Check for updates

Received: 31 May 2024 | Revised: 23 June 2024 | Accepted: 26 June 2024

DOI: 10.1111/kykl.12407

ORIGINAL ARTICLE

KYKLOS WILEY

The nature and significance of the political ideal of the Rule of Law: Hayek, Buchanan, and beyond

Hartmut Kliemt

Institutional and Behavioral Economics, Justus Liebig Universität, Giessen, Germany

Correspondence
Hartmut Kliemt, Institutional and Behavioral Economics, Justus Liebig Universität, Giessen, Germany.
Email: hartmut.kliemt@t-online.de

Abstract

Hayek and Buchanan endorsed Böhm's "private law society" as expressive of the ideal of *a government of laws, and not of men*. But they also acknowledged that among the many, the enforceability of legal custom, adjudication, and legislation must be *politically* guaranteed by a state. Due to unavoidable state-involvement, risks of excessive rent-seeking and authoritarian arbitrary government loom large once "rules of rule change" enable sophisticated forms of ruling by law. Even if in WEIRDS (Western, Educated, Industrialized, Rich, Democratic, Societies) legal rules are enacted, modified, and derogated exclusively according to legal "rules of rule change," the prevalence of the key attributes of "generality, certainty, and equality of enforcement" of the Rule of Law is in no way guaranteed. — The paper addresses this and the role, nature, and significance of constraining ruling *by* law through practicing the "political ideal of the Rule of Law".

1 | INTRODUCTION AND OVERVIEW

In his lectures on "The Political Ideal of the Rule of Law," F. A. v. Hayek states that the Rule of Law is "not a rule of the law but a rule about the law, a meta-legal doctrine, or a political ideal" (Hayek, 1955/2014, p. 163).[1] To be

[1]This article appears in Kyklos as part of a trilogy of papers (-, the two others being Sugden, 2024 and Vanberg, 2024) presented at a symposium at the Justus-Liebig-University Giessen in 2022 in commemoration of the 40th anniversary of awarding honorary doctoral degrees to F.A. v. Hayek and J.M. Buchanan for their seminal work on the political economy and philosophy of Constitutional Democracy.

This is an open access article under the terms of the Creative Commons Attribution-NonCommercial-NoDerivs License, which permits use and distribution in any medium, provided the original work is properly cited, the use is non-commercial and no modifications or adaptations are made.
© 2024 The Author(s). *Kyklos* published by John Wiley & Sons Ltd.

politically prevalent in a concrete society, a political ideal like that of the Rule of Law must be "practiced" by sufficiently many, sufficiently influential members of that society (*Marsilius of Padua*, 2005). Only then can an institutional specification of law show "key attributes" of the Rule of Law like "generality, certainty, and equality of enforcement" (Caldwell as editor in Hayek, 42/2014, p. 12)[2]; and, only then can the legal conventions of a concrete society guarantee David Hume's three "natural laws" of "the stability of possession, it's transference by consent and the performance of promises" ((Hume, 1739), Bk III, pt ii, sec.12).[3]

That the three abstract requirements of "Humean natural law" must be fulfilled by the specific *legal conventions* of a society to enable exchange, division of labor and specialization in a politically de-politicized "private law society" (Böhm, 1966) is *not* a matter of convention but of empirical laws.[4] The corresponding technological knowledge of how the abstract requirements can be fulfilled is based on empirical hypotheses.[5] Whether or not the multiple social organizational forms (markets, firms, clubs etc.) that may arise in a private law society are to be deemed *desirable* is, however, not a matter of empirical knowledge. It is a matter of value judgments and decision making (H. Albert, 1985).[6]

Subsequently, Hayek's and Buchanan's political ideal of the Rule of Law is used without further ado as a repository of evaluative standards for assessing alternative technologies of "ruling by law." The focus is not on the ends but rather on the means of ruling by law (Robbins, 1933) which takes place through the application of "rules of rule change" in adjudication and legislation.[7] On the latter, Hayek makes a fundamental remark[8]:

> Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder. Unlike law itself, which has never been 'invented' in the same sense, the invention of legislation came relatively late in the history of mankind. It gave into the hands of men an instrument of great power which they needed to achieve some good, but which they have not yet learned so to control that it may not produce great evil.
>
> ((Hayek, 2022), CW, vol. 19, pp. 97–98))

In view of potential abuses of legal powers of rule change and the risks for pursuing the political ideal of the Rule of Law, Hayek tended to prefer "rule change by adjudication" over "rule change by legislation."[9] Buchanan endorsed legislation but was also deeply concerned that without broad support for the political ideal of the Rule of Law in society rules of rule change could turn into "weapons of legal mass destruction."

Hayek and Buchanan were both influenced by broadly Kantian ideals. Hayek thought that legal evolution in WEIRD societies had preceded and inspired Kant. For him, experiencing forms of the Rule of Law came first, and

[2]Bruce Caldwell, the editor of Hayek's lectures, speaks of "the rule of law as a meta-principle." This seems rather vague but related concepts are as vague: "orientation statements" in social practices (Homans, 1967), "topical thinking in the law" (Viehweg, 1993), "rules of thumb" in rational decision-making (Gigerenzer, 1997) etc.

[3]Driving on the left side of the street may do as well as using the opposite side as long as there is *a single* focal side.

[4]Hume speaks of "natural laws" ((Hume, 1739), Bk III, pt.ii, sec12) *not* as a subscriber to traditional "natural law" theory. Quite to the contrary he applies the rather common strategy of authors to use the established terms of their opponents with a new meaning. In doing so, Hume was implicitly claiming that he could capture all relevant aspects that the traditionalists attributed to "natural law" without their metaphysical and meta-ethical liabilities.

[5]To put it slightly differently, that these three conditions must be fulfilled by concrete conventions, is rooted in "human nature" due to general empirical physical, psychological, and biological laws of nature.

[6]That the ordoliberal supporters of Böhm's ideal of a private law society seem blissfully unaware of its fundamental similarity to Humean natural law shows itself when an electronic search for "Hume" in "The Oxford handbook of ordoliberalism" (Biebricher et al., 2022) returns no locations referring to Hume.

[7]The problem of so-called "paradoxes of self-amendment" (Suber, 1990) arises from such rules. It is exacerbated by the fact that in principle the rules of rule change can be applied to themselves; for a particularly simple presentation of such structures, see Hofstadter (1986, essay nomic).

[8]The statement is inspired by stunning remarks to the same effect in German legal theory ((Rehfeldt, 1951), 67–68). It anticipates rather famous parallel remarks in (Hart, 1961).

[9]But Hayek also remarks that "though the much lauded flexibility of the common law may have been favourable to the rise of the Rule of Law so long as general opinion tended in that direction, the common law also shows, I am afraid, less resistance to its decay once that vigilance is relaxed which alone can keep liberty alive." (Hayek, 1955/2014), CW, vol.15, p. 146). Hayek later propagated court-like legislative bodies hopefully less vulnerable to political rent-seeking (Hayek, 1979). On Hayek's views in relation to those of other authors, see e.g. the introduction to "Law, Legislation, and Liberty" (Hayek, 2022), CW, vol. 19, p. xxxvii) by the editor Jeremy Shearmur (on Hayek and Leoni) while Bertolini (2019) comments on Hayek, Buchanan, and Leoni.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

abstract ethical ideals like the categorical imperative second — as a result rather than original cause of the rise of WEIRDS.[10] Buchanan thought of principles of democratic contractarianism as "relatively absolute absolutes" ((Buchanan, 1999), CW, vol.1, pp. 442–454) and hoped that the integration of such a priori principles into the political ideal of the Rule of Law might improve how adjudication and legislation are exercised.[11]

Subsequently, differences between Hayek and Buchanan are acknowledged but their basic political ideal of the Rule of Law is reconstructed as fundamentally the same. Section 2 lays out a sketch of the possible role of rational beliefs, rational expectations, and delusions in creating and sustaining legal customs. Section 3 invokes Popper's unduly neglected concept of "protectionism" ((Popper, 2020), ch 6) in reconstructing the relationship between the *rights' producing*, tax-financed protective agency of the state, and the political ideal of the Rule of Law. Section 4 suggests that despite Hayek's and Buchanan's own misguided rejections of "conservatism" and "positivism," their central political ideal of the Rule of Law should be reconstructed not only as implying "protectionism" but also as implying "*analytic* legal positivism" and "*analytic* legal conservatism." On the basis of these reconstructions, Section 5 summarily characterizes Hayek's and Buchanan's views as "Rule of Law Conservatism."

