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The Freedom of the Prices: Hayek's *Road to Serfdom* Reassessed

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Abstract: Recent debate has questioned the contemporary relevance and even the original validity of F. A. Hayek's *Road to Serfdom*. Was it directed against command socialism only or against welfare-state interventionism too? Should it even be read anymore? This essay takes a step back from the dichotomy between socialism and interventionism and explores two specific ideas of Hayek's which deserve renewed attention: first, his claim that economic liberty is the fundamental liberty and that political liberty is merely secondary in value. Second, Hayek's conception of the rule-of-law, which has implications for contemporary command-and-control regulation. Furthermore, that Hayek's conception of the rule-of-law in the *Road to Serfdom* is related to his economic theory of prices in “The Use of Knowledge in Society.” While Hayek's specific target in the *Road to Serfdom* was command socialism, his book embodied arguments – elaborated in his later works – which are more widely applicable and relevant.

Keywords: rule of law; liberty; freedom; rights; price system

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In a series of recent essays, Andrew Farrant and Edward McPhail have questioned the value of F. A. Hayek's *Road to Serfdom* (2007 [1944]).¹ They dispute Caldwell's (2007:30f) claim that Hayek's *Road to Serfdom* was directed solely against full-blown command planning and socialism.² Instead, Farrant and McPhail say, Hayek himself claimed, in subsequent writings, that his arguments in the *Road to Serfdom* applied to the contemporary welfare state or mixed economy as well. Because the welfare state has obviously not resulted in Soviet- or Nazi-style totalitarianism, Farrant and McPhail say, Hayek's arguments must be mistaken. Similarly, Farrant and McPhail also reject the claim (Caldwell 2011, Boettke and Snow 2012) that *Road to Serfdom*'s criticism of central planning must be distinguished from Hayek's milder criticism of the welfare state in *The Constitution of Liberty* (2011 [1960]) and in *Law, Legislation, and Liberty* (1973a, 1976a, 1979). Caldwell (2011, 1997:1866-1871) and Boettke and Snow (2012) argue that *Road to Serfdom* must be understood in its specific historical and institutional context – that it must not be confused with Hayek's later works, which are more relevant to the political situation today. Farrant and McPhail claim that Hayek himself considered all his works to relate to a single, ongoing theme, and that in Hayek's view, the same arguments apply against both command planning and the welfare state or mixed economy. Farrant and McPhail claim this makes all of Hayek's arguments dubious. Furthermore, they say, even if Caldwell is correct that *Road to Serfdom* was directed solely against command planning, this would render *Road to Serfdom* irrelevant to contemporary political issues. According to Farrant and McPhail, one cannot simultaneously argue – as Caldwell does – that *Road to Serfdom* was written about an obsolete, defunct form of socialism and yet that the book is also relevant today. In response, Boettke and Snow (2012) have argued that Farrant and McPhail misunderstand and under-appreciate Hayek's arguments.

This essay will contribute to the defense of Hayek by Caldwell (2007, 2011), Boettke (1995), and Boettke and Snow (2012). Rather than replying point-by-point to Farrant and McPhail, instead, I will elaborate on two specific features of Hayek's works which I believe have been under-appreciated

or misunderstood. Thus, I will implicitly respond to Farrant and McPhail's claim that *Road to Serfdom* is irrelevant by highlighting features which I believe deserve renewed attention. I will point out only some of the broader implications, for my purpose is to be suggestive, not comprehensive. I do not aim to refute every single remark by Farrant and McPhail nor definitively defend Hayek, but instead, I hope to move the discussion of Hayek to another plane to facilitate constructive debate.

Throughout this essay, I will be making constant reference to Hayek's other books and essays on political philosophy, for they constitute the continuation and culmination of the research program which Hayek began in the *Road to Serfdom*. Some of Hayek's arguments to which I will appeal are most completely elaborated in his later writings, but all of them were originally expressed – however incompletely – in the *Road to Serfdom*. In my interpretation, Hayek's later writings adapted his own arguments against command planning in *Road to Serfdom* and applied them to the contemporary mixed economy. While *Road to Serfdom* was indeed written about command planning (cf. Caldwell 2007:30f., 2011; Boettke and Snow 2012; Godard 2013), it embodies novel claim about economics and politics which are more broadly relevant (cf. Boettke 1995).³ Indeed, in postwar Germany, the *Road to Serfdom* was received, not as a conservative reaction against socialism, but as progressive and revolutionary advocacy for free-markets (Godard 2013). I hope to rehabilitate this German version of his legacy, arguing that the negative arguments against command socialism in *Road to Serfdom* embody a positive program for today.

Section I demonstrates that Hayek expressed the novel but neglected opinion economic liberty is *the* fundamental liberty – that political liberty and democratic representation are merely secondary in value. In section II, I argue that Hayek's conception of the rule-of-law in the *Road to Serfdom* has important implications for the contemporary regulatory state because command-and-control regulation is a “light” form of command socialism. Furthermore, I argue that Hayek's normative defense of the rule-of-law is related to his positive economic views on economic calculation and the price-system. Finally, that Hayek's conception of the rule-of-law has implications for our understanding of

Scandinavian socialism. Section III concludes.

I. ECONOMIC AND POLITICAL LIBERTY

One of Hayek's central claims in *Road to Serfdom* is that *all* planning and economic intervention is necessarily coercive: it is impossible to interfere in the economy without interfering in individual people's lives. Boettke (1995:11) takes brief notice of this feature but he does not explore it in any great detail, merely quoting one statement by Hayek without offering any commentary or explanation. Lawson and Clark (2010), in their empirical examination of the Hayek-Friedman claim that political freedom relies on prior economic freedom, do not mention the importance Hayek placed on economic freedom for its own sake. In fact, they appear to imply that Hayek ranked political freedom particularly highly (Lawson and Clark 2010:231):

Hayek, writing immediately after World War II, appeared more concerned with the trappings of traditional political democracy: freedom to vote, run for office, organize political parties, etc. Friedman, writing in the early 1960s, appears equally concerned with a broader array of civil liberties and, indeed, often downplays the role of formal political rights like voting (e.g., in Hong Kong).

