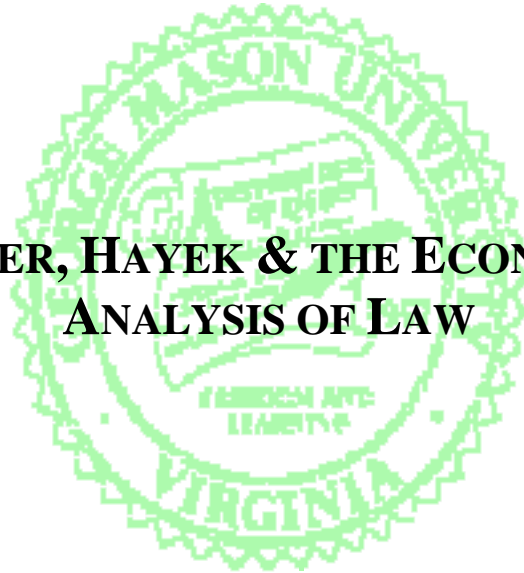


GEORGE MASON UNIVERSITY SCHOOL OF LAW

POSNER, HAYEK & THE ECONOMIC ANALYSIS OF LAW



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POSNER, HAYEK & THE ECONOMIC ANALYSIS OF LAW

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Abstract:

This Essay examines Richard Posner's critique of F.A. Hayek's legal theory and contrasts the two thinkers' very different views of the nature of law, knowledge, and the rule of law. Posner conceives of law as a series of disparate rules and as purposive. He believes that a judge should examine an individual rule and come to a conclusion about whether the rule is the most efficient available. Hayek, on the other hand, conceives of law as a purpose-independent set of legal rules bound within a larger social order. Further, Posner, as a legal positivist, views law as an order consciously made through the efforts of judges and legislators. Hayek, however, views law as a spontaneous order that arises out of human action but not from human design. For Hayek, law as a spontaneous order—of which the best example is the common law—contains and transmits knowledge that no one person or committee could ever know, and thus regulates society better than a person or committee could. This limits the success of judges in consciously creating legal rules because a judge will be limited in the forethought necessary to connect a rule to other legal and non-legal rules and what Hayek termed "the knowledge of particular circumstances of time and place."

This Essay also explores Posner's argument that Hayek misunderstood the "rule of law" as the "rule of *good* law." Contrary to Posner, in the view Hayek came to espouse in his later work, the common law embodies the rule of law in a way that positivist creations of law do not. When judges consciously make law it is those human actors, not the "law" as such, that "rule." When law arises out of a spontaneous order, however, it is the law that rules. Judges merely articulate it. Posner does not distinguish between these two processes, and therefore sees a difference between the "rule of law" and the "rule of *good* law" which Hayek does not. This is because for Hayek the "rule of law" is only meaningful in a liberal society where law arises out of a spontaneous order.

Keywords: Hayek, Posner, law & economics, common law, spontaneous order, rule of law, judicial knowledge, stare decisis, precedent, positivism, group selection

JEL Codes: B53, KOO, BOO

Posner, Hayek, and the Economic Analysis of Law

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Although F.A. Hayek was trained as a lawyer and earned a Nobel Prize as an economist, he has been largely ignored by modern law and economics scholars. Richard Posner's recent essay comparing Hayek and Hans Kelsen through the lens of the economic analysis of law indicates why Hayek has been overlooked by the modern school of law and economics.¹ The Hayekian view of the world rests on conceptions of law, economics, and the state that are fundamentally at odds with prevailing modes of analysis. Finding this fundamental incompatibility, Posner concludes somewhat surprisingly (to both conventional wisdom as well as himself), that it is Kelsen, not Hayek, who provides a better fit with modern law and economics analysis.

This essay will focus on three areas of contrast between Posner and Hayek's models of the economic analysis of law. This comparison, however, quickly reveals more fundamental and far-reaching distinctions between the Posnerian and Hayekian systems of law. At root, the two systems turn on radically different assumptions about the nature of knowledge and ignorance in society and the economy, and the impact that

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¹ Richard A. Posner, *Kelsen, Hayek, and the Economic Analysis of Law*. Judge Posner originally produced this essay for a conference sponsored by the European Law and Economics Association in Vienna in 2001. The essay was then included as Chapter 7 of Posner's 2003 book *Law, Pragmatism & Democracy*. See RICHARD A. POSNER, *LAW, PRAGMATISM & DEMOCRACY* (2003) [hereinafter POSNER, *LAW, PRAGMATISM & DEMOCRACY*]. It was again used in a symposium article in the *New York University Journal of Law and Liberty* in 2005. See Richard A. Posner, *Hayek, Law, & Cognition*, 1 *NYU J. L. & LIBERTY* 147 (2005) [hereinafter Posner, *Hayek, Law & Cognition*]. This latest version expanded upon the previous work and included some discussion of Hayek's theory of psychology, and a more general critique of Austrian Economics. For the most part this Essay refers to the version in *Law, Pragmatism & Democracy*, but makes use of that in the *New York University Journal of Law and Liberty* as well.

this holds for the nature of the judicial process. Posner believes that judges (such as himself) are capable of collecting and applying substantial amounts of both factual and theoretical knowledge that can and should be used to inform the judicial function. Hayek, by contrast, is doubtful about *any* collective decision-maker, including judges, having the ability to collect and weigh a sufficient amount of information to be able to consciously develop and improve the law according to any measuring stick of social outcome.

From this fundamental disagreement on the nature of knowledge and the ability of judges to harness it, fundamental disagreements arise about both the positive and normative economic analysis of law. First, Posner and Hayek hold fundamentally different views about the nature of the common law, as encapsulated in Hayek's characterization of the common law as a "spontaneous order," in contrast to Posner's conceptualization of the common law as essentially a collection of disparate rules. Second, it leads to a radical difference of opinion regarding the normative purpose of law in society. Posner argues that judges should consciously use law to further designated social goals, namely wealth-maximization; Hayek, by contrast, argues that the purpose of the law should be to create the conditions necessary for the maintenance of the spontaneous order of society, including the spontaneous order of the common law itself. Finally, these contrasting views of the nature of law and the role of economic analysis in law generate fundamentally different views of the rule of law. Whereas Posner contends that Hayek confuses the "rule of law" with the "rule of *good* law" or the "rule of *liberal* law," the analysis presented here reveals that Hayek views the rule of law as being determined precisely by its relationship to a liberal social order and market economy.

Thus there is in fact no confusion in Hayek's use of the rule of law, but rather it may be Posner who is confused because his use of the term fails to provide social context to its use.

Part I of this essay thus begins with the different understandings of knowledge in Hayek and Posner's systems of economics. Part II then compares Hayek and Posner's view of law and the judicial role in the common law. Part III addresses Posner's criticism of Hayek's understanding of the concept of the "rule of law." Part IV concludes with an analysis of the accuracy and normative attractiveness of these two rival views of the economic analysis of law.

I. The Nature of Judicial Knowledge

The foundation for the disagreement between Posner and Hayek on the economic analysis of law is grounded in a fundamental difference between the two over the nature of knowledge and its accessibility to collective decision-makers such as judges.

A. Posner on Judicial Knowledge

The cornerstone of Posner's economic analysis of law is that judges do, can, and should use economic principles to inform their decision-making and to improve the law itself. Embedded within this analysis is a fundamental assumption about the ability of judges to compile and analyze the knowledge necessary to understand the implications of their decisions and to render decisions that will have both the goal and effect of improving the economic efficiency of the law.

In Posner's view, when a judge announces a legal rule he must take into consideration the future effects of that rule. For example, in a torts case the judge should "consider the probable impact of alternative rulings on the future behavior of people

engaged in activities that give rise to the kind of accident in the case before him.”² In choosing between possible rules efficiency is the paramount criterion. According to Posner, judges “might as well concentrate on increasing” efficiency because they are not well disposed, *qua* common law judges, to enforce alternative values, such as wealth redistribution.³ Thus, Posner views judges as future-looking rule-makers who decide which rules to impose on the parties before them based upon the most efficient outcome that will follow from those rules. This includes assessing what would be the most efficient outcome in circumstances where, because of transaction costs, a transaction would not occur without judicial intervention.⁴

Viewing judges as rule makers who seek the most efficient outcome begs the question of *how* judges decide what rule will be the most efficient. Posner admits as much when he states “the economic theory of law presupposes machinery for ascertaining the existence of the facts necessary to the correct application of a law.”⁵ Judges must rely on the facts provided by the parties in the cases before them, but also general social science data that can help judges ascertain how a legal rule will influence behavior.

Posner admits that there are some limits to this view, limits that Hayek, as is discussed below, recognizes much more concretely. Posner states that in crafting new rules of law “judges, and legal professionals in general, may be so bereft of good sources

² RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 26 (6th ed. 2003) [hereinafter POSNER, *ECONOMIC ANALYSIS*].

³ POSNER, *ECONOMIC ANALYSIS*, *supra* note, at 252 ; *see also id.* at 533 (“If, therefore, common law courts do not have effective tools for redistributing wealth . . . it is to the benefit of all interest groups that courts . . . should concentrate on making the pie larger.”).

⁴ *See, e.g., id.* at 250 ([T]he common law establishes property rights, regulates their exchange, and protects them against unreasonable interference—all to the end of facilitating the operation of the free market, *and where the free market is unworkable of simulating its results.*” (emphasis added)). *See generally*, Ronald A. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

⁵ POSNER, *ECONOMIC ANALYSIS*, *supra* note, at 267.

of information . . . that their most efficient method of deciding cases and resolving issues of institutional design is to follow, or at least to be strongly constrained by, precedent.”⁶ Posner limits this handicap, however, to situations when social change has created conditions so removed from the judges’ knowledge that precedent is the only reference point. This is not meant to imply that Posner does not believe judges should generally adhere to precedent—he does—but that judges should also seek outside information in crafting legal rules.

