ARTICLES

The Traditions and History of the Meaning of the Rule of Law

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ABSTRACT

The literature on the rule of law, if nothing else, is replete with various definitions and explanations on the meaning and purpose of the rule of law. At its core, the rule of law establishes that power—government power—is to be limited by the law, and the arbitrary use of executive power is condemned. From this core, there is disagreement on the scope of the rule of law in application and the defining of justice and equity. There is much debate as to whether the principle of rule of law centers on process or outcomes. This article seeks to address the why behind the purpose of the rule of law with a focus on its legal, philosophical, historical, social, and political development from the perspective of the enlightenment and Christian biblical theology as well as the modern definitions of the rule of law, which focus on the dichotomy of process vs. outcome.

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INTRODUCTION

Leges sine moribus vanae.1

Lord, You have heard the desire of the humble; . . . do justice to the fatherless and the oppressed, that the man of the earth may oppress no more.2

It is said that the principle of the rule of law is that no man is above the law. This principle is considered a truism. But what is the rule of law and why does it matter? In times of peace and war, as well as in determining the relationship between the individual and the state, the Law is said to be supreme. This article seeks to explore the philosophical, historical, moral, political, legal, and religious foundations of the rule of law concept within classical western legal and political thought. It is not proposed that a full review of the concept of the rule of law is summarized in this article, but rather Part I of this article will provide a summary of the meaning of the rule of law as developed by the original writings of the men of the enlightenment and utilitarian thought which formed the foundation of American legal thought. In Part II of the article, the modern view of rule of law is explored with a focus on how it differs from the classical view and how the change impacts modern political understandings of justice and fairness within society.

I. THE WHY BEHIND THE IMPORTANCE OF THE RULE OF LAW OVER RULE BY LAW

Justice! Justice is what a lawyer gets when a judge rules in his favor. [I am talking about the Law]. The Law is what we live by. It is the rules! A man can not live any other way. I have seen cities burned. I have seen children slaughtered. Law is what separates us from the beasts. We leave it we leave a hole with no bottom!3

Learn to do good; Seek justice, Rebuke the oppressor; Defend the fatherless, plead for the widow.4

The foundation of the rule of law and the understanding of why it is important begins with the question why is the law needed in the first place. The men of the enlightenment (John Locke, Thomas Hobbes, Cesare Beccaria, Jeremy Bentham, and Charles de Montesquieu) approached the questions regarding both theory and structure of government with an initial question: what is the role of government in relation to the nature of man. While John Locke wrote in the Second Treatise of Government, that the rule of law embodied the protection

4. Isaiah 1:17 (NKJV) (This scripture is summarized in an inscription on the main entrance of The Old Bailey, “Defend the children of the poor and punish the wrongdoer.”).
of man’s inherent right to freedom and liberty from other men and then from the power of government, Thomas Hobbes proposed that the rule of law was defined by the need to protect the liberty of man, not from government, but from the nature of mankind. Hobbes famously asserted in *Leviathan* that:

> Hereby it is manifest that, during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man . . . where every man is enemy to every man, . . . men live without other security than what their own strength and their own invention [provides] . . . . In such condition there is no place for industry . . . no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.6

Locke came to a similar conclusion in his explanation for why man formed government:

> If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? why will he give up this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.

> The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.7

The father of the U.S. Constitution, James Madison, found agreement with both Hobbes and Locke, and wrote in Federalist 10 regarding the nature of mankind that:

> So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful

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distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.8

Together these men provide the foundation for understanding why the rule of law is significant. The rule of law is not a political catch phrase to embody what observers want the law to be, it is a foundational principle encompassing what the nature of man is and what man needs to live outside of the state of nature and achieve peace, justice, and the freedom to enjoy the fruits of his labor. Locke teaches that to have freedom and liberty the law must be predominant, and Hobbes teaches that there must be a common power (the government) to control the natural state of man (warfare and violence between mankind) in order to have freedom and liberty. Later in his assessment of the nature of man,

8. The Federalist No. 10, at 74–75 (James Madison) (Clinton Rossiter ed., 2003). Madison was no dreamer when it came to the problem of forming a government that relies on the will of other men to rule and govern with justice. For he observed:

With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? Are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

Id.
Hobbes makes an interesting observation on how justice and injustice are defined and the source of their definitions. Hobbes writes regarding the natural state of man, i.e., war between men:

To this war of every man against every man this also is consequent, that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind. If they were, they might be in a man that were alone in the world, as well as his senses and passions.9

Madison again found agreement with Hobbes, for he observed:

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

... The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.

... No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.10

While Locke echoed Hobbes (and Madison echoed both) that without the rule of law there can be no freedom, law, or justice, Locke and Hobbes found disagreement on what existed in the state of nature before government. Hobbes not only maintains that in war, which is the natural state of mankind before the formation of government, there is no justice because in war there is no law, but also that the idea of justice is a conception, and justice is a result of the government’s power to enforce the law. Justice is defined by the senses and


10. THE FEDERALIST NO. 10, supra note 8, at 74.
passions of man as he defines the presence and requirements of law. Thus nothing can be unjust or just without the law. Right and wrong, good and evil, injustice and justice are defined by the power of the law applied to actions of humanity. The nobility of the law is not in what it rules, but that it does rule. This is at the core of why the rule of law matters. The rule of law allows man to move from a state of war to one of peace in which man, as Locke writes, can live in and enjoy the fruits of freedom and liberty in safety.

This view of the law and the rule of law is broader and more coherent than the procedural view of the law and the rule of law. F.A. Hayek, for example, wrote that the rule of law:

stripped of all technicalities . . . means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge . . . . While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under Rule of Law the government is prevented from stultifying individual efforts by ad hoc action.11

Although Hayek was not wrong, such an explanation for the rule of law is incomplete. As discussed in more detail below, the value of the rule of law is in what it both prevents and upholds. The rule of law is a general concept. As Professor Raz correctly observes, the rule of law “requires . . . the subjection of particular laws to the general, open, and stable ones [and] particular laws should be guided by open and relatively stable general ones.”12 Such general, open, and stable laws include the ideals that all laws are to be measured by, and how, a society is to be ordered under law. This is both a legal and political philosophy. The rule of law provides a hierarchy for the law from its highest ideals to its most specific rules that demand obedience and are backed by the coercive power of government. In the United States, that higher general, open, and stable law is the U.S. Constitution, the Bill of Rights, and the Fourteenth Amendment Due Process and Equal Protection of the law clauses. In England, that higher law is the Common Law and the Natural Law. All specific laws are subservient to the higher law.

While Hobbes and Locke agreed on the need for the coercive power of the law, what Hobbes called the “common power to keep men in awe,” and under control in order to bring man out from under the natural state of war and allow freedom and justice to prevail, they parted company on the source of the law. Hobbes proposed that the sovereign, however defined and structured, is the final authority and source of the law with the ability to change societal governing

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laws at its own discretion to control what Locke called the “ill nature” of man.\textsuperscript{13} The sovereign was the source of the law.\textsuperscript{14} Locke rejected the proposition that the law originated with the sovereign. Locke asserted that the law existed before civil government and the social compact (contract). Locke explained that in the state of nature before government, there was \textit{Law} that governed the behavior of man. That law was natural law.\textsuperscript{15} Natural law was the law of nature and the law that governed the nature of things as they exist. In other words, the laws of nature were those laws that held the universe together and governed its existence. Locke wrote that under natural law man was free to dispose of his treasures and possessions but this liberty was not a state of unbridled license. The law of nature was obligatory on all men and known naturally to all men through man’s ability to think and reason. Locke explains:

the \textit{state of nature} has a law of nature to govern it, which obliges every one:
and reason, which is that law, teaches all mankind, who will but consult it,
that being all \textit{equal and independent}, no one ought to harm another in his life,
health, liberty, or possessions . . . .\textsuperscript{16}

And in order to address the need for the just enforcement of the natural law among men,

God hath certainly appointed government to restrain the partiality and vio-
ence of men. I easily grant, that \textit{civil government} is the proper remedy for the
inconveniences of the state of nature.\textsuperscript{17}

While Hobbes, in describing the purpose of government, did not assert a
preference or difference between one form of civil government to another,
Locke asked rhetorically if the state of nature is any worse than a society
governed by an “absolute monarch . . . where one man, commanding a multi-
tude, has the liberty to be judge in his own case, and may do to all his subjects
whatever he pleases, without the least liberty to anyone to question or controul
those who execute his pleasure?”\textsuperscript{18} Locke introduced to Hobbesian social
contract theory that the sovereign was not absolute and there was law before
government.

In Chapter IX: Of the Ends of Political Society and Government of the
\textit{Second Treatise of Government}, Locke asserts that the purpose of civil government
is to (1) protect the property rights of all men, (2) develop and apply a
known law (statutory law) developed and secured from the known principles of

\begin{itemize}
  \item \textsuperscript{13} \textit{Locke, supra} note 5, at 12.
  \item \textsuperscript{14} \textit{Hobbes, supra} note 6, at 197.
  \item \textsuperscript{15} \textit{Locke, supra} note 6, at 9.
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.} at sec. 13.
  \item \textsuperscript{18} \textit{Id.}
\end{itemize}
natural law and apply the known law to all men equally, and (3) enforce the requirements of the known law upon disputing parties and exact punishment when the law requires it. A century later Cesare Beccaria and Jeremy Bentham would supplement these ideas with their work to create a rational system of justice in England. Beccaria, in his 1764 work *On Crimes and Punishment*, adopted a Hobbesian view of the nature of man that required the force of law to preserve and define justice. In chapter 2, *Of the Right to Punish*, Beccaria wrote:

Let us consult the human heart, and there we shall find the foundation of the sovereign’s right to punish. . . . No man ever gave up his liberty merely for the good of the public. Such a chimera exists only in romances. Every individual wishes, if possible, to be exempt from the compacts that bind the rest of mankind.

. . .

Thus it was necessity that forced men to give up a part of their liberty. It is certain, then, that every individual would choose to put into the public stock the smallest portion possible, as much only as was sufficient to engage others to defend it.19

But Beccaria parts company with Hobbes and joins Locke in describing the limits and purpose of the law and the purpose of justice. In the same chapter, Beccaria writes regarding limited government that:

every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this then that the sovereign’s right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

. . .

Observe that by justice I understand nothing more than that bond which is necessary to keep the interest of individuals united, without which men would return to their original state of barbarity. All punishments which exceed the necessity of preserving this bond are in their nature unjust.20

While agreeing with Locke that the power of the sovereign was limited to the need to control man’s “original state of barbarity,” Beccaria did not define justice21 and law as sourced from natural law that existed in the state of nature

20. Id.
21. Beccaria made clear that his conception of justice was based on the conclusion that justice is defined by control of man’s natural tendency for “barbarity” and that sovereign power and law was
before man formed government to protect his natural rights. Rather, the definition of justice, as well as the value, purpose, and the limits of the law, originate in its ability to control criminal behavior. On this point, Beccaria agreed with Hobbes. It was in this context that Beccaria and Bentham wrote on the utility of the law and, especially Beccaria, rejected the practice of applying punishments for crime through judge made law. Beccaria’s On Crimes and Punishment (1764) and later Bentham’s Of Laws in General (1782) and Introduction to the Principles of Morals (1780), asserted that for justice to be employed the law must be established before punishment so that man, being a rational being, can make judgments based on the dual motivations of pain and pleasure, the two motives that explain all human decision making and behavior. Both men asserted that judge made and enforced law was irrational because it could change at the will of the judge. Such arbitrary defining and application of the law was, by definition, unjust. Specifically, a system of judge made law was deemed unjust because such laws were not “known law” and enforcement of such law was by definition tyrannical. Judge made law was considered tyrannical because the source of law belongs to the legislature and only the application of the known law to the facts of a specific case is given to the magistrate. Tyranny is defined, in part, by the agents of government acting outside of their designated purpose under the law. The king enforces the law, the judge applies the law, and the legislature makes the law. To Beccaria and Bentham, followed by Montesquieu and Madison and Hamilton—the rule of law keeps man in order by keeping governmental power in order.

While Beccaria evaluated the source and purpose of the law by its rationality, Bentham evaluated both the source and purpose of the law by its utility. Bentham in Introduction to the Principles of Morals wrote that for the law not to be arbitrary it must not be groundless, inefficacious, unprofitable, or needless. The measure of this utility is whether the goal of the law “in common, is to augment the total happiness of the community . . . to exclude, as far as may be, everything that tends to subtract from that happiness: in other words, to exclude

limited to achieving the goal of controlling such barbarity. He concluded chapter two with this proposition:

We should be cautious how we associate with the word justice an idea of anything real, such as a physical power, or a being that actually exists. I do not, by any means, speak of the justice of God, which is of another kind, and refers immediately to rewards and punishments in a life to come.

Id. at 21.

22. Beccaria wrote in the first sentence of chapter three:

The laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. No magistrate then, (as he is one of the society,) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws.

Id. at 21.
mischief.” While Bentham proposed that the test of the law was utility, he had a more philosophical and less of a religious view of the source of the law and the power to make law. In Of Laws in General written by Bentham in 1782 but not formally published until 1970, Bentham wrote that the source of the law that governs a society is the formation of the society itself and the sovereign power developed within that society to safeguard the common happiness.

Classical understanding of the origin and purpose of the law and the significance of the rule of law, as we have discussed, begins with the writing of Leviathan (1651) by Hobbes and The Second Treatise of Government (1689) by Locke in the seventeenth century. The work of Hobbes and Locke were supplemented in the late eighteenth century with the writing of On Crimes and Punishment (1764) by Beccaria and Introduction to the Principles of Morals (1780) by Bentham. Between Hobbes and Locke and Beccaria and Bentham was the writing of The Spirit of Laws (1752) by Charles de Montesquieu.

Montesquieu, agreeing with Locke, said of the law that it has always been in existence and its existence is based on the very existence of all things, both natural and human. Asserting an even more Christian view of the reason for the law than Locke, Montesquieu wrote:

There is, then, a prime reason; and laws are the relations subsisting between it and different beings, and the relations of these to one another.

God is related to the universe, as Creator and Preserver; the laws by which He created all things are those by which He preserves them. He acts according to these rules, because He knows them; He knows them, because He made them; and He made them, because they are in relation to His wisdom and power.

24. On this point he found agreement with Hobbes, writing on the source of the law that

as the definition intimates, be the will of the sovereign in a state. Now by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person.

25. CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS 13 (Thomas Nugent, ed., Cosimo 2011) (1752). Montesquieu wrote similarly to John the Apostle who wrote of the deity of Jesus that “In the beginning . . . all things were made . . . and without Him nothing was made that was made.” John 1:1–3 (NKJV); see also Blackstone who wrote:

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be.

... This, then, is the general signification of law, a rule of action dictated by some superior being . . . ; But laws, in their more confined sense and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with
The reason this is important is because Montesquieu, as did Locke, rejected the Hobbesian view that nothing is just or unjust without the law. Montesquieu argued that the world and the universe had an order and that neither could exist without laws to hold them together. Law is created by the relationship between things and among things as established by God. This being true, Montesquieu, as did Locke, asserted that before man formed society man was governed by the law. Furthermore before there was law designed by man, there was justice; and justice existed and was defined by the law of relations between things. Agreeing with both Hobbes and Locke regarding the state of man before society, that in the state of nature man was in fear of other men and men knew that they were weak in the face of other men, Montesquieu broke with Locke by observing that “[a]s soon as man enter[ed] into a state of society he los[t] the sense of his weakness; equality cease[d], and then commence[d] the state of war . . . between different nations . . . [and] between individuals.”