2 | CUSTOM KING OF ALL

In his "The Republic of Beliefs: A New Approach to Law and Economics," Kaushik Basu seeks to develop a new "approach to law, rooted in game theory, [to; H.K.] … give us an understanding of how a society becomes law-abiding" ((Basu, 2018), 4). Basu deserves to be quoted somewhat more extensively not only as an eminent Law and Economics scholar but also as the former Chief Economist of the World Bank[12]:

> Gordon Brown, former British prime minister, is believed to have said ((World Bank, 2017), p. 95), 'In establishing the rule of law, the first five centuries are always the hardest.' Gordon Brown's observation is often treated as a joke, but it is not. It makes the important point that for the law to develop roots and the rule of law to prevail requires ordinary people to believe in the law; and to believe that others believe in the law. Such beliefs and meta beliefs can take very long to get entrenched in society.
>
> ((Basu, 2018), 4)

Basu's book shows that looking at the institutionalization of law through the window of rational choice theory and belief formation can be of greatest heuristic value for theory formation. But from an empirical point of view, the belief in the explanatory power of rational choice theory may well be based on common illusions of economists. In fact, one may feel reminded of what William J. Bernstein has to say about the delusions of crowds in general[13]:

> When [Darius] was king of Persia, he summoned the Greeks who happened to be present at his court, and asked them what they would take to eat the dead bodies of their fathers. They replied that they would not do it for any money in the world. Later, in the presence of the Greeks, and through an interpreter, so that they could understand what was said, he asked some Indians, of the tribe called Callatiae, who do in fact eat their parents' dead bodies, what they would take to burn them. They

[10]"Kant's … celebrated 'categorical imperative' is indeed little more than an extension to the field of morals of the basic idea underlying the Rule of Law." ((Hayek, 2014), 146)

[11]The 'Bu-Kantian' roots of 'Buchantianism' (Kliemt, 61) can be found in Vining (1956, first part, in particular p. 19).

[12]To its great credit, the World Bank has cultivated an ongoing interest in the Rule of Law, see e.g., Legal Vice Presidency, World Bank (2003) and World Bank (2017). It seems fitting that Hayek's original lecture "the political ideal of the Rule of Law" was presented in 1955 at a bank as well, namely the national bank of Egypt.

[13]Referring to "Herodotus, The Histories. Baltimore: Penguin Books 1954, 190–191".

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

> uttered a cry of horror and forbade him to mention such a dreadful thing. One can see by this what custom can do, and Pindar, in my opinion, was right when he called it 'king of all'.
>
> ((Bernstein, 2021), 9,)

After this, Bernstein makes his central point about rationality and rationalization:

> The Greeks, after all, were antiquity's intellectuals, and Darius must have been tickled to box their rhetorical ears. His unspoken messages to the Greeks: You may be the most learned among humankind, but you are just as irrational as the rest of us; you are simply better at rationalizing just why, despite all evidence to the contrary, you are still right.
>
> ((Bernstein, 2021), p.9)[14]

That Bernstein draws attention to the delusions and not only to the celebrated wisdom of crowds seems justified. But when he ascribes to Darius the unspoken messages, that the Greeks are "just as irrational as the rest of us" only "better at rationalizing just why," the empirically minded social scientist of our days may have second thoughts. Social scientist might feel tempted to reformulate the rational belief formation that Basu invokes in his explanation of the workings of the law, as unspoken message to economic rational choice theorists as follows:

> You may be the most learned among social theorists, but you are just as irrational as the rest of us; you are simply better at rationalizing just why, despite all evidence to the contrary, you are still right.

In particular, game theoretic rational choice explanations of observable real-world behavior seem so far away from evidence-based explanations, that Reinhard Selten as one of the leading theorists of pure game theory put it outside empirical science proper. He spoke of it as a kind of "theology of rationality" or "rationology" (Selten, 1999).[15]

In any event, it seems unclear why becoming committed to a custom without a sufficient rational reason should not merely be non-rational rather than *ir*rational in the pejorative sense of the term.[16] Moreover, *expressing* a commitment to a specific arbitrary custom by *declaring* that a rival custom would not be adopted "for any money in the world" can be an instrumentally rational act under certain conditions. Likewise, *demanding* not "to mention such a dreadful thing," quite independently of the epistemic status of the expressed content, can, depending on purpose, also be instrumentally rational (in particular if demanding it is a low-cost act).[17]

Relying on a broad conception of instrumental rationality one can shed light not only on ancient customs but also on practices of our times. For example, in the modern United States, when declaring allegiance to the political ideal of the Rule of Law people state that it is held "to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[18] It seems that even those US citizens who neither believe that a Creator, nor that unalienable rights exist, nor that their individual acts in these regards are causally significant can *without ir*rationality repeat formulas like the preceding in ritualized expressive speech acts. Even Hobbes as one of the first if not the first theorist who

[14]As opposed to his older splendid book on exchange (Bernstein, 2009), in his recent book Bernstein is focusing on the dark side of large numbers' interaction and the delusions rather than the wisdom of crowds as celebrated, e.g., in (Surowiecki, 2005).

[15]That in particular Bayesian updating of beliefs on which game theorists tend to rely may be completely toothless against delusionary content is shown in (M. Albert, 2017). The only filters discriminating against arbitrary rationalizations may be practical institutional ones, see H. Albert (2010) and M. Albert (2011).

[16]It depends strongly on whether we classify as irrational what cannot be supported deductively by reasons that themselves are already rationally justified or whether we leave room for some kind of non-deductive rationality, see on this M. Albert (2011, 2022), H. Albert (1985), and Musgrave (1993). For a history of science account relevant here (Wootton, 2016) and for its relation to "analytical conservatism," see Brennan and Hamlin (2004, 2016).

[17]The content could be completely fictitious and expressing it collectively insignificant. See for more on "expressive rationality," (Brennan & Buchanan, 1984; Brennan & Lomasky, 1993), and for the related "economy of esteem" (Brennan & Pettit, 2004).

[18]See the Declaration of Independence, https://www.archives.gov/founding-docs/declaration.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

consequently applied the model of homo economicus to "rationalize" human action across the board, felt forced to acknowledge in his later years — that "… the power of the mighty hath no foundation but in the opinion and belief of the people" ((Hobbes, 1990), 16).

In sum, the preceding seems to indicate that convictions and political ideals, even if they may seem as arbitrary as the funeral customs of the Greeks and the Callatiae, may become so deeply entrenched that they appear as firmly grounded as are laws of logic or of nature.[19] In the Republic of Beliefs, the political ideal of the Rule of Law — like ancient funeral customs — may be supported by (quasi-)religious and other rites. But this support need not be irrational even if there are no sufficient rational reasons for what is supported. In cases like the political ideal of the Rule of Law, custom may come first (logically and timewise), rationalization and rationality second.

3 | RULE OF LAW, PROTECTIONISM, AND RIGHTS

There cannot be the Rule of Law without laws, but there can be laws that violate the standards of the Rule of Law. There can be law without a state, but it takes a state to see to it that the key attributes of "generality, certainty, and equality of enforcement" of the Rule of Law are guaranteed on the level of individual citizens. — Again, a sketch of a prominent historical narrative suffices to illustrate the preceding remarks and to prepare the ground for further discussion.

