Hayekian Socialism

Richard A. Epstein

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr
Part of the Law and Economics Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol58/iss1/7

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
Essay

HAYEKIAN SOCIALISM

RICHARD A. EPSTEIN*

I have thought long and hard about my choice of the heretical title for this lecture—"Hayekian Socialism." In retrospect, the obvious reason for rejecting this title is to avoid a manifest injustice to one of the most articulate opponents of socialism of the twentieth century. His short essay, The Use of Knowledge in Society,1 offers a lucid account of the social function of the price system which is as fresh today as the day it was written. His earlier writings on the "socialist calculation" debate showed that central planners could not coordinate the fragmentary and incomplete information that allows markets to generate a set of prices even when individuals are largely ignorant of the alternative uses to which scarce goods could be put.2 The strength of Hayek’s views can only be captured in relation to the positions he was forced to refute, such as the proposal for the creation of a Supreme Economic Council to set the prices of all factors of production.3

In the end, and notwithstanding the power of Hayek’s destructive critique, I decided to stick with this title for the less weighty reason that it draws into public view one strand of Hayek’s thought that is inconsistent with his overall intellectual orientation. On balance, I have decided that it would be better to use a title that to some will sound like an oxymoron, than to suppress the one discordant strand in Hayek’s overall thought. I trust that Hayek’s many admirers will recognize that I have chosen the title to provoke some useful reflection on Hayek’s life, not to stir unnecessary animosity or controversy.

---

3. Id. at 134. The two works targeted by Hayek are 2 OSKAR LANGE & FRED M. TAYLOR, On the Economic Theory of Socialism: Government Control of the Economic Order (Benjamin E. Kippincott ed., 1938) and H.D. DICKINSON, Economics of Socialism (1939). Lange and Taylor at least had the sense to call the central planning agency the Central Planning Board. Hayek, for obvious rhetorical purposes, preferred the more grandiose title of the S.E.C., no relation to our Securities and Exchange Commission.

---

* James Parker Hall Distinguished Service Professor, The University of Chicago. B.A., Columbia College; B.A., Oxford University; LL.B., Yale Law School. This Article is an extended and revised version of the Gerber Lecture delivered at the University of Maryland School of Law on March 11, 1998.

---

271
Oddly enough, however, it is possible to be too diffident about my mission. Hayek was no stranger to controversy. Born in Vienna in 1899, he completed his studies both in law and in economics—which is not to say that he studied law-and-economics, as we now know it—during the early 1920s. He migrated to England around 1930 and shortly thereafter became a charter member of that great band of economists who worked and taught at the London School of Economics during the 1930s. His own market instincts found a congenial home in his professional circumstances, even though the clear drift of English political thought moved smartly in favor of more extensive government regulation through central planning. Hayek’s most famous work, *The Road to Serfdom,* first published in 1944, was written as a popular response to this social trend, and marks the turning point in Hayek’s intellectual life from professional economist to political economist. It is largely in the latter capacity that he is known today.

*The Road to Serfdom* generated instant controversy. Some reviewers praised the book as a kind of intellectual Magna Carta. For its time, *The Road to Serfdom* gave a clear and incisive account of all that had gone and would go wrong in the modern English social welfare state—free individuals under planning would be reduced to a condition but one step above slavery. The enthusiastic response to the American edition of the book showed that its readers could easily transpose his arguments into an attack on the economic portions of Roosevelt’s New Deal with its constant effort to cartelize markets in agriculture, labor, and industrial production. But Hayek did not receive a hero’s welcome in all quarters, for *The Road to Serfdom* was assailed by others as the most reactionary, vile, vicious, intemperate, and unwise publication to hit the streets of England for a long, long time: People who enjoyed vigorous democratic institutions could not be called serfs in their own time. Both sides to the debate shared the

7. See Henry Hazlitt, *An Economist’s View of ’Planning’,* N.Y. *Times* Book Review, Sept. 24, 1944, at 1 (reviewing Hayek, *The Road to Serfdom*) (“[Hayek] tries to point out how socialism by its very nature must be anti-liberal and anti-democratic, and how national ’planning’ can seem to be successful only as it progressively removes all freedom of choice from the individual.”).
8. See, e.g., Herman Finer, *Road to Reaction* at ix, xii (1945) (describing *The Road to Serfdom* as “the most sinister offensive against democracy to emerge from a democratic country for many decades” and criticizing Hayek because his “apparatus of learning is deficient, his reading incomplete[,] . . . his understanding of the economic process . . . big-
common ground that Hayek advocated a smaller government and a larger private sector. Without question, that is the view that he put forward in his other works, most notably *The Constitution of Liberty*, and thereafter, his three-volume set *Law, Legislation and Liberty*. He was the self-proclaimed arch enemy of socialism, and all his abstract political theory was written with a most practical end in mind—to overthrow the dominant mind set in England and elsewhere. So the question may be fairly set: If Hayek's intellectual pedigree is as clear as protagonists on both sides of the debate assume, then why pour oil onto troubled waters with the title, "Hayekian Socialism"?

My motivation is simple. In order to understand the evolution of political theory, it is important to identify the strands of socialist thought in Hayek that with time have become the mainstays of the political left. Hayek's effort to find some common ground with his opponents led him to make unwise concessions to the benevolent use of state power. Of course, Hayek did not conceive of himself as the champion of the expansion of government power; nor has he ever been construed that way by friend or foe. But nonetheless, his substantive positions helped to make respectable the growth of state power in the post-World War II era. Quite simply, Hayek was prepared throughout his political writings to accept some claim for minimum welfare rights for all individuals, even as he attacked centralized planning on the one hand and industry-specific protectionism on the other. The size and importance of that concession can be best understood first by setting out Hayek's general orientation, and then by isolating the unmistakable, if unintended, socialist elements found in his

9. See 3 Friedrich A. Hayek, *Law, Legislation and Liberty: The Political Order of a Free People* 36, 41-64 (1979) [hereinafter 3 Hayek, *Law, Legislation and Liberty*] (arguing that government power "ought always to be ... confined to the administration of a sharply circumscribed range of means entrusted to its care" and outlining the limited scope of legitimate activities that government may undertake).


work. In fairness to Hayek, at times toward the end of his life, he seemed aware of the potential scope of his modest concessions. But during his most creative period, those state institutions that he spared in his original attacks of socialism became the bulwark of the revisionist socialism of the next generation. The first portion of this lecture therefore critically summarizes Hayek’s basic intellectual orientation. The second portion examines the critical connection between the socialism of central planning and the more modern socialism (at least of a sort) associated with the guarantee of minimum welfare rights.

I. HAYEK IN A NUTSHELL

Hayek shares one common feature with other great political philosophers—their views of politics rest on their understanding of human nature. Thus, for Aristotle, one begins with the general notion of human sociability; for Hobbes, one begins with the general notion of irreducible individual self-interest. For Hayek, the key aspect of the human condition is captured in one word—ignorance. Over and over again, Hayek writes about the inability of rational thought to cope with the constantly changing circumstances of human societies here and everywhere, today and tomorrow. The only thing that we know with some degree of certainty is our ignorance about the shape of the social world and the future path of human and natural events. He reminds us repeatedly of “the impossibility for anyone of knowing all the particular facts on which the overall order of the activities in a Great Society is based.” By the “Great Society,” he meant one that was well-ordered in accordance with his theories, not the massive government intervention championed by Lyndon Johnson. “Though not a single economy, the Great Society is still held together mainly by what vulgarly are called economic relations.”

