

No. 10-38
July 2010

WORKING PAPER

THE EVOLUTION OF RULE OF LAW IN HAYEK'S THOUGHT,
1935–1955

By Steven D. Ealy

MERCATUS CENTER
George Mason University

The ideas presented in this research are the author's and do not represent official positions
of the Mercatus Center at George Mason University.

THE EVOLUTION OF RULE OF LAW IN HAYEK'S THOUGHT, 1935-1955:
FROM *COLLECTIVIST ECONOMIC PLANNING* TO *THE POLITICAL IDEAL OF
THE RULE OF LAW*

Steven D. Ealy
Senior Fellow, Liberty Fund, Inc.

Abstract:

Friedrich Hayek's interest in the ideal of rule of law as the centerpiece of a free society grew out of his analysis of the nature of centralized economic planning. This paper traces the development of rule of law in Hayek's thought from his early studies on economic planning through his political analysis of economics and political life as contained in *The Road to Serfdom* to his lectures on "The Political Ideal of the Rule of Law" delivered in Cairo in 1955. These lectures became the core of *The Constitution of Liberty*, in which Hayek integrates his concern with rule of law with basic philosophical principles, on the one hand, and an analysis of approaches to public policy on the other.

Dr. Steven D. Ealy (M.A., Government, Claremont Graduate University and Ph.D., Political Science, University of Georgia) is a senior fellow at Liberty Fund. Before joining Liberty Fund in 1993, he was professor of government at Armstrong State College (now Armstrong Atlantic State University) in Savannah, Georgia (1981–1993), and assistant professor of political science at Western Carolina University (1979–1981). He is author of *Communication, Speech, and Politics: Habermas and Political Analysis* (1981), and has edited writings by Robert Penn Warren, Willmoore Kendall, and Eric Voegelin. He has written on the fiction, poetry, and social commentary of Warren, the history and intellectual foundations of American philanthropy, and on constitutional interpretation. He serves on the Board of Visitors for the Pepperdine University School of Public Policy, and is a contributing editor of *Conversations on Philanthropy* and a member of the Advisory Editorial Board of *Society*.

THE EVOLUTION OF RULE OF LAW IN HAYEK'S THOUGHT, 1935–1955:
FROM *COLLECTIVIST ECONOMIC PLANNING* TO *THE POLITICAL IDEAL OF
THE RULE OF LAW*

Steven D. Ealy
Senior Fellow, Liberty Fund, Inc.

Near the conclusion of “Kinds of Rationalism,” a public lecture delivered in Tokyo in 1964, Friedrich Hayek reflected on his intellectual development. He explained why, as “a very pure and narrow economic theorist, [he] was led from technical economics into all kinds of questions usually regarded as philosophical.”¹ He pinpointed his 1937 essay, “Economics and Knowledge,” in which he “examined . . . some of the central difficulties of pure economic theory,” as the beginning of his systematic interest in broader questions of social and political philosophy. Hayek’s description of this early essay highlighted themes familiar to those who know his later work—the use of knowledge in society, the concept of spontaneous order, and the role of rule of law in structuring social interaction.

Its main conclusion was that the task of economic theory was to explain how an overall order of economic activity was achieved which utilized a large amount of knowledge which was not concentrated in any one mind but existed only as the separate knowledge of thousands or millions of different individuals. But it was still a long way from this to an adequate insight into the relations between the abstract rules which the individual follows in his actions, and the abstract overall order which is formed as a result of his responding . . . to the concrete particular circumstances which he encounters. It was only through a re-examination of the age-old concept of freedom under the law, the basic conception of traditional liberalism, and of the problems of the philosophy of law which this raises, that I have reached what now seems to me a tolerably clear picture of the nature of the spontaneous order of which liberal economists have so long been talking (KR, p. 92).

The origins of Hayek’s “philosophical turn” can be placed even earlier than he indicates for at least two reasons. First, “Economics and Knowledge” offers a mixture of

¹ F. A. Hayek, “Kinds of Rationalism,” in F. A. Hayek, *Studies in Philosophy, Politics, and Economics* (Chicago: University of Chicago Press, 1967), p. 91. Hereafter KR.

technical economic and philosophical analysis and cannot therefore be the origin of his interest in broader philosophical questions. By the time he wrote this essay, Hayek had already reflected enough on some of the philosophical questions that will later dominate his thought that he can offer an articulate explanation of at least some of them (especially on questions of social epistemology). Second, one theme of “Economics and Knowledge” that Hayek did not highlight in 1964, but which was his major concern in the mid-1930s, is the nature of planning. It is in his early discussion of planning that Hayek begins to formulate his understanding of rule of law as a part of his interest in the nature and dynamics of social knowledge, and which allows us to push the origins of Hayek’s interest in questions of political philosophy even earlier than he himself did.

In this paper I trace the origin of Hayek’s philosophical interest in the rule of law to 1935, when he still articulated it in terms of “very pure and narrow economic” theory in *Collectivist Economic Planning: Critical Studies in the Possibilities of Socialism*,² a volume he edited and to which he contributed two essays. Hayek’s early discussion of law is a far cry from his fully articulated understanding of Rule of Law as a political ideal and the foundation of a liberal political order that he presented much later in his Cairo Lectures on *The Political Ideal of the Rule of Law* and in *The Constitution of Liberty*,³ but it is here that we find the seeds of his later views.

² F. A. Hayek, editor, *Collectivist Economic Planning: Critical Studies in the Possibilities of Socialism* (London: George Routledge and Sons, 1935). Hayek’s contributions on this volume, “The Nature and History of the Problem” (hereafter NHP) and “The Present State of the Debate,” were reprinted first in his *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948) and more recently in his *Socialism and War: Essays, Documents, Reviews*, edited by Bruce Caldwell (Indianapolis: Liberty Fund, Inc., 2009), pp. 53-79 and 89-116, a volume in The Collected Works of F. A. Hayek. References will be to the Liberty Fund edition of these essays.

³ F. A. Hayek, *The Political Ideal of the Rule of Law* (Cairo: National Bank of Egypt Printing Press, 1955), and F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960). Hereafter PIR and CL.

