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Analysis of Bruno Leoni's work is integral for an understanding of recent developments in jurisprudence, especially in law and economics. Professor Leoni's work is one of the fountainheads of this movement. Legal scholars of today should refresh themselves from the source, for Professor Leoni did far more than merely anticipate later developments; he offered cogent reasons for the incompatibility of legislation with the very free market preferred by exponents of the law and economics movement. Professor Leoni's deep knowledge of jurisprudence and of legal, political, and economic history informed his work and offers insights into the proper relationship between law, legislation, and liberty.

In his contribution to this volume Professor Aranson offers a provocative and helpful reintroduction to Professor Leoni's scholarship in light of its continuation by other law and economics scholars. This essay intends to complement Professor Aranson's work by illuminating and emphasizing the importance of certain central features of Professor Leoni's thought. Two topics are particularly relevant to a proper understanding of Professor Leoni's work. First, we shall recapitulate and apply Professor Leoni's arguments about the importance of an understanding of economics for legal scholars, including his warnings about the incompatibility of the free market economy with legislation. Second, an examination of his view of legal evolution reveals a concept of law and its role in society different from that offered by advocates of legislation. In this comment, we show the interrelationships between Professor Leoni and the current law and economics movement, and his impact on that movement.

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The Relationship Between Economics and Law

In his principal English language work, *Freedom and the Law*,[1] Professor Leoni argues that there is an analogy between, on the one hand, the workings of the market economy and the spontaneous evolution of a common law legal system, or system of "lawyer's law,"[2] and, on the other, between a centralized command economy and legislation.[3] Professor Leoni is careful to note, however, that "*there is more than an analogy*" in the two cases.[4] Special emphasis should be placed on the word "more." Ultimately, legislation is incompatible with the requirements of the free market economy. Legislation is also a source of rent-seeking, in a way that lawyers' law is not.[5] The crucial question that Professor Leoni addresses is whether legislation and the market economy (and hence the free society) can in the long run coexist. As Professor Leoni remarked:

> It is . . . paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation. The fact is that economists are very rarely lawyers, and vice versa, and this probably explains why economic systems, on the one hand, and legal systems, on the other, are usually separated and seldom put into relation to each other.[6]

A good example of the differences between legislation and the common law is how these two systems approach the development and assignment of property rights under new eco-

1. B. LEONI, FREEDOM AND THE LAW (2d ed. 1972).
2. *Id.* at 22.
3. *Id.* at 21.
4. *Id.* at 22 (emphasis in original). *See also id.* at 90: "Even those economists who have most brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really compatible with a law-making process centralized by the authorities."
5. It is worth emphasizing that rent-seeking is not a newly discovered phenomenon. Indeed, it was a central focus of study in the Italian tradition of economic thinking in which Professor Leoni was steeped. *See* Buchanan, *"La Scienza delle Finanze": The Italian Tradition in Fiscal Theory*, in J. BUCHANAN, FISCAL THEORY AND POLITICAL ECONOMY 24 (1960) for a treatment of such figures as Maffeo Pantaleoni, Vilfredo Pareto, Giovanni Montemartini, and others. *See also* Montemartini, *The Fundamental Principles of a Pure Theory of Public Finance*, in CLASSICS IN THE THEORY OF PUBLIC FINANCE 137 (R. Musgrave & A. Peacock eds. 1967), V. PARETO, MANUAL OF POLITICAL ECONOMY 17-22, 25-27, 31-36 (A. Schwier trans. 1971); V. PARETO, SOCIOLOGICAL WRITINGS 114-20, 137-42, 162-64, 270 (S.E. Finer ed. 1966). Professor Leoni refers also in *Freedom and the Law* to his compatriots Gaetano Mosca, author of THE RULING CLASS (1939), a study of class conflict, and Roberto Michels, author of the classic study POLITICAL PARTIES (1959), and formulator of the "Iron Law of Oligarchy." *See* B. LEONI, *supra* note 1, at 102, 126.
6. B. LEONI, *supra* note 1, at 22.

nomic conditions, including technological advances.[7] Three cases deserve mention: the allocation of property rights in electro-magnetic broadcasting, the allocation of rights to groundwater and surface water flows, and the delineation and enforcement of "intellectual property rights."

In the first case, legislation actively preempted the system of property rights to broadcasting that was already emerging through the court system[8] in the manner described by Professor Leoni—that is, by parties to a dispute making claims before a court. While a system of property rights was emerging through a common law process, Congress seized control of "spectrum allocation" and asserted federal regulation of broadcasting, with its attendant rent-seeking and economic inefficiencies. We are still suffering from the results.