Thus government does not and cannot change the nature of mankind. Man is controlled by the law; he is not perfected by it. The nature of man to control and dominate other men through force and evil remains even with the controlling power of government and law.

While Locke and Hobbes both proposed that man’s propensity for violence

both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior.

This will of his Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 38–40 (1765–1769).

26. Montesquieu wrote:

Particular intelligent beings may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.

MONTESQUIEU, supra note 25, at 14.

27. Montesquieu wrote:

We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as, for instance, if human societies existed, it would be right to conform to their laws; if there were intelligent beings that had received a benefit of another being, they ought to show their gratitude; if one intelligent being had created another intelligent being, the latter ought to continue in its original state of dependence; if one intelligent being injures another, it deserves a retaliation; and so on.

Id.

28. Id. at 16.
was controlled when he formed society, and Locke asserted that the law provides man with the ability to enjoy life, liberty, and property. Montesquieu, as Madison and Hamilton did, observed that the formation of societies did not change the state of war within societies or between them. The Spirit of Laws approached the purpose of the law by not only focusing on how various government systems and structures function, but on what the main purpose, or the spirit, of the law is—namely the governing and organizing of the relationships between individuals and between nations based on rational reason. Thus, the rule of law is not a means to an end; the rule of law is the end. The rule of law is important beyond any specific law, for the rule of law establishes how mankind relates to itself and provides the explanation for that relationship—that because man exists, law and justice exist. The relationship between mankind establishes justice and the rule of law relates to how justice will be implemented and defined.

During the drafting and ratification of the U.S. Constitution, Madison and Hamilton used the ideas of the men of the Enlightenment and paraphrased the words of Locke and Montesquieu to answer how the people could form a national government that was able to both govern and be governed. Madison and Hamilton added to the development of the rule of law the idea that just government depends on the virtue of the men who govern and are governed as well as the subservience of government to the law. In his defense of the formulation and the acceptance of the proposed Constitution in the face of the anti-federalists who opposed the Constitution, Madison asserted:

29. Madison is credited with being the father of the U.S. Constitution, and its horizontal and vertical federalism system, the separation of powers doctrine, and the principle that the Constitution is the supreme law of the land. The credit is well due, but the idea of separated powers was not his original thought. Beccaria wrote the following regarding the separation of power to make law (legislative) from enforcing law (executive) from applying the law (judicial) as follows:

If every individual be bound to society, society is equally bound to him, by a contract which from its nature equally binds both parties. This obligation, which descends from the throne to the cottage, and equally binds the highest and lowest of mankind, signifies nothing more than that it is the interest of all, that conventions, which are useful to the greatest number, should be punctually observed. The violation of this compact by any individual is an introduction to anarchy.

The sovereign, who represents the society itself, can only make general laws to bind the members; but it belongs not to him to judge whether any individual has violated the social compact, or incurred the punishment in consequence. For in this case there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused who denies it. It is necessary then that there should be a third person to decide this contest; that is to say, a judge, or magistrate, from whose determination there should be no appeal; and this determination should consist of a simple affirmation or negation of fact.

Beccaria, supra note 19, at 21–22; see also Isaiah 33:22 (NKJV). The Prophet Isaiah wrote on the three distinctions of the governing powers of God, that “[t]he Lord is our Judge, The Lord is our Lawgiver, and the Lord is our King.”
As there is a degree of depravity in mankind which requires a certain degree
of circumspection and distrust, so there are other qualities in human nature
which justify a certain portion of esteem and confidence. Republican govern-
ment presupposes the existence of these qualities in a higher degree than any
other form. Were the pictures which have been drawn by the political jealousy
of some among us faithful likenesses of the human character, the inference
would be, that there is not sufficient virtue among men for self-government;
and that nothing less than the chains of despotism can restrain them from
destroying and devouring one another.30

Madison enshrined what Locke wrote into our political, legal, and constitu-
tional structure; that the “common power” is controlled when any action the
government takes (1) is authorized by the law and (2) is for the purpose of the
benefit of all to enjoy the liberty, freedom, and property rights equal to that
which was enjoyed in the state of nature before the need for safety created civil
government.31 To put it another way, as Bentham wrote, a law is valid only
when it seeks to preserve the common good—which is to prevent the mischief
of man against his fellow man.

The men of the Enlightenment, with the exception of Hobbes, proposed that

30. THE FEDERALIST NO. 55, at 343 (James Madison) (Clinton Rossiter ed., 2003); see also REINHOLD
NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A
CRITIQUE OF ITS TRADITIONAL DEFENSE xxxi–xxxiv (1944). Niebuhr observed that:

A free society requires some confidence in the ability of men to reach tentative and tolerable
adjustments between their competing interest and to arrive at some common notions of justice
which transcend all partial interests.

... The democratic techniques of a free society place checks upon the power of the ruler and
administrator and thus prevent it from becoming vexatious. The perils of uncontrolled power
are perennial reminders of the virtues of a democratic society; particularly if a society should
become inclined to impatience with the dangers of freedom and should be tempted to choose
the advantages of coerced unity at the price of freedom.

Id.

31. Locke wrote:

But though men, when they enter into society, give up the equality, liberty, and executive
power they had in the state of nature, into the hands of the society, to be so far disposed of by
the legislative, as the good of the society shall require; yet it being only with an intention in
evry one the better to preserve himself, his liberty and property; (for no rational creature can
be supposed to change his condition with an intention to be worse) the power of the society, or
legislative constituted by them, can never be supposed to extend farther, than the common
good; but is obliged to secure every one’s property, by providing against those three defects
above mentioned, that made the state of nature so unsafe and uneasy. And so whoever has the
legislative or supreme power of any common-wealth, is bound to govern by established
standing laws, promulgated and known to the people, and not by extemporary decrees; by
indifferent and upright judges, who are to decide controversies by those laws; and to employ
the force of the community at home, only in the execution of such laws, or abroad to prevent
or redress foreign injuries, and secure the community from inroads and invasion. And all this
to be directed to no other end, but the peace, safety, and public good of the people.

LOCKE, supra note 5, at 68.
there was law before man created society; but all of the men of the enlightenment agreed that the rights enjoyed in that state of nature free from all government could not be fully enjoyed because of man’s natural propensity for war and domination of other men. They all agreed, again with the exception of Hobbes, that the law is birthed by the nature of things that exist because things exist. Again they all asserted that the rule of law manifests justice through specific laws and government institutions are created to allow all people to enjoy what they could not in the state of nature. This understanding, with a focus and acknowledgement of God as the creator, originator, and provider to the mind of men the knowledge of the laws of nature and the universe, found affirmation in British Common Law. Regarding the source of law, Blackstone wrote that “[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.”

As Locke and Montesquieu wrote, so did Lord Chief Justice Coke when he wrote that the law of nature forms the foundation for the rule of law because it predates the laws of man and the:

law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex aeterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world.

Thus, the rule of law provides an avenue of “appeal to a higher standard of law and justice than the merely mortal or, at the least, than the enacted law of merely contemporary rulers.” Madison came to this very conclusion regarding the Bill of Rights, which he initially opposed but later came to support. Madison wrote to Jefferson that he doubted that a bill of rights would stand against the passions of men when sufficiently aroused in fear of national threat, but it would provide something to be appealed to when addressing the justice or correctness of proposed legislation.

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35. Madison wrote to Jefferson:

My own opinion has always been in favor of a Bill of Rights . . . . At the same time I have never thought the omission a material defect, nor been anxious to supply it . . . . I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light: . . . 4. because experience proves the inefficacy of a Bill of Rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state . . . . Although it be generally true, as above stated, that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the government, yet there may be
In summation, the classical understanding of the rule of law addresses the question of whether anyone, king or subject, is above the law. The rule of law at its core answers the question in the negative; but more importantly, the rule of law also forms the foundation for the role and purpose of government in relation to the individual—both in civil (political) and social matters. In classical Western political thought the rule of law acknowledges the need for government and governmental power to control the nature of mankind because of the acknowledgement that man is evil and left to his own without government, life is “solitary, poor, nasty, brutish, and short.” Government serves the purpose of protecting each individual from the evil of his fellow man so that each man can enjoy his natural right to life, liberty, and the pursuit of happiness. To enjoy such rights, which are given to man by what the classical philosophers called nature; man surrenders his absolute right to be free from dominance to the government so as to enjoy these very same rights. But he surrenders only enough of those rights that the government needs to provide those protections. To protect man from government, the rule of law requires the government to be subject to the law. Government subjected to the law will, by its nature, protect mankind and not enslave it. It is this classical understanding of the rule of law that Madison, Hamilton, and James Wilson advanced and was written into the U.S. Constitution. The writings of Leviathan (1651) by Hobbes, The Second Treatise of Government (1689) by Locke, On Crimes and Punishment (1764) by Beccaria, The Spirit of Laws (1752) by Charles de Montesquieu, and Introduction to the Principles of morals (1780) by Bentham, all found summation in Madison when he concluded in Federalist Papers 51 (1788) that:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each depart- ment the necessary constitutional means and personal motives to resist en- croachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the occasions on which the evil may spring from the latter source; and, on such, a Bill of Rights will be a good ground for an appeal to the sense of the community.

government; but experience has taught mankind the necessity of auxiliary precautions.

The men of the enlightenment provided the theoretical underpinnings of the ideas that found resonance in the Constitutional Convention and in the oldest written constitution on the face of the earth.

In Part II of this article we continue to review the historical foundations and definitions of the rule of law and how agreement on these foundations has changed over time. Part II begins with the distinction between rule of law and rule by law and the development of the proposition that the rule of law includes social justice, the outcome of law within society. These changes from the classical understanding of the rule of law have resulted in the dispute over the very meaning and purpose of the rule of law. This review over the dispute will provide a background for the modern discussion on the role of government.

II. THE DIFFERING CONCEPTIONS OF THE NATURE AND MEANING OF THE RULE OF LAW

No man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.36

The law is all powerful and constant, but what can be done when mercy has greater force than law.37

Justice isn’t free! Justice just costs money. Mercy is expensive.38

Western political philosophy, beginning with the Greeks and later in the enlightenment and the age of reason, has placed great value on the individual and rational thought. Natural law proposes that justice can be defined through the rational and logical thought of man. According to natural law theory, rational thought is a gift from God who provided the ability to reason in order to provide mankind with the ability to comply with His Eternal Law and develop laws to institute justice upon the earth.

Greek thought, funneled into the main stream of Western ideas about government and law primarily by the Roman Stoics, postulated a view of the universe, of man, and of law which retains its vitality today. Christian thought built on these foundations and provided a theory of government and law which appeared to reconcile authority and justice. The cosmic order, emanating from the mind of God, according to St. Thomas Aquinas, to some extent is perceptible to man’s rational faculties and, as Natural law, provides a univer-

37. B. Tosia, quoted in 12 (Three T Productions 2007).
sal standard for the formation and administration of human law by those invested with the care of the community. The objective of government and law is thus the common good.39

The rule of law builds upon the theory of natural law that justice is the measure by which both man and king are to be judged and that natural man formed society to protect the natural rights given to all men—the right to life, liberty, and property—by God. The rule of law allows the individual to keep all three while at the same time governing and placing in order how all three can be achieved and protected. The rule of law provides the four corners of the law governing human action that can be predicted and depended upon. This is what makes all other aspects of society stable. Rule by law, in contrast, asserts that the four corners of the law that governs society are what the sovereign says they are when it says they are. Under rule by law, security is within the whims and views of the sovereign. Order is maintained by rule by law, but justice, as defined by classical theory, is not. When justice is not predictable into the future—life, liberty, and property change from a being right to being a privilege. Rule by law requires the people to be subservient to the law, but it makes no such demand of the sovereign.

It is generally accepted within modern western democracies that the rule of law provides the foundation for predictability in the law and that government is subordinate to the law not superior to it. But there is more to the rule of law than agreement that it prevails over rule by law. There are different views of what the rule of law is and what the goal of the law is regarding the outcome as well as the process of establishing societies.

While the men of the enlightenment and those who wrote and debated the U.S. Constitution viewed the rule of law as an end in which man could enjoy his natural rights free from the nature of other men while enjoying the rights he maintained before government; the rise of modern industrial societies raised new questions on the meaning of the rule of law. The question changed from the justification of government per se and protection of liberty from government coercion to the question of what is a just society and how can the law be used to establish justice and equity (and equality) in a modern industrial society.


True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions . . . . We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge . . . .

Id. at 488 citing Cicero, De Re Publica Book III at XXII.
Beginning in the late nineteenth century, the meaning and purpose of the law changed from a traditional/formalist (positivist/procedural) view in which the rule of law was defined by negative rights, property, and contract rights, to a social justice/normative (subjective/substantive) view in which the rule of law was defined as a means to an end—the end being a better and egalitarian society. This change grew out of the gilded age, the rise of the robber barons, the American industrial revolution, the rise of substantive economic due process, and the rise of the labor union and the progressive movements of the early twentieth century. The great depression, the new deal, and the social and civil rights movements of the sixties and seventies, all coalesced to redefine the rule of law to be a tool to address social ills and political injustices. The rule of law was redefined by social outcomes. In Part II.A, the modern understanding of classical rule of law theory is reviewed. Part II.B reviews the modern social welfare (social justice) approach. Comparisons of both perspectives are provided in Part II.C, which is followed by final conclusions.

A. The Modern Traditionalist Approach

Fairness, justice, and freedom; these are words that undergird the purpose of the rule of law. The rule of law is more than a set of rules that govern society, although such rules are important primarily because people need to know the line separating lawful from unlawful conduct. In the modern literature on the rule of law, the question of why the rule of law is important is generally answered by descriptions of what the rule of law does. The answer addresses both “the troublesome [question of not only] who governs but also the equal question of how a country is governed [either] based on the rule of men or on the rule of law.” The significance of the modern description of the rule of law is that it defines the relationship between civil society and its citizens. The traditional definition of the rule of law is the instrumentalist formalist view in which the rule of law is defined by the system of law and governance it establishes.

On the one hand, as a principle of distribution, it designates a sphere in which individuals are accorded the freedom to develop and launch forth in every

40. As Justice Holmes observed:

The reason why [the study of law] is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.