CRITIQUE OF PLANNING AND ORIGIN OF RULE OF LAW

Hayek began his introductory essay to *Collectivist Economic Planning* by arguing that the West was on the verge of replacing the uncritical belief in man's capability of engineering "a reconstruction of society on rational lines" with a serious discussion of this issue.

It seemed so easy to improve upon the institutions of a free society which had come more and more to be considered as the result of mere accident, the product of a peculiar historical growth which might as well have taken a different direction. To bring order to such chaos, to apply reason to the organization of society, and to shape it deliberately in every detail according to human wishes and the common ideas of justice seemed the only course of action worthy of a reasonable being (NHP, p. 53).

This view was founded on a belief that with the advent of socialism "the economic problem" would disappear, and that the major difficulties to be addressed were ethical and psychological in nature. This view is mistaken, according to Hayek, because "the economic problem arises . . . as soon as different purposes compete for the available resources" (NHP, p. 56). The impact of the First World War, however, provided the illusion that centralized planning could replace economic competition as the foundation for the production and distribution of goods.

After the war, the ruling socialist parties throughout Europe were "for the first time largely concerned with the practical question of how to organize production on socialist lines. These discussions were very much under the influence of the war years, when the states had set up food and raw material administrations to deal with the serious shortage of the most essential commodities" (NHP, p. 71). There was a widespread belief that this wartime activity proved, first, that the "central direction of economic activity

[was] practicable and even superior to a system of competition,” but additionally and perhaps more important, “that the special technique of planning developed to cope with the problems of war economics might be equally applied to the permanent administration of a socialist economy” (NHP, p. 71).

The bulk of Hayek’s essay addressed the question of whether socialist planning—production and distribution of good without pricing signals—was possible. His essay, as well as the entire collection, is part of what comes to be known as the “socialist calculation debate.” He did, however, offer a brief discussion of law as a framework that allowed the market to operate, and his later emphasis on the rule of law grew out of this initial concern with technical economic questions related to planning.

In a section entitled “planning and capitalism,” Hayek suggested that planning appropriate to a capitalist system involves establishing “the most appropriate permanent framework which will secure the smoothest and most efficient working of competition”—the legal framework—and argued that this issue “is of the greatest importance and one which it must be admitted has been sadly neglected by economists” (NHP, p. 66). Never an enthusiast of laissez-faire economics,⁴ Hayek recognized the need for a legal system to provide structure for human activity and interaction. He clearly distinguished between a legal system which provided a framework for free action and the “central direction” of planning.

Hayek favored “a permanent legal framework so devised as to provide all the necessary incentives to private initiative to bring about the adaptations required by any change” and opposed “a system where such adaptations are brought about by central

⁴ In addition to NHP, p. 65, see F. A. Hayek, *The Road to Serfdom: Text and Documents*, edited by Bruce Caldwell (Chicago: University of Chicago Press, 2007), pp. 71, 118. Hereafter RS.

direction” (NHP, p. 66). According to Hayek, socialist planning “has to deal with day-to-day changes of every sort,” while the limited planning appropriate to a free society “is concerned only with the permanent framework of institutions and may be dispensed with if one is willing to accept the institutions which have grown in a slow historical process” (NHP, p. 66). Thus even at this early date Hayek emphasized the possibility of spontaneous order⁵ as an alternative to rationally directed construction as the foundation of social life.

The recognition of the necessity of a legal framework for economic and social life, however, did not yet lead to an articulation of the rule of law. The next step in Hayek’s development is found in two essays on “Freedom and the Economic System.”⁶ Again in these essays Hayek’s primary concern was the nature of economic planning and its inevitable “curtailment of individual liberty” (FES 1938, p. 181). In his 1938 essay, Hayek did not offer an explicit discussion of the nature of law, but simply contrasted planning with what later⁷ he would identify as two of the key characteristics of the rule of law, generality, and equality. “Planning must be understood here in the wide sense of any deliberate attempt at central direction of economic activity which goes beyond mere general rules that apply equally to all persons, and which tells different people individually what to do and what not to do” (FES 1938, p. 183). In his 1939 pamphlet, as part of an extended critique of planning, Hayek began to provide an analysis of the

⁵ He uses the notion of spontaneity elsewhere in this essay: “As the progress of the analysis of the competitive system revealed the complexity of the problems which it solved spontaneously, economists became more and more skeptical about the possibility of solving the same problems by deliberate decision” (NHP, p. 68).

⁶ F. A. Hayek, “Freedom and the Economic System,” *Contemporary Review* (April 1938), pp. 434-442, reprinted in *Socialism and War*, pp. 181-188 (hereafter FES 1938); and F. A. Hayek, *Freedom and the Economic System*, Public Policy Pamphlet No. 29 (Chicago: University of Chicago Press, 1939), reprinted in *Socialism and War*, pp. 189-211 (hereafter FES 1939). References will be to the Liberty Fund edition of these essays.

⁷ See RS, pp. 112, 117, PIR, pp. 34-36, and CL, pp. 149-156.

characteristics of the rule of law and to show how the framework established by rule of law allows for the “spontaneous solution”⁸ of various problems.

There is confusion over the nature of planning on the part of the public, Hayek argued, because the word “planning” is used for two very different activities. At one level “planning” is benign, because the word is used “to describe the application of reason to social problems in general” (FES 1939, p. 194). Planning in this sense is “indispensable if we want to deal with these matters intelligently and to which it is impossible to object on rational grounds” (FES 1939, p. 194). This reasonable but loose use of the term “planning” provides a cover for “planning in the strict sense” even though “there is a world of difference between economic planning in the narrow sense of the term and the application of reason to social problems in general” (FES 1939, p. 194).

The type of reasonable planning that Hayek supported allows for the establishment of “a system of general rules, equally applicable to all people and intended to be permanent, which provides an institutional framework within which the decisions as to what to do and how to earn a living are left to the individuals” (FES 1939, p. 194). To restate the point, Hayek argued, “we can plan a system in which individual initiative is given the widest possible scope and the best opportunity to bring about effective coordination of individual effort” (FES 1939, p. 194). The outcome of this type of general planning is “that the direction of production is brought about by the free combination of the knowledge of all participants, with prices conveying to each the information which helps him to bring his actions in relation to those of others” (FES 1939, p. 194).