3.1 | Ruling by law — politicized and de-politicized

The narrative of "'Njal's Saga" (Cook, 1997) describes a legal contest in medieval Iceland shortly after 1,000 CE. Compared with advanced societies — even of the time — the Icelandic society was small. But it was complex and large in comparison with so-called primitive societies of its own and our time. There was a rather complex legal order among a population of more than 50.000 thousand inhabitants. Except for the "law speaker" who — supported by a circle of attending "experts" — would rehearse legal rules and precedents at the annual Thing, no specialized organization of governance existed.[20] But there was an oral tradition and a rule-based order of law without a state.

Impersonal legal rules played a role in legal disputes but whether and how they affected behavior depended on personal relations. It hardly influenced the behavior of those citizens who felt under an overwhelming personal duty to take sides with a particular party of a concrete legal contest. But on the behavior of "bystanders" who were only under the influence of the law and not of duties of personal loyalty, what the law "said" could exert some influence.[21]

Iceland being an island, external threats of invasion were negligible in the relevant period.[22] The ensuing anarchical equilibrium in the "closed system" was akin to the oligopolistic equilibrium among sovereign nations under "rules of international law."[23] As in international politics among sovereign states, the relations between individuals – as

[19]And, even if lacking the analytical or empirical truth of laws of logic or of nature. Even beliefs that are embedded in the co-evolutionary processes of "genes, mind, and culture" (Lumsden & Wilson, 1981) and are part of the secret of the success of our species (Henrich, 2016, 2020) may be based on delusions.

[20]See for general "popular" surveys of social organizational forms (Diamond, 2012; Henrich, 2016, 2020; Pinker, 2012). For an anthropological account of "scaling up" ((Henrich, 2020), ch 3) and, of course, ((Hume, 1739), Bk III, part ii, chap 7) with its clear analysis of commons' problems in large groups. The related literature is huge, e.g., from a political theory point of view (Acemoglu & Robinson, 2013), political history (Fukuyama, 2012), evolutionary psychology (Greene, 2013), on commons problems ((Ostrom, 1990), and relying on (Taylor, 1976)).

[21]In consequence, the size and the strength of coalitions of supporters of the contestants in legal disputes would potentially depend on the impersonal rules of law.

[22]For more on a defensive state that keeps out internal and external threats to anarchical law, see Kliemt (2015) referring to de Jasay (1998) and Jasay (2011).

[23]The potential functional equivalence of the status quo of a Hobbesian anarchy equilibrium with a system of stability of possession is center stage in some of Buchanan's work, e.g., Buchanan (1999, CW, vol. 7), see also Buchanan and Bush (1973). On "divided sovereignty" in international law (Pavel, 2014); for game theory background, see Taylor (1976).

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyklos.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

described by the Saga – were characterized by continuous "networking" and coalition formation efforts.[24] In consequence, Icelandic anarchy was as "politicized" as the international relations of our days are under "international law." Other than in a properly working "*de*-politicized" Rule of Law system, under Icelandic law, individuals could in their individual capacities practically never rely exclusively on the legal merits of their claims but had to rely on the politics of mobilizing an enforcing coalition.[25]

Note, that the ordered anarchy on Iceland was politicized on the level of individual relations because it lacked the political institution of a state. For, only if there is a factual political monopoly to the use of credible threats of violence, can those in control of that power confer its use on individuals. Only if backed by the *collective* monopoly can *individuals* stand their ground in a particular choice against other individuals or coalitions thereof.[26]

In sum, one can have law without a state but cannot have Rule of Law without a state. The (impersonal) "generality, certainty, and equality of enforcement" of legal rules for *individuals* that is demanded by Hayek's and Buchanan's political ideal of the Rule of Law cannot — at least not among the many — be realized without a state. It takes state-sponsored politics to "drive out politics" from inter-*individual* legal relations, beliefs, and expectations.[27]

3.2 | From ideal demands to Popperian real protectionism of legal rights

Like Hayek and Buchanan with whom he shared a realistic view of the origins and workings of state power, Karl Popper endorsed the state as an instrument of realizing political ideals like that of the Rule of Law.[28] He believed that the state should protect "the freedom of the citizens as equally as possible" ((Popper, 2020), 105).

Popper insisted that the so-called "protective state" when doing what it should do does not merely protect what exists independently of it. The protective state produces individual liberties:

> Although the political theory which I call protectionism … is fundamentally a liberal theory, I think that the name may be used to indicate that, though liberal, it has nothing to do with the policy of strict non-intervention (often, but not quite correctly, called 'laissez-faire'). Liberalism and state-interference are not opposed to each other. On the contrary, any kind of freedom is clearly impossible unless it is guaranteed by the state.
>
> ((Popper, 2020), 106)[29]

That "any kind of freedom is clearly impossible unless it is guaranteed by the state" seems empirically correct if we think of protections of *individual* freedom in large-scale interactions. As was already emphasized in the preceding discussion of Icelandic ordered anarchy, only a de facto monopoly on the ultimate use of violence can bestow — along certain legally defined dimensions of social interaction — *equal* blocking power on each *individual* within "a

[24]Comparable to the law in Icelandic anarchy, the rules of international law exert a causal influence on current affairs but nobody would doubt that — due to the lack of a global monopolist — enforcement remains through and through political. Those who like Anthony de Jasay (e.g. in Jasay, 58) think about anarchy in terms of de-politization should think twice: there may be law in anarchy, but — except for very small groups —there will be politics, too.

[25]Equilibrium concepts that involve personal players and equilibrium concepts that allow for players formed of coalitions of persons come to mind here — inclusive the relation between so-called co-operative (not all moves explicit) and non-co-operative game theory (all moves explicit); see for more on this (Güth & Kliemt, 2007).

[26]Whether the monopolist as a corporate actor will through its agents do what it should according to the rules of law, of course, depends on whether or not the monopolist is "corrupted" internally.

[27]A state monopoly of the use of force will always create risks of political abuse controlled only by forces in an *ultimately* "anarchical equilibrium." Almost superfluous to mention (Tullock, 1993), (C. K. Rowley et al., 1988) (Krueger, 1974). Yet, note also the argument of "the return of the free-rider" (Jasay, 1989).).

[28]That the first state-like organizations must have been "protection rackets" serving as instruments of external warfare and of internal rent-extraction does not imply that this state of affairs must persist, see North et al. (2013). Popper (2020) focuses on the history of ideas concerning the role of states. He neglects the real social-evolutionary (Hayek) as well as the fictious teleological "as if" explanations (Buchanan) of state orders.

[29]Popper's "The open society and its enemies" ((Popper, 2020), first published in 1945) was written more or less at the same time and out of the same deep concerns about the sustainability of the Rule of Law as Hayek's "The road to serfdom" ((Hayek, 2008), first published in 1944). The freedom Popper is thinking of is that of individuals as emerges under the Rule of Law.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

constitution of liberty."[30] Only with a monopoly backing them, *individuals* can – as the political ideal of the Rule of Law demands – equally and separately trigger irresistible state support on their side against certain forms of (collective or individual [non-state]) action of others.[31]

3.2.1 | Ideal abstract demands are not concrete rights

Ideal theories of rights focus primarily on reasons for demanding that individual rights be protected while treating problems of supplying rights as secondary issues. Yet,

> reasons for wishing there were such things as rights, are not rights; — a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread.
>
> ((Bentham, 1843), anarchical fallacy II)

That ethical theorists of all times seem to be particularly prone to commit what Bentham classified as an "anarchical fallacy" when raising their a priori demands is unsurprising. Yet, economists seem no better than ethicists when they feel entitled to assume that social institutional facts exist, simply because abstract economic theories demonstrate that fully rational actors *would* rationally bring about those institutional facts.[32] After all, such abstract demonstrations

> require, if they are to be politically informative, elaboration into statements about particular concrete people doing things to other people
>
> ((Geuss, 2008), p. 24).[33]

Note that the need for such an elaboration exists completely independently of whether there is objective knowledge of "practical norms and values." Institutional realization would be necessary even if non-empirical (a priori) knowledge of right and wrong would be accessible and could be described in value judgments that are true in the sense of corresponding to ("alleged") facts.