Oliver Wendell Holmes, The Path of Law, 10 Harv. L. Rev. 457, 457 (1897).

direction, a sphere which is granted precedence over the state. The state itself is taken to be merely a means to the ends individuals set for themselves. The rule of law thus postulates a separation between civil society and the state; and, as a separate sphere, civil society is legitimated in its demands for the least possible interference in its internal affairs. On the other hand, as a way of organizing that basic distribution, the rule of law postulates that the state, recognized as limited in principle, should maintain a separation of its powers and competences as guarantee to its own limitation.42

Professor Day also adopts this instrumentalist formative view of the rule of law by asserting that it provides man with the ability to “know where they stand and to plan their affairs accordingly.”43 Professor Day explains that the value of the rule of law is that it establishes and upholds the legal system (the judiciary) within society, and the legal system in turn protects the rights of individuals and the general order within a society. Similarly, Professor O’Donnell, in defining the role of the judiciary in light of the value of the rule of law, explains that “[w]ithout a vigorous rule of law, defended by an independent judiciary, rights are not safe and the equality and dignity of all citizens are at risk.”44 Here O’Donnell defines the rule of law as being the opposite of rule by law. The rule of law, contrary to rule by law, establishes a legal system with a hierarchy in which:

the relationship among legal rules are themselves legally ruled, and that there is no moment in which the whim of a given actor may justifiably cancel or suspend the rules that govern his or her actions. No one, including the most highly placed official, is above the law.45

The rule of law thus insures that the legal system remains a central aspect of the overall social order so as to bring definition, order, clarity, and predictability into human interactions.46 Professor Frank Lovett echoes the traditional view of the rule of law by asserting that its value lies in the fact that not only does it protect against ex post facto laws, and that it ensures predictability, but that it also restricts government power within a legal system.47 This positivist view provides five main perspectives on the rule of law: (1) a general concept of governing law; (2) a conceptual connection between classical definitions of the rule of law and the utility of the law; (3) how these principles govern what the government can and cannot do; (4) provide the normative answer to why government should conform to the rule of law; and (5) develop political and

45. Id. at 34–35.
46. Id. at 35.
social institutions to ensure that government conforms to the principles of the
rule of law and to what the law actually requires. The modern literature definitions on the rule of law focus on governance by law, government under law, and enforcement of individual civil rights within a society. The latter focus places emphasis on preventing a society from devolving into despotism under law and provides “protection of individuals from arbitrary intrusion. In other words, the legal order must provide for, and protect zones of, individual freedom from interference, negative liberty.” Other definitions of the rule of law have focused on the morality of the law as the source of its meaning and importance, while others assert that the rule of law is nothing more than the clearly defined and obeyed rules that a society follows. Still others define the rule of law substantively focusing in on the fairness, justice, or level of coercive power that is used to limit or expand rights for the greater good, a concept discussed in more detail in Part II.B.

As Professor Radin concluded, “the central precepts of the Rule of Law can be defended either instrumentally, as necessary to make a legal system work to structure behavior, or substantively, as necessary to fairness, human dignity, freedom, and democracy.” The former view defines the rule of law as structural and only promises the lack of arbitrary oppression while the latter defines the rule of law as a source of political and social ideals regarding both the quality and equality (equity) of life within the society. It is obvious that how the rule of law is defined is a policy choice itself. The formalist (positivist) view asserts that the rule of law is a limited and negative concept. As Lincoln observed, “The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, at all, or can not, so well do, for themselves-in their separate, and individual capacities.

48. Id.
50. Id. at 645.
54. Radin, supra note 52, at 791. For a rejection of the latter approach to the rule of law see Raz, supra note 12, at 215–216.
55. Understanding the rule of law as a negative right is best explained as follows: The rule of law is essentially a negative value. The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people’s freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself. It is thus somewhat analogous to honesty when this virtue is narrowly interpreted as the avoidance of deceit.

Raz, supra note 12, at 224.
the people can individually do as well for themselves, government ought not to interfere.”

Under this view, the rule of law is a limited functionalist concept. Under this approach, the “rule of law is not a panacea [to political and social ills]. There are countless problems it does not and cannot solve.” But the one problem it does solve is violence; “the rule of law means the replacement of violence by law.”

Under the formalist (positivist) view, policy debates remain political not legal. Under the normative (substantive) view discussed below, concepts of human dignity, justice, freedom, equality under law are defined broadly to encompass the quality of life and social welfare of the society. Under the latter view, the rule of law becomes less of a concept of control of government power and becomes the source of social change, thus making key policy debates legal not political.

The traditional view of the rule of law includes both positive and negative aspects. The former focuses on what the law requires by its text while the latter places affirmative controls on government power over the individual. Tradi-

59. This is a key complaint made by Supreme Court Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Breyer; that political issues have been framed in legal terms in order to get the Supreme Court to make determinations in disputes that are in fact political and social. They complain that the Court’s entertainment of political issues as if they were legal ones has threatened the independence of the Court and has made it in the mind of the public a political institution and not a strictly legal one. See, Arthur H. Garrison, The Supreme Court and its Role to Decide Issues of Law and Not Justice: Criminal Justice and the 2011 Term, 49 CRIM. L. BULL 274 (2013).
60. The rebellion against the formalist view of the law that occurred during the late nineteenth and twentieth centuries was a result of various historical, political, legal, and jurisprudential events. These include (1) the rise of the popular electorate, (2) the affects of the industrial revolution on the working classes, (3) the rise of a middle class, (4) the fall of the idea that the law was the result of historical principles, (5) the rise of the idea that the law was the result of logic not morality (or natural law based on ethics or religion), (6) the rise of case law as the method of legal education, formal law school education, and the fall of legal education based on historical texts and writings, (7) the rise of legal realism (1920–1940), (8) the rise of sociological jurisprudence, (9) the rise of progressive jurisprudence, (10) the events of World War Two (specifically the analysis of how the law and rule of law not only failed to stop the atrocities of Nazi Germany but supported them), and (11) the rise of critical legal studies movement (1970’s). See Martin P. Golding, Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments, 36 J. OF LEGAL ED. 441 (1986); Bailey Kuklin and Jeffrey W. Stempel, Foundations of the Law: An Interdisciplinary and Jurisprudential Primer (West Academic Publishing 1994); Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge Univ. Press 2004).
61. Raz, supra note 12, at 227.
62. See generally, Tamanaha, supra note 60; see also Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law (Cambridge Univ. Press 2006); Ronald A. Cass, The Rule of Law in America (John Hopkins Univ. Press 2001).
tional formalist rule of law places focus on the process of making the law, the textual requirements of the law (positivism), the procedural enforcement of the law, and equal application of law not the equal results thereof. Process focuses on determining if the law was properly made and is compliant with the three tenets of Law: generality, certainty, and equality. It is not concerned with whether the law should (normative) require a specific social or policy result. As discussed in Part I, this traditional view of the rule of law is reflected in the writings of the men of the enlightenment, all of whom essentially proposed that the law is sovereign over the King and that the role of government is to create and protect the common good as well as preserve order, but no more. The work of Adam Smith added to this understanding that the financial market, left alone from the power of government, will over time provide the most efficient distribution of wealth within the society as a whole. Smith added to the traditional approach the assertion that government, per se, is more of an impediment than a benefit to the economic success of a society when dealing with the natural problems with an economy, for example the problems created by monopolies. He asserted that government moves too slowly to make adjustments in order to address failures within the economic system. These propositions together form the modern civil libertarian view of government; that government is, per se, not competent to address the social needs of society outside of ensuring public safety, order, and maintaining freedom of economic affairs through the law of contract, the protection of property, and laws prohibiting fraud. It is this governmental purpose of maintaining freedom of economic affairs through the rule of law that prompted President Theodore Roosevelt to assert that the government has to “control and regulate all big combinations” of corporations and to remove trusts and monopolies from the economy so as to “give honest business certainty as to what the law was and security as along as the law was obeyed.”

The classical meaning of the rule of law in relation to economic affairs does not focus on the substance of the policy within the law, but rather the focus is on the “infringement of that private sphere which the general rules of law were intended to protect. [The men like Adam Smith and John Stuart Mill] did not mean that government should never concern itself with any economic matters. But they did mean that there were certain kinds of governmental measures which should be precluded on principle and which could not be justified on any grounds of expediency.” Classical rule of law focuses on the power of government in general terms not in terms of specific rules passed by legitimate

65. See, e.g., Faire Jacob Viner, Adam Smith and Laissez, 35 J. of Pol. Economy 198 (1927).
66. Theodore Roosevelt, Theodore Roosevelt: An Autobiography 432 (1922); see also, infra note 71.
means. As Hayek observed regarding governmental power in the economic affairs of society, the focus is the:

exercise of the coercive power of government which was not regular enforcement of the general law and which was designed to achieve some specific purpose. The important criterion was not the aim pursued, however, but the method employed. There is perhaps no aim which they would not have regarded as legitimate if it was clear that the people wanted it; but they excluded as generally inadmissible in a free society the method of specific orders and prohibitions. Only indirectly, by depriving government of some means by which alone it might be able to attain certain ends, may this principle deprive government of the power to pursue those ends.

...True, there are good reasons why all governmental concern with economic matters is subject and why, in particular, there is a strong presumption against government’s actively participating in economic efforts. But these arguments are quite different from the general argument for economic freedom. [The general argument for economic freedom] means that, so long as [the governmental regulations in economic affairs] are compatible with the rule of law, they cannot be rejected out of hand as government intervention but must be examined in each instance from the viewpoint of expediency. The habitual appeal to the principle of non-interference in the fight against all ill-considered or harmful measures has had the effect of blurring the fundamental distinctions between the kinds of measures which are and those which are not compatible with a free system. And the opponents of free enterprise have been only too ready to help this confusion by insisting that the desirability or undesirability of a particular measure could never be a matter of principle but is always one of expediency.68

As Hayek correctly observed, the general principle of the rule of law or what he called “general laws” includes three propositions: first “a free society demands not only that the government have the monopoly of coercion but that it have the monopoly only of coercion and that in all other respects it operate on the same terms as everybody else”; second, “that all coercive action by government must be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible”; and third, the lack of government coercion, interference, intervention, or “infringement of that private sphere which the general rules of law were intended to protect.”69 Under the classical conception of freedom and the rule of law, as long as these three principles are  

68. Id. at 221.
69. Id. at 222–223, 220 respectively. Added to these are the three tenets of law—generality (that the law be established in advance and is not specific in application to a specific individual) certainty (that the application of the law is predictable and reliable) and equality before the law (treating all people the same regardless of the inequality of the parties). See, e.g., Brian Z. Tamanaha, The History and Elements of the Rule of Law, SINGAPORE J. OF L. STUD. 232–247 (2012).
present, unlawful government coercion (tyranny) is not present. Returning to Adam Smith and the classical concept of economic freedom and the role of government, Hayek correctly observed that according to “Adam Smith and his immediate successors the enforcement of the ordinary rules of common law would certainly not have appeared as government interference; nor would they ordinarily have applied this term to an alteration of these rules or the passing of a new rule by the legislature so long as it was intended to apply equally to all people for an indefinite period of time.”

Three years into the dawn of the twentieth century, President Roosevelt reflected the prevailing conception of both the rule of law and the role of government in the enforcement of the law in the United States when he made the following promise before Congress:

The consistent policy of the National Government, so far as it has the power, is to hold in check the unscrupulous man, whether employer or employee; but to refuse to weaken individual initiative or to hamper or cramp the industrial development of the country... Whenever either corporation, labor union, or individual disregards the law or acts in a spirit of arbitrary and tyrannous interference with the rights of others... the Federal Government... will see to it that the misconduct is stopped, paying not the slightest heed to the position or power of the corporation, the union or the individual... in accordance with the law of the land. Every man must be guaranteed his liberty and his right to do as he likes with his property or his labor, so long as he does not infringe the rights of others.

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70. Hayek, supra note 67 at 221.
71. Roosevelt, supra note 36. President Grover Cleveland similarly asserted the classical libertarian theory of government when he complained to Congress that it had appropriated more money than needed for the expenses of government. Aside from having a budget surplus problem that modern Presidents and Congresses would love to have, his complaint centered on the role and limited purpose of government. In his Third Annual Address to Congress on December 6, 1887 he complained:

You are confronted at the threshold of your legislative duties with a condition of the national finances which imperatively demands immediate and careful consideration.

The amount of money annually exacted, through the operation of present laws, from the industries and necessities of the people largely exceeds the sum necessary to meet the expenses of the Government.

When we consider that the theory of our institutions guarantees to every citizen the full enjoyment of all the fruits of his industry and enterprise, with only such deduction as may be his share toward the careful and economical maintenance of the Government which protects him, it is plain that the exaction of more than this is indefensible extortion and a culpable betrayal of American fairness and justice. This wrong inflicted upon those who bear the burden of national taxation, like other wrongs, multiplies a brood of evil consequences. The public Treasury, which should only exist as a conduit conveying the people’s tribute to its legitimate objects of expenditure, becomes a hoarding place for money needlessly withdrawn from trade and the people’s use, thus crippling our national energies, suspending our country’s development, preventing investment in productive enterprise, threatening financial disturbance, and inviting schemes of public plunder.
As John Locke concluded, the role of government is to make specific laws in order to protect physical safety, trade, contract, and property. With these protections established, the individual is left to the results of his own talents and the fruits of his decisions. For government to do any more would, as President Cleveland asserted in 1887, perpetuate a system that “encourages the expectation of paternal care on the part of the government, and weakens the sturdiness of our national character.”72

With the rise of mercantilism and later capitalism, as well as the rise of Protestantism, the individual’s right to economic opportunity and the enjoyment of the fruits of his labor—property rights—became a central part of the traditional concept of the law and the rule of law. The proposition that government involvement in society is limited to the protection of property and contract, in addition to classical rule of law principles, have come to be known as classical liberalism. Liberalism, developed after the end of the Dark Ages, proposes that each individual has the right to personal liberty and limited governmental control over the results of human interaction. Short of preventing harm to individuals by individuals (harm defined in terms fraud in the marketplace and physical violence) the government has no role in the interactions between free individuals.

But liberalism, which embraced capitalism as a chief tenet, does not have a substantive (normative) view of just laws or just outcomes. The focus is on efficiency not equity. Justice and liberty, as defined by the traditional libertarian, occurs if freedom is assured—freedom in all its forms; the freedom to succeed and fail and the freedom to act as without governmental intrusion, so long as the action does not interfere with the freedom of another. Governmental power is limited to the procedures and process of the law, whether they are clear and established to guide behavior. While this traditional approach does not focus on the “justness” of the law per se or the outcomes of the law once applied to specific situations, and focuses on application of the law regardless of outcome, the social welfare approach to the law is consequentialist in approach. The social welfare (social justice) approach focuses on the consequences, outputs, and outcomes of the law. This consequentialist approach to the law uses the law

72. Infra note 100. Pennsylvania Governor Edward Rendell came to a similar conclusion about the American character when commenting on radio station 97.5 FM The Fanatic in Philadelphia a radio show, on December 27, 2010 about the postponement of a football game due to a projected 6–12 inch snowstorm. The Governor asserted that “we’ve become a nation of wusses. The Chinese are kicking our butt in everything. If this was in China do you think the Chinese would have called off the game? People would have been marching down to the stadium, they would have walked and they would have been doing calculus on the way down.” Governor Ed Rendell Sounds Off, ESPN NEWS, December 29, 2010, http://sports.espn.go.com/nfl/news/story?id=5960674.
to achieve policy objectives. Examples of this consequentialist approach include cause lawyering and adversarial legalism.73

B. The Social Welfare Approach

The social welfare approach to the rule of law developed during the middle and late nineteenth century as a reaction and an attack on the Industrial Revolution for its lack of concern for the labor class, who suffered low wages and death in unsafe factories, and its failure to fairly distribute the wealth created by its operation. Social welfare or normative (substantive) rule of law (or its modern incarnation—social justice theory) supports two of the three traditional general tenets of the rule of law. Generality (that the law be established in advance and is not specific in application to a specific individual) and certainty (that the application of the law is predicable and reliable). As discussed below, the social justice approach subordinates the third tenet, equality before the law (treating all people the same regardless of the inequality of the parties), to social equality or equity in outcome.

