



**THE DARK SIDE OF THE
RELATIONSHIP BETWEEN THE RULE OF
LAW AND LIBERALISM**

Brian Z. Tamanaha

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INTRODUCTION

Like any political ideal, the rule of law is susceptible to different uses and has various potentialities and consequences, good and bad. On the positive side, the rule of law has made a “great contribution to human existence” in its capacity to hold governments legally accountable.¹ The rule of law, however, has a negative underside as well. A prominent strain within liberal

¹ BRIAN Z. TAMANAHA, ON THE RULE OF LAW 139 (2004).

thought utilizes the rule of law to unduly circumscribe political decision-making on issues relating to property and the market. Liberalism, this article will show, has a long history of aligning with the rule of law in a conservative and anti-democratic manner.

The rule of law, liberalism, and democracy are often thought to make a happy triumvirate, but their relationship, particularly with respect to democracy, is marked by antagonism. Constitutional restraints on legislation, which have an anti-majoritarian import, are the most obvious and familiar example of this. The tension generated when liberalism and the rule of law form a pair against democracy, however, extends deeper and broader than that. Its contemporary expression, as will be elaborated on later, can be found in the spread of neoliberal reforms around the world through the activities of international economic organizations, a phenomenon which has no obvious connection with constitutionalism (though has begun to resemble a form of constitutionalism).

The full scope and operation of this side of the rule of law and its relationship with liberalism is not easy to appreciate because it is not wholly contained within a single body of ideas and has not taken a consistent form. They are like reliable companions who have traveled together over the past few centuries, traversing various circumstances, manifesting a consistent (if sometimes submerged) anti-democratic thrust. The rule of law provides essential support for democracy, to be sure, but time and again it has also joined with liberalism against democracy. Liberalism is the dominant partner in this aspect of their relationship, utilizing the rule of law to advance liberal ends. When liberal ends are threatened by democracy, democracy has often suffered.

For those familiar with the history of liberal thought, this assertion is not a revelation. Eighteenth century liberals promoted democracy on the condition that only the intelligent and wise—which they equated with male owners of substantial property—would be entitled to vote. Male suffrage was limited accordingly until the early nineteenth century in the U.S.,² and late nineteenth century in England, and female suffrage did not come until the twentieth century. Leading liberals openly expressed contempt for

² See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY* (2005) (historical study of the restriction and later expansion of suffrage in the U.S.).

and fear of popular democracy—which many equated with mob rule—particularly for the perceived threat it posed to property rights.

That is not the image or practice of liberalism and the rule of law within liberal democracies today. While it is important to recognize that their pairing has evolved in ways that are more congenial to democracy, it is no less true, and useful to be reminded, that liberalism and the rule of law continue to resist democracy on issues relating to property and the market. Aspects of this show up in liberal political and economic thought; aspects of it show up in the relationship between the common law and legislation; aspects of it show up in certain formulations of the rule of law; and aspects of it show up in the realm of contemporary economic development. Each respective topic will be taken up in order below, focusing narrowly on where they overlap and interact. The first Part will recount the battle of ideas over the shift from classical liberalism to modern “social” or “imbedded” liberalism. The second Part will recount the contest between the common law and legislation for primacy as sources of law. After juxtaposing these two contexts, the third Part will introduce the notion of the rule of law and retell parts of this history, drawing out the ways in which liberals have invoked the rule of law to resist legislation and democracy in connection with property and the market. To demonstrate that this pattern continues today, the fourth Part will discuss how liberalism and the rule of law function in contemporary development activities in an anti-democratic manner. The final Part will elaborate on why this connection with liberalism constitutes the “dark side” of the rule of law, and *for* the rule of law.

The objective of this article, it must be emphasized at the outset, is not to discredit liberal ideas or the rule of law. Liberalism and of the rule of law have positive legacies that stand apart from this aspect of their relationship. A spotlight is thrown on this connection between the rule of law and liberalism in the conviction that both stand to benefit (separately and together), and society will be better off, if this historical tendency is recognized and held up to scrutiny.

I. THE SHIFT FROM CLASSICAL LIBERALISM TO MODERN LIBERALISM

Within liberalism, the rule of law is understood as liberty under standing law. As L.T. Hobhouse put it, “the first condition of free government is government not by the arbitrary determination of the ruler, but by fixed rules of law, to which the ruler himself is subject.”³ Friedrich Hayek used similar terms in the *Constitution of Liberty*: “The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free.”⁴ Both accounts echo John Locke’s observation in *The Second Treatise of Government* that “freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man”⁵ Liberalism asserts that liberty from the encroachments of fellow citizens and from the arbitrary whims of government officials cannot exist without the rule of law.

Beyond this core agreement about the essential role of the rule of law in securing liberty, liberal thought splinters in different directions. The major fault line is between classical liberalism and modern social liberalism. In an intellectual path that runs from Adam Smith, to nineteenth century laissez faire theorists, to the 20th century thought of Ludwig von Mises and Hayek, to turn of the 21st century neoliberalism, classical liberals champion the protection of property, liberty of contract, the free market, and limited government. Classical liberalism builds upon a view of humans as autonomous, rational individuals dedicated to maximizing their interests (a vision castigated by critics as the “political theory of possessive individualism”⁶).

³ L.T. HOBHOUSE, *LIBERALISM* 17 (Oxford Univ. Press 1964) (1911).

⁴ FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1960).

⁵ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 13 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1689).

⁶ C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962).

The protection of property is pivotal to classical liberalism. Locke emphasized that “[t]he great and chief end, therefore, of men’s uniting into common-wealths, and putting themselves under government, is the preservation of their property.”⁷ Although Locke viewed property expansively to include one’s labor and person, he primarily meant property in the narrower sense of possessions. Ludwig von Mises, the leading early 20th century exponent of classical liberalism, affirmed that “[t]he program of liberalism . . . if condensed into a single word, would have to read: *property*, that is, private ownership of the means of production All the other demands of liberalism result from this fundamental demand.”⁸ “When, therefore, people call the liberals apologists for private property, they are completely justified.”⁹

Mises asserted that liberalism is not concerned with spiritual or other inner aspects of humans, but solely with supplying materialistic needs—“It does not promise men happiness and contentment, but only the most abundant possible satisfaction of all those desires that can be satisfied by the things of the outer world.”¹⁰ Mises was unapologetic about what critics derided as the shallowness of liberalism, for he believed these traits had an unparalleled capacity to generate wealth. The protection of property insures that the means of production remains in the most productive hands—when people enjoy the fruits of their labor, their productive activities increase. An unfettered free market maximizes wealth by insuring the production and exchange of goods and services in the right amount at right price to match their highest values. In this understanding, liberalism and capitalism constitute a single arrangement: “[a] society in which liberal principles are put into effect is usually called a capitalist society”¹¹

Classical liberals envision a narrow and strictly limited role for government. “As the liberal sees it, the task of the state consists solely and exclusively in guaranteeing the protection of life, health, liberty and private property against violent attacks. Everything that

⁷ LOCKE, *supra* note 5, at 66.

⁸ LUDWIG VON MISES, LIBERALISM: THE CLASSICAL TRADITION 2 (Bettina Bien Greaves, ed., Liberty Fund, Inc. 2005) (1927).

