordering of society which now are in jeopardy were originally taken care of through institutional arrangements which have since been dismantled.

I certainly do not want to be misunderstood as arguing for a return to coverture, slavery, and the labor regime of the master-servant law. The expansion of freedom in the United States is something we all applaud. I have used the Founding Fathers to make my point that liberty can not be discussed in a social vacuum. When full liberty was accorded to women, children, and workers, it spilled over the confines of politics and economics and penetrated every nook of society. Similarly, when citizenship no longer differentiates between a group of prosperous adult white males and the rest of society, public responsibility loses its appeal as a sign of status. These are the historical developments which have worked to create a different social milieu than that which the Founding Fathers knew and wrote about and believed in.

Extending liberty will always be one of our goals, but so must be that of building a community which I would define as a shared sense that society collectively bears responsibility for its reproduction and order. It seems pertinent now to ask: "Is it possible to have either liberty or justice without community?" Limiting government was only one of the Founding Father's aims, and it can certainly only be one of ours when we see that it takes effective government to make liberty

8. For an interesting discussion of this point, see KAREN ORREN, *BELATED FEUDALISM* (1991).

meaningful. Their goal was to extend liberty within an ordered world of social relations. Ours is the task of recovering order with a people very much at liberty.

COMMENTS ON BERNARD H. SIEGAN'S "HAYEK AND THE UNITED STATES CONSTITUTION"

The Honorable Douglas H. Ginsburg†

I suppose it is useful to be reminded from time to time that there are people who do not think that liberty is a primary index of human accomplishment and justice. In Professor Appleby's case, at least, the reason seems to be that she confuses liberty with libertinism.¹ Although I quite agree with her call for the restoration of order,² I do not think that the disorder we are witnessing in the streets arises from people having too much liberty. On the contrary, many of us do not have the liberty that we once had to walk safely in our own neighborhoods. Nor do those who have taken away our liberty have more for themselves as a result. They have been demoralized by a government that has pauperized them and destroyed the structure of their families for two generations. What this tells me is that we need less government and more liberty, not vice versa.

I. REGULATION

Turning now to Professor Siegan's paper,³ I am going to make three observations, in increasing order of generality. I will first address Professor Siegan's discussion, in defense of liberty, of the unfortunate results wrought by the various governmental regulatory programs that have been the subject of the many studies he summarizes in his book, *Economic Liberties and the Constitution*,⁴ and refers

† Judge, United States Court of Appeals, District of Columbia Circuit. Judge Ginsburg was appointed to the bench in 1986, after serving as Assistant Attorney General for Antitrust Division in the United States Department of Justice.

1. See Joyce Appleby, Comments on Bernard H. Siegan's "*Hayek and the United States Constitution*," 23 Sw. U. L. REV. 491 (1994).

2. *Id.* at 493-94.

3. See Bernard H. Siegan, *Hayek and the United States Constitution*, 23 Sw. U. L. REV. 469 (1994).

4. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

to in his paper, *Hayek and the United States Constitution*. His discussion culminates in quoting Ronald Coase's observation that "regulation is either ineffective or . . . on balance the effect is bad . . . so uniformly as to create a puzzle; one would expect to find in all these studies at least some government programs that do more good than harm."⁵ Perhaps we can solve that puzzle if we put it in the following perspective.

The studies in question address various programs of economic regulation, which are virtually certain to be inefficient and perverse because their core purpose is to prevent voluntary transactions that do not involve any significant externalities. The studies examine such things as residential rent control, energy rationing, and regulations limiting entry into transportation markets. Inevitably, they conclude, as one would predict, that such regulatory programs are inefficient and usually ineffective. There is no anomaly.

The results might, at least in principle, be different if one studied what has come to be called "social regulations," namely regulation of health and safety risks, which in some cases do involve significant externalities. Not always, to be sure; regulation of occupational safety, for instance, is for the most part regulation of conduct that involves no externalities.

The most prominent example of social regulation that does involve externalities is the control of air and water pollution. It is quite possible that upon analysis of a particular program dealing with air and water pollution, one could conclude that the effect on balance is beneficial. I admit, however, that this conclusion is not very likely, given the way in which we are going about the task of environmental regulation. Public policy is still emphasizing unsuccessful and discredited command and control techniques that are not likely to achieve significant benefits; and such benefits that command and control techniques do achieve could be provided at a lower cost if more appropriate regulatory methods were used.

For those of us concerned with promoting liberty, as opposed to expanding state control, the contemporary problem is not economic deregulation. Economic deregulation has already occurred in such important sectors of the economy as energy, communications, transportation, and finance. The problem is instead one of choosing the right techniques for social regulation. Except in a few areas, such as

5. *Id.* at 4 (quoting RONALD COASE, *ECONOMISTS AND PUBLIC POLICY IN LARGE CORPORATIONS IN A CHANGING SOCIETY* 184 (J. Fred Weston ed., 1974)).

mandated recycling, we are not in a position to call for complete deregulation; rather, we can only advocate greater reliance upon property rights in the service of environmental quality. This creates a difficulty, however, because arguing about technique—arguing for market-oriented solutions to these sorts of problems—is not politically very motivating. As a result, the view that we should approach necessary social regulation in a way that also reflects concern with the preservation of liberty has won very limited acceptance in the Congress, which still routinely legislates in the traditional command and control fashion.

I raise this point in connection with Professor Siegan's paper because, notwithstanding the great advance of liberty over economic regulation in the last fifteen years, the greatest threat of government intrusion into the everyday lives of citizens today comes from the inept response of governments at all levels to the unavoidable problem of controlling environmental pollution. We see the Federal Government even now reaching in the name of the environment to control such minutiae as the types of appliances one can purchase. Indeed, the environmental challenge may be the last best way to socialist heaven because it can be used to justify so much more governmental intrusion than would be acceptable today upon any other ground. The Green War, it seems, has replaced the Cold War, as the favored rationale for extending the powers of the government. Those who love liberty had better stop fighting the last war and attend to the present one before they lose it by default.

II. ECONOMIC AND PERSONAL LIBERTIES

In the course of his discussion of the record of the United States Supreme Court, Professor Siegan said that the Court protects personal liberties to a much greater extent than economic liberties.⁶ That is, if anything, an understatement. Apart from outright takings of private property, there is virtually no protection whatsoever for economic liberty. Consider the Court's most recent case on the subject, *Federal Communications Commission v. Beach Communications, Inc.*,⁷ decided in June 1993—in which, I hasten to disclose, the Court reversed a decision that I had joined in a divided panel of the Court of Appeals.⁸

6. Siegan, *supra* note 3, at 483.

7. 113 S. Ct. 2096 (1993).

8. See *Beach Communications, Inc. v. Federal Communications Comm'n*, 965 F.2d 1103 (D.C. Cir. 1992).

The Supreme Court upheld an FCC regulation for which the Commission offered no real justification, but which the Court determined could be justified under a hypothetical situation that was not known to exist.⁹ In simple terms, the FCC has held that a satellite dish atop an apartment building is subject to regulation as a cable system if the signals it receives are then carried by wire to another apartment building, but only if the two buildings are not under common ownership or management.¹⁰ When asked by the court of appeals to justify this distinction based upon interests in real estate, the Commission was unable to go beyond saying that a district court in North Dakota had ordered it to amend its regulation in this fashion;¹¹ the FCC made no defense of it on the merits. Nonetheless, the Supreme Court upheld this seemingly arbitrary regulation, stating that the "Congress had to draw the line somewhere" and that this necessity left "the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally."¹² The Court went on to imagine two possible reasons for the line that the Congress drew.¹³ The Court suggested that the Congress might have believed that this line would result in the most efficient use of regulatory resources, or that the regulation might limit the potential for the owner of such a system to monopolize the services provided to surrounding buildings.¹⁴

More important than the hypothetical rationale for the regulation, the unanimous opinion of the Supreme Court makes it abundantly clear that the federal courts are to have nothing to do with determining the rationality of the limitations that government imposes upon the economic liberties of the people. As Justice Thomas wrote for eight of the nine Justices, "equal protection is not a license

9. *Beach*, 113 S. Ct. at 2100-05.

10. *Id.* at 2099-2100 (citing *In re Definition of a Cable Television Sys.*, 5 F.C.C.R. 7638, 7639-42 (1991)).

11. See *In re Definition of a Cable Television Sys.*, 5 F.C.C.R. at 7638 (citing *City of Fargo v. Prime Time Entertainment, Inc.*, No. A 3-87-47 (D.N.D. Mar. 28, 1988) (unpublished)). In the FCC's previous regulation, the hallmark of the cable system was quite sensibly its use of public rights-of-way, i.e., crossing streets and ways.

12. *Beach*, 113 S. Ct. at 2102.

13. *Id.* at 2103.

14. See *id.* at 2103-04. Justice Stevens, on the other hand, observing that "[f]reedom is a blessing," would have upheld the regulation solely because, in his opinion, "[a] decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom." *Id.* at 2105 (Stevens, J., concurring).

for the courts to judge the wisdom, fairness, or logic of legislative choices."¹⁵ This does not leave much, if anything, for a court to judge in the area of economic regulation.

As Professor Siegan discusses, the Supreme Court has, simultaneous with its reining in of economic freedom and notwithstanding many changes of personnel, expanded the First Amendment's protection of speech beyond anything that could ever have been imagined by the Framers and beyond anything known in any other country.¹⁶ While the text of the amendment is modest—the "Congress shall make no law . . . abridging the freedom of speech"¹⁷—the Court, at almost every turn has adopted an expansive interpretation. It now applies to the executive and judicial branches, that is to every aspect of the Federal Government, and through the Fourteenth Amendment incorporation doctrine, to the states as well.¹⁸ Indeed, through the state action doctrine, private parties who are acting in concert with a government, or who might be perceived as an agent of a government, are also subject to the limitations of the First Amendment.¹⁹

Moreover, the text of the First Amendment—that the "Congress shall make no law . . . *abridging* the freedom of speech"²⁰—suggests that the Framers intended only to prevent the Congress from lessening the freedom of speech that then obtained. In fact, however, the Court now applies the First Amendment to protect speech that could have been punished in 1789 as sacrilegious, profane, or indecent. As a result, under current First Amendment jurisprudence, it is virtually impossible for the government to penalize anyone for the use of words, whether written or spoken, regardless of whether one can discern an idea in them. Furthermore, the concept of speech itself has been expanded to include virtually all forms of expression analogous to speech, including things that are ordinarily viewed as conduct, such as picketing.²¹

The disparity between the Court's protection of expression and its non-protection of economic liberty is often perceived as anoma-

15. *Id.* at 2101.

16. See Siegan, *supra* note 3, at 483-84.

17. U.S. CONST. amend. I.

18. See *Stromberg v. California*, 283 U.S. 359, 368-69 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1927).

19. See, e.g., *Alliance for Community Media v. Federal Communications Comm'n*, 10 F.3d 812 (D.C. Cir. 1993), *vacated and reh'g banc granted*, 15 F.3d 186 (D.C. Cir. 1994).

20. U.S. CONST. amend. I (emphasis added).

21. See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

lous. I sense that Professor Siegan believes that there is an anomaly, particularly where he says that in its function of securing liberties "the contemporary Supreme Court has applied the Constitution with a very discriminating hand . . . [r]egardless of constitutional language and purpose," expressing its own preferences by giving some liberties high and others low priority.²²

The disparity is not truly anomalous, however. The Court's system of preferences is not inexplicable, nor is it arbitrary, as others have suggested, on the ground that the Court's members are part of the intellectual class, or are idea people.

Consider Professor Siegan's point that with regard to economic liberties the Court has capitulated at every turn.²³ He discusses *McCulloch v. Maryland*,²⁴ in which the limitation of congressional power implied by the Necessary and Proper Clause²⁵ was read out of Article I.²⁶ A century later, the Court allowed the Congress to regulate not only the instrumentalities of interstate commerce but also goods moving in interstate commerce.²⁷ In the late 1930's, the Court upheld regulation of matters that are not even "in," but merely "affect," interstate commerce.²⁸ As a result, hardly any subject is now beyond the reach of the national government.²⁹ In sum, as the Congress asserted a continuously broader subject matter jurisdiction, the Court always succumbed to the congressional will to expand, so that there is now a plenary national government.

Each of the Court's decisions acquiescing in this expansionary tendency amounts to a *de facto* amendment of the Constitution; each decision essentially repeals a constitutional restraint upon the legisla-

22. Siegan, *supra* note 3, at 483.

23. *See id.*

24. 17 U.S. (4 Wheat.) 316 (1819).

25. U.S. CONST. art. I, § 8, cl. 18.

26. *McCulloch*, 17 U.S. at 324.

27. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court acknowledged congressional power to prohibit the interstate transportation of goods only where "the use of interstate transportation was necessary to the accomplishment of harmful results." *Id.* at 271. The Court held that Congress had no authority under the Commerce Clause, however, to prohibit the interstate transportation of goods made in violation of a child labor act because "[t]he goods shipped [were] themselves harmless." *Id.* at 272. In *United States v. Darby*, 312 U.S. 100 (1941), the Court dropped the requirement that the goods be harmful, holding that the Congress can constitutionally prohibit the interstate shipment of goods merely because they are manufactured in violation of federal minimum wage or maximum hour regulations.

28. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

29. This line of cases reached its logical limit in *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (holding that wheat being grown by an individual on his own property for his own use affects interstate commerce, and therefore can be regulated by the Congress).

ture. This process of judicial amendment stands in sharp contrast to the elaborate process mandated by the Constitution itself: an amendment requires the greatest of all super-majorities, *viz* three-quarters of the states and two-thirds of each House.³⁰ There is understandably no other process as taxing and as much an inhibition to change as the amendment process. Hence, on the assumption that the Constitution may be amended only through this arduous route, the Framers authorized the Congress to legislate on a day-to-day basis with a simple majority of each House and the concurrence of the President.³¹ The Framers did make it difficult to legislate, to be sure, but not nearly as difficult as to amend the Constitution. Once the safeguards of the amendment process are removed, however, by the Court's acquiescence in congressional expansion—and the Congress no longer has a subject matter jurisdiction limited to its enumerated powers or even to matters of truly national rather than local significance—then it becomes increasingly important to preserve and police, and indeed to expand upon, the procedural limits that the Framers placed upon the Leviathan.

Four examples will help to put this point in perspective. First, after the process of judicial capitulation was completed in the 1930's, the post-war Supreme Court became extraordinarily concerned with ensuring the fullest democratic participation in government. The Court attempted to ensure such democratic participation through the one-person/one-vote line of decisions,³² the abolition of poll taxes,³³ and so on, all aptly recounted by John Hart Ely in his book *Democracy and Distrust*.³⁴

Second, the Court became concerned with punctilious adherence by the Congress to the constitutional procedures for governing, as seen generally in the cases dealing with separation of powers, and most particularly in *Immigration and Naturalization Service v. Chadha*,³⁵ which Professor Siegan discusses.³⁶ Highly formalistic insistence that the Congress proceed in exactly the way prescribed for legislating is what one would expect from a Court attempting to constrain procedurally a Congress that had loosed the substantive limitations that the Framers had set upon its powers.

30. See U.S. CONST. art. V.

31. U.S. CONST. art. I, § 7, cl. 2.

32. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

33. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

34. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105-34 (1980).

35. 462 U.S. 919 (1983).

36. See Siegan, *supra* note 3, at 488.

Third, as Professor Siegan again notes, the Court became more insistent than ever before upon the protection of the rights of persons accused of a crime.³⁷ In a society where anything may be made a crime, this is particularly important. When consensual and victimless conduct can be penalized as a felony, when previously unexceptionable conduct (such as a trucker's backhauling a load rather than returning empty) can be made into a regulatory crime, and when filling in one's backyard may turn out to violate a wetlands protection law and carry a criminal penalty, then one's conscience is no longer much of a guide to staying out of trouble. One needs not only legal advice at every turn, but also a new system of constitutional constraints to prevent the government from abusing this sword of Damocles that hangs over everybody.

Finally, the Supreme Court's concern with the First Amendment rights of speech, assembly, and petition is equally understandable: if anything may be the subject of political decision-making, then everything is potentially political. It therefore becomes extremely important to protect the public's right to express its views to the legislature; virtually anything that even arguably has expressive content might be important to a political decision.

This, I think, explains the seeming anomaly of a Court that has become increasingly concerned with personal liberties at the same time that it has capitulated to the legislature with regard to economic liberties. The capitulation laid the groundwork for the concern.

III. THE PROBLEM OF MAJORITARIANISM

Professor Siegan closes on an optimistic note, or at least one that sounds satisfied. He says that our Constitution has been more successful than any other in constraining the state.³⁸ And, more's the pity, there can be no doubt that this is true. But the comparison tends to obscure how far even we have drifted from the modest role for the state envisioned by the Framers.

The tragedy of the framing was the failure to anticipate the emergence of political parties, which made it much easier to legislate by building coalitions that transcend any particular issue. Political parties accomplish this by internalizing the logrolling function within the coalition, so that votes can be organized and legislation can be produced at a furious rate. Surely Professor Hayek's proposal to separate gov-

37. *Id.* at 484.

38. *Id.* at 489.

ernmental and legislative functions into separate assemblies³⁹ would also be put to naught in short order by ambitious men grasping for power over others.