⁸ Language he used in NHP, p. 68.

Among the concerns that might be governed by this “rational framework of general and permanent rules”⁹ would be the establishment of “general principles of private property and freedom of contract” (FES 1939, p. 195). This legal framework is, in effect, “a mechanism . . . through which production is to be directed, but no decision is consciously made about the ends to which it is directed” (FES 1939, p. 195). The established rules (or laws) “aim mainly at the elimination of avoidable uncertainty by establishing principles from which it can be ascertained who at any moment has the disposition over particular resources, and of unnecessary error by the prevention of deception and fraud” (FES 1939, p. 195).

These rules (laws) are to be general, which means first, that “they apply equally to all people,” and second, “that they are instrumental in helping people to achieve their various individual ends, so that in the long run everybody has a chance to profit from their existence” (FES 1935, p. 195). These general laws are not designed to assist or harm any particular individuals or groups, but to all people to be “free to follow their own preferences” (FES 1939, pp. 195, 194).

In this pamphlet Hayek outlined this rational framework of law as a contrast to “planning in the narrow sense.” The “essence” of this narrow planning “is that the central authority undertakes to decide the concrete use of the available resources, that the views and the information of the central authority govern the selection of the needs that are to be satisfied and the methods of their satisfaction” (FES 1939, p. 196). He then explicitly contrasted this economic planning with the establishment of a system of “general and permanent rules” In a system of central planning, “planning is no longer confined to the creation of conditions which have their effect because they are known in advance and are

⁹ Hayek also called this “a rational system of law” (FES 1939, p. 194).

taken into account in the decision of individuals” (FES 1939, p. 196). Unlike the framework established by general laws, in which the initiative and foresight of individuals acting on the basis of their personal knowledge and personal goals are the motivating force of social and economic activity, in a system of economic planning “the knowledge which guides production is no longer combined knowledge of the people who are in immediate charge of the various operations—it is the knowledge of the few directing minds which participate in the formulation and execution of a consciously thought-out plan” (FES 1939, p. 196).

In his 1939 pamphlet on “Freedom and the Economic System,” Hayek had begun to outline in detail what a legal system should entail and how such a system of “general and permanent” laws would help overcome uncertainty and thus provide a framework for individual initiative and action. While the shape of his mature thought is starting to emerge at this point, he is still primarily concerned with developing a critique of planning and he has yet to come to grips with the concept of rule of law. An examination of *The Road to Serfdom* shows that Hayek had fine-tuned his critique of planning in the intervening five years. He had thought a great deal about the role of law in a free society, and it is in *The Road to Serfdom* that Hayek provided his first extended and systematic treatment of, not law, but of Rule of Law.

THE ROAD TO SERFDOM AND THE RULE OF LAW

In the introduction to the original edition of *The Road to Serfdom*, Hayek acknowledged that this work was an extension of the argument he had begun to develop in the two essays on “Freedom and the Economic System” (RS, p. 38). Hayek

characterized *The Road to Serfdom* as a “political book” in which “all that I shall have to say is derived from certain ultimate values” (RS, p. 37). But while *The Road to Serfdom* grew out of “certain ultimate values,” its purpose was not to examine or justify those values. Thus *The Road to Serfdom* occupies a position somewhere between Hayek’s earlier scientific studies (if one takes economics to be a science, as did Hayek) and his later work in *The Constitution of Liberty*, which he characterized as a work dealing with the “basic issues of political philosophy” (CL, p. 5) which offers a statement of “principles which claim universal validity” (CL, p. 4).

As with his essays on “Freedom and the Economic Order,” in *The Road to Serfdom* Hayek was attempting to combat the drift toward totalitarianism through centralized planning which characterized much of European civilization during the mid-twentieth century. His interest in law again grew out of his interest in presenting an alternative to planning as a foundation for advanced (and advancing) industrial society. Hayek offered a much more detailed discussion of the nature of planning and the way in which planning inevitably leads to an effort to control or regulate every aspect of social life than in his earlier essays, but I will focus on why this work is important in the development of his thought. *The Road to Serfdom* was the first place in which Hayek articulated the importance of “Rule of Law” in a free society.

The key chapter in *The Road to Serfdom* for understanding the role of law in Hayek’s system is entitled “Planning and the Rule of Law.” Hayek built his argument around the distinction between “a free country” and “a country under arbitrary government” (RS, p. 112). The crucial element in this distinction is that a free country recognizes and observes “the great principles known as the Rule of Law” (RS, p. 112). In

essence the Rule of Law “means that government in all its actions is bound by rules fixed and announced beforehand” (RS, p. 112). A key component of binding government is the reduction of executive discretion “as much as possible”¹⁰ (RS, p. 112).

The system of Rule of Law has a number of important features. First, the legal system is a set of formal rules “intended to be merely instrumental in the pursuit of people’s various individual ends” (RS, p. 113). These laws are designed to provide a long-term framework for individual action, and therefore are not based on the possibility of assisting particular individuals or groups; rather, they are designed to allow all individuals or groups to maximize their own interests.

The formal rules tell people in advance what action the state will take in certain types of situation, defined in general terms, without reference to time and place or particular people. They refer to typical situations into which anyone may get and in which the existence of such rules will be useful for a great variety of individual purposes. The knowledge that in such situations the state will act in a definite way, or require people to behave in a certain manner, is provided as a means for people to use in making their own plans. Formal rules are thus merely instrumental in the sense that they are expected to be useful to yet unknown people, for purposes for which these people will decide to use them, and in circumstances which cannot be foreseen in detail (RS, p. 114).

This “formal” nature of law relates to the question of impartiality, which I will touch on below. The formal nature of law is so important for Hayek that he punctuated the foregoing argument by again stressing the impersonal nature of law, or to put it slightly differently, stressing the fact that the legislator has no idea of who specifically the laws will assist.