⁹ *Id.* at 60.

¹⁰ *Id.* at xix.

¹¹ *Id.* at xxv.

goes beyond this is an evil.”¹² The government can impose taxes only to the extent necessary to provide for these functions. Mises opposed unemployment benefits (which he, like many classical liberals, saw as encouraging indolence), he opposed government provided public education, and he accepted that a significant disparity of wealth and income inevitably develops under liberalism.¹³ He opposed the minimum wage as an artificial interference in the labor market that lowers production and increases unemployment, and he opposed labor unions for the same reasons, asserting that they are beneficial to immediate union members but harmful for workers generally.¹⁴ Mises acknowledged that these various positions impose agonizing consequences on people who are unemployed or earn low wages, but insisted that in the long run the material welfare of all is enhanced by these liberal ideas. When Mises penned his purist liberal brief (in the 1920s), although laissez faire liberalism was enjoying a small revival, the prospects for creating the liberal state he envisioned were increasingly remote; major elements of the social welfare state were already in place and destined to expand.

The mid-nineteenth century apotheosis of classical liberalism in England and America, known as the age of laissez faire,¹⁵ coexisted with severe social dislocation, terrible work conditions, and widespread poverty. Intense pressure was generated for reform, heightened when (later in the century) the working class was given the right to vote, heightened further by the lurking specter of the overthrow of liberal capitalism in favor of socialism. Liberalism, critics charged, applied the coercive power of law in favor of the owners of property at the expense of wage earners.¹⁶ Liberal thinkers, notably John Stuart Mill,¹⁷ moved by the visibly harsh consequences of liberalism as well as by the fear of forced revolutionary

¹² *Id.* at 30.

¹³ *Id.* at 12-14, 57, 85.

¹⁴ *Id.* at 56-57.

¹⁵ For an empirical study showing the relatively limited degree of government intervention during this period, see P.W.J. Bartrip, *State Intervention in Mid-Nineteenth Century Britain: Fact or Fiction?*, 23 J. BRIT. STUD. 63 (1983).

¹⁶ See HAROLD J. LASKI, *THE RISE OF EUROPEAN LIBERALISM* (Transaction Press 1997) (1936).

¹⁷ See JOHN STUART MILL, *ON LIBERTY* (Stefan Collini ed., Cambridge Univ. Press 1989) (1859); HOBHOUSE, *supra* note 3, at 58.

change if nothing was done, began to advocate the modification of doctrinaire liberal precepts to ameliorate its more painful consequences. This movement gave rise to a new “social liberalism” – a near oxymoron at the time – which gained momentum toward the end of the 19th century.

In contrast to the abstractions that occupied classical liberalism, prominently liberty of contract and formal equality, the new liberals set their eyes on reality. “We are perpetually confronted,” Hobhouse observed in his concise and passionate 1911 manifesto for social liberalism, “with the masses whom the machine of wealth grinds down in its onward sweep or tosses aside into the rubbish heap.”¹⁸ Talk of liberty rings hollow in the face of “massive poverty.”¹⁹ The new liberal “has to look deeper into the meaning of liberty and to take account of the bearing of actual conditions on the meaning of equality.”²⁰ New liberals observed that genuine liberty is defeated by social and economic conditions beyond the control of individuals. “There may be a tyranny of custom, a tyranny of opinion, even a tyranny of circumstance, as real as any tyranny of government and more pervasive.”²¹

Once prevailing social and economic conditions are considered, a series of consequences follow that social liberalism played out. There can be no sharp separation of the individual from society, for individuals are thoroughly shaped and constrained by social forces; individuals are born into communities, perpetually live in communities, and take their language, identity, and values from communities; everything an individual does affects others; and everyone owes their successes (and failures) in significant ways to others and to surrounding circumstances.²² Individuals and societies are thus intertwined in manifold respects. Property rights are the product of and granted by the government, for they exist and are preserved through state coercion.²³ It follows from all of this that the wealthy have not amassed their fortunes solely through the dint of the own industrious efforts, just as the poor are not entirely

¹⁸ L.T. Hobhouse, *The New Spirit in America*, 100 CONTEMP. REV. 1, 3 (1911).

¹⁹ *Id.*

²⁰ HOBHOUSE, *supra* note 3, at 115.

²¹ *Id.* at 63.

²² *Id.* at 63-73.

²³ *Id.* at 98.

deserving of their state of want. Consequently, the government has an affirmative obligation to address circumstances that defeat the exercise of liberty. It must assure that able bodied workers can earn a "living wage," that education is provided so that opportunity will be real, and that help is available to support those in abject need.²⁴ As Hobhouse described it: "We said above that it was the function of the State to secure the conditions upon which mind and character may develop themselves. Similarly we may say now that the function of the State is to secure conditions upon which its citizens are able to win by their own efforts all that is necessary to a full civic efficiency."²⁵ To provide these services, the government may tax the wealthy, particularly through inheritance taxes and taxes on high incomes.²⁶ The wealthy have little grounds to object since social circumstances and government enforced legal regimes contribute to and create the conditions for their acquisition of wealth.

New liberalism thus justified the social welfare state. It stopped short of socialism in not advocating state or collective ownership of the means of production, and in allowing a wide scope for the market to function. But social liberalism is a far cry from classical liberalism. To underscore the difference, witness Hobhouse's comments about the right to property: "to carry through the real principles of Liberalism, to achieve social liberty and living equality of rights, we shall have to probe still deeper. We must not assume any rights of property as axiomatic. We must look at their actual working and consider how they affect the life of society."²⁷ This is pure heresy for classical liberalism, which held property rights sacrosanct.

A final notable difference between these competing schools of liberalism is also relevant: classical liberals evinced a consistent fear and disdain of democratic legislation, whereas social liberals welcomed it as the means to implement reforms. This difference

²⁴ *Id.* at 74-87.

²⁵ *Id.* at 83.

²⁶ *Id.* at 97.

²⁷ *Id.* at 54.

plays out in the next Part, covering the shift in legal primacy that took place in America from the common law to legislation.²⁸

II. THE CONTEST BETWEEN THE COMMON LAW AND LEGISLATION

Until the turn of the 20th century, the common law was the main body law in England and America. The “rule of law,” in this early stage, essentially meant that the common law provided the basic legal structure for the law making power and general activities of the government (executive and legislature). Legislation existed alongside the common law for centuries, but was secondary to the latter in standing, bulk, and scope. The common law, it was often said, represented the customs of the people descended from time immemorial, developed into a coherent body or rules and natural principles through the efforts of judges.²⁹ This combination of traits earned the common law a deserved place above legislation. A scholar of medieval thought described it as follows:

The Common law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. As yet men are not clear that an act of Parliament can do more than declare the Common Law. . . . The Common Law is the perfect ideal of law; for it is natural reason developed and expounded by collective wisdom of many generations. . . . Based upon long usage and almost supernatural wisdom, its authority is above, rather than below that of Acts of Parliament or royal ordinances³⁰

²⁸ The subjects and developments covered in this article took place in England and America, and writers from both influenced events. For the purposes of brevity, however, the legal discussion will mostly focus on developments in the United States.