Perhaps the resulting problems of excessive coercion and of a government that overrides individual autonomy without hesitation can best be addressed not by trying to restore limits upon the subject matter jurisdiction of the legislature, but by establishing a rule of decision that makes it more difficult to legislate, regardless of subject matter. The most promising rule of which I am aware was proposed by the Swedish economist Knut Wicksell at the turn of this century.⁴⁰

Wicksell starts with a very simple proposition: "It would seem to be a blatant injustice if someone should be forced to contribute toward the costs of some activity which does not further his interests or may even be diametrically opposed to them."⁴¹ The example he uses is that of a tax laid upon one person in order to give money to another, but his point is certainly not limited to fiscal measures.

If government were literally dependent upon the "consent of the governed," then legislation would depend upon unanimous consent. There could be no possible ground of objection to whatever decision is reached by unanimous consent because no one would be coerced to do what he opposes. Wicksell thus concludes that if, in principle, government is made legitimate by consent, then nothing should be enacted into law except by the unanimous consent of the legislators.⁴² (He acknowledges that representatives are still required in a large community,⁴³ although unanimity among legislators may not reflect unanimity among their constituents.)

A rule of unanimity is not practical because there will inevitably be holdout problems. That is, there will be people who will refuse to agree to a proposed measure even though it would benefit them, in order to extract some still greater consideration for themselves. Wicksell recognizes this problem and suggests that a super-majority rule for the passage of ordinary legislation, requiring, say, seven-eighths or nine-tenths approval, would solve this problem.⁴⁴

39. See *id.* at 489-90.

40. See Knut Wicksell, *A New Principle of Just Taxation*, in CONSTITUTIONAL CHOICE (J.M. Buchanan trans., Richard A. Musgrave & Alan T. Peacock eds., 1958). Wicksell's article was originally published in 1896. He wrote in German, so his work was presumably available to Hayek.

41. *Id.* at 89.

42. See *id.* at 90-91.

43. See *id.* at 91.

44. See *id.* at 92.

More important, Wicksell's rule of decision would largely resolve the problem of majoritarianism in the modern state. It is not perfect, but it is much more promising than Hayek's proposal for separate legislative and governmental assemblies. Yet, it is only a small variation on our existing structure, a simple numerical change in the majority rule for legislating that would truly secure us from the depredations of a government that acts, often at the behest of a few, in derogation of the liberties of all the people.

LAW AND LEGISLATION IN HAYEK'S LEGAL PHILOSOPHY

Leonard P. Liggio†

Why I Am Not a Conservative, Hayek's concluding chapter of *The Constitution of Liberty*,¹ provides us with his own overview of his political and legal philosophy. He is insistent that his liberalism has nothing to do with conservatism. Writing in the 1950's when there was an emerging New Conservatism based more on European writers and less on American sources, Hayek said:

[W]hat in Europe was called "liberalism" was here the common tradition on which the American polity had been built: thus the defender of the American tradition was a liberal in the European sense. This already existing confusion was made worse by the recent attempt to transplant to America the European type of conservatism, which, being alien to the American tradition, has acquired a somewhat odd character.²

Hayek adds that in Europe the twentieth century liberalism, which predominated, had been rationalistic and constructivist leading into acceptance of planning. This made it a precursor of socialism. Hayek's first objection to conservatism is that it cannot offer an alternative to socialism. The liberal "differs much more from the collectivist radical of today than does the conservative. While the last generally holds merely a mild and moderate version of the prejudices of his time, the liberal today must more positively oppose some of the basic conceptions which most conservatives share with the socialists."³

† Leonard P. Liggio, Distinguished Senior Scholar, Institute for Humane Studies, George Mason University, Fairfax, Virginia, 22030, and Research Professor, George Mason University, School of Law, Arlington, Virginia, 22201; Associate, University Seminar on the History of Legal and Political Thought, Columbia University, New York.

1. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) [hereinafter HAYEK, *THE CONSTITUTION OF LIBERTY*].

2. *Id.* at 397.

3. *Id.* at 398.

Hayek sees the analysis which liberals and conservatives share. But he emphasizes that, contrary to the conservatives, the liberals have a commitment to improvement and development:

Liberalism is not adverse to evolution and change; and where spontaneous change has been smothered by government control, it wants a great deal of change of policy. So far as much of current governmental action is concerned, there is in the present world very little reason for the liberal to wish to preserve things as they are. It would seem to the liberal, indeed, that what is most urgently needed in most parts of the world is a thorough sweeping-away of the obstacles to free growth.⁴

While the liberal and conservative might share a concern for any expansion of government powers, the conservative may propose the use of government coercion to limit progress in society outside the control of government.

There would not be much to object to if the conservatives merely disliked too rapid change in institutions and public policy; here the case for caution and slow process is indeed strong. But the conservatives are inclined to use the powers of government to prevent change or to limit its rate to whatever appeals to the more timid mind. In looking forward, they lack the faith in the spontaneous forces of adjustment which makes the liberal accept changes without apprehension, even though he does not know how the necessary adaptations will be brought about.

This fear of trusting uncontrolled social forces is closely related to two other characteristics of conservatism: its fondness for authority and its lack of understanding of economic forces. Since it distrusts both abstract theories and general principles, it neither understands those spontaneous forces on which a policy of freedom relies nor possesses a basis for formulating principles of policy.⁵

Hayek is particularly concerned with the conservatives' worship of government leaders and statesmen whose power would not be limited in order to accomplish 'great things' in particular circumstances when not constrained by the rule of law. Conservatives

did show an understanding of the meaning of spontaneously grown institutions such as language, law, morals, and conventions that anticipated modern scientific approaches and from which the liberals might have profited. But the admiration of the conservatives for free growth generally applies only to the past. They typically lack

4. *Id.* at 399.

5. *Id.* at 400-01.

the courage to welcome the same undesigned change from which new tools of human endeavors emerge.⁶

Hayek continues:

So unproductive has conservatism been in producing a general conception of how a social order is maintained that its modern votaries, in trying to construct a theoretical foundation, invariably find themselves appealing almost exclusively to authors who regard themselves as liberal. Macaulay, Tocqueville, Lord Acton, and Lecky certainly considered themselves liberals, and with justice; and even Edmund Burke remained an Old Wig to the end and would have shuddered at the thought of being regarded as a Tory.⁷

Hayek comes to a major area of difference between conservatives and liberals. Indeed, a recent book by liberal legalist, Clint Bolick,⁸ has led to a major example of this conflict.

Dr. Donald Devine, former professor of political science at the University of Maryland and former director of the U.S. Office of Personnel Management, raises the question whether decentralization should be the highest goal as conservatives believe, or whether as Bolick sees it, the 14th Amendment has "completed the federalism equation: a preference for decentralized power, but only to the extent consistent with the overreaching goal of maximizing individual liberty."⁹

The role of local governments restricting civil liberties is exactly the contests on which many liberals and conservatives will not see eye to eye. Hayek sees this as an issue on which conservatives lack principles.

When I say that the conservative lacks principles, I do not mean to suggest that he lacks moral conviction. The typical conservative is indeed usually a man of very strong moral convictions. What I mean is that he has no political principles which enable him to work with people whose moral values differ from his own for a political order in which both can obey their convictions. It is the recognition of such principles that permits the coexistence of different sets of values that makes it possible to build a peaceful society with a minimum of force. The acceptance of such principles means that we agree to tolerate much that we dislike. There are many values of the conservative which appeal to me more than those of the socialists; yet for a liberal the importance he personally attaches to

6. *Id.* at 401.

7. *Id.*

8. CLINT BOLICK, *GRASS ROOTS TYRANNY* (1993).

9. Donald Devine, *Resuscitation of Big Government Nostrums*, WASH. TIMES, Nov. 2, 1993, at A15.

specific goals is no sufficient justification for forcing others to serve them. . . . To live and work successfully with others requires more than faithfulness to one's concrete aims. It requires an intellectual commitment to a type of order in which, even on issues which to one are fundamental, others are allowed to pursue different ends.

It is for this reason that to the liberal neither moral nor religious ideals are proper objects of coercion, while both conservatives and socialists recognize no such limits. I sometimes feel that the most conspicuous attribute of liberalism that distinguishes it as much from conservatism as from socialism is the view that moral beliefs concerning matters of conduct which do not directly interfere with the protected sphere of other persons do not justify coercion. This may also explain why it seems to be so much easier for the repentant socialist to find a new spiritual home in the conservative fold than in the liberal.¹⁰

Hayek found himself particularly at odds with conservatives regarding democracy. For Hayek, it was not democracy itself, but unlimited government which was and is the problem. Hayek notes:

I have made it clear earlier that I do not regard majority rule as an end but merely as a means, or perhaps even as the least evil of those forms of government from which we have to choose. But I believe that the conservatives deceive themselves when they blame the evils of our time on democracy. The chief evil is unlimited government, and nobody is qualified to wield unlimited power. The powers which modern democracy possesses would be even more intolerable in the hands of some small elite.

At any rate, the advantages of democracy as a method of peaceful change and of political education seem to be so great compared with those of any other system that I can have no sympathy with the anti-democratic strain of conservatism. It is not who governs but what government is entitled to do that seem to me the essential problem.¹¹

In a conservative criticism of Hayek, Gottfried Dietze, professor of political science at Johns Hopkins University and representing a Right-Hegelian perspective, associates Hayek with the English common law tradition. Dietze, like many Germanic political scientists, and in contrast to the German historical law school, is horrified by English common law theorists such as Sir Edward Coke and his denial of sovereignty in English common law. Dietze says that Hayek "is

10. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1, at 401-02.

11. *Id.* at 403.

reminiscent of Sir Edward Coke when he talks about the artificial reason of the law that has been build up over the ages by great jurists.”¹²

Dietze’s criticism of Hayek’s view on legislation draws on Hayek’s concept of law. Hayek sees the law evolving from “the slow and gradual process of judicial development, which precludes a rapid adaption of the law to wholly new circumstances.”¹³ Although Hayek believed judges should be restrained in revision of earlier decisions, the common law tradition especially in America, satisfies Hayek’s desire both for evolution and for response to rapidly changing new conditions. The decision of a federal district judge to improve the legal situation in the face of new technology, for example, is likely to be better than possible enactment by the temporary majority in a legislature. It will receive review by the court of appeals, and perhaps the Supreme Court.

Dietze continues his discussion by conflating Hayek’s acceptance of democracy as the least evil method of government with his love of legislation. Dietze attempts to place Hayek in the legislative camp by contradiction:

The age of democracy is an age of legislation because legislation makes up the bulk of democratic law. It constitutes an important part of modern state law and, as Hayek pointed out again and again, a great threat to freedom and the rule of law. However, as he has also shown, legislation can be an essential support of liberalism and the Rechtsstaat. Hayek praises legislation while he condemns it. This is not surprising. Although Hayek distinguished *isonomia* or the rule of law and liberalism from democracy and emphasizes that democratic development can be and has been a threat to the rule of law and to freedom, he also leaves no doubt that democratic development can be and has been an important part of the evolution of liberty and the rule of law.¹⁴

Dietze, in his conflating of legislation and democracy in Hayek, confuses Hayek’s belief in democracy as the people’s active defense of liberty against government officials, and democracy as the legislative activity of government officials. For Hayek, democracy is only a means and not an end. “Democracy is the only method of peaceful change that man has yet discovered.”¹⁵

12. Gottfried Dietze, *The Necessity of State Law*, in *LIBERTY AND THE RULE OF LAW* 74-78 (1979).

13. *Id.* at 77.

14. *Id.* at 78-79.

15. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1, at 107.

Rather than the major violence of civil war, Hayek would prefer the lesser violence of a majority vote—a referendum, for example. However, adjustment by court decisions would preclude such appeal to major violence, or the violence of majoritarianism over a minority. Finally, Hayek sees democratic institutions as conducive to informing public opinion. Hayek shares with Tocqueville the view that a democratic society creates the conditions for education of the voters. Regarding Hayek, Dietze comments: “The liberal who rejects conservatism because it is static feels that democracy as a process of forming opinion must be given preference over a government by an elite which may be all too static, that the value of democracy proves itself in its dynamic aspects.”¹⁶

Dietze, drawing on Hayek’s *Rules and Order*, declares:

Hayek reveals himself as a liberal rather than a conservative when he stresses the liberating effect of legislation. More effectively than judicial decisions, legislation may do away with injustices caused by the fact that “the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice.” In an obvious agreement with Marx, the honorary president of the Mont Pelerin Society writes that the law on the relations between master and servant . . . has been shaped in large measure by the views of the parties.¹⁷

I. KNOWLEDGE AND IGNORANCE

Hayek thinks that the ultimate division between liberals and conservatives concerns knowledge. The liberals’ concept of the long-range strength of ideas contrasts with the conservatives’ faith of a particular set of inherited ideas. The conservative does not like new knowledge or its consequences.

At the core of all of Hayek’s work is the question of human knowledge. Hayek is not so concerned with epistemology. Epistemology has been of interest to Hayek’s older colleague and mentor, Ludwig von Mises, as well as to other economists working in a Hayekian framework.

Earlier in *The Constitution of Liberty*, Hayek addresses the question of human knowledge. Preceding chapter two, *The Creative Powers of a Free Civilization*, Hayek places a quotation from Alfred North Whitehead: “Civilization advances by extending the number of impor-

16. Dietze, *supra* note 12, at 79.

17. *Id.* at 78.

tant operations which we can perform without thinking about them.”¹⁸ Hayek begins chapter two:

The Socratic maxim that the recognition of our ignorance is the beginning of wisdom has profound significance for our understanding of society. The first requisite for this is that we become aware of man's necessary ignorance of much that helps him to achieve his aims. Most of the advantages of social life, especially in its more advanced forms which we call “civilization,” rest on the fact that the individual benefits from more knowledge than he is aware of. It might be said that civilization begins when the individual in the pursuit of his ends can make use of more knowledge than he has himself acquired and when he can transcend the boundaries of his ignorance by profiting from knowledge he does not himself possess.¹⁹

Hayek's beginning point is the concept adopted by the moral philosophers of the Scottish Enlightenment: society and civilization are the products of human actions, but not of human design. Hayek says: “It is the product of his actions or, rather, of the action of a few hundred generations. This does not mean, however, that civilization is the product of human design, or even that man knows what its functioning or continued existence depends upon.”²⁰

For Hayek, we are misled if we conclude that man, as the creator of civilization, can change civilization's institutions as he pleases. Man had not, according to Hayek, “deliberately created civilization in full understanding of what he was doing or if he at least clearly knew how it was being maintained.”²¹ Hayek opposed a Cartesian approach to knowledge:

The whole conception of man already endowed with a mind capable of conceiving civilization setting out to create it is fundamentally false. Man did not simply impose upon the world a pattern created by his mind. His mind is itself a system that constantly changes as a result of his endeavor to adapt himself to his surroundings. It would be an error to believe that, to achieve a higher civilization, we have merely to put into effect the ideas now guiding us. If we are to advance, we must leave room for a continuous revision

18. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1, at 22 (citing ALFRED N. WHITEHEAD, *INTRODUCTION OF MATHEMATICS*, (2d ed. 1961)).

19. *Id.* at 22.

20. *Id.* at 23, 426 n.1. (referring to ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* 279 (1966)).

21. *Id.* at 23.

of our present conceptions and ideals which will be necessitated by further experiences.²²

Hayek challenged the view that "regards human reason as something standing outside nature and possessed of knowledge and reasoning capacity independent of experience."²³ The human mind's growth is conditioned on the development of civilization, and the human mind cannot predict its own development.

There is the fact that man's mind is itself a product of the civilization in which he has grown up and that it is unaware of much of the experience which has shaped it—experience that assists it by being embodied in the habits, conventions, language, and moral beliefs which are part of its makeup. Then there is the further consideration that the knowledge which any individual mind consciously manipulates is only a small part of the knowledge which at any one time contributes to the success of his action.²⁴

Hayek emphasizes the magnitude of each individual's ignorance compared to the knowledge which contributes to successful goals. The knowledge is dispersed among an untold number of individuals. It is the knowledge of individuals that does not exist in wholes. Civilization permits each person to gain from the "separate, partial, and sometimes conflicting beliefs of all men."²⁵

In other words, it is largely because civilization enables us constantly to profit from knowledge which we individually do not possess and because each individual's use of his particular knowledge may serve to assist others unknown to him in achieving their ends that men as members of civilized society can pursue their individual ends so much more successfully than they could alone.²⁶

Hayek was very influenced by his friend, the chemist, Michael Polanyi. Hayek quotes Polanyi: "If a library of the year 3000 came into our hands today, we could not understand its contents. How should we consciously determine a future which is, by its very nature, beyond our comprehension?"²⁷

Hayek quotes Michael Polanyi on the spontaneous formation of a "polycentric order": "When order is achieved among human beings by allowing them to interact with each other on their own initiative—

22. *Id.*

23. *Id.* at 24.

24. *Id.*

25. *Id.* at 25.