B. Hayek on Judicial Knowledge

Hayek holds a far less optimistic view of the ability of judges to collect and synthesize the degree of knowledge necessary to engage in the far-reaching economic balancing encouraged by Posner or to even predict whether the adoption of a particular rule will make society better-off or worse-off. Others have addressed the question as to whether judges are suited by training and expertise to engage in the far-ranging inquiry demanded of the Posnerian wealth-maximizing judge.⁷ It has also been questioned whether judges in fact are as likely to adopt wealth maximization as their primary goal, as Posner believes, instead of egalitarian or redistributive goals.⁸ Hayek’s challenge, however, is more fundamental—assuming that a judge possesses the technical ability to execute the economic analysis necessary to choose the economically efficient rule, and assuming further that the same judge faithfully seeks to implement his scheme, can such a judge actually predict that any decision he takes will in fact *effectuate* an improvement

⁶ *Id.* at 561.

⁷ See, e.g., James M. Buchanan, *Good Economics, Bad Law*, 60 VA. L. REV. 483 (1974) (reviewing First Edition of Posner’s *Economic Analysis of Law*).

⁸ James E. Krier, *Book Review: Economic Analysis of Law*, 122 U. PA. L. REV. 1664 (1974); Todd J. Zywicki, *The Rise & Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1563-64 (2003) [hereinafter Zywicki, *Rise & Fall*].

in the law? In other words, if Richard Posner himself had the time to rule on every important case, could he in fact effectuate substantial long-term improvement in the law?

The implications of the Hayekian system suggest that Hayek would say “no.” Posner recognizes this intuition, who notes that for Hayek the notion of a “capitalist judge” would be a contradiction in terms, just as would be a “socialist judge.”⁹ Posner indicates that he believes Hayek’s rejection of a capitalist judge rests on the normative notion of the judge’s role in society and the propriety of reading one’s personal views into the law. Posner writes, “The contradiction Hayek identifies has nothing to do with the content of the judge’s policy views. It lies rather in the judge’s allowing those views to influence his decisions.”¹⁰ Posner concludes that as a result, the role of a Hayekian judge is “passive,” relegated to enforcing the expectations created by custom, rather than seeking to improve the law according to socialist principles, capitalist principles, or any other principles.¹¹

Although Posner is correct in observing that Hayek rejects the proper role of judges as seeking to improve the law according to capitalist or any other principles, Hayek’s rejection lies in positive, not normative analysis. It seems evident that that if judges or any other collective decision-maker *could* improve the law by reading capitalist principles into it, then the judge should do so.¹² The challenge, therefore, is not the judge’s normative goals, but whether tinkering with particular legal rules will actually bring about the desired effect of actually improving the law. For Hayek, it is this step of

⁹ POSNER, LAW, PRAGMATISM & DEMOCRACY, *supra* note, at 277. This is drawn from Hayek’s comment in Law, Legislation and Liberty. F.A. HAYEK, 1 LAW, LEGISLATION & LIBERTY: RULES & ORDER 121 (1973) [hereinafter HAYEK, LLL: RULES & ORDER].

¹⁰ POSNER, LAW, PRAGMATISM & DEMOCRACY, *supra* note, at 277.

¹¹ *Id.*

¹² In this view, Hayek presumably would disagree with those such as Buchanan, who truly do see the role of judges as being passive, implementing the policy choices made at the constitutional or political level. See Buchanan, *Good Economics, Bad Law*, *supra* note.

trying to predict whether changes to the law will actually bring about the predicted and desirable economic and social effects that the judge seeks to achieve that presents the insuperable obstacle. Thus, Hayek's critique is not primarily grounded in the idea that it is *inappropriate* for judges to impose particular policy views in the law, but rather that it is *impossible* for judges to reliably and predictably bring about the desired policy goals that they seek to obtain.¹³

Hayek's view as to the proper role of the judge derives from his observations regarding the ability of judges to overcome their ineradicable knowledge of the effects of their decisions, and hence, their inability to predict whether their decisions will actually advance or retard the achievement of their desired goals. In turn, this suggests that although Posner is correct in noting that Hayek sees the role of the judge as being limited to enforcing parties' legitimate expectations, this does *not* mean that judges are "passive." Rather, they still retain the task of distinguishing legitimate from illegitimate expectations, and determining how particular rules fit within the larger overall framework of rules.¹⁴

Judges, Hayek argues, are fundamentally ignorant about almost all of the effects and consequences of their decisions. The inability of judges to foresee the full implications of their decisions arises from the inherent complexity of society and the fundamental inability of judges to collect all of the information that would be necessary to determine whether, in fact, any given rule will tend to increase economic wealth in the long run. As Hayek states, "Law-making is necessarily a continuous process in which

¹³ LLL:RULES AND ORDER, *supra* note, at 102 (noting that the judge "will never be able to foresee all of the consequences of the rule he lays down"); cf. G. Marcus Cole, *Shopping for Law in a Coasian Market*, 1 NYU J. L. & Liberty 111, 115 (2005) ("[V]ery complex orders, comprising more information than any one brain could possibly access, can only be brought about spontaneously.").

¹⁴ These attributes of Hayek's system are discussed in greater detail *infra*, Part III.

every step produces hitherto unforeseen consequences for what we can or must do next.”¹⁵ To understand fully why judges cannot predict the full consequences of their decisions, it is necessary to review Hayek’s understanding of knowledge, and how that pertains to judicial decision-making.

In his famous essay *The Use of Knowledge in Society*, Hayek addresses the issue of the nature of knowledge in the context of central economic planning under socialism.¹⁶ As will become readily apparent, however, the challenge of economic planning under socialism is readily applicable to the challenge of a wealth-maximizing Posnerian judge.¹⁷ As Hayek notes, the “economic problem of society is thus not merely a problem of how to allocate ‘given’ resources It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only those individuals know.”¹⁸ This decision, in turn, necessitates a second decision—should we place primary authority for economic decisions in particular contexts in the hands of individual actors, or in the hands of centralized decision-makers such as judges? Answering this question leads to a corollary question—should the task of social institutions, such as law, be designed primarily to try to efficiently funnel dispersed knowledge from individuals to centralized decision-makers, or should social institutions primarily seek to convey to the individuals such additional knowledge as they need in order to enable them to dovetail their plans with those of others?¹⁹ Posner

¹⁵ F.A. HAYEK 2 LAW, LEGISLATION, & LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 65 (1976) [hereinafter HAYEK, LLL: MIRAGE].

¹⁶ F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945), reprinted in THE ESSENCE OF HAYEK 211 (CHIAKI NISHIYAMA & KURT R. LEUBE eds., 1984) [hereinafter Hayek, *Use of Knowledge*].

¹⁷ See Gerald P. O’Driscoll, Jr., *Justice, Efficiency, & The Economic Analysis of law: A Comment on Fried*, 3 J. LEGAL STUD. 355 (1980).

¹⁸ Hayek, *Use of Knowledge*, *supra* note, at 212.

¹⁹ *Id.* at 213.

suggests that the purpose of social institutions should be to accomplish the former—to funnel information about individual preferences, constraints, and the like to judges, who can then weigh these various elements and come out with a rational resource allocation. Hayek indicates by contrast that the purpose of law is to provide to dispersed economic decision-makers the “additional knowledge” necessary to rationally plan their own affairs.²⁰ As Hayek states the puzzle, “This is not a dispute about whether planning is to be done or not. It is a dispute as to whether planning is to be done centrally, by one authority for the whole economic system, or is to be divided among many individuals. . . . Competition . . . means decentralized planning by many separate persons.”²¹ In other words, the question is whether the purpose of the law is to accomplish some overall social objective or “plan,” such as suggested by Posner, or whether the law is designed to serve as an input into individual expectations to enable them to effectuate their *own individual* plans by coordinating their affairs with others who are necessary to effectuating one’s own plans. To understand whether the purpose of law should be to funnel information from market actors to judges, or instead from judges to market actors, it is first necessary to understand the nature of knowledge in the Hayekian system.

Hayek distinguishes between two types of knowledge—scientific knowledge and “knowledge of the particular circumstances of time and place.”²² The latter form of knowledge, Hayek emphasizes, is the essence of economic knowledge. It consists of such acts as knowing of and putting to use a machine not fully employed, reallocating a particular individual to a position where his skills can be better used, or being aware of a

²⁰ *Id.* at 213.

²¹ *Id.* at 212; see also Todd J. Zywicki, *Epstein & Polanyi on Simple Rules, Complex Systems, & Decentralization*, 9 CONST. POL. ECON. 143 (1998).

²² Hayek, *Use of Knowledge*, *supra* note, at 214.

surplus stock of goods that can be drawn upon during an interruption of supplies.²³ This type of knowledge is simply not the type of knowledge that can be easily transmitted to a centralized decision-maker, and in some cases cannot be transmitted at all. It includes tacit knowledge and other similar types of knowledge and not express data of costs and benefits. For decision-makers seeking to make maximum use of this knowledge of time and place, it is necessary to distribute “additional knowledge” to those decision-makers.

C. Hayek and Posner’s Analogies to the Price System

Hayek focuses on the price system as an institution that provides the type of “additional knowledge” that individuals need in order to make efficient use of this decentralized knowledge.²⁴ He uses the example of a change in the market for tin, such as an increase in demand through a new use for tin, or a decrease in supply through the elimination of source of demand.²⁵ It does not matter whether there is an increase in demand or decrease in supply—and as Hayek stresses, it is significant that in fact it does not matter what caused the tin scarcity. “All that the users of tin need to know,” he observes, “is that some of the tin they used to consume is now more profitably employed elsewhere and that, in consequence, they must economize tin.”²⁶ Most users of tin need not know where the more urgent need has risen or why—only a small number of users need to know of the initial scarcity for information to be transmitted through the price system to signal that tin has become more scarce. Hayek illustrates the chain of information transmission that conveys to end users of tin the need to conserve or make more efficient use of tin:

²³ *Id.* at 214.

²⁴ Or, indeed, to make investments to develop this sort of tacit and decentralized knowledge.

²⁵ Hayek, *Use of Knowledge*, *supra* note, at 218.

²⁶ *Id.* at 219.