But in fact, Hayek – like Friedman – discounted the value of formal political rights, emphasizing instead the importance of economic rights. In *The Road to Serfdom*, Hayek argued that economic planning and intervention entail making people's decisions for them. Crucially, this is true of both full-blown command planning as well as piecemeal intervention (Huerta de Soto 2010:83-87). As Hayek notes, many of the planners have failed to realize these facts. “The consolation our planners offer us is that this authoritarian direction will apply 'only' to economic matters” (2007 [1944]:124). But this reply is based on “the erroneous belief that there are purely economic ends separate from the other ends of life” (Hayek 2007 [1944]:125). Economics is simply choosing those means which are

best at accomplishing given ends. Hayek thus agreed with Mises (1981 [1922]:107) that in this sense, every aspect of life is economic. For example, it is impossible to learn and obtain knowledge without access to physical books, classrooms, and/or computing devices. For government to plan the production of these physical things is to plan the terms and conditions on which people will be able to obtain knowledge. Or as Milton Friedman famously pointed out (1962:16-18), freedom of speech cannot be maintained when the government owns all the printing presses (cf. Hayek 1973c:149, Rothbard 1977:26, Mises 1981 [1922]:538). Therefore, Hayek (2007 [1944]:126) states, economic planning raises the question of “whether it shall be we who decide what is more, and what is less, important for us, or whether this is to be decided by the planners.” “The authority directing all economic activity . . . would control the allocation of the limited means for all our ends” (Hayek 2007 [1944]:126). “Economic control is not merely control of a sector of human life which can be separated from the rest; it is the control of the means for all our ends” (Hayek 2007 [1944]:127, quoted in Boettke 1995:11).

Similarly, when Marx said that “in place of the government over persons comes the administration of things,” Mises (1981 [1922]:73) replied, “there can be no administration of goods which is not administration of men – i.e. the bending of one human will to another – and no direction of productive processes which is not the government over persons – i.e. domination of one human will by another.” Furthermore, Mises said (1981 [1922]:493),

Whatever people do in the market economy, is the execution of their own plans. In this sense every human action means planning. What those calling themselves planners advocate is not the substitution of planned action for letting things go. It is the substitution of the planner's own plan for the plans of his fellow men.

This passage by Mises is reminiscent of something Hayek often said, *viz.* that the question is not planning versus no planning, but rather, the question is, who plans? Are individuals permitted to plan their own lives, or will the government plan their lives for them? Hayek aptly summarized his argument by prefacing his chapter (“Economic Control and Totalitarianism” in the *Road to Serfdom*)

with this quotation from Hilaire Belloc: “The control of the production of wealth is the control of human life itself” (Hayek 2007 [1944]:124).

It may be difficult for some philosophers to understand why economic liberty is so important for its own sake according to Mises and Hayek. As Brennan (2014:80) notes, “Some philosophers – themselves never having owned a business – might have a hard time understanding these kinds of desires.” In response, Brennan (2014:78) explains that people “have ideas and visions that they want to implement. Pursuing projects over the long term is often part (if not the only part) of what gives coherence and meaning to their lives.” Pursuing these projects requires physical means, and so “They also want to be able to use, give-away, sell, and in some cases, destroy these objects, as part of their pursuit of their visions of the good life” (Brennan 2014:79f.). Many philosophers believe that the fundamental human liberties are precisely those which a philosopher uses in his daily life to pursue his scholarly studies, such as the freedom of speech. They cannot understand why the freedom to own private property is so important. Brennan (2014:80) continues, “But if that philosopher can understand why one might want to write a book by oneself, rather than with co-authors or by a committee, the philosopher can similarly understand why someone might want to own a factory or a farm or a store.” It is private property which allows us to pursue our dreams, express ourselves, and achieve self-actualization. Citing John Tomasi, Brennan (2014:92) continues, “people have an interest in being 'self-authors,' that is, in choosing a conception of the good life and finding the means to achieve that conception.” Like Brennan, Mises and Hayek argue that economic liberty is essential because it implies the individual's freedom of access to the means for accomplishing his ends.

Thus, while different interventions will have different consequences, the fundamental fact is – according to Hayek – that *all* interventions negate individual freedom to one degree or another. Perhaps price-controls, command-and-control regulation, and discriminatory taxation deny freedom more than simple redistribution of wealth and neutral taxation, because they interfere more with the autonomy of individual decision-making and planning (Ikeda 2015:409, 414). But above all, every government

intervention entails making people's decisions for them – planning their lives in their steads. Moreover, one intervention tends to beget another due to the law of unintended consequences (Hayek 2007 [1944]:137).

According to Lawson and Clark (2010:231), Hayek “appear[s] to adhere to a proto-public choice argument that 'power corrupts.'” Indeed, the famous quotation by Acton introduces Hayek's chapter on “Why the Worst Get on Top” (2007 [1944]:157).⁴ But this is not the central argument of Hayek's book. Instead, and more importantly, Hayek argues that every economic intervention itself inherently and directly compromises freedom. It is not merely that a system of democratic elections cannot be sustained after a long train of economic interventions – although Hayek does claim this – but more importantly, Hayek says, individual liberty is undermined by the economic interventions themselves. Hayek defined freedom as “a state in which each can use his knowledge for his purposes” (1973a:55f.). Freedom is the individual's ability to make decisions for oneself. In fact, Hayek's entire political philosophy (e.g. 1973a, 1976a, 1979) is based on his fundamental and axiomatic belief that all individuals should be free and enabled to pursue their own goals.

Thus, Hayek's argument is not merely that certain kinds of intervention tend to produce political side-effects which eventually lead to the non-democratic aspects totalitarianism. Although Hayek certainly does believe this, it is mistaken to believe that Hayek criticizes economic interventions primarily because they tend to eventually compromise democracy and suffrage. Rather, Hayek argues that economic liberty is *the* fundamental liberty, and political liberty is valuable only insofar as it helps guarantee economic liberty. Freedom means individual not collective decision-making. Consider what Hayek says about democracy in *The Road to Serfdom* (2007 [1944]: 110f.):

Democracy is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom. As such it is by no means infallible or certain. . . . [There is] the misleading and unfounded belief that, so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary. . . . If democracy resolves on a task which

necessarily involves the use of power which cannot be guided by fixed rules, it must become an arbitrary power.

For Hayek, democracy and suffrage have merely instrumental value. The fundamental desideratum is economic liberty. Democratic participation in the political process is not valuable for its own sake, but only insofar as it restricts the scope of government power and reduces the extent of political intervention in the economy. According to Hayek, democracy is merely a means, not an end. The primary goal is limitation of government to preserve economic liberty. Thus, in *The Constitution of Liberty*, he added (2011 [1960]:167), “Liberalism is a doctrine about what the law ought to be, democracy a doctrine about the manner of determining what will be the law. . . . [Liberalism] accepts majority rule as a method of deciding, but not as an authority for what the decision ought to be.” Democracy may be a valid and important means of limiting political power, but ultimately, political decisions are to be guided by the fundamental principle that economic liberty is sacrosanct.

This explains why, in an encyclopedia article on the liberal philosophy, in the section on democracy (1973c:142-144), Hayek devoted three paragraphs to discussing how limitation of power takes precedence over democracy, and only one paragraph to how democracy itself cannot survive – giving way to authoritarianism – when political power is not limited. The latter claim is often considered the heart of *Road to Serfdom*, but Hayek clearly believed this claim was of merely secondary importance. Furthermore, Hayek famously declared (1976b:154),

I must confess to preferring non-democratic government under the law to unlimited (and therefore essentially lawless) democratic government. Government under the law seems to me to be the higher value, which it was once hoped that democratic watch-dogs would preserve.