²⁹ A superb introduction into common law theory can be found in J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957).

³⁰ FATHER FIGGIS, *DIVINE RIGHT OF KINGS* 228-30 (2d ed. 1914), *quoted in* EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 34-35 (1955).

The superiority of the common law over legislation was an early and consistent theme,³¹ as evidenced in this excerpt from John Davies 1612 *Irish Reports*:

And this Customary Law [the English Common Law] is the most perfect and the most excellent, and without comparison the best, to make and preserve a Commonwealth. For the *written Laws* which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Triall or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a Custome doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law.³²

The congenital antipathy of the common law toward legislation was on full display in the views of William Blackstone, the giant of the Anglo-American legal world from the late 18th through the 19th century. He earned renown for compiling, organizing, and rationalizing the common law in *Commentaries on the Laws of England*, a four volume set he completed between 1765 and 1769. Blackstone acknowledged the final law-making power of Parliament (subject to natural law), albeit in unflattering terms: "It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations . . .; this being the place where that absolute despotic power which must in all governments reside somewhere, is here entrusted by the constitution of these

³¹ See generally BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

³² John Davies, *quoted in* POCOCK, *supra* note 29, at 33.

kingdoms.”³³ Defenders of the common law considered legislation a disruption of the logical structure and integrity of the common law, subject to capture and abuse by passion and special interests. At various points in the *Commentaries* Blackstone repeated that the Parliament should build on the common law but not tamper with or significantly alter it, a view widely shared among common lawyers of the time.³⁴

Jeremy Bentham was an infamous early critic of Blackstone and the common law, writing a decade after the *Commentaries* was published to great acclaim. He savaged the common law as the preserve of lawyers and judges who wished to keep the law obscure and under their control to enhance their income and status, and he chided Blackstone for concealing this in claims of immanent rationality.³⁵ Bentham argued that law is an instrument to serve human purposes. It should be designed and applied to achieve the greatest happiness of the greatest number. Bentham urged that a clear and comprehensive code be enacted, understandable to all, to replace the common law.

The codification movement in the United States enjoyed a few limited successes in the mid-19th century; more relevant for the purposes here is the defense on behalf of the common law uttered in an 1890 speech by one of the most recognized American jurists of the day, James C. Carter:

That the judge can not *make* law is accepted from the start. That there is already existing a rule by which the case must be determined is not doubted. . . . It is agreed that the true rule must somehow be *found*. . . . [O]ur unwritten law—which is the main body of our law—is not a command, or a body of commands, but consists of rules springing from the social standard of justice, or from the

³³ Blackstone’s *Commentaries*, Vol. 1, 160, quoted in David Lieberman, *Blackstone’s Science of Legislation*, 27 J. OF BRIT. STUD. 117, 132 (1988).

³⁴ *Id.* at 142-48.

³⁵ See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776); see also GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986).

habits and customs from which that standard has itself been derived.³⁶

Carter was not just repeating the traditional story of the common law; he was pointedly attacking legislation as a source of law, and he was attacking legal positivism, a theory of law Bentham helped develop. Legal positivism, also known as the “command” or “will” theory of law, holds that law is whatever legal officials declare as law. Carter insisted that “no legislature can make what laws it will.”³⁷ With a rhetorical flourish, he dismissed Bentham as someone who “may be accurately described by the vulgar designation of *crank*.”³⁸

Like Mises, who articulated his unadulterated vision of classical liberalism long after its peak, Carter offered his impassioned defense of the common law when its fate was being sealed. The steadily mounting bulk and scope of legislation in the late 19th century, dislodging the common law from its superior legal perch, was prompted by groups importuning legislatures to deal with problems thrown up by the manifold economic and technological changes taking place at the time. America was undergoing a rapid transition away from a largely rural society and economy based upon the efforts of individuals toward an urban-centered, industrialized, mechanized, society dominated by large enterprises.³⁹ Legislation and administrative regulations dealing with these new circumstances were enacted at a quickening pace.⁴⁰ The perceived threat this posed to the old order is openly displayed in an 1895 outburst by Supreme Court Justice Stephen J. Field: “The present assault on capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests

³⁶ James C. Carter, *The Ideal and the Actual in the Law*, in REPORT OF THE THIRTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 10-11 (1890) (emphasis in original).

³⁷ *Id.* at 27.

³⁸ *Id.* at 30 (emphasis in original).

³⁹ For an excellent history of the period and the stresses it created, see MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920* (2003).

⁴⁰ See TAMANAHA, *supra* note 31, at 41-47 (2006).

will become a war of the poor against the rich,—a war constantly growing in intensity and bitterness.”⁴¹

A symbolic turning point in the battle between the common law and legislation was the 1908 publication of “Mechanical Jurisprudence” and “Common Law and Legislation” by the prominent Harvard jurist, Roscoe Pound.⁴² Both articles pressed the same theme: judges were stuck in a mode of abstract analysis of legal concepts—like liberty of contract—that originated in a bygone day, concepts that failed to meet the needs of new social circumstances. Informed by liberal views about property and laissez faire,⁴³ courts were throwing up barriers to social welfare and pro-labor legislation, striking some as unconstitutional and narrowly construing others on the terms set by the common law.⁴⁴ Pound insisted, echoing Bentham, that “as a means to an end, [law] must be judged by the results it achieves, not by the niceties of its internal structure.”⁴⁵ In a clear nod to legal positivism, Pound recognized that “much of American legislation . . . is founded on an assumption that it is enough for the State to command.”⁴⁶ He placed his considerable prestige squarely on the side of legislation as the best way to provide a new basis for the common law.

The triumph of legislation over the common law was long in the making but relatively swift in its denouement. In 1937, Harvard Law School convened a conference with the theme “The Future of the Common Law,” the subtext of which was, as one participant noted: “Has the common law, as we know it, a future?”⁴⁷ It was too early to announce the demise the common law—which thrives to this day in selected areas of the law—but such an obser-

⁴¹ *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429, 607 (1895) (Field, J., dissenting).

⁴² Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

⁴³ See generally WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* (1998); TAMANAHA, *supra* note 31, at 35-40.

⁴⁴ See TAMANAHA, *supra* note 31, at 34-40, 47-52. It must be emphasized, however, that many such regulations survived court review.

⁴⁵ Pound, *Mechanical Jurisprudence*, *supra* note 42, at 605.

⁴⁶ *Id.* at 613.

⁴⁷ Oliver Winslow Branch, Remarks, in *THE FUTURE OF THE COMMON LAW* 149 (Greenville Clark ed., 1937).

vation would have been unthinkable three decades earlier. The weight and momentum of legislation and administrative regulations as expanding bodies of law had come to swamp the common law.

III. LIBERAL RESORT TO “THE RULE OF LAW”

Having thus juxtaposed the shift from classical liberalism to new liberalism with the shift from the common law to legislation, in this Part the rule of law will be added in a selective retelling of their combined history that focuses on how invocations of the rule of law have been deployed within liberalism in a consistent pattern that protects property rights and the market from legislative interference.