If only some [users of tin] know directly of the new demand, and switch resources over to it, and if the people who are aware of the new gap thus created in turn fill it from still other sources, the effect will rapidly spread throughout the whole economic system and influence not only all the uses of tin but also those of its substitutes and the substitutes of these substitutes, the supply of all the things made of tin, and their substitutes, and so on; and all of this without the great majority of those instrumental in bringing about these substitutions knowing anything at all about the original cause of these changes. The whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that though many intermediaries the relevant information is communicated to all.²⁷

Posner, by contrast, uses an example of milk delivery in New York City, which at first glance appears to make the same point at Hayek's tin mine. "No milk czar decides how much milk is needed when and by whom and then obtains the necessary inputs, which include dairy farms and farmers, milk-supply plants, refrigerated milk trucks, packaging equipment and materials, accounting and other support activities, and the scheduling and provision of delivery to retail outlets."²⁸ The only coordinator that brings together all these suppliers of raw materials, labor, and capital is the price system. Moreover, not only are they coordinated *within* the milk distribution system, the milk distribution system is coordinated with still *other* agricultural and other markets, regionally, nationally, and even globally.²⁹

But in altering the example, it appears that Posner has in fact also inadvertently, but importantly, recharacterized the point of Hayek's example. Hayek's example is chosen to illustrate the *dynamic* nature of markets and the price system, which responds in a rapid and decentralized manner to an exogenous demand or supply shock. Posner's

²⁷ *Id.* at 219.

²⁸ Posner, *Hayek, Law, & Cognition*, *supra* note, at 149. .

²⁹ *Id.*

example, by contrast, is one of a *static* analysis of the market and the coordination of the many individuals in the market. While the market, of course, performs both functions, the choice of examples also illustrates a subtle difference of mindset in the different ways that Hayek and Posner view the law and other social institutions, such as markets. For Posner, the world is essentially orderly, predictable, and in equilibrium. The fundamental social problem, therefore, is how to arrange social, legal, and economic institutions so as to maximize social wealth in equilibrium. Coordination of individual activity is essentially taken for granted, and the goal is to ensure that this coordination occurs at the level of interaction that maximizes social wealth.

For Hayek, by contrast, the world is fundamentally in disequilibrium. The marvel is not that coordination occurs without the oversight of a “milk czar,” but rather that coordination occurs *at all* in light of the fact that coordination *could not* be imposed by any milk czar. Every action by any individual creates a new perturbation to the system—a new use for tin or the elimination of a source of tin. From a civil war in Zambia to a flat tire in Brooklyn, there are constant disruptions to the flow of goods and services. The miracle, therefore, is that coordination can emerge from this chaotic stew of disparate individual actions and motivations. For Hayek, therefore, the goal of social institutions—including law—is fundamentally to enable smooth individual *coordination*. Coordination cannot be taken for granted—smooth coordination only results from the existence of social institutions that enable individuals to predict one another’s actions.

Indeed, Hayek’s understanding of equilibrium itself differs from the standard neoclassical model that underlies Posner’s example.³⁰ The differences between the two

³⁰ See F.A. von Hayek, *Economics & Knowledge*, reprinted in L.S.E. ESSAYS ON COST (James M. Buchanan & George F. Thirlby eds., 1981) (originally published in *Economica*, Feb. 1937).

conceptions of equilibrium are worth elaborating upon here as they directly relate to Hayek and Posner's views on the ordering power of the common law. The standard understanding of equilibrium describes a collective market phenomenon, where supply and demand are in balance. "General equilibrium" is thus a model of an entire economy where all markets "clear." All that is necessary for a market to be in equilibrium, therefore, is to assume that all relevant parties have full knowledge of prevailing market prices so that they know the relevant price at which to transact. For Hayek, however, equilibrium does not describe "a market," rather it describes an *individual* phenomenon, and specifically the coordination of the various plans formulated and pursued by individual economic actors. Equilibrium is thus a matter of *individual* coordination of plans, rather than a description of a *social* pattern.³¹ In a society based on exchange, once equilibrium is conceived of as coordination of individual plans, it becomes evident that the most important information is *not* the price of various goods but rather the predictability of the actions of other people with whom one wants to trade. As Hayek puts it, "since some of the 'data' on which any one person will base his plans will be the expectation that other people will act in a particular way, it is essential for the compatibility of the different plans that the plans of the one contain exactly those actions which form the data for the plans of the other."³² To say that "society" is in a state of equilibrium, therefore, "means only that a compatibility exists between the different plans which the individuals composing it have made for action in time."³³ He adds:

It appears that the concept of equilibrium merely means that the foresight of the different members of the society is in a special sense correct. It must be correct in the sense that every person's

³¹ *Id.* at 49-50.

³² *Id.* at 50-51.

³³ *Id.* at 53.

plan is based on the expectation of just those actions of other people which those other people intend to perform, and that all these plans are based on the expectation of the same set of external facts, so that under certain conditions nobody will have any reason to change his plans. Correct foresight ... is ... the defining characteristic of a state of equilibrium.³⁴

Equilibrium is thus disturbed whenever one person changes his plans, thereby upsetting the interwoven plans of others. A plan may change either as the result of an internal impulse (simply a subjective change of mind) or in response to an external stimulus (such as an unexpected collapse of a tin mine). As illustrated in his example of the New York milk market, Posner sees the key economic question of one of the coordination of the division of labor through the price system, thereby enabling milk to be delivered efficiently to the proper location. Hayek, however, stresses that in addition to the division of labor, there is also a problem of the division of *knowledge*.³⁵ This describes not just the problem of the efficient distribution of milk, but also the more complicated question of how parties decide whether to manufacture, distribute, and consume milk, instead of yogurt, ice cream, or cheese, or dairy products at all.³⁶ The value of the price system, therefore, is to send signals to market actors as to how much dairy product to produce, in what forms, and even more far-reaching questions of whether to allocate a given parcel of land to dairy farming or something else.³⁷ By focusing only on the coordination of the division of labor, Posner essentially ignores this larger context and the larger value of the information transmitted by the price system.

³⁴ *Id.* at 54.

³⁵ *Id.* at 63-64.

³⁶ *Id.* at 63.

³⁷ *See id.* at 63 (“[P]rice expectations and even the knowledge of current prices are only a very small section of the problem of knowledge as I see it. The wider aspect of the problem of knowledge with which I am concerned is the knowledge of the basic fact of how the different commodities can be obtained and used, and under what conditions they are actually obtained and used, that is, the general question of why the subjective data to the different persons correspond to the objective facts.”)

The price system allows individual consumer decisions about preferences for milk to be transmitted through many steps to decisions about how many cows a dairy farmer should own and even whether his farm is better used as a dairy farm or a strip mall in light of future expectations of competing needs. Prices thus enable parties to better coordinate their plans by enabling them to predict how other parties are likely to act in the future.

For Hayek, legal rules are another social institution similar to that of prices—conveying information to individual actors about both how he should behave as well as how *other* people can be predicted to behave.³⁸ “[T]he system of rules into which the rules guiding the action of any one person must be fitted does not merely comprise all the rules governing his actions but also the rules which govern the actions of the *other members of society*.”³⁹ This emphasis on coordination is illustrated in Hayek’s subtle observation that law operates “not by directly assigning particular things to particular persons, but by making it possible to derive from ascertainable facts to whom particular things belong.”⁴⁰ This in turn specifies who has the authority to decide to what use, among many competing possible uses, particular things can be put toward.

Prices and legal rules, however, are not the exclusive social institutions that perform these sorts of functions. Tradition is a particularly powerful and important source of rules that provide guidance as to parties legitimate expectations of one another’s actions, and therefore to improve interpersonal coordination. Greater coordination among people governed by a set of social, legal, and economic rules enables

³⁸ Thus, both legal rules and economic prices comprise some of the “external facts” that parties rely upon in coordinating their plans with one another. *See supra* n. 34 and accompanying text. As Marcus Cole observes, Hayek’s analogy between prices and legal rules is imperfect. *See* Cole, *supra* note, 121-22. The difficulties in the analogy identified by Professor Cole do not appear to undermine the use of the analogy as discussed here.

³⁹ HAYEK, LLL: MIRAGE, *supra* note, at 25.

⁴⁰ *Id.* at 37.

each individual to make maximum use of his local knowledge and to accomplish his own goals. In turn, enabling individuals to maximize the use of their local knowledge is the necessary condition for prosperity and wealth-maximization.

This observation about the importance of tradition as a provider of social rules to further the goal of interpersonal coordination has an additional implication for understanding the role of judges in Hayek's system versus Posner's. A characteristic feature of Posner's jurisprudence is an implicit belief in legal-centrism, meaning that law is viewed as the primary and often determinate system of rules for determining social outcomes. Thus, whether the field under study is divorce, bankruptcy, torts, or employment discrimination, Posner implicitly assumes that the actions of the parties subject to those rules are determined primarily by the legal rules and the incentives those rules create. Hayek, by contrast, recognizes that legal rules are merely one of many different sets of social rules that govern interactions. This recognition further complicates the efforts of a judge seeking to determine the "efficient" rule in any given situation. A Posnerian judge will thus face a three-fold challenge. First, the judge must possess sufficient learning, information, and expertise to be able to determine the efficient legal rule in isolation. Second, the judge must be able to determine whether the efficient rule in isolation is also the efficient rule when embedded in and interacting with *other* relevant legal rules. But finally, the judge must be able to discern how the legal rule interacts with other *non-legal* rules that may be relevant to the determination.⁴¹

Consider, for instance, the concept of "fiduciary duty" in Anglo-American corporate law. Consider a judge attempting to determine whether to impose a scheme of

⁴¹ See HAYEK, LLL: MIRAGE, *supra* note, at 26 ("This may well mean that the rule one ought to follow in a given society and in particular circumstances in order to produce the best consequences, may not be the best rule in another society where the system of generally adopted rules is different.").

fiduciary duty on corporate officers and directors, as opposed to a contractarian approach. First, the judge would need to know whether governance by fiduciary duty is an efficient rule, a debate that goes back generations and has absorbed many of the leading, and most economically-sophisticated, judges and legal thinkers. Second, the determination of the existence and efficient scope of fiduciary duty in any given situation also will depend on the rules of contract that prevail, and in particular, how courts treat relational contracts as opposed to discrete contracts. Other areas of law may also be relevant. Finally, the efficacy of fiduciary duty as a restraint on managerial agency costs may also be a function of more diffuse social norms and traditions. For instance, there appears to be a substantial difference among countries and cultures in the level of interpersonal and social trust that prevails among people.⁴² It is plausible that the level of social trust that prevails would be an important consideration in determining whether a given society can be best governed by broad and informally-defined concepts such as “fiduciary duty,” rather than taking a more specific contractarian, regulatory, and rule-bound approach to the problem.⁴³

Stated more concretely, while high-trust societies such as the United States can govern large corporations by fiduciary duty, in a low-trust society such as Russia, reliance on fiduciary duty may be an invitation to looting and self-dealing by corporate directors. In turn, these difficulties of structuring low-cost, effective substitutes for fiduciary duty obligations in low-trust societies has a feedback effect of limiting the size and scale of corporations in low-trust societies. Francis Fukuyama argues, for instance,

⁴² See Paul J. Zak & Stephen Knack, *Trust & Growth*, ECON. J., ROYAL ECON. SOC., 111(470) (2001).