In the case of property rights to water, a similar process has occurred. Congress and state legislatures have seized control of water resources and precluded the further development of common law private property rights. This has led to problems of groundwater overmining in western states, pollution, and political conflict and rent-seeking.[9]

Similarly, the reliance on legislative protection of "intellectual property rights" through state-enforced monopolies (patents and copyrights) generally has been based on explicitly utilitarian claims. Consequently, common law forms of protection—bailments, trade secrecy, and other contractually specifiable agreements—have atrophied, generating substantial rent-seeking and political conflict, as well as numerous restraints on the market process, including restrictions on the introduction of new technologies.[10]

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7. The approach here is informed by the theory of property rights advanced by another pioneer in the law and economics movement, Harold Demsetz. *See* Demsetz, *Toward a Theory of Property Rights*, in THE ECONOMICS OF PROPERTY RIGHTS 31 (E. Furubotn & S. Pejovich eds. 1974).

8. *See* Mueller, *Reforming Telecommunications Regulation*, in E. DIAMOND, N. SANDLER & M. MUELLER, TELECOMMUNICATIONS IN CRISIS: THE FIRST AMENDMENT, TECHNOLOGY, AND DEREGULATION (1983); Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (describing developments in radio and television regulation since the turn of the century).

9. *See* T. ANDERSON, WATER CRISIS: ENDING THE POLICY DROUGHT (1983); WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT (T. Anderson ed. 1983).

10. *See* Plant, *The Economic Theory Concerning Patents for Inventions* in A. PLANT, SELECTED ECONOMIC ESSAYS AND ADDRESSES 35 (1974); Plant, *The Economic Aspects of Copyright in Books*, *id.* at 57; Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983); Breyer, *The*

In all three cases there can be little doubt that reliance on legislation rather than common law has undermined the market economy and precluded its efficient and equitable functioning. The relationship between the free market and common law is, as Professor Leoni insists, far more than analogical. The expansion of legislation is demonstrably incompatible with the spontaneous order of the market system.

But there is more at work than simply opportunities for rent-seeking opened up by reliance on legislation rather than common law. Legislation is inherently based on policy—the pursuit of specifically intended outcomes. Common law, in contrast, addresses the needs of parties coming before judges to seek resolution of specific conflicts, or redress of specified grievances. As Professor Leoni's colleague F. A. Hayek[11] has argued, the spontaneous order of the market economy and of the extended society generally rests on abstract principles aimed at no particular outcomes. As Professor Hayek argues, by adhering to the principles of a common law liberal order "we shall have power only over the abstract character but not over the concrete details of that order."[12] In Professor Hayek's view, there need not be any

> agreement on the concrete results it will produce in order to agree on the desirability of such an order[. B]eing independent of any particular purpose, it can be used for, and will assist in the pursuit of, a great many different, divergent and even conflicting individual purposes. Thus the order of the

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Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970); Machlup & Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950).

11. In a sense, Professor Hayek paved the way for the development of Professor Leoni's own ideas, which in turn influenced Professor Hayek's later writings (especially his three-volume work LAW, LEGISLATION, LIBERTY (1973, 1976, 1979)). Professor Leoni's *Freedom and the Law* was based on lectures given at the Fifth Institute on Freedom and Competitive Enterprise at Claremont Men's College (now Claremont-McKenna College) on June 15-28, 1958, which many leaders of the emerging law and economics movement attended. Professor Hayek encountered Professor Leoni's ideas as he was completing CONSTITUTION OF LIBERTY (1960) and discussed Professor Leoni's work in his lectures at an interdisciplinary seminar at the University of North Carolina at Chapel Hill in June 1959, along with James Buchanan, a pioneer in the development of public choice economics. One of the connecting threads in the development of public choice economics, law and economics, and the work of Professors Leoni and Hayek is the William Volker Fund, which supported all three through funding and through contacts initiated by Dr. F. A. Harper, a senior economist at the Volker Fund who later founded the Institute for Humane Studies. The Volker Fund sponsored Professor Leoni's lectures and later published them, after Dr. Harper transcribed Professor Leoni's handwritten notes and the tape of the lectures.