Before proceeding, it bears emphasizing that the shift from classical to social liberalism and the shift from the common law to legislation were roughly contemporaneous—both mostly taking place during several decades on either side of the turn of the 20th century. They intersect at crucial points: the rise of legislation corresponded with and provided the vehicle for the establishment of the social welfare state, which was the concrete instantiation of social liberalism. The criticism of classical liberalism for its blind abstractions paralleled the criticism of common law courts for their blind abstractions; their respective critics made much the same argument, that the conditions of modern mass society must be recognized and accounted for. To sum up their connection in a sentence: ongoing social, industrial, and economic events provoked political and legal responses (legislative actions reacted to by courts), which were matched by shifts in the realm of ideas and theories (from classical liberalism to social liberalism). Participants at the time recognized that these developments were all of a piece.⁴⁸

A few preliminary words must also be said about the connection between the common law and liberalism, property rights in particular. Historians have argued that the common law was individualist in bent well prior to the emergence of liberalism,⁴⁹ such that the former may have helped pave the way for the latter. R.H. Tawney remarked that “The dependence of constitutional

⁴⁸ See Hobhouse, *supra* note 18 (referring to obstructionist actions by U.S. courts in his account of the transition in liberalism).

⁴⁹ See ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM* (1978).

government on the survival of the common law is a commonplace. The significance of that survival for the rise of economic individualism in England has been less emphasized, but it is not less important.⁵⁰ Both sentences from Tawney are relevant to this exploration: the first refers (implicitly) to the role that the common law played in restricting legislation, while the second to its solicitude for economic liberalism; their combined point is that the common law helped restrict legislation unfriendly to rise of economic liberalism. In his intellectual history of laissez faire, economic historian Jacob Viner asserted that "It was in this period [late sixteenth and early seventeenth century] that Sir Edward Coke appealed to the common law as a traditional barrier to the interference by government with the economic and other 'freedoms' of the individual."⁵¹ Sir Edward Coke (1552-1634) famously asserted in *Dr. Bonham's* case that legislation inconsistent with the common law was invalid. An extensive study of Coke's corpus of decisions concluded that "it is clear that in his opinion the ruling principle at common law was freedom of enterprise."⁵² Blackstone, the great expositor of the common law, extolled the supreme right of property (which he grounded directly in natural law).⁵³ From these origins,⁵⁴ the common law has maintained a consistent emphasis on protecting property, which, as alluded to earlier, fed into and informed U.S. constitutional analysis up through the turn of the twentieth century.⁵⁵

Extrapolating from the foregoing, several assertions will be offered to set the stage for the exploration of the connection between liberalism and the rule of law. Common law doctrines supported liberalism; liberalism was threatened by legislation; the common law was threatened by legislation; the common law and liberalism had separate and joint reasons for resisting legislation,

⁵⁰ R.H. Tawney, *quoted in* Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 30, 30 (1935).

⁵¹ Jacob Viner, *The Intellectual History of Laissez Faire*, *J. L. & ECON.* 45, 55 (1960).

⁵² Wagner, *supra* note 50, at 44.

⁵³ See Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 *U. CIN. L. REV.* 67, 67-70 (1985).

⁵⁴ See G.E. Aylmer, *The Meaning and Definition of "Property" in Seventeenth Century England*, 86 *PAST & PRESENT* 87, 87, 92 (1980).

⁵⁵ For an excellent study of this complex of ideas, see generally Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985).

and for extending mutual support. After the common law gave way to legislation and the rule of law achieved stand-alone prestige, by the mid-20th century, liberalism latched on to the rule of law directly, lessening its identification with (though still favoring) the common law. To offer this reconstruction of mutual interests and beneficial alignments, it must be emphasized, is not to suggest that any of this was conscious or the product of strategic considerations—but that it happened in a convenient and consistent fashion. The flux and flow of these of positive and negative attachments will be made evident in the following narrative.

The emphasis herein on the common law, it must be said, does not suggest that liberalism exclusively relied on the common law as its protector. Important early liberal thinkers, prominently Locke, relied heavily on natural law, which was thought of much like the common law as establishing limits on legislation. Locke's argument in the *Second Treatise* was directed at bringing the monarch under legal restraints so he said little by way of limitations against legislative power. The import of his argument, however, weighs against both: "Locke's *Treatise* had as its main goal the establishment of claims against unlimited interference by government with personal interests or 'rights.' 'Property' in the narrow sense was undeniably one of these 'rights' to which Locke attached great importance."⁵⁶ Political theorists have debated why, given this concern, Locke failed to articulate any specific protections for individual rights. Leo Strauss argued that Locke thought such protections were unnecessary because only substantial property owners had the right to vote (estimated at 3% of the population⁵⁷), and this "was a sufficient safeguard for individual rights because [Locke] thought that all who had the right to be consulted were agreed on one concept of the public good: maximizing the nation's wealth" ⁵⁸ Locke specifically asserted that law making power is controlled by natural law principles,⁵⁹ and he wrote that "the law of nature is the greatest defense of the private

⁵⁶ Jacob Viner, "Possessive Individualism" as Original Sin, 29 CAN. J. OF ECON. & POL. SCI. 548, 557 (1963).

⁵⁷ See ROBERT A. HEINMAN, AUTHORITY AND THE LIBERAL TRADITION 29 (1984).

⁵⁸ C.B. Macpherson, *The Social Bearing of Locke's Political Theory*, 7 W. POL. Q. 1, 21 (1954).

⁵⁹ JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 213-15 (Robert Horwitz, et al. trans., Cornell Univ. Press 1990) (1664).

property of the individual.”⁶⁰ As philosopher John Grey put it, “There is in Locke what is lacking in earlier individualist writers—a clear perception that personal independence presupposes private property, securely protected under the rule of law.”⁶¹ Although Locke was conspicuously silent with respect to the “ancient constitution” (and the common law) as a source of legal limits on government,⁶² this would become a theme for other leading liberals.

Adam Smith, the other early liberal giant, characterized society as a natural order that emerges from the uncoordinated, self-interested actions of individuals. He presented an unflattering image of politicians as “insidious and crafty” and prone to influence by special interests,⁶³ and he portrayed law (here meaning legislation) as an interference in the natural order:

The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations; though the effect of these obstructions is always more or less either to encroach upon its freedom, or to diminish its security.⁶⁴

Smith’s general complaints against law were not directed at common law rules, which provided the framework within which the

⁶⁰ *Id.* at 239.

⁶¹ JOHN GRAY, *LIBERALISM* 14 (Open University Press, 2nd ed. 1995).

⁶² See David Resnick, *Locke and the Rejection of the Ancient Constitution*, 12 *POLITICAL THEORY* 97, 97 (1984). Pocock asserts that despite Locke’s failure to raise the subject, “the idea of the immemorial law . . . has been found to have appeared, based consistently on the same assumptions, in every major controversy and in the mind of every important political thinking from Coke to Locke.” J.G.A. Pocock, *Burke and the Ancient Constitution – A Problem in the History of Ideas*, 3 *HIST. J.* 125,130 (1960).

⁶³ Donald Winch, *Science and the Legislator: Adam Smith and After*, 93 *ECON. J.* 501, 503 (1983) (quoting and characterizing Adam Smith).