For Hayek, the truly important thing is that the government's activities be restricted by the rule-of-law in order to ensure economic liberty. Political liberty – meaning democracy and widespread suffrage – are valuable only insofar as they help guarantee economic liberty. Hayek lamented the fact that

democratic suffrage was confused with limitation of government. In his words, (1976b:153; cf. Hayek 1979:3),⁵

Thus arose unlimited democracy . . . [from the belief] that the control of government by elected representatives of the majority made any other checks on the powers of government unnecessary, so that all the various constitutional safeguards which had been developed in the course of time could be dispensed with.

Thus, it is profound misinterpretation of Hayek to claim that he criticizes economic interventions merely because they tend to eventually require the abandonment of democracy. Such an interpretation assumes Hayek valued democracy *per se* more than he actually did. Nor was Hayek alone in discounting the value of democracy, for others as well have argued that limitation of political power is more important than democratic representation. For example, in a textbook on basic political theory, Hague and Harrop (2007: 49) write,

[L]iberal democracy is a compromise. Specifically, it seeks to integrate the authority of democratic governments with simultaneous limits on their scope. By definition, liberal democracy is limited government. ... Elected rulers are subject to constitutions that usually include a statement of individual rights. ... In these respects, a liberal democracy is democracy disarmed.

Hague and Harrop argue that liberal democracy is liberal precisely because it is not fully democratic. Indeed, Hague and Harrop (2007: 49) say, the United States is “the most liberal (and perhaps the least democratic) of all the liberal democracies.” Liberal democracy, according to Hague and Harrop, implies that certain areas of life are excluded from democratic decision-making. This is in line with what was said by Hayek's fellow ordo-liberal (Kolev 2010), Wilhelm Röpke (1998 [1957]:69):

Democracy is, in the long run, compatible with freedom only on condition that all, or at least most, voters are agreed that certain supreme norms and principles of public life and economic order must remain outside the sphere of democratic decisions.

Furthermore, according to Hayek (1973b:108), this tension between limited government and democracy goes back to the founding of the liberal philosophy, which already placed precedence for the one over the other:

For Locke, and for the later theorists of Whiggism and the separation of powers, it was not so much the source from which the laws originated as their character of general rules of just conduct equally applicable to all which justified their coercive application.

Edward S. Corwin (1955: 4) made a similar statement about America's founding:

The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of an essential and unchanging justice. . . . There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, all together regardless of the attitude of those who wield the physical resources of the community.

According to Hayek, human freedom and liberty require that a private sphere or protected domain be carved out in which individuals may act for themselves and plan their own lives, safe from interference by others – not just private criminals but from the government as well. Political liberty, according to Hayek, exists insofar as the political system successfully safeguards economic liberty. On the one hand, political liberty entails a government which promotes economic liberty by preventing such private crimes as murder, theft, and fraud as well as by enforcing contracts. But at the same time, political liberty implies protection against incursions by the government itself, such as illegitimate or excessive taxation and regulation. Thus, political liberty necessarily entails limitation of government but it does not necessarily imply democracy, which is merely a means to the end of limiting government. Sometimes, the limitation of political power actually requires the limitation of democracy.

But this aspect of Hayek's thought has been neglected, not only by Farrant and McPhail (passim) and by Lawson and Clark (2010:231), but this misunderstanding is evident in E. F. M. Durbin (1945)'s response to Hayek's *Road to Serfdom* as well. According to Durbin (1945:360), Hayek wrongly assumed that “planning” means comprehensive planning, specifying the precise quantities and destinations of every nut and bolt. But in fact, Durbin (1945:360) says, “planning” in the popular sense means only “a principle of administration and not an inflexible budget of production.” According to Durbin (1945:361),

The final responsibility for taking economic decisions is transferred from the private company or group of shareholders to the representatives of the community sitting upon the Board of a Public Corporation – who are, in their turn, answerable to some Supreme Economic Authority dependent on a Parliament freely elected by the people.

But Durbin does not answer the question which Hayek would have considered fundamental: will these public officials make the same decisions as private market actors would have, or not? (cf. Leoni 2009 [1965]:67). If the political decisions differ from the private ones, then economic liberty has been compromised. Durbin believes he can refute Hayek by distinguishing between comprehensive planning and piecemeal intervention and regulation. But Hayek's argument was that any form of planning or intervention is objectionable simply because political decision-making displaces private decision-making. The more government plans, the less individuals can. Durbin claims it sufficient that the political authority will be democratically elected, but Hayek already argued this is irrelevant. The question is not whether the political officials are democratically elected or not, but whether they deny individuals the ability to make private economic decisions for themselves. Durbin pleads that *Road to Serfdom*'s criticism of comprehensive central-planning is misplaced because “[b]y 'economic planning,' I repeat, we mean a change in the direction of responsibility” (Durbin 1945:362). But it is precisely this “change in the direction of responsibility” which Hayek objected to. Durbin continues (1945:364) that, “We are politically free because we share in forming the laws, not because we can do what we like.”

But for Hayek, it is precisely when “we can do what we like” that we are free. Our “share in forming the laws” is valuable only insofar as it helps ensure that “we can do what we like.” For Durbin, economic liberty is merely secondary in value, and it is democratic suffrage which takes precedence, whereas the exact opposite is true for Hayek. According to Durbin's logic, we could be politically free if we shared in forming the laws which enslaved us, even if we couldn't do what we like. Hayek might have responded that freedom means more than electing one's slavemaster.

Durbin does not merely disagree with Hayek, but rather, he fundamentally misunderstands his point. According to Durbin (1945:368), Hayek's argument on the relationship between economic and political liberty is “historical,” based merely on the fact that historically, economic and political liberty have been expanded simultaneously. Therefore, Durbin (1945:368) says, Hayek's argument is “a plain case of *post hoc, ergo propter hoc*.” But this is not at all what Hayek means. Hayek's claim is not that historically, economic and political liberty have grown up together. Instead, Hayek's claim is that individual freedom inherently requires economic liberty. His argument is not historical, but logical and philosophical. According to Hayek, economic liberty takes precedence over political liberty simply because economic liberty is more important. The individual's freedom to plan his own private life and make his own personal decisions is more valuable than his ability to vote. In fact, the purpose of voting is merely to help the individual safeguard his own private domain.

For another example, consider David Schweickart's (1992:19, 22) proposal for an economic democracy to centrally direct investment.⁶ Schweickart claims that this would avoid the totalitarian problem of comprehensive economic planning. But to control investment is to control everything. As Hayek said, “The basic decision must be at the center so long as the allocation of capital comes from the center. If nobody except for the government is allowed to own capital it is the government which decides all of the ultimate questions” (Ebeling 1977:11). Or as Milton Friedman famously demonstrated, government fiscal policy crowds out private investment. Schweickart believes that as long as the government does not engage in Stalinist comprehensive planning, liberty is safe. But Hayek

responds that the key is that whenever government – no matter how democratic – makes any decision at all, it threatens the abilities of individuals to privately make economic decisions in their own lives. Hence, the distinction between command planning and mere intervention evades the fundamental issue, *viz.*: that regardless of the specific political structure of decision-making, every political intervention denies the abilities of individual people to make private economic decisions (cf. Huerta de Soto 2010:83-87). This is true even though not all interventions do so in the same way or to the same degree. Hayek would not have claimed that Schweickart's economic democracy will necessarily lead to gulags and concentration camps. Instead, Hayek would have simply replied that if government decides investment, then private individuals do not. Every additional decision made by government means one less economic decision made by a private individual in his own personal life.