¹⁰ Hayek, much to the chagrin of those who might be called “ideological libertarians,” always kept one eye on the practical realities confronted in the political and social world. Thus he recognized that “this ideal [of the Rule of Law] can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men” (RS, p. 112). This final point indicates the problem of slippage that always occurs in enacting and implementing public policy, a problem that is the bane of all ideological reformers of every political persuasion.

In fact, that we do *not* know their concrete effect, that we do *not* know what particular ends these rules will further, or which particular people they will assist, that they are merely given the form most likely on the whole to benefit all the people affected by them, is the most important criterion of formal rules in the sense in which we here use this term (RS, p. 114).

Thus formal laws “do not involve a choice between particular ends or particular people, because we cannot know beforehand by whom and in what way they will be used” (RS, p. 114).

The second characteristic of Rule of Law is impartiality. Impartiality in enacting law is important to maintain because this impartiality helps to keep both the legislator and legislation within its appropriate bounds. “Where the precise effects of government policy on particular people are known, where the government aims directly at such particular effects, it cannot help knowing these effects, and therefore it cannot be impartial” (RS, p. 115). In such a situation, Hayek argued, government “must, of necessity, take sides, impose its valuations upon people and, instead of assisting them in the advancement of their own ends, chose the ends for them” (RS, p. 115).

Knowledge of specific effects of law at the time the law is being made has an impact both on the law and on the government. When law is made with these particular effects in mind “it ceases to be a mere instrument to be used by the people and becomes instead an instrument used by the lawgiver upon the people and for his ends” rather than for the various ends chosen by various individuals (RS, p. 115). Likewise, the nature of government changes when specific effects rather than a general framework of laws are sought. “The state ceases to be a piece of utilitarian machinery intended to help individuals in the fullest development of their individual personality and becomes a ‘moral’ institution—where ‘moral’ is not used in contrast to immoral but describes an

institution which imposes on its members its views on all moral questions” (RS, p. 115).¹¹

Hayek argued that legislative impartiality can only be achieved by restricting legislation to principles so general and formal that the legislator cannot know the effect of these laws on particular ends or particular individuals. As Hayek put it, “To be impartial means to have no answers to certain questions” (RS, p. 115)—no answers perhaps especially to questions of how one should structure one’s life and spend one’s time, but it also means having no answer to the question most frequently asked by constituents: “What does this law mean for me?” The appropriate answer to that question, if the law enacted is actually formal and instrumental in Hayek’s sense, is always the same—the law means for you what you make of it.

A third characteristic of a Rule of Law regime is that it is founded upon “formal equality before the law” (RS, p. 117) rather than status or privilege. “Formal equality” means, first, that the law is open for all to know, and second, that the procedures and mechanisms of the legal system apply neutrally to all. Hayek contrasts this formal equality with any attempt to achieve substantive equality between people. Pursuit of substantive equality in effect destroys the Rule of Law because to achieve substantive equality the government must abandon its position of impartiality—“To produce the same result for different people, it is necessary to treat them differently” (RS, p. 117). At a minimum, such differential action on the part of government destroys the legal

¹¹ This argument concerning government as a “moral institution” relates to Hayek’s discussion earlier in RS that comprehensive economic planning requires the “conception of a complete ethical code” in which all social and individual goals can be rank-ordered on a comprehensive hierarchy of values (see chapter 5, “Planning and Democracy,” esp. pp. 100-101)

framework of general laws which allow individuals to predict government action and shape their choices with that knowledge in mind.

Hayek recognized that the principle and practice of formal equality before the law may lead to or increase substantive inequality. “It cannot be denied that the Rule of Law produces economic inequality—all that can be claimed for it is that this inequality is not designed to affect particular people in a particular way” (RS, p. 117). Hayek’s argument is reminiscent of a comment in *Federalist* Number 10:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties, is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . .¹²

The fourth characteristic of Rule of Law is the universal application of law. This requirement flows naturally from the principle of formal equality and is essential for the stability and predictability that the Rule of Law regime is designed to achieve. Hayek went so far as to argue on behalf of universal application “that for the Rule of Law to be effective it is more important that there should be a rule applied always without exceptions than what this rule is. Often the content of the rule is indeed of minor importance, provided the same rule is universally enforced” (RS, p. 117). The principle of universal application of the law minimizes uncertainty because it allows individuals to predict the actions of government, but beyond that, to predict the actions of other people within broad limits (RS, p. 113).

¹² Alexander Hamilton, John Jay, and James Madison, *The Federalist*, George W. Carey and James McClellan, eds. (Indianapolis: Liberty Fund, 2001), p. 43.

A regime of Rule of Law, therefore, is characterized by formal rules, written impartially, with equality before the law and with the universal application of the law. On all of these points, Hayek argues, centralized economic planning is the exact opposite.

The planning authority cannot confine itself to providing opportunities for unknown people to make whatever use of them they like. It cannot tie itself down in advance to general and formal rules which prevent arbitrariness. It must provide for the actual needs of people as they arise and then choose deliberately between them. It must constantly decide questions which cannot be answered by formal principles only, and, in making these decisions, it must set up distinctions of merit between the needs of different people. . . . it will always be necessary to balance one against the other the interests of various persons or groups. In the end somebody's views will have to decide whose interests are more important; and these views must become part of the law of the land, a new distinction of rank which the coercive apparatus of government imposes upon the people (RS, p. 113).

Hayek made two general arguments in favor of Rule of Law, the first an economic argument and the second a political or moral argument. What Hayek called the economic argument actually turns on the cognitive limits of the state. Because the state cannot know those things which depend on "the circumstances of time and place" it "should confine itself to establishing rules applying to general types of situations" and allow individuals free reign in the realm of specific circumstances "because only the individuals concerned in each instance can fully know these circumstances and adapt their actions to them" (RS, p. 114). For individuals to effectively make use of their local knowledge, however, it is essential that they are capable of predicting government action which might impinge on their plans. Hayek concludes that "if the actions of the state are to be predictable they must be determined by rules fixed independently of the concrete circumstances which can be neither foreseen nor taken into account beforehand" (RS, p. 114).