26. *Id.*

27. *Id.* at 426 n.2 (quoting MICHAEL POLANYI, *THE LOGIC OF LIBERTY* (1951) [hereinafter POLANYI, *THE LOGIC OF LIBERTY*]); see also MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* (1958).

subject only to the laws which uniformly apply to all of them—we have a system of spontaneous order in society.”²⁸

Starting in September, 1993, I participated in a Folger Institute seminar: *Orthodox Sources of Unbelief in Early Modern England and France*, directed by Professor Alan C. Kors (History Department, University of Pennsylvania). During the discussion of the growth of naturalism and science in the seventeenth century, a puzzle arose. Lord Chancellor Francis Bacon, in the reign of James I, proposed an approach to science which was based upon an over-arching total explanatory method for understanding nature. Later seventeenth century English natural philosophers, such as Sir Robert Boyle and Sir Isaac Newton, saw Bacon as a major forerunner, yet their approach was totally different. They did not think that there was a general systems-theory, as did Bacon. Rather, they sought to understand nature from experimentation which would reveal the explanation of natural phenomenon. Hayek’s thinking parallels these founders of the British Academy.

During the 1930’s Hayek began to study the history of the intellectual point which he found threatening to civilization. He wrote a number of articles in *Economic* which he recast into his famous work, *The Counter-Revolution of Science*²⁹ (this work encompasses the articles that appeared in *Economic*). Hayek tried to analyze the epistemological conflict between two kinds of rationalism. Without searching for earlier representatives, Hayek sees the rise of a second tradition of rationalism in the seventeenth and eighteenth centuries as a foundation for the thinking he condemns in the nineteenth and twentieth centuries.

Hayek associates himself with the rational tradition from Aristotle through Thomas Aquinas to John Locke (Joseph Schumpeter considers Locke a Late Scholastic). Hayek criticizes the constructivist rationalism with whom he associates Francis Bacon, Rene Decartes, and Thomas Hobbes in seventeenth century, and Jean-Jaques Rousseau and the Encyclopedists in the eighteenth century. For Hayek, the constructivist rationalist tradition continues in the nineteenth century with Henri de Saint-Simon, August Comte, Georg W.F. Hegel, and Karl Marx. Hayek calls this “constructivist rationalism science.”

28. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1, at 160 (quoting POLANYI, *THE LOGIC OF LIBERTY*, *supra* note 27, at 159).

29. F.A. HAYEK, *THE COUNTER-REVOLUTION OF SCIENCE* (1955) [hereinafter HAYEK, *THE COUNTER-REVOLUTION*].

Hayek favors critical rationalism. He associates critical rationalism with Aristotle, Thomas Aquinas, the School of Salamanca, John Locke, Montesquieu, Bernard Mandeville, David Hume, Adam Smith, Adam Ferguson, Edmund Burke, Immanuel Kant, Alexander von Humboldt, Benjamin Constant, Alexis de Tocqueville and Lord Acton. An important entry into Hayek's epistemology may be found in his *The Confusion of Language in Political Thought*.³⁰

Initially, Hayek intended to write an intellectual history of classical liberalism. Hayek presented a number of historical papers during the Second World War while the London School of Economics was housed at Cambridge University. Lord Acton, who had been Regius Professor of Modern History at Cambridge, was particularly attractive to Hayek.³¹ He presented *Individualism: True or False* at University College, Dublin, which Hayek felt introduced his unfulfilled study of individualist philosophy of the eighteenth century. The chapters of Hayek's later work *The Counter-Revolution of Science*,³² appeared in the journal, *Economica* (1941-44), along with a chapter of Eli Halevy's *The Era of Tyrannies*.³³ There Hayek dealt with the retreat of classical liberalism in France. He had hoped to expand his discussion to deal with Germany, England, and America, but never did. Instead, Hayek abandoned his projected history of modern social thought, and looked to more theoretical presentations of his ideas. But, a summation of his views was presented in Hayek's *The Road to Serfdom*.³⁴

Written in the early 1940's, *The Road to Serfdom*³⁵ drew on De Tocqueville, Lord Acton, and Hilaire Belloc. Hayek noted that the growth of statism is a sharp break from the "whole evolution of Western Civilization": rapidly abandoning "the salient characteristics of Western Civilization as it has grown from the foundations laid by Christianity and the Greeks and Romans . . . the basic individualism inherited by us from Erasmus and Montaigne, from Cicero and Tacitus, Pericles and Thucydides, is progressively relinquished."³⁶

In his famous chapter ten, *Why the Worst Get on Top*,³⁷ Hayek emphasizes the conflict of power and liberty:

30. F.A. HAYEK, LONDON, THE CONFUSION OF LANGUAGE IN POLITICAL THOUGHT (1968); Eugene F. Miller, *The Cognitive Basis of Hayek's Political Thought*, in LIBERTY AND THE RULE OF LAW, *supra* note 12, at 242-67.

31. F.A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS parts I & II (1967).

32. HAYEK, THE COUNTER-REVOLUTION, *supra* note 29.

33. ELI HALEVY, THE ERA OF TYRANNIES 265-85 (1965).

34. F.A. HAYEK, THE ROAD TO SERFDOM (1944).

35. *Id.*

36. *Id.* at 10.

37. *Id.* at 100.

While to the great individualist social philosophers of the nineteenth century, to a Lord Acton or a Jacob Burckhardt, down to contemporary socialists, like Bertrand Russell, who have inherited the liberal tradition, power itself has always appeared as the arch evil, to the strict collectivist it is a goal in itself.³⁸

II. THE RULE OF LAW

The core of Hayek's *The Constitution of Liberty*³⁹ was his earlier work based on the lectures which he presented in Cairo for the National Bank of Egypt: *The Political Ideal of the Rule of Law*.⁴⁰ William P. Baumgarth sees the Rule of Law as Hayek's legal ideal:

Indeed, Hayek's formulation of the principles of the "rule of law" serves as a synthesis of his notions about man, mind, and society, as an application of his epistemological views on the limitations of the human intellect, of his modified rule utilitarianism, and of his notions of spontaneous order in society to the problem of the nature and limits of the liberal state.⁴¹

The Cairo lectures influenced Hayek's friend, Bruno Leoni, professor of legal theory at the University of Pavia, and later president of the Mont Pelerin Society. Hayek's influence is reflected in chapter three, *Freedom and the Rule of Law*.⁴²

In June, 1958, Bruno Leoni presented the lectures that became *Freedom and the Law*⁴³ at a Summer Seminar at Claremont McKenna College in California. The other lecturers were Hayek and Milton Friedman. At this seminar for young faculty and graduate students, Hayek's lectures were the manuscript chapters of *The Constitution of Liberty*,⁴⁴ and Friedman's lectures were the manuscript chapters of *Capitalism and Freedom*.⁴⁵

At Claremont, Hayek was strongly influenced by Leoni's lectures. Hayek encouraged their publication in the Series of Humane Studies for Van Nostrand Co., Princeton, New Jersey. Since Hayek's manuscript for *The Constitution of Liberty*⁴⁶ was completed, Hayek's

38. *Id.* at 144. .

39. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1.

40. F.A. Hayek, Fiftieth Anniversary Commemoration Lectures, National Bank of Cairo, Egypt (1955).

41. William P. Baumgarth, *Hayek and Political Order: The Rule of Law*, 2 J. LIBERTARIAN STUD. 11, 11-28 (1978).

42. BRUNO LEONI, *FREEDOM AND THE LAW* 58 (3d ed. 1991).

43. *Id.*

44. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1.

45. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

46. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1.

new reflections, stimulated by Leoni's *Freedom and the Law*⁴⁷ lectures, led him to undertake a new project which ultimately became his three volume *Law, Legislation, and Liberty*.⁴⁸

Leoni's starting points were taken from Baron de Montesquieu and A.V. Dicey. Leoni notes nineteenth century continental scholars concerned with the rule of law. Such scholars include Francois Guizot and Benjamin Constant in France and Otto von Gierke in Germany.

Leoni begins with Dicey's quotation of the principle of the English common law court's Law French: "La ley est la plus haute inheritance, que le roi had; car par la ley il meme et toutes ses sujets sont rules, et si la ley ne fuit, nul roi et nul inheritance sera."⁴⁹

Leoni concluded that Dicey saw three different meanings to the rule of law:

(1) the absence of arbitrary power on the part of the government to punish citizens or to commit acts against life or property; (2) the subjection of every man, whatever his rank or condition, to the ordinary law of the realm and to the jurisdiction of the ordinary tribunals; and (3) a predominance of the legal spirit in English institutions, because of which, as Dicey explains, "the general principles of the English constitution (as, for example, the right to personal liberty or the right to public assembly) are the result of judicial decisions. . . . ; whereas under many foreign constitutions the security given to the rights of individuals results or appears to result from the general (abstract) principles of the constitution."⁵⁰

Dicey's emphasis on the rule of the judicial decisions in the formation of basic legal principles impressed Leoni. Dicey held that contrary to continental countries, the United States was not ruled by the general principles of the Constitution and the Bill of Rights, but from the judicial decisions of ordinary courts.⁵¹ Leoni notes:

The increasing importance of the legislative process in the present age has inevitably obscured, both on the European Continent and in the English-speaking countries, the fact that law is simply a complex of rules relating to the behavior of the common people.

47. LEONI, *supra* note 42.

48. F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973) [hereinafter HAYEK, *LAW, LEGISLATION, AND LIBERTY*].

49. LEONI, *supra* note 42, at 61 ("The law is the highest estate to which the king succeeds, for both he and all his subjects are ruled by it, and without it there would be neither king nor realm."); see also Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J.L. & PUB. POL'Y 661 (1988); Leonard P. Liggio & Tom G. Palmer, *Freedom and the Law: A Comment on Professor Aranson's Article*, 11 HARV. J. L. & PUB. POL'Y 713 (1988).

50. LEONI, *supra* note 42, at 61.

51. *Id.* at 62 (citation omitted).

This is no reason to consider these rules of behavior much different from other rules of behavior in which interference on the part of political power has been only exceptionally, if ever, exercised. . . . We have become increasingly accustomed to considering law-making as a matter that concerns the legislative assemblies rather than ordinary men in the street and, besides, as something that can be done according to the personal ideas of certain individuals provided that they are in an official position to do so. The fact that the process of lawmaking is, or was, essentially a private affair concerning millions of people throughout dozens of generations and stretching across several centuries goes almost unnoticed today even among the educated elite.

It is said that the Romans had little taste for historical and sociological considerations. But they did have a perfectly clear view of the fact I have just mentioned. For instance, according to Cicero, Cato the Censor, the champion of the traditional Roman way of life against the foreign (that is, Greek) importation, used to say that "the reason why our political system was superior to those of other countries was this: the political systems of other countries had been created by introducing laws and institutions according to the personal advice of particular individuals like Minos in Crete and Lycurgus in Sparta Our state, on the contrary, is not due to the personal creation of one man, but of very many . . . through a series of centuries and generations. For he said that there never was in the world a man so clever as to foresee everything and that even if we could concentrate all brains into the head of one man, it would be impossible for him to provide for everything at one time without having the experience that comes from practice through a long period of history." . . . The law-making process, so Cato says, is not actually that of any particular individual, brain trust, time, or generation. If you think that it is, you have worse results than you would have by bearing in mind what I have said. Look at the fate of the Greek cities and compare it with ours. You will be convinced. . . . Even those economists who have the most brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really compatible with a law-making process centralized by the authorities. This leads some of these economists to accept an idea of the certainty of the law, that is, of precisely worded rules such as those of written law, which is compatible neither with that of a free market nor, in the last analysis, with that of freedom understood as the absence of constraint exercised by other people, including the authorities, over the private life and business of each individual.

It may seem immaterial to some supporters of the free market whether rules are laid down by legislative assemblies or by judges,

and one may even support the free market and feel inclined to think that rules laid down by legislative bodies are preferable to the *rationes decidendi* rather imprecisely elaborated by a long series of judges. But if one seeks historical confirmation of the strict connection between the free market and the free law-making process, it is sufficient to consider that the free market was at its height in the English-speaking countries when the common law was practically the only law of the land relating to private life and business.⁵²

Leoni agrees with Dicey that a revolution was occurring in English law and that there was:

the gradual overturning of the law of the land by way of statutory law and through the conversion of the rule of law into something that is now increasingly coming to resemble the Continental *etat de droit*, that is, a series of rules that are *certain* only because they are written, and *general*, not because of a common belief on the part of the citizens about them, but because they have been decreed by a handful of legislators.⁵³

Leoni continues: "This is exactly what is meant by the *long-run certainty of the law*, and it is incompatible, in the last analysis, with the short-run certainty implied by identifying law with legislation."⁵⁴

Hayek's concerns about mere majorities was shared by Leoni in his analysis of "general will" in chapter seven of *Freedom and the Common Will*.⁵⁵ Leoni refers to the legal majorities, described by Lawrence Lowell, as an unacceptable majority. For Leoni: "Strictly speaking we ought to conclude that no group decision, if it is not unanimous, is the expression of a will common to all the people who participate in that decision at a given time."⁵⁶ According to Leoni:

Eliminating all group decisions taken by majorities of the Lowell type would mean terminating once and for all the sort of legal warfare that sets group against group in contemporary society because of the perpetual attempt of their respective members to constrain, to their own benefit, other members of the community to accept nonproductive actions and treatment. From this point of view, one could apply to a conspicuous part of contemporary legislation the definition that the German theorist Clausewitz applied to war, namely, that it is a means of attaining those ends that it is no longer possible to attain by way of customary bargaining. It is this prevailing concept of the law as an instrument for sectional purposes that

52. *Id.* at 87-90.

53. *Id.* at 90-91.

54. *Id.* at 92-93.

55. *Id.* at 133.

56. *Id.* at 136.

suggested, a century ago, to Bastiat his famous definition of the state: "L'Etat, la grande fiction a travers laquelle tout le monde s'efforce de vivre au depens de toute le monde." ("that great fictitious entity by which everyone seeks to live at the expense of everyone else.") We must admit that this definition holds good also in our own time.

An aggressive concept of legislation to serve sectional interest has subverted the ideal of political society as a homogeneous entity, nay, as a society at all. Minorities constrained to accept the results of legislation they would never agree to under other conditions feel unjustly threaten and accept their situation only in order to avoid worse or consider it as an excuse for obtaining on their behalf other laws that in turn injure still other people.⁵⁷

Leoni continues:

Professor Hayek, who is one of the most eminent supporters of written, general, and certain rules at the present time as a means of counteracting arbitrariness, is himself perfectly aware of the fact that the rule of law "is not sufficient to achieve the purpose" of safeguarding individual freedom, and admits that it is "not a sufficient condition of individual freedom, as it still leaves open an enormous field for possible action of the State."⁵⁸

Leoni finally concludes:

This is also the reason why free markets and free trade, as a system as much as possible independent of legislation, must be considered not only as the most efficient means of obtaining free choices of goods and services on the part of the individuals concerned, *but also as a model for any other system of which the purpose is to allow free individual choices, including those relating to the law and legal institutions.*⁵⁹

Leoni already had framed his basic argument:

In fact, what we are often confronted with today is nothing less than a potential *legal war of all against all*, carried on by way of legislation and representation. The alternative can only be a state of affairs in which such a legal war cannot any longer take place, or at least not so widely or so dangerously as it now threatens to do.

If we contrast the position of judges and lawyers with the position of legislators in contemporary society, we can easily realize how much more power the latter have over the citizens and how much less accurate, impartial, and reliable is their attempt, if any, to "interpret" the people's will. *In these respects a legal system centered*

57. *Id.* at 137-38.

58. *Id.* at 150 (quoting HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1, at 46).

59. *Id.*

*on legislation resembles in its turn—as we have already noticed—a centralized economy in which all the relevant decisions are made by a handful of directors, whose knowledge of the whole situation is fatally limited and whose respect, if any, for the people's wish is subject to that limitation.*⁶⁰

In his introduction, Leoni emphasizes the similarity in the evolution of the legal system of the republican, the early imperial Rome, and the English common law. He stresses their growth as discovery rather than enactment, and wishes that lesson was understood by "the advocates of inflated legislation in the present age."⁶¹ While most praise the Romans and the English they do not know the basis of their wisdom:

Very few realize, however, what this wisdom consisted in, that is, how independent of legislation those systems were in so far as ordinary life of the people was concerned, and consequently how great the sphere of individual freedom was both in Rome and in England during the very centuries when their respective legal systems were most flourishing and successful.⁶²

Leoni draws on the evolution of the Roman legal system to develop his analysis of legal certainty. In chapter four of *Freedom and the Law*,⁶³ Leoni contrasts the short-run certainty of law in the context of legislation which can be replaced at any moment by the legislative process, and long-term certainty of the law in the context of the common law decisions.⁶⁴ He calls attention to the legislation of the assemblies of the ancient Greek *polis*. He contrasts the development of Roman law with the Greek legislative activity.

A large part of the Roman rules of law was not due to any legislative process whatever. Private Roman law, which the Romans called *jus civile*, was kept practically beyond the reach of legislators during most of the long history of the Roman Republic and the Empire . . . W.W. Buckland, repeatedly point[s] out that "the fundamental notions, the general scheme of Roman law, must be looked for in the civil law, a set of principles gradually evolved and refined by a jurisprudence extending over many centuries, with little interference by a legislative body."⁶⁵

60. *Id.* at 21-22.

61. *Id.* at 11.

62. *Id.*

63. *Id.* at 76.