These two examples – Durbin and Schweickart – help us to reevaluate one of Farrant and McPhail's claims against Hayek. They (F&M 2011a:102 / M&F 2013:969, 2012:424) quote Toye's statement that “Attlee government’s policy in the 1940’s was merely interventionism under the barest veneer of planning.” Like Durbin, Farrant and McPhail believe the distinction between intervention and comprehensive planning is crucial, and that Hayek's arguments in the *Road to Serfdom* are relevant only to comprehensive planning but fail to make any mark against mere intervention. According to both Durbin as well as Farrant and McPhail, Hayek's criticism of command planning was therefore irrelevant to then-contemporary interventionist Britain. But the question is, will political officials do the same things as the capitalist executives would have, or not? Will political interventions override individual decision-making, or not? If political officials make the same decisions as the capitalist executives would have, then they are superfluous. But if they make different decisions, then they override consumer sovereignty and violate economic liberty. Either the government's arbitrary regulations, price-controls, and interventions overrule the market or they do not (cf. Leoni 2009 [1965]:67). As the socialist Maurice Dobb said “Either planning means overriding the autonomy of separate decisions, or it apparently means nothing at all” (quoted in Hoff 1981:267 and Huerta de Soto

2010:267n41; cf. Hayek 1948:158).⁷ Therefore, Hayek claimed, if our goal is to maximize individual freedom, all forms of intervention are suspect – including social democracy, democratic socialism, market socialism, and economic democracy (cf. Huerta de Soto 2010:83-87).

So far, the debates over Hayek's legacy have failed to appreciate Hayek's belief that regulations and economic interventions are inherently objectionable, not merely because they indirectly compromise democracy – although they do – but primarily because economic liberty is *the* fundamental precondition for an individual's ability to plan his own life. According to Hayek, economic liberty is valuable for its own sake. Democracy is merely instrumentally valuable for limiting political power so that individuals can freely plan their own lives and make decisions for themselves. Perhaps future debates over Hayek's legacy will be more fruitful if they explicitly take these facts into account.

II. THE RULE-OF-LAW

The second idea of Hayek's which deserves renewed attention is his conception of the rule-of-law. In his 1956 preface to the *Road to Serfdom* (2007 [1944]:45), Hayek referred to this chapter (2007 [1944]:112-123) as the central chapter of the book. Moreover, Hayek's conception of the rule-of-law pervades his magnum opus, *Law, Legislation, and Liberty* (1982a).⁸ According to Hayek, the rule-of-law entails general, purpose-independent laws which apply to everyone equally. These laws apply in an unknown number of situations to an unknown number of people. Laws satisfying this standard are generally negative, constituting prohibitions rather than mandates. They cannot single out specific individuals, nor can they specify the activities which individuals ought engage in. These are general rules of just conduct equally applicable to all, laying down a framework within which individuals are free to make decisions for themselves. Laws specify the rules by which individuals are free to create their own personal, protected domains which no one else may invade. Such “purpose independent ('formal') rules of just conduct . . . did not impose obligations for particular actions . . . but consisted

solely in prohibitions from infringing the protected domain of each . . . Liberalism is therefore inseparable from the institution of private property” (1966: 165). Individuals must be free to carve out their own protected domains and to make decisions for themselves within the framework of the general, non-discriminatory rule-of-law.⁹ Like the rules of sports, legitimate law must establish only the rules of game but refrain from commanding economic actors how to play the game. Or to take Hayek's own example, the rules of the road constrain the manner in which one must drive but do not specify any specific destination (Hayek 2007 [1944]:113). Hayek's conception of the rule-of-law may be understood as the legal standard for the protection of the economic liberty of individuals to make decisions for themselves.

According to Hayek, laws must be publicized, well-known, and impartially enforced. Moreover, there must be minimal opportunity for discretionary and arbitrary treatment by public officials. But this is far from sufficient, and not all publicized, impartially-enforced laws satisfy the rule-of-law. If the rule-of-law were merely formal or procedural, then unjust, immoral laws could easily satisfy the rule-of-law. For example, the government could order the death penalty for all members of a certain religious group. As long this death penalty is enshrined in publicized written law and impartially enforced against all members of this religious group, then it satisfies the procedural rule-of-law. But the rule-of-law has a substantive component as well: not only must the law be well-known and impartially enforced, but it must be general and purpose-independent as well. Individuals must remain free to make decisions for themselves in their own lives. Laws exist to enable individuals to create their own protected, private domains by prohibiting certain activities, thereby permitting all others. No legitimate law may single out specific individuals or activities – even if it is otherwise duly-enacted by the sovereign legislature. Discriminatory legislation, no matter how duly-enacted, does not satisfy the rule-of-law because it does not promote individuals' abilities to carve out their own protected domains.

In “Principles of a Liberal Social Order,” an essay summarizing his political philosophy, Hayek distinguished between the formal and substantive aspects of the rule-of-law, saying (1966:165),

The 'rule of law' corresponds here to what in German is called *materieller Rechtsstaat* [material rule of law] as distinguished from the mere *formelle Rechtsstaat* [formal rule of law] which requires only that each act of government is authorized by legislation, whether such a law consists of a general rule of just conduct or not.

The concept of a substantive rule-of-law has fallen into disrepute, and the rule-of-law has come to be associated with only its formal or procedural aspects. But this is merely a recent development.

According to Hayek (1966:169f.),

the term 'law' itself, which in the older conception of the 'rule of law' had meant only rules of conduct equally applicable to all, came to mean any rule of organization or even any particular command, approved by the constitutionally appointed legislature. Such a conception of the rule of law which merely demands that a command be legitimately issued and not that it be a rule of justice equally applicable to all (what the Germans call the merely *formelle Rechtsstaat*), of course no longer provides any protection of individual freedom.

As David Bernstein (2011:9) similarly notes,

the idea that the guarantee of 'due process of law' regulates the substance of legislation as well as judicial procedure arose from the long-standing Anglo-American principle that the government has inherently limited powers and the individual citizen has inherent rights. . . . [C]ertain types of acts passed by legislatures could not be valid legislation, which naturally led to the conclusion that enforcing them could not be due process *of law*.