Hayek's moral argument for Rule of Law turned on the question of the predictability of substantive outcomes as a threat to the impartiality of government action. "If the state is precisely to foresee the incidence of its actions, it means that it can leave those affected no choice." Hayek concluded, "Whenever the state can exactly foresee the effects on particular people of alternative courses of action, it is also the state which chooses between the different ends" (RS, p. 115). The possibility of creating "new opportunities open to all" requires the establishment of a general framework within which individuals can operate rather than the establishment of substantive goals or ends (RS, p. 115). A Rule of Law regime enhances the individual's control over his own life because "the government is prevented from stultifying individual efforts by *ad hoc* action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts" (RS, pp. 112–13).

The doctrine of Rule of Law as outlined by Hayek has many opponents, and Hayek identifies some of them. At the most general level, Hayek's Rule of Law regime will be a target of attack for anyone who favors "the deliberate organization of the labors of society for a definite social goal" (RS, p. 100). Substantive "fairness" as a political principle leads to the desire for substantive, rather than formal, policies (RS, p. 116). Distributive justice which aims at "material or substantive equality of different people" undermines the formal equality necessary for Rule of Law (RS, p. 117). The Rule of Law in any meaningful sense is also undermined by the view that "so long as all actions of the state are duly authorized by legislation, the Rule of Law will be preserved" (RS, p. 119). Hayek would explore this question at more length in later works, but here simply

observed that “the fact that someone has full legal authority to act in the way he does gives no answer to the question whether the law gives him power to act arbitrarily or whether the law prescribes unequivocally how he has to act” (RS, p. 119). Thus, to the extent that legal rules allow for arbitrary acts by the government and its agents the practice of the legal system falls short of the Rule of Law. For now it suffices to emphasize the position that mere “legality” is compatible with arbitrary government in a way that Rule of Law is not, and to note that we will examine this issue at length later in this paper.

As the idea of Rule of Law developed in Hayek’s thought through *The Road to Serfdom*, his discussion of this notion was secondary and incidental to his primary concern, which was a critique of central planning. After *The Road to Serfdom*, however, the concept of Rule of Law took center stage in Hayek’s thought. Rule of Law became the ideal which provided the foundation for a liberal society and the framework which allowed such a society to thrive. The discussion of Rule of Law as the political ideal motivating liberalism is the heart of both Hayek’s Cairo lectures (1955) and *The Constitution of Liberty* (1960).

CAIRO LECTURES: *THE POLITICAL IDEAL OF THE RULE OF LAW*

The Political Ideal of the Rule of Law consisted of four lectures: Freedom and the Law (a historical survey), Liberalism and Administration (the Rechtsstaat), The Safeguards of Individual Liberty, and The Decline of the Rule of Law. In his brief preface to the National Bank of Egypt’s publication of the lectures, Hayek characterized them as the “tentative results” of an ongoing study and suggests that they “should

therefore be regarded as an advance sketch of an argument which needs to be developed on a larger canvas” (PIR, pp. ii).

The “larger canvas” for the complete exposition of Hayek’s views would prove to be *The Constitution of Liberty*, and his reworking of the materials from the Cairo Lectures would constitute the middle section of that work, “Freedom and the Law” (CL, pp. 131–249). Although the substance of these lectures was incorporated into *The Constitution of Liberty*, at times Hayek’s formulations were slightly different in the two works and his argument was often clearer in the earlier lectures.

Hayek offered two reasons for beginning his lectures with a discussion of the historical development of the Rule of Law. First, he argued, a “silent revolution” in the western understanding of law has occurred over the past century, silent in that the same terms and concepts have continued to be used, but their meaning has changed dramatically. These changes in meaning had “whittled away most of the guarantees of individual liberty” (PIR, p. 3) which Rule of Law was designed to protect and which provided the core of traditional liberal commitments. Hayek’s historical discussion of the development (and decline) of the Rule of Law was designed to expose the “transformation of the whole conception of law and of the powers of the state” wrought by this revolution (PIR, p. 3).

Hayek’s second argument for a historical approach to his subject may seem puzzling at first glance, but it pointed to an underlying and consistent dimension of his thought: “Abstract discussions of the meaning of liberty have rarely been very fruitful” (PIR, p. 4). Hayek argued that such discussions take place among people so used to the practices of freedom that their senses have become a bit jaded and therefore they may

become “more interested in ‘new freedoms’” than in the liberties they actually possess, perhaps even to the extent of a willingness to trade in old liberty for the promise of new freedoms. The historical approach was designed to counter this intellectual sluggishness. Hayek hoped to revitalize our understanding of individual liberty with a “glance back at the time when this liberty was still a new thing, a value to be fought and striven for” (PIR, p. 5).

A deeper reason for his historical approach, however, related to Hayek’s longstanding interest in the nature of human rationality. In “Kinds of Rationalism” Hayek contrasted “constructivist rationalism,” which believes that “human civilization is the product of human reason,” with an earlier view (which at times Hayek identified as “anti-rationalist”) which sees “human reason as the product of a civilization which was not deliberately made by man but which had rather grown by a process of evolution” (KR, p. 86). Here I will simply suggest that “abstract discussions” of liberty tend to support a “constructivist” understanding of human reason and human society, while a historical account of the development of human liberty will emphasize the evolutionary nature of civilization and human reason.

As noted in my discussion of *The Road to Serfdom*, Rule of Law is something other and more fundamental than adherence to mere legality. Rule of Law is fundamentally opposed to arbitrary government, while mere legality may allow the government to act in an arbitrary fashion. Rule of Law is “an extra-legal rule, which cannot itself be a law but can only exist as the governing opinion about the attributes good laws should possess” (PIR, p. 26). Hayek resisted any effort to base Rule of Law on an understanding of “natural law” or “Higher Law” teaching. Rather, he argued, “It is too

easy a solution to ascribe to [Rule of Law] existence elsewhere than in the conviction of men, to impute to it objective validity apart from human will” (PIR, p. 26). To the extent that Rule of Law has “permanent validity” it is “in the sense that any man who shares certain fundamental values and possesses the understanding of human affairs which the experience of generations has accumulated” will find it of value and worth protecting. Hayek’s understanding of the nature of Rule of Law takes us to an understanding of self government in its most fundamental sense: “its comprehension requires an ever renewed act of the understanding and of the will and that to preserve it demands constant self-discipline” (PIR, p. 26).