64. *Id.*

65. *Id.* at 81-82 (quoting W.W. BUCKLAND & ARNOLD MCNAIR, *ROMAN LAW AND COMMON LAW* 4 (F.H. Lawson ed., 2d ed. 1952)).

Joseph Raz, in his discussion of Hayek and the Rule of Law, notes the corruption of the rule of law in contemporary legal thought. Raz provides the example of the 1959 International Congress of Jurists in New Delhi. Raz goes on to describe this perversion of the doctrine of the rule of law as follows:

The function of the legislature in a free society under the rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational, and cultural conditions which are essential to the full development of his potentiality.⁶⁶

Professor Ronald Hamowy, who completed his doctoral studies under the direction of F.A. Hayek at the Committee on Social Thought at the University of Chicago, on the subject of Adam Ferguson and the Scottish Enlightenment, has provided several important contributions to the analysis of Hayek's legal and political thought. Hamowy's first comment was *Hayek's Concept of Freedom: A Critique*.⁶⁷ Hayek replied: *Freedom and Coercion: A Reply to Mr. Hamowy*.⁶⁸ Hamowy returned to the subject in his *Law and the Liberal Society: F.A. Hayek's Constitution of Liberty*,⁶⁹ and in *The Hayekian Model of Government in an Open Society*.⁷⁰

A strong re-affirmation of the analysis of F.A. Hayek and Bruno Leoni can be found in the work of Giovanni Sartori, professor at Florence, Stanford and Columbia Universities. Like Leoni and based in part on Leoni, Sartori roots his study in the English constitutional system:

What the founding fathers of liberal constitutionalism had in mind—in relation to the legislative process—was to bring the rule of law into the state itself, that is, to use Charles H. McIlwain's terms, to extend the sphere of *jurisdictio* (jurisdiction) to the very realm of *gubernaculum* (government). English constitutionalism actually originated in this way, since the *garantiste* principles of the English constitution are generalizations derived from particular de-

66. Joseph Raz, *The Rule of Law and Its Virtue*, in *LIBERTY AND THE RULE OF LAW*, *supra* note 12, at 4.

67. Ronald Hamowy, *Hayek's Concept of Freedom: A Critique*, 1 *NEW INDIVIDUALIST REV.* 28 (1961).

68. F.A. Hayek, *Freedom and Coercion: A Reply to Mr. Hamowy*, 1 *NEW INDIVIDUALIST REV.* 30 (1961).

69. Ronald Hamowy, *Law and the Liberal Society: F.A. Hayek's Constitution of Liberty*, 2 *J. LIBERTARIAN STUD.* 287 (1978).

70. Ronald Hamowy, *The Hayekian Model of Government in an Open Society*, 6 *J. LIBERTARIAN STUD.* 137 (1982).

cisions pronounced by the courts in relation to the rights of specific individuals . . . there is no doubt that liberal constitutionalism looked forward to a government of politicians that would somehow have the same flavor and give the same security as a government of judges. But after a relatively short time had elapsed, constitutionalism changed—although less rapidly and thoroughly in the English-speaking countries—from a system based on the rule of law to a system centered on the rule of legislators.⁷¹

Giovanni Sartori's discussion of the shift from the rule of law, as represented by the Anglo-American common law, to the rule of legislators, brought him to Bruno Leoni's *Freedom and the Law*.⁷²

Sartori quotes Leoni:

The fact that in the original codes and constitutions of the nineteenth century the legislature confined itself chiefly to epitomizing non-enacted law was gradually forgotten, or considered as of little significance compared with the fact that both codes and constitutions had been enacted by legislatures, the members of which were the 'representatives' of the people The most important consequence of the new trend was that people On the Continent and to a certain extent also in the English-speaking countries, accustomed themselves more and more to conceiving of the whole law as *written law*, that is, as a single series of enactments on the part of legislative bodies according to majority rule Another consequence of this . . . was that the law-making process was no longer regarded as chiefly connected with a theoretical activity on the part of the experts, like judges or lawyers, but rather with the mere will of winning majorities inside the legislative bodies.⁷³

Sartori emphasizes that when Friedrich Carl von Savigny published his massive *System of Actual Roman Law*,⁷⁴ the identification of law with legislative actions of "representatives" was not acceptable, especially to the chief exponent of the historical school of law.⁷⁵ Sartori believes that today a legal scholar well-grounded in the history of law can better appreciate the complete revolution that has occurred since the days of Savigny. Sartori notes:

For when law is reduced to State law-making, a "will conception" or a "command theory" of law gradually replaces the common-law idea of law, i.e., the idea of a free lawmaking process derived from custom and defined by judicial decisions.

71. GIOVANNI SARTORI, *LIBERTY AND LAW* 36-37 (Institute for Humane Studies 1976).

72. LEONI, *supra* note 42, at 14.

73. SARTORI, *supra* note 71, at 37.

74. FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF ACTUAL ROMAN LAW* (1867).

75. SARTORI, *supra* note 71.

There are many practical disadvantages, not to mention dangers, in our legislative conception of law. In the first place, the rule of legislators is resulting in a real mania for law-making, a fearful inflation of laws. Leaving aside the question as to how posterity will be able to cope with hundreds of thousands of laws that increase, at times, at the rate of a couple of thousand per legislature, the fact is that the inflation of laws in itself discredits the law.

Nor is it only the excessive quantity of laws that lessens the value of law, it is also their bad quality. Our legislators are poor law-makers, and this is because the system was not designed to permit legislators to replace jurists and jurisprudence.

In this connection it is well to remember that when the classical theory of constitutionalism entrusted the institutional guarantee of liberty to an assembly of representatives, this assembly was not being assigned so much the task of changing the laws, but rather preventing the monarch from changing them unilaterally and arbitrarily. As far as the legislative function is concerned, parliaments were not intended as technical, specialized bodies; and even less as instruments devised for the purpose of speeding up the output of laws.

Furthermore, laws excessive in number and poor in quality not only discredit the law; they also undermine what our ancestors constructed, a relatively stable and spontaneous law of the land, common to all, and based on rules of general application. For, inevitably, "legislative bodies are generally indifferent to, or even ignorant of, the basic forms and consistencies of the legal pattern.

They impose their will through muddled rules that cannot be applied in general terms; they seek sectional advantage in special rules that destroy the nature of law itself." And it is not only a matter of the generality of the law. Mass fabrication of laws ends by jeopardizing the other fundamental requisite of law-certainty.

Certainty does not consist only in a precise wording of laws or in their being written down: it is also the long-range certainty that the laws will be lasting. And in this connection the present rhythm of statutory lawmaking calls to mind what happened in Athens, where "laws were certain (that is, precisely worded in a written formula) but nobody was certain that any law, valid today, could last until tomorrow."⁷⁶

III. RULES AND ORDER

The remarkable aspect of Hayek's mind was its continued growth and development. When I first encountered Hayek's writings and

76. *Id.* at 36-38 (citations omitted).

Hayek himself almost forty years ago, he seemed to have typical European liberal limitations, first and foremost utilitarianism. Hayek's lectures at the New York University Faculty Club and the University Club, in conjunction with Ludwig von Mises' Gallatin House (6 Washington Square North) seminars on the methodology of the social sciences which I was attending, seemed predictable modern progressivism. Hayek did not seem to have the "feel" for history which Ludwig von Mises manifested. Hayek later wrote his self-analysis of the mental or attitudinal differences between von Mises and himself. Hayek demonstrated the differences between the concerns of von Mises and those of himself. They were different personalities able to contribute much in collaboration with each other.

I was able to work more closely with Hayek as the result of two programs. In the summer of 1959, I attended a seminar program at the University of North Carolina at Chapel Hill, similar to the 1958 seminar at Claremont with Hayek, Leoni, and Friedman. At Chapel Hill the lecturers included Harell de Graaf, American economic historian at Cornell University; Gregg Lewis, University of Chicago economist; Hayek lecturing from the manuscript chapters of *The Constitution of Liberty*;⁷⁷ and James Buchanan, University of Virginia political economist introducing his work on unanimity, social choice and the Italian public finance theorists who inspired his contributions.

In 1960, I received a post-doctoral fellowship in economic history at New York University. Among the economics lecturers were Ludwig von Mises, F.A. Hayek, Milton Friedman and Israel Kirzner; among the historians were Howard Adelson, Raymond de Roover, Herbert Heaton and Earl Hamilton.

These seminars and informal discussions with Hayek did not change my general view about the limitations of his views in utilitarianism, if not of Bentham, at least of John Stuart Mills. Hayek's distinction between the constructivist rationalists and the critical rationalists provided some depth. Hayek's study of the Scottish Enlightenment and of Edmund Burke added more depth.

In 1962, Hayek left the Committee on Social Thought at the University of Chicago and accepted a position at the University of Freiburg-im-Breisgau, Baden. My contact with Hayek thereafter was almost non-existent until April, 1975 when he returned to the United States for the first of his annual visits. I had been assigned by the Institute for Humane Studies and the Liberty Fund, his hosts on that

77. HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra* note 1.

and subsequent return trips to the United States, to meet Professor and Mrs. Hayek at Kennedy Airport and to escort them to their hotel, inform them of their program in New York and Washington, and detail their residence at the Institute for Humane Studies in California.

In 1973, the first volume, *Rules and Order*, of Hayek's new trilogy, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*⁷⁸ was published. In the meantime, during a period of difficulty and concern regarding his health and the state of the world, Hayek seemed to have added greatly to his knowledge. He had broken from the constraints of progressivism, and come to appreciate the legal and political philosophy of earlier thinkers more than what the usual litany of the textbooks regarding the Renaissance and the Enlightenment minds had done. The three volumes of *Law, Legislation, and Liberty*,⁷⁹ and his final contribution, *The Fatal Conceit*⁸⁰ show this concept.

Hayek's break-through was his discovery of forerunners of his thought earlier than Sir Edward Coke, Sir Matthew Hale, John Locke, Montesquieu, the Scottish Enlightenment, Edmund Burke, and Benjamin Constant. He discovered the important role, after the Classical Age, of the medieval and early modern scholastic philosophers. According to Hayek:

There occurred later one promising development in the discussion of these questions by the medieval schoolmen, which led close to a recognition of the intermediate category of phenomena that were "the result of human action but not of human design." In the twelfth century some of those writers had begun to include under *naturalis* all that was not the result of human invention or a deliberate creation Indeed, in the discussion of the problems of society by the last of the schoolmen, the Spanish Jesuits of the sixteenth century, *naturalis* became a technical term for such social phenomena as were not deliberately shaped by human will. In the work of one of them, Luis Molina, it is, for example, explained that the "natural price" is so called because "it results from the thing itself without regard to laws and decrees, but is dependent on many circumstances which alter it, such as the sentiments of men, their estimation of different uses, often even in consequence of whims and pleasures."⁸¹

78. HAYEK, LAW, LEGISLATION, AND LIBERTY, *supra* note 48.

79. *Id.*

80. F.A. HAYEK, 1 THE FATAL CONCEIT (W.W. Bartecy ed., 1988).

81. HAYEK, LAW, LEGISLATION, AND LIBERTY, *supra* note 48, at 20-21 (citations omitted).

For Hayek, the Spanish scholastics are an important link between Thomas Aquinas and the medieval schoolmen, as well as Locke and his successors. Hayek had become acquainted with the important contributions of the Spanish scholastics to economics through the dissertation written under his direction at the London School of Economics by Marjorie Grice-Hutchinson, later professor of economics at the University of Malaga.

Marjorie Grice-Hutchinson's works are: *The School of Salamanca*⁸² and *Early Economic Thought in Spain*.⁸³ Notable contributions to understanding the important role of the School of Salamanca were made by Joseph Schumpeter and Raymond de Roover. When the Mont Pelerin Society agreed to hold its first meeting in Spain in 1979 to recognize the re-establishment of constitutional government, Hayek said he would attend only if he could speak on the central role for liberal thought of the Spanish scholastics, and if he and Marjorie Grice-Hutchinson could present their papers in the great *Aula* at the University of Salamanca.

I have written separately on the legal thought of the School of Salamanca in a paper, *A Hayekian Approach to Law and International Relations*, for a Liberty Fund symposium directed by Professors Viktor Vanberg and James Buchanan of the Center for Study of Public Choice, George Mason University. I will not repeat that material here.

Professor Norman P. Barry, University of Buckingham, has discussed the role of the School of Salamanca in *The Tradition of Spontaneous Order*.⁸⁴ Barry, in the section of his article, *Scholasticism and the Market as Spontaneous Order*, said:

Hayek has always claimed that his explanation of a more or less self-correcting social system continues a long tradition. While acknowledging it is absurd even to speculate on the beginnings of a tradition. Hayek often refers to the original Spanish schoolmen as the founders of the theory of spontaneous order.⁸⁵

Barry's sub-sections of his article were entitled, *The School of Salamanca*, *Scholastic Economic Thought & the Market*, and *Molina: The Market & Natural Law Ethics*.

82. MARJORIE GRICE-HUTCHINSON, *THE SCHOOL OF SALAMANCA* (1952).

83. MARJORIE GRICE-HUTCHINSON, *EARLY ECONOMIC THOUGHT IN SPAIN 1177-740* (1978).

84. NORMAN P. BARRY, *The Tradition of Spontaneous Order*, in 5 *LITERATURE OF LIBERTY* (1992).

85. *Id.* at 12.

The Iberian Neo-Scholastics of the sixteenth and seventeenth centuries, or the School of Salamanca, were part of a rich European intellectual milieu that included similarly thinking philosophers such as Richard Hooker (1553-1600) and Hugo Grotius (1583-1645). Two of the most important thinkers at that time were Luis de Molina and Jacobus Arminius (1569-1609). Arminius was a professor of theology at the University of Leyden and founded the anti-Calvinist school in reformed theology which created the Remonstrant Church in the Netherlands. Hugo Grotius was the most famous of the disciples of Arminius.

Arminianism became the important theology of the Anglican Church. It was able to build upon the foundations laid by Richard Hooker, whom John Locke admired as the "judicious Hooker." He integrated the theology and the legal and political theory of Thomas Aquinas into the Anglican Church. Like other scholastics, Hooker rests authority on the consent of the people, especially in the representative institutions. A firm grounding of this analysis was expressed in the writings of the Conciliarists, such as Nicolas of Cusa, whom Hooker cites. These representative institutions may on occasion give some statutory expression to implement the legal system, the customary or common law.⁸⁶

Hugo Grotius utilized the philosophical concepts developed by the scholastic thinkers and presented them in a modern form by the School of Salamanca, especially Molina and Suarez. Grotius, in opposition to Bodin, Althusius, and others, did not accept the concept that sovereignty was unitary. Rather, like other Germanic constitutional theorists at the time, he saw sovereignty as divided and counter-balancing. Drawing on the natural rights doctrine of the Spanish scholastics, Grotius became the starting point of legal studies after the publication of *De Jure Belli ac Pacis* (1625).⁸⁷

Originally, Dominican (The Order of Preachers), of which Albertus Magnus and Thomas Aquinas were leading philosophers in the thirteenth century, by the late sixteenth and early seventeenth centuries, the leaders of the School of Salamanca were Jesuits (Society of

86. A. PASSERIN D'ENTREVES, *RICCARDO HOOKER: CONTRIBUTO ALLA THEORIA E ALLA STORIA DEL DRITTO NATURALE* (1932); *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (1952); CARL J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 71-76 (2d ed. 1963).

87. FRIEDRICH, *supra* note 86, at 63-64; John B. Stewart, *Opinion and Reform in HUME'S POLITICAL PHILOSOPHY* 15 (1992).

Jesus), such as Juan de Mariana, Luis de Molina, Juan de Lugo, and Francisco Suarez.

Burton M. Leiser's section, *Custom and Law: Suarez on Custom and Law*,⁸⁸ presents Suarez's description of the rights-making powers of individuals and the law-making powers through the sufferance of the community.⁸⁹ Suarez explains that a custom contrary to natural law does not properly deserve to be called custom, and cannot serve as a source of law, for the natural law is universally applicable and immutable.⁹⁰ For Suarez, custom creates law and custom can negate or destroy legislation. Leiser notes: "Nevertheless, Suarez says that custom may abrogate existing law, both canon and civil, for in this opinion the power to abrogate law rests in the hands of the people; and when they manifest their will, as they do through the observance of customs, their right cannot be denied."⁹¹

Cambridge University Press has included the political writings of Francisco de Vitoria and of Francisco Suarez in the important series: *Cambridge Texts in the History of Political Thought*. The series editors are Raymond Geuss and Quentin Skinner. A recent contribution to the relation of Hayek's thought to the Scottish Enlightenment is Claude Gautier, *L'invention de la Societe Civile*.⁹²

In conclusion, let us consider the comments of John R. Lucas, fellow of Merton College, Oxford:

Law, Legislation, and Liberty, which gives an analysis of law as profound as H.L.A. Hart's *Concept of Law* and is in certain crucial respects preferable to it . . . Hayek claims that the rule of law requires that laws be couched in general terms and have universal application and argues that only so can the individual know how the law bears on his plans and what he must do or abstain from doing, in order to be free of coercion or orders backed by threats of coercion.