12. F. HAYEK, STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS 163 (1967).

> market, in particular, rests not on common purposes but on reciprocity, that is on the reconciliation of different purposes for the mutual benefit of the participants.[13]

Thus, specific claims of law generate abstract principles of general applicability.[14]

The modern law and economics movement includes scholars who are familiar with the work of both Professor Leoni and Professor Hayek, including members of the Virginia School of Property Rights economics,[15] the University of Chicago Law School, the Austrian School of Economics, and participants in the various programs of the Law and Economics Center directed by Henry G. Manne (now Dean of the George Mason University School of Law).

Judge Richard Posner has stressed the importance of efficiency in the development of the common law, and has suggested that judges should base their decisions on considerations of efficiency and maximization of wealth.[16] Although this approach has contributed to an understanding of the economic efficiency of the common law, it has also narrowed the focus of the law and economics movement, and has obscured Professor Hayek's insights regarding the general nature of rules governing a spontaneous order. By focusing on desirable *specific* outcomes (efficiency and wealth maximization), the "Posnerian" approach ignores the broader economic understanding of the legal system as an order derived from the adjudication of individual claims rather than from a public pol-

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13. *Id.*

14. Law thus emerges out of a process and is characterized as "horizontal," rather than "vertical." *See* L. FULLER, THE MORALITY OF LAW 204 (2nd ed. 1969). Professor Fuller criticizes legal positivism for assuming that "law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself upon the citizen." *Id.*

15. The term "Virginia School" refers to the ideas and contributions of a group of scholars who taught at the University of Virginia, including Ronald Coase, James Buchanan, and Gordon Tullock.

16. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 98-99 (1972):

> The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities. . . . In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomic resource use.

See also Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL. STUD. 103 (1979); Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980); Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980).

icy blueprint.[17] Recently, however, another generation of law and economics has returned to the mainstream approach pioneered by Professors Hayek and Leoni, and by Milton Friedman, Aaron Director, and Ronald Coase at the University of Chicago after World War II.

Law and Legal Evolution

Professor Leoni noted:

> [T]he connection between economics and the law is implied, but it is rarely regarded by economists as a special object worthy of their research. They consider, for instance, the exchange of goods, but not the behavioral exchange that makes possible an exchange of goods, regulated and occasionally enforced for that purpose by the law of all countries.[18]

While he encouraged economists to study the connection with law, Professor Leoni also warned of the dangers of an economics that too closely emulates the methods of the physical sciences.[19] As Professor Leoni cautioned, "the attempts so frequently made in our time by economists to play the role of physicists are probably much more damaging than useful in inducing people to make their choices according to the results of that science."[20]

Social relations exemplify what Professor Hayek has termed organized structures of "essential complexity."[21] Echoing Pro-

17. *See* Leoni, *The Law as Claim of the Individual*, 40 ARCH. FOR PHIL. L. & SOC. PHIL. 45, 58 (1964):

> Individuals make the law insofar as they make successful claims. They not only make previsions and predictions but try to have these predictions succeed by their own intervention in the process. Judges, jurisconsults and above all legislators, are just individuals who find themselves in a particular position to influence the whole process through their own intervention.

18. B. LEONI, *supra* note 1, at 50.

19. *Id.* at 159-68.

20. *Id.* at 160.

21. F. Hayek, 1974 Nobel Memorial Lecture, in THE ESSENCE OF HAYEK (C. Nishiyama & K. Leube eds. 1984). Professor Hayek explained:

> Organized complexity here means that the character of the structures showing it depends not only on the properties of the individual elements of which they are composed, and the relative frequency with which they occur, but also on the manner in which the individual elements are connected with each other. In the explanation of the working of such structures we can for this reason not replace the information about the individual elements by statistical information, but require full information about each element if from our theory we are to derive specific predictions about individual events. Without such specific information about the individual elements we shall be confined to what on another occasion I have called mere pattern predictions—predictions

fessor Leoni's warning against a social science modelled on the physical sciences, Professor Hayek concludes:

> If man is not to do more harm than good in his efforts to improve the social order, he will have to learn that in this, as in all other fields where essential complexity of an organized kind prevails, he cannot acquire the full knowledge which would make mastery of the events possible.[22]

Professor Leoni's and Professor Hayek's approach to law and legal evolution is premised upon a commitment to historical study, and a broad conception of what constitutes human reason and knowledge. Tradition, custom, the division of labor, general rules, and the other elements of what we call civilization can be seen as instantiations of reason, rather than as irrational or arational obstacles to reason. They are—at a minimum—devices for economizing knowledge. As Professor Thomas Sowell states in *Knowledge and Decisions*,[23] "Civilization is an enormous device for economizing on knowledge."[24] The division of labor and the market process allow individuals to use knowledge possessed by others, without personally acquiring that knowledge. The market obviates the need to reinvent the wheel. Similarly, the customs and traditions that characterize a civilization allow us to use the experiences of previous generations.

