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LAW AND LEGISLATION IN HAYEK'S LEGAL PHILOSOPHY

Leonard P. Liggiot†

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

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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 Arminium (1569-1609). Arminium 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 Arminium.

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.