But the main drift of his admirable exegesis of the nature of law is that legislation is not generally necessary and that we can live safely under a common-law system in which the laws are not fully formulated and in which, therefore, the rule of law cannot be characterized in terms of any strong principle of universality.⁹³

88. BURTON M. LEISER, *CUSTOM, LAW, AND MORALITY* 63 (1969).

89. *Id.* at 63-65.

90. *See generally id.*

91. *Id.* at 136.

92. CLAUDE GAUTIER, *L'INVENTION DE LA SOCIETE CIVILE* 236-69 (1993).

93. John R. Lucas, *Liberty, Morality, and Justice*, in *LIBERTY AND THE RULE OF LAW*, *supra* note 12, at 160-62.

LIGGIO ON HAYEK: SYSTEMIC KNOWLEDGE, THE RULE OF LAW, AND UTILITY

Christopher T. Wonnell†

For the sake of manageability, and at the inevitable cost of oversimplification, let me take Professor Liggio's paper¹ as asserting the following four propositions:

1. Hayek is more libertarian than conservative. Unlike the conservative, Hayek favors fundamental changes in the course of well-established governmental policy, disfavors elitist or undemocratic regimes, and welcomes the changes in our practices, attitudes, and values that will be brought about by the growth generated under market institutions. He also would not support the use of force to ensure moral conformity, even on the part of governments of relatively small geographical jurisdiction.²
2. For Hayek, individual human beings are constitutionally incapable of possessing the requisite knowledge to construct entire social systems with any prospect of success. This is partially due to the fact that the knowledge available at any one time is widely diffused. However, it is also because human beliefs and values are affected, in largely unpredictable ways, by the social systems themselves. We never could have formed our current beliefs without the experimental base of a successful social system that was already highly evolved, and we will not be capable of grasping the nature of a desirable replacement for that system until we have gathered a new experiential base of living within variants of that system.³
3. Hayek's substantive vision of the Rule of Law is causally linked to the common law process. Substantively, Hayek favored rules which were concretions of abstract principles binding upon all persons, permitting no arbitrary exceptions for particular persons or

† Professor of Law, University of San Diego School of Law; J.D 1982, University of Michigan; B.A. 1979, Northwestern University.

1. Leonard P. Liggio, *Law and Legislation in Hayek's Legal Philosophy*, 23 Sw. U. L. REV. 507 (1994).

2. See generally *id.* at 507-12.

3. See generally *id.* at 512-17.

groups, and that were stable and predictable over time. The common law process involves attempts by judges to "find" law in the sense of already developed practices, conventions, and moral customs. These social customs, especially when systematized by jurists, embody the requisite Rule of Law virtues more reliably than a legislative process that feels free to "make" and remake laws in ways that enable legislators to get re-elected.⁴

4. Hayek's ideas changed and improved over time, partly because Hayek became familiar with medieval and early modern scholastic philosophers. Those philosophers began to develop the idea that complex social structures could evolve without being designed, and that customs could embody wisdom and legal authority. These ideas moved Hayek away from the ideal of utilitarian calculation, or "planning for freedom" and toward a subtle appreciation for the methods of more reliable social progress.⁵

I do not wish to quarrel over whether these four propositions are correct interpretations of Hayek's views. The interesting questions upon which I wish to concentrate are whether these propositions, being attributed to Hayek, are true, and whether the views are consistent with each other.

The first point concerns the apparent tension between propositions One and Two. Hayek the libertarian believes that we possess enough knowledge to re-work established social structures in significant ways. It is true that lack of knowledge plays a major role in Hayek's economic case for markets, that is, that markets make use of information possessed by many people to generate prices, and that those pricing structures in turn stimulate the search for still more useful information. However, this is a selective point about what we do and do not know, rather than a comprehensive doubt about our ability to grasp system-wide information. We know the prerequisites of market processes, such as property rights, freedom of contract, and the Rule of Law (understood substantively). We also know that this process will lead to prices that are predictable in the "pattern" sense, that is, that the prices will reflect marginal rates of substitution, transformation, and the like. However, we do not know the precise prices that will result, or the concrete products that will be profitable to produce at these prices.

The question is whether the Hayek of Proposition Two would concede that individuals have enough capacity to make the systemic libertarian judgments specified in Proposition One. All major West-

4. See generally *id.* at 517-25.

5. See generally *id.* at 525-28.

ern democracies have moved a considerable distance away from laissez faire policies.⁶ How do we know that there isn't some functional reason making these developments necessary? Perhaps there is a reason that escapes present science but which will become knowable in the science available to us in the libraries of the year 3000 written with the benefit of this new set of experiences. This skepticism, an almost relativism or historicism, of Proposition Two does not sit well with the confidence in our present ideas. That is seemingly needed to advocate the fundamental changes called for by Proposition One.

It is true that one can tell a story about how the state apparatus has grown without depending upon functional justifications; public choice is largely such a story. On the other hand, one can tell power-based stories about how most social institutions arose, such as the roles of sexuality and gender rules.⁷ Proposition Two seems to caution us against using these stories as the basis for a confident belief that established institutions with questionable historical pedigree can be set aside without significant cost (think about the historical pedigree of existing property rights). We may be missing a functional purpose of these evolved institutions that has enabled the societies that embraced them to survive and expand. The question is whether this proposition, if true, feeds back upon and calls into question Proposition One.

The only reconciliation between these two propositions that occurs to me is to regard Proposition Two as in the nature of a presumption, requiring strong scientific evidence for bucking well established institutions and movements. An analogy to medicine might be drawn. The human body is, of course, an extremely complex spontaneous order of cells and other constituents, evolved by natural selection without having been consciously designed by man. Doctors properly show respect for the body's internal self-corrective functions, and endeavor to work with them rather than against them whenever possible. On the other hand, the science of medicine does assert that it is possible to make improvements on the evolved structure if one acquires enough knowledge. In this century, at least, that confidence has ap-

6. See, e.g., *A Rough Road Back to the Free Market*, BUS. WK., Oct. 15, 1979, at 50 (discussing the turn toward the free-market system in Britain and France); Jonathan R. Macey and Geoffrey P. Miller, *The End of History and the New World Order: The Triumph of Capitalism and the Competition Between Liberalism and Democracy*, 25 CORNELL INT'L. L.J. 277, 289-300 (1992) (discussing market capitalism in the New World Order).

7. See generally, e.g., Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135 (1990) (discussing jurisprudence and gender from a historical and contemporary viewpoint).

peared to be justified. No doctor, however, would advocate a radical "starting-from-scratch" approach in trying to rebuild the human body. Without knowing precisely what could go wrong, the doctor would, quite correctly, be willing to assume that something will indeed go wrong.

Let me move to Proposition Three, which is in many ways the most interesting. This proposition asserts a causal link between the processes of the common law and the substantive ideal of the Rule of Law.⁸ There is an obvious link to the fields of law and economics, for example, where Posner asserts that the common law has produced efficient rules that legislative rent seeking is always threatening to undermine.⁹ As of today, no one has produced a very convincing explanation as to why the common law should have generated such efficient outcomes. However, Posner has convinced me, though perhaps not most legal scholars, that it has indeed done so to a very large extent.

At first glance, common law processes do not seem well designed to promote Rule of Law virtues. Lacking statutory rules, one is often not certain what the court will do until the decision is made, and it is then applied retroactively. Moreover, the common law is very fact-oriented, seeking to reach intuitive justice in the case at hand (with due regard to precedents with sufficiently similar facts). Historically, common law judges have not tried very hard to tie the results in particular cases, or particular categories of cases, to abstract theories which would ensure that cases with different factual settings are indeed being treated in accordance with unitary principles.

On the other hand, I find the arguments which assert that the common law does in fact promote the Rule of Law values, in spite of its apparently non-Rule of Law processes, rather persuasive. Common law judges traditionally believed that they were "finding" the law, and the existence of customary norms made that proposition less metaphysical than the critics have charged. Because one could not credibly assert that a radically unstable law was always being "found," and because customs by their nature had to have a certain durability, the result was often more long-term predictability than statutes have provided. Moreover, it has indeed proved possible to establish highly general patterns in what appears to be the morass of factual detail. The doctrine of promissory estoppel provides a recent example of

8. See generally Liggio, *supra* note 1, at 517-25.

9. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

identifying such a general principle.¹⁰ Posner's economic analysis provides an even more powerful example.¹¹

On the other hand, the direction of causation still remains something of a mystery to me. The customary source of common law explains its predictability. However, what explains the fact that cases turn out to be reconcilable under general abstract principles? Is there some reason why customs that evolve in one place and time, regarding one commodity, will bear structural similarities to the customs that evolve elsewhere? And what are the relations among efficiency, the common law, and the Rule of Law criteria? Is it that customs tend to be efficient, and that because what is efficient in one setting is often efficient elsewhere, i.e., likes end up being treated alike? Or, is it that the common law requirement of squaring results with precedents produces Rule of Law consistency, and that this formal requirement for rules tends to exclude inefficient regimes such as price controls which by definition cannot satisfy Rule of Law constraints?

Certain norms undoubtedly arise spontaneously and independently in otherwise quite different settings. People with a wide variety of concrete purposes would find it useful to preserve the integrity of such institutions as a promise keeping and truth telling. Moreover, a general norm of "tit-for-tat" reciprocity is probably likely to evolve in many settings; its utility in prehistoric days may even have made it part of our biological constitution by now. The critical point, however, concerns the question of baseline entitlements. Some societies are likely to have traditions of compulsory servitude and hierarchy, and affirmative duties are notoriously difficult to state as universal rules. Other societies are likely to have tribalistic traditions that regard the private ownership of property as inherently anti-social. Each small group will have its own developed customs of who owes what affirmative duties to whom, and who is entitled to use communal lands for what purpose, and those customs are not likely to be easily transportable to either an open society of strangers or another small group with a different history.

The Darwinian explanation may be important at this level. Small groups with strong customs of compulsory service or tribal property probably stayed small, at least if their skills in military matters did not

10. Promissory estoppel is the doctrine holding that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of promise." *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1981).

11. See *POSNER, supra* note 9.

enable them to conquer more prosperous neighbors. Societies with better baseline entitlements prospered and expanded, such that over time, the analogies available for common law adjudication became increasingly libertarian in character. Darwinian explanations are certainly more compelling when discussing events in the relatively remote past than they are today, since the Darwinian mechanism of premature death as punishment for inefficient customs was more plausible when the social surplus under any set of institutions was perilously small.

Finally, Liggio's fourth proposition posited that Hayek's views underwent change for the better in his later years. I have nothing to contribute on the question of the Spanish scholastics,¹² but the general point of a change in Hayek's views is an interesting one. In particular, Liggio postulates that Hayek became less of a utilitarian in his later years,¹³ and that this was a change for the better.

It is true that most references to utilitarianism in Hayek's later works, such as *The Fatal Conceit*,¹⁴ are critical references that express skepticism about the knowledge required to make consciously utilitarian calculations. Hayek was always something of a rule or system utilitarian, so the question is whether even this aspect of utilitarianism had dropped out of the equation in his later works, and if so, what normative standard had replaced it.

Hayek has never been very clear about his basic normative commitments. To me, his works always reflect the essential mind-set of the economist, concerned with positive questions of cause and effect, and expanding on traditional economics only by including the causes and effects of our values and morals. However, I wonder if Hayek may have lost confidence in his later years about whether the market really could make people happier and whether this was the ultimate goal. As the social system generated new products, it would also generate new tastes, and Hayek seemed to regard the resulting state as progress even if people felt as dissatisfied as they always had. People who knew that they had not read Shakespeare (or who read Shakespeare but then found most other writers inadequate) would feel the same dissatisfaction as those who lived before Shakespeare appeared. However, this would be a more noble sadness, reflecting the progress of human tastes to a higher aesthetic level.

12. See generally Liggio, *supra* note 1, at 527-30.

13. *Id.* at 527.

14. FRIEDRICH A. VON HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM*, reprinted in 1 *THE COLLECTED WORKS OF F.A. HAYEK* (W.W. Bartley III ed. 1989).

On the other hand, much of *The Fatal Conceit* reads as if the ultimate goal is simply keeping people alive in large numbers, something which Hayek felt a world that had turned its back on the market could not do. I am not certain that Hayek entertained either the “noble sadness” or the “quantity of life” views. In the end, however, I suspect that it does not matter a great deal, since Hayek’s interest in, and contribution to, purely normative questions was always secondary to his cause-and-effect analysis, and it is in the latter where his long-term contributions primarily will be found.

COMMENTS ON LEONARD LIGGIO'S "LAW AND LEGISLATION IN HAYEK'S LEGAL PHILOSOPHY"

Butler Shaffer†

I wish to correct the record. Professor Siegan stated, earlier, that "no one favors absolute liberty."¹ Professor Siegan is wrong. *I* favor absolute liberty. I also favor societal order. Unfortunately, we still cling to the belief that, in the face of so much disorder in our world, there is something that *institutional authorities*—particularly officials of the State—can *do* to change all of this, and that such action on the State's part necessarily includes a further *restriction* of liberty. I would like to suggest that, when we understand what is implicit in both human liberty and social order, we will discover that we are talking about the same thing. When we discover what *liberty* is really about, we will also have answered the question of how *order* is provided in our world.

Underlying not only Liggio's paper,² but the legal philosophy of Hayek that is the subject matter of this symposium, are the following questions: What is the nature of order in society? What role does law play in the realization of such order? And most importantly, what do we have in mind when we speak of law? Liggio and Hayek join law school commencement speakers everywhere in extolling the virtues of the "rule of law," but what are the social dynamics and the consequences associated with our embracing of this phrase?

Liggio reminds us of Bruno Leoni's distinction between "law" as a system of legislatively enacted and politically enforced rules, and "law" in its common law meaning—as that body of commonly held

† Professor of Law, Southwestern University School of Law

1. Bernard H. Siegan, *Hayek and the United States Constitution*, 23 SW. U. L. REV. 469 (1994).

2. Leonard Liggio, *Law and Legislation in Hayek's Philosophy*, 23 SW. U. L. REV. 507 (1994).

expectations that permeate a given society. We are also reminded that our attraction to one definition or the other has major consequences: the former reflecting *centralized* and *institutionalized* systems of decision-making, and the collectivist economic practices that are implicit therein; the latter being expressive of *decentralized* and *individualized* decision-making practices, and the reliance on impersonal market-place influences in generating and sustaining the economic life of a given society. It is on this fundamental distinction that I would like to focus most of my remarks.

Thanks to the capacity of intellectuals to corrupt the meaning of words—a tendency so well-noted by George Orwell and others—most modern Americans still persist in the illusion that there is a fundamental distinction between “liberal” (in its contemporary usage) and “conservative” political programs; that the political “Left” and “Right” represent the polarization of alternative beliefs and practices. Hayek’s work has contributed greatly to the apparent growing disenchantment with such disingenuous thinking. Indeed, it is becoming more commonplace to recognize that the political “Left” and “Right” represent, in the words of a friend of mine, “only two wings of the same bird of prey.” In this connection, we are also reminded of Ambrose Bierce’s cutting definition of a “Conservative”: “[a] statesman who is enamored of existing evils, as distinguished from the Liberal, who wishes to replace them with others.”³ As modern society continues to collapse into a seeming entropic free-fall, the insights offered by Hayek into the nature of informal, spontaneously derived patterns of social order, may prove essential to our efforts to move beyond twentieth century definitions of “Left” and “Right”, and to discover fundamentally new and more orderly social premises.

I would feel woefully remiss—at a symposium of this nature—to let pass the opportunity to comment upon the major transformations presently occurring within Western thinking, all of which are centered upon the notion of spontaneously derived order as the underlying principle within nature. From work being done in such diverse fields as quantum mechanics, holography, biological systems, management policies, economics, the brain, and that current hotbed known as “chaos”, we are witnessing the collapse of the Newtonian model of the universe. According to this traditional model, the universe is organized on the basis of discrete building blocks of matter, whose content and energy patterns can be known with sufficient detail to allow for a

3. AMBROSE BIERCE, THE DEVIL’S DICTIONARY 40 (1978).

predictable—hence, controllable—world. This Newtonian model has given us a view of the world—including human society—that is both mechanistic and deterministic in nature. It has also underlain the modern political State, producing such human disasters as State socialism (whether of the “Left” or “Right”), Keynesianism, the regulatory State, and all other systems premised upon politically planned and directed societies.

This traditional model is being replaced by one which sees the universe as too complex to be understood sufficiently to allow for such prediction and control. From physicist David Bohm’s⁴ and neuroscientist Karl Pribram’s use of holography to explain, respectively, the structure of the universe and the human brain; to physicist Ilya Prigogine’s work⁵ in which instability (i.e., *non-equilibrium*) is shown to be a condition for resisting entropy and generating more complex systems of order; to James Lovelock’s “Gaia” hypothesis,⁶ which postulates that the life system of planet Earth spontaneously manages atmospheric conditions in order to sustain conditions necessary for life; to findings from the study of “chaos”⁷ which inform us that, beneath the appearances of “disorder” and “chaos” in our world can be found patterns of *unpredictable* regularity, we are bearing witness to the withering away of the intellectual premises upon which imposed and managed systems of control, including political systems, have rested. Chaos theory is confirming, contrary to the structured premises of our institutionalized conditioning, that the more complex society becomes the more we have to rely upon informal, spontaneous systems for maintaining order.