Rule of Law is “a doctrine *about* what the law ought to be, or about certain general attributes which the laws must possess in order to conform to it” (PIR, p. 33). Rule of Law, therefore, is not merely the demand for legality or constitutionalism, but it deals with the foundation of legitimate governmental action and “it implies certain requirements concerning the contents of the Constitution” (PIR, p. 33).

Since “the Rule of Law is a limitation upon all legislation,” Hayek argued, “it follows that it cannot itself be a law in the same sense as the laws passed by the legislator” (PIR, p. 33). Hayek acknowledged that constitutional provisions can make departure from Rule of Law more difficult, but such provisions can never totally eliminate the possibility of infringements of the Rule of Law. Hayek’s argument again emphasized the importance of the ultimate foundation of Rule of Law in human understanding and self-discipline. He maintained that “the ultimate legislator can never by law limit his own powers, because he can also abrogate any law he has made” (PIR, p.

33). As a meta-legal doctrine the Rule of Law “will be effective only in so far as the legislator feels himself bound to abide by it” (PIR, p. 33).

Hayek argued that the “ultimate legislator” can never limit his own powers by law, so it is important that we determine exactly who this “ultimate legislator” is. One strain of democratic theory suggests that “the people” hold this position, and Hayek’s argument suggests the possibility that he accepted this view. After making the general argument that Rule of Law was effective only to the extent that the legislator felt himself bound by it, Hayek applied this point specifically to democratic systems. “In a democracy this means in effect that whether the Rule of Law will be obeyed or not will depend on whether it is accepted by public opinion, on whether it is part of the sense of justice prevailing in the community” (PIR, p. 33).¹³ While Rule of Law as a set of applications of a political ideal can never be fully achieved, its provisions may be approached more or less closely, and “how far they will be realized will depend on the state of public opinion” (PIR, p. 33).¹⁴

If belief in the Rule of Law is part of the underlying convictions, both legislation and jurisdiction will tend to approach it more and more. If, on the other hand, its principles are represented as impracticable or perhaps even as undesirable, and people cease to strive for their realization, they will rapidly disappear; a society where this happens will quickly move backwards towards that state of arbitrary tyranny against which the movement for the Rule of Law was directed. (PIR, p. 33)

¹³ Compare James Madison’s argument in a letter to Thomas Jefferson dated October 17, 1788: “Supposing a bill of rights to be proper the articles which ought to compose it, admit of much discussion. I am inclined to think that *absolute* restrictions in cases in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations, in extraordinary cases will lose even their ordinary efficacy.” In *James Madison: Writings*, edited by Jack N. Rakove (New York: The Library of America, 1999), p. 422.

¹⁴ What is the foundation for public opinion? In *The Constitution of Liberty* Hayek would provide an analysis of the importance of tradition as the foundation of political community, and therefore ultimately as the foundation of public opinion.

Hayek's historical discussion was intended to show that Rule of Law was not the conscious creation of political founders, but rather "is really a complex of doctrines which have been formulated a different times and which are connected only by serving the same end" (PIR, p. 34). The end of Rule of Law

is to limit coercion by the power of the state to instances where it is explicitly required by general abstract rules which have been announced beforehand and which applied equally to all people, and refer to circumstances known to them (PIR, p. 34).

One important application of the principles of Rule of Law is "*nullum crimen, nulla poena sine lege*, that is, the rule that nothing must be treated as a crime and punished without a previously existing law providing for it" (PIR, p. 34).

Hayek identified three "classical requirements" for Rule of Law legal systems as follows: "laws must be general, equal, and certain" (p. 34). Laws are *general* "not only in the sense of applying equally to all people, but also in the sense that they do not refer to particulars but apply whenever certain abstractly defined conditions are satisfied" (PIR, p. 35).

Hayek had earlier dealt with the question of equality in these lectures in his discussion of the Greek origins of Rule of Law. *Isonomia* is the Greek word used in Herodotus to designate equality before the law, and is a key component of Hayek's argument that there was an understanding of individual liberty, as opposed to communal liberty, in the ancient world (PIR, pp. 6–7).¹⁵

Hayek considered the second requirement, "*equality* before the law," to be the "most difficult and perhaps most important requirement" of the three (PIR, p. 35). Part of the difficulty is that equality before the law "seems to be one of those ideals which

¹⁵ See Robert B. Strassler *The Landmark Herodotus: The Histories* (New York: Pantheon Books, 2007), pp. 245-46, esp. fn. 3.80.6a.

indicate a direction without clearly defining the goal” (PIR, p. 36). Hayek’s resolution of the difficulties revolving around equality before the law can be summarized in two points: “the laws must be the same for all,” and any “differentiation which [law] makes must not be aimed at benefitting particular people” (PIR, p. 36).

Hayek considered equality before the law so crucial because he thought it offered the best hope of minimizing oppression by the state. “The requirement that the laws must be equally applicable to all, that nobody must have the power of dispensing from them, makes [the passage of oppressive legislation] highly improbable” (PIR, p. 47). Whether Hayek was overly optimistic in this belief, this view was one that that he shared with *Federalist 57*, which argued that an important factor in “restraining [the House of Representatives] from oppressive measures” is “that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society.”¹⁶

Certainty of the law, the third of Hayek’s requirements, was in his judgment the most important for economic activities. He wrote, “I doubt whether the significance which the certainty of the law has for the smooth and efficient working of economic life can be exaggerated, and there is probably no single factor which has contributed more to the greater prosperity of the Western World, compared with the Orient than the relative certainty of the law which in the West had early been achieved” (PIR, p. 36). This

¹⁶ *The Federalist*, p. 297. *Federalist 57* also speaks to the issue of the people—or public opinion—as the foundation of liberty. “This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interest, and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the house of representatives from making legal discriminations in favour of themselves, and a particular class of the society? I answer, the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased, as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.”

conclusion is not surprising, for as my previous discussion has shown, from his earliest writings on planning and law, Hayek had emphasized the importance of known laws clearly outlining what actions government would take under certain circumstances as crucial in allowing individuals to make their personal and economic choices.