Thus, knowledge and reason are "embodied" in institutions and practices; the dictates of reason need not be explicitly formulated in language to be reasonable. They may be tacit as well—"implicit" within the practices or institutions of a community—but that does not make them any less "rational." Thus, as Professor Sowell argues:

> Given the imperfections of language and the limitations of specific evidence, it is by no means a foregone conclusion that the more formally logical articulation is in fact more ra-

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of some of the general attributes of the structures that will form themselves, but not containing specific statements about the individual elements of which the structures will be made up.

Id. at 270.

22. *Id.* at 276.

23. T. SOWELL, KNOWLEDGE AND DECISIONS (1980). Professor Sowell acknowledges at the start of this book that "If one writing contributed more than any other to the framework within which this work developed, it would be an essay entitled, *The Use of Knowledge in Society*, published in the *American Economic Review* of September 1945, and written by F. A. Hayek . . . ." *Id.* at *ix*. Professor Sowell presented portions of the book at a 1978 conference organized by the Center for Law and Economics.

24. *Id.* at 7.

> tional, much less empirically correct . . . . This is not an argument for mysticism rather than logic. It is simply a recognition that the weight of generalized but unrecorded experience—of the individual or of the culture—may be greater than the weight of other experience which happens to have been written down or spelled out.[25]

Thus, reason and knowledge can be embodied in practices as well as in statements.[26] Professor Hayek further argues:

> In this sense a rule not yet existing in any sense may yet appear to be 'implicit' in the body of the existing rules, not in the sense that it is logically derivable from them, but in the sense that if the other rules are to achieve their aim, an additional rule is required.[27]

The role of the judge is, therefore, to discover and make explicit the rule that is implicit in the practices, customs, and institutions of the people. His job is not to create the rule, but to discover it, formulate it—to the extent possible—in explicit terms, and apply it to the specific case before him.[28] Such a claim need not degenerate into historicism; the critical function of reason is not anaesthetized by reliance on practice, tradition, and custom. Rather, these sources of knowledge provide the material on which reason operates.[29] The judge does not enter the court stripped of his powers of reason. Rather, reason determines both the choice of the rule and the moment of its ap-

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25. *Id.* at 102.

26. *See* 1 F. HAYEK, LAW, LEGISLATION AND LIBERTY 76-77 (1973):

> Although still an unfamiliar conception, the fact that language is often insufficient to express what the mind is fully capable of taking into account in determining action, or that we will often not be able to communicate in words what we well know how to practise, has been clearly established in many fields.

Professor Hayek supports this proposition by citation to the work of Michael Polanyi, in M. POLANYI, PERSONAL KNOWLEDGE (1958) and his own essay *Rules, Perception and Intelligibility*, in F. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS (1967). *See also* M. POLANYI, THE LOGIC OF LIBERTY (1951); M. POLANYI, THE TACIT DIMENSION (1980). *Cf.* ARISTOTLE, METAPHYSICS 980b28-981a24 on the relationship between *empeiria* (experience), *dynamis* (ability), and *logos* (speech or the giving of an account).

27. *Id.* at 78.

28. *Id.* at 115-18. *Cf.* N. BARRY, HAYEK'S SOCIAL AND ECONOMIC PHILOSOPHY 76-102 (1979) (describing Professor Hayek's theory of law).

29. *See* Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 281-90 (1987) for a discussion of the relationship between tradition and reason in the formation of law. Professor Barnett identifies an "electorate of law" that includes "judges, scholars, lawyers, clerks, law students, and philosophers, living and dead." *Id.* at 286. To this list we would add plaintiffs—as well as those who resolve disputes without resorting to the courts. Further, the almost universal recognition of the principle of "*meum*" and "*tuum*" (recognized in the breach as well as in the practice) indicates the existence of a universal core principle of law that is not relativized and that provides a foundation for the universalistic claims of reason.

plication. Law then develops through the application of the rule to new situations.[30]

It is thus the parties to a dispute who frame the scope of the judge's decision, its range of application, and the nature of the rule he is to apply:

> By the time the judge is called upon to decide a case, the parties in the dispute will already have acted in the pursuit of their own ends and mostly in particular circumstances unknown to any authority; and the expectations which have guided their actions and in which one of them has been disappointed will have been based on what they regarded as established practices. The task of the judge will be to tell them what ought to have guided their expectations, not because anyone had told them before that this was the legal rule, but because this was the established custom which they ought to have known . . . . What must guide his decision is not any knowledge of what the whole of society requires at the particular moment, but solely what is demanded by general principles on which the going order of society is based.[31]