⁴³ For an argument along these line, see Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, in GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW & GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS (Curtis J. Milhaupt ed., 2003).

that in order to minimize the agency problems associated with a separation of ownership and control, corporations in low-trust societies tend to be family-owned and of relatively smaller scale of operations, as opposed to the far-flung separation of ownership and control in American corporations, with widely-held stock holdings.⁴⁴ In turn, a society dominated by family-owned corporations will generate its own set of financial, market, and legal institutions that will differ dramatically from other societies. Imposing the “wrong” legal rule, therefore, will have the additional consequence of causing private actors to try to develop new self-help systems and other market responses to compensate for the unfortunate rule.⁴⁵

Looking just at this example, there seem to be profound difficulties in determining the efficient rule in isolation alone, much less understanding it with reference to other substantive bodies of law (such as contract law) and larger market and social institutions, such as levels of trust. Confronted with such challenges, Hayek would likely argue it is hubristic for a judge to try to rewrite the law according to any defined criteria, whether they seek to support efficiency, social justice, or feminist notions of equality. Instead, given the judge’s radical limits on his ability to predict the full effects of his decision, the wise judge is also a modest judge, attempting to establish the parties’ legitimate expectations in the interaction in question. This will minimize the disruptive effect of legal rules and help to preserve interpersonal coordination.

⁴⁴ FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995)

⁴⁵ An example is the American experience with the Robinson-Patman Act, an antitrust statute that among other things, prohibits “price rebates” to consumers. See 15 U.S.C. 13(a), *et seq.* Subsequent interpretations of Robinson-Patman have held that coupons are not price rebates, and thus do not run afoul of the Robinson-Patman Act. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). As a result, even though the Act clearly is inconsistent with competition and consumer welfare, the ability to easily circumvent it through the issuance of coupons substantially ameliorates the harm caused by the Act. In turn, American consumers have come to develop an expectation of using coupons in shopping, and advertisers have developed marketing schemes around them. This is provided as evidence of the manner in which legal rules interact with market practices in unpredictable ways.

II. Purposes of Law

The purpose of law for Hayek, therefore, is to preserve legitimate expectations and to enable interpersonal coordination, rather than to try to accomplish some end-state goal. Law provides order and predictability in a world characterized by unpredictability and “flux.”⁴⁶ This also explains why, contrary to Posner’s statements, Hayek does not consider the judicial role to be “passive.”⁴⁷ Posner mistakes modesty for passiveness. A Hayekian judge merely has a different responsibility from a Posnerian judge. Whereas Posner exhorts judges to decide cases so as to further some external standard of value, such as wealth maximization, a Hayekian judge has the more modest responsibility of ensuring the internal consistency of his own decision within the overall operating order of the overall spontaneous order—or perhaps more accurately, spontaneous *orders*—in which the judge acts.

Hayek justifies this emphasis on “immanent criticism” or the internal consistency of particular rules within an overarching system of rules by arguing that this approach to law is most likely to maximize interpersonal coordination. Because the purpose of law is to provide guidance to individual actors as to the predicted behavior of other individuals, law serves to preserve legitimate expectations. It follows, Hayek argues, that legitimate expectations are best preserved by making legal rules internally consistent within a given set of rules. When confronted with a dispute that cannot be resolved by settled rules, Hayek argues that the judge’s task is to make any new rule cohere smoothly within the set of existing rules. “If the decision cannot be logically deduced from recognized rules, it still must be consistent with the existing body of such rules in the sense that it serves

⁴⁶ See Mario Rizzo, *Law Amid Flux: The Economics of Strict Liability in Tort*, J. LEG. STUDIES 9 (1980).

⁴⁷ POSNER, LAW, PRAGMATISM, & DEMOCRACY, *supra* note, at 277.

the same order of actions as these rules.”⁴⁸ Judges, therefore, should not engage in external criticisms of legal rules to critique their “efficiency” or the like, but instead, should engage in a process of internal or “immanent criticism” of the extent to which any given legal rule or decision coheres with other related and conceptually surrounding rules. “[A]dvance here is achieved,” Hayek writes, “by our moving within an existing system of thought and endeavouring by a process of piecemeal tinkering, or ‘immanent criticism’, to make the whole more consistent both internally as well as with the facts to which the rules are applied.”⁴⁹ Indeed, Hayek marks this emphasis on “immanent” versus external criticism as a distinguishing feature of “evolutionary (or critical) as distinguished from the constructivist (or naïve) rationalism.”⁵⁰ Hayek argues that by focusing on improving the internal coherence of the legal system, rather than the improvement of the legal system relative to some external benchmark, the judge thereby upholds parties’ legitimate expectations and acts as “a servant endeavouring to maintain and improve the functioning of the existing order.”⁵¹ By nurturing the operation of the legal order through improvement of its internal coherence, the judge thus helps to maintain the overall coordination of society and the economy that depends on the legal order.

The Hayekian judge thus is not passive simply because he rejects the notion that a judge can or should try to remake society according to some more egalitarian or efficient standard of value.⁵² Rather the judge should strive to preserve parties’ legitimate

⁴⁸ HAYEK, LLL: RULES AND ORDER, *supra* note, at 115-16.

⁴⁹ HAYEK, LLL: RULES AND ORDER, *supra* note, at 118.

⁵⁰ *Id.*

⁵¹ *Id.* At 119..

⁵² As Hayek states the matter, “There is little significance in being able to show that if everybody adopted some proposed new rule a better overall result would follow, so long as it is not in one’s power to bring this about.” *Id.*

expectations. Note, however, that preservation of legitimate expectations often will be best furthered not by rote adherence to precedent, but also by a prudent and thoughtful updating of rules to adapt to changing needs and expectations.⁵³ In particular, because legal rules are just one element of the set of rules and practices that guide individual behavior in society, changes in non-legal rules may interact with legal rules such that in order to best preserve expectations and predictability about others' actions, it becomes necessary to amend some legal rules to better cohere with changing legal and non-legal rules. The objective is to increase social coordination, such that individuals will have maximum freedom to act on local information as it arises. Interpersonal *coordination*, not aggregate economic efficiency, should be the overarching goal of the legal system. Hayek writes, "The distinctive attitude of the judge thus arises from the circumstance that he is not concerned with what any authority wants done in a particular instance, but with what private persons have 'legitimate' reasons to expect, where 'legitimate' refers to the kind of expectations on which generally his actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which generally his actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success."⁵⁴

It is thus tempting to treat Hayek as a purely formalistic adherent to precedent, but such a view does not appear to be accurate. Such an interpretation of Hayek misunderstands two elements of his thought. First, Hayek's view of precedent differs from the prevailing modern view of precedent, one that is accepted by Posner. Second,

⁵³ HAYEK, LLL: MIRAGE, *supra* note, at 116.

⁵⁴ HAYEK, LLL: RULES & ORDER, *supra* note, at 98.

Hayek differs with Posner regarding the relevant unit of analysis for the study and evolution of legal rules. Whereas Posner examines law at the level of the individual *rule*, Hayek views the relevant level of analysis at the level of the *system* of rules. In other words, where Posner sees individual selection as the unit of selection for legal analysis and change, Hayek sees group selection among groups of rules as the operative model. Both points require some elaboration.

First, Hayek's view of precedent differs from the prevailing modern view of precedent. Modern scholars operating under the mindset of legal positivism, view the utility of precedent as serving to create and maintain expectations of parties about particular legal rules.⁵⁵ For most of the history of the common law, although judges followed precedent where available, they did not follow the doctrine of *stare decisis*.⁵⁶ Most commentators today collapse the two, treating precedent and *stare decisis* interchangeably. The key distinction is that under a principle of *stare decisis*, a single case authored by an authoritative court standing alone is binding in all subsequent cases; whereas precedent, as traditionally applied, arose only through a *pattern* of several cases decided in agreement with one another, thereby giving rise to a presumption of the correctness of the legal principle. Plucknett observes, "An important point to remember is that one case constitutes a precedent; several cases serve as evidence of a custom. . . . It is the custom which governs the decision, not the case or cases cited as proof of the custom."⁵⁷ He adds, "A single case was not a binding authority, but a well-established

⁵⁵ See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 213 (1986) (noting positivist roots of *stare decisis*); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 514 (1996) (characterizing the strict doctrine of precedent as "essentially a positivist theory, more congenial to the codification movement but grafted onto the doctrine of precedent").

⁵⁶ See Zywicki, *Rise and Fall*, *supra* note, at 1565-81.