13. See Aristotle, Politics 9 (H. Rackham trans., Harvard Univ. Press 1972) (asserting that “man is by nature a political animal”).
14. See Thomas Hobbes, Leviathan 91 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (“The Right of Nature . . . is the Liberty each man ha[s], to use his own power, as he will himself[] , for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing . . . he[] shall conceive to be the aptest means thereunto.”).
16. Id. at 112. Hayek then explains what he means by these “vulgarly” relations: “What are commonly called economic relations are indeed relations determined by the fact that the use of all means is affected by the striving for those many different purposes. It is in
More than anything else, Hayek's political philosophy is an effort to ask what are the appropriate adaptive responses to this pervasive level of systematic ignorance.

Hayek's faith in ignorance led to a profound anti-utilitarian streak that one might not expect from a persistent critic of socialism. To be sure, Hayek had no objection to the conventional accounts of utility that asked whether some particular means was appropriate to a given end. But the object of his scorn was the "constructivist fallacy of utilitarianism." Accordingly, he was deeply skeptical of the philosophical tradition that used "utility" as a marker for the desirable end states of human action. In particular, he rejected any and all versions of the Benthamite principle, in which the objective of the social order is to maximize the greatest good for the greatest number, or perhaps more dangerously, to maximize some impersonal entity known as "utility" that hovers above, but is not part of, any particular individual within society. "The trouble with the whole utilitarian approach is that, as a theory professing to account for a phenomenon which consists of a body of rules, it completely eliminates the factor which makes rules necessary, namely our ignorance." Hayek thought that these utilitarian programs were enormously dangerous because they suggested that somebody inside the state, or inside society, had enough knowledge about individual mental-states and satisfactions to make the calculations of utility that this aggressive utilitarian program in fact required. Thus, Hayek thought strong collectivist and socialist components were built into utilitarian thought at the ground level. For him, utilitarianism was not the philosophy of market liberalism; it was a license for state intervention.

What then was its antidote? For Hayek, salvation came from a combination of two ideas—the creation of a spontaneous order and the rule of law. By "spontaneous order," Hayek referred to the decentralized processes in which countless interactions between ordinary individuals produced a set of results that were pleasing to each, but which could not have been obtained by the command of any central-
ized political order. According to Hayek, it is the capacity for error in particular cases that impels individuals within the spontaneous order to gear their conduct by certain standard rules and practices, the precise reasons for which they cannot fully understand. By the rule of law, Hayek referred to those general principles for guiding human behavior which allowed each individual to pursue his or her own ends in accordance with their subjective preferences. The rule of law was the handmaiden of the spontaneous order, and for Hayek, the rules of the spontaneous order develop much like the rules of grammar—the people who follow the rules know how they work.

The obvious illustration of this spontaneous order for social relations is not a latent grammar, but the development of a market in any standard commodity or good, where the terms and condition of trade, including matters of quality, delivery and price, are set by no one in particular, but for the benefit of all who are found in the group at large. Indeed, it is clearly the competitive market process, as imperfect as it is, that allows for the diffusion of social information, much of it embedded in prices, about first the cost of production, and then the value of the goods and services they generate. Or, as Hayek was fond of saying, “The advantages of competition do not depend on it being ‘perfect.’” Rather, they depend on the ability of the competitive market process to reduce radical indeterminacy to acceptable levels through thousands of decentralized, cooperative decisions.

In taking this line, we can see, on this point at least, the close affinity between Hayek and Hobbes. Hobbes is of course well known for his view of the subjective value in contracts through his attack on...
the medieval doctrine of the just price.\textsuperscript{27} The same theme comes through in Hayek's account of our collective ignorance of subjective values attached to individual ends. If I have a horse, and you have a cow, I may prefer to have your cow and you may prefer to have my horse. Thus, we can arrange an exchange that leaves both of us better off. But if any outside observer looks at the physical world, he will still see one cow and one horse. The only way that this observer could conclude that the exchange has improved value by better matching people with objects (or animals) in the external world is to accept the self-knowledge that each person has of his own preference set.

I have just given the simplest case of barter. But if one attempts to discover how to sort out thousands of different commodities and services among thousands of individuals, Hayek's insight remains valid today. An endless array of multiple, successive, and progressive exchanges does a better job than centralized planning in producing the right goods and services, assigning them to the right individuals, and encouraging innovation. Consider the ripple effects from the one simple barter of horse for cow. If I can anticipate that my horse will be more valuable to you, then instead of a single haphazard exchange, I will go into the business of breeding horses for sale. In order to operate this business, I will have to acquire the necessary "inputs." I will hire other people to train the horses, buy grain to feed them, hire somebody to build a barn to house them, and so forth. In each of these transactions, I will deal with another individual who takes exactly the same view of the world as I do. Each individual is quite willing to exchange what he has for something that he values more. And all will recognize that it is wiser to invest in the things that others want than to rely on chance. So investment in human and physical capital continues apace. The genius of the price and market system is that it allows everyone to purchase someone else's outputs, without having to try to figure out what his inputs are or how much they cost. I can enjoy a concert without having to instruct the pianist on how to play the piano or the crew on how to arrange the staging and the lighting. Instead, I can rely on the warranties and promises of other individuals to satisfy my wants. I do not need the knowledge of such things in order to superintend this process. Hayek's basic insight is that prices and markets facilitate selective communications among individuals.

\textsuperscript{27} Hobbes, supra note 14, at 105 ("As if it were Injustice to sell dearer than we buy; or to give more to a man than he merits. The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give.").
and thus overcome the fundamental barrier of ignorance, one transaction at a time.

Our ability to overcome ignorance is not static but dynamic, for the same process operates with greater efficiency as other individuals either enter into established networks of cooperative exchanges or form their own. Because the system of voluntary exchange is not bound to particular persons, places, or times, markets themselves always facilitate new entry. Someone will come in who, in the short run, destabilizes the world for some other individual who thought he enjoyed the position of a preferred supplier. But the creative energies of the new entrant spur other individuals to rethink their own lives and businesses, and thereafter to redeploy and redirect their own goods and services. The system thus generates a virtuous circle, if only the state does not treat the new entrant as a wrongdoer for disturbing the established patterns of trade in the market. Indeed, his passionate defense of free entry in *The Road to Serfdom* is one of Hayek’s great contributions to the creative energies of voluntary markets.\(^{28}\)

The origins of this spontaneous order for Hayek do not rest in the constructivist thought of utilitarian calculation. The metaphor, or rather comparison, that Hayek evokes is obviously toward the untidy but successful processes of biological evolution through natural selection. Indeed, the title of Chapter One of the first volume of *Law, Legislation and Liberty* is “Reason and Evolution.”\(^{29}\) Hayek picks his words well. The former term is tied to a false Cartesian understanding of the world, and the latter to a Darwinian perspective, which, according to Hayek, Darwin had borrowed from the great social scientists, starting with Bernard Mandeville and David Hume.\(^{30}\) We need not trouble over the pattern of influence to recognize that Darwin’s great contribution was to show how a complex natural order could be explained by a single mechanism, that of natural selection—a process by

\(^{28}\) See Hayek, *The Road to Serfdom*, supra note 6, at 88-100 (emphasizing that “political freedom is meaningless without economic freedom” and economic freedom can only be sustained through competition and individual choice without government intervention).