It is therefore a misnomer to speak of "judge-made" law. Judges do not make the law out of thin air; rather, in conjunction with other legal scholars and with the parties to disputes, they discover it. As Professor Leoni writes:

> The Roman jurist was a sort of scientist: the objects of his research were the solutions to cases that citizens submitted to him for study, just as industrialists might today submit to a physicist or to an engineer a technical problem concerning their plants or their production. Hence, private Roman law was something to be described or to be discovered, not something to be enacted—a world of things that were there, forming part of the common heritage of all Roman citizens.[32]

Law thereby follows and validates common practice. It evolves alongside practice; it does not dictate it. Writing again of Ro-

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30. This process reveals another analogy with the decentralized market process, for the decision of a judge in a particular case is subject to review by other participants in the legal process. One judge cannot impose his personal will or idiosyncratic interpretation of the law on the entire legal system; similarly, innovations in the market process arise through the decentralized activities of entrepreneurs and firms and are then subject to the review of consumers, investors, and other market participants. In both the market process and the common law process there is little danger of having "all your eggs in one basket," as is the case with both socialism and legislation.

31. F. HAYEK, *supra* note 26, at 86-87.

32. B. LEONI, *supra* note 1, at 84.

man law, Professor Leoni states, "When changes occurred, they were recognized by the jurists as having already happened in their environment rather than being introduced by the jurists themselves."[33]

The spontaneous evolution of the law merchant also supports this interpretation of the law-making process. As Leon Trakman writes, "Custom, not law, has been the fulcrum of commerce since the origins of exchange. From the earliest times, merchants have devised their own business practices and regulated their own conduct. International trade law has been fostered by merchant custom."[34] Business practice and custom, rather than strict legalism, informed the law merchant: "The Law Merchant sought to integrate custom into its decision-making process."[35] Thus, "Business practice and the extensive history of international trade . . . serve as the basis of legal development; they are not peripheral thereto."[36]

This spontaneous emergence of international commercial law was intimately related to the fragmentation of political authority in Europe; law was needed to govern trade practices across cultural, religious, and geographical divides. Commercial law was also a competitive process, involving selection of judges from the scholarly legal community as well as from among the business community itself.[37]

For these reasons Professor Leoni can describe the spontaneous process of law-making in voluntaristic terms as

> a sort of vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people's will is in a series of definite instances—a collaboration that in many respects may be compared to that existing among all the participants in a free market.[38]

Thus, law making is described as analogous to the competitive market process, which Professor Hayek has termed a "discov-

33. *Id.* at 94.

34. L. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 7-8 (1983).

35. *Id.* at 18.

36. *Id.* at 97.

37. *Id.* at 15: "The use of 'merchant' judges was a further feature of the Law Merchant era. Adjudicators were generally selected from among the ranks of the merchant class on the basis of their commercial experience, their objectivity and their seniority within the community of merchants."

38. *Id.* at 21.

ery process."[39] Through many individual and localized acts information about what the law is is revealed through the legal process, just as information about supply and demand conditions is revealed through the myriad localized acts of buying and selling that constitute the market process.[40]

Professor Leoni underlined the theme in other lectures delivered in America but never published: "The legal process always traces back in the end to individual claim. Individuals make the law, insofar as they make claims."[41]

The West's plurality of legal institutions permitted the evolution of legal orders that maximized individual freedom and limited coercive institutions. In R. W. Southern's words, "Law was not the enemy of freedom: on the contrary, the outline of liberty was traced by the bewildering variety of law which was evolved during the period [that is, the Middle Ages]."[42] The role of polycentric political authority and multiple legal jurisdictions in the development of the Western legal tradition has been carefully revealed by the legal historian H. J. Berman,[43] while the parallel dependence of economic development on political fragmentation has recently been highlighted by eco-

39. Hayek, *Competition as a Discovery Process*, in F. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS (1978).

40. Barry, *The Tradition of Spontaneous Order*, 5 LIT. OF LIBERTY 7, 44 (1982):

> [Bruno Leoni's *Freedom and the Law*] is perhaps the most sophisticated expression of the evolutionary theory of law; for Leoni does not rely merely on the "wisdom of history" but constructs a direct analogy between law and the market. Law develops in a case by case manner during which judges fit and adapt existing law to circumstances so as to produce an overall order which, although it may not be "efficient" in a technical, rationalistic sense, any more than competitive markets are "perfect," is more stable than that created by statute . . . . statute law is in fact much more capricious [than common law] precisely because, in the modern world especially, statutes change frequently according to the whims of legislatures . . . . A structure of law which is not the result of will and cannot be known in its entirety, paradoxically, displays more regularities than a written code.