Bernstein italicizes "of law" in the original to emphasize the following (Bernstein 2012):

[my critic] avers that "due process" quite clearly refers only to "a guarantee of procedural fairness," i.e., "notice and a fair hearing before an impartial tribunal." But in fact, this is not clear at all. The mistake [my critic] is making is to separate "due

process” from “of law.” We live in a positivist age, where valid “law” is simply whatever the legislature passes and the governor signs. But the Fourteenth Amendment was not passed in such an age, but at a time when legislation that involved an arbitrary and capricious deprivation of people's rights was not considered to be proper “law” at all.

Or as Aquinas said, an unjust law is no law at all.

Unfortunately, Hayek says, the classical liberal writers rarely made their substantive conception of law explicit, but they merely tacitly assumed that “law” means general, universal rules (1973b:109, 1974b:138). According to Hayek, the substantive conception of the rule-of-law has declined because of the twin influence of unlimited democracy and legal positivism. The tacit understanding that legitimate law must satisfy certain formal requirements have given way to the procedural conception that the law is whatever the people or their representatives have willed, regardless of the content of that legislation. But Hayek rejects the Hobbesian superstition of legal positivism that the sovereign must be unlimited, for the sovereign may be constrained by general principles of justice. Any legislation violating these principles may be declared unlawful. Similarly, Hayek rejects the belief that the majoritarian will of the people takes precedence over justice.

Hayek's conception of the rule-of-law implies a free-market economy with liberty of contract and association. By enabling individuals to make private decisions and coordinate voluntarily with others, general laws of just conduct enable the existence of a unplanned spontaneous order and market economy without guaranteeing any particular outcomes. Hayek distinguishes between a “spontaneous order based on abstract rules which leave individuals free to use their own knowledge for their own purposes, and an organization or arrangement based on commands” (1966:162).¹⁰ Hayek notes that “in contrast to an organization, neither has a spontaneous order a purpose nor need their be agreement on the concrete results it will produce” because a spontaneous order is “independent of any particular purpose” (1966:163). Hayek describes modern civilization is a “Great Society” which comprises

innumerable people with varying goals and purposes. Unlike the intimate life of a primitive tribe, we do not all know each other nor can we agree on specific, concrete desirable outcomes. We cannot organize society on the basis of the specific commands of an organization with one universally shared goal. Instead, the most we can agree on – assuming we wish to preserve our individual freedom – is rules of just conduct. Once we have all agreed to the same rules of the game, we cannot complain who the winner is.

Hayek's theory implies an important criticism of the commands and controls typical of the contemporary regulatory story. A free society, in which individuals are permitted to make decisions for themselves and allowed to plan their own lives, must – Hayek said – be governed by purpose-independent, abstract rules concerning protected private domains. Individuals must be free to pursue their own purposes within general guidelines without being given specific commands or orders. But most regulations are not abstract, purpose-independent rules which allow people to plan for themselves. Instead, they require individuals to take specific actions in the pursuit of specific outcomes. Most regulations do not establish or protect private domains; they invade them. Thus, Hayek lamented how administrative law has been “subjecting the conduct of private individuals and organizations to special purpose-directed rules, or even to special commands or permissions by administrative agencies” (1973a:132). Hayek criticized “‘administrative powers over persons and property,’ not consisting of universal rules of just conduct but aiming at particular foreseeable results, and therefore necessarily involving discrimination and discretion. It is in connection with administrative law in this sense that a conflict with the concept of freedom under the law arises” (1973a:137f.). In a free society, “the private citizen and his property are not subject to specific commands (even of the legislature), but only to such rules of conduct as apply equally to all” (1979:24). Moreover, genuine competition means freedom to experiment with new methods and techniques so that we may *discover* the best ways of doing things. But regulations will tend to enshrine the status quo and prevent disruptive change. Therefore, competitive discovery requires that (1979:76),

the powers of the majority must be limited to the enforcement of such general rules as will prevent the individuals from encroaching on the protected domains of their fellows, and should not extend to positive prescriptions of what the individuals must do.

Command-and-control regulation is therefore generally inadmissible. Most regulations are neither general nor purpose-independent because they require individuals to take specific actions in order to achieve specific outcomes. Only the general rules of a market economy truly allows individuals to make decisions for themselves. Command-and-control regulation is inconsistent with an unplanned spontaneous order.

Hayek also criticizes the rent-seeking and log-rolling which are unfortunately endemic today, under the institutions of unlimited, legal positivist democracy. Where the rule-of-law is merely procedural, the legislature is empowered to grant privileges to special interests. Moreover, when the legislature is able to grant special privileges, then it must grant such privileges, for it is impossible for any party to obtain a majority without using the powers which it possesses. The problem, according to Hayek, is not that we need to vote the scoundrels out (1979:135):

So long as the present form of democracy persists, decent government cannot exist, even if the politicians are angels or profoundly convinced of the supreme value of personal freedom. We have no right to blame them for what they do, because it is who, by maintaining the present institutions, place them in a position in which they can obtain power to do any good only if they commit themselves to secure special benefits for various groups.

If the law were substantively limited to general, abstract, purpose-independent rules of just conduct, there would be little room for special interest legislation. Hayek's defense of the substantive rule of law may be understood as a call for a legal rule which eliminates opportunities for interest groups to obtain special exemptions and concessions by special pleading (Boettke 1995: 10).

Hayek's rule-of-law also implies that taxation should be as neutral as possible. Taxes should not

politically reward and penalize specific behaviors, but instead, individuals should be free to make decisions according to the demands and desires of those with whom they trade and interact. When private individuals act, they should only have to take into account what willing and voluntary neighbors and partners ask of them, not what uninvolved third-parties – i.e. political officials – would like to see happen. In other words, discriminatory taxation is objectionable for the same reason as command-and-control regulation. Mises (1981 [1922]:230; cf. *ibid.* 447) noted that discriminatory taxation can amount to *de facto* regulation, saying,

Directly or indirectly through its taxation policy, [the socialist state] determines the conditions of labour, moves capital and labour from one branch of industry to another . . . These tasks falling to the State are the only important ones and they constitute the essence of economic control.

Thus, we should rank different forms of taxation according to how discriminatory they are. Hayek rejected the progressive income tax precisely because it is discriminatory and violates the rule-of-law. But no form of income taxation – flat or progressive – is as discriminatory as taxing specific activities and persons.

Furthermore, if the purpose of the rule-of-law is to enable individuals to make decisions for themselves, then it is crucial for individuals to be permitted to freely adjust their behavior to the tax regime. The state should not demand behaviors which run counter to the incentives created by the taxes – as if taxed products and activities are not taxed at all (cf. Mises (1981 [1922]:446). For example, suppose the state were to impose corporate taxes or artificially raise the costs of domestic labor and yet prohibit firms to relocate internationally, compelling them to remain where costs are higher. A command to behave as if taxation does not exist interferes with freedom and individual autonomy more than the taxation itself, and it entails more regulation which runs counter to the rule-of-law.