\(^{29}\) 1 Hayek, *Law, Legislation and Liberty*, supra note 21, at 8.

\(^{30}\) According to Hayek:

It was in the discussion of such social formations as language and morals, law and money, that in the eighteenth century the twin conceptions of evolution and the spontaneous formation of an order were at last clearly formulated, and provided the intellectual tools which Darwin and his contemporaries were able to apply to biological evolution. Those eighteenth-century moral philosophers and the historical schools of law and language might well be described . . . as Darwinians before Darwin.

*Id.* at 23.
which nature takes an undifferentiated “soup” of organic chemicals, which it then transforms through trial and error, success and failure, into the incredibly rich kingdom of animals and plants. For Darwin, it was never certain in theory which of several natural variations was the fittest, and which would be extinguished; instead, the competition between species and between members of the same species meant that their offspring would have differential rates of success. The distribution of survivors would not look like the distribution of their ancestors, and the movement between generations, when repeated countless times, accounted for the diversity of animal and nature life.  

Yet here again, the Darwinian point is not as conclusive as Hayek might think. Darwin did not believe only in natural selection; he also believed in artificial selection, and, as Jared Diamond reminds us, he did not begin The Origin of Species with a discussion of natural selection, but instead with “a lengthy account of how our domesticated plants and animals arose through artificial selection by humans.”  

It was conscious domestication that brought us horses, cows, wheat, and corn. And it was that ability that allowed individuals to forge the larger social units and complex political institutions that were impossible in hunter-gatherer societies.

In thinking about the application of these Darwinian principles to matters of political organization, Hayek did not sufficiently appreciate the importance of either artificial selection or of the role that self-interest played in the selection process and gave, perhaps, too much weight to the indeterminacy of outcomes that natural selection offered. Hayek found in natural selection a way to legitimize a decentralized spontaneous order. He believed that individuals could develop, by hook or by crook, the set of compatible social behaviors that would allow them to thrive in common, even if they too did not understand the reasons why their own practices turn out to be both durable and successful. Ignorance again plays the central role. At points, Hayek sounds almost mystical; the success of spontaneous order made Hayek deeply suspicious of rational efforts to alter the patterns of these social interactions. Those who sought utility directly were not likely to find it. Those who ignored its lure were likely to stumble upon it. In the end, Hayek was more opposed to the practice of “constructing” utility than he was to the idea of utility itself.


Hayek's uneasiness about the constructivist strand of utilitarian thought has strong resonance even today. Within the modern law-and-economics movement, the small-state types, like myself, tend to be very suspicious of general and abstract principles such as the use of the time-honored formulas for negligence in ordinary accident cases. The formula starts with the view that every individual is under an obligation to take reasonable care to avoid harming other individuals by his own activities. But in fleshing out the standard of reasonable care, we quickly turn to Learned Hand's generalized cost-benefit formula that asks us to compare the burden of precautions with their expected gains, or whether $B > PL$. That formula in turn both invites and requires a jury or judge, or some combination of the two, to make an exhaustive examination of the circumstances that led up to the accident. The range of relevant factors confers a huge level of discretion on any trier of fact, which has to count as the expansion of state power that Hayek himself feared.

To avoid those difficulties, the small-government theorist will be drawn to strict liability rules, in which the question of liability depends on the outcome of individual choice, wholly without regard to whether the conduct that led up to it was rational or not. The decisions on rationality are thrown back on private decision makers, so that state officials can make their decisions under general rules that are devoid of overt and complicated utilitarian calculations.

---

33. See, e.g., Kerwhacker v. Cleveland, Columbus & Cincinnati R.R. Co., 3 Ohio St. 172, 176 (1854) (reciting the "maxim of the law, tested by the wisdom of centuries, exacts of every person, in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor").

34. See United States v. Carroll Towing Co., Inc., 159 F.2d 169, 173 (2d Cir. 1947). In determining whether the absence of a bargee would make the owner of a barge liable for injuries to other vessels that occurred after she broke away from her moorings, the court held that the owner's duty to protect against injuries resulting from such an event was a function of three variables:

(1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called $P$; the injury, $L$; and the burden, $B$; liability depends upon whether $B$ is less than $L$ multiplied by $P$: i.e., whether $B < PL$.

Id.

35. See, e.g., id. at 173-74 (examining factors such as time of day, season, weather, and location and condition of the harbor to determine the extent of the duty owed by the absent bargee).

36. See, e.g., RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 95 (1995) (using strict liability to allow private decisions in accident prevention, so that "a person who makes the right calculations will prefer paying for those accidents that are too expensive for him to avoid").
These strict liability rules work well for harms inflicted on strangers, but not in consensual arrangements, where it is often in the interests of individual plaintiffs to assume the risk of bad outcomes in order to gain the benefits of possible favorable ones. But here too, the good Hayekian should gravitate away from the use of cost-benefit formulas to judge the reasonableness of conduct, after the fact, in some particular case. Rather, where contract is not present as a guide, the emphasis shifts to the question whether the conduct of a physician or supplier of goods and services follows the customary standards of practice of the trade or profession, or indeed of any respectable segment thereof. The legal system again shies away from explicit utilitarian calculations, which it is likely to get wrong.

In sum, Hayek overstated our ignorance of general social practices. But his point has special cogency in those situations in which we call upon public institutions to make judgments about the rationality of individual conduct in litigation contexts. One must shudder to think of how Hayek would have responded to the modern law of sexual harassment and the hopeless tangle that comes in distinguishing welcome from unwelcome advances. To remain in the consequentialist tradition of the law-and-economics movements, we must embrace the general rules of which Hayek spoke. The legal system must work, as it were, through the rule of law, that is, through a series of general rules which force cost-benefit calculations to be made, not by the State, which is generally ignorant of what the individuals within it want or desire, but rather by the individuals themselves. The latter are more knowledgeable of, and are better able to act upon, their own preferences.

The key question is, however, how far we can push this basic insight. Someone has to choose rules, and neither judges nor legislators operate by the hit or miss techniques that characterize the spontaneous order. At some level we have to be confident enough of certain general empirical regularities in order to decide which general rule should be preferred to another. We would not want to adopt a rule of law of broad application that said that individuals are never responsible in tort when they maim strangers or mistreat patients. We take that position not because of our abiding sense of human ignorance, but because of our fear of the systematic effects of unrestrained individual self-interest. The party that keeps all the gains and bears none of the losses is likely to engage in too many dangerous activities, no

37. See Hayek, The Constitution of Liberty, supra note 10, at 162-75 (explaining that the conception of freedom under the law rests on obedience to abstract rules generated by individuals as opposed to particular rules laid down by governments).
matter what the refined differences in individual temperament or social situation. Thus, ignorance has to be woven into a more general theory in order to choose among a list of potential general and abstract rules.