41. B. Leoni, Lectures given December 2-6, 1963, Freedom School Phrontistery, Colorado Springs, Colorado.

42. *Cited in* Hayek, *supra* note 39, at 123.

43. *See* H. BERMAN, LAW AND REVOLUTION 38-39 (1983):

> The Source of the supremacy of law in the plurality of legal jurisdictions and legal systems within the same legal order is threatened in the twentieth century by the tendency within each country to swallow up all the jurisdictions and systems in a single central program of legislation and administrative regulation.

Competition among legal systems and jurisdictions was central to the development of Western liberty, as Professor Berman notes: "Given plural legal systems, victims of unjust laws could run from one jurisdiction to another for relief in the name of reason and conscience." *Id.* at 146.

nomic historians Nathan Rosenberg and L. E. Birdzell, Jr.[44] The historical evidence holds clear implications for the current debate over federalism, as well as for the advantages of a spontaneous common law process over coercive legislation.

The spontaneous process of law-making is preferable to legislation because the law that is discovered by such process will have proved its value in competition with other practices and customs.[45] The decentralized character of the common law means that it is an open system of legal innovation in which new ideas are accepted only after a long probationary period. Just as the market process coordinates the plans of innumerable individuals and tests innovations in production and economic exchange, the decentralized legal process reinforces the certainty of "grown" customs and practices. Importantly, this means that both practice and law are not static; they evolve.[46] This is why Professor Hayek, as a classical liberal, distanced himself from the conservatives in his famous postscript to *The Constitution of Liberty, Why I am Not a Conservative*.[47] As Professor Hayek wrote:

> [O]ne of the fundamental traits of the conservative attitude is a fear of change, a timid distrust of the new as such, while the liberal position is based on courage and confidence, on a preparedness to let change run its course even if we cannot predict where it will lead. There would not be much to object to if the conservatives merely disliked too rapid change

44. *See* N. ROSENBERG & L. BIRDZELL, JR., HOW THE WEST GREW RICH 136-37 (1986):

> [I]t seems certain that the development of capitalism in the West owed a great deal to the fragmentation of Europe into a multitude of states and principalities. Competition among the political leaders of the newly emerging nation-states . . . was an important factor in overcoming the inherited distaste of the rural military aristocracy for the new merchant class. Had the merchants been dealing with a political monopoly, they might not have been able to purchase the required freedom of action at a price compatible with the development of trade.

45. *See* Radnitzky, *An Economic Theory of the Rise of Civilization and Its Policy Implications: Hayek's Theory Generalized*, 38 ORDO: JAHRBUCH FUR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 47 (1987); M. Vihanto, *The Evolutionary Theory of Rules and the Spontaneous Order*, Monograph, Turku School of Economics and Business Administration, Turku, Finland (1987) (on file with the authors).

46. To say this is not necessarily to descend into relativism; the evolution of law is consistent with certain core principles that remain invariant over time. *See* R. SUGDEN, THE EVOLUTION OF RIGHTS, CO-OPERATION AND WELFARE (1986) on the spontaneous emergence of property and cooperation, and Sugden, *Labour, Property and the Morality of Markets*, in THE MARKET IN HISTORY 9 (B. Anderson & A. Latham eds. 1986) for a treatment rooted in game theory of inalienable Lockean "self-ownership" and the genesis and acceptance of alienable titles to property. On the spontaneous emergence of cooperation, see R. AXELROD, THE EVOLUTION OF COOPERATION (1984).

47. F. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

> in institutions and public policy; here the case for caution and slow progress is indeed strong. But the conservatives are inclined to use the powers of government to prevent change or to limit its rate to whatever appeals to the more timid mind . . . . The conservative feels safe and content only if he is assured that some higher wisdom watches and supervises change, only if he knows that some authority is charged with keeping the change "orderly."[48]

It is only when men are free that tradition retains its force as a "living" thing. To attempt to "freeze" tradition through legislation is to kill it, to reduce it to rote. Liberalism, tradition, freedom, and law walk hand in hand; one cannot pick and choose among them. Professor Leoni in his work opened the eyes of countless scholars to this important truth.

48. *Id.* at 400.