⁶⁴ Jacob Viner, *Adam Smith and Laissez Faire*, 35 *J. POL. ECON.* 198, 209 (1927) (quoting ADAM SMITH, *WEALTH OF NATIONS*).

spontaneous order of relations took place. "To Adam Smith and his immediate successors," Hayek observed, "the enforcement of the ordinary rules of the common law would certainly not have appeared as government interference."⁶⁵ Viner emphasized that "It seems clear . . . that Smith, like later and more doctrinaire exponents of *laissez faire*, took for granted the inevitability of private property and class conflict, and understood by justice the whole legal and customary code of his time dealing with individual rights, privileges, and obligations under that system of economic organization."⁶⁶ Smith provided a surprisingly frank (almost Marxist) account of the role of law and government in connection with the preservation of property: "Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce others to an equality with themselves by open violence."⁶⁷

Although Edmund Burke is today considered a seminal conservative,⁶⁸ in his day he was perceived as a liberal (or "Old Whig").⁶⁹ His economic ideas matched those of Adam Smith, with whom he shared a mutually respectful relationship.⁷⁰ Like many of their peers, Burke too believed that society was comprised of a natural order, a belief consistent with his traditionalism.⁷¹ Burke held a more extreme *laissez faire* position than Smith, however, for the latter permitted selected wage regulations and support for the poor (among other types of government action),⁷² which Burke rejected.⁷³ Burke's liberal views were thoroughly infused by the

⁶⁵ HAYEK, *supra* note 4, at 221.

⁶⁶ Viner, *supra* note 64, at 223.

⁶⁷ ADAM SMITH, *LECTURES ON JURISPRUDENCE* 208, (R. L. Meek et al. eds., 1978).

⁶⁸ See J.G. MERQUIOR, *LIBERALISM OLD AND NEW* 70-71 (1991).

⁶⁹ See HAYEK, *supra* note 4, at 401, 407.

⁷⁰ See William Clyde Dunn, *Adam Smith and Edmund Burke: Complementary Contemporaries*, 7 S. ECON. J. 330, 342, 344 (1941).

⁷¹ See *id.* at 337-38; see also O.H. Taylor, *Economics and the Idea of Jus Naturale*, 44 Q. J. ECON. 205, 206-08 (1930).

⁷² See Emma Rothschild, *Adam Smith and Conservative Economics*, 45 ECON. HIST. REV. 74, 84-86 (1992); James Conniff, *Burke on Political Economy: The Nature and Extent of State Authority*, 49 REV. POL. 490, 490-91 (1987).

⁷³ See Winch, *supra* note 63, at 515.

common law tradition (he studied law for a time).⁷⁴ As Pocock put it, Burke's thought "was founded upon an identification of the rules and spirit of English society with the rules of and spirit of the common law; and the common law had taken shape as a law of real property."⁷⁵ Liberty, for Burke, was "drawn from" the common law of real property.⁷⁶ A natural target of Burke's critique of political rationalism—the notion that society and people should be remade for the better—was legislative action, which (along with education) was the primary mechanism for translating the rationalist impulse into concrete action.

Albert V. Dicey, a renowned English liberal at the close of the nineteenth century, was the leading constitutional scholar of his generation. Dicey is a key figure in this account because he is responsible for giving modern currency to the phrase "the rule of law." Dicey lamented what he saw as the ongoing shift in English law away from individualism toward collectivism.⁷⁷ What Dicey meant by individualism was "the liberty of individual property owners,"⁷⁸ which he saw as threatened by social welfare programs and the burgeoning administrative system, both built by legislation.⁷⁹ "English collectivists," Dicey wrote, "have inherited from their utilitarian predecessors a legislative doctrine, a legislative instrument, and a legislative tendency pre-eminently suited for the carrying out of socialistic experiments."⁸⁰ He argued that this ongoing shift spelled the demise of the rule of law. Dicey located the rule of law squarely in courts and the common law. The rule of law, according to Dicey, was a product of the multitude and totality of "judicial decisions determining the rights of private persons

⁷⁴ See Reed Browning, *The Origin of Burke's Ideas Revisited*, 18 EIGHTEENTH-CENTURY STUD. 57, 67 (1984).

⁷⁵ Pocock, *supra* note 62, at 130.

⁷⁶ *Id.* at 131.

⁷⁷ See generally Harlo Perkins, *Individualism Versus Collectivism in Nineteenth Century Britain: A False Antithesis*, 17 J. OF BRIT. STUD. 105 (1977).

⁷⁸ *Id.* at 117.

⁷⁹ See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 146-47 (Beacon Press 2001).

⁸⁰ A.V. Dicey, Opus 310, *quoted in* William H. Coates, *Benthamism, Laissez Faire, and Collectivism*, 11 J. OF THE HIST. OF IDEAS 357, 357 (1950).

in particular cases brought before the Courts.”⁸¹ As one contemporary observer put it: “In England the rule of law is coterminous with the cognizance of ordinary courts: it is the rule of the judicature.”⁸²

The shift from individualism to collectivism that Dicey opposed was the same shift from classical liberalism to social liberalism set forth in Part One, and it was effectuated in the rise of legislation described in Part Two. Dicey’s distinct contribution was to explicitly invoke the venerable rule of law in the fight. In a manner of speaking, he upped the ante by insisting that the bastion of English liberty, the rule of law – which he posited in the courts, against the legislature – was imminently at risk from these developments.

In his 1944 classic, *The Road to Serfdom*, Friedrich Hayek extended Dicey’s tack. “The Rule of Law was consciously evolved only during the liberal age,” Hayek proclaimed, “and is one of its greatest achievements, not only as a safeguard but as the legal embodiment of freedom.”⁸³ He defined the rule of law as the notion that “the government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”⁸⁴ To satisfy this requirement, laws must be set out in advance, be made public, be phrased in general terms, treat people equally, and be certain and stable.⁸⁵

Hayek asserted that “any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law.”⁸⁶ Attempts at achieving substantive equality and distributive justice are inconsistent with the rule of law, according to Hayek, because both require context specific adjustments in social distributions of opportunities and wealth, which cannot be accomplished through the application of general rules set forth in advance. Hayek asserted that “It cannot be denied that the Rule of Law produces economic inequality – all that can be claimed for it is

⁸¹ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 115 (Liberty Fund 1982) (1885).

⁸² Ernest Barker, *The Rule of Law*, in POLITICAL QUARTERLY 116, 118 (1914).

⁸³ FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 90 (1994).

⁸⁴ *Id.* at 80.

⁸⁵ HAYEK, *supra* note 4, at 205-19.

⁸⁶ HAYEK, *supra* note 83, at 87-88.

that this inequality is not designed to effect particular people in a particular way.”⁸⁷ This negative consequence is offset, Hayek claimed, by the fact that the poor would be better off because the society would have greater overall wealth.

A subtle but crucial emendation by Hayek to liberal thought must be flagged here. Mises (Hayek’s colleague) also acknowledged that redistributions are prohibited and economic inequality results, but he attributed this to the implications of liberal doctrines relating to the protection of property and the free market,⁸⁸ not to the rule of law as such. In the above passages Hayek laid responsibility for the prohibition against redistribution and for the resultant economic inequality on the rule of law itself. This move by Hayek insinuates the rule of law within the complex of classical liberal ideas, thereby raising the stakes (akin to Dicey): an opponent of these doctrines is not just challenging classical liberalism but, even worse, *threatening the rule of law*. In 1944, when Hayek wrote this, the social welfare state was a *fait accompli*, with classical liberalism apparently moribund, but the ideal of the rule of law had begun to enjoy increasing prestige as the key element that distinguished the free West from Nazi Germany and Communist Russia.⁸⁹ Hence Hayek astutely, though by all indications with true conviction, hitched his liberalism to the rising star of the rule of law.