Indeed, we can take the argument at least one step further. The design of political institutions may well have to take into account difficulties in predicting the political future, but it also has to take into account some universal tendencies of human nature. Part of the price that Hayek pays for his strong anti-utilitarian sentiment is that he cannot be particularly enamored with efforts to form political society through conscious acts of statesmanship by analogy, as it were, to breeding and other forms of artificial selection. The ideal constitution within a Hayekian world would be the English Constitution with its unclear origins, slow growth, and shadowy conventions. But he should be suspicious of the quite deliberate architecture of the United States Constitution, with its conscious reliance on the staples of political theory—separation of powers, checks and balances, enumerated powers, federalism, and entrenched rights.

Indeed, I think that it is useful to ponder the contrast between Hayek's general views of decentralized power and The Federalist No. 1,38 where the question put by Hamilton is whether, when we form a modern society, we want to do so by "reflection and choice," or whether we shall remain forever subject to the vagaries of "accident and force."39 Indeed, it is not far-fetched to see in the United States Constitution a rejection of the idea that a sound government could just evolve from the uncoordinated activities of well-intentioned individuals, or even thirteen somewhat fractious American states. Hayek himself was somewhat torn by this counterexample, and in The Constitution of Liberty hinted his ambivalence toward the matter when he introduced his discussion of the United States Constitution by saying: "Much is sometimes made of the fact that the American Constitution is the product of design and that, for the first time in modern history, a people deliberately constructed the kind of government under which they wished to live."40 Yet, while he minimizes the impact of

38. The Federalist No. 1 (Alexander Hamilton).
39. Hamilton says it a lot better:
   It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.
Id. at 1 (Roy Fairfield ed., 2d ed. 1981).
design, he finds himself in basic sympathy with all the major components of the American system set out above.

What was needed from Hayek, however, was some tempering of his basic hostility toward planned organizations. The theory of voluntary interactions may well explain the emergence of spot markets for the purchase and sale of given goods. However, it works far less well in explaining the emergence of a wide range of intermediate institutions from stock exchanges to trade associations, to condominium associations—institutions which often rely on specific articles of incorporation that specify in some detail the rights and duties of their members, and which take care to outline both the governance procedures and the dispute resolution mechanisms among individuals.41 The conscious creation of these institutions is not necessarily a good or a bad thing. Rather, the decision to put all transactions of a similar type into one basket leads to a high stakes game. Those organizations that put together poor constitutions will have to reform or perish. But those who come up with sound designs will outperform those groups that do not attend to the question of governance at all. And so it is that we see how some voluntary organizations flourish while others languish or die. The reason why we spend so much time on constitutional issues is that we get only one shot at the right organization, because the monopoly of state power cannot afford the luxury of trial and error that might be tolerated with a large number of private organizations. Hayek is not successful in papering over the tensions between the success of American constitutionalism and his own predilections for the rise of spontaneous order. He would have done better by praising the founders of the American Constitution for their practical wisdom, and recognizing the limits as well as the uses of the principles of spontaneous order.

Hayek's affection for the principle of spontaneous order was not, of course, directed against the United States Constitution. It was directed toward the expansion of state power under socialism. His main target was central planning, a term which today has a largely archaic sound, in no small measure to Hayek's attacks on the practice. But

41. See Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115, 115 (1992) ("The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members."); see also A.W. Brian Simpson, Contracts for Cotton to Arrive: The Case of the Two Ships Peerless, 11 CARDOZO L. REV. 287, 304 (1989) (explaining that the Cotton Brokers' Association "provided a system for arbitrating the disputes which arose from time to time between the [cotton] brokers and set standard contract forms and associated trading rules" (footnote omitted)).
writing about this subject today requires us to jolt our memories and recall just how pervasive and controversial the issue of central planning was both in Great Britain and the United States between the two World Wars. The Great Depression had taken its toll on the confidence that Western democracies had placed in markets and small governments. Everywhere the corporatist state was thought to be the source of economic security and the remedy for unemployment, economic dislocation and general privation. The segmentation of financial institutions in the United States was a creature of the depression, as were agricultural cartels and collective bargaining in employment.

Central planning was not confined to the United States and Great Britain, but was raised to a destructive art by the totalitarian nations under Communist, Fascist, and Nazi rule. Hayek, as an Austrian, was keenly aware of the consequences of the annexation of Austria into Germany in 1938, and one of the themes in *The Road to Serfdom* was his gloomy warning that the central planning of Great Britain could insensibly lead to the rise of totalitarian regimes and the necessary decline of cherished political liberties and democratic institutions.42 But in this respect at least, Hayek seems to have overstated his case. It may well be that Western democracies do not accord any preferred or entrenched status to the market and think that many forms of economic regulation that Hayek loathes pass constitutional muster. However, they do draw the line at government action which suppresses political dissent or confiscates private property. People are not sent to the gas chambers for demanding free elections, thereby sparing the democratic West the horrors of its totalitarian neighbors.

The constitutional safeguards of Great Britain and the United States operate in very different ways. In neither country are they sufficient to drive us to the social optimum, and they surely leave the gate

42. Hayek stated:

Now, it is somewhat difficult to think of Germany and Italy, or of Russia, not as different worlds but as products of a development of thought in which we have shared; it is, at least so far as our enemies are concerned, easier and more comfortable to think that they are entirely different from us and that what happened there cannot happen here. Yet the history of these countries in the years before the rise of the totalitarian system showed few features with which we are not familiar.

*Hayek, The Road to Serfdom*, supra note 6, at 11.

Hayek never quite parted from this theme, noting, for example, that defenders of the administrative state could so twist the conception of the rule of law to affirm the proposition that "if Hitler had obtained power in a constitutional manner, the rule of law would still have prevailed in Nazi Germany." *Hayek, The Constitution of Liberty*, supra note 10, at 243 (citing *Finer*, supra note 8, at 60).
open for faction and intrigue. But by the same token, it is critical to recognize as well that the protections that have survived have commanded sufficiently wide public support to help ward off the catastrophic consequences of totalitarian regimes.

A proper evaluation of Hayek's critique of central planning should be divorced from his critique of totalitarian regimes. But even taken in isolation, Hayek still deplored government central planning. In his view, no group of individuals has the knowledge and skills to coordinate the activities of millions of separate individuals, all of whom have their own distinctive ends and conceptions of the good. The state should therefore confine its attentions to fostering those institutions that make these private expressions of self-worth possible, which once again brings us safely back to the rule of law and the emergence of market institutions. No experts could generate the full range of needed socialist calculations. Even when the totalitarian elements were removed, Hayek remained deeply suspicious of the administrative state whose particularistic commands he saw as the antithesis of the rule of law.