While Hayek argued that separation of powers may be an important component of Rule of Law, he cautioned that such “procedural rules” should always be judged in terms of the support they offer to Rule of Law, and not as principles co-equal with or independent of Rule of Law requirements. Hayek’s primary focus on separation of powers emphasized the separation between legislative and judicial functions. This division, he believed, grew out of the basic requirements discussed above. “The principle that the general rules should be laid down apart from their application to particular instances almost requires that these distinct functions should be performed by distinct groups of people” (PIR, p. 37). The legislature is responsible for enacting general rules, and those rules are then applied in specific individual cases by judges who had no part in the initial debate and enactment of the law.

In addition to the argument from principle for separating the legislative and judicial branches, there was a practical one. To reiterate a point already made, Hayek believed “It would always be difficult to get any body to bind itself strictly by the words of a rule it has itself formulated” (PIR, p. 37). Division of rule making from rule enforcing might solve this difficulty.

In the course of his discussion of separation of powers, Hayek made another argument which touches on a subject of much recent controversy, that of “original intent jurisprudence.”

Since what should count ought not to be the hidden intentions of the maker of the rules but what they rules as they have been promulgated must mean to an impartial observer, it would seem necessary that their application should be left to an independent authority (PIR, 37).

Hayek's argument offered a critique of "originalism" in the same vein as the position articulated by Justice Antonin Scalia, who speaks of the "original meaning" of laws and constitutions rather than "original intention." Scalia stated his position succinctly: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."¹⁷

Although this discussion takes place under the rubric of "separation of powers," Hayek made clear that in a well-functioning Rule of Law regime, the judiciary would in effect not be a "power" at all. He stated, "If this ideal could ever be fully achieved the judge could hardly be regarded as a separate power but would rather become a kind of machine applying the law" (PIR, p. 37). Ever the realist, however, Hayek recognized that the full achievement of this ideal is highly unlikely. First, "it is probably inevitable that certain general conceptions enter into the interpretation of the law which are not explicitly stated in the law," and second, "in the actual struggle of forces the persons who have to apply the law are among the most important" (PIR, p. 37). He judiciously concludes that "there is at least some good justification for describing [judges] as a distinct 'power'" (PIR, p. 37).

Hayek's fourth lecture dealt with "The Decline of the Rule of Law," which was a major theme in his thinking about the topic. The Rule of Law Hayek held up as the ideal in these lectures is a particularly English phenomenon, a set of beliefs and practices that evolved slowly over time. One might argue that history produced the ideal of Rule of

¹⁷ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), p. 38.

Law, and that what history gives history can take away. In fact, Hayek's analysis began with the very point that history has removed its support for Rule of Law through a silent revolution (see above, pp. 17–18). Hayek suggested that Rule of Law had reached its high water mark at some period in the past and has been ebbing ever since, at least in the countries he paid most attention to—Britain, France, Germany, and the United States. Just as Hayek's discussion of the growth of Rule of Law was couched in historical rather than theoretical terms, so was his discussion of its decline.

Rather than tracing Hayek's historical account in each country, I will highlight a number of key elements found in the decline of Rule of Law as a political ideal. While its growth in England was slow and convoluted, its impact on other countries, especially France, was immediate and perhaps bordered on “constructivist rationality.” As Hayek wrote, “Any attempt at a ‘rational reconstruction’ of how it worked and what it achieved required that principles be made explicit which had never been stated, and that gaps be filled which would at once have made themselves felt if the institutions had been simply transplanted into a different atmosphere” (PIR, pp. 15–16). Put simply, the evolved practices of British law and life could not be replicated in settings with a different cultural and political evolution. The results of Britain's evolution became the model for “Continental students who by deliberate legislation hope to equal and improve upon what Britain had achieved by slow growth” (PIR, p. 16).

Hayek argued that the French Revolution was “largely inspired by the ideal of the Rule of Law,” yet he was skeptical that that revolution advanced its cause. Three aspects of the French experience are of particular note. First, “Perhaps no revolution, even if its aim is to make the law sovereign, is likely to increase the respect for the law” (PIR, p.

17). In an age in which political revolution has become a common occurrence, the very instability of governments perhaps undermines Rule of Law as an ideal not only in those countries experiencing revolution, but also in those countries merely observing it from afar.

The second aspect of the French Revolution is, for Hayek, the most important in undermining Rule of Law. The belief that with democratic revolutions, “since at last the control of all power had been placed in the hands of the people, all safeguards against any abuse of that power had become unnecessary” (PIR, p. 17), weakened the spirit of “eternal vigilance” essential for maintaining a free society. A third feature of the French experience was an attack on “the whole principle of merely formal equality before the law” and the demand for equal outcome of condition (PIR, pp. 18, 49).

In Germany, historicist and positivistic critiques challenged both Natural Law and the Kantian foundations of the *Rechtstaat* (see PIR, pp. 18 ff.). The historical approach “created a moral and legal relativism which, somewhat contrary to the attitude which a real understanding of the non-rational forces in history should produce, implied a denial of the value of any experience that is embodied in traditions and institutions” (PIR, p. 27). For a legal positivism which “knows no principles beyond the positive laws, [and therefore] has no criteria to judge whether a law is good or bad” (PIR, p. 27), Rule of Law is literally meaningless. “Since the Rule of Law as a limitation upon legislation is a sort of meta-legal principle which cannot be a part of a positive law but to which the positive law may or may not conform, it could have no meaning within the compass of positive jurisprudence” (PIR, p. 27). Rule of Law was reduced to mere legality, which

provides no defense at all against arbitrary or discriminatory legislation or government action.