Hayek regularly expressed antipathy toward legislation. “The ‘law’ that is a specific command, an order that is called a ‘law’ merely because it emanates from the legislative authority, is the chief instrument of oppression,” he wrote.⁹⁰ He viewed natural law theory favorably because it imposed limits on legislation, writing that “legal positivism from the very beginning could have no sympathy with and no use for those meta-legal principles which underlie the ideal of the rule of law . . . , for those principles which imply a limitation upon the power of legislation.”⁹¹ Along the same lines, he asserted that “the notion of a higher law above municipal codes,

⁸⁷ *Id.*

⁸⁸ VON MISES, *supra* note 8, at 12-14.

⁸⁹ See Edgar Bodenheimer, *Power and Law: A Study of the Concept of Law*, 50 ETHICS 127, 129 (1940).

⁹⁰ HAYEK, *supra* note 4, at 155-56.

⁹¹ *Id.* at 237.

with which Whiggism began, is the supreme achievement of Englishmen and their bequest to the nation.”⁹²

In his later work, Hayek extolled the unique capacity of the common law to provide the foundation for the rule of law. He analogized the “invisible hand” of the market to the common law, characterizing the common law as a self-correcting spontaneously grown order that inures to the benefit of all without being the intentional product of anyone, or subject to any centralized control, evolving along with society to provide an up to date legal framework for interaction.⁹³ In terms redolent of classical common law theory, Hayek argued that judges are not truly legislating but only declaring already existing rules immanent within previously decided cases and prevailing customs and norms of the social order.⁹⁴ It was too late in the day for Hayek to assert that the common law imposes limits on legislation, but the unmistakable import of his presentation is that the common law is a superior form of law and that legislation poses a threat to the rule of law.

IV. THE CONTEMPORARY CULMINATION

The final piece in the entangled relationship between the rule of law and liberalism brings us to the present. Unlike the preceding discussion, it does not involve the work of theorists, but rather represents the culmination of this stream of ideas in a course of action. Beginning in the late 1980s and accelerating in the 1990s, Western nations and international financial institutions implemented world-wide a set of reforms labeled the “Washington consensus.” The World Bank and the International Monetary Fund began to condition loans and grants to developing countries on a package of economic and political reforms called “good governance” and “structural adjustment programs,” which entailed reducing market restrictions and trade barriers, freeing capital flow, privatizing publicly held assets, protecting property and enforcing contracts, protecting foreign investments, enacting western commercial laws, reducing corruption, establishing independent courts,

⁹² *Id.* at 409 (quoting Lord Acton).

⁹³ FRIEDRICH HAYEK, *LAW, LEGISLATION AND LIBERTY* 72-122 (1973).

⁹⁴ *Id.* at 117-19.

enhancing democracy, and, prominently, building the rule of law.⁹⁵ This neoliberal package of reforms aims at reproducing the economic and legal conditions that prevail in Western countries⁹⁶

In addition to requiring loan recipient countries to implement these reforms, international lending organizations altered how they allocated aid. Spending money directly on infrastructure development and economic projects came to be seen as wasteful when established legal institutions are lacking. The resultant shift in expenditures has been dramatic. "Thirty yeas ago," the General Counsel to the World Bank recently observed, "the Bank had 58% of its portfolio in infrastructure, today it is reduced to 22% while human development and law and institutional reform represent 52% of our total lending."⁹⁷

Today, establishing the rule of law is *the* central plank in development thought and activities. As Thomas Carothers observed, "Aid agencies prescribe rule-of-law programs to cure a remarkably wide array of ailments in developing and post-communist countries, from corruption and surging crime to lagging foreign investment and growth."⁹⁸ Citing World Bank studies, former President of the World Bank James Wolfensohn "said that the empirical evidence shows a large, significant and causal relationship between improved rule of law and income of nations, rule of law and literacy, and rule of law and reduced infant mortality."⁹⁹ A detailed study issued in 2006 by the Bank, *Where Is the Wealth of Nations?*, asserted that "in most countries *intangible capital* is the largest

⁹⁵ See David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEX. INT'L. L.J. 387, 398-408 (2000) (overview of World Bank and IMF programs).

⁹⁶ See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

⁹⁷ Roberto Danino, *The Legal Aspects of the World Bank's Work on Human Rights* (Oct. 2006), <http://www1.worldbank.org/devoutreach/october06/article.asp?id=386>.

⁹⁸ THOMAS CAROTHERS, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 17 (2006).

⁹⁹ Press Release No: 2002/013/S, *Rule of Law Central to Fighting Poverty*, World Bank President Calls on Governments to Recognize the Link Between Law and Development,

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20011894~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

share of total wealth.”¹⁰⁰ “Intangible capital,” according to the study, includes human capital (knowledge and skills in labor force), social capital (trust), and governance elements. The study emphasized that “the rule of law” – which it defined as “the extent to which agents have confidence in and abide by the rules of society”¹⁰¹ – makes a substantial contribution to intangible capital.¹⁰² Increasing the rule of law, it concluded, is one of “the most important” means to increase total wealth.¹⁰³ The study even made a concrete assertion that a one percent increase in the rule of law index contributes more to intangible capital than a one percent increase in school years.¹⁰⁴

It is beyond the scope of this article to evaluate the often claimed connection between the rule of law and economic development (although it must be said that the extraordinary economic development of China in the past two decades, when lacking key aspects of the rule of law, serves as a major counter-example).¹⁰⁵ The point of raising it here is to show once again how the rule of law has been intertwined in a broader liberal agenda with adverse implications for democracy. Although enhancing democracy is routinely listed among the collection of development initiatives, a prominent feature of the structural adjustment and good governance programs was the manifestly anti-democratic mode in which they were implemented.

Under the threat that the aid would be withheld if they refused, these reforms were “voluntarily” accepted by nations that wished to receive economic aid. Political leaders often bypassed popular input, for the reforms invariably brought harsh immediate social and economic consequences.¹⁰⁶ Recipient countries typically enacted these programs without seeking or securing broad

¹⁰⁰ KIRK HAMILTON ET AL., *WHERE IS THE WEALTH OF NATIONS? MEASURING CAPITAL FOR THE 21ST CENTURY* 87 (2006).

¹⁰¹ *Id.* at 92.

¹⁰² *Id.*

¹⁰³ *Id.* at xviii.

¹⁰⁴ *Id.* at 94.

¹⁰⁵ Carothers suggests that the link is questionable and has yet to be demonstrated. CAROTHERS, *supra* note 98, at 17-18.