The traditional mechanistic, and, I might add, dehumanized, model of social order reflects the sense that human society is something to be managed and controlled, an attitude more at home with *legislatively* defined rules of law identified by Leoni.⁸ The emerging model of complexity, unpredictability, and spontaneously ordered chaos, reflects the attitude that human society is *self-managing* in the sense alluded to by Hayek, namely, that it is the product “of human actions, but not of human design.”⁹ Because, in Hayek’s view, the

4. DAVID BOHM, QUANTUM THEORY (1951).

5. ILYA PRIGOGINE, FROM BEING TO BECOMING (1980).

6. J.E. LOVELOCK, GAIA—A NEW LOOK AT LIFE ON EARTH (1987).

7. EXPLORING CHAOS: A GUIDE TO THE NEW SCIENCE OF DISORDER (Nina Hall ed. 1993).

8. Liggio, *supra* note 2, at 518-19.

9. *Id.* at 527 (citing F.A. HAYEK, 1 THE FATAL CONCEIT (W.W. Bartecy ed., Routledge 1988)).

human mind cannot predict its own development,¹⁰ we must challenge the idea of a consciously ordered system of social order. It is to be expected that those who embrace this emerging model of a holistic and spontaneous order will find themselves reconsidering the older *common law* practices.

Hayek had the insight to see these spontaneously derived systems of order at work in his field of study, economics. But it is important to note that the marketplace is *not* "the" spontaneous order, but only one manifestation of a deeper, self-organizing, self-regulating system of order that is beginning to be understood as the essence of our universe. As elsewhere in nature, social order may be nothing more than the *unintended consequences* of human activity.

An experience of one of our colleagues here at the law school is a recent example of the serendipitous nature of unplanned order. This person and her husband own a home that is located in the middle of a development that was thoroughly devastated by recent fires here in Southern California. As they watched from another residence, television cameras showed their neighborhood completely ablaze. They were convinced that their home had been lost. When they were finally able to return to their neighborhood, they found their home untouched by the fire, although their neighbors' homes had been burned to the ground. What they later discovered was this: their home happens to have a fire hydrant in front of it. When the fire fighters arrived to try to put out the fires at neighboring houses, they attached their hoses to this hydrant and inadvertently drenched our colleague's home. Later, fire fighters returned to battle another fire at another neighboring home and, in attaching their hoses to this same hydrant, again managed to douse our colleague's home. As a result, our colleague's home was kept wet during the fire, and sparks were never able to get a start. Thus, while fire fighters struggled to restore order to the neighborhood, an effort that proved futile, they inadvertently saved the home of this couple.

The attraction of Hayek, and so many others, to the "rule of law," however, does little to answer the question of *how* that law is determined. Though common law judges spoke of "discovering" the law—in contrast to modern judges who presume to "establish" such rules—a good deal of unexplored assumptions are simply smuggled into the question of where such rules are to be discovered. The key to Hayek's understanding of spontaneously derived order is found in his observa-

10. *Id.*

tion of "phenomena that were 'the result of human action but not of human design.'" ¹¹ This view is reminiscent of Oliver Wendell Holmes classic view that "[t]he life of the law has not been logic: it has been experience."¹² But this only begs the question: *Whose* experiences? I know a man who spends most of his time travelling the world as a hobo. I have discussed with him the nature of the informal rules that operate within the hobo community. This community is more complex than might first appear to an outsider. He informed me that the most serious offense among hoboes, an offense likely to result in the death penalty to a violator, consists in stealing another hobo's shoes. Will the customs and expectations of the hobo community become part of the common experiences upon which courts will discover a rule of law and punishment to be enforced against shoe thieves in our society? And what about the practices and usages common to the street-corner gangs, or the Amish, or those who live communal rather than traditional family lives, or the Mafia? Bruno Leoni insisted upon rules that were "expression of a will common to all";¹³ but one wonders whether, indeed, the diversity and changefulness of human beings make it possible to ever distill a "common will", and whether—like our tendencies to glorify Athenian democracy when most of its population was excluded from participation in it—we have in mind anything more than a calculation of the preferences of those who share our peculiar biases.

Leoni considered the lawmaking process to be a synthesis of private transactions involving "millions of people throughout dozens of generations and stretching across several centuries."¹⁴ He goes on to discuss A.V. Dicey's characterization of the "rule of law" to include: (1) "the absence of arbitrary power" over citizens, and (2) "the subjection of every man, whatever his rank or condition, to the ordinary law of the realm."¹⁵ Such attributes have a reassuring sense to them, as long as one does not examine them closely. For upon examination, *all* power, by definition, is exercised arbitrarily, at least in the sense that legally relevant distinctions are always being made between and among categories of persons or behaviors on the basis of the subjective preferences of those in power. Thus, for example, the classic liberal sentiments that produced the most beautiful of all documents of

11. *Id.* at F.A. HAYEK, 1 *THE FATAL CONCEIT* (W.W. Bartecy ed., Routledge 1988).

12. O.W. HOLMES, JR., 1 *THE COMMON LAW* (1881).

13. Liggio, *supra* note 2, at 520 (citing BRUNO LEONI, *FREEDOM AND THE LAW* 136 (3d ed. 1991)).

14. *Id.* at 519.

15. *Id.* at 518 (citing BRUNO LEONI, *FREEDOM AND THE LAW* 136 (3d ed. 1991)).

human liberty, the Declaration of Independence, were nevertheless capable of accepting a system of State-enforced slavery even as they celebrated the proposition that "all men are created equal" and are endowed with such "inalienable rights" as "life, liberty, and the pursuit of happiness." Modernly, such arbitrary distinctions find expression in a variety of practices. For example, people who sell *cigarettes* to the public are subsidized by the federal government, while those who sell *marijuana* are sent to prison for life sentences; long-established religious organizations are protected by First Amendment guarantees, while the creators of *new* religions are persecuted as "cult leaders", and subjected to military assaults and fiery deaths. All such distinctions are assiduously defended by most legal practitioners as necessary for the maintenance of the "rule of law"! In the proposition "four legs good, two legs bad", even the swinish founding fathers of Orwell's *Animal Farm*¹⁶ were capable of crafting arbitrary distinctions that would find acceptance among the bovine bourgeoisie! As for the egalitarian assumptions that are supposed to adhere in the "rule of law", we need only recall Anatole France's observation that "[t]he majestic equality of the laws . . . forbid the rich and the poor alike to sleep under the bridges, to beg in the street, and to steal . . . bread."¹⁷ Perhaps Hayek and Leoni had something else in mind, akin, perhaps, to the approach later taken by John Rawls, in his efforts to discover the kinds of irreducible legal principles which men and women in a state of ignorance may believe form their particular temporal interests.¹⁸

Some of the preceding observations lead me to raise the following additional questions concerning Hayek's attitudes toward modern formal systems of law.

First, Liggio tells us of Hayek's apparent satisfaction with appellate review of lower court decisions as a way of assuring "the slow and gradual process of judicial development."¹⁹ Does the common law tradition depend upon the employment of a *State* judiciary system, or as the early "Law Merchant" and contemporary practices such as arbitration (including such offshoots as the television program "The People's Court") demonstrate, can we rely upon the non-coerced marketplace to effectively resolve disputes? And if there *is* a market

16. GEORGE ORWELL, *ANIMAL FARM* 40 (1946).

17. Anatole France, *The Red Lily*, in *THE WRITINGS OF ANATOLE FRANCE* 75 (1931).

18. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

19. Liggio, *supra* note 1, at 510 (citing Gottfried Dietze, *The Necessity of State Law*, in *LIBERTY AND THE RULE OF LAW* 74-78 (1979)).

for having disputes settled, would such marketplace solutions require *judicial review*, or is judicial review only a means for assuring the centralization of political authority for the determination of the rules under which men and women will conduct their lives? If we answer "yes" to such questions, then have we really insulated the legal system from the problems associated with legislatively defined rules of law? If, as Bruno Leoni warns, "no free market is really compatible with a law-making process centralized by the authorities,"²⁰ will not a resort to judicial review simply move the mounting political pressures in the *legislative* process over to the seat of the highest *judicial* authority (i.e., the Supreme Court)? Given James Buchanan's insights into the self-serving nature of political decision-making, can we realistically expect special-interest groups, including the political decision-makers themselves, to refrain from influencing the policy directions taken by the appellate courts in their review of lower court decisions? Has not the recent history of United States Supreme Court nominees illustrated just how susceptible the judicial system is to manipulation for the benefit of narrow political, economic, social, or ideological interests? Or, are there still some among us who cling to the faith in the political "independence" of the judiciary?

Perhaps, consistent with the underlying assumptions of *other* marketplace behavior, it is better to abandon the practice of judicial review and allow a decision maker's determination to be final. If, indeed, we are to employ private arbitrators, might not the same marketplace restraints that attend decision-making elsewhere (i.e., the communication of information about reliability, price, integrity, competency, and other factors) work just as well in disciplining the behavior of marketplace judges? In fact, is this not already the case with present systems of arbitration? In our selection of judges, as in our choices with other goods and services, it may prove to be the case that our greatest protection (assuming, of course, that the preservation of our individual autonomy and the spontaneous order that emerges therefrom are qualities we wish to protect) is to be found in that most politically *incorrect* maxim: "let the buyer beware." Unless, as in Hayek's words, we are to admit to a "fear of trusting uncontrolled social forces,"²¹ ought we not contemplate whether a centralized system of judicial decision-making, operating through judicial review, is at all compatible with the decentralist assumptions of a common law system?

20. *Id.* at 519.

21. *Id.* at 508.

Second, I would like to question another legal sacred cow—discussed briefly by Liggio in his reference to Giovanni Sartori's writings²²—the idea of *constitutionalism*. Is it possible to restrain political power through design (i.e., by the creation of written constitutions)? Given the expansive power now exercised by the American government, and considering the fact that the erstwhile Soviet Union was able to maintain its tyrannical practices under a constitution (modeled, at least in form, upon the United States Constitution, including a "bill of rights") it is timely to reexamine the proposition that liberty, like other forms of order, can be imposed upon a society by conscious direction. As the obverse side of the coin being assayed herein, we may discover that tyranny, however constituted, is, like so much of the social disorder in our world, the unintended consequence of trying to impose order by legal force.

22. See generally *id* at 523-25.

HAYEK AND MARKETS

M. Bruce Johnson†

From time to time society encounters a mind that directs our attention to the true subject matter of economics: the trade and exchange processes of daily life. Friedrich A. Hayek devoted a long and prolific career to explaining how free markets make good sense and order out of society's widely dispersed knowledge.¹ He conceived the notion of "specific knowledge of time and place" and forcefully argued that central planners could not possibly use information as well as the market.²

This Article argues that Hayek had a much broader notion of the market process than some of his interpreters commonly suggest, and that he used terms like *the market*, *market exchange*, and *the price system* quite differently than contemporary economics uses them. In particular, I will argue that a mere price cannot capture all of the specific knowledge of time and place identified by Hayek.³ I will also argue that *the firm* and *the market* are not mutually exclusive concepts, rather, firms or teams of firms frequently perform market functions. In other words, I visualize a market process that generates more information than price per se and accomplishes this via complex teams of business firms. This revision or generalization of market theory prompts me to conclude my remarks with some uncomplimentary references to contemporary economic theory. In a contest with contemporary economic theory, Hayek emerges the clear winner on the

† Professor of Economics, University of California, Santa Barbara.

1. For a wide ranging assessment of Hayek's work, see WILLIAM F. BUCKLEY, JR. ET AL., *ESSAYS ON HAYEK* (Fritz Machlup ed., 1976). See in particular Fritz Machlup, *Hayek's Contributions to Economics*, in *ESSAYS ON HAYEK*. *Id.* at 13.

2. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) [hereinafter Hayek, *The Use of Knowledge*]. The committed socialist would reject Hayek's argument since they believe central planners have preferences superior to the common man.

3. Some conclude that Hayek believed prices fully reflected all relevant private information. See, e.g., Sanford Grossman, *On the Efficiency of Competitive Stock Markets Where Traders Have Diverse Information*, 31 J. FIN. 573, 584-85 (1976); SANFORD J. GROSSMAN, *THE INFORMATIONAL ROLE OF PRICES* 1 (1989).

criterion of understanding trade and exchange, the stuff of which economics is made.

I. HAYEK AND THE USE OF KNOWLEDGE

Hayek argued that markets coordinate the various bits of information and knowledge scattered among individuals spontaneously, without design or comprehension by any human mind.⁴ His human order consisted of individuals with different ideas and purposes, whose behavior could not be predicted from past data.⁵ Therefore, choices and inter-dependencies could not be determined in advance since rationality in society was a simultaneous solution, and valuable knowledge was spread among too many people for any one person or central authority to comprehend.

The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is . . . a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge not given to anyone in its totality.⁶

Hayek saw a fundamental law of economics in the process of using this information. Hayek saw prices as signals, a form of communication, that enabled everyone to work to satisfy the wants of people they did not know.⁷ Numerous separate planning activities led to a spontaneous general order, a product of individual actions, not of central design.⁸

Although Hayek stressed the importance of markets in collecting and imparting information, a careful reading demonstrates that he did not imply that prices alone performed that function.

We are only beginning to understand on how subtle a communication system the functioning of an advanced industrial society is based—a communications system which we call *the market* and

4. Hayek, *The Use of Knowledge*, *supra* note 2, at 519.

5. *Id.* at 520.

6. *Id.* at 519-20.

7. *Id.* at 526-27.

8. *Id.*

which turns out to be a more efficient mechanism for digesting dispersed information than any that man has deliberately designed.⁹

Adam Smith was the first to perceive that we have stumbled upon methods of ordering human economic cooperation that exceed the limits of our knowledge and perception. His 'invisible hand' had perhaps better have been described as an invisible or unsurveyable pattern. We are led—for example by the pricing system in market exchange—to do things by circumstance of which we are largely unaware and which produce results that we do not intend.¹⁰

Hayek saw the price system as a part of the market exchange process rather than identical to it.¹¹ Furthermore, he envisioned a social and cultural context within which he saw law, custom, and tradition providing a framework where markets and competition worked their magic.¹² Hayek cited Alfred Whitehead on an important point: "Civilization advances by extending the number of important operations which we can perform without thinking about them."¹³ Hayek further commented:

This is of profound significance in the social field. We make constant use of formulas, symbols and rules whose meaning we do not understand and through the use of which we avail ourselves of the assistance of knowledge which individually we do not possess. We have developed these practices and institutions by building upon habits and institutions which have proved successful in their own sphere and which have in turn become the foundation of the civilization we have built up.

The price system is just one of those formations which man has learned to use (though he is still very far from having learned to make the best use of it) after he had stumbled upon it without understanding it.¹⁴

Hayek believed that competition meant decentralized planning by many separate individuals and teams of individuals.¹⁵ Voluntary action played a key role in his vision.¹⁶ He viewed collective planning

9. Friedrich August von Hayek, *The Pretence of Knowledge*, Nobel Memorial Lecture (Dec. 11, 1974), in 79 AM. ECON. REV. 3, 7 (1989) (emphasis added) [hereinafter Hayek, *The Pretence of Knowledge*].

10. F.A. HAYEK, *The Fatal Conceit: The Errors of Socialism*, in THE COLLECTED WORKS OF F.A. HAYEK 14 (W. W. Bartley III ed., 1988) (emphasis added) [hereinafter Hayek, *The Fatal Conceit*].

11. Hayek, *The Use of Knowledge*, *supra* note 2, at 526-27.

12. *Id.* at 526-28.

13. *Id.* at 528.

14. *Id.*

15. *Id.* at 521.

16. *Id.* at 520-21.

as inconsistent with competition, and believed that markets could create prosperity without loss of freedom given the proper legal background.¹⁷

Although Hayek pictured a process that made the most of the diverse knowledge scattered among individuals, he did not specify the formal characteristics of the process because he viewed the process itself as spontaneous and as illusive as the knowledge it filtered.¹⁸ He viewed the price system as an important part, but not the only part, of the process.¹⁹ The price of a product by itself cannot convey all available information, thus price per se cannot aggregate information completely:

We must look at the price system as such a mechanism for communicating information if we want to understand its real function—a function which, of course, it fulfills less perfectly as prices grow more rigid. (*Even when quoted prices have become quite rigid, however, the forces which would operate through changes in price still operate to a considerable extent through changes in the other terms of the contract.*)²⁰

II. ON MARKETS AND THEIR PROPERTIES

Define a meta-price that includes the quality characteristics, terms of sale, warranty, and all other relevant information beyond the price per se. "We know, of course, with regard to the market and similar social structures, [there are] a great many facts which we cannot measure and on which indeed we have only some very imprecise and general information."²¹ For instance, in the real world, business firms hold inventories and frequently use them as buffer stocks to smooth out demand. If sales increase unexpectedly, inventories temporarily fall but prices frequently do not rise. For a variety of reasons (including the wishes of buyers) inventories, not prices, serve as shock absorbers in many markets. To rely on price alone to transmit information from a market is much like relying on only one of several vital signs (e.g., temperature, pulse, blood pressure) to tell the complete story of a patient's health.

According to various interpretations, a market can be an institution at a particular time and space where buyers and sellers congre-

17. *Id.* at 521, 528.