In short, rights do not "get" protected simply because it is known to be objectively "right" if they be protected. It is an issue of greatest interest how to get the "protection job" done.[34]

3.2.2 | The rule of law, unconditional rights, and the welfare state

For subscribers to "rights universalism," humans "have" rights because they are members of our species. But even legal systems of WEIRDS that refer in their legal rules to human rights or to "human dignity" abstractly and

[30]Of course, the claim that a factual monopoly is in place does not imply the claim that it cannot be challenged, it is merely claimed that it is overwhelmingly unlikely that a challenge will succeed. To prevent that countervailing power against exercising a right can be successfully mobilized, individual rights' protection requires state-sponsored collective action rather than inaction (or "laissez-faire"). Empowering all individuals in some regards requires disempowering all others in some regards.

[31]In Icelandic ordered anarchy, there could be no claims by which *individuals* could trigger agents of the state monopolist to take protective action on their *individual* behalf simply because there was no state. In their support, others were acting in their individual capacities rather than as legally empowered agents of a state.

[32]There can be law without a state. But Bentham is correct that, without a state, individual rights in the full sense that empowers individuals to claim them in their individual capacities cannot exist among the many.

[33]Like Geuss, as an outsider, Gaus as an insider to rational choice approaches was particularly critical of ideal theories (Gaus, 2016).

[34]The content of protections is not only for the mafia of interest but even more so for adherents of the political ideal of the Rule of Law.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

universally cannot supply their enforcement services to all members of humankind with "generality, certainty, and equality of enforcement."[35]

As a matter of fact, guarantees of rights can be predictably enforced in general and equal ways only for members of concrete sovereign WEIRDS.[36] In slightly different terms, access to protective services provided ("produced") by the state-sponsored legal staff of a particular WEIRD society is guaranteed if and only if conditions of citizenship are fulfilled. Citizenship is granted after acceptance into the community conditional on "birth," "voluntary immigration," or "coerced abduction (slavery)."[37] Though all particular rights that are components of citizenship may conceivably be voluntarily alienable under Rule of Law, there must be some rights that an individual community-member cannot be legally deprived of.[38] In particular, certain minimal protections of "due process" must not be conditional on particular past, present, or future ability and willingness to pay for service.[39] Other than in case of a club, the political ideal of the Rule of Law also forbids requiring a quid pro quo in return for the minimal protective service guarantees that are constitutive for membership in the political community.[40]

In concrete WEIRDS the "key attributes" of the Rule of Law, "generality, certainty, and equality of enforcement" manifest themselves in well-specified *U*nconditional *B*asic *R*ights, UBRs. Many classical liberals might intuitively think here only of guaranteed access to legal protections of so-called "negative rights" and not claims to a share of some "pie" which are often referred to as "positive rights." Yet, on the fundamental level of creating rights, the distinction between such negative and positive rights breaks down: According to protectionism, both kinds of rights must be produced by the state in a coercive process of regulation and redistribution.[41]

Even highly contested *U*nconditional *B*asic *I*ncome, UBI, is with respect to regulatory and redistributive attributes in the same category as other state-sponsored unconditional rights. That UBRs are in kind while UBI is in cash, is true, yet, the "in kind—in cash" difference is ephemeral as compared to the essential aspects of *coercive* redistribution and regulation that UBI and UBR have in common as coercive tax financed guarantees.[42]

3.3 | In short sum, protectionism, and the rule of law

The rights' producing activities of the state are monopolistically coercive. They are tax-financed, regulatory, and redistributive. *There is simply no state that is not a welfare state of sorts*. Within a protectionist approach to rights, the so-called nightwatchman and the nanny-state are *not* categorically distinct alternatives but extremes on a continuum of "rights producing" welfare states.[43] As reconstructed the political ideal of the Rule of Law is a welfare state ideal

[35]On feasibility issues in general, see Brennan and Pettit (2005) and Hamlin and Stemplowska (2012). On the essential role of "bridge principles" like "ought presupposes can" (e.g., (H. Albert, 1985)).

[36]Due to his quasi-Kantian contractarianism, one might have second thoughts concerning Buchanan here, see Vanberg (2022). Yet, contrary to what Buchanan's ideal normative individualism seems to imply, political Buchantianism always presupposes a concrete *group* of citizens deciding in the shadow of assumed individual veto power of members of a concrete group (e.g., a sovereign nation) Buchanan (CW, 24, vol. 3). .

[37]Though Buchanan (1965) is the founding document of the theory of clubs (Cornes & Sandler, 1996), Buchanan's and Tullock's (CW, 24, vol. 3) political contractarianism assumes individual veto power and exogenously determined membership in a community.

[38]People can be born into citizenship. Under Rule of Law, they may have the right to voluntarily forego citizenship altogether but under the Rule of Law certain elementary protections must not be withheld to them. It goes without saying that capital punishment is problematic even if rights to fair trial, etc., are complied with.

[39]The ostracism practiced in classical Athens does merely show that the then and there prevailing legal system was *not* expressive of what is understood here as the "political ideal of the Rule of Law."

[40]To some extent, the most basic legal guarantees are meant to accrue, independently of compliance with the rules of the law (unless a court decided otherwise). It seems one of the features of the political ideal of the Rule of Law that even the serial killer caught with a smoking gun is endowed with certain guarantees that must not be withheld.

[41]With respect to the "sins" of regulation and redistribution so-called "negative" UBRs are completely analogous to archetypical share-rights like the guaranteed access to minimum housing, basic food, clothing, rescue services in emergencies, etc.

[42]See on UBI in Buchanan and Hayek very instructively (Lehto & Meadowcroft, 2021), for the analogous argument for UBR (Kliemt, 1993) and on the necessity of a *conjoint* approach to taxing and spending (Brennan and Buchanan, cap. 8 of CW vol.9 of (Buchanan, 1999)).

[43]Institutionalized coercive tax funded schemes that offer unconditional claims to monetary wealth and schemes that offer claims to services and goods delivered in kind can be provided on a society-wide large scale only by the state using its fundamental coercive power to tax, to redistribute and to regulate. So, all distinctions are distinctions in the set of (welfare) states; perhaps best ordered incompletely along two dimensions (regulation, redistribution).

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyklos.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

that puts the burden of proof on those who intend to move away from the minimal redistribution necessary to maintain the Rule of Law.

4 | CONSERVATISM AND LEGAL POSITIVISM IN THE RULE OF LAW

Hayek and Buchanan have both explicitly distanced themselves from "conservatism" ((Hayek, 1960), appendix), (Buchanan, 2006)).[44] Since "conservatism" has many different meanings, it is unclear what precisely they sought to reject. Without lengthy reflections on the meaning of "conservatism," it seems safe though to state that Hayek and Buchanan sought to reject *authoritarian* views located on the "arbitrary government side" of the "general distinction between the Rule of Law and arbitrary government" ((Hayek, 2008), CW, vol. 2, p.113).

4.1 | Arbitrary authoritarianism vs analytic conservatism

A kind of "authoritarianism" that ratifies whatever those in power decide seems clearly incompatible with the political ideal of the Rule of Law. This is so because it endorses arbitrary authority and not because it is conservative in supporting the powers that be. But not all meaningful conceptions of "conservatism" endorse some authoritarian form of arbitrary government, say, by an elite of best (wo-)men unconstrained by law.[45] Many self-declared conservatives are indeed as opposed to arbitrary government as Hayek and Buchanan were.

When American conservatives of our days express their concerns about too much central government regulation by invoking John Adams' slogan of "a government of laws, and not of men," they associate big regulatory with latently arbitrary government as did Hayek and Buchanan.[46] Yet, it would be a mistake to put all into the same box of "populist" resentment against big and remote government.[47]

Hayek and Buchanan understood that a "constitution is like a chastity belt whose key is always within the wearer's reach" ((Jasay, 1998), ch 4). Due to the fact that secondary rules of rule change are necessary to extend the "government of laws" to adjudication and legislation, the trade-off between enhancing constitutional commitment power and preserving constitutional flexibility cannot be avoided in complex forms of ruling by law.