In England, the assault on Rule of Law took the form of defense of extensive delegation of power to decide individual cases without clearly defined general laws (PIR, p. 53), the expansion of discretionary powers, and the attack on the impartiality of the judiciary (PIR, p. 54). In the United States, the development and expansion of administrative law which violated basic principles of separation of powers was the key element in the decline of rule of law (PIR, p. 56). Hayek quotes Roscoe Pound on “a tendency away from courts and law and a reversion to justice without law in the form of a revival of the executive and even legislative justice and reliance upon arbitrary governmental power” reminiscent of sixteenth-century England (PIR, p. 56).

For Hayek, Rule of Law was an ideal but not a panacea for all of our ills. In fact, “The Rule of Law gives us only a necessary and not a sufficient condition of individual freedom” (PIR p. 46). Within the broad scope allowed by Rule of Law, legislation and administration “might still become very irksome and harmful” (PIR, p. 46) or merely “silly” (PIR, p. 47).

As Hayek acknowledged, his understanding of Rule of Law leaves a realm of potential government action which is “enormous. Anything which can be achieved by laying down and enforcing general rules, equally applicable to all people, is in principle admissible under it” (PIR, p. 46). This area of legitimate government action can include regulations concerning the safety and quality of products and state production “so long as the state does not prevent private people from also doing what it does” (PIR, p. 46)—that is, state enterprises are acceptable as long as the state doesn’t grant itself a monopoly.

What Rule of Law does prohibit are state efforts to destroy private property and engage in the “central direction of economic activity, today known as ‘economic planning’” (PIR, p. 47).

In addition to the concerns Hayek delineated, I will mention two aspects of his own work which perhaps are potential traps for Rule of Law. First, Hayek saw the primary threat to Rule of Law coming from legislatures, and therefore separation of powers and judicial review were front-line defenses from his perspective. His idealized view of judges seemed to accept the argument made in *Federalist* 78 that the judiciary “will always be the least dangerous to the political rights of the constitution” because “It may truly be said to have neither FORCE nor WILL, but merely judgment.”¹⁸ While Hayek noted judicial abuses in his historical account, he seemed to maintain his support for judicial review. Of course, if the judiciary comes to exercise will rather than judgment, it can destroy Hayek’s ideal of Rule of Law.

Second, Hayek distinguished the state’s service activities from its coercive function and did not believe that its service role posed a threat to individual liberty or to Rule of Law (PIR, pp. 48–49). Here I simply raise the question of whether this distinction can be maintained and suggest that governmental provision of services always combines a dual focus in providing services and monitoring compliance. The policeman role of monitoring compliance and enforcing regulations has the potential to become more significant in the lives of citizens than the services provided and potentially allows for widespread coercion. Hayek’s response, perhaps, would be that this could occur only in situations in which government has given itself a monopoly in service provision, and that competition between private providers and government would minimize this danger.

¹⁸ *The Federalist*, p. 402.

HAYEK'S LATER WORK

In 1960 Hayek published *The Constitution of Liberty*, taken by many to be his crowning intellectual achievement. Hayek delivered the Cairo Lectures as a side trip during a project to retrace John Stuart Mill's journey through Italy and Greece and publish an annotated edition of Mill's letters. As Hayek noted in an autobiographical journal, "These lectures, together with the constant preoccupation with Mill's thinking, brought it about that after our return to Chicago in the autumn of 1955 . . . I had before me a clear plan for a book on liberty arranged round the Cairo lectures."¹⁹ Reflecting on Hayek's comment, Eugene F. Miller provides a succinct overview of the structure of *The Constitution of Liberty*. "In this light, we see that Part I . . . takes up questions of individual freedom that Mill wrestled with, but failed to resolve satisfactorily. Part II restates and expands the Cairo Lectures. Part III applies the rule of law to issues of government policy."²⁰ *The Constitution of Liberty* presents 1) Hayek's fullest statement of the growth and principles of the Rule of Law and 2) his most complete effort to examine the basic principles of liberalism as the foundation for a free society and to relate those principles to Rule of Law.

Just as Hayek had traced the rise and decline of the Rule of Law, we can trace its rise and decline in Hayek's own thought. In 1973 Hayek published the first volume of a three-volume study entitled *Law, Legislation and Liberty*. In his introduction he

¹⁹ F. A. Hayek, *Hayek on Hayek: An Autobiographical Dialogue*, edited by Stephen Kresge and Leif Wenar (Indianapolis: Liberty Fund), pp. 129-130.

²⁰ Eugene F. Miller, "Hayek's *Constitution of Liberty*: An Account of Its Argument" (unpublished manuscript, 2009), p. 66.

characterized *The Constitution of Liberty* as offering a restatement and clarification of “the traditional doctrine of liberal constitutionalism.”²¹

But it was only after I had completed that work that I came to see clearly why those ideals had failed to retain the support of the idealists to whom all the great political movements are due, and to understand what are the governing beliefs of our time which have proved irreconcilable with them (LLL, p. 2).

Hayek listed three changes in belief which make contemporary society deaf to the argument for Rule of Law (LLL, p. 2). 1) We no longer believe “in a justice independent of personal interest.” 2) Legislation is now used (by all parties and political persuasions, perhaps) to achieve preferred outcomes “for specific persons and groups.” 3) Separation of powers has been breached by “the fusion in the same representative assemblies of the task of articulating the rules of just conduct with that of directing government.”

The result of all of this, in Hayek’s judgment, was “The first attempt to secure individual liberty by constitutions has evidently failed” (LLL, p. 1). With *Law, Legislation and Liberty* Hayek abandoned his philosophical work on Rule of Law and made a new start to defend individual liberty in a free society. Hayek’s emphasis would now be on institutions rather than principles (LLL, pp. 3–4). His primary objective, however, would remain the same. “It is only in the present book that I address myself to the question of what constitutional arrangements, in the legal sense, might be most conducive to the preservation of individual freedom” (LLL, p. 3).

²¹ Friedrich A. Hayek, *Law, Legislation and Liberty Volume I: Rules and Order* (Chicago: University of Chicago Press, 1973), p. 2. Hereafter LLL.