¹⁰⁶ See Richard Sandbrook, *Economic Liberalism Versus Political Democratization: A Social-Democratic Resolution?*, 31 CAN. J. AFR. STUD. 482 (1997).

domestic consent.¹⁰⁷ They “emerge from a top-down and secret process of negotiations between technocrats representing a government and an international lending agency.”¹⁰⁸ The programs, which restrict and control domestic law-making on a host of important issues, amount to a form of “economic constitutionalism” that precludes policy choices and politics in connection with broad swaths of internal matters.¹⁰⁹ Defenders of these programs insist that where properly implemented they have helped the poor (a disputed claim¹¹⁰). What is relevant here is not whether the promised economic benefits have been delivered, but rather the anti-democratic tenor of these programs – the latest episode in the long history set forth in this article. Democracy is fine, as long as it keeps its hands off the liberal program. Even legislation is fine, as this example shows, when legislation is utilized to implement and protect the liberal program.

Another relevant aspect of this initiative is the way the rule of law is measured and understood within the development context. Combining statistics and surveys produced by a multitude of organizations world-wide, the Bank has produced a set of World-wide Governance Indicators, assigning a score for each country (212 in total) on six governance dimensions.¹¹¹ These scores are relied up by international organizations and nations making aid decisions, so they carry real significance. The “rule of law” score purports to measure “the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of

¹⁰⁷ See *id.* at 491-97.

¹⁰⁸ *Id.* at 495.

¹⁰⁹ Kanishka Jayasuriya & Andrew Rosser, *Economic Orthodoxy and the East Asian Crisis*, 22 *THIRD WORLD Q.* 381, 390, 393 (2001).

¹¹⁰ See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); Jan Nederveen Pieterse, *Global Inequality: Bringing Politics Back In*, 23 *THIRD WORLD Q.* 1023 (2002).

¹¹¹ See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators, 1996-2006* (World Bank Policy Research Working Paper Series, No. 4280, July 2007). The six dimensions are 1) voice and accountability, 2) Political Stability and Absence of Violence, 3) Government Effectiveness, 4) Regulatory Quality, 5) Rule of Law, 6) Control of Corruption. *Id.* at 3-4.

crime and violence.”¹¹² Set aside the large question of whether it is possible to quantify the rule of law in this manner, or, assuming it is possible, whether these studies have done so adequately, which are serious issues, though beyond the scope of this essay.¹¹³ Two more directly relevant points about this score merit attention. First, when compiling the “rule of law” score, the largest input by a wide margin—almost 60% of the total in weighted terms—came from “commercial business information providers.”¹¹⁴ For example, the “Index of Economic Freedom” produced by the avowedly conservative (classical liberal) Heritage Foundation was one of sources factored into the rule of law rating.¹¹⁵ The second point is that, along with issues of crime, the most frequently identified measure of “the rule of law” is “property rights.”¹¹⁶ That was the *exclusive* measure for the rule of law used by the Heritage Foundation,¹¹⁷ as well as by several other sources. Consequently, a substantial component of a country’s rule of law score hinges upon whether it protects property rights to the satisfaction of business concerns. This makes sense from the standpoint of the business community wishing to conduct commerce in developing countries—which matters to economic development—but nonetheless it is an exceedingly narrow view of the rule of law, inconsistent with the multifaceted definition set forth elsewhere in the report.

The international development context is dominated by a fuzzy chain of unsupported purported neo-equivalences/causal relations as follows: liberalism equals economic development equals the rule of law equals property rights.

V. DRAWING OUT THE CONNECTION

The three-plus centuries of liberal thought superficially canvassed in this article can be reduced crudely to this: liberalism utilizes

¹¹² *Id.* at 4.

¹¹³ For a critical examination that raises these questions, see Melissa A. Thomas, *What Do the Worldwide Governance Indicators Measure?*, Oct. 2006, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/1740479-1149112210081/2604389-1167941884942/what_do_wgi_measure.pdf.

¹¹⁴ Kaufmann et al., *supra* note 111, at 28.

¹¹⁵ *Id.* at 55.

¹¹⁶ See Thomas, *supra* note 113, at 23-24.

¹¹⁷ Kaufmann et al., *supra* note 111, at 55.

the rule of law to protect property rights (and often the market) in whatever way possible. When property rights were threatened by monarchs or legislatures, it was held that, under the rule of law, natural law protections of property stand above positive law, and the essential purpose of law is to protect property (so claimed Locke). When property rights were preserved in the common law, it was glorified as the ancient constitution that established the controlling framework for all law, constituting the binding rule of law (so contended Coke, Burke, and Carter). When property rights were threatened by democratic legislation, the rule of law was invoked to resist or denigrate or provoke fears about legislation (as did Dicey, and turn of the twentieth century U.S. judges). When the social welfare state laid burdens on property rights to achieve greater social justice through redistribution, it was said (by Hayek) to be inherently inconsistent with the requirements of the rule of law. And now, in the international development context, societies have been coerced into implementing a package of liberal reforms without democratic input, using the standard refrain that all things good flow from the rule of law, which (substantially) comes down to the protection of property.

This long historical association between the rule of law and the preservation of property, revealingly, has not remained constant over time. In the first few centuries, the rule of law was utilized as a—natural law, common law, or constitutional—trump that narrowly restricted or invalidated infringements upon the right to property. Within this understanding, the *content* of natural law, the common law, and constitutional provisions extended *substantive* protections to property rights. The protection came from the right itself, not from the rule of law—which as a general notion simply means the law controls (whatever its content).

In the course of the 20th century, however, with the rise of democratic legislation and the social welfare state, natural law and common law no longer operated as trumps within law, and substantive constitutional trumps with respect to economic and property rights were cut back. The relationship between liberalism/property and the rule of law was then reformulated. Hayek constructed an argument to the effect that the redistribution of property—in the pursuit of social justice or greater equality—is impermissible not owing immediately to its infringement upon the substantive right to property but because it is inconsistent with the

requirements of the rule of law itself (understood in purely formal terms). Formerly the liberal argument was: property is the keystone of liberty simpliciter. Now the argument became: the rule of law is the keystone of liberty; redistribution threatens the rule of law; hence redistribution threatens liberty.

Finally, at the outset of the 21st century, their relationship has once again transformed. Rarely do people today argue, with Hayek, that the rule of law itself prohibits efforts at achieving greater social justice, which has scant plausibility given the presence of modern social welfare states with robust rule of law systems. Now, in the development context, the protection of property and the rule of law are mentioned together as close correlates at the core of a cluster of liberal economic and political notions. The explicit overarching objective is not liberty but economic development; and economic development, it is repeatedly said, depends upon the rule of law. The rule of law holds the dominant position in this complex of ideas—drawing upon its prestige as *the* preeminent legitimating ideal in global political discourse—but the protection of property is still present, albeit standing in the background, enjoying the successes of its hugely popular partner.

The centuries old pattern within liberal thought brought out in this article is that property must be protected and the rule of law has time-and-again served as its primary protector. Notwithstanding innumerable surrounding changes over time in material circumstances and theoretical constructions, this core functional relationship between the two has remained constant.

VI. WHY “THE DARK SIDE” OF THE RULE OF LAW?

To prevent misunderstandings, it is necessary to state forthrightly that I embrace political liberalism. Property rights are important and liberty is a supreme good, in my view, *within societies and for people that embrace liberal values*. I agree that core aspects of economic liberalism and the market enhance wealth. If all of this is good, one might ask, why have I labeled this “the dark side of the relationship between the rule of law and liberalism”? Part of the answer has to do with classical liberalism, and part of it has to do with the consequences of this relationship for the rule of law.