⁵⁷ See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 347 (5th ed. 1956).

custom (provided by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive.”⁵⁸

Traditionally, therefore, judicial decisions in particular cases were thought to *illustrate* principles of law, but were not themselves the *source* of authoritative law.⁵⁹ Hayek approvingly quotes Lord Mansfield’s aphorism that “the common law ‘does not consist of particular cases, but of general principles, which are illustrated and explained by those cases’.”⁶⁰ Lord Holt, for instance, observed, “The law consists not in particular instances and precedents, but in the reason of the law”⁶¹ Coke, whose magisterial collection of cases enabled him to cite precedent far more than any prior judge, nonetheless characterized precedent as “examples” of the “true rule” and not “in and of themselves authoritative sources of those rules.”⁶² As a result, the traditional common law judge was not “bound by any past articulation of that law, never absolutely bound to follow a previous decision, and always free to test it against his tradition-shaped judgment of its reasonableness.”⁶³

Through most of the history of Anglo-American common law, therefore, precedent was flexible and based on the congruence of legal decisions with expectations, reason, and judgment. The convergence of several independently acting judges on similar conclusions as to the best rule or principle attested to the wisdom and consensus

⁵⁸ *Id.* See also POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW & ITS INSTITUTIONS 275-77 (A.K.R. Kiralfy ed., 4th ed. 1962).

⁵⁹ Zywicki, *Rise and Fall*, *supra* note, at 1568-69; see also Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 445 (1996).

⁶⁰ HAYEK, LLL: RULES & ORDER, *supra* note, at 86 (citing W.S. HOLDSWORTH, SOME LESSONS FROM LEGAL HISTORY 18 (1928) (quoting Mansfield)).

⁶¹ C.H.S. FIFOOT, LORD MANSFIELD 16 (1936) (quoting Hale).

⁶² Berman & Reid, *supra* note, at 447; see also CARLETON KEMP ALLEN, LAW IN THE MAKING 143-50 (2d ed. 1930).

⁶³ ALLEN, *supra* note, at 194-95.

support for the rule, rather than the authority of the rule.⁶⁴ Precedent was thus more a tradition composed of the decisions of many independent judges acting over time, rather than the sovereign statement of a “law-making” judge. The stricter form of *stare decisis*—that a decision in one case binds subsequent decision—did not arise until the mid-Nineteenth century, primarily as outgrowth of Benthamite legal positivism and the belief that law must issue as a sovereign command from the pen of a known judicial author, rather than the emergence of a principle from the decentralized and spontaneous agreement of several independent judges over time.⁶⁵

Following the traditional common law vision of precedent, Hayek believed that it is the legal *principle* that should be followed, not the precise terms of the rule itself. Although compliance with the more precise legal rule would appear to maximize coordination and predictability, Hayek observes that this appearance of predictability is illusory. In comparison to the precise terms of a particular rule, the more abstract underlying principle will be both more stable and provide a better guide to expectations about how others will behave. Whereas particular rules can change rapidly, principles change only gradually.⁶⁶ Hayek writes, “It seems to me that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to

⁶⁴ See A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 491 (1999) [hereinafter Pritchard & Zywicki, *Finding the Constitution*]; J.G.A. Pocock, *Burke & the Ancient Constitution: A Problem in the History of Ideas*, in J.G.A. Pocock, *POLITICS, LANGUAGE & TIME: ESSAYS ON POLITICAL THOUGHT & HISTORY* 202, 213 (1971).

⁶⁵ See GERALD J. POSTEMA, *BENTHAM & THE COMMON LAW TRADITION* 213 (1986); see also Berman & Reid, *supra* note, at 514 (characterizing *stare decisis* as “essentially a positivist theory, more congenial to the codification movement but grafted onto the doctrine of precedent”); Caleb Nelson, *Stare Decisis & Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 38 (2001) (noting influence of Bentham on American move toward stricter *stare decisis*).

⁶⁶ This insight is elaborated in greater detail by Bruno Leoni. BRUNO LEONI, *FREEDOM & THE LAW* [End of Chapter 4] (1961).

deriving his decisions only from those among accepted beliefs which have found expression in the written law.”⁶⁷ Moreover, articulated verbiage in written judicial opinions are only imperfect reflections of the principles that underlie a given opinion, thus it is the principle that should govern, not the precise language of the case.⁶⁸

The more flexible understanding of precedent from the traditional common law is captured in Hayek’s characterization of the common law as a spontaneous order. Hayek simply does not characterize the virtues of a precedent-based legal system in the cost-benefit terms advanced by modern commentators, such as predictability and minimization of administrative costs that arise from following cases according to *stare decisis*.⁶⁹ Instead, Hayek shares the traditional view that cases are merely *illustrations* of more abstract legal principles; cases are not “law” in and of themselves. The independent efforts of many judges deciding many cases over time generates legal principles, and it is those principles that matter, not the constituent cases themselves. The legal principles that emerge from this implicit collaboration among many judges reflect greater wisdom and consensus than any individual judge deciding any individual case. Thus it is that Hayek characterizes the common law as a spontaneous order in the same way that the market is a spontaneous order. Just as a “market price” for a particular good or service emerges from the decentralized interaction of many individuals, legal principles similarly emerge from the decentralized process of the common law. Moreover, Hayek argues that the law that emerges from this decentralized common law process will be better than

⁶⁷ HAYEK, LLL: RULES & ORDER, *supra* note, at 116. Moreover, he argues that where judicial decisions have most departed from public expectations is when the “judge felt that he had to stick to the letter of the written law” rather than informing the written law with generally accepted expectations. *Id.* at 117.

⁶⁸ HAYEK, LLL: RULES & ORDER, *supra* note, at 78.

⁶⁹ See POSNER, ECONOMIC ANALYSIS, *supra* note, at 553-55 (stating that judges follow precedent, in part, because the legal certainty it promotes lowers the volume of litigation and lessens the need to hire more judges and dilute the power of existing judges).

legislative law, or its equivalent, law imposed by a single case and followed as *stare decisis* in subsequent cases. This is because the rule that emerges will have been tried out in several different factual contexts and found to be reasonable and in accordance with the parties' expectations. As such, the legal principle comes to be understood and relied upon in the community. Indeed, Hayek provocatively argues that judges do a disservice when they adhere to the letter of a precedent when it conflicts with a more coherent principle, in that it is the principle that does and should guide individual expectations, not the letter of the particular precedent.⁷⁰

Hayek's view of precedent and the role of judges follows from his view of the dispersion of knowledge in society. Judges are not asked to make the "best" ruling in any given case because they are to be "passive," as suggested by Posner, but rather because they can do better over time by deferring to the accumulated knowledge of wisdom and tradition in the law. There is thus a high degree of "redundancy" in the Hayekian view of the common law that is absent from Posner's model.⁷¹ In Posner's model, the law is only as good as a particular judge is wise. Hayek's model, by contrast, is built on the insights of sound Burkean tradition, in that the common law reflects the accumulated knowledge of many judges collaborating over time. Indeed, Posner's model surrenders the very purpose of Hayek's framework—the idea that the common law is embodied with tacit knowledge that should be followed even if all of this knowledge cannot be fully understood and articulated. Thus, the deference to precedent is intended not just to reinforce individual expectations, but also because the accumulation of precedent over

⁷⁰ HAYEK, LLL: MIRAGE, *supra* note, at 26.

⁷¹ Robert Sugden, *Spontaneous Order*, 3 NEW PALGRAVE ENCYCLOPEDIA OF LAW & ECONOMICS 485, 488 (P. Newman, ed. 1997).

time reflects a body of traditional knowledge that can provide a source of wisdom deeper than the learning or experience of any single or group of contemporary judges.⁷²

Second, Hayek differs with Posner in his characterization of the proper level of selection for the study of legal rules. Posner argues that there will be selection of the most efficient rules at the level of individual legal rules. Hayek, by contrast, views the relevant level of selection for legal rules as being selection among *groups* of legal rules. Hayek's selection mechanism, like Posner's, is evolutionary in nature. The difference between the two, therefore, rests in the level of selection on which they see selection pressures operating.

Posner's view of rule selection is at the level of a judge choosing between alternative individual rules. Precedent binds the judge's selection of these rules, but only to the extent that the judge feels it is best to adhere to that precedent. What a judge should choose, and what precedent generally entices him to choose, is the most efficient rule. For Posner a classic example is *Hadley v. Baxendale*, the famous case explicating the limits on recovery in a suit for lost profits.⁷³ In a *Hadley*-scenario, A contracts with B for a service that—if performed as contracted—will result in a large profit for A. B does not know what lost profits A might have if he breaches his contract with A. B then breaches the contract and fails to perform the service for A. A therefore fails to achieve the profits he had hoped to garner through B's service. A then sues B for the profits he did not make because of B's breach. The example in *Hadley* itself was B fixing A's grindstone so that A could make money at grinding corn. The question presented is

⁷² See Andrew P. Morriss, *Hayek & Cowboys: Customary Law in the American West*, NYU J. L. & LIBERTY 35, 40 (2005) ("Hayek assumes that judges cannot know enough to do what Posner expects them to do.")..

⁷³ *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). See discussion at POSNER, ECONOMIC ANALYSIS, *supra* note, at 127.

whether A can recover the lost profits (what he would have made from grinding corn), or merely the cost of the service B failed to perform (the cost of fixing the grindstone).

To Posner, a judge faced with this question will base his decision on what is the better *individual* rule. The judge will review the relevant case law and, if the answer is fairly straight-forward, decide whether he wants to follow those precedents, or whether a different rule would be better. If the precedents are not straight-forward then he can simply apply the rule of his choice. In this way Posner agrees with Hayek that the common law, over time, “tests” rules and gives rise to rules that are more societally useful.⁷⁴ However, this occurs through a process of judges repeatedly analyzing individual rules and assessing which rule in a given instance yields a better result.

Hayek argues that the proper level of selection is at the meta-rule level, which is to say, in selection between *societies* governed by different systems of rules.⁷⁵ Individuals can choose and experiment with different individual rules *within* an ongoing spontaneous order, exerting choice over which rules are selected to prevail within the spontaneous order. The emergent properties of the system, however, result from the spontaneous interaction of all of these individually created rules, and thus are not designed by anyone. The spontaneously-generated *system* of rules, therefore, can be understood as having group selection properties independent of the particular attributes of the rules that comprise it.