The social justice approach shares with the traditional approach the victory of the principle of rule of law over rule by law and supports the governing principle of separation of powers with an independent judiciary. While sharing these concepts, the social welfare approach to the rule of law introduces a truth not considered by classical theory: the proposition that a legal and political system can adhere to all of these principles and still be despotic and unjust. The social justice approach asserts that the rule of law means more and requires more than statutory compliance. It should be remembered that the great abominations of Slavery and Jim Crow in America, Apartheid in South Africa, and Fascism in the Third Reich were all established and maintained in full compliance with the written law both procedurally and substantively.

In the classic novel, Les Miserables, Victor Hugo explores the issue of law without mercy and the meaning of justice.74 In his book, Hugo explains through


74. In the preface of his book, Hugo explains the moral issues to be raised in his book:

So long as there shall exist, by virtue of law and custom, decrees of damnation pronounced by society, artificially creating hells amid the civilization of earth, and adding the element of human fate to divine destiny; so long as the three great problems of the century—the degradation of man through pauperism, the corruption of woman through hunger, the crippling of children through lack of light—are unsolved; so long as social asphyxia is possible in any part of the world;—in other words, and with a still wider significance, so long as ignorance and poverty exist on earth, books of the nature of Les Misérables cannot fail to be of use.

the character of Javert that the law, which assures order, does not necessarily provide forgiveness and certainly does not require mercy or a just outcome.  

75. Javert was a police officer of absolutes as he made plain to the Mayor of Vigau when he attempted to be relieved of duty for what he considered was the crime of insubordination and slander. Javert told the Mayor that there was no room for evil and evil did not warrant mercy but only the justice of the letter of the law.

Mr. Mayor, I have come to request you to instigate the authorities to dismiss me. . . . Mr. Mayor, you were severe with me the other day, and unjustly. Be so to-day, with justice. . . . Mr. Mayor, six weeks ago, in consequence of the scene over that woman, I was furious, and I informed against you. . . . As an ex-convict. . . . Jean Valjean. He was a convict whom I was in the habit of seeing twenty years ago, when I was adjutant-guard of convicts at Toulon. [My superiors thought me in error and now] I am forced to do so, since the real Jean Valjean has been found.

So far as exaggeration is concerned, I am not exaggerating. This is the way I reason: I have suspected you unjustly. That is nothing. It is our right to cherish suspicion, although suspicion directed above ourselves is an abuse. But without proofs, in a fit of rage, with the object of wreaking my vengeance, I have denounced you as a convict, you, a respectable man, a mayor, a magistrate! That is serious, very serious. I have insulted authority in your person, I, an agent of the authorities! If one of my subordinates had done what I have done, I should have declared him unworthy of the service, and have expelled him. Well? Stop, Mayor; one word more. I have often been severe in the course of my life towards others. That is just. I have done well. Now if I were not severe towards myself all the justice that I have done would become injustice. Ought I to spare myself more than others? No! Why I should be good for nothing but to chastise others, and not myself! Why should I be a blackguard! Those who say, “That blackguard of a Javert” would be in the right. Mr. Mayor I do not desire that you should treat me kindly; your kindness roused sufficient bad blood in me when it was directed to others. I want none of it for myself. The kindness which consists in upholding a woman of the town against a citizen, the police agent against the mayor, the man who is down against the man who is up in the world, is what I call false kindness. That is the sort of kindness which disorganizes society. Good God! it is very easy to be kind the difficulty lies in being just. Come! if you had been what I thought you, I should not have been kind to you, not I! You would have seen! Mr. Mayor I must treat myself as I would treat any other man. When I have subdued malefactors, when I have proceeded with vigor against rascals, I have often said to myself “If you flinch, if ever I catch you in fault, you may rest at your ease!” I have flinched, I have caught myself in a fault. So much the worse! Come, discharged, cashiered, expelled! That is well. I have arms. I will till the soil; it makes no difference to me. Mr. Mayor, the good of the service demands an example. I simply require the discharge of Inspector Javert.

All this was uttered in a proud, humble, despairing, yet convinced tone, which lent indescribable grandeur to this singular, honest man.

“We shall see,” said M. Madeleine.

And he offered him his hand.

Javert recoiled, and said in a wild voice:—

“Excuse me, Mr. Mayor, but this must not be. A mayor does not offer his hand to a police spy.”
Javert was a police officer consumed with the capture of Valjean who was guilty of violating his parole and the good that Valjean had done during his violation was irrelevant to the fact that he violated his parole and the law. Javert believed that there was only the law and there was no room for mercy in the pursuit of justice. Javert’s mother was a prostitute and his father was a thief, and he was a man who pushed himself to be without fault, and he had no

He added between his teeth:—
“A police spy, yes; from the moment when I have misused the police. I am no more than a police spy.”

Then he bowed profoundly, and directed his steps towards the door.
There he wheeled round, and with eyes still downcast:—
“Mr. Mayor,” he said, “I shall continue to serve until I am superseded.”

He withdrew. M. Madeleine remained thoughtfully listening to the firm, sure step, which died away on the pavement of the corridor.

Victor Hugo, Isabel Florence Hapgood, Helen James (Bennett) Dole, Huntington Smith and Arabella Ward, 1 the works of victor hugo, les miserables 195–196, 200–201 (1887); see also, Hugo, supra note 74, at 300.

76. Javert’s all consuming pursuit of Valjean and his absolutist view of law and order over mercy and justice had led to such a perversion that at Fantine’s death bed Javert said to Fantine, “Listen to me! You’ll never see your daughter again! You’re going to prison! He can’t save you. He’s a criminal. Scum of the earth!” To make it worse, to Valjean he said, “You’ll not fetch things for your whore! You’re going back where you belong, and this bitch is going to jail.” Les Miserables (Columbia Pictures 1998).

77. As Javert told Valjean, “There is no God. There is only the law. Guilt and innocence do not exist outside the law.” Les Miserables (CBS television broadcast Dec. 27, 1978). The same view is expressed by Thomas Hobbes in Leviathan, supra note 9.

78. In the 1998 movie of Les Miserables, Javert arrests Fantine for assaulting three men who attacked her for being a prostitute. Valjean, as the Mayor of Vigau, goes to the police station and orders Javert to release her after he sentenced Fantine to six months in prison. Javert countermands Valjean’s order and Valjean relieves Javert of command for the night. Javert’s resistance was heightened after Valjean forgives Fantine’s emotional condemnation of Valjean for allowing her to be put out into the street by his factory manager.

Javert: She spat on you.
Valjean: She was upset. I forgive her.
Javert: She insulted you. In front of my men, she defiled you.
Valjean: That’s my concern, Inspector.
Javert: No, sir. You are wrong. You are the personification of order, morality, government, in fact, the whole of society. You don’t have the right to forgive her for debasing all of us. You don’t have the authority to destroy justice.

Les Miserables, supra note 76. (emphasis added); see also Hugo, supra note 74, and Hugo, et al., supra note 75, at 180–189.

79. In the 1935 movie Les Miserables, Javert, in humiliation, stands before his superior justifying why he should receive a promotion, which he had earned, when confronted with the past of his parents. In his defense he defines himself and the law. He told his superior:

It is quite true what it says there. My mother was a tramp, my father died in the gallies. I myself was born in prison. I swore to myself that I would not be of that class. I swore to get out of it. I did get out. I said to myself there are only two classes of society, those who attack it and those who guard it. The book of regulations are my bible. Why if you take this away from me, what is there left. I beg you to believe sir that never would I fail in my duty to the law. It is my whole life. If I were to fail, it would break me. Sir.

Les Miserables (20th Century Pictures 1935).
sympathy for those with faults or those who protected them. Javert, the representative of pure law and order in which justice is defined by the application of the law without mercy, was without answer when he provided mercy to and received mercy from Valjean. When Javert was confronted with the truth

80. See Hugo, Et Al., supra note 74, at 195–196 (“I have often been severe in the course of my life towards others. That is just. I have done well. Now if I were not severe towards myself all the justice that I have done would become injustice... Good God! it is very easy to be kind the difficulty lies in being just.”); see also Les Miserables, supra note 76 (“An honest man has nothing to fear from the truth. For example, Paris knows that my father was a thief and my mother, a prostitute. If my mother or father were to move here to Vigau I would want everyone to know who and what they are.”); Les Miserables, supra note 79 (in which Javert said “I too have a creed.”).

I have always said to myself, yes you are hard you’re ruthless when you’re in the right. But look out. One day you yourself will trip. Then will you be just? Well I swore I would. That time has arrived Monsieur Madeleine. I have caught myself. I have committed a crime. What I have always demanded for others, the law—good or bad but the law to the letter I now demand for myself.

81. It was this strictness of view that the law was just only when it is procedurally applied without concern for outcome that lead to a crisis of mind that resulted in the demise of Javert. When Javert considered how Valjean could have allowed the revolutionaries to kill him and was saved by him, that Valjean was prepared to surrender to him only with the request that he save Marius, the boyfriend of Cossett, and after granting Valjean’s request; Javert said:

I see before me two roads, both equally straight—I have before known but one straight line. One excludes the other—which is the true one? To owe my life to a malefactor; to accept that debt, and to pay it; to be, in spite of myself, on a level with a fugitive from justice! To allow him to say, “Go away,” and to say to him in return, “Be free!” Give up Jean Valjean? That is wrong. Leave Jean Valjean free? That is wrong. In both cases, dishonor to me. A galley-slave sacred! a convict not to be taken by justice! and that by my act? This is terrible. What is this terrible thing penetrating my soul? Admiration for a convict! respect for a galley-slave! Can that be possible? A beneficent malefactor, a compassionate convict! Kind, helpful, clement; returning good for evil; returning pardon for hatred; loving pity rather than vengeance; preferring to destroy himself rather than destroy his enemy; saving him who has stricken him; kneeling upon the height of virtue, nearer the angels than men? I—must acknowledge that this monster exists. Yes, a convict is my benefactor. O! how base; I am a horror to myself. This is not endurable. I cannot live thus.

Harry Clifford Fulton, Jean Valjean, or The Shadow of the Law—A Dramatization of Victor Hugo’s Les Miserables: In Five Acts 53–54 (1886); see also Hugo, supra note 74, at Vol. 5, 230.

82. In the 1998 movie, Javert captures Valjean and Valjean asked that the injured Marius be released and then he will surrender to him. Javert amazed asks “is that all you want?” Javert orders the constables to take Marius wherever Valjean says and then bring him back to the river they were standing at. When Marius is safe in the care of Cossett, Valjean surrenders to Javert as he promised. But Javert thinking about the years of chasing Valjean only to be saved from death by him, gives a note to constables for the Prefect explaining his freeing of Valjean. After the constables leave, Javert and Valjean stand alone.

Javert: I’m glad I had time to myself. I needed to think about what you deserve. You’re a difficult problem. Move to the edge.

Valjean: Why aren’t you taking me in?

Javert: You’re my prisoner. Do what I tell you! You don’t understand the importance of the law. I’ve given you an order. Obey it. [Javert moves Valjean to the edge of the river and puts a gun to Valjean’s head] Why didn’t you kill me?

Valjean: I don’t have the right to kill you.

Javert: But you hate me.
that the law properly applied can be cruel and in such situations only mercy and justice can fill the gap (in addition to admitting that a criminal can be just), it was too much for Javert and he committed suicide, for the world only made sense to him through the letter of the law regardless of outcome. In his book, Javert removes the handcuffs from Valjean, puts them on himself, walks to the end of the ledge of the river and falls in. LES MISERABLES, supra note 76.

83. In the musical Les Miserables, Javert in his last moments before his suicide said:

Who is this man? What sort of devil is he? To have me caught in a trap. And choose to let me go free? It was his hour at last. To put a seal on my fate. Wipe out the past. And wash me clean off the slate! All it would take was a flick of his knife. Vengeance was his, and he gave me back my life!

Damned if I’ll live in the debt of a thief! Damned if I’ll yield at the end of the chase. I am the Law and the Law is not mocked, I’ll spit his pity right back in his face. There is nothing on earth that we share. It is either Valjean or Javert!

How can I now allow this man to hold dominion over me? This desperate man whom I have hunted. He gave me my life, he gave me freedom. I should have perished by his hand! It was his right. It was my right to die as well. Instead I live, but live in hell!

And my thoughts fly apart. Can this man be believed? Shall his sins be forgiven? Shall his crimes be reprieved? And must I now begin to doubt. Who never doubted all these years? My heart is stone and still it trembles. The world I have known is lost in shadow.

Is he from heaven or from hell? And does he know, that granting me my life today, this man has killed me even so? I am reaching, but I fall. And the stars are black and cold. As I stare into the void, of a world that cannot hold, I’ll escape now from the world. From the world of Jean Valjean. There is nowhere I can turn. There is no way to go on . . . .

LES MISERABLES, Javert’s Suicide, (Universal Records 2012).

84. When asked “You never temper justice with mercy?” Javert answered “No. We might as well understand each other, Monsieur Madeleine. I administer the law—good, bad, or indifferent—it’s no business of mine. But the law to the letter!” LES MISERABLES, supra note 79; see also LES MISERABLES, supra note 76 (“No, sir. You are wrong. You are the personification of order, morality, government, in fact, the whole of society. You don’t have the right to forgive her for debasing all of us. You don’t have the authority to destroy justice.”). Throughout the many plays, movies and musicals based on Victor Hugo’s Les Miserables some interesting views of law and justice have been put in the mouth of Javert. But they all center on the distinction between law and justice. For example,

I am an officer of the law doing my duty. I have no choice in the matter. It makes no difference what I think or feel or want. It has nothing to do with me—nothing! Can’t you see that?

Reform is a discredited fantasy. Modern science tells us that people are by nature, law breakers or law abiders. A wolf could wear sheep’s clothing but he’s still a wolf.

I’ve hunted you across the years . . . Men like you can never change . . . Men like me can never change . . . My duty’s to the law—you have no rights . . . Dare you talk to me of crime and the price you had to pay. Every man is born in sin. Every man must choose his way. You know nothing of Javert. I was born inside a jail. I was born with scum like you. I am from the gutter too!

Quotes of Javert from Les Miserables, IMDB, http://www.imdb.com/character/ch0014451/quotes. LES MISERABLES (Twentieth Century Fox Film Corporation 1952), LES MISERABLES, supra note 76 and LES
Hugo shows that law and order can produce a perverse outcome when the letter of the law is pursued without justice and mercy. Injustice can occur when the process is lawful. In the mind of Javert, the perversion was the proposition that the law is defined and tempered by mercy and justice. To Javert this concept makes the law a fool and without meaning, certainty, or justification:

His supreme anguish was the loss of certainty. He felt that he had been uprooted. The code was no longer anything more than a stump in his hand. He had to deal with scruples of an unknown species. There had taken place within him a sentimental revelation entirely distinct from legal affirmation, his only standard of measurement hitherto. To remain in his former uprightness did not suffice. A whole order of unexpected facts had cropped up and subjugated him. A whole new world was dawning on his soul: kindness accepted and repaid, devotion, mercy, indulgence, violences committed by pity on austerity, respect for persons, no more definitive condemnation, no more conviction, the possibility of a tear in the eye of the law, no one knows what justice according to God, running in inverse sense to justice according to men. He perceived amid the shadows the terrible rising of an unknown moral sun; it horrified and dazzled him. An owl forced to the gaze of an eagle.