Remarkably, this interpretation of Hayek's conception of the rule-of-law squares perfectly with Hayek's writings on the problem of economic calculation, especially his famous essay, "The Use of

Knowledge in Society” (Hayek 1945).¹¹ According to Hayek, the price-system does not only allow individuals to coordinate their activities with each other, but it also enables every individual to bring his own unique knowledge to bear. As Hayek showed, it is the price-system which allows individuals to freely make decisions based on their own knowledge. In fact, Hayek defined freedom as “a state in which each can use his knowledge for his purposes” (1973a:55f.). Thus, Hayek's writings on the rule-of-law and the price-system turn out to share a common theme: both systems – the legal and the economic – are essential to the individual's ability to plan his own life and make his own decisions for himself in light of facts as they subjectively appear to him. As he said in an essay summarizing his philosophy, “Liberalism . . . made it possible to utilize the knowledge and skill of all members of society to a much greater extent than any order created by central direction.” (1966:162). This requires that “the coercive activities of government should be limited to the enforcement of such . . . universal rules of just conduct, protecting a recognizable private domain of individuals” (1966:162). Similarly, Hayek (1973c:135f.) said, The “general rules of individual conduct” which “inseparable from the institution of several property” ensure the individual is “free to use his own knowledge and skills in the pursuit of his own purposes.” Thus, Hayek's conception of the rule-of-law implies a market economy based on private property, where prices communicate the unique, local knowledge of every individual. Remarkably then, Hayek's political and his economic works turn out to share a common theme; “The Use of Knowledge in Society” turns out to be arguing much the same point as the chapter on the rule-of-law in *Road to Serfdom*.

This close relationship between the rule-of-law and the market or price-system recalls Röpke's distinction between “compatible” and “incompatible” interventions (1992 [1942]:260; cf. 1987 [1951]:7f.):

we find that a differentiation between two groups of state intervention is of foremost importance, for which we have suggested the terms “compatible” and “incompatible” interventions: i.e. those that are in harmony with an economic structure based on the

market, and those which are not. Interventions which do not interfere with the price mechanism and with the automatism of the market derived from it are compatible, they let themselves be absorbed as new “data”; interventions which paralyse the price mechanism and therefore force us to replace it by a planned (collectivist) order, we call incompatible.

Hayek (1976a:188n21) quibbled with Röpke's formulation, saying that it “aims at the same distinction” as Hayek's own “but I should prefer not to describe 'conform' [compatible] measures as 'interference' [intervention].” In other words, Hayek basically agreed with Röpke but thought that “compatible” interventions are not interventions at all. The important point for us is that Hayek agreed with Röpke that the fundamental test of any government action or policy is whether it is compatible or not with the market (cf. Jackson 2010:138f.). Like the German ordoliberalists – including Röpke – Hayek sought to furnish a “framework”, an “economic order” within which the competitive “economic process” could operate (Kolev 2010:10-16; cf. Hayek 1947).¹²

Hayek stated that his conception of the rule-of-law did allow for a minimum social safety net provided that it was “outside the market” and did not aim to determine relative income relationships. The government could furnish public services provided that these services were for the benefit of all not and not merely sectional groups, that the government possessed no monopoly, and that it assessed taxes uniformly (non-progressively). Furthermore, citing Milton Friedman (1962)'s school voucher program, Hayek noted just because it is sometimes necessary for government to finance public goods through coercive taxation does not imply that the government must itself administer the production and distribution of those public goods (1979:46). Thus, Hayek's conception of the rule-of-law has implications for the provision of government services as well, favoring forms of welfare and social assistance which provide benefits with minimal administration so that they seamlessly integrate with the market. For example, Hayek would apparently consider it preferable to offer money-denominated vouchers for healthcare to the poor, to be spent on unregulated private insurance, rather than to regulate

private insurance with specific mandates.

Hence, although the *Road to Serfdom* was written in response to full-blown command socialism (Caldwell 2007:30f, 2011; Godard 2013), if we wish to assess its contemporary relevance and applicability, it would be more helpful to take a more nuanced view of economic policies and systems, putting them on a continuum rather than dichotomous poles, assessing how compatible each is with the competitive market process and the rule-of-law. For example, it would be fruitless to debate whether Hayek would have supported public education or school vouchers if we insist on categorizing public education as “socialism” and vouchers as “mixed economy.” Instead, we should recognize that vouchers are more compatible with private property, non-discriminatory law, competition, and the price-system.

Similarly, the multidimensional nature of the Fraser Institute's Economic Freedom of the World (EFW) Index allows us to avoid sterile debates between socialism and the mixed economy.¹³ Rather than trying to pigeonhole actually existent economies into one category or the other, we may recognize that different interventions have different effects, affecting freedom and prices in different ways. All interventions – whether “socialist” or “mixed” – compromise freedom the autonomy of individual decision-making in similar yet different ways (Huerta de Soto 2010:83-87). Thus, without rigidly and awkwardly distinguishing between socialism and the mixed-economy, we may recognize that regulatory command-and-control, administrative commands, and discriminatory taxation are more damaging to freedom, individual autonomy, and the price-system than neutral taxation and general, abstract, purpose-independent rules of just conduct.

Therefore, in judging Hayek's response to a given regulation, tax, or intervention, we should assess the degree to which the intervention is compatible with the rule-of-law – i.e. whether it is general and neutral, or whether it is specific and discriminatory – and how much it constrains individual decision-making and choice. Indeed, Lawson and Clark (2010:235) note that

the Hayek–Friedman hypothesis is confirmed most strongly when looking at the legal

structure and property rights and the regulation areas of the EFW [Economic Freedom of the World] index. These two areas are more closely identified with political and civil liberties than the other areas of the EFW index (fiscal size of government, monetary policy, and trade policy).

Thus, Hayek's arguments were institutionally contingent: Hayek criticized a given system or policy insofar as it interfered with the price-system, including individuals' abilities to make personal decisions for themselves in the light of facts as they subjectively appeared to them. Socialism and the mixed-economy interfere with prices and individual decision-making in different ways and so they produce similar but different effects. Farrant and McPhail are completely right to criticize those who conflate Obamacare with Stalin's Five Year Plans and who condemn the Obama administration as equivalent to Hitler (F&M 2010a, 2010b, 2012:95; M&F 2012:423f., 2013:967). But Farrant and McPhail (2010b) argue – wrongly, I claim – that Hayek himself would have agreed with those who ignorantly make the comparison. Farrant and McPhail claim that Hayek's claims in *The Road to Serfdom* must be wrong because the contemporary welfare state has not taken us down the road to serfdom. But a better explanation is that taxation and redistribution of income do not interfere with freedom and the price-system the way discriminatory taxation and command-and-control do (Ikeda 2015:409, 414).

This interpretation of the *Road to Serfdom* as a defense of the price-system and a criticism of arbitrary command-and-control regulation robs Durbin (1945)'s criticism of much of its force. Durbin argues that the system of market socialism allows the government to direct the economy while preserving the role of prices and avoiding the problem of totalitarianism. In Durbin's words (1945:361, 364),

There is no formal or logical contradiction between planning and pricing. It is perfectly possible for a centralised authority to order a price system to appear and to follow the guidance it necessarily gives. There is no necessary connection between the form of the authority by which decisions are taken and the principles according to which the

decisions are made. . . . The theory of value and economic accountancy has been generalised to such a degree that it applies as much, or as little, to a centrally directed economic system as to any other.