First, "throwing away the constitutional key to the constitutional chastity belt altogether" (e.g., by using the legislative rules of rule change to abolish all such rules) is logically possible but would in the last resort not prevent concrete changes of laws nor maximize constitutional commitment.[48] Without rules of rule change, the changes would merely be brought about with higher likelihood extra-legally (in breach of law) by concrete (wo-)men rather than as part of the desired self-amending "government of laws."[49] Second, since the political ideal of the Rule of Law is "not a rule of the law but a rule about the law," it cannot itself be enacted as part of a government of laws. Pursuing the abstract political ideal of the Rule of Law must itself be cultivated as part of a concrete "'living custom" that lacks explicit rules of rule change.

[44]For short remarks in this regard, on Hayek, see Lemieux (2018), and on Buchanan, see Meadowcroft (2006) and Niskanen (2006).

[45]On Plato and Aristoteles as authoritarians; see Popper, 2020, and more recently Peters (2011). On an even more recent effort to "modernize" authoritarian conservatism, see Hazony (2022).

[46]The familiar John Adams quote lingers on in remarks of Mike Johnson — an alleged Trump ally — and in 2024 speaker of the house of representatives https://www.speaker.gov/principles/; the quote itself may be located by https://oll.libertyfund.org/quotes/john-adams-argues-that-the-british-empire-is-not-a-true-empire-but-a-form-of-a-republic-where-the-rule-of-law-operates-1763.

[47]In the Buchanan family tradition, there may have been a streak of this, though see Brennan (2015). A helpful comparison of conservatism in the American and the European tradition is Zoeller (2010).

[48]See on this (Hoerster, 1972; Kliemt, 1978; Raz, 1972; Ross, 1969).

[49]That relying on this logical possibility is not necessarily the most effective way of increasing the commitment power of constitutions is discussed in Lutz (1994). There the trade-off between increasing the inflexibility of a constitution and reducing the likelihood that it be abandoned in practice is perceptively analyzed and empirically illustrated.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

In line with the preceding conclusion, Hayek and Buchanan implicitly endorsed concrete WEIRD *customary practices of going about the law*. This endorsement included a certain kind of "conservative" respect for the legal status quo in concrete WEIRDS of their time.[50] In view of this, the subsequent discussion will refer to Hayek and Buchanan as practical "Rule of Law Conservatives" (conservative with respect to certain aspects of WEIRDS).[51] It intends to show that "Rule of Law Conservatism" implies what will be referred to as "analytic conservatism" and "analytic legal positivism." It will hopefully illustrate that these distinctions are not merely conceptual niceties but matter in theory and practice of the Rule of Law to the present day.[52]

4.2 | Analytic conservatism implies analytic legal positivism

Hayek and Buchanan both understood that the "generality, certainty, and equality of enforcement" of laws (which the political ideal of the Rule Law demands) require that the legal status quo be respected to some extent. They, however, underappreciated the relevance of the trivial fact that it is not possible to intentionally respect the legal status quo without knowing what the positive law in status quo in fact is.

Presumably distracted by the extended discussion whether a "value-neutral identification" of "positive law" without some "evaluative ratification" is viable, Hayek and Buchanan felt compelled to distance themselves from legal positivism in the same "lump sum" manner that they adopted in case of their rejection of conservatism. Yet, rejecting the value-neutral Hartian variant of legal positivism (Hart, 1961), which will be called "analytic legal positivism" subsequently, along with other variants goes against the grain of Hayek's and Buchanan's own Rule of Law Conservatism. For, if it cannot be empirically ascertained on the basis of value neutral criteria what the positive rules of rule change are then it does not make sense to intend changing the law by these rules only.[53]

One can characterize "analytic positivism" by the twin theses that there is "positive law" and that "broadly empirical value-neutral criteria suffice to recognize it." With this characterization in hand, it seems obvious that analytic conservatism implies analytic legal positivism. For, being intentionally conservative about the legal status quo apparently presupposes that it can be known what one intends to be conservative about.[54] However, it seems that Buchanan presupposes the viability of analytic legal positivism while sympathizing with its radical anti-thesis of a complete indeterminateness of law which would render knowing it impossible.[55]

4.3 | For and against analytic legal positivism

Since governing is always a matter of "particular concrete people doing things to other people," a government *literally of laws* is impossible. To make sense of the slogan, it is necessary to interpret "government of law" as, say, "government by concrete people who choose non-arbitrarily by virtue of being guided by law." Accordingly, when

[50]Referring to Hayek's and Buchanan's political ideal of the Rule of Law as "Rule of Law Conservatism" does not seem far-fetched. It is a rule-based conservatism as opposed to the "case by case conservatism in pursuit of supreme values" that adherents of arbitrary authoritarianism endorse, see critically on the latter (Bernholz, 2017).

[51]Geoffrey Brennan and Alan Hamlin "characterize Hayek as a conservative despite his famous protestations to the contrary because he, as much as any recent writer, provides the sort of analytic foundation for a principled defence of the status quo of the type that we take to be characteristic of the conservative position." ((Brennan & Hamlin, 2004), p. 679, fn)

[52]Again, due to a rather precarious use of terms Hayek and Buchanan feel induced to explicitly reject "legal positivism" along with their rejection of conservatism.

[53]If in a regime of government of laws some changes of law (enactment, derogation, modification) would not be subject to law, how could it be a government of laws?

[54]Analytical positivism is *not* about ratifying/rejecting normative demands. It is concerned with identifying them. Yet, whether such identification is feasible is an open question.

[55]In case of Hayek's ideas of court-like *legislation*, the indeterminateness thesis seems almost trivially true. At least "finding what to legislate" seems an almost bizarre concept; see, however, for an error-theory (Mackie, 1977)

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

governing in non-arbitrary ways people must be guided by the ideal of playing by the rules of law rather than by the ideal of making the best discretionary choices opportunistically in a case-by-case manner.

It would contradict being guided by the rules of law if always all "people would act *economically*; when an opportunity of an advantage was presented to them they would take it" ((Hicks, 1979), 43).[56] If concrete (wo-)men would universally act like homo economicus, law would in the end have to be made up by them on the spot in discretionary decision-*making*. The characteristic assumption of economics amounts to the anti-conservative principle of making forward-looking opportunistic choices in each situation taken separately. The message that homo economicus behavior prevails universally would be a message of despair for adherents of the ideal of a government of people guided by law since there would be no way to know beforehand what the law demands and the intention to be led by it would be based on a delusion.[57]

4.3.1 | The alleged indeterminateness of law

The corresponding rather wide-spread perception of radical indeterminateness of "positive law" seems to arise because in theory and practice jurists focus almost exclusively on hard cases. Yet, forming a theory of how prevailing legal practices affect social interaction by a sample of court cases is akin to forming a theory of entrepreneurial behavior on the basis of a sample of entrepreneurs who went broke.[58] Theoretically, there seem almost infinite ways of contesting claims about what "the law is." Yet, in practice, citizens of WEIRD societies seem to perceive their legal orders basically as "sufficiently predictable" for making the effort of complying with them meaningful. In general, under the Rule of Law, citizens do not go to court unless there is a non-frivolous reason to do so.[59]

A single stylized example of how a legislative change of rules, after an initial phase of exploring what the courts will do, led to rather settled concrete expectations, should suffice as an illustration of what typically seems to be involved here. After the German "travel law" was enacted, a period of "testing the waters" commenced. For example, initially, a large seller of package tours was sued in court because not all egg-cups in a rented apartment were of the same series. Yet, this challenge was rejected immediately as "frivolous." Later on, cases similar to this did not go to court since the effort seemed an obviously bad bet. Other potential challenges were classified as obviously justified. They did *not* go to court because the side expecting to lose in a potential contest would immediately give in. In consequence, it became rather swiftly predictable which class of social interactions would *not* go to court.[60]

However, even if it were quite predictable what the courts would do,[61] regularities of law-compliant *overt* behavior do not yet show that we are dealing with "a government of laws, and not of men." To see why, recall that the proposed interpretation of that slogan invoked two aspects (a) "non-arbitrary government by concrete people" and (b) that the behavior "be guided by law." Though predictability of overt behavior of concrete people may be seen as amounting to (a) non-arbitrariness, being guided by law in the sense of (b) amounts to an additional claim concerning the cause of predictability. This special kind of causality claim stipulates that humans are motivated predominantly by reasons that they derive from what they perceive as "positive law."