He said to himself that it was true that there were exceptional cases, that authority might be put out of countenance, that the rule might be inadequate in the presence of a fact, that everything could not be framed within the text of the code, that the unforeseen compelled obedience, that the virtue of a convict might set a snare for the virtue of the functionary, that destiny did indulge in such ambushes, and he reflected with despair that he himself had not even been fortified against a surprise.

He was forced to acknowledge that goodness did exist. This convict had been good. And he himself, unprecedented circumstance, had just been good also. So he was becoming depraved.

He found that he was a coward. He conceived a horror of himself.

Javert’s ideal, was not to be human, to be grand, to be sublime; it was to be irreproachable.

Now, he had just failed in this.85

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85. HUGO, supra note 74, at 230.

See also the movie LES MISERABLES (Deutsche Film 1957) in which Javert explained to the Mayor of Vigau how criminals can be recognized, “It’s simple—you have the honest citizens, who are established, and you have those who haven’t any work or family or home of their own. The former respect law and order and property, while the latter respect nothing on earth. I am duty bound to defend the former against the latter. No problem there.” In LES MISERABLES, supra note 77, Javert made clear to his assistant that the law is simple, “the law does not allow for special days, a crime that is committed must be punished” and to the Mayor of Vigau he maintained that “there are two classes of people, those who attack society and those who guard it. We are the guardians and I have failed in my duty. The laws of society can never be ignored.”
Like Judas, after his betrayal of Jesus, Javert could not live with his act and he committed suicide. As Judas condemned himself for betraying innocent blood, Javert condemned himself for breaking his own law; law applied without mercy is just. *Les Miserables* also analogized Valjean with Peter, in that when Peter betrayed Jesus he cried and repented and became a great man. So it was with Valjean who, being guilty of stealing silver from the home of a priest after receiving kindness from that priest, was defended by the same priest and given the property that he had stolen to be his own. As did Peter, Valjean repented from his hate and became the man who saved Javert. *Les Miserables* is a story of forgiveness and redemption from injustice and hate. It is also a story of Javert, who applied the law without mercy and grace and how justice can be perverted when it has no meaning outside of the letter of the law in application.

Unlike Javert, the social welfare approach to the rule of law asserts that the law can be procedurally correct and be unjust because procedural justice does not addresses the fairness or equity in the laws passed and enforced.86 The social welfare approach addresses the problem of the positivist approach that can tolerate a “wicked legal system,” which is a legal system that is competent and rule of law based but supports a facially repugnant moral ideology.87 “Here the standard example is the South African legal system insofar as it has been made the instrument of apartheid ideology. [The] South African judge’s duty to decide hard cases on the interpretation of apartheid laws in terms of the principles which best explain and justify those laws [are] resolved in the light of apartheid policy.”88 Another example is slavery in pre civil war America. Ask the slave in the antebellum south if the rule of law, the Bill of Rights, the Constitution, and the system of government that it is built upon are just and applicable to him. Similarly, ask the free black who is kidnapped from the north and sold as a slave if the local southern sheriff is under any legal duty to defend his right to be freed and have the kidnapper imprisoned.

Consider an even earlier example of a “wicked legal system,” that is law without justice. Under the rabbinical and Roman law of the time, the law prohibited executions on the Sabbath and prohibited the Jews under Roman rule from imposing the death penalty. After Jesus was sentenced to be crucified, his accusers went to Pilate because it was the Preparation Day for the Passover Sabbath and it was unlawful for the bodies of Jesus and the other condemned men to remain on their crosses at the beginning of the Passover (which began at sundown), so they said to Pontius Pilate break their legs and let them die so they can be taken away.89 Hear the voice of the law without its older sisters grace and mercy—these men who are sentenced to death and who are suffering are

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87. Id. at 84.
not dying fast enough to suit us, so break their legs so they may die faster. The request and action of breaking their legs was well within the letter of the law and the practice of executions. But that does not change the cruelty of the act. “[B]ecause the law brings about wrath” by defining and recognizing sin, evil, and injustice and because the law requires retribution and atonement for the aggrieved (“for where there is no law there is no transgression”), Paul wrote, “you who attempt to be justified by law; you have fallen from grace” because “the strength of sin is the law” and when the law is not subservient and under subjection to mercy and grace, the law is a “ministry of death written and engraved on stones” because “the letter [of the law] kills.” The obedience to the letter of the law without justice can produce “wicked” results.

Under the positivist approach, the “wicked” nature of the law is of no consequence to the judge because the law is the law and the role of judge is to enforce it, and the role of the citizen is to obey it regardless of its moral content. The rule of law is the law of rules. The positivist approach separates law from morality and only seeks to control the chaos or social conflict within the state of nature. Legal positivism asserts that there is a distinction between what the

90. See Romans 4:15; Galatians 5:4; 1 Corinthians 15:56; and 2 Corinthians 3:7, 6 (NKJV) (respectively). From the Christian tradition, the significance of the law vs. grace is shown by the treatment of the children of Israel after they were brought from Egypt. From the time of Exodus 12 (Passover) through the travel through the desert and arrival at Mount Sinai (Exodus 19) God provided for them and never punished them for any unbelief or act of disobedience. Grace abounded. But upon the children of Israel saying that they were able to meet God and do what he asked of them by their own abilities, the law of requirements and death for failure to obey the law came between God and His people (“whoever touches the mountain shall surely be put to death. Not a hand shall touch him, but he shall surely be stoned or shot with an arrow; whether man or beast, he shall not live.”) See Exodus 19:8, 10–13, and 32:28 (NKJV). The relationship of grace between God and His people did not return until coming of Jesus and his resurrection. John 1:17 (NKJV) (“For the law was given through Moses, but grace and truth came through Jesus Christ”). Compare also Exodus 32:28 (when God’s law falls on the heads of men) with Acts 2:41 (when God’s spirit falls on the heads of men) and Exodus 19:1–5 (pre-law) (the Children of Israel were encamped before the Sinai Mountain and God promised to make them “a special treasure to [Himself] above all people”) with Exodus 19: 10–24 (post-law) (when God appeared as fire, smoke and thunder before the Children of Israel in which He commanded that only Moses could approach Him lest He kill them and their priests).

The significance of this tradition to the meaning of the law and the rule of law is that justice and mercy predate the law. The law without mercy and grace brings death and harshness and what is desired by God, even under the law, is that man and those who govern do justice, love mercy and walk and act in humility before Him (Micah 6:8); see also, Arthur Garrison, The Rule of Law and the Rise of Control of Executive Power, 18 Tex. Rev. L. & Pol. 303; Galatians 3:19 (AMP) on the purpose of the law and its utility:

What then was the purpose of the Law? It was added [later on, after the promise, to disclose and expose to men their guilt] because of transgressions and [to make men more conscious of the sinfulness] of sin; and it was intended to be in effect until the Seed (the Descendant, the Heir) should come, to and concerning Whom the promise had been made. And it [the Law] was arranged and ordained and appointed through the instrumentality of angels [and was given] by the hand (in the person) of a go-between [Moses, an intermediary person between God and man].

91. See R. Rueban Balasubramaniam, Hobbism and the Problem of Authoritarian Rule in Malaysia, 4 Hague Journal on the Rule of Law 211 (2012) and Dyzenhaus, supra note 86.
law is and what the law ought to be and at its most basic definition, positivism asserts that the law is just because it’s the law and those under the law—to enjoy the freedom the law provides—must acquiesce to what ever the law provides and follow those who make the law regardless of individual beliefs or values to the contrary.\textsuperscript{92} The role of the judge, according to positivism, is not to make the law “live up to the promise of moral principles”\textsuperscript{93} of justice, but rather the judge is to enforce the distinction between what the law is and what it should be. The judge is to interpret and apply the law based on the facts of the case, the text of the law and the intent of the legislature that passed the law in accordance with the constitutional system for making the law.\textsuperscript{94} The social welfare approach rejects this proposition.

The social welfare approach focuses on the fact that classical rule of law systems allows for drastic inequities and misdistribution of wealth, power, and poverty. The social welfare approach maintains that for laws to be just they have to substantively address the sharp edges of capitalism and acknowledge that the freedom asserted by traditional libertarian rule of law is of no account if the poor and the working class are paid slave wages and are not afforded the opportunity to feed and educate their children. To address these needs, the social justice rule of law approach proposes that justice should not be defined by individual freedom (to allow a man to be abused by anything short of physical violence) but should be defined by substantive equality—treating differently situated people differently in order to account for the inequality of their


\textsuperscript{93} Dyzenhaus, \textit{supra} note 86, at 85. Professor Bedner suggests that in defining the rule of law focus should be placed on the elements of the rule of law rather than on trying to develop a monomorphous conception. Within the positivist approach to defining the rule of law there have been two approaches . . . [t]he first has been to make the now familiar distinction between formal and substantive versions of the rule of law—formal versions going back to Greek tradition and substantive to the Lockean fundamental rights approach. Formal versions are concerned with law as and instrument and a basis of government, but are silent on what the law should regulate. Substantive versions, on the other hand, set standards to the contents of a norm, which should be morally defined.

The Second approach to classification builds on the insight that rule of law definitions range from restricted (thin) to elaborate (thick) and that there is some sequence in this.

\textsuperscript{94} Dyzenhaus, \textit{supra} note 86, at 91; \textit{see also} Fegen, \textit{supra} note 93, at 1187; Moller, \textit{supra} note 93, at 136; Bedner, \textit{supra} note 92, at 48; Durden, \textit{supra} note 92, at 71.
positions. Such an approach subordinates the third classical tenet of the rule of law, *equality* before the law (treating all people the same regardless of the inequality of the parties) to social outcomes. Substantive equity is not the same as its sister idea: distributive justice. Distributive justice focuses on the distribution of goods, services, and benefits in a society and asserts that the law should allow for interfering with the natural distribution of goods and services in order to make sure the resulting distribution is fair and equitable among all of the members of the society. Substantive equality addresses social results within society. It seeks to use the law to ameliorate social injustice, achieve social equity, or create proportional equality in social outcomes. Affirmative action, the use of social policy and law to address and ameliorate prior injustice, is an example of the substantive equality approach. Examples of distributive justice include a progressive tax system, direct welfare payments to the poor, or state funded universal health care for all citizens. Both the substantive equality and distributive justice approaches focus on the rights and protections due an individual normatively, outcomes as they should be.

The social welfare rule of law approach maintains that certain social and economic rights are owed by society and the protection of those rights from those with power in society (both public and private) is the purpose of government. An iteration of the substantive (normative) rule of law approach is the proposition that an individual has a “right” to certain social and economic outcomes from society simply by being a member of that society. This approach is Kantian in that the assertion is that the rule of law protects certain “human rights” and society is obligated to meet the minimalist needs of all people in a “fair and equitable” way. Of course the defining of what the minimalist needs are and the implementation of what is a “fair and equitable” distribution is an entirely separate issue that divides and defines the different camps within social welfare theory.

C. Discussion of the Applications of the Two Approaches

It is important to understand that these two approaches to the rule of law, traditional and social welfare, are not simply two sides of the same coin. They represent two different basic foundational philosophies on how a society should be designed and governed and two fundamentally different views of the nature of a just society. The social welfare view defines a just society as one that seeks to counter the natural inequities of life and does not allow those fortunate by birth to take advantage of their position to the detriment of those who were not as fortunate. Social justice theorists accept that merit has its place but reject the proposition that merit is the sole or even main explanation for success. Success is provided to some due to the position they hold, not the work they perform. This approach rejects the concept that freedom includes the risk of being taken advantage of by any and all social institutions, except the government. Social justice rejects the result that the rule of law, freedom, and justice include the
freedom of the poor to starve.\textsuperscript{95} As “[f]reedom of expression is meaningless to an illiterate . . . freedom from government interference must not spell freedom to starve for the poor and destitute.”\textsuperscript{96} “The strongest argument for including social rights into a rule of law definition is . . . other parts of the rule of law can only function effectively if social rights are fulfilled and therefore a rule of law definition without makes little sense for the poor and disadvantaged.”\textsuperscript{97}

The traditional view proposes that the inequities within a society and between people are natural and cannot be changed by society without stealing from one to give to another—the very definition of injustice. The traditional libertarian admits that there are inequities between people but this is the result of birth and the nature of life itself. What the traditional libertarian rejects is justice defined by the use of the law and the governmental power of coercion, which backs the power of the law, to adjust for the inequities of life. Justice only exists when all people are treated equally before and under the law, not in the equality of the outcome of the law. The traditional libertarian defines freedom, justice, and fairness by the individual having the right to try to make the best of his life in a world that, as Hobbes observed in \textit{Leviathan}, is naturally solitary, poor, nasty, brutish, and short.

The traditional rule of law approach is reflected in a scene from the popular movie \textit{Rocky Balboa} when Rocky explained to his son that “the world ain’t all sunshine and rainbows. It’s a very mean and nasty place and I don’t care how tough you are, it will beat you to your knees and keep you there permanently if you let it.” It’s the last phrase, “keep you there permanently \textit{if you let it}” that separates the traditional approach from the social welfare approach. The traditional approach places responsibility on the individual to achieve success and enjoy its rewards or to suffer the consequences of failure regardless of the fact that life is not fair. The social justice approach rejects this proposition. Social justice encompasses concepts of social, political, and economic conflict within society as an explanation for inequality in outcomes.

\begin{quote}
We suggest that the mere existence of consensus cannot be taken as proof that social conflict and social repression are absent. Genuine consensus can be said to exist when it is coupled with objective social justice; that is, where all social groups share equally in the opportunity to meet the organic needs of survival, satisfaction, self-worth and self-determination, and where no group is excluded on an \textit{a priori} basis from full participation in the process of
\end{quote}


\textsuperscript{96} The International Commission of Jurists 1959 congress quoted in Bedner, \textit{supra} note 92, at 66.

\textsuperscript{97} Bedner, \textit{supra} note 92, at 66.
political control False consensus exists where individuals assent to a system of control which objectively deprives them of any of these opportunities.

... If one experiences structural blockages in meeting one's needs and these blockages exist in support of the interests of the ruling class, then one is the victim if social repression whether or not one accepts these blockages as legitimate. Or, in other words, Black slaves were the victims of social repression whether they viewed their slavery as repressive subjugation to illegitimate power, or as an appropriate condition for those bearing the “mark of Cain.”

... To the degree that... processes function to maintain structural blockages to certain groups meeting their needs in any social control system, repression is an integral component of that system.98


Unlike justice in the broad sense, social justice is a relatively recent concept, born of the struggles surrounding the industrial revolution and the advent of socialist (and later, in some parts of the world, social democratic and Christian democratic) views on the organization of society. It is a concept rooted very tenuously in the Anglo-Saxon political culture....