For example, says Durbin, market socialism makes it unnecessary for the socialist state to “conscript the necessary number of works to man the industry and direct them to live in certain places and work for certain wages [and] to force them into obedience” (Durbin 1945:363). Of course, Mises (1981 [1922]:119-123,192-194) and Hayek (1940, 1982b) disputed the feasibility of market socialism, arguing that it embodied insoluble contradictions (cf. Leoni 2009 [1965], Lavoie 1985b, Steele 1992, Huerta de Soto 2010). But let us suppose, for the sake of argument, that Durbin is right. What Durbin does not realize is that he has conceded nearly the entire argument to Hayek. Hayek's claim is that without private property and market prices, individual freedom is impossible. It is not democracy, Hayek said, but market prices which make individual liberty possible. Durbin's response is that freedom is possible if the socialist government perfectly simulates the market economy. Thus, Durbin conceded the essentials of Hayek's argument. As Huerta de Soto (2010:174) notes, “socialist theorists were forced to withdraw to a weak second line of defense, one built on precisely the essential elements of that economic system they so hated and wished to destroy . . . In contrast, they now strive, with comic insistence, to justify socialism with the argument that it permits the preservation of the market.” W. H. Hutt (1975 [1954]:131) went so far as to say, “The so-called 'socialist economists' were clearly attempting to restore the market and the power of substitution. So much was this so, that I believed the result of their labours would ultimately be the re-building of laissez-faire institutions, in elaborate disguises of name and superficial form.”

Moreover, while Durbin (1945:357) calls himself a “democratic socialist,” his system of market socialism actually has very little place for democracy. If the socialist government is to imitate the market and institute economic equilibrium, then it is mathematics, not the democratic will of the people which is authoritative. The system of market socialism has no place for democratic input or discretion

(cf. Steele 1992: 157).¹⁴ Thus, Durbin's advocacy of market socialism undermines his own claim that, “We are politically free because we share in forming the laws” (1945:364). Durbin's criticisms of Hayek amount to a tacit admission that Hayek was right all along.

This interpretation of Hayek also turns the example of Sweden completely on its head. Samuelson and Sachs – cited by Farrant and McPhail (2009:5,9,11,12; 2010a:98, 107; 2010b:84; 2012:101) – argue that if Hayek were correct, we may have expected Scandinavian socialism to have turned totalitarian by now. But if we understand Hayek to be criticizing regulatory command-and-control and interference with the price-system, we see that this criticism misses the point entirely.¹⁵ The Scandinavian system relies more on taxation and redistribution than regulation or nationalization (Stein 1991, Sanandaji 2011, Sumner 2015, Tupy 2016, Mitchell 2016, Iacono 2016). Scandinavian countries have historically offered a high degree of protection of private property and freedom to internationally trade. While Scandinavian countries tax at extremely high rates, they have also been engaging in widespread privatization and deregulation. Sweden even has a nationwide school voucher program. In many ways, Sweden is more pro-market than the United States. This is *not* the socialism which Hayek criticized, as Hayek noted in 1976 (2007 [1944]:54):

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 socialistic.¹⁶

If anything, Scandinavian “socialism” has vindicated Hayek precisely it has generally eschewed command-and-control regulation; its relative success is built upon a maintenance of the price-system. This suggests that it is not safety nets which make robust markets viable – creating a favorable public opinion by protecting the least-well-off from the vagaries of markets – but the opposite: it is robust markets which produce the wealth which makes safety nets affordable.¹⁷ Indeed, as Hayek said

(1976a:139), “It has been this market mechanism which has created the increase of aggregate income, which also has made it possible to provide outside the market for the support of those unable to earn enough.” This explains why Sweden can afford its welfare system while Greece and Venezuela cannot. Highly-regulated economies cannot absorb the costs of extensive welfare states.

The Swedish model has much in common with the German ordo-liberal program of combining robust markets, prices, property, and competition with a minimum social safety net – instead of relying on quasi-socialist command-and-control regulation and nationalization. When we consider that the ordo-liberals in Germany were inspired by the *Road to Serfdom* – perceiving it as more than a negative criticism of socialism, but as a positive program for markets (Godard 2013:378-382) – and that Hayek was arguably an ordo-liberal himself (Kolev 2010), we realize that it is not merely mistaken to point to the Scandinavian model as refuting Hayek, but it is almost perverse. To the degree that the Scandinavian model has succeeded, it is precisely because it has that much in common with what Hayek advocated. Sweden does not refute Hayek; it vindicates him.

III. CONCLUSION

A variety of authors have either misinterpreted or under-appreciated the nature and significance of Hayek's arguments in *The Road to Serfdom*. For example, Lawson and Clark (2010:231) argue that Hayek chiefly placed value on formal political rights, not economic rights. Shleifer and Vishny (1994:168, 170) cite Hayek only to justify why he will not be discussed. Andrew Farrant and Edward McPhail are highly critical of Hayek, arguing that according to Hayek himself, *The Road to Serfdom* applied not only to command planning but also to the contemporary welfare state or mixed economy as well. Because the welfare state has obviously not resulted in Soviet- or Nazi-style totalitarianism, Farrant and McPhail say, Hayek's arguments must be mistaken. Caldwell (2011, 1997:1866-1871) and Boettke and Snow (2012) reply that the *Road to Serfdom* must be understood in its specific historical

and institutional context of command planning (cf. Godard 2013) and that it must not be confused with Hayek's later works, which are more relevant to the political situation today. Farrant and McPhail respond that Hayek's defenders cannot have it both ways: they cannot say *The Road to Serfdom's* argument was only against socialism and yet that it is still relevant today.

Many of these authors assume that we must sharply distinguish between socialism on the one hand and the mixed economy or welfare state on the other. Their argument reduces to a debate over how Hayek evaluated the members of this dichotomous set. But it is better to understand Hayek as criticizing any intervention which interferes with private property and the functioning of the price-system (cf. Huerta de Soto 2010:83-87). Hayek's argument is an institutionally contingent one, and whether a given intervention will lead us down the road to serfdom depends how compatible a given intervention is with the functioning of the price-system. All interventions necessarily substitute political decision-making for individual autonomy, albeit to different degrees.¹⁸

According to Hayek, economic liberty is *the* fundamental liberty, because it comprises an individual's ability to choose means for the accomplishment of his or her own ends. Thus, economic liberty implies freedom of individual decision-making. Any intervention which compromises economic liberty inhibits individuals' abilities to access and utilize the means for accomplish their diverse, individual ends. According to him, democracy possesses merely instrumental value, whereas economic liberty is valuable in itself. Therefore, he was less concerned with how interventions would tend to eventually compromise democratic suffrage.