It seems that Hayek thought that more often than not what is perceived by actors as positive law is sufficiently determinate to guide them in non-arbitrary ways.[62] Buchanan was somewhat more ambiguous concerning such "realism of law" (see (Brennan & Kliemt, 2022)). But as is shown next, there are places in Buchanan's writings in

[56]This mirrors the distinction between non-arbitrary rule bound and arbitrary authoritarian unbound government.

[57]Of course, if analytic legal positivism would have to be rejected as infeasible then this would not bode well for analytic conservatism — after all, that one of its implications is refuted refutes analytic conservatism as well.

[58]Presenting an unbiased account of how "the law that is" works, we need to direct attention not only to cases that go to court, and why; we also need to pay attention to why so many "potential cases" do *not* go to court.

[59]What is non-frivolous has also to be determined in relation to prevailing customs.

[60]For example, either customers did not sue in the first place or companies voluntarily paid certain compensations…

[61]Outside civil law, in particular in criminal law, principles like "nulla poena sine lege" and rules that make sure that citizens are treated as innocent unless a court passes a verdict also seem well-working in predictably keeping cases out of court.

[62]That Hayek's position is compatible with Hartian analytical positivism has recently been argued convincingly in (Nientiedt, 2021).

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

which he also, in line with analytic legal positivism, clearly assumed that in legal practice actors are motivated ("guided") by perceived positive law.

4.3.2 | Buchanan on positivism in practical adjudication

Principles of legal positivism can be interpreted either as methodological norms meant to guide an analytical fact-finding mission of jurisprudence, *analytic legal positivism*, or as practical norms demanding to comply with valid positive law in social and political life, *practical legal positivism*.[63]

In the spirit of analytic legal positivism, Buchanan frames the role of an adjudicator as analogous to that of a referee:

> The agent who is appointed as referee does not himself participate in the choice of rules, at least in his role as referee … He is ideally limited to finding fact. He asks the questions: (W)hat rules are in existence? Have these rules been violated? …
>
> ((Buchanan, 1999), CW, vol.18, p. 176)

This re-affirms that Buchanan accepts that in pursuit of the political ideal of the Rule of Law, adjudicating agents should determine the law that is with the attitude of an analytic legal positivist.[64] For those who — e.g., as Rule of Law Conservatives — intend to respect the law, the diagnosis that something is as a matter of fact demanded by the established law is one prima facie reason to behave accordingly. In the role of providing such a reason what the positive law demands is in no way per se decisive. It enters with other prima facie reasons into a personal practical "all things considered" judgement of Rule of Law Conservatives in which they weigh all their perceived competing reasons for and against actions against each other.

Again, there are two steps involved: first, adjudicators must find out according to the *methodological* norms of analytic legal positivism what the legal status quo is; second, adjudicators must decide according to personally accepted practical values and norms how to use the legal powers conferred on them when passing a verdict in their role as agents enforcing the state-sponsored legal order.[65] In any event, an actor in the role of an adjudicator must ultimately make a *personal* choice to comply or not with what the adjudicator perceives as the positive law that is. This choice is not predetermined by what positive law is perceived to demand nor by sanctions looming large in case of (not) complying with the demand.[66]

Here is what Buchanan has to say on the troubling issues of making such choices with an eye on "social change" and the role of his preferred contractual metaphor in rationalizing it:

> The temptation becomes strong to assert what is essentially the positivist position that a structure of law, a legal system, a set of property rights, exists and that there is relatively little point in trying to

[63]Note that both "categorical" as well as "prudential/hypothetical" demands of practical legal positivism are meaningful only if positive law *can* be determined.

[64]This does not say anything about the "meta-ethics." Whether the law beyond being "positive" is merely conventional or rooted in some objective "normative facts" may be left open; even if there were objectively known "abstract prescriptive laws" that knowledge would have to be translated into concrete theses about what concrete people ought to and would do to other concrete people. Subjectively, a concrete choice in response to that knowledge would in any event be necessary.

[65]Compliance with the methodological norms of analytic positivism in "finding out" is required by the constitutive principles of the political ideal of the Rule of Law that Hayek and Buchanan endorse. Yet, compliance with a finding is *not* a foregone conclusion for Hayek and Buchanan since they reject such practical legal positivism. An actor can still deviate from what the law demands but this is — in particular among those who share the political ideal of the Rule of Law — an extra-ordinary conflictual situation.

[66]That something as a matter of fact is demanded by someone or some rule does as such not preempt the personal act of making a choice in compliance or in violation of the demand.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

> understand or to develop a contractual metaphor for its emergence that would offer assistance in finding criteria for social change.
>
> ((Buchanan, 1999), CW, vol.7, p. 70)[67]

Conceding in his next sentence that "(t)here is merit in this approach," Buchanan reminds the reader that the approach does not exclude "complementary bodies of analysis." Moreover, applying the rules that are found to be in existence according to the methodological norms of analytical positivism still requires concretization since "(i)n the real world the existing set of rights and claims contains many areas where precise boundaries are unclear" ((Buchanan, 1999), CW, vol.18, p. 176). Here, according to Buchanan, the agents of the state must step in and draw "clear lines of demarcation among claims where none seemed to exist before. In such actions the state is clearly 'making the law.'" ((Buchanan, 1999), CW, vol.18, p. 176).

This is in line with the "protectionist" argument insofar as it conceptualizes the protective state as a productive one. Such a state can make use of power conferring rules of rule change that entitle its agents to make law. *In legislation*, Buchanan — contrary to Hayek — is content to let things rest with the entitlement to make the law, but not so in adjudication. Accepting that under the Rule of Law adjudicators are empowered to create law within the boundaries left by the legal status quo, Buchanan issues the warning that such powers invite

> a profound and ultimately dangerous confusion … about the role of the state in making constitutional law and in modifying the whole set of legal arrangements, including the assignment of individuals' rights and claims … [The confusion, H.K.] emerges in the form of legal positivism which states that 'the law' is what the state determines it to be and that individual rights are, and must be, defined by the state and, as a consequence, unnecessarily depend on the state.
>
> ((Buchanan, 1999) vol.18, p. 176)

One can share Buchanan's concerns but suspect that he may himself be falling victim to what is indeed a "profound and ultimately dangerous confusion" created by the foes of the political ideal of the Rule of Law. For, according to the preceding discussion of protectionism, in WEIRDS *all* rights including the so-called negative rights are (co-)*produced* in a state-sponsored process. Individual rights exist as facts of positive law only due to the productive activities of the state and of the actions of its concrete agents towards concrete individuals.

Now, these basic truths are not changed if state and government (as an agent of the community at large) are distinguished. In that case what is right or wrong in the legal sense ultimately still depends on the state and the customs on which the state itself depends. But government, though depending on the state can become constrained by positive law and by positive rights. Government as an institution within the state-order can be so constrained on an intermediate level and in ways the state as a whole cannot be constrained on the ultimate level of order creation. Rights are protected by "the law that is" against *arbitrary* intrusions of personal or corporate actors — including government — if it so happens that one lives under the Rule of Law.[68]

Hayek and Buchanan acknowledge that the political ideal of the Rule of Law is "not a rule of the law." In the proper sense of the term "rule," it is not even "a rule about the law." The political ideal of the Rule of Law must itself be "practiced" or be "conserved" as a living "custom" of WEIRDS.