Some proponents of social justice—though significantly fewer since the collapse of State communism—dream of total income equality... In the modern context, those concerned with social justice see the general increase in income inequality as unjust, deplorable and alarming. It is argued that poverty reduction and overall improvements in the standard of living are attainable goals that would bring the world closer to social justice. However, there is little indication of any real ongoing commitment to address existing inequalities. In today’s world, the enormous gap in the distribution of wealth, income and public benefits is growing ever wider, reflecting a general trend that is morally unfair, politically unwise and economically unsound. Injustices at the international level have produced a parallel increase in inequality between affluent and poor countries.

... The issue of equality of opportunities further complicates efforts to determine whether ground has been lost or gained in the realm of social justice. Apart from the issue of unemployment, an area in which social justice appears to have suffered setbacks in recent years, there is the crucial question of whether societies offer their people sufficient opportunities to engage in productive activities of their choice wherever they wish, whether at home or abroad, and to receive benefits and personal and social rewards commensurate with their initiative, talents and efforts. This might be termed economic justice; for many it represents justice or fairness in the broadest sense. It has traditionally been perceived as the basis for social justice in the United States of America, the economically dominant country today.

Within the context of the present analysis, economic justice is considered an element of social justice, a choice justified by the desire to convey the idea that all developments relating to justice occur in society, whether at the local, national, or global level, and by the related desire to restore the comprehensive, overarching concept of the term “social”, which in recent times has been relegated to the status of an appendix of the economic sphere.

Social justice theory defines freedom and justice as all members of society in fact enjoying the benefits of the society, not merely as all members of society in theory having the opportunity to enjoy those benefits. Inequality, by definition, establishes that all members of society do not enjoy the benefits of society. The social welfare (social justice) approach proposes that in a just society the rule of law requires that those who enjoy success due to the gifts bestowed by the accident of birth should not enjoy the freedom and rewards gained by those gifts at the expense of those less fortunate. The traditional view would not dispute the biblical observation that “for unto whomsoever much is given, of him shall be much required; and to whom men have committed much, of him they will ask the more.”

Traditional theory, however, does not translate this truth to mean that the government is obligated to compensate and make societal adjustments to equalize the less blessed by birth by taking from those with more blessings. In other words, the biblical truth that “Great gifts mean great

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100. For example see the veto message of President Grover Cleveland to “[a]n act to enable the Commissioner of Agriculture to make a special distribution of seeds in the drought-stricken counties of Texas, and making an appropriation therefore” on February 16, 1887:

I feel obliged to withhold my approval of the plan proposed by this bill to indulge a benevolent and charitable sentiment through the appropriation of public funds for that purpose.

I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the general government ought to be extended to the relief of individual suffering which is in no manner related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that though the people support the government, the government should not support the people.

The friendliness and charity of our countrymen can always be relied upon to relieve their fellow-citizens in misfortune. This has been repeatedly and quite lately demonstrated. Federal aid in such cases encourages the expectation of paternal care on the part of the government, and weakens the sturdiness of our national character, while it prevents the indulgence among our people of the kindly sentiment and conduct which strengthens the bond of a common brotherhood.

Reflecting the traditional view, in the same month the President explained what principles should govern federal expenditures of public funds. On June 19, 1886 the President vetoed Senate bill No. 763, entitled “An act for the erection of a public building at Sioux City, Iowa” reflecting his general approach and principle in government expenditures: “It seems to me that in the consideration of the merits of this bill the necessities of the Government should control the question, and that it should be decided as a business proposition, depending upon the needs of a Government building” not the needs of the people. On the same day the President voted a similar a bill supporting the construction of a federal building in the City of Zanesville, Ohio. He explained to Congress that

The public buildings now in process of construction, numbering eighty, involving constant supervision, are all the building projects which the government ought to have on hand at one time, unless a very palpable necessity exists for an increase in number. The multiplication of these structures involves not only the appropriations made for their completion but great expense in their care and preservation thereafter.

While a fine government building is a desirable ornament to any town or city, and while the securing of an appropriation therefore is often considered as an illustration of zeal and activity
responsibilities; greater gifts, greater responsibilities,’

101 does not translate into “from each according to his ability to each according to his needs.”

102 The traditional view asserts that freedom is defined as the right to try to be happy

in the interests of a constituency, I am of the opinion that the expenditure of public money for such a purpose should depend upon the necessity of such a building for public uses.

Congress reconsidered supporting construction of a federal building in Ohio and passed House bill No. 6976, entitled “An act to erect a public building at Portsmouth, Ohio” which the President vetoed on February 26, 1887. He again asserted that necessity and public need alone justify the expenditure of public funds, explaining to Congress that

The care and protection which the government owes to the people do not embrace the grant of public buildings to decorate thriving and prosperous cities and villages, nor should such buildings be erected upon any principle of fair distribution among localities.

The government is not an almoner of gifts among the people, but an instrumentality by which the people’s affairs should be conducted upon business principles, regulated by the public needs.

Melville W. Fuller, The President’s Vetoes, in 1 The Chicago Law Times 233 (Catharine V. Waite ed. 1887). Fuller approving of the President’s position summarized the classical civil libertarian view of government as follows:

This is in strict accordance with the American creed, which declares belief in the ability of the people to govern themselves, and in which therefore paternalism has no place. To adopt the theory that government should support the people is to substitute the bread and circus of the decadence of the Roman power, for the honest self-reliance, and self-respecting dignity of the American citizen.

Id. at 233–234.


102. Karl Marx, Critique of the Gotha Program 27 (Wildside Press 2008) (1875). What is interesting about the famous quote is that Marx thought that this ideal could only occur after the differences between the abilities and strengths of individuals to produce labor was equalized—a state of nature that could not exist in a communist society at its earliest stages. In context Marx wrote:

Further, one worker is married, another is not; one has more children than another, and so on and so forth. Thus, with an equal performance of labor, and hence an equal in the social consumption fund, one will in fact receive more than another, one will be richer than another, and so on. To avoid all these defects, right, instead of being equal, would have to be unequal.

But these defects are inevitable in the first phase of communist society as it is when it has just emerged after prolonged birth pangs from capitalist society. Right can never be higher than the economic structure of society and its cultural development conditioned thereby.

In a higher phase of communist society, after the enslaving subordination of the individual to the division of labor, and therewith also the antithesis between mental and physical labor, has vanished; after labor has become not only a means of life but life’s prime want; after the productive forces have also increased with the all-around development of the individual, and all the springs of co-operative wealth flow more abundantly—only then then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!

Id. at 26–27 (emphasis added). The only reason that the idea that man being naturally unequal can live in a society in which all talent is equalized in quality and usefulness did not collapse by its acknowledgement that it does not naturally exist is because of his proposition that the role of government is to own all labor and the fruits thereof and to redistribute according to needs of society as a whole, thus making individual labor and talent irrelevant.

Thirdly, the conclusion: “Useful labor is possible only in society and through society, the proceeds of labor belong undiminished with equal right to all members of society.”

A fine conclusion! If useful labor is possible only in society and through society, the
and successful in a hard, unjust, and unequal world, not actually being happy and successful. This traditional view of life and the rule of law inspired Lincoln to defend capitalism and to use its virtues as an explanation for abolishing slavery. As Professor Allen C. Guelzo points out:

The key virtue of liberal capitalism for Lincoln was mobility. “We stand at once the wonder and admiration of the whole world,” Lincoln said in 1856, and the “cause is that every man can make himself.” This was partly due to the genius of American government, which limited the reach of government over the people to the performance of “whatever they need to have done, but can not do, at all, or can not, so well do, fore themselves—in their separate, individual capacities”—a formula which neatly restrained government from suffocating American liberty, without forbidding it from serving the American economy. But it was also partly due to the opportunities offered by liberal capitalism and free wage labor. The equality promised by the Declaration of Independence was not a negative equality, in which all were held to a certain limit in order to prevent the rest from failing below a lower limit, but a positive equality in which everyone had equal access to self-improvement, whether they used it or not or used it well or wisely or not.103

proceeds of labor belong to society—and only so much there from accrues to the individual worker as is not required to maintain the “condition” of labor, society. In fact, this proposition has at all times been made use of by the champions of the state of society prevailing at any given time. First comes the claims of the government and everything that sticks to it, since it is the social organ for the maintenance of the social order; then comes the claims of the various kinds of private property, for the various kinds of private property are the foundations of society, etc. One sees that such hollow phrases are the foundations of society, etc. 

Id. at 19. Such is the foundational idea of socialism and secular social justice theory; that the natural inequities between individuals can be adjusted by government and should be adjusted by government because all types of labor and fruits thereof should be considered equal regardless of the fact that at the start all types of labor and talents are not equal in utility or distribution among all people. The inequality that naturally results from the variation of skill and ability in life is what government should address, not the inequality that naturally begins in life; see also supra note 98. 103. Allen C Guelzo, Afterword LINCOLN’S AMERICAN DREAM: CLASHING POLITICAL PERSPECTIVES 486 (Kenneth L. Deutsch & Joseph R. Fornieri eds., 2005). The first two quotes are taken from Lincoln’s August 27, 1856 speech in Kalamazoo, Michigan and the last is attributed to him dated July 1, 1854. THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 56, at 364, 220 respectively. The full quotation of the latter is as follows:

The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, at all, or can not, so well do, for themselves—in their separate, and individual capacities.

In all that the people can individually do as well for themselves, government ought not to interfere.

See also Lincoln’s speech to the 166th Ohio Regiment three years into the civil war in which he explained what their sacrifice was for. He said:

I suppose you are going home to see your families and friends. For the service you have done in this great struggle in which we are engaged I present you sincere thanks for myself and the country. I almost always feel inclined, when I happen to say anything to soldiers, to impress
Lincoln argued that government is equally tyrannical when it takes the fruits of labor and gives it to another as when it takes away the opportunity and incentive to labor and gain those fruits; both of which formed the foundation for slavery. As President Lincoln asserted:

I like the system which lets a man quit when he wants to, and wish it might prevail everywhere. One of the reasons why I am opposed to Slavery is just here. What is the true condition of the laborer? I take it that it is best for all to leave each man free to acquire property as fast as he can. Some will get wealthy. I don’t believe in a law to prevent a man from getting rich; it would do more harm than good. So while we do not propose any war upon capital, we do wish to allow the humblest man an equal chance to get rich with everybody else. When one starts poor, as most do in the race of life, free society is such that he knows he can better his condition; he knows that there is no fixed condition of labor, for his whole life. I am not ashamed to confess

upon them in a few brief remarks the importance of success in this contest. It is not merely for to-day, but for all time to come that we should perpetuate for our children’s children this great and free government, which we have enjoyed all our lives. I beg you to remember this, not merely for my sake, but for yours. I happen temporarily to occupy this big White House. I am a living witness that any one of your children may look to come here as my father’s child has. It is in order that each of you may have through this free government which we have enjoyed, an open field and a fair chance for your industry, enterprise and intelligence; that you may all have equal privileges in the race of life, with all its desirable human aspirations. It is for this the struggle should be maintained, that we may not lose our birthright—not only for one, but for two or three years. The nation is worth fighting for, to secure such an inestimable jewel.

Id. at Vol III, 512. (emphasis added).

104. As Lincoln asserted during his last debate with Douglas on October 15, 1858:

That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time, and will ever continue to struggle. The one is the common right of humanity and the other the divine right of kings. It is the same principle in whatever shape it develops itself. It is the same spirit that says, “You work and toil and earn bread, and I’ll eat it.” No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.

Id. at 315. (emphasis added). To a nation that honored democracy and freedom and maintained slavery he observed in 1859 and 1858 respectively:

This is a world of compensations; and he who would be no slave, must consent to have no slave. Those who deny freedom to others, deserve it not for themselves; and, under a just God, can not long retain it.

As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy.

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Id. at 376 and Vol. II, 532 respectively. Lincoln would come to the realization that the civil war was about the moral issue of ending slavery not addressing the political issue of his election. He came to understand that the union could only be saved with the abolition of slavery and that abolition would only come through war. See Garrison, The Rule of Law and the Rise of Control of Executive Power, supra note 90 and Arthur Garrison, Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War: A Historical Perspective (2011).
that twenty-five years ago I was a hired laborer, mauling rails, at work on a flat-boat—just what might happen to any poor man’s son! I want every man to have the chance—and I believe a black man is entitled to it—in which he can better his condition—when he may look forward and hope to be a hired laborer this year and the next, work for himself afterward, and finally to hire men to work for him! That is the true system.  

Property is the fruit of labor—property is desirable—is a positive good in the world. That some should be rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another; but let him labor diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.


Although social conservatives enjoy quoting this passage of Lincoln, they often fail to observe that the passage is from a speech that is wholly purposed to attack the evil of slavery (using an analogy of snakes found in ones bed) and Lincoln was advocating that the Republican Party stand firm in saying slavery is a social wrong to be opposed. He also made clear in the same speech that Southern corporate and political advocacy of slavery had an impact on both the poor and the free laborer. He asserted:

I desire that if you get too thick here, and find it hard to better your condition on this soil, you may have a chance to strike and go somewhere else, where you may not be degraded, nor have your family corrupted by forced rivalry with negro slaves. I want you to have a clean bed, and no snakes in it! Then you can better your condition, and so it may go on and on in one ceaseless round so long as man exists on the face of the earth!

Id. at 25. The Republican Party of 1860 was not singularly a party defined by the opposition to the spread of slavery or being anti-slavery in general, although there were such sentiments, but it was more an anti-southern party. The Republican Party came into existence with a resentment and a determination to resist the political domination of the South over the politics of the nation as a whole. See Earl Maltz, Dred Scott and the Politics of Slavery (2007).

It was within this political context that the Republican Party came support free labor (and the limitation of government power over the individual) in opposition to slave labor (government interference with individual labor and wages) in the new territories and new states.

106. The Collected Works of Abraham Lincoln, supra note 56, at Vol VII, 259–260. The context of this statement is interesting for it was a letter to provide conformation of the presentations at the association conference. Lincoln affirmed his long-standing view that the war was about two issues; Slavery and free labor as well as the issues of democracy and legitimacy of elections. Lincoln wrote to the members:

You comprehend, as your address shows, that the existing rebellion, means more, and tends to more, than the perpetuation of African Slavery—that it is, in fact, a war upon the rights of all working people.

Partly to show that this view has not escaped my attention, and partly that I cannot better express myself, I read a passage from the Message to Congress in December 1861:

It continues to develop that the insurrection is largely, if not exclusively, a war upon the first principle of popular government—the rights of the people. Conclusive evidence of this is found in the most grave and maturely considered public documents, as well as in the general tone of the insurgents. In those documents we find the abridgement of the existing right of suffrage and the denial to the people of all right to participate in the selection of public officers, except the legislative boldly advocated, with labored arguments to prove that large control of the people in government, is the source of all political evil. Monarchy itself is sometimes hinted at as a possible refuge from the power of the people.
The traditional rule of law approach thus defines injustice (the lack of individual

In my present position, I could scarcely be justified were I to omit raising a warning voice against this approach of returning despotism.

*Id.* (citing *Id.* at Volume V, 51–53).