But Hayek was no naive visionary. He certainly did not believe that markets could operate of their own volition without any kind of support from the state. It is at this juncture that the rule of law becomes critical to offer a secure framework for these voluntary transactions to take place. The rule of law supplied the universal forms of engagement in which particular desires could be satisfied. However, it is at this point that the reader, or at least this reader, finds his abstractions elusive and unsatisfying. However insistent Hayek is on the centrality of the rule of law, he does not reveal the precise content of the "rules of just conduct" or explain why their universal application is sufficient protection against favoritism and intrigue. We can freely

43. Nothing that I say here should be construed as a recantation of my outspoken views on the proper interpretation of the Takings Clause. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 331 (1985) ("My thesis is that the eminent domain approach, as applied both to personal liberty and private property, offers a principled account of both the functions of the state and the limitations upon its powers.").

44. See Richard A. Epstein, Imitations of Libertarian Thought, Soc. Phil. & Pol., Summer 1998, at 412, 423 (arguing that security, as "the indisputable core of any conception of personal autonomy," provides a strong barrier to totalitarian movements).

45. See HAYEK, THE CONSTITUTION OF LIBERTY, supra note 10, at 260 (observing that the expansion of the welfare state, which followed the decline of the rule of law, could not occur without depriving individuals of choice in matters that the state deemed it necessary to correct and control).

46. See 2 HAYEK, LAW, LEGISLATION AND LIBERTY, supra note 15, at 34-42 (describing the rules of just conduct by their function to limit the range of possible actions available to individuals under various circumstances).
concede that the elimination of extraordinary procedures and secretive deliberations commonly associated with Star Chamber tends in the right direction. However, at points Hayek makes a near mystical appeal to the abstract values contained in the rule of law. But is it more homily or analysis? What he needed to do was to look beyond the rule of law as a set of formal considerations and to explain which rules of universal application are in fact just. He should treat, as I have suggested elsewhere, the rule of law as a necessary, but not a sufficient, condition for a sound political order.

My colleague Cass Sunstein has written: "Hayek thinks that the rule of law forbids 'arbitrary' distinctions. But any judgment that distinctions are 'arbitrary' stems not from the notion of the rule of law, but from an independent set of arguments, specifying the appropriate grounds for distinguishing among people and groups." I have no doubt that Hayek supported traditional conceptions of individual autonomy, private property, and freedom of contract, but he showed none of the depth of feeling toward these conceptions that he showed toward the rule of law.

Indeed, one of Hayek's weaknesses is his relative indifference to the creation of social infrastructure that thoughtful proponents of laissez-faire have long recognized as necessary to secure the institutions of voluntary exchange. It is not sufficient simply to have rules that enforce contracts and prevent the rule of force. It is also neces-

47. As I have previously argued:
[I]f the rule of law... is necessary for a just and sound society, it is a very different question to ask whether it is sufficient to achieve that result. In one sense it would be desirable that the answer were yes, for then it would be possible to make judgments about sound social arrangements solely by noting some easily observable marks of formal laws. Nonetheless I think that... Hayek [was] too optimistic in thinking that the rule of law in and of itself offered sufficient protection for the just social order. Some rule of law is better than no rule of law. But the choice of the best, even the best achievable, form of political organization demands more than faithful adherence to the rule of law can provide.


49. As one commentator noted:
[T]he pioneer systematic exponents of [laissez faire], the Physiocrats and Adam Smith, argued for... the limitation of governmental activity to the enforcement of peace and of "justice" in the restricted sense of "commutative justice," to defense against foreign enemies, and to public works regarded as essential and as impossible or highly improbable of establishment by private enterprise or, for special reasons, unsuitable to be left to private operation.

sary to have common institutions and common property to make the system work. Indeed, a modern society needs to have at least some measure of public planning. On that matter, it is one thing to quote Hayek’s wonderful passage:

The distinction . . . between formal law or justice and substantive rules is very important and at the same time most difficult to draw precisely in practice. Yet the general principle involved is simple enough. The difference between the two kinds of rules is the same as that between laying down a Rule of the Road, as in the Highway Code, and ordering people where to go; or, better still, between providing signposts and commanding people which road to take.\(^5\)

But Hayek’s statement cannot be allowed to conceal the fact that it is the function of the state to determine whether these highways will run through town or around it, how many lanes they will have, and where the on and off ramps will be located. Those matters require at least some knowledge of how public institutions can support private development. In *The Constitution of Liberty*, Hayek makes some concessions to this need for infrastructure. He recognizes the need to take into account the “neighborhood effects” that the activities of one landowner will have on another,\(^5^1\) and that, in light of these effects, “[t]he general formulas of private property or freedom of contract do not . . . provide an immediate answer to the complex problems which city life raises.”\(^5^2\) But he is far more effective in his denunciation of rent control rules\(^5^3\) than he is in the articulation of an intelligent rule that explains what form of land use planning is acceptable by government and what forms amount to impermissible social control. Over and over again his basic inclination is to try to reduce the messy business of land planning to a specific application of the general rule of law:

---

52. Id.
53. Id. at 344.

Because of rent restriction, large sections of the population in Western countries have become subject to arbitrary decisions of authority in their daily affairs and accustomed to looking for permission and direction in the main decisions of their lives. They have come to regard it as a matter of course that the capital which pays for the roof over their heads should be provided free by somebody else and that individual economic well-being should depend on the favor of the political party in power, which often uses its control over housing to assist its supporters.

*Id.* at 344.
Such "town planning" [of the good sort], which operates largely through its effects on the market and through the establishing of general conditions to which all developments of a district or neighborhood must conform but which, within these conditions, leaves the decisions to the individual owner, is part of the effort to make the market mechanism more effective.54

His bromides offer little of value to anyone who must sort out different land use proposals, or pass on the constitutionality of various government land use restrictions.

The problem here is deeper than Hayek would like to admit. Once we recognize that coherence is necessary for planning infrastructure, it becomes far more difficult to start from the assumption that the land planner is radically ignorant of what individuals want. At the very least, we have to decide that it is better to build our four-lane highways between the population centers of Washington and Baltimore than between two isolated farms. To be sure, this simple-minded choice requires little reflection, but the location of highways is far more contentious as we make detailed plans for the system that requires us to decide whether to widen Fourth or Fifth Street. The task admits no perfection, but the mere fact that it is undertaken requires us to acknowledge that perhaps we can find more regularity in human preferences and human conduct than Hayek was willing to accept. It is not necessary for us to deny the important component of subjectivity in human preferences. But it is necessary to recognize some greater capability to learn of these preferences than Hayek is prepared to acknowledge. In an odd sense, therefore, Hayek pushes too hard on our collective ignorance to the extent that it denies us the ability to make intelligent collective judgments on the location, construction, and funding of social infrastructure. Thus far it looks like Hayek's opposition to socialism leaves him unable to account for the state provision of classical public goods.