For example, Hayek theorized that capitalist societies, with rules protecting private property and free enterprise, will propagate themselves—that is last longer and

⁷⁴ See POSNER, *ECONOMIC ANALYSIS*, *supra* note, at 560 (“A rule of the common law emerges when its factual premises have been so validated by repeated testing in litigation that additional expenditures on proof and argument would exceed the value of the additional knowledge produced.”).

⁷⁵ See HAYEK, *LLL: RULES & ORDER*, *supra* note, at 50, 74, 98.

spread their systems of rules to other societies—better than non-capitalist societies because capitalist societies become wealthier with higher rates of population growth.⁷⁶ The interaction between a capitalist and a non-capitalist society occurs on many different levels, including obvious examples such as rules of contract law, but also non-legal rules such as work ethic and increased cooperation between strangers.⁷⁷

No one person or committee selects which group of rules, or which rules within those groups of rules, are adopted by a society and which are not. An individual rule only makes sense in context with the other legal rules of the society, plus the countless cultural customs and habits that order the society. As societies “select” systems of rules the individual rules will relate to each other in ways that an individual judge will be unable to ascertain. The selection at the meta-level will be independent of what any one individual’s choice to follow a specific rule. The selection will occur spontaneously and the system that wins out will simply be the system whose rules are accepted more often than the alternatives.

This emphasis on the group selection aspect of legal rules also explains why Hayek sees the proper role of a judge as focusing on seeking to harmonize and create internal consistency among the constituent rules of the legal system. To focus on the properties of any given rule in isolation is to miss the larger point, which is how the rules that comprise the system of legal rules mesh with one another, and perhaps even more fundamentally, to understand the still higher level of selection as to which behaviors should be governed by legal rules rather than some other system of social ordering, such

⁷⁶ See F.A. HAYEK, THE FATAL CONCEIT 120-122 (1988); see also Todd J. Zywicki, “Was Hayek Right About Group Selection After All?” *Review Essay of* *Unto Others: The Evolution & Psychology of Unselfish Behavior*, by Elliot Sober & David Sloan Wilson, 13 REV. AUSTRIAN ECON., 87-88 (2000) [hereinafter Zywicki, *Was Hayek Right*]; Morriss, *supra* note, at 38.

⁷⁷ See Zywicki, *Was Hayek Right*, *supra* note, at 87 n.5 & n.6.

as market exchange or voluntary civil society associations. Because of the abstract and complex nature of the spontaneous order, individuals today generally will be unable to know for certain which set of rules are optimal; it is only through competition among different systems of rules that we can discover which system is best. Like natural selection, selection among systems of rules is backward-looking, in that which set of rules is superior to alternatives can be determined only after the fact. A forward-looking judge of Posner's liking does not make sense on this understanding, because the choice to adopt a new rule will necessarily lack an understanding of how the rule fits in with the countless other rules of the surrounding society. On the other hand, Hayek is not wholly defeatist—experience, history, and anthropology can provide some insight as to the attributes of systems of rules that are most likely to prevail from this selection process. Reason can thus be a source of useful innovations in legal and social rules, but reason is an imperfect guide to selection among particular rules.

III. The Rule of Law

The foregoing discussion about the nature of the common law also helps to explain some of the differences between Posner and Hayek regarding the nature of the rule of law. Posner argues that Hayek confuses the notion of the “rule of law” with the idea of the “rule of *good* law,” which is the law of a liberal political order.⁷⁸ Posner thus thinks it essential to disentangle the two, arguing that Nazi Germany and the Soviet Union were in fact governed by the rule of law, as their legal system contained the formal prerequisites of law. Posner's criticisms echo those who have launched similar criticisms

⁷⁸POSNER, LAW, PRAGMATISM, & DEMOCRACY, *supra* note, at 281.

of Hayek's characterization of the rule of law.⁷⁹ It is not clear, however, that Posner and other critics have fully understood Hayek's views on the rule of law, especially as they developed over time. It may be that Hayek in fact committed the error ascribed to him by Posner; but, on the other hand, it is necessary to first fully understand what Hayek meant by the "rule of law" and why he may have been correct to use the term in the way he did.

It is true that in his early writings Hayek implicitly adopted the formalistic understanding of the rule of law advocated by Posner.⁸⁰ First, the rule of law requires that government action be "bound by rules fixed and announced beforehand."⁸¹ Second, rules must be known and certain, so that individuals can form their behavior to those laws.⁸² Third, the rule of law requires equality in the sense that the law applies equally to all persons and does not prejudice some categories of people at the expense of others.⁸³ The term "rule of law" thus was intended to generalize Hayek's observations about the common law into an animating principle for the legal system generally—that law is a purpose-independent system designed to enable individuals to increase the predictability of each others' behavior and thus to better coordinate their affairs.⁸⁴ A primary purpose of the rule of law, therefore, was to subject governmental behavior to the discipline of rules, but the rule of law also rightly refers to the ability to predict the behavior of *all* actors, not merely the government. Thus, the rule of law sweeps in the idea of the reliable enforcement of property rights and contracts and protection from tortious and

⁷⁹ See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996); Joseph Raz, *The Rule of Law and Its Virtue*, in JOSEPH RAZ, *THE AUTHORITY OF LAW* 210 (1979); but see Todd J. Zywicki, *Cass R. Sunstein (1996) Legal Reasoning & Political Conflict*, 8 CONST. POL. ECON. 355-358 (1997).

⁸⁰ For a discussion of Hayek's and others' related views on the rule of law, see Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 S. CT. ECON. REV. 1, 3-21 (2003) [hereinafter Zywicki, *Rule of Law*].

⁸¹ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

⁸² FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 208 (1960).

⁸³ *Id.* at 209.

⁸⁴ HAYEK, *LLL: RULES & ORDER*, *supra* note, at 85.

criminal behavior. Following the colloquial distinction, perhaps the best definition of the “rule of law” was to be found by comparing it to its antithesis the “rule of men,” discretionary governance by individual decision-makers. “Freedom” for Hayek is thus not the libertarian ideal of a minimum of coercion; rather, freedom is understood as the minimum of *arbitrary* or *discretionary* coercion by others, and the state specifically.

In his early efforts to distinguish discretionary coercion from justifiable coercion within the rule of law, Hayek implicitly endorsed the formalistic concept of the rule of law. As noted by Ronald Hamowy, however, Hayek’s early understanding of the rule of law was shown to be a necessary but not sufficient condition of a free society. Even though advance articulation and equal application of the law reduces the threat of arbitrary coercion, it does not eliminate it because the rules themselves are still created by men.⁸⁵ Thus, even if it is possible to fully articulate the conditions for government coercion in advance, those conditions themselves may have improper distinctions built into them. Human actors (legislators and judges) must still *choose the rules*, therefore, the law itself can have human will built into it, thereby seemingly legitimating undue restrictions on freedom so long as they comport with the rule of law.⁸⁶ This critique anticipates Posner’s argument that the legal systems of Nazi Germany and the Soviet Union were characterized by the rule of law, even if they were not the rule of “good” law such as would prevail in a liberal society.

Hayek, however, clearly came to believe that the English common law uniquely embodied the rule of law. To understand why, it is necessary to refer back to Hayek’s

⁸⁵ Ronald Hamowy, *Hayek’s Concept of Freedom: A Critique* 1 NEW INDIVIDUALIST REV. 28 (1961); Ronald Hamowy, *Law & the Liberal Society: F.A. Hayek’s Constitution of Liberty*, 2 J. LIBERTARIAN STUD. 287 (1978).

⁸⁶ Leonard Liggio, *Law & Legislation in Hayek’s Legal Philosophy*, 23 SOUTHWESTERN U. L. REV. 507 (1994).

view of the common law as a spontaneous order, and in particular, the parallels he draws between the common law and the price system in markets. Hayek's central claim in both settings is identical—the rules that emerge from the decentralized decision-making of the common law, like the prices that emerge from the decentralized decision-making of markets, are not “made” by anyone. The prices that emerge from the spontaneous order of the market system can be contrasted with a centrally-planned economy, where identifiable decision-makers instruct producers how to allocate resources. Similarly, the common law can be compared to other systems of law (such as civil law systems) where rules are made by identifiable “sovereign” decision-makers. This parallel runs both ways—just as the common law bears a conceptual resemblance to markets, Hayek's condemnation of legal positivism flows from his recognition that in postulating the need for a sovereign decision-maker, positivists were implicitly engaging in “central planning” of the legal system.

Understanding this concept of the common law as a spontaneous order thus helps to explain why Hayek eventually came to define the rule of law coterminously with the common law in Volume 1 of *Law, Legislation, and Liberty (LLL)*.⁸⁷ Hayek's extensive discussion of the common law in that volume can be best understood as his effort to reply to the critiques launched by Hamowy and others to his earlier more formalist statement of the rule of law in the *Constitution of Liberty*. In short, it appears that Hayek implicitly recognized the force of the critique that mere formalistic restraints on governmental rule-making were necessary but not sufficient to build a free society. Hayek's argument in *LLL* is thus to argue that under the common law system it is fundamentally incorrect to

⁸⁷ The following discussion draws on Todd J. Zywicki, *Reconciling Group Selection and Methodological Individualism*, in *Evolutionary Psychology & Economic Theory*, 7 ADVANCES IN AUSTRIAN ECONOMICS 267, 273-75 (2004).

believe that human decision-makers, whether legislators or judges, choose the rules that govern their society. Because the rules generated by the common law are the outputs of a spontaneous order, it is not accurate to say that they are chosen by anyone, including judges. Judges simply *articulate* these pre-existing rules, they do not *create* them. In this sense, common law rules are emergent from the larger common law system, in the same way that prices for individual goods are emergent properties of a market system. This argument, if correct, provides Hayek's key response to the Hamowy critique. If the rules themselves are not consciously chosen by political decision-makers, but rather the political decision-makers merely articulate the rules that are produced by the spontaneous order of the common law, then it appears that Hayek has closed the loop on his argument regarding the rule of law. To the extent that an individual is "coerced" into performing on a contract, or imprisoned for burglary, or prohibited from trespassing on another's property, this coercion does not constitute an undue infringement on his freedom. For, by definition, "freedom" is defined as the absence of arbitrary or discretionary coercion by another person. Here, it is not the legislator or judge who is coercing the wrongdoer, but the force of tradition and spontaneously-generated rules produced by the impersonal process of group selection.