Lincoln made clear in his address to Congress in 1861 that the issue of the insurrection based in part on the nature of capital and labor and the nature of man’s existence to both. It was Lincoln’s view that the war in part was over whether a man is bound for life to the state he is initially born in. It was Lincoln’s view that the South asserted that blacks were born to be slaves for life, and the poor laborer poor and a laborer all his life. Lincoln asserted otherwise. Lincoln continued after the above cited paragraphs:

Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration. Capital has its rights, which are as worthy of protection as any other rights. Nor is it denied that there is, and probably always will be, a relation between labor and capital, producing mutual benefits. The error is in assuming that the whole labor of community exists within that relation. A few men own capital, and that few avoid labor themselves, and, with their capital, hire or buy another few to labor for them. A large majority belong to neither class—neither work for others, nor have others working for them. In most of the southern States, a majority of the whole people of all colors are neither slaves nor masters; while in the northern a large majority are neither hirers nor hired. Men with their families—wives, sons, and daughters—work for themselves, on their farms, and in their houses, and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand, nor of hired laborers or slaves on the other. It is not forgotten that a considerable number of persons mingle their own labor with capital—that is, they labor with their own hands, and also buy or hire others to labor for them; but this is only a mixed, and not a distinct class. No principle stated is disturbed by the existence of this mixed class.

Again: as has already been said, there is not, of necessity, any such thing as the free hired laborer being fixed to that condition for life. Many independent men everywhere in these States, a few years back in their lives, were hired laborers. The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land for himself; then labors on his own account another while, and at length hires another new beginner to help him. This is the just, and generous, and prosperous system, which opens the way to all—gives hope to all, and consequent energy, and progress, and improvement of condition to all. No men living are more worthy to be trusted than those who toil up from poverty—none less inclined to take, or touch, aught which they have not honestly earned. Let them beware of surrendering a political power which they already possess, and which, if surrendered, will surely be used to close the door of advancement against such as they, and to fix new disabilities and burdens upon them, till all of liberty shall be lost.

*Id.* at 52–53. After citing his comments to Congress, Lincoln concluded to the association that:

The views then expressed remain unchanged, nor have I much to add. None are so deeply interested to resist the present rebellion as the working people. Let them beware of prejudice, working division and hostility among themselves. The most notable feature of a disturbance in your city last summer, was the hanging of some working people by other working people. It should never be so. The strongest bond of human sympathy, outside of the family relation, should be one uniting all working people, of all nations, and tongues, and kindreds. Nor should this lead to a war upon property, or the owners of property.

*Id.* at Vol. VII, 259. Lincoln’s point was not, as conservatives claim, that those who don’t have should not seek to take from those who do by honest work, but rather that those who work share a common interest in success and should oppose those who assume that all who are poor or enslaved were born to be so and are destined to serve those with capital. This is the context of the quote above.
freedom) as governmental coercion, not corporate or private economic coercion; because the individual is not free to avoid the former either in theory or in fact, but the individual in theory is free to avoid the subjugation by the latter. The theoretical ability to avoid private or corporate economic coercion (because a person can choose to move to an area free from the specific economic coercion) is sufficient, *per se*, to establish individual freedom regardless of whether in fact an individual is free from private or corporate economic coercion.

The modern dispute over the meaning of the rule of law is not simply a philosophical debate. The debate has political and policy significance. The social justice approach defines the rule of law as an instrument, a tool or a means to an end. Viewed in this way, the rule of law is used “as an empty

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107. Defining injustice by government interference with the pursuit of success, the fruits of success and failure forms the basis of traditional classical theory. As George Will asserted regarding government and its relation to prosperity and equality:

I think big government harms prosperity. It harms prosperity by allocating resources not in terms of efficiency, but in terms of political power that directs the allocation. I think big government harms freedom, because it is an enormous tree in the shade of which the smaller institutions of civil society cannot prosper. And most of all, big government today harms equality. It harms equality because, by concentrating power in Washington, in big government, it makes itself susceptible to the rent-seeking by big, muscular interest groups. The only people who can come to Washington and bend the government to private purposes.

Get the government out of our lives more and more, and you’ll find that freedom and the market allocations of wealth and opportunity prevails.

Jefferson understood—Jefferson understood that you can have a government with minimal attention to the absolute essentials we have talked about. Of course, we want government to build roads, we want government to defend the shores, we want the government to deliver the mail. But after it does the essentials, understand what Ronald Reagan did. When Ronald Reagan said we’re going to have less government—under Reagan, respect for government, something we all want, respect for government rose as government’s role declined.


In commenting on the rise the relationship between increased government, business, and interest group activity in vying for power within government, George Will made this observation:

If you want to understand your government, don’t begin by reading the Constitution. It conveys precious little of the flavor of today’s statecraft. Instead, read selected portions of the Washington telephone directory . . . which contain listings for all the organizations with titles beginning with the word “National.”


108. As Professor Tamanaha writes:

This is the key point. The notion that law is an instrument was urged by its early proponents in an integrated two-part proposition: Law is an instrument to serve the social good. The crucial twist is that in the course of the twentieth century, the first half of this proposition swept the legal culture while the second half became increasingly untenable. As the century wore on, the seemingly inexorable penetration of moral relativism, combined with the multiplication of groups aggressively pursuing their own agendas, convinced in the rightness of their claims, dealt a deep wound to the notion of a shared social good. This book traces out the myriad
vessel to be filled as desired, and to be manipulated, invoked, and utilized in the
furtherance of ends.” The social welfare approach uses the law as a tool to
achieve the particular social or political goals of individual groups regardless
of the impact on society as a whole. This approach to the rule of law turns
political debates into legal debates to be settled by the dictates of a higher law—constitutional law in the United States—through the
courts.

Neither of these views of the rule of law (traditional or social welfare) are the
result of reasoned thought or policy preferences. They are the foundations from
which reasoned thought and policy preferences originate and flow. These are
fundamental original views of life, humanity, justice, and equality. These posi-
tions form the points of demarcation in which policy debate will not result in
resolution but are the grounds in which political debate occur.

... worrisome implications of this twist. Rather than represent a means to advance the public
welfare, the law is becoming a means pure and simple, with the ends up for grabs.

The proposition that law is pervasively understood and utilized as a means to an end, when
stated as such, is clear enough. What this means in concrete terms varies depending upon the
context, however. An instrumental understanding of law thus appears in markedly different
forms. Beneath this apparent variety they are united by a common underlying orientation. An
instrumental view of law means that law is consciously viewed by people and groups as a tool or means with which to
achieve ends. The supply of possible ends is open and limitless, ranging from personal
(enrichment, harassment, or advancement), to ideological (furthering a cause), to social goals
like maximizing social welfare or finding a balance of competing interests.

TAMANAHA, LAW AS A MEANS TO AN END, supra note 62, at 4, 6.

109. Id. at 1.

110. The difference between the two approaches to the law has been described operationally as
follows:

Lawyers with a purely instrumental [social welfare] view of law will manipulate legal rules
and processes to advance their clients’ ends; lawyers with a non-instrumental [classical] view,
in contrast, will accord greater respect for the binding quality of legal rules and will strive to
maintain the integrity of the law. Cause lawyers incite litigation to bring about desired social
change, an exclusively instrumental course of action for which there is no non-instrumental
counterpart. An instrumental judge manipulates the applicable legal rules to arrive at a
preferred end, whereas a non-instrumental judge is committed to following the applicable
legal rules no matter what the outcome. Groups that take an instrumental view of judging
strive to secure the election or appointment of judges who will diligently apply the law with no preconceived controlling end in mind. Legislators with an instrumental view will promote whatever law will help secure their
re-election (personal end), or further their ideological position (political end), or advance the
public good (social end); a legislator with a non-instrumental view, a view that had currency
two centuries ago but has long been defunct, will seek to declare the immanent norms of the
community or natural principles.

Id. at 7.
CONCLUSION

There are of course those who do not want us to speak. I suspect even now, orders are being shouted into telephones, and men with guns will soon be on their way. Why? Because while the truncheon may be used in lieu of conversation, words will always retain their power. Words offer the means to meaning, and for those who will listen, the enunciation of truth. [That truth being] fairness, justice, and freedom are more than words, they are perspectives.  

The tyrant will always find a pretext for his tyranny, and it is useless for the innocent to try by reasoning to get justice, when the oppressor intends to be unjust.  

Sic Semper Tyrannis.  

I can’t let you use this court to raise a lynch mob . . . . It’s not about being right, Mr. McCoy. It’s about doing right.  

Professor Krygier writes that the “rule of law is better understood as an ideal than a specific recipe for institutional design.” Although the rule of law is not a term of art because its meaning is subjective to the user, there is a universal value to the meaning of the rule of law and why it matters is multi-dimensional. There is virtue in the fact that the rule of law requires power to be subject to the law, that the law is required to have certain characteristics, and that it protects liberty and freedom (however these last two concepts are defined). But the rule of law is important beyond these concepts because the rule of law is more than

113. “Thus always to tyrants.” The words yelled by John Wilkes Booth after assassinating President Lincoln on April 14, 1965.  
114. Law and Order: Gunshow (NBC television broadcast Sep. 22, 1999).  
116. In regard to the differing concepts and definitions of the rule of law within discipline, Professor Peerenboom wrote:  

It is time to give up the quest for a consensus definition or conception of rule of law and to accept that it is used by different actors in different ways for different purposes. But rather than seeing this as a disadvantage, we should turn this into an advantage by using the different definitions and ways of measuring rule of law to shed light on more specific questions.  

117. These include generality, publicity, clarity, capacity of compliance (conformability), enforceability, and non-contradictory. See Skaaning, supra note 41, at 4-5 and Raz, supra note 12, at 214–217.
the idea that governmental power must be controlled.\textsuperscript{118}

The rule of law includes why the government is to be controlled. The foundation upon which the rule of law is built is the idea there are principles and laws, natural law, that predate government. As discussed above, there are various perspectives that support the concept of the rule of law. The Christian theoretical perspective\textsuperscript{119} (which formed the foundation used by the men of the enlightenment) asserts that before organized society there was God, and he made the heavens and earth and the natural laws that govern their existence.\textsuperscript{120} God then created man and established laws for him within creation.\textsuperscript{121} The enlightenment philosophers took this as a basis to develop the social contract theory of government in which man was free under the laws of God, the natural law, but because man became evil, the lack of peace and the presence of evil required the existence of government. Government thus enforces the laws of nature and society to control the evil nature of mankind. But once this is done, the need for government is settled, but the power given to it must be controlled so man is not in a worse place than where he was before government. Thus government power must be controlled under the same laws of nature that govern men. The principle that those with power are controlled by the law, from the Christian theoretical perspective, is required because the Law applies and governs the hand of God Himself.\textsuperscript{122} When He created the heavens and the

\begin{footnotes}
\footnotetext[120]{See Genesis 1:1–2; John 1:1–3 (NKJV).}
\footnotetext[121]{See Genesis 2:15–17; Exodus 20:1–17 (NKJV).}
\footnotetext[122]{See, e.g., Leviticus 26:44 (“I will not . . . break My covenant with them for I am the Lord their God”); Psalm 89:34–35 (“My covenant I will not break, nor alter the word that has gone out of My lips, once I have sworn by My holiness”); Psalm 138:2 (“For You have magnified Your word above all Your name”); Matthew 5:17–18 (“Do not think that I came to destroy the Law or the Prophets. I did not come to destroy but to fulfill. For assuredly, I say to you, till heaven and earth pass away, one jot or one tittle will by no means pass from the law till all is fulfilled”); 2 Timothy 2:12 (“He remains faithful; He cannot deny Himself”) (NKJV).}
\end{footnotes}
earth, God established laws for its governance regarding good and evil and that He was legally obligated under His own law to punish the evil heart of mankind and the wages of sin is death. Under the law of sin, mercy and forgiveness could only be received after blood sacrifice—first through sacrifices of animals and later with the blood sacrifice of His Son. With the latter sacrifice competed by His Son, God gained the legal right to forgive and forget the evil of mankind at the asking.

Isaiah 45:51 (“I am the LORD, and there is none else, there is no God besides me”); Hebrews 6:13,18 (“He could swear by no one greater, He swore by Himself . . . it is impossible for God to lie”); Genesis 22:16; Psalm 33:9,11; Psalm 119:160; Isaiah 45:22–23; Isaiah 55:11; Jeremiah 23:29; Amos 6:8 (NKJV).


124. See, e.g., Genesis 8:21–22 (“. . . I will never again curse the ground . . . nor will I again destroy every living thing as I have done. While the earth remains . . .”); Jeremiah 33:25 (“Thus says the Lord, ‘If My covenant is not with day and night and if I have not appointed the ordinances of heaven and earth’”); Isaiah 66:1–2 (“Thus said the LORD, ‘The heaven is my throne, and the earth is my footstool . . . . For My hand made all these things, thus all these things came into being,’ declares the LORD’); Jeremiah 32:17 (“You made the heavens and the earth by Your great power and outstretched arm”); Job 38:11 (“. . . I said [to the sea] this far you may come, but no father and here your proud waves must stop”); Job 38:33 (“. . . the ordinances of the heavens . . . set their dominion over the earth . . . ”); Matthew 6:10 (“Your will be done on earth as it is done in heaven”) (NKJV); see also supra note 122.

125. See, e.g., Genesis 3:11–19; Genesis 4:10–15; Genesis 6:5; Genesis 8:21; Exodus 12:12; Psalm 89:30–32; Habakkuk 1–2; Mark 13:31; 2 Corinthians 5:10; Romans 1:18; Romans 5:12; Thessalonians 1:6; 2 Peter 2: 4–11; Revelation 6:9–11 (NKJV).

126. See, e.g., Genesis 2:17; Exodus 12:12–27; Romans 6:23 (NKJV).

127. 1 John 1:7 (AMP) (“the blood of Jesus Christ His Son cleanses (removes) us from all sin and guilt [keeps us cleansed from sin in all its forms and manifestations]”); see also Genesis 3:21; Exodus 20:24; Exodus 24:12; Leviticus 5:1–13; Leviticus 16:5,16,29–30; Leviticus 17:11; Matthew 3:17; Luke 9:35; John 1:1, 14,29; John 3:16; Acts 4:12; Romans 5:6–21; Romans 9:9–15; Galatians 3:13; Hebrews 7:25; Hebrews 9:12–15,22,28; Colossians 2:11–14; 1 John 2:1–2; Revelation 5:6,9 (NKJV).

128. “But now the righteousness of God apart from the law is revealed . . . through faith in Jesus Christ . . . whom God set forth as a propitiation by His blood . . . that He might be just and the justifier of the one who has faith in Jesus.” Romans 3:21–26 (NKJV); infra note 129.