II. SOCIALISM AND MINIMUM RIGHTS

It is quite clear that Hayek's appeal to our collective ignorance explains the dominance of free markets, but it also leaves him unable to develop a sound theory of when collective action is required and how it should be conducted. The notion of collective goods presents an endless challenge to political thinkers of all persuasions. What is quite fascinating about Hayek is that he does not limit the state role to

54. Id. at 350.
the provision of these public goods, but moves beyond this point. Upon re-reading The Road to Serfdom, one notices that the topic of Chapter 9 is "Security and Freedom." I wish to focus on the former, because security is one of the great terms of Western Civilization, yet one whose meaning and nuances do not, generally speaking, receive sufficient attention—including from Hayek himself. By contrast, the social contract tradition of English law, beginning with Hobbes, and including Hume and Locke, sets forth a very clear and coherent account of security; this account drives most of what these philosophers believe. They begin, of course, with an original position which they were happy to call, as we are not, "the state of nature." In the state of nature, there are no public or collective restraints upon the action of any individual. Hobbes thought that in this condition natural liberty allowed individuals to do whatever they could until restrained by a greater force. Although in the state of nature we can describe acts in physical terms, such as "tending my garden" or "blowing your brains out," we cannot say that either of them is right or wrong until some greater power decrees that action to be a wrong.

Others, most notably Locke, have disagreed with Hobbes as to whether there could be a system of right and wrong in a state of nature. But where people start is in a sense less important than where they end. The entire social contract tradition identifies the manifest of inconvenience with individual excesses in the state of nature. The great question of political theory is how each of us trades in some of our untrammeled liberty of action for security against various kinds of activities undertaken by other individuals.

The fundamental issue of political theory is how to orchestrate this surrender of liberty for security. First, we attempt to use contrac-

55. HAYEK, THE ROAD TO SERFDOM, supra note 6, at 119.
56. For my more detailed account, see Epstein, supra note 44, at 420 ("What is striking about the Hayekian position is that neither form of security under discussion [in chapter 9 of The Road to Serfdom] refers to the protection that the state supplies against external aggression, independent of the wealth of its citizens.").
57. See HOBBS, supra note 14, at 91 ("The Right of Nature . . . is the Liberty each man ha[s], to use his own power, as he will himself[ ], for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing . . . he[ ] shall conceive to be the aptest means thereunto.").
58. See id. ("Liberty, is understood . . . [as] the absence of external[ ] Impediments: which Impediments may of[ten] take away part of a mans power to do what he[ ] would . . .").
59. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1698) ("The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.").
tual terms, yet quickly realize their inadequacy because there are too many parties, with too diffused interests, with too great a geographical dispersion for one contract to bind all individuals. Even if everyone alive or in a given region could agree at one point in time, the moment new people are born, or strangers immigrate into the community at large, the old contract will have to be renegotiated or abandoned. Thus, the usual tools of offer and acceptance, and actual consent, do not suffice to form the social order. To use Ronald Coase's influential and modern formulation of the problem, the transaction costs are so high to preclude a voluntary agreement from which everyone could gain. But at the most visceral level, unanimity is essential lest the one individual not bound by the social contract subjugate or kill all the others.

To escape this untimely outcome, social contract theory looks to individuals' objectives in forming ordinary contracts. And we (and here it is the collective "we") conclude that each individual wishes to surrender something he values (natural liberty) in order to gain something of greater value (political security). Hayek's faith of radical ignorance notwithstanding, we are reasonably confident that in this stark example we know what individuals value and fear, and that we can decide what institutional arrangements serve, or frustrate, those interests. Thus, we are also confident that almost all individuals—except for a few pathological cases—prefer the right to live to the right to kill another individual. Under its classical liberal formulation, the great social contract sacrifices liberty, but only to the extent that it is necessary to gain security against force and fraud. Perhaps we might go further, but surely we go this far.

Rightly organized, this social contract overcomes the difficulties of actual agreements. The present generation can adopt this institution by political measures, and command the allegiance of all individuals by showing them how they benefit on net from the arrangements to which they are forced to subscribe. Future generations and new immigrants are allowed to enter the society on the same terms that bind everyone else. Because what is required is universal forbearance from the use of force and fraud, the substantive content of the obligation does not shift with each arrival or departure. Population shifts do not require us to redefine the basic obligations or take special steps to inform newcomers what is required of them. Combined with systems of taxation and regulation that allow the formation of infrastructure,
we have a system that falls short of perfection, but nonetheless operates with some level of overall efficiency.

How, if at all, should this classical account of the relationship between liberty and security be updated for the modern age? Hayek’s response is quite surprising in light of the general tenor of his thought. Far from being skeptical, cautious, or wary of new-fangled ideas, Hayek swallows them too easily. He spends little time discussing security against aggression, although he clearly endorses it. Rather, he puts that to one side, only to distinguish between two other conceptions of security. The first is security against privation and suffering; the second is security that insulates one’s general economic position from the economic forces of change:

These two kinds of security are, first, security against severe physical privation, the certainty of a given minimum of sustenance for all; and, second, the security of a given standard of life, or of the relative position which one person or group enjoys compared with others; or, as we may put it briefly, the security of a minimum income and the security of the particular income a person is thought to deserve. . . .

There is no reason why in a society which has reached the general level of wealth which ours has attained the first kind of security should not be guaranteed to all without endangering general freedom. . . . [T]here can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody. Indeed, for a considerable part of the population of England this sort of security has long been achieved.

Nor is there any reason why the state should not assist the individuals in providing for those common hazards of life against which, because of their uncertainty, few individuals can make adequate provision. Where, as in the case of sickness and accident, neither the desire to avoid such calamities nor the efforts to overcome their consequences are as a rule weakened by the provision of assistance—where, in short, we deal with genuinely insurable risks—the case for the state’s helping to organize a comprehensive system of social insurance is very strong. . . . To the same category belongs also the increase of security through the state’s rendering assistance to the victims of such “acts of God” as earthquakes and floods. Wherever communal action can mitigate disasters against which the individual can neither attempt to guard himself nor make provision for the conse-
quences, such communal action should undoubtedly be taken.\textsuperscript{61}

This distinction was stated with equal clarity over thirty years later in Volume 2 of \textit{Law, Legislation and Liberty}:

There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend. To enter into such an insurance against extreme misfortune may well be in the interest of all; or it may be felt to be a clear moral duty of all to assist, within the organized community, those who cannot help themselves. So long as such a uniform minimum income is provided outside the market to all those who, for any reason, are unable to earn in the market an adequate maintenance, this need not lead to a restriction of freedom, or conflict with the Rule of Law. The problems with which we are here concerned arise only when the remuneration for services rendered is determined by authority, and the impersonal mechanism of the market which guides the direction of individual efforts is thus suspended.\textsuperscript{62}

Yet he thinks (quite rightly) that the other form of security is counterproductive in the extreme. In one memorable passage, he succinctly states the difficulty:

[T]he policies which are now followed everywhere, which hand out the privilege of security, now to this group and now to that, are nevertheless rapidly creating conditions in which the striving for security tends to become stronger than the love of freedom. The reason for this is that with every grant of complete security to one group the insecurity of the rest necessarily increases. If you guarantee to some a fixed part of a variable cake, the share left to the rest is bound to fluctuate proportionally more than the size of the whole. And the essential element of security which the competitive system offers, the great variety of opportunities, is more and more reduced.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{61} HAYEK, THE ROAD TO SERFDOM, supra note 6, at 120-21.
\item \textsuperscript{62} 2 HAYEK, LAW, LEGISLATION AND LIBERTY, supra note 15, at 87.
\item \textsuperscript{63} HAYEK, THE ROAD TO SERFDOM, supra note 6, at 128. For a similar recognition of the risks of political guarantees, see David Schmidt, \textit{Guarantees}, Soc. PHIL. & POL., Summer 1997, at 1, 3:
\begin{quote}
[A] society is trying too hard when, to avoid the prospect of leaving individuals to "sink or swim," it issues guarantees that not only collectivize responsibility but externalize it at the same time. Such guarantees do not merely help decision
\end{quote}
\end{itemize}
His great argument is of course that the illusion of this second form of security is counterproductive. Giving some individuals a protected position does not reduce the amount of natural uncertainty in the world; indeed, it increases the amount of uncertainty—natural and political—that all individuals have to bear. But so long as some individuals claim exemption from these external forces other individuals will have to bear their additional cost for no additional compensation. It follows, therefore, that it is a hopeless task for the state to confer on each individual the "right" to some particular job and to the maintenance of the historical income that it has generated. Hayek notes that many workers have entered into trades that have long yielded them a certain income. When new technology becomes available, however, a new generation no longer needs blacksmiths or typists or chiropractors or abdominal surgeons or law professors to the same degree as before. Such individuals find that diminished demand leads to lower income.

In The Road to Serfdom, Hayek thus denounces that form of security that allows individuals who invest human capital to enjoy their peak earnings throughout life. He is surely at his best when insisting that a policy of guaranteed income within established professions and trades ruins the competitive market. Once certain services become unneeded, then some form of state subsidy will be required in order to maintain at the same level the incomes of those who have provided these services. In turn, this subsidy will require heavy taxes on other individuals, including those innovators who promise greater advances to society than individuals whose services are subsidized. The mere possibility that interest groups could obtain such relief poses the added danger of leading them to take up the cause of resistance, rather than weaning themselves from their dependence on traditional occupations. At root, this new form of security operates at cross-purposes with the classical conceptions of security, which are linked to the protection of private property and voluntary exchange against the perils of force and fraud. Strong property and contract allow individuals to plan for the future and to pool risks through contracts of insurance.

makers spread costs among themselves but also help them pass costs on to third parties without consent.

*Id.*

64. See *Hayek, The Road to Serfdom, supra* note 6, at 122-23 ("We all know the tragic plight of the highly trained man whose hard-learned skill has suddenly lost its value because of some invention which greatly benefits the rest of society. The history of the last hundred years is full of instances of this kind . . . .").
In the short term, Hayek wrote in vain. The conservative government of Winston Churchill was whisked out of office in the general elections held at the conclusion of the war. Then followed a period of increased socialization of the means of production over the thirty-five years until Margaret Thatcher became Prime Minister of Great Britain in 1979. Thatcher took on coal miners who had demanded exactly the sort of security that Hayek had deplored; the coal miners insisted on their right to mine coal so long as a single lump was left in the ground, no matter how high the cost of extraction or how low its market value. The trade unionists saw changes in the conditions of supply, demand, and profit as utterly irrelevant to their position; other citizens thus had to pay for this particular extravagance. The stagnation in England in real income in the post-war period showed that Hayek was right to reject these partial claims for security as destructive of the security of the whole. It is a lesson that we should not forget today when the Al Gores of the left and the Patrick Buchanans of the right offer their own brands of protectionism with the same deleterious consequences.

I have no doubt that Hayek rightly foresaw that this provincial form of job protection constitutes the greatest threat to the vitality of a free society. It hardly follows, however, that Hayek should have conceded (let alone claimed) that the state did have an obligation to provide that form of security that protected individuals from various forms of privation—minimum incomes, health insurance, and flood and earthquake insurance. Accordingly, in *The Road to Serfdom*, Hayek lists an impressive array of services that he was willing to let the state provide. Also, when general employment levels fluctuate due to public policy decisions, Hayek seemed willing to entertain—although not as clearly so as in the other cases—some system of unemployment insurance for the purpose of tiding people over the rough...

65. See Maureen Johnson, *Thatcher Says She Will Not Compromise with Union*, ASSOCIATED PRESS, Feb. 1, 1985, *available in* 1985 WL 2850675 (“Mrs. Thatcher . . . said it was unacceptable for the miners to deny management the right to close unprofitable mines.”).

66. See 3 *HAYEK, LAW, LEGISLATION AND LIBERTY*, supra note 9, at 144 (“By conferring . . . on the trade unions unique privileges, which hardly government itself enjoys, organizations of workers have been enabled to exploit other workers by altogether depriving them of the opportunity of good employment.”).


69. See text accompanying supra note 61.
times. Although somewhat uneasy about the point, Hayek was prepared to say that, as long as we allow free entry and exit into businesses, and allow wages and prices to move, then health and safety regulations could be consistent with the effective operation of competitive markets.

As I noted earlier, Hayek had second thoughts about this point, for some thirty years later he wrote:

At the time I wrote, socialism meant unambiguously the nationalization of the means of production and the central economic planning which this made possible and necessary. In this sense Sweden, for instance, is today very much less socialistically organized than Great Britain or Austria, though Sweden is commonly regarded as much more socialist. This is due to the fact that socialism has come to mean chiefly the extensive redistribution of incomes through taxation and the institutions of the welfare state.

In his review of Hayek's collected works, Cass Sunstein derides Hayek's asserted connection between state control over the means of production and the redistribution of wealth in society: "[t]his, certainly, is a far less plausible claim. Nothing in his arguments in this book establishes it." But with a little work, we can forge that connection, both in formal and pragmatic terms, even more closely than Hayek understood. Start with Hayek's concurrence in the conventional wisdom that socialism means the collective ownership of the means of production. In the classic planned economy, the state either ran the business itself, set the terms and conditions under which private parties could sell their wares, or established the wages at which they were forced to pay their employees. That distinction is only one of a matter of degree (although important for that reason). Having the state set these prices and wages is to give it a partial ownership

70. See HAYEK, THE ROAD TO SERFDOM, supra note 6, at 121 ("[T]hough [the] solution [to unemployment] will require much planning in the good sense, it does not—or at least need not—require that special kind of planning which according to its advocates is to replace the market.").

71. See id. at 132 ("There can be no question that adequate security against severe privation... will have to be one of the main goals of policy. But if those endeavors are to be successful and are not to destroy individual freedom, security must be provided outside the market and competition be left to function unobstructed.").

72. HAYEK, 1976 Preface, supra note 12, at xxiii. The same point was made more forcefully by Milton Friedman in his 1971 introduction to the German translation, which he quoted extensively in his special introduction written in 1994 to the 50th anniversary edition of the book. See Milton Friedman, Introduction to F.A. HAYEK, THE ROAD TO SERFDOM at xiii (fiftieth anniv. ed. 1994).

73. Sunstein, supra note 48, at 40.
position by depriving the owner of some of the standard incidents of ownership. That elimination might be justified in the regulation of monopoly institutions such as common carriers and public utilities, as an effort to edge closer to a competitive economy. But when the regulation is imposed, regardless of market structure and in competitive markets, that justification fails, so the assertion of state power amounts to a partial state ownership of the means of production, a limited form of socialism.