18. See Hayek, *The Fatal Conceit*, *supra* note 10, at 14. Hayek said Adam Smith's "invisible hand" had perhaps better have been described as an invisible or unsurveyable pattern."

19. Hayek, *The Use of Knowledge*, *supra* note 2, at 526.

20. *Id.*

21. Hayek, *The Pretence of Knowledge*, *supra* note 9, at 3.

gate (e.g., the early morning farmers' market, the New York Stock Exchange, and the annual trade show for any number of products). Markets can also be continuous and disembodied (e.g., computer networks for foreign exchange, the market for corporate control, and the market for law school graduates).

If price is not sufficient to provide the complete picture, a broader notion of the market comes into play. Think of markets as processes for facilitating trade and exchange rather than as places or tangible things. Walmart forms a market, as does the L. L. Bean catalog, and the computer network for used auto parts. Think "dynamics" rather than "static." Think "change" rather than "frozen," and "disequilibrium" rather than "equilibrium." Since disequilibrium prices are sources of potential profit, they stimulate discovery and exploitation of previously unnoticed alternatives.²²

Consider local markets which can be found virtually anywhere in the world.²³ This institution illustrates many features that fit and elaborate the Hayek model. Sellers spontaneously appear at the break of dawn with loaded wagons, carts, vans, pickup trucks and autos. They spread an incredible array of items on makeshift tables and benches, or on plastic tarpaulins unfolded on the ground. The mix of goods offered for sale from market to market defies prediction. Sellers often mark their goods with asking prices. Just as often, however, they do not, waiting instead for the buyer to explore and begin the bargaining. Prices vary with the weather, the crowd, the lateness of the day, and the season. Actual transaction prices differ from asking prices for many reasons: the buyer is in a hurry or the buyer with a distaste for haggling may simply pay the asking price, while others may bargain with varying intensity. The casual browser will see hundreds, perhaps thousands of items for sale, and will probably fail to notice just as many more.

Information about asking prices comes at a cost. The buyer must walk about noting various offers by the sellers. Goods are sold throughout the market day at different prices to different people. Some deals look so good when compared to other experiences and expectations, that they are taken before the entire market is canvassed. Others are not as attractive and the buyer passes, perhaps

22. ESTEBAN F. THOMSEN, *PRICES AND KNOWLEDGE: A MARKET- PROCESS PERSPECTIVE* 37, 44 (1992).

23. The typical Southern California flea-market convenes at the local drive-in theater early Sunday morning. Similar gatherings occur around the country and the world with local variations wherever people congregate to trade and exchange.

returning later to make a lower offer if the items remain unsold. Buying an item at the market is like buying a lottery ticket, the price one pays is associated with a distribution of possible outcomes. Price alone does not sufficiently inform the buyer.

Consider another example that demonstrates the impossibility of possessing sufficient knowledge of prices, characteristics, and preferences of potential buyers. The monthly magazine *Computer Shopper* has approximately 800 tabloid-sized pages in each issue and carries multi-page advertising for approximately 350 different vendors of computer hardware, software, and related items. Every issue contains articles about new products and procedures, as well as regular columns discussing trends and technology. This magazine, along with others of similar genre, is part of the market process that educates consumers, develops their preferences, and helps them in their purchases. *Computer Shopper* is a market. Never mind that the computer hardware or the software package that is chosen as the "best buy for the money" may be obsolete by the magazine's next issue. Clearly, this market is a dynamic process rather than a static equilibrium where one price clears the market for all buyers and sellers.

Consider next the prospect of purchasing a small business. The business will have an asking price that we all know does not convey all of the relevant information about the venture. A prudent prospective buyer will want to: (1) examine the books; (2) interview customers, employees, and suppliers; (3) schedule purchase payments over time which are tied to the performance of the business; (4) secure a non-competition clause from the seller; and (5) arrange a time frame in which the seller will teach the business to the new owner. All these special terms will be written into the purchase contract along with a purchase price different from the asking price. Suppose that buyer and seller have agreed on all these terms, including the sales price of the business. No one would argue that the sales price, by itself, was sufficient to describe or completely inform someone about the transaction. Although the price is an actual transaction price, it does not fully reflect all relevant information in the transaction.

Human knowledge is illusive. Much tacit knowledge is not written, and cannot be written comprehensively.

[T]here is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of the particular circumstances of time and place. . . . We need to remember only

how much we have to learn in any occupation after we have completed our theoretical training.²⁴

Most of the knowledge of time and place cannot be condensed in a single price. Even if the buyer in my hypothetical business purchase has experience in the industry, he/she does not have personal knowledge about the particular business he/she is purchasing. The business' sales price cannot capture or reflect the value of the knowledge that would be transferred during the transition training period. Why not simply put this knowledge in written form and deliver it to the buyer? Because some knowledge cannot be transmitted through the written word. If you doubt this proposition, try to make pie crust from scratch following your grandmother's recipe. Or try to make a good, smooth fudge, roast coffee beans well, or draft a winning opening argument to a jury according to directions from a book.

Suppose a reliable authority reports that the going wage in Mexico is four dollars a day. Would that information alone be sufficient to persuade managers to close their U.S. plants and move to Mexico? Obviously, price alone would not provide enough information to prompt action. The managers would want to know about the labor skills and productivity of the Mexican workers, as well as information pertaining to Mexico's legal and political institutions, regulatory and taxing authorities, and transportation and communication facilities. Prices may serve as signaling devices or surrogates, but they are not sufficient carriers of knowledge.

If you still believe prices capture and convey all relevant information, you have never remodeled a house. A simple construction project of modest, finite dimensions can be very detailed. It can include elaborate drawings, specifications, and contracts. However, blueprints cannot completely capture everything that is relevant. The interplay of space and materials is too complicated to be completely specified before construction. Some people, possessing knowledge that cannot be memorialized on paper, must watch the project develop, catching and dealing with inconsistencies as they arise. As a result, the final quoted price for a home remodeling is only one dimension of the meta-price.

Consider a final example involving a manufacturing firm. The firm retains a variety of suppliers and subcontractors who provide materials and component parts used in the manufacture of the final product. In addition, the firm sells to dealers (some with exclusive

24. Hayek, *The Use of Knowledge*, *supra* note 2, at 521-22.

territories and some not), with the assistance of manufacturers' sales representatives. Information flows continuously between the various agents and the manufacturer at the central hub. For example, dealers may report that some product lines are selling very well at retail asking prices, while others are not. Certain features have high perceived value with customers and this knowledge is transmitted to the manufacturer. In exchange, the manufacturer discusses the possibilities for expanding production and improving the properties of the materials and components used with his suppliers and subcontractors. Working together, the manufacturer and subcontractors develop new materials and components with superior properties, sometimes at greater or lower cost. The manufacturer's advertising features the advance designs and superior properties of the subcontractors' materials.

The entire assembly of dealers, manufacturers, manufacturers' representatives, subcontractors, and material suppliers take on the characteristics of a team that works together for a common purpose. Team goals include beating the competition and producing a better and/or cheaper product than competing teams. The better the competition, the keener the quest to accomplish these goals. For example, to stay competitive a team will purchase rivals' products and tear them apart. They will study, reverse engineer, and improve if appropriate. Rivals' sales and marketing plans will also be studied by the team for weakness and possible openings.

It is neither accurate nor useful to portray team members or agents as separate firms buying and selling in various markets based on price alone. Prices are less important than the understandings the agents have with one another. For example, inventories must be held in some form somewhere in the team, and the parties must agree on how the cost of holding buffer stocks of materials, components, and final products will be shared. Temporary price changes do not break relationships between the manufacturer and agents. The wish for long-term, profitable relationships mean that prices charged between agents must provide an acceptable profit for each concerned. Suppliers may accept razor-thin margins in return for favored treatment and steady business. Supplier/manufacturer relationships often involve mutual loyalty and frequently persist over years; their termination causes great trauma. Thus, because keeping everyone in the association happy with the arrangement is important, would-be suppliers find it very difficult to break into the team.

I propose that these associations of firms perform the functions that Hayek had in mind when he discussed markets. Think of all the

data, information, knowledge, and wisdom that are produced and exchanged within the team. Clearly, a vector of prices cannot describe this knowledge. No set of prices could convey enough information to enable a team to function. Unless, of course, the team was frozen in a make-believe world of perfect competition where technologies and tastes are completely revealed, understood, and constant.²⁵

III. CONVENTIONAL THEORY AND THE USE OF KNOWLEDGE

Conventional economic theory assumes consumers have all relevant information about their own preferences, the availability of goods, the prices of goods, and anything else necessary to carry out the trivially simple task of maximizing utility subject to income and price constraints. Conventional theory also assumes that firms know all about available technology, enabling them to carry out a similarly trivial maximization exercise.

The perfectly competitive general equilibrium model cannot answer the questions: How are prices set? Who sets prices? How do prices change? How does technological progress occur? The model is remarkable because it has no markets, no direct communication between agents, no actual trades, no observed data, no inventories, no bid prices or asked prices, no competition among agents who never interact, no money or medium of exchange, and no institutions (legal, customs, traditions, etc.). The model's "firms" and "consumers" are nothing more than misleading labels for "production techniques" and "tastes."²⁶

In spite of the general equilibrium model's silence on the fundamental problem of economics—trade and exchange—the model is widely promoted as a benchmark for evaluating markets and making recommendations for public policy in the real world. Although the model's builders disregard central features of real world markets, they promote their model for normative purposes—to critique and modify the behavior of real market participants. For example, a leading textbook in law and economics states:

25. Judge Douglas H. Ginsburg has addressed the neglect of nonprice competition in another context: "[I]t should be clear that nonprice competition deserves a more prominent role in antitrust analysis than it has heretofore had." Douglas H. Ginsburg, *Nonprice Competition*, 38 ANTITRUST BULL. 83, 107 (1993).

26. See Robert W. Clower & Peter Howitt, *Foundations of Economics, Presented at Is Economics Becoming a Hard Science? Conference* (Oct. 1992); Robert W. Clower, *Towards a Reconstruction of Economic Theory*, Address Before the Canadian Economic Association (June 5, 1993).

General equilibrium will be achieved only where competitive forces have led to the equality of marginal benefit and marginal cost in the market for every single commodity. As you can well imagine, this is a stringent condition, unlikely to be realized in the real world. However, there are two good, practical reasons for knowing what the conditions of general equilibrium are. First, while it may be unlikely that *all* real-world markets obey those conditions, it is not unlikely that many of them will. Second, *the specification of the conditions that lead to general equilibrium provides a benchmark for evaluating markets and making recommendations for public policy.*

Modern microeconomics has gone even further than this and has shown that the general equilibrium established under the condition known as "perfect competition" is socially optimal. *This remarkable conclusion is sometimes called the Theorem of the Invisible Hand.*²⁷

Unfortunately, modern microeconomics assumes away the problem of Adam Smith's Invisible Hand!²⁸ The theory of perfect competition is not remarkable for its treatment of competition and markets. It is notable instead for the way it assumes that trade and exchange, the very stuff of which economics is made, must be a costless activity. Modern theory uses terms like "competition" and "markets" to describe theoretical concepts that have no counterparts in the real world. According to Professor Ronald Coase:

In the modern textbook, the analysis deals with the determination of market prices, but discussion of the market itself has entirely disappeared. This is less strange than it seems. Markets are institutions that exist to facilitate exchange, that is, they exist in order to reduce the cost of carrying out exchange transactions. In an economic theory which assumes that transaction costs are non-existent, markets have no function to perform, and it seems perfectly reasonable to develop the theory of exchange by an elaborate analysis of individuals exchanging nuts for apples on the edge of the forest or some similar fanciful example.²⁹

The general equilibrium model is held as the standard by which we should judge real world markets and competitors. It precludes, by construction, any behavior that businessmen, laymen, and even some economists consider to be competitive acts. Advertising, special promotions, product improvement, price cutting, research and development, information acquisition, and innovation are all perceived as

27. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 44 (1988) (emphasis added).

28. See *supra* note 10 and accompanying text.

29. R. H. COASE, THE FIRM, THE MARKET, AND THE LAW 7-8 (1988).

competitive acts in the real world. They have no role in the competitive model of general equilibrium theory.

Prices glue the general equilibrium model together. Firms and households need only the equilibrium vector of prices that they "take" as given. By construction, the price vector includes all of the knowledge and information required. The theory that price equals marginal cost for every commodity and that relative prices are identical for all firms and consumers follow from the assumption that every relevant bit of information is captured in prices.

Hayek was aware of the shortcomings of traditional theory:

What is the problem we wish to solve when we try to construct a rational economic order?

On certain familiar assumptions the answer is simple enough. *If* we possess all the relevant information, *if* we can start out from a given system of preferences and *if* we command complete knowledge of available means, the problem which remains is purely one of logic. That is, the answer to the question of what is the best use of the available means is implicit in our assumptions. . . .

This, however, is emphatically *not* the economic problem which society faces. . . . [T]he "data" from which the economic calculus starts are never for the whole society "given" to a single mind which could work out the implications and can never be so given.³⁰ [T]here is something fundamentally wrong with an approach which habitually disregards an essential part of the phenomena with which we have to deal: the unavoidable imperfection of man's knowledge and the consequent need for a process by which knowledge is constantly communicated and acquired.³¹

Incidentally, our students are not misled. They come to us with an innate appreciation for the dynamics of the marketplace and they scoff at the notion that Microsoft Corporation violates the social efficiency condition by selling software at prices greater than the marginal cost of a diskette. They instinctively know that progress does not come from producing at a point where price equals marginal cost. They roll their eyes at the pronouncement that informational asymmetries (where the seller knows more about his product than the buyer) are market failures. They master their lessons, but even the most public-spirited do not look for jobs in perfectly competitive industries.

A certain schizophrenia exists when we believe one thing and teach another. Today, growing numbers of economists appreciate

30. Hayek, *The Use of Knowledge*, *supra* note 2, at 519.

31. *Id.* at 530.

market institutions and incentives and suspect that collectivist government activities distort private incentives by crippling contract and property rights. When economists refer to "the market," they mean the institutions and processes within which individuals are free to negotiate, buy and sell without interference from the state. This awareness came from two different but related sources: First, from practical observations of real world experience with government intervention; Second, from the non-establishment, original, paradigm shattering analyses by James Buchanan, Gordon Tullock³² and others in the field of public choice, and by Ronald Coase and others from the *Journal of Law and Economics*.

Unlike the physical sciences, economics cannot test its hypotheses in the laboratory. Nor can economists run field tests similar to those used for new drugs. Although relevant, realism of assumptions is not a good standard for judging theory. However, models that ignore the problems of knowledge and information, that preclude real trade and exchange at non-equilibrium prices, and that assume away buffer stocks cannot be useful achievements in positive economics.

IV. CONCLUSION

Somewhere in the recesses of my memory I recall the story of two accomplished Nineteenth Century personages each of whom at the outset of his career considered and rejected economics as a profession. One rejected the profession because it was too easy and the other because it was too difficult. The first scorned the contemporary economic theories as trivial, simple-minded irrelevancy. The second contemplated the complexity of real-world economics and decided that the task was too daunting. This tale is contemporary.

Numerous others have since accepted the career challenge of economics. Today, the American Economic Association ("AEA") has some twenty thousand members, a number that has remained roughly constant over the past twenty-five years.³³ Indeed, there are probably more economists alive and publishing research today than ever lived before the Second World War. If we assume that each AEA member devoted half of his/her time to research, society should have harvested the benefit of 250,000 person years of economic research during the past quarter century.

32. JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

33. 83 AM. ECON. REV. 647 (1993), 79 AM. ECON. REV. 640 (1989) (Statistical Summary: Analysis of Membership & Subscriptions).

What has this monumental professional research effort produced by way of knowledge and understanding of real world trade and exchange? What great discoveries are there to match those in electronics, computers, telecommunications, medicine, pharmaceuticals, chemistry, physics, and biology? Perhaps our best work in economic theory lies ahead of us. As Friedrich A. Hayek stated:

The recognition of the insuperable limits to his knowledge ought indeed to teach the student of society a lesson in humility which should guard him against becoming an accomplice in men's fatal striving to control society—a striving which makes him not only a tyrant over his fellows, but which may well make him the destroyer of a civilization which no brain has designed but which has grown from the free efforts of millions of individuals.³⁴

34. Hayek, *The Pretence of Knowledge*, *supra* note 9, at 7.

THE ECONOMIST AS HISTORIAN? F.A. HAYEK AND THE DEFINITION OF THE MARKET

John Majewski†

As an economic historian, I have often found myself in neutral territory contested between two warring disciplines. Historians and economists have a long-standing grudge that is still strong today. In early American history, to take one example, issues as diverse as the market-orientation of Northern farmers to the economic rationality of Southern slavery have provoked heated exchanges between the two disciplines.¹ These disputes center on the historian's demand for a fuller and more rounded portrait of economic behavior than econometric models can provide. Historians want more culture and custom, less numbers and math. Economists, on the other hand, have proven resistant to integrating culture and custom into their models. While economic analysis has added immeasurable knowledge and sophistication to historical discourse, economists themselves now realize that traditional economic theory is not enough in understanding the economic past.²

F.A. Hayek's view of markets, admirably explicated in M. Bruce Johnson's essay *Hayek and Markets*,³ presents an exciting opportunity for resolving the debate between economists and historians. Johnson

† Ph.D. candidate, 1994, University of California, Los Angeles; M.A., 1991, University of California, Los Angeles; M.Sc., 1989, London School of Economics; B.A., 1988, University of Texas, Austin.