This explains Hayek's repeated comparison between the legal system and the market system in *LLL*. Hayek suggests that it is a logical absurdity to say that a grain farmer is "coerced" when he has to sell his grain for a price lower than the price at which he would prefer to sell. Because prices are set by the impersonal process of the market, it cannot be said that any identifiable individual or individuals have "coerced" you in deciding the price at which you can sell your grain. If you can be said to be "coerced" at

all, it is by the impersonal process of the market. In *LLL*, rules emerge in society in the same way that prices emerge in a market. Thus, just as it is nonsensical to say that the farmer is “coerced” by the market into selling his grain for an undesired price, it is equally nonsensical to say that your freedom is restricted when you are coerced by legal rules that have evolved spontaneously. To illustrate the point, it would be equally absurd to say that you are “coerced” into using the word “car” to communicate the idea of a car to someone else, rather than some other word you may prefer for the same idea, such as “gooblestopper.” Is your freedom restricted when you are required to use the term “car” to coordinate communication with others? No, Hayek suggests, because language is not invented by anyone and so no particular person is forbidding you from using “gooblestopper” instead of “car.” It is just that the word “car” has evolved to mean a certain concept in a given system of language, and if you use that term you can coordinate with others and accomplish your goals. If you do not use that term, you will be unsuccessful. Thus, when the rules that govern interactions—market prices, language, customs, legal rules—are generated by impersonal processes that are controlled by no one, then being forced to comply with those rules cannot be said to be an improper restraint on your freedom. With respect to the rule of law specifically, common law rules that develop spontaneously and are articulated by judges (not “created” by them) can thus be said to embody the rule of law. It is the *rules* that coerce, not individuals. And because the rules themselves emerge from the evolutionary group selection process and are not chosen by anyone, Hayek argues that it can be said that their application is consistent with the rule of law and freedom.

At first glance, the emphasis on the common law process, the spontaneous development of law, and the centrality of common law judges in *LLL* seems to represent a repudiation of the argument in *The Constitution of Liberty*. There, the emphasis is on the idea of the *Rechtsstaat* and the discipline of the rule of law is aimed at legislatures rather than judges. As suggested by this argument, however, Hayek probably saw the argument of *LLL* as an elaboration of *The Constitution of Liberty*, not a repudiation, in that it explains how the rules exist independent of the will of individual law-makers. Thus, it is fully consistent to say that rules may be the result of human action (methodological individualism) but not human design (group selection). Put differently, Hayek's thesis is that while individual reason and individual action are good for introducing variation in to a system of rules, individual reason and control is too limited to effectively shape the selection among rules or systems of rules.

Hayek would thus reject Posner's purported distinction between the rule of "law" on one hand, and the rule of "good law" or "liberal law" on the other. It would be equally senseless to try to draw a distinction between the "price" for a good and the "good price" for a product. The rules that emerge from the common law process, like the prices that emerge from the market process, do not fit into these sorts of conceptual categories. A legal rule can be said to be consistent with the rule of law only if it emerges from an impersonal spontaneous order process rather than being authored by a particular individual. Similarly, a "price" is what emerges from the impersonal spontaneous order of the market. In both cases, the opposite of a law or a price is the command of some individual decision-maker, a rule of "men." To be governed by the

“rule of law,” therefore, is in fact to be governed by rules that emerge spontaneously, as Hayek sees as being best embodied by the common law process.

This suggests a further extension of Hayek’s views of the relationship between the rule of law and a liberal social and economic order, and why Hayek rejects the notion that Nazi Germany was a society governed by the rule of law, which is of course a central thesis of *The Road to Serfdom*. Hayek suggests that the “rule of law” is a concept that is meaningful *only* in a liberal society. Indeed, given the common misunderstanding of the meaning of the term the “rule of law,” it may be more useful to simply refer to the type of society that Hayek has in mind as a “rule of law society,” in the same way that we refer to an economy organized according to private exchange as a “market economy.” A rule of law society is indeed the society described in the first part of this essay, one in which law is a purpose-independent mechanism that enables individuals to pursue their own several ends, rather than forcing individuals to pursue ends favored by authoritative decision-makers. Just as we distinguish between a market economy and a centrally-planned economy, we can distinguish between a rule of law society and a society organized to accomplish distinct end-state social goals. A society organized by abstract and impersonal law, as opposed to the particular decisions of particular men, is in fact a liberal society. A society according to the commands of authoritative decision-makers is in fact something else, and is a society where the rule of law is meaningless.

Although what Hayek has in mind here can be difficult to tease out, it appears that he has something in mind like Michael Oakeshott’s understanding of the rule of law as characterizing a civil association, as opposed to an enterprise association.⁸⁸ The rule of

⁸⁸ See Michael Oakeshott, *The Rule of Law*, in MICHAEL OAKESHOTT, *ON HISTORY: AN OTHER ESSAY* 119 (1983); see also Nigel Ashford, *Michael Oakeshott and the Conservative Disposition*, 25 *THE*

law, Oakeshott suggests, is appropriate only to a liberal social order, and indeed serves as the central organizing and defining principle for such a society. A social order organized around end-independent rules, he observes, will produce freedom, “But this ‘freedom’ does not follow as a *consequence* of this mode of association; it is *inherent* in its character.”⁸⁹ He continues, “And this is the case also with other common suggestions: that the virtue of this mode of association is its consequential ‘peace’ (Hobbes) or ‘order.’ A certain kind of ‘peace’ and ‘order’ may, perhaps, be said to characterize this mode of association, but *not as consequences*.”⁹⁰

Posner, unlike Hayek and Oakeshott, rejects the argument that the concept of the rule of law is an inherently classical liberal notion. As Oakeshott suggests, Posner is in the camp that argues that freedom and prosperity are the consequences of following the rule of law.⁹¹ Oakeshott, and seemingly Hayek, reject this consequentialist interpretation of the rule of law as engrafting a purpose onto a purpose-independent social order. As noted, Hayek would reject the notion that the legal system should strive for any collective goal independent of the disparate purposes of the individuals governed under that economic order. Hayek seemingly would find it similarly flawed to argue that the purpose of the rule of law is to create economic growth. Instead, the rule of law should be seen as an inherent part of a liberal social order, in that the rule of law is meaningless in a society that rejects the notion that the order exists for some purpose other than to enable the individuals who comprise it to coordinate their affairs and to interact harmoniously.

INTERCOLLEGIATE REV. 29 (1990); Guri Ademi, *Legal Intimations: Michael Oakeshott and the Rule of Law*, 1993 WIS. L. REV. 839 (1993).

⁸⁹ Oakeshott, *supra* note, at 161 (emphasis added).

⁹⁰ *Id.* (emphasis added)

⁹¹ *Id.*; see also Zywicki, *Rule of Law*, *supra* note, at 6-8.

IV. Hayek, Kelsen, and Posner on Positivism

Finally, this explains Posner's conclusion that Kelsen "would not have subscribed to Hayek's view of 'true' (that is, good) law, because he was not a Hayekian libertarian, not because he was a legal positivist."⁹² Hayek, Posner argues, cannot have known a great deal about Kelsen, or indeed about legal positivism, to have said what he said about him.⁹³ Unlike Hayek, Posner notes, Kelsen's analysis of law is "content neutral" whereas "Hayek is interested only in content."⁹⁴ Posner concludes that Hayek merely missed the distinction.⁹⁵

But the foregoing may explain why Hayek did not miss the distinction. Hayek conflates what Posner calls "content" or substantive law into the rule of law itself. Law can only be made in two ways—either by designated authors (positivism) or through spontaneous order processes. As noted, Hayek believed that traditional common law judges did not "make" law, but rather "discovered" it. This is the lynchpin of his argument that the law is a spontaneous order, and that when a judge decided a case he simply articulated the inchoate principles embedded in the law and did not affirmatively make law. Hayek writes, "While the process of articulation of pre-existing rules will . . . often lead to alterations in the body of such rules, this will have little effect on the belief that those formulating the rules do no more, and have no power to do more, than to find and express already existing rules, a task in which fallible humans will often go wrong, but in the performance of which they have no free choice. The task will be regarded as

⁹²POSNER, LAW, PRAGMATISM, & DEMOCRACY, *supra* note, at 289..

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

one of discovering something which exists, not as one of creating something new, even though the result of such efforts may be the creation of something that has not existed before.”⁹⁶

Hayek rejected positivism because it argued that law was and should be consciously “made” and, in fact is made by judges, legislators, or other authoritative law-makers. As Posner notes, Hayek argued that the basic flaw of positivism was the belief that law could be devoid of any discussion of content.⁹⁷ Indeed, Hayek argues that with respect to private law and “especially . . . the common law” it is “simply false” to say that these laws have been made by positivist law-makers rather than emerging from a spontaneous order process.⁹⁸

Posner, following the legal realist tradition, may respond that Hayek’s distinction is unrealistic—that judges in fact “make” law and that law is not “discovered” in the manner Hayek claims. Hayek, of course, responds that Eighteenth Century common law judges were not the positivist legal rule-makers that they are today. Judges, he argues, did in fact believe themselves to be “finding” law, not making it, and in fact did so.⁹⁹ Hayek argued that the law itself emerged from the decentralized spontaneous order previously described. To which Posner might respond that this distinction is nonsense, in that it remains the case that the law is composed of the aggregation of individual judges’ decisions, and thus it remains that judges “make” the common law. But once again, this response fails to appreciate the nature of a spontaneous order process as conceived by

⁹⁶ HAYEK, LLL: RULES & ORDER, *supra* note, at 78

⁹⁷ HAYEK, LLL: MIRAGE, *supra* note, at 44-56.

⁹⁸ *Id.* at 46.