Hayek proceeded to defend the rule-of-law as the necessary legal framework for protecting individual freedom. Legitimate law is a set of general, abstract, purpose-independent rules which enable form protected, private domains for themselves. These laws are negative in character, prohibiting certain actions for everyone equally without mandating that specific individuals take any specific actions. This means that the law must not merely satisfy formal, procedural requirements – such as that the law must be well-known and impartially enforced – but furthermore, the law must

satisfy substantive requirements as well, for an unjust law is no law at all. These substantive requirements largely correspond to the principles of economic liberty.

Hayek's conception of the rule-of-law implies a market system where prices communicate the unique, local information and knowledge of individuals so that individuals are free to make decisions for themselves in light of the data as they subjectively appear to them. Hayek's philosophical defense of the rule-of-law therefore dovetails with his economic analysis of socialist calculation. This implies a criticism of command-and-control regulation as well as discriminatory taxation. Instead, Hayek would favor a market- and price-based system where taxation is neutral and laws serve only to prevent coercion and thus maximize economic liberty. Social welfare policies should be “outside the market,” or as Röpke said, “compatible” with the price-system. Farrant and McPhail claim that Hayek must be wrong because Scandinavian socialism has not turned totalitarianism, but my argument turns this claim on its head. Scandinavian “socialism” is characterized by a high degree of protection of private property and a low degree of regulation. Thus, the success of the Scandinavian system actually corroborates Hayek. It is not generous social safety nets which enable robust markets, but it is robust markets which create the wealth which enable safety nets. Thus, Scandinavia can afford its welfare state while Greece and Venezuela cannot.

While I have not said everything there is to be said about Hayek, I hope to have demonstrated a few neglected points of interest. Even though the *Road to Serfdom* was written in response to full-blown command socialism, it embodies arguments which apply to other policies and systems as well (Boettke 1995). It will be rightly objected that many of the points made in this essay are only briefly intimated in the *Road to Serfdom* of 1944, and that they were completely expressed by Hayek only his later works – especially the *Constitution of Liberty* in 1960 and in his trilogy, *Law, Legislation, and Liberty* (1982). But it is one thing to say that the *Road to Serfdom* has little if anything to say of value, and something entirely else to say that the *Road to Serfdom*, while incomplete, constituted the beginning of a decades-long research project which allowed Hayek to make novel arguments which

deserve renewed attention. Hayek's later, expanded works on political philosophy are consistent with the arguments he briefly made in the *Road to Serfdom*, especially in his chapters on economic liberty and the rule-of-law. Hopefully, the debate over Hayek's legacy can now move constructively forward.

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- ¹ See Farrant and McPhail (2012, 2011a, 2011b, 2011c, 2010a, 2010b, 2009), McPhail and Farrant (2013, 2012).
- ² Godard (2013) implicitly agrees with Caldwell.
- ³ According to Boettke (1995), *The Road to Serfdom* anticipated at least three basic teachings of Public Choice: first, the logic of collective action which enables special interests to obtain privileges. Second, that political behavior is conditioned by the institutional constraints and incentives of the office (“why the worst get on top”). Third, Arrow's Impossibility Theorem (cf. Boettke and Leeson 2002, Boettke and Snow 2012, Huerta de Soto 2010:268n53, Makovi 2016). Boettke also discerns in Hayek the claimed impossibility of maintaining political freedom without economic freedom (cf. Lawson and Clark 2010).
- ⁴ While Shleifer and Vishny (1994) use Public Choice to criticize market socialism, they neglect Hayek, mentioning him only to say that he will not be discussed (1994:168, 170).
- ⁵ Cf. Mises (1981 [1922]:64f.).
- ⁶ Lavoie (1985a:125-171) evaluates the economic implications of similar schemes.
- ⁷ Cf. H. D. Dickinson: “even if a socialist planner wished to realize freedom he could not do so and remain a planner” (quoted in Hayek 1948:206). Likewise Heilbroner (1978, 1986:126), quoted by Boaz (2005, 2016).
- ⁸ In a series of essays (1976b, 1973b, 1973c, 1967b, 1967c, 1966), Hayek summarized most of the arguments he would later make in his masterwork (1982a).
- ⁹ Kolev (2010:12-15) interprets Hayek's conception of the rule-of-law as part of the German ordoliberal program for furnishing a “framework” for competition. Cf. Godard (2013:378-382).
- ¹⁰ Hayek's distinction is similar to that which Oakeshott drew between a civic association and an enterprise association (Capaldi and Lloyd 2011:xxiii; cf Hayek 1967c:89, 1976a:15).
- ¹¹ In a 1939 article presaging *The Road to Serfdom*, Hayek explicitly linked his discussion of the rule-of-law with his article on “Economics and Knowledge” (Hayek 1997 [1939]:194n9 citing Hayek

1937). Interestingly, no such explicit reference is made in *Road to Serfdom*.

- ¹² It is true that in *Road to Serfdom*, Hayek endorsed many non-libertarian interventions (Hoppe 1994, Block 1996), moderately distancing himself from Misesian *laissez-faire* (Jackson 2010, Kolev 2010). But in 1976, Hayek said of *Road to Serfdom*, “I had not wholly freed myself from all the current interventionist superstitions, and in consequence still made various concessions which I now think unwarranted” (2007 [1944]:55; cf. Jackson 2010:139n31, Kolev 2010:9). Moreover, Hayek's theories often lead to more libertarian conclusions than Hayek himself drew (Boettke 1995:22n1).
- ¹³ I owe this point to Daniel J. D'Amico.
- ¹⁴ Schweickart's system calls for a “democratic, market-conforming plan” (1992:19). Perhaps a four-sided triangle as well.
- ¹⁵ But I will concede to Farrant and McPhail that Hayek apparently misapplied his own theories, for I use Hayek's theories to judge Sweden differently than Hayek himself did. As Farrant and McPhail (2009:22n; cf. 2010a:116n3) note, “In a 1977 interview, when asked why 'do Sweden and many Scandinavian welfare states seem to be prospering?', Hayek suggests that '[t]he standard feeling that life is really not worth living is very strong in Sweden” (Hayek 1992 [1977]:9).
- ¹⁶ Farrant and McPhail (F&M 2009:15, 2010a:111, 2010b:86; M&F 2013:980n1) note that this passage continues to express a prediction that Swedish socialism will “slowly, indirectly, and imperfectly” bring about the same consequences as full-blown planning.
- ¹⁷ I owe this argument to Phillip W. Magness.
- ¹⁸ Insofar as Hayek wrongly predicted that the welfare state would pursue totalitarian policies, this does not negate the validity of his theories. While Hayek may not have predicted the future accurately, Hayek's analysis of given policies is not wrong simply because the government adopted different policies – especially if we consider that Hayek's warnings were falsified largely because they were heeded (cf. Witt 1992, Caldwell 1997:1868f, Boettke and Snow 2012, Jackson 2010:150), especially in Germany (Godard 2013:378-382).