129. 1 John 3:17; Romans 8:1 (AMP); see also Revelation 1:5 (“And from Jesus Christ the faithful and trustworthy Witness, the Firstborn of the dead [first to be brought back to life] and the Prince (Ruler) of the kings of the earth. To Him Who ever loves us and has once [for all] loosed and freed us from our sins by His own blood”); Romans 8:1 (“Therefore, [there is] now no condemnation (no adjudging guilty of wrong) for those who are in Christ Jesus”); Hebrews 8:12 (“For I will be merciful and gracious toward their sins and I will remember their deeds of unrighteousness no more”) and 2 Corinthians 5:19 (AMP) (“It
It is this perspective that justifies the proposition that both men and government must be under the law and obey the law.\textsuperscript{130} When Jesus was driven into the wilderness, he did not invoke the name, rank, or power of God. He invoked the law\textsuperscript{131} in response to the temptations of his tormentor, and his tormentor departed under the utterance of the law. As the power held in the hand of God is governed under the law, so is it required of man. This perspective—adopted by the Kings of ancient Israel, the ancient Athenians and Romans, the men who wrote the Magna Carta 1215, the men of the glorious revolution of 1688 and the writers of the Bill of Rights of 1689, the men of the enlightenment, and the signers of the Declaration of Independence 1776—defines what the natural law, God’s law, requires of a lawful and just society. The natural law tradition includes the requirement that government should seek to do justice, provide mercy, protect the weak, do no evil to strangers, show justice to the widow and the orphan, do not use unjust scales or measures, and that those whose duty it is to apply the law, judges and kings, they must do so with impartiality.\textsuperscript{132}

It is upon this dynamic of logic and perspective that the institutions and practical principles of the rule of law within Western thought have been built, maintained, and defended. Such institutions and principles include an independent judiciary, a free press, legal concepts like the prohibition of \textit{ex post facto} laws and double jeopardy, criminal procedure, constitutional law, administrative law, government subservience to the law even when it is inconvenient, and the social/political acceptance of non-governmental legal associations and professional organizations that advocate for the protection of individual rights and


\textit{Let it be not said that the sovereign is not subjected to the law of his State; the contrary proposition is the truth of natural law . . .; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and the he himself obeys the law.}

Tunc, at 408.

\textsuperscript{131.} See \textit{Matthew} 4:1–11 and \textit{Luke} 4:1–11 in which the Law of Moses was invoked; \textit{Deuteronomy} 8:3; \textit{Deuteronomy} 6:16 and \textit{Deuteronomy} 6:13 respectively (NKJV).

\textsuperscript{132.} See, e.g., \textit{Deuteronomy} 1:16–17; \textit{Deuteronomy} 27:18–19; \textit{Leviticus} 19:33; \textit{Leviticus} 19:15; \textit{Numbers} 27:1–9; \textit{Exodus} 23:3, 6; \textit{Job} 34:10–12, 19; \textit{Psalm} 146:5–9; \textit{Psalm} 50:15; \textit{Psalm} 12:5; \textit{Psalm} 9:9–10, 12 and 18; \textit{Psalm} 34:6; \textit{Proverbs} 11:1; \textit{Micah} 6:8 (NKJV); see also supra notes 120–131.
watch for government corruption and abuse. But more important, the rule of law rests on the people within a society to accept the primacy of the Law over personal, philosophical, and religious moral beliefs. The rule of law rests on the acceptance of all that all are subject to and subservient to the law:

From the fact that the rule of law is a limitation upon all legislation, it follows that it cannot itself be a law in the same sense as the laws passed by the legislator. Constitutional provisions may make infringements of the rule of law more difficult. They may help to prevent inadvertent infringements by routine legislation. But the ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal. It will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestionably accepted by the majority.

A society that is so constructed on that common ideal also has institutions and methods of addressing injustice (however that is defined) and laws that are unjust in a manner that changes such laws but honors the idea of the Law and its superiority. A society that culturally has not developed to such a stage will not easily endure the inconveniences of the Law or specific laws when they do not agree with the moral or religious views held by certain aspects of society or the government. Put simply, the institution of the rule of law and the principles of a liberal democracy cannot be implanted in any society. In part because the

The First point that must be stressed is that, because the rule of law means that government must never coerce an individual except in the enforcement of a known rule, it constitutes a limitation on the powers of all government, including the powers of the legislature. It is a doctrine concerning what the law ought to be, concerning the general attributes that particular laws should possess. This is important because today the conception of the rule of law is sometimes confused with the requirement of mere legality in all government action. The rule of law, of course, presupposes complete legality, but this is not enough: if a law gave government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all laws conform to certain principles.

Hayek, supra note 67 at 205.
134. Id. at 205–206 (emphasis added).
135. See, e.g., Cynthia Alkon, The Flawed U.S. Approach to Rule of Law Development, 177 PENN ST. L. REV. 797 (2013), who argues that the United States has a flawed approach in providing rule of law development funds to underdeveloped countries that don’t have the political and social history or social institutions to implement rule of law programs; see also Jeffrey Redding, Secularism, the Rule of Law, and Shari a Courts: An Ethnographic Examination of a Constitutional Controversy, 57 ST. LOUIS...
rule of law depends on a set of values and when implemented the rule of law becomes more than the sum of its parts:

Law is more than the words that put it on the books; law is more than any decisions that may be made from it; law is more than the particular code of it stated at any one time or in any one place or nation; more than any man, lawyer or judge, sheriff or jailer, who may represent it. True law, the code of justice, the essence of our sensations of right and wrong, is the conscience of society. It has taken thousands of years to develop, and it is the greatest, the most distinguishing quality which has evolved with mankind. None of man’s temples, none of his religions, none of his weapons, his tools, his arts, his sciences, nothing else he has grown to, is so great a thing as his justice, his sense of justice. The true law is something in itself; it is the spirit of the moral nature of man; it is an existence apart, like God, and as worthy of worship as God. If we can touch God at all, where do we touch him save in the conscience? And what is the conscience of any man save his little fragment of the conscience of all men in all time?

The rule of law is man’s attempt to establish relationships between individuals and between individuals and government. The rule of law is man’s attempt to civilize himself, his environment, and create civilizations under the law. The rule of law is an explanatory and foundational idea of


136. This understanding of the rule of law is not without dispute. Communist countries and countries ruled by other legal and cultural traditions would not define the rule of law by the principles of individual freedom and liberty and by definition limited power of government and the government not being a tool of religious values and beliefs. In such nations and cultures the European age of enlightenment view of the rule of law is an affront.

137. In the American context, the rule of law is the embodiment of both individual freedom and liberty in all of its forms. Thus the rule of law, embodied in paper under the U.S. Constitution and the Bill of Rights, settles the proposition that government is limited and that the individual has rights that are not subject to the laws of man because those rights are bestowed by the law of nature—by the hand of God to all mankind.


139. The value of the rule of law is in the fact that it provides definition to already existing relationships. These relationships define how individual laws are made, how they are enforced, and how they are applied to specific individuals. These relationships define the hierarchy of differing laws and differing legal institutions. These relationships settle before a dispute how disputes will be settled. The value of the rule of law and why the rule of law is important is in the order it creates, the identities it maintains, the values it protects, and the agreements it represents between the barbarous nature of men who decide to live within a society to protect the rights they own but cannot fully protect in the state of nature.

140. As Justice Holmes said:

The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.
The rule of law underpins the establishment and functioning of constitutional governmental structures, which includes a higher law to appeal to when a specific law is seen as unjust or wrong. The rule of law is defended because of what it represents in its classical meaning:

Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey. And the constitution which the new American nation was to give itself was definitely meant not merely as a regulation of the derivation of power but as a constitution of liberty, a constitution that would protect the individual against all arbitrary coercion.

The rule of law ensures that no one is above the law (obedience to the law is required and enforced) and no one is below the law (not provided the protections of the law).

Holmes, supra note 40, at 459.

141. Returning to Hayek’s exposition of the rule of law in democracies:

If the ideal of the rule of law is a firm element of public opinion, legislation and jurisdiction will tend to approach it more and more closely. But if it is represented as an impracticable and even undesirable ideal and people cease to strive for its realization, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny.

Hayek, supra note 67, at 206.


143. See The Papers of James Madison, supra note 35 at 296-300 (In Madison’s letter to Jefferson on the drafting and inclusion of a Bill of Rights to the U.S. Constitution, he states “yet there may be occasions on which the evil may spring from the [government]; and, on such, a Bill of Rights will be a good ground for an appeal to the sense of the community”).

144. Hayek, supra note 67, at 181–82.

145. The rule of law involves the lack of arbitrary power over the natural freedom of liberty enjoyed by all from state of nature. Government exists to protect that freedom from other men and then to protect it from government. The enforcement of this lays in part on the requirement that the rule of law requires that the specific laws passed by the government are share the three traditional tenets of generality, certainty and equality. Such is the classical theory of the rule of law:

The conception of freedom under the law . . . rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and therefore free. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man’s will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by “law” we mean the general rules that apply equally to everybody.
The rule of law is not a term of art within political philosophy, legal theory, or in political science.¹⁴⁶ It means different things to different people. But the rule of law defines the primacy of the law and that primacy ensures against government tyranny.¹⁴⁷ These principles answer the Hobbesian perception of

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¹⁴⁶ This is Hayek’s chief complaint. He complains that the distinction between the rule of law in its classical general sense is confused with the rule of law regarding the obedience to the law and the mechanical structure in making laws that govern behavior.

But if it is the law that makes us free, this is true only of the law in the sense of abstract general rule, or of what is called “the law in the material meaning,” which differs from law in the merely formal sense by the character of the rules and not by their origin. The “law” that is a specific command, an order that is called a “law” merely because it emanates from the legislative authority, is the chief instrument of oppression. The confusion of these two conceptions of law and the loss of the belief that laws can rule, that men in laying down and enforcing laws in the former sense are not enforcing there will, are among the chief causes of the decline of liberty, to which legal theory has contributed as much as political doctrine.

... The classical view is expressed in Chief Justice John Marshall’s famous statement: “Judicial power, as contradistinguished from the power of laws, has no existence. Courts are mere instruments of law, and can will nothing.” Hold against this the most frequently quoted statement of a modern jurist, that has found the greatest favor among so-called progressives, namely, Justice Holmes’s that “general propositions do not decide concrete cases.” The same position has been put by a contemporary political scientist thus: “The law cannot rule. Only men can exercise power over other men. To say that the law rules and not men, may consequently signify that the fact is to be hidden that men rule over men.”

¹⁴⁷ The rule of law is a system of defining government as well as establishing the hierarchy of both law and government power. From the earliest days of human society governmental power has existed. The rule of law settles the truth that this power is not absolute. A constitutional republic, like the United States, asserts that in this hierarchy of law the Constitution stands supreme and all other laws and all government action must be subservient it the Constitution—both to its mechanical rules of government operation (horizontal and vertical federalism) and its principles of liberty that the government may not abridge (Due Process of Law and Equal Protection of the Law as well as the Bill of Rights).

A constitution which in such manner is to limit government must contain what in effect are substantive rules, besides provisions regulating the derivation of authority. It must law down general principles which are to govern the acts of the appointed legislature. The idea of a constitution, therefore, involves not only the idea of hierarchy of authority or power but also that of a hierarchy of rules or laws, where those possessing a higher degree of generality and
nature\textsuperscript{148} by replacing rule by law with rule of law.\textsuperscript{149} The classical (traditional) approach defines the rule of law “as an instrument and basis for government”\textsuperscript{150} or, put another way, the rule of law defines and justifies the existence of government. The rule of law means “what it says: the rule of laws [and] people should obey the law and be ruled by it.”\textsuperscript{151} The outcome of the process of the law does not define the rule of law.\textsuperscript{152} This was the approach of Hobbes and reflected in the character of Javert. Consider an episode of the T.V. series Law and Order: SVU in which a prosecutor concluded that, although the application of the law required an unfortunate and inconvenient result, “I have to enforce the law. The law is not always about justice.”\textsuperscript{153} The classical distinction between law and justice is recognized in fiction as well as in politics.

The late nineteenth and early twentieth century changed the classical approach to defining the rule of law to include within its meaning that the law is designed to protect certain classes or groups with special protections.\textsuperscript{154} The rule of law was redefined by the equal distribution of the output and outcome of labor and the fruits thereof.\textsuperscript{155} Justice and the rule of law under this social proceeding from a superior authority control the contents of the more specific laws that are passed by a delegated authority.

\textit{Id.} at 178. Hayek was correct when he wrote that the idea of a higher Law that governed the formation of lower laws is an old one and that “the idea of making this higher law explicit and enforceable [sic] by putting it on paper, though not entirely new, was for the first time put into practice by the Revolutionary colonists. The individual colonies, in fact, made the first experiments in codifying this higher law with a wider popular basis than ordinary legislation.” \textit{Id.} at 179. Although he was correct that in a constitutional republic the rule of law is based on a “moral tradition of the community, a common ideal shared and unquestionably accepted by the majority,” he did not fully consider the fact that the meaning of the higher law and the asserted purpose for it can change in the minds of the society while at the same time maintaining the basic idea of the rule of law. \textit{Id.} at 205–206.


\textsuperscript{149} Although rule by law is considered the antithesis of rule of law, rule by law can also be understood as the antithesis of rule by men—the latter being connected to arbitrariness. Rule by law defined in this manner “is indeed the ultimate foundation of any attempt at curbing the existence of state power.” Thus, “if one considers the situation that the government rules by individual decree only, it becomes clear that the requirement of the rule by law is vital.” Bedner, \textit{supra} note 92, at 57. When rule by law is contrasted with the rule of law concept, rule by law is understood to be “conveying a rather negative meaning upon it. It in fact suggests that the state has law at its disposal as a powerful weapon without being subject to any restraint it inherently imposes.” \textit{Id.}

\textsuperscript{150} Bedner, \textit{supra} note 92, at 54.

\textsuperscript{151} Raz, \textit{supra} note 12 at 212.

\textsuperscript{152} Id; see also, Tamanaha, \textit{Supra} notes 60, 62 and 108 and accompanying text.

\textsuperscript{153} \textit{Law & Order: Special Victims Unit, Protection} (NBC television broadcast Jan. 11, 2002).

\textsuperscript{154} Hayek points out that the word privileges comes from the Latin private or specific laws for specific groups. His complaint regarding special status laws for specific groups is that it is violates the traditional or classical understanding of the rule of law; under which there “is the reign of general and equal laws, of rules which are the same for all, or, we might say, of the rule of \textit{leges} in the original meaning of the Latin word for laws—\textit{leges} that is, as opposed to the \textit{privi-leges}.” HAYEK, \textit{supra} note 67, at 154.

\textsuperscript{155} See \textit{supra} notes 102 and 107 and accompanying text.
welfare approach are defined as means, not ends. The social welfare (social justice) approach defines the rule of law to include moral conceptions and attempt to “set standards to the contents” of positive law. The social welfare definition includes the morality and substantive results of the law. In other words, the rule of law is about the outcome and output of the creation and application of the law; not just simply the process and procedure of how the law is created and applied. The rule of law means more and requires more than statutory compliance.

The dynamics of this change from the classical to the social welfare (social justice) definition of the rule of law is manifested in the arguments between social conservatives and social progressives in current American and world politics. Although both perspectives agree that the meaning of the rule of law includes the protection of individuals from each other and protection of individuals from government, the broader meaning of the rule of law is constructed within the politics and philosophy one holds. To paraphrase a famous phrase, the beauty of the rule of law lays in the eyes of the beholder.

156. “The long-standing distinction between thin (or procedural) and thick (or substantive) conceptions of the rule of law has been debated, refined and elaborated at great length, as has the differences between rule of law, rule by law and rechtssstaat.” Peerenboom, supra note 116, at 6. Rechtssstaat being government obedient to its own rules and laws. Bedner, supra note 92, at 58.

157. Id. at 54.