1. See, e.g., ROBERT W. FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 158-190 (1974); HERBERT G. GUTMAN, *SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS* 5-13 (1975); Michael A. Bernstein & Sean Wilentz, *Marketing, Commerce, and Capitalism in Rural Massachusetts*, 44 J. ECON. HIST. 171, 171 (1984); Winifred B. Rothenberg, *Markets, Values, and Capitalism: A Discourse on Method*, 44 J. ECON. HIST. 174, 178 (1984).

2. See, e.g., ROBERT W. FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 388-417 (1989) (focusing attention on the "moral problems" of slavery rather than the narrowly drawn economic focus of his earlier work).

3. M. Bruce Johnson, *Hayek and Markets*, 23 Sw. U. L. REV. 547 (1994).

lucidly summarizes Hayek's contention that economics constitutes far more than a dry optimization problem where full information with regard to tastes, preferences, and technology is treated as a given.⁴ Rather, Hayek understood the economic problem as one of coordination: how does an economy collect all of the incomplete and fragmentary knowledge of various actors, and then coordinate that knowledge into meaningful action? Hayek literally marvelled at how prices transmitted information. When a resource such as tin or copper became scarce, rising prices led consumers to use it sparingly "without an order being issued, without more than perhaps a handful of people knowing the cause."⁵ Hayek, however, did not see prices as the single provider of relevant information. As Johnson stresses, "Hayek saw the price system as a part of the market exchange process rather than identical to it. Furthermore, he [Hayek] envisioned a social and cultural context within which he saw law, custom, and tradition providing a framework where markets and competition worked their magic."⁶ For Hayek, "law, custom, and tradition" help create voluntary institutions—ranging from sophisticated credit checks to a magazine such as *Consumer Reports*—the purpose of which is to provide information that coordinates action.⁷

From the standpoint of the historian, Hayek's expanded view of markets as the transmitters of information broadens our understanding of economic theory. It allows an analysis of a whole range of institutions known as "knowledge producers." Two central questions immediately come to mind: how do these institutions come about, and how do various actors interpret the information they produce? The first question leads one to study the social context of information dissemination; the second question leads one to study its cultural context. For either question, economics becomes a discipline in which psychology, sociology, law, cultural theory, and history all have a say. Hayek himself wrote extensively on all of these subjects, leaving a huge body of literature that reflects the interdisciplinary richness of his approach. For the economic historian, it allows one to weave both social and cultural history into the fabric of the economic past. This is especially so for the history of preindustrial economies, where the absence of telecommunications technology and other modern conve-

4. See generally *id.*

5. FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 87 (1948).

6. Johnson, *supra* note 3, at 549.

7. See generally Daniel B. Klein, *Quality Control by Voluntary Means: Information, Reputation, and Trust* (1993) (unpublished manuscript, on file with the *Southwestern University Law Review*) (providing a superb overview of a whole range of knowledge-producing institutions).

niences made information transmission particularly important and costly. How did different customs serve to reduce risk from uncertainty and transaction costs in long-distance trade? How did merchants form social networks that provided essential information? How did artisans learn of work in other cities? Economic, social, and cultural historians are already asking these questions, as well they should. However, under Hayek's expanded definition of markets, they assume even greater importance.

Hayek's conceptualization of markets as layers of voluntary actions is a powerful tool for historians, but I think its importance to the relationship between economics and history goes beyond that. Here I disagree somewhat with Johnson's analysis. I find Hayek's evolutionary view of markets and institutions—what Hayek called “spontaneous order”—frustrating, and unsatisfying from a policy point of view. There is an old joke about a group of academics marooned on a remote island attempting to open canned food without implements. The economist's solution is simple and elegant: “Assume a can opener.” One sometimes has the feeling that Hayek's answer to solving difficult economic problems would be: “Assume spontaneous order.” In dealing with public goods questions, information asymmetries, and other types of market failures, I suspect that Hayek would argue that institutions, including appropriate common law decisions, would develop over time. Evoking spontaneous order is hardly a persuasive position, especially to the critic who already feels that the voluntary institutions are the root of the problem.

This is why Hayek attached so much importance to history, for it was history that would show the efficacy of voluntary institutions. Spontaneous order could not predict the future, but it could help make sense out of the past, thereby strengthening Hayek's case for economic liberty. Perhaps no policy question interested Hayek more than monetary policy. It is therefore not surprising to find that Hayek wrote papers entitled *Genesis of the Gold Standard in Response to English Coinage Policy in the 17th and 18th Centuries*,⁸ and *First Paper Money in 18th Century France*,⁹ while encouraging one of his graduate students at the London School of Economics, Vera C. Smith, to write

8. 3 FRIEDRICH A. HAYEK, *Genesis of the Gold Standard in Response to English Coinage Policy in the 17th and 18th Centuries*, reprinted in THE COLLECTED WORKS OF F.A. HAYEK, THE TREND OF ECONOMIC THINKING: ESSAYS ON POLITICAL ECONOMISTS AND ECONOMIC HISTORY 127 (W.W. Bartley III & Stephen Kresge eds., 1991) [hereinafter HAYEK, *Genesis of the Gold Standard*].

9. 3 FRIEDRICH A. HAYEK, *First Paper Money in 18th Century France*, reprinted in THE COLLECTED WORKS OF F.A. HAYEK, THE TREND OF ECONOMIC THINKING: ESSAYS ON POLIT-

a book on monetary history, called *The Rationale of Central Banking*.¹⁰ The importance of history to Hayek is most evident in his essay *History and Politics*,¹¹ published as an introduction to *Capitalism and the Historians*.¹² The purpose of *Capitalism and the Historians* was to overturn pessimistic interpretations of the industrial revolution, which he termed the "one supreme myth which more than any other has served to discredit the economic systems to which we owe our present-day civilisation [sic]"¹³ Hayek realized that as long as most people believed that spontaneous order caused havoc in the past, they would have little regard for it in the present. Indeed, he went so far as to praise the "Whig history" of Hallam¹⁴ and Macaulay¹⁵ for "[i]ts beneficial effect in creating the essentially liberal atmosphere of the nineteenth century."¹⁶

While classical liberals can no longer depend on Whig history, Hayek's interest in the past as a means of creating faith in economic liberty still has strong appeal. Hayek's intellectual heirs have examined everything from toll roads in early America to private education in England.¹⁷ These efforts have been devoted to finding out how voluntary institutions have historically overcome market failure. In a very real sense, Hayek's research program has led economists to become historians of the economic past.

ICAL ECONOMISTS AND ECONOMIC HISTORY 155 (W.W. Bartley III & Stephen Kresge eds., 1991).

10. See HAYEK, *Genesis of the Gold Standard*, *supra* note 8, at 127 n.1 (citing VERA C. SMITH, *THE RATIONALE OF CENTRAL BANKING* (P.S. King ed., 1936)).

11. 3 FRIEDRICH A. HAYEK, *History and Politics*, reprinted in *THE COLLECTED WORKS OF F.A. HAYEK, THE TREND OF ECONOMIC THINKING: ESSAYS ON POLITICAL ECONOMISTS AND ECONOMIC HISTORY* 56 (W.W. Bartley III & Stephen Kresge eds., 1991).

12. See *id.* at 56 n.1.

13. *Id.* at 60.

14. *Id.* at 57 & n.2.

15. *Id.* at 57 & n.3.

16. *Id.* at 58.

17. See, e.g., Daniel B. Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 *ECON. INQUIRY* 788, 788 (1990); see generally *THE THEORY OF MARKET FAILURE: A CRITICAL EXAMINATION* (Tyler Cowen ed., 1988) (containing various essays on education, law and other public goods).

A THESIS IN SEARCH OF A DISCIPLINED PROOF: COMMENTS ON BRUCE JOHNSON'S "HAYEK AND MARKETS"

Warren S. Grimes†

Professor Johnson offers us a realistic yet appealing view of markets.¹ Although disciplining forces ultimately prevail, Johnson describes a marketing process in which information vacuums are frequent, transaction costs are significant, and price and other terms of sale are constantly in flux.² As an antitrust lawyer, I find this overall description of markets credible. I am also sympathetic to Johnson's bias in favor of competition and against regulation. But I am left uncertain as to how Professor Johnson would translate his thesis into public policy. If the point is that markets, however imperfect, generally function far better than any centrally planned economy, I would agree. If, on the other hand, his thesis is that the market process *always* functions better without government intervention, I would disagree. Quite simply, the Johnson paper does not make that case.

I have a second concern. However appealing as a general matter, the Johnson/Hayek thesis lacks a rigorous and disciplined proof, or even a methodology for seeking that proof. If economics is to be more than a debating society for those with contrasting views about how to organize and allocate society's resources, it must go beyond appealing descriptions. One man's vision of markets remains only a vision unless deductive logic and inductive proof are marshalled in support.

To offer such support, one could reason deductively from premises, as microeconomists do, or draw conclusions inductively from available data, as industrial organization economists do. Indeed, one

† Professor of Law, Southwestern University School of Law.

1. M. Bruce Johnson, *Hayek and Markets*, 23 Sw. U. L. REV. 547 (1994).

2. *Id.*

might join the ranks of common law antitrust lawyers, whose eclectic reasoning process draws from the collective wisdom of a century of court decisions and the concrete facts of a case in controversy. In his paper, Professor Johnson does none of these things.

Johnson is highly critical of the static deductive models of microeconomists.³ Such models do seem awkward for measuring the dynamic market process he describes. Johnson complains that the failure of markets to function in the manner postulated under microeconomic theory has been cited as an excuse for government intervention.⁴ But microeconomic theory has surely been misused on all sides of the economic debate. For example, during the Reagan years, antitrust enforcement was scaled back under the rallying cry of allocative efficiency. Whether or not this scaling back was justified, the emphasis on a microeconomist's vision of perfectly allocated goods and services seems an oversimplified and unrealistic platform for devising antitrust policy.

The misuse of microeconomic theory by those who would impose more or less regulation is surely not a basis for discarding all microeconomic theory. I would agree with Professor Johnson that the work of many microeconomists is based upon unrealistic assumptions. On the other hand, the microeconomist's premises are stated or discernable. Those who would question the outcome of a particular model are free to inquire into those premises. In short, microeconomics provides a discipline for an ordered inquiry. The antitrust policy makers who focused on the goal of allocative efficiency forced those who disagreed to come up with disciplined explanations as to how other antitrust goals would be served by a particular enforcement initiative.⁵ In this way, I think, the microeconomist's models have moved the antitrust policy debate forward.

Professor Johnson points out that economists cannot test their hypotheses in the laboratory or with a field test (as one might do with drugs).⁶ But what would he offer in its place? Industrial organization economists, working with flawed but still meaningful data, have made real contributions to our understanding of how markets work.⁷ Marrying the deductive work of the microeconomist and the inductive ap-

3. *Id.* at 555-58.

4. *Id.* at 558.

5. See, e.g., Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

6. See Johnson, *supra* note 1, at 558.

7. See, e.g., William G. Shepherd, *Theories of Industrial Organization*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 37 (Harry First et al. eds., 1991).

proach of the industrial organization economist may be the best hope of narrowing and furthering a meaningful economic debate.

Such collective wisdom would, I suspect, support Professor Johnson's proposition that many regulatory interventions in the United States have failed to achieve their goals, or have achieved them only at unacceptably high costs.⁸ But an empirically grounded approach would also provide support for another proposition: that many dysfunctional markets exist and that measured and carefully tailored intervention may be beneficial. Let me offer some examples of areas where regulation has achieved some success, or where limited regulation might benefit the market process. While this listing is not exhaustive, it suggests a number of legitimate roles for government regulation: maintaining healthy and safe products and services, protecting the public against harmful side effects of commercial activity (such as pollution), creating uniform quality standards, curbing monopoly abuses, and closing information voids that would deprive consumers of meaningful price and quality comparisons among products.

The market for the sale of fresh milk appears reasonably competitive. American consumers can shop at supermarkets or convenience stores to purchase this important commodity at competitive prices. In particular, a consumer can shop with the assurance that various milk products (whole milk, low-fat milk, or non-fat milk) are safe and relatively uniform in quality, regardless of brand. But how well would this market function if we did not have government regulation of safety and labelling of milk products?⁹ A not unlikely scenario is that some consumers would become sick or even die from drinking unhealthy milk. Milk producers might also offer a bewildering array of non-standardized products, depriving the consumer of the opportunity to make meaningful price/quality comparisons. Yet another scenario is that the industry would cartelize, setting safety and labeling standards by self-interested industry fiat.

Contrast the relative stability and workable competitive conditions of the milk industry with the insurance industry. The selling of insurance is unregulated by the federal government and inconsistently (some would say ineptly) regulated by the states. In the life insurance market alone, there are a bewildering array of policies available with widely varied rates of return. Writing in the 1980's, Andrew Tobias found that, for term life insurance, the rate of claims payments for

8. See Johnson, *supra* note 1, at 557-58.

9. I am not addressing here a more controversial government intervention: the provision of price supports for farmers who sell milk.

each dollar of premium varied between \$.40 and \$.90 on the dollar.¹⁰ For other types of insurance, the pay-out was even lower: insurance companies paid out approximately \$.10 in claims for every \$1.00 paid for flight insurance, \$.15 for each \$1.00 in title insurance, and \$.20 for each \$1.00 in rental car insurance.¹¹ On the other hand, Tobias reported that the pay out for social security was \$.98 for each \$1.00.¹² Surely, one reason for the disproportionately low pay-outs by insurance companies is the consumer's inability to obtain and digest information about the coverage and cost of their insurance policies.

Information voids existing in the insurance business are, under Professor Johnson's thesis, likely to be corrected through teams of firms at all levels. One would hope and expect, for example, that if firms are selling flight insurance at a high margin of profit, someone else will enter the market and sell at a much lower margin. But this may not occur. Take, for example, the life insurance market.

I have already noted Tobias' data that pay-out ratios varied widely for term life insurance. But that is only the simplest form of life insurance. More complex policies (universal and whole life) are also widely sold. *Consumer Reports* magazine recently did a three-part survey of life insurance policies offered by major life insurance companies.¹³ They found a confusing array of terms and conditions that affected the value of these policies, to the point that even a relatively informed consumer would have great difficulty making meaningful cost/quality comparisons among the various policies.¹⁴ Is this a market in which this dynamic market process that Johnson envisions will bring discipline, or have the sellers of life insurance found sustainable ways to operate inefficiently or charge higher prices through their non-standardized and complex array of policies and sales promotion techniques?

I suspect a great improvement in this market might be effected by relatively minor regulatory interventions. For example, requiring that life insurance companies indicate cost information through a standardized, interest-adjusted, net cost index, might make it far easier for consumers to make cost comparisons.¹⁵ An additional step might be

10. ANDREW TOBIAS, *THE INVISIBLE BANKERS* 74 (1982).

11. *Id.*

12. *Id.*

13. *Life Insurance* (pts. 1-3), 58 CONSUMER REP., July-Sept. 1993, at 431, 525, 595.

14. See generally *id.* pt. 1, at 431.

15. *Id.* pt. 3, at 598. This is a reform recommendation of *Consumer Reports*.

to define certain standard form policies that all carriers would be required to provide.

As a final example of potentially beneficial intervention, I would point to the antitrust law governing tie-ins. Tie-ins occur when a seller refuses to sell the tying product, absolutely or conditionally, unless the buyer agrees to purchase the tied product. Such bundled sales of goods or services are not uniformly harmful. But where the seller can be shown to have market power in the tying product, or where market imperfections undercut consumer information or motivation, the tie is likely to be harmful.

There are now almost a century of court decisions interpreting the antitrust law's applicability to tie-ins. These decisions have done a reasonable job of isolating a critical variable that determines whether ties are likely to be harmful: the power that the tying seller possesses in the tying product market. When the seller possesses such market power, a number of competitively harmful results can occur, including raising the costs of rival sellers of the tied product or fostering cartel behavior in both the seller and customer industries.¹⁶

Courts have been slow to recognize the role that information voids and market distortions may play in harmful ties.¹⁷ But such information problems can be intelligibly isolated and assessed by courts. For example, information problems are more likely when the products and services are complex, the purchase of the tied product is deferred, and the tie targets buyers who are relatively unsophisticated.¹⁸

The challenge that markets present to policy makers is not simply to know that markets are generally preferable to centrally planned economies; it is to know when and to what extent fine tuning and disciplined intervention will produce a better functioning market without unacceptably high regulatory costs. That is not an easy assignment. I agree with Professor Johnson that many costly errors have been made in the past. Yet, as I have tried to suggest, disciplined intervention can produce better functioning markets. Economists have an opportunity to provide more and better guidance as to how and when such intervention might occur without generating offsetting regulatory costs.

16. See Warren S. Grimes, *Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections*, 62 ANTITRUST L.J. 263 (1994) (discussing market imperfections associated with tie-ins).

17. The Supreme Court may have moved to rectify this shortcoming in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072 (1992).

18. See generally Grimes, *supra* note 16.