[67]It may be noted in passing that the contractarian thought experiment is structurally historicist in the Popperian sense and as such subject to the Popperian general criticism of historicism.

[68]These constraints are at best "relatively absolute absolutes" ((Buchanan, 1999), vol.1, p. 442). They could always conceivably be otherwise than they in fact are. But at each point in time, they exist as much as funeral customs of the Greeks and the Callatiae did.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

4.3.3 | Rule of law conservatism and contractarianism

Adjudicators who endorse Rule of Law Conservatism seem to hold up the standard that they must seek to "find" what the law says. According to the preceding discussion, they therefore have to act according to methodological norms of analytic legal positivism. For instance, they will have to consider the frequency-dependent facts of legal compliance established in the community. Once these facts are ascertained the adjudicator will know the space "in which clear lines of demarcation among claims" are perceived to exist and where no such lines exist. Note that individual adjudicators will know this *before* they themselves draw *additional* lines in or by adjudication (in "the spirit of the laws"). It is only in this latter — possibly rather spacious — realm which is limited by positive law that adjudicators are entitled to follow standards that are not those of positive law.

Within Buchanan's analytically conservative approach an adjudicator who pursues the political ideal of the Rule of Law conceives of herself as entitled to exercise her or his own judgement in creating law within certain limits. It is *only* within the limits of what is perceived as positive law that under the political ideal of the Rule of Law an *adjudicator* may "legitimately" employ contractual metaphors as auxiliary heuristics. In this way, an auxiliary role of contractarianism in providing additional premises needed to weigh conflicting demands can be accommodated within analytic conservatism and positivism. Only where the law in the legal status quo remains silent the contractual metaphor can be incorporated into the pursuit of the political ideal of the Rule of Law.[69]

As Buchanan rightly suspects, filling the discretionary space left for adjudication this way certainly would be more in the spirit of the political ideal of the Rule of Law than adopting the implicitly utilitarian welfare economic principles that dominate more conventional law and economics approaches.[70] Yet, even to the extent that it can be determined by a legal fact-finding mission what compliance with the positive law requires, the questions of *personal* compliance with what the rules of positive law demand remains open. The normative ethical question of what to do in personal practice must be separated from the jurisprudential question of what the law as a matter of fact demands. Without this separation, it is impossible to identify the personal — first person — ethical problem of the analytic conservative in full: If I vest the presumed legal status quo with some normative ethical dignity should I comply with perceived positive law or follow other personal ethical standards?

To answer this personal normative ethical question, an extra normative step must be taken by the adjudicator. This step requires weighing the consequences of law-abidance with the consequences of breaking "the law that is" in a concrete case in the role of the adjudicator. Breaking what is diagnosed as "the law that is" according to the methodological norms of analytic legal positivism may be justified for an adjudicator who in the last resort always and therefore also under the Rule of Law must make a personal choice according to personal moral standards.[71] The political ideal of the Rule of Law does not preempt such choices.

4.4 | In sum, conservatism, positivism, and making the law

As far as personal acts are concerned the political ideal of the Rule of Law Conservatism demands to acknowledge the full tragedy that might arise if the positive law requires one thing and the personal ethics the opposite. In such cases, "making up" the law in a creative "interpretation," as being different from what it is according to the analytically positivist standards of its "identification" may be a tempting but is certainly a dangerous strategy.[72] Of all people Hayek himself acknowledges

[69]As an ultimate ethical standard contractarianism may as any other foundational theory contradict the principles of the political ideal of the Rule of Law, but this opens another can of worms which better remain untouched here.

[70]See succinctly (Posner, 1998) and for a rather Germanic discussion in relation to Hayek (Mestmäcker, 2007).

[71]Contractarian standards may be one class of such standards and certainly not *the* ultimate class.

[72]Persons who conceive of themselves as free and responsible actors see themselves as *making* choices. They are responsible for their choices and also for making a serious effort to understand where the normative problems lie; they are not responsible for what the law says nor for (frequency-dependent) consequences of collective (non-)compliance. See on this lucidly ((Gilboa, 2009), pp. 12–13).

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

> that there is some inherent conflict between a system of case law and the ideal of the Rule of Law. Since under case law the judge constantly creates law, the principle that he merely applies pre-existing rules can under that system be approached even less perfectly than where the law is codified.
>
> ((Hayek, 2014), p. 146)

So, to invoke another cliché, in case of the relationship between the political ideal of the Rule of Law things are in practice more complicated than we might suspect in theory.

5 | SUMMARY CONCLUSIONS CONCERNING THE NATURE AND SIGNIFICANCE OF THE POLITICAL IDEAL OF THE RULE OF LAW IN HAYEK, BUCHANAN, AND BEYOND

After introducing the political ideal of the Rule of Law as a practice of dealing with rules of law rather than itself a rule of law, (1) it was suggested to perceive that practice as an example of the traditional concept of a custom, (2). Hayek's and Buchanan's central views on the *nature* of the Rule of Law were reconstructed and (mostly) endorsed as custom-based, conventionalist, right-based and protectionist (3). In part (4), the *significance* of Hayek's and Buchanan's political ideal of the Rule of Law for present practices of adjudication and legislation was discussed with special emphasis on adjudication. Criticisms of Hayek's and Buchanan's own criticisms of what they understood by "conservatism" and "positivism" were offered. In consequence, it was suggested that on the basis of adequate analytic concepts of conservatism and legal positivism, Hayek' and Buchanan's political ideal of the Rule of Law should be interpreted as (analytic) *Rule of Law Conservatism*.

Beyond this we may note that in WEIRD societies, the Rule of Law is presently under siege because citizens mix up the political ideals of "Rule of Law" and of "Democracy." Like Hayek and Buchanan, citizens of WEIRDS today seek a new "reflective equilibrium" (Rawls, 1951, 1971). They must come to terms with the fact that due to the ascent of democratic ideals, Constitutional Democracies have become a less safe place for the Rule of Law.

To go back to the political wisdom of the Federalists ((Hamilton et al., 2001) and to make serious efforts to renew and enlarge it with institutional economic methods and insights (Eichenberger & Frey, 1999) may be the best way of going beyond political ideals like Hayek's and Buchanan's Rule of Law Conservatism.

Since I personally feel that the Rule of Law in WEIRDS is the greatest of all achievements of human civilization the primary task of the institutional political economist must be that of making concrete institutional proposals for rendering WEIRDS and the Rule of Law more resilient and sustainable. Hayek and Buchanan devoted much of their work to this task. "Rocking on the porch along with me as his long time critic" Buchanan once in a while summed up our most basic common conviction of the merits of the Rule of Law laconically: "Better in the West!"

> * I thank Michael Baurmann and Daniel Nientied for criticisms of a former version of this paper. Until his untimely demise to 'the great library above' in the summer of 2022, Geoffrey Brennan and I have been working on a joint book "on exchange" (timely for the Adam Smith year) for which this paper provides some background. Two years hence, I feel like finishing for good what had been basically finished March 2022. Hopefully the final product will appear in 'local libraries down here and under' to represent Geoffrey's spirit among 'worldly philosophers'.

ACKNOWLEDGEMENT

Open Access funding enabled and organized by Projekt DEAL.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no datasets were generated or analysed during the current study.

ORCID

Hartmut Kliemt https://orcid.org/0000-0002-4778-2017

REFERENCES[73]

Acemoglu, D., & Robinson, J. A. (2013). *Why nations fail: The origins of power, prosperity and poverty* (1st ed.). Profile Books.