⁹⁹ See Pritchard & Zywicki, *Finding the Constitution*, *supra* note,; Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law & Legislative Solutions to Large-Number Externality Problems*, 46 CASE WESTERN RESERVE L. REV. 961 (1996)

Hayek. If the common law is truly a spontaneous order, then it is no more accurate to say that individual judges “make” the law than it would be to say that a particular farmer “sets” the price for grain in a market when he sells at a price that finds a willing buyer, or that a speaker “makes” a word when he communicates in a way so as to be understood by others. Whether law, prices, or speech, what matters is the overall order, which no one constructs.

Under the institutional structure of the traditional common law, it was difficult for judges to make new and impose it on unwilling individuals because individuals could exit that legal system and choose judges that would provide them with law and justice that was grounded in the expectations of the parties to the dispute, rather than the litigation serving as a means for the achievement of larger social goals.¹⁰⁰ During the formation of the common law, in the several centuries before its maturity in the Eighteenth and Nineteenth Centuries, the “common law”—that is the courts of the King’s bench—was only one of many legal systems in England.¹⁰¹ Others, public as well as private, included the courts of Chancery, ecclesiastical courts, and law merchant courts, to name only a few.¹⁰² Through legal fictions concerning jurisdictional rules, parties had varied choices as to which court system to submit to.¹⁰³ Judges were often paid from their court’s user fees, and therefore had incentives to render impartial justice, and were not as easily captured by rent seekers.¹⁰⁴ Furthermore, there were not “courts of highest resort,” as we view appellate courts today, so there could be experimentation within legal systems as to

¹⁰⁰ Adam Smith quote [Again, couldn’t figure this one out. –AS]

¹⁰¹ Zywicki, *Rise & Fall*, *supra* note, 1582-83.

¹⁰² *Id.* at 1583.

¹⁰³ *Id.* at 1584.

¹⁰⁴ *Id.* at 1583.

the correct rules of law.¹⁰⁵ This plurality of justice provided for competition for litigants between legal systems, and competition between legal systems and between judges for the rulings most preferred by litigants. Note that these were not the rulings most preferred by *plaintiffs*. This was because litigants—unlike a modern interest group, such as today’s plaintiffs’ bar, or a repeat player such as a labor organization—often could not predict whether they would be a plaintiff or defendant in the next case to come along.¹⁰⁶ Therefore, parties would be predisposed to seek the most predictable ruling, not the ruling that provided a precedent for increased rents in future litigation.

Law thus tended to reinforce the goals of private ordering and meeting the needs of the party to the dispute. Judges had little opportunity or power to impose their preferred policy goals on litigants. Given this lack of power, it appears that judges did in fact act in the manner suggested by Hayek—they sought to discern the legitimate expectations of the parties in the disputes that arose before them. Judges simply were unable to engage in the social engineering advocated by Posner to advance goals of efficiency, redistribution, or any other goals. Had they sought to do so, they would have lost business to rival courts who were more diligent about responding to the needs of the parties in the case before the judge, rather than viewing the case as a means to accomplish larger social goals. Under this set of constraints, it is realistic to assume that judges did in fact seek to “discover” the law in existing expectations, rather than “make” law, and that in fact judges succeeded in doing so.

¹⁰⁵ *Id.* at 1582.

¹⁰⁶ *Id.* at 1609 (“[M]ost of the disputes in question arose from conflicts between two individuals, not between institutional repeat players. Under these conditions, reciprocity norms would tend to govern the evolution of legal doctrine, rather than rent-seeking norms.”).

Recent judicial innovations, such as the rise of *stare decisis* and appellate courts of last resort, have in many ways dramatically altered the world that Hayek is describing. Historically, again, the common law emerged from competition among many different judges acting in many different court systems with overlapping jurisdictions.¹⁰⁷ Thus, judges had little power to bind other judges by authority, but could do so only on the basis of the persuasiveness of their rulings.¹⁰⁸ It also may be accurate to state that a Supreme Court can “make” law in the way that the decentralized court systems of the history of the common law could not.¹⁰⁹ Precedent, as noted, was a more flexible concept, such that one judge could not bind subsequent judges temporally. Subsequent judges reserved the right to reject the precedent if it was thought wrongly decided. *Stare decisis*, by contrast, enables a first judge in time to bind subsequent judges, thereby perhaps making it accurate to say that the first judge “makes” law to be applied by subsequent judges. These various innovations—the development of monopolistic and hierarchical court systems and the rise of *stare decisis*—are relatively recent innovations in the Anglo-American law.¹¹⁰ Moreover, these developments dramatically increased the potential for courts to “make” law, as opposed to “finding” law, as they did in the traditional common law world.

It is thus conventional for modern day sophisticates to reject the idea that traditional common law judges “found” or “discovered” law, rather than “making” it. Of course common law judges “made” law, it is argued. For instance, Justice Scalia has written that he knows that judges “make” law, but that they nonetheless should be viewed

¹⁰⁷ See *Id.* at 1582-83.

¹⁰⁸ Zywicki, *Rise and Fall*, *supra* note, at 1613.

¹⁰⁹ See Pritchard & Zywicki, *Finding the Constitution*, *supra* note, at 465; LEONI, *supra* note, at 24.

¹¹⁰ Zywicki, *Rise & Fall*, *supra* note, at 1617 (explaining these ideas did not take hold until well into the Nineteenth Century).

as “discovering” law because such a view limits their discretion.¹¹¹ The proper making of law, he argues, should be left to the legislature, as that embodies the democratic choice of the people in the act of making law.¹¹² This view makes perfect sense if one assumes that law must be consciously made. From this standpoint, those judges who denied that they were making law were either dishonest, in that they *knew* they were making law and just would not admit it, or naïve, in that they failed to recognize that this is precisely what they were doing. A full understanding of the institutional constraints that historically were imposed on common law judges suggests that it is both plausible and likely that those judges in fact tended to discover, rather than make law. It is thus the anachronism of modern commentators imposing modernist, positivist presumptions on centuries-old history that may be the error in this situation.¹¹³

CONCLUSION

Posner’s critique of Hayek is fundamentally based in a belief that judges should purposely shape the law toward greater efficiency. Further, Posner sees Hayek’s view that judges should merely reinforce expectations as one that would leave the law static, moribund, and unable to adapt to an ever-changing society. Also, Posner views Hayek’s understanding of the rule of law as confused, and that Hayek inappropriately substituted “law” with “the rule of law.” As we have seen, this critique rests on two fundamental distinctions between his views and Hayek’s.

¹¹¹ See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring). In *James B. Beam*, Justice Scalia reveals that, at bottom, he is a positivist and definitely does not accept a Hayekian view of the common law: “I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.” *Id.* (emphasis in original).

¹¹² Pritchard & Zywicki, *Finding the Constitution*, *supra* note, at 419-20.

¹¹³ For an example, see Richard A. Posner, *Blackstone and Bentham*, 19 J.L. ECON. 569 (1976) (suggesting that Blackstone was more “modern” and less naïve about the nature of law and role of judges than traditionally thought); Albert A. Alschuler, *Rediscovering Blackstone* 145 U.P.L. REV. 1 (1996) (same)

First, Posner believes that individual rules of law can be viewed separately from the larger legal and societal order. On the contrary, Hayek argues that an individual rule is as it is because it has grown out of the system of expectations embodied within a larger set of rules, and that set includes not only legal rules, but non-legal rules of customs and morals. When courts enforce community expectations they should look not just to the most recent case on point—the strict doctrine of *stare decisis*—but to the concepts that underpin the relevant case law, and the larger order the case law exists within. Thus, enforcing the expectations of the community will not result in a static and formulaic reinforcement of norms propounded by fallible human actors, i.e. judges, but the application of the rules of a spontaneously-formed societal order which necessarily *does* respond to the “changing needs” of society as it reflects the rules that society’s members continually create by their actions but not by their design.

Second, and very closely related to the first distinction, Posner holds that judges can know what legal rules will lead to socially-desirable results. Hayek argues that such forward-thinking “law making” is merely another form of central planning, destined to fail in some degree because of the limits of human knowledge. Posner’s reaction to this argument is that this is true in the case of a centrally-planned economy, but not necessarily so on the level of a judge forming an individual rule.¹¹⁴ There an individual truly can access the information available and “legislate” a better rule.¹¹⁵ This again, however, circles back to the first assumption, that a rule can be examined independently

¹¹⁴ See Posner, *Hayek, Law & Cognition*, *supra* note, 164. Posner argues that Hayek, and the Austrian School of economics as a whole, have not “offered convincing reasons for believing that instrumental reasoning guided by economic models can never improve government regulation.” *Id.* Posner suggests that customs may become “vestigial and dysfunctional” and that Hayek offers no answer as to when lawmakers should—as Hayek admits occasionally must happen—reject custom. *Id.* at 162.

¹¹⁵ But see Donald J. Boudreaux, *Hayek’s Relevance: A Comment on Richard A. Posner’s Hayek, Law & Cognition*, 2 NYU J. L. & LIBERTY 157 (2006) (arguing that Posner places too much faith in the power of planners who necessarily lack complete information).

of its larger legal and societal order. To “make” law with proper knowledge a judge must know how these rules interrelate with the individual rule in question, and what the consequences will be to the other rules with the change to the individual rule. This, again, argues Hayek, is knowledge that no one expert judge, or group of judges, can know.

These errors lead Posner to misunderstand Hayek’s conception of the rule of law. For Hayek, the rule of law is not simply the non-arbitrary enforcement of preexisting rules. It is also the enforcement of rules that have been formed through a spontaneous process. Kelsen and Posner, on the other hand, as positivists, view law as arising through conscious decision making. Under a positivist conception of law, the rule of law describes any legal system where laws, however created, are duly made and obeyed. However, under Hayek’s conception such a process is not a complete description of the rule of law. Although consciously-designed rules may be called “law,” they do not make for a “rule of law” as they are the outcome of human design. In other words, “man made” law is an example of the rule of men. For Hayek, only in a liberal order, with a process such as the common law to allow a spontaneous order of law to arise, can the rule of law reign.