Classical liberalism is an extreme set of views that, when influential, has occasioned ruthless suffering on masses of people (al-

though it has also helped produced wealth and improved material conditions for many who benefited). Much like its ideological opponent, communism, it counsels that the immediate pain of large groups of people is a necessary sacrifice for the greater good overall that promises to follow. By this chain of reasoning, generations of living people have been consigned to suffering on the grounds that available solutions would make things worse overall. It is essential to recognize, however, that throughout the history of liberalism the market has never been free of significant intervention, and property rights have never been treated as inviolate. Even Adam Smith did not assume a rigid laissez faire stance, for he recognized that there are moral as well as economic reasons that justify intervention; what Smith opposed were corrupt, rent-seeking, inefficient and stupid interventions (plentiful in the government of his day).¹¹⁸ Even at the height of 19th century laissez faire England and America there was intervention,¹¹⁹ much of which involved pragmatic legislative responses to the unbearably harsh consequences produced by industrialization; for example, on behalf of workers who labored 12 or more hour days under unsafe and physically demanding conditions for sustenance wages (as occurred in the 19th century in the West, and happens today in developing countries around the world). In his sweeping history of liberalism,¹²⁰ Karl Polanyi argued that laissez faire liberalism is a utopian ideology that has never been borne out in practice, not only because its terrible human and environmental consequences (which accompany the wealth it generates) inevitably call forth interventionist responses, but also because the market in various ways requires constant government participation.¹²¹

Modern social welfare states demonstrate that liberalism and capitalism can be constructed in ways that provide for social welfare without lapsing into government tyranny. The shrill

¹¹⁸ See Viner, *supra* note 64, at 198; Rothschild, *supra* note 72, at 74.

¹¹⁹ See generally Henry Parris, *The Nineteenth Century Revolution in Government: A Reappraisal Reappraised*, 3 HIST. J. 17 (1960); J. Bartlett Brebner, *Laissez Faire and State Intervention in Nineteenth-Century Britain*, 8 J. ECON. HIST. 59 (1948); Perkins, *supra* note 77; Oliver MacDonagh, *The Nineteenth-Century Revolution in Government: A Reappraisal*, 1 HIST. J. 52 (1958).

¹²⁰ See POLANYI, *supra* note 79, at 170-230.

¹²¹ See *id.* at 141-86.

warning from liberals like Dicey and Hayek that social welfare programs threaten the imminent demise of liberty has the feel of scaremongering. Hayek was correct that particularized decisions cannot be squared with the application of general rules, but many redistributive measures (estate taxes, for example) or efforts at social justice are formulated as general rules applied equally to all, consistent with the rule of law.¹²²

Despite positioning themselves as defenders of liberty—a claim that is merited on its own terms—this article has shown a consistent pattern of liberals in the classical vein trying to prevent, narrow, invalidate, or discredit democratically produced legislation that seeks to redistribute property or temper market mechanisms to further competing aims. At the turn of the 20th century this was evident in the actions of U.S. courts that struck or narrowed social welfare and labor legislation; at the turn of the 21st century this is evident in the neoliberal package of reforms imposed on developing countries seeking aid.¹²³ For anyone who sees democracy—the exercise of political choice over one’s affairs—as an expression of liberty, this side of liberalism involves persistent attempts to invoke the rule of law to restrict the exercise of political liberty. This is the dark side of the rule of law within liberal theory.

Those in the West who find solace in the fact that developing countries have thus far suffered the brunt of the aforementioned anti-democratic imposition of neoliberal reforms are perhaps unduly optimistic in thinking they have escaped a similar fate. This very same process, with similar anti-democratic tendencies, is taking place writ large around the globe as the imperatives of market capitalism increasingly dictate policies to national governments.¹²⁴ The “great transformation” Polanyi described involved the market coming to occupy the dominant organizing position within capitalist societies.¹²⁵ We may well be witnessing the completion of this

¹²² See TAMANAHA, *supra* note 1, at 98.

¹²³ It may be objected that these reforms were not “imposed,” since the countries could reject them (albeit losing the aid); from the perspective of the receiving end, however, there is little question that the reforms have been “imposed.” For a sustained argument about the anti-democratic thrust of neoliberalism around the world today, see HARVEY, *supra* note 96, at 152-206.

¹²⁴ See generally *id.*

¹²⁵ See POLANYI, *supra* note 79.

transformation, not just in the sense that every individual nation comes to be organized in this fashion, but in the further sense that the entire community of nations (the global order) is increasingly organized in the same terms. Liberal mechanisms and institutions functioning at the transnational level (for example, the World Trade Organization) are already coalescing into a *de facto* kind of “economic constitutionalism” which, through the operation of the rule of law, constrains, overrides, and dictates to domestic law making in connection with liberal economic matters (affecting property rights, tariffs, subsidies, efforts to protect jobs). In the past, natural law, the common law, and constitutional provisions provided the controlling norms that were enforced by the rule of law. In the future, if current developments bear out, it will be unadulterated liberal economic norms that control world-wide. Liberals will view this prospect happily, but individuals and societies that prefer other values above (or equal to) material improvement will find it alienating and disempowering.

There is also a dark side *for* the rule of law in this relationship. As I have argued elsewhere,¹²⁶ the rule of law originated prior to liberalism and can exist independent of liberalism. Liberals tend to obscure this in their jealous identification of the rule of law with liberalism. From a broader perspective, the singular achievement of the rule of law is its insistence that governments must act in accordance with the law – an essential restraint that is valuable in all societies regardless of their social, cultural, economic, or political orientation. In view of the awesome power and resources governments can wield, holding the government to legal restraints is a universal good.

The risk in recent developments is that the rule of law is ripe to be tainted by its close identification with liberalism, particularly in developing countries. A number of these countries have suffered from the adverse consequences of neoliberal reforms;¹²⁷ the disparity in wealth has increased to new heights in many countries, without any evident improvement for the poor majority;¹²⁸ and in

¹²⁶ See TAMANAHA, *supra* note 1.

¹²⁷ See STIGLITZ, *supra* note 110.

¹²⁸ For indications that it is heading in this direction in many societies, see Pieterse, *supra* note 110, at 1023.

many of these societies the populace had little say over whether to accept or modify these reforms. International development organizations now divert money away from infrastructure projects in favor of rule of law projects, like training judges and police, and drafting and implementing legal codes that protect property and foreign investment. In all these various activities, the “rule of law” is put forth as the “front man” for the liberal package. If this initiative goes badly in any number of possible ways owing to an innumerable complex of local and global factors, as seems likely to occur in many places, if substantial pain is suffered without the promised economic benefits to the general public, if courts are perceived to defend the rich who enjoy increasing wealth while most in society are left wanting, the rule of law may be held responsible or tarnished, viewed by the populace with suspicion or cynicism—making it all the harder to implant and build the rule of law.

It would be a tragic paradox if the great liberal advocates for the rule of law contributed to preventing it from taking hold and spreading around the world.