To be sure, this form of state regulation differs from traditional socialism in that the state takes a chunk of every business and forswears direct ownership of its large industrial firms. The comparison brings to mind the relationship between collective bargaining laws and antidiscrimination laws. The former impact (most heavily) unionized firms. The latter cut a broader swathe, but exert a smaller effect on every firm, unionized or not. No a priori argument establishes which form of regulation interferes most with the operation of a competitive labor market. The precise incidence of state restrictions has to be examined to determine the magnitude of specific state interventions; there are no short cuts.

A couple of examples should help illustrate the potential magnitude of the problem. Let the state supply insurance against floods and earthquakes, and the private market for those goods will be crowded out, often with catastrophic effects. Hayek writes as though these markets are free of moral hazard when he describes these losses as "disasters against which the individual can neither attempt to guard himself nor make provision for the consequences." But once the state decides to provide insurance at below market rates (or worse, bail people out without requiring any insurance from them at all), it provokes just this threat to sound resource allocation. Moral hazard and adverse selection are alive and well in these markets. Individuals will build their homes in areas that are exposed to high risks of floods and earthquakes—right in the heart of hurricane territory if necessary. And because governments will resist paying for these subsidies directly, they will find ways to burden private insurance companies with the systematic losses associated with assigned risk pools. One common strategy is to forbid companies to exit markets in which the

75. Hayek, THE ROAD TO SERFDOM, supra note 6, at 121.
76. See Junger, supra note 68.
premiums are set too low, as Florida did after Hurricane Andrew.\footnote{Florida’s law featured two central provisions. See 1993 Fla. Laws ch. 93-401 (imposing moratorium on cancellation and non-renewal of residential property insurance policies on the basis of risk of hurricane claims); FLA. STAT. ANN. § 215.555 (West Supp. 1998) (calling for mandatory participation on the part of the state in the Hurricane Catastrophe Fund by providing reimbursements to insurers).}

But these coercive measures in turn undermine otherwise viable voluntary markets, producing the very dislocations that Hayek so heartily disapproved.

The same point can be made of the system of social security, introduced in 1935, nearly a decade before Hayek wrote *The Road to Serfdom*. These programs have the exact same effect on “security” that Hayek feared. Social security works wonders for the income of those who joined the program earlier, and whose income today is guaranteed against major fluctuations. But the correlative taxes needed to fund the program place at ever greater risk the next generation of individuals who are asked to keep the program in clover. No system of general redistribution can make all individuals more secure simultaneously, and the high level of intergenerational wealth transfers has many of the same consequences of the job protection and security programs that rightly earned Hayek’s wrath.

Sixty years later, the new battleground for security was the ill-fated Health Security Act of 1993.\footnote{For a detailed discussion, see Richard A. Epstein, *Mortal Peril: Our Inalienable Right to Health Care?* 215 (1997) (concluding that the demise of Clinton’s Health Security Act was well deserved because “[i]t could have done little to improve the lot of the uninsured, but it would have done much more to reduce care and increase the cost of care for the rest of the population”). For a far more sympathetic account, see Theda Skocpol, *Boomerang: Clinton’s Health Security Effort and the Turn Against Government in U.S. Politics* (1996).} One reason why that program failed was that it could not generate increased security to all individuals simultaneously, even though it could impoverish them all simultaneously. Politically, the group most opposed to the passage of the Act turned out to be senior citizens on Medicare who recognized that their preferred position was threatened by any effort to extend guarantees to all citizens.

A more limited intervention can also have profound effects. We can have entry and exit of firms into labor markets, but so long as all workers are entitled to receive Medicare protection at age sixty-five, competition over one important component of retirement benefits is effectively curtailed by the state monopoly in critical contract terms. And the same pattern of intergenerational transfers is an outgrowth of the recent amendments to the age discrimination laws that eliminate mandatory retirement for (amongst others) university professors.
Here again, the additional security that is conferred on senior employees comes out of the hide of younger generations. In academic terms, senior faculty get to keep their positions, their pensions, and their salaries, while younger faculty members scramble to fill folding chairs which, as their name suggests, offer no job security at all. Even as late as 1976, Hayek had little sense of the extent to which these state programs could grow under the shadow of state protection, or of the implicit tax they impose on economic growth.

This quick review shows why it is improper to conclude that abandoning central planning renders benign other forms of state regulation. Indeed, to some extent, the rejection of state planning—which is hardly the same thing as a rejection of land planning—over large sectors of the economy has intensified the pressure on legislative bodies to adopt various forms of general regulation of health and safety. Sometimes, perhaps often, regulation that addresses these concerns serves public-regarding ends. But even when the motivation seems sound, why should the government think it appropriate to force people to adopt particular safety rules that they are always free to adopt voluntarily? The impetus for state regulation often comes down to the danger to which Hayek was always alert—blocking entry. One pervasive theme of modern regulatory and constitutional work highlights the disparate impact of formally neutral rules. Let the same restriction apply to a large plant and a small one, and the cost of compliance—or, more accurately, the cost of compliance per unit of good—could easily differ. The effect, therefore, is to place a heavier tax on the one business than on its rival, which in turn retards entry or spurs exit, thereby increasing industrial concentration. Hayekian fears about central planning do not disappear simply because the next generation of regulation adopts novel tactics to achieve its end.

In sum, I think that the charge of Hayekian socialism carries with it a certain reluctant accuracy, because Hayek did not see the close intellectual and institutional connections between the government interventions that he supported and those which he opposed. In part,
Hayek made this mistake because of the political circumstances of his own time. In order to slay the dragon of central planning, he thought it imperative to concede some points to the opposition. But a second reason is at work as well, and it brings us back to the philosophical origins of the Hayekian position. The central feature of Hayekian thought was its reliance on ignorance. It is ignorance that makes central planning fail. It is ignorance that gives local knowledge its real bite. It is ignorance that leads us to embrace a conception of subjective value.

I value my ignorance as much as the next fellow. But truth be known, Hayek has gotten his central philosophical point only partly right. He overstates the level of ignorance that we have, and thus underestimates the dangers of government intervention driven by knowledge of partisan advantage. It may well be that I cannot draw the demand curve for my new widget, or anticipate any of the thousands of events that will determine its price; but I do know that there are few states of the world in which I am better off without my protected monopoly than with it. And ignorant, though I may be, I will be prepared to invest a good deal in securing that legal protection if allowed to do so by the rules of the game. With partial knowledge I can put self-interest to work in the political sphere just as I can put it to work in the economic sphere. Truth be known, that is where Hayek goes wrong. We (collectively) may not know enough to manage a complex economic system from the center, but we (individually) do know enough to seek to rig the rules of the game to cut in our favor. Imperfect information coupled with confined self-interest offers a better set of behavioral assumptions about individual actors and social processes. Once we make those assumptions, we must be aware of the dangers that come from interferences with contractual freedom and with legal efforts to maintain, from the center, minimum levels of security for us all. These ideals may sound fine in the abstract, but in practice they confer too much power on government bureaucrats and often invite private behaviors that ape many of the worst characteristics of the central planning that Hayek rightly deplored. The Hayekian critique applies to the Hayekian concessions on minimum welfare rights. In that important sense, the charge of Hayekian socialism sticks.