Albert, H. (1985). *Treatise on critical reason*. Princeton University Press. https://doi.org/10.1515/9781400854929

Albert, H. (2010). The economic tradition and the constitution of science. *Public Choice*, *144*(3/4), 401–411. https://doi.org/10.1007/s11127-010-9675-9

Albert, M. (2011). Methodology and scientific competition. *Episteme*, *8*(2), 165–183. https://doi.org/10.3366/epi.2011.0014

Albert, M. (2017). How Bayesian rationality fails and critical rationality works. *Homo Oeconomicus*, *34*(4), 313–341. https://doi.org/10.1007/s41412-017-0062-3

Albert, M. (2022). How to escape from model Platonism in economics: Critical assumptions, robust Conclusions, and approximate explanations. *Homo Oeconomicus*, *39*, 37–68. https://doi.org/10.1007/s41412-022-00122-x

Basu, K. (2018). *The republic of beliefs: A new approach to law and economics (reprint edition)*. Princeton University Press.

Bentham, J. (1843). In J. Bowring (Ed.), *Anarchical fallacies* (Vol. 2). William Tait. https://oll.libertyfund.org/titles/bentham-works-of-jeremy-bentham-11-vols

Bernholz, P. (2017). *Totalitarianism, terrorism and supreme values: History and theory* (1st ed. 2017 Edition). Springer. https://doi.org/10.1007/978-3-319-56907-9

Bernstein, W. J. (2009). *A splendid exchange: How trade shaped the world (Main)*. Atlantic Books.

Bernstein, W. J. (2021). *Delusions of crowds: Why people go mad in groups*. Atlantic Monthly Press.

Bertolini, D. (2019). Constitutionalizing leviathan: A critique of Buchanan's conception of lawmaking. *Homo Oeconomicus*, *36*(1), 41–69. https://doi.org/10.1007/s41412-019-00086-5

Biebricher, T., Bonefeld, W., & Nedergaard, P. (2022). *The Oxford handbook of Ordoliberalism*. Oxford University Press. https://doi.org/10.1093/oxfordhb/9780198861201.001.0001

Böhm, F. (1966). Privatrechtsgesellschaft und Marktwirtschaft. *Ordo*, *17*, 75–151.

Brennan, G. (2015). Buchanan's anti-conservatism. *Public Choice*, *163*(1/2), 7–13. https://doi.org/10.1007/s11127-014-0223-x

Brennan, G., & Buchanan, J. (1984). Voter choice: Evaluating political alternatives. *American Behavioral Scientist*, *28*(2), 185–201. https://doi.org/10.1177/000276484028002003

Brennan, G., & Hamlin, A. (2004). Analytic conservatism. *British Journal of Political Science*, *34*(4), 675–691. https://doi.org/10.1017/S0007123404000249

Brennan, G., & Hamlin, A. (2016). Practical conservatism. *The Monist*, *99*(4), 336–351. https://doi.org/10.1093/monist/onw009

Brennan, G., & Kliemt, H. (2022). An Albertian view of Buchanan's contractarianism. *Homo Oeconomicus*, *39*, 69–82. https://doi.org/10.1007/s41412-022-00127-6

Brennan, G., & Lomasky, L. (1993). *Democracy and decision*. Cambridge University Press. https://doi.org/10.1017/CBO9781139173544

Brennan, G., & Pettit, P. (2004). *The economy of esteem*. Oxford University Press. https://doi.org/10.1093/0199246483.001.0001

Brennan, G., & Pettit, P. (2005). The Feasibility Issue. In F. Jackson & M. Smith (Eds.), *The Oxford handbook of contemporary philosophy* (pp. 258–279). Oxford University Press.

Buchanan, J. M. (1965). An economic theory of clubs. *Economica*, *32*, 1–14. https://doi.org/10.2307/2552442

Buchanan, J. M. (1999). *The collected works of James M. Buchanan*. Liberty Fund.

Buchanan, J. M. (2006). *Why I, too, am not a conservative: The normative vision of classical liberalism*. Edward Elgar Pub. https://doi.org/10.4337/9781845428211

Buchanan, J. M., & Bush, W. (1973). Anarchism. *Journal of Economic Issues*, *7*(1), 162–164. https://doi.org/10.1080/00213624.1973.11503093

Buchanan, J. M., & Tullock, G. (1962), *42*(3).

[73]The relevant literature to the topic of this paper is too extended to be covered satisfactorily. I should like to mention that, after a first version of this paper had been finished in 2022 a book length treatment on "Law's Rule" appeared written by one of the leading philosophical-legal theorists of our time (Postema, 2022). This book as well as treatments of the rule of law like e.g. (Waldron, 2020) and (Maravall, 2003) deserve a separate discussion.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

Cook, R. (1997). *Njal's Saga*. Penguin.
Cornes, R., & Sandler, T. (1996). *The theory of externalities, public goods, and club goods (second)*. Cambridge University Press. https://doi.org/10.1017/CBO9781139174312
Diamond, J. (2012). *The world until yesterday: What can we learn from traditional societies? (Auflage: Trade paperback.)*. Allen lane.
Eichenberger, R., & Frey, B. (1999). *The new democratic federalism for Europe. Functional, overlapping and competing jurisdiction*. Edward Elgar.
Fukuyama, F. (2012). *The origins of political order: From Prehuman times to the French revolution (trade paperback)*. Profile Books Ltd.
Gaus, G. (2016). *The tyranny of the ideal: Justice in a diverse society*. Princeton University Press.
Geuss, R. (2008). *Philosophy & real politics*. Princeton University Press. https://doi.org/10.1515/9781400835515
Gigerenzer, G. (1997). Bounded rationality: Models of bounded rationality. *Swiss Journal of Economics and Statistics*, *133*, 201–218.
Gilboa, I. (2009). *Theory of decision under uncertainty* (1st ed.). Cambridge University Press. https://doi.org/10.1017/CBO9780511840203
Greene, J. D. (2013). *Moral tribes: Emotion, reason, and the gap between us and them*. Penguin.
Güth, W., & Kliemt, H. (2007). The Rationality of Rational Fools. The Role of Commitments, Persons and Agents in Rational Choice Modeling. In F. Peter & H. B. Schmid (Eds.), *Rationality and commitment* (pp. 124–149). Oxford University Press. https://doi.org/10.1093/oso/9780199287260.003.0007
Hamilton, A., Jay, J., & Madison, J. (2001). *The federalist*. Liberty Fund. http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788
Hamlin, A., & Stemplowska, Z. (2012). Theory, ideal theory and the theory of ideals. *Political Studies Review*, *10*(1), 48–62. https://doi.org/10.1111/j.1478-9302.2011.00244.x
Hart, H. L. A. (1961). *The concept of law*. Clarendon Press.
Hayek, F. A. (1955). *The political ideal of the rule of law*. National bank of Egypt. https://books.google.de/books?id=5REeAAAAMAAJ
Hayek, F. A. (1960). *The constitution of liberty*. University of Chicago Press.
Hayek, F. A. (1979). *Law, legislation and liberty: A new statement of the liberal justice principles of justice and political economy. – The political order of a free people: Vol. Bd.3*. Routledge & Kegan Paul.
Hayek, F. A. (2008). In B. Caldwell (Ed.), *The road to serfdom: Text and documents: The definitive edition* (1st ed., Vol. 2). Routledge. https://doi.org/10.4324/9781315728124
Hayek, F. A. (2014)., 42 In B. Caldwell (Ed.), *The market and other orders* (Vol. 15). Routledge.
Hayek, F. A. (2022). In J. Shearmur (Ed.), *Law, legislation, and liberty, volume 19* (Vol. 19). University of Chicago Press. https://press.uchicago.edu/ucp/books/book/chicago/L/bo88750093.html
Hazony, Y. (2022). *Conservatism: A rediscovery*. Regnery Gateway.
Henrich, J. (2016). *The secret of our success: How culture is driving human evolution, domesticating our species, and making us smarter*. Princeton University Press. https://doi.org/10.1515/9781400873296
Henrich, J. (2020). *The weirdest people in the world: How the west became psychologically peculiar and particularly prosperous (01 edition)*. Allen Lane.
Hicks, J. (1979). *Causality in economics*. Blackwell.
Hobbes, T. (1990). *Behemoth or the long parliament*. University of Chicago Press. https://doi.org/10.7208/chicago/9780226229843.001.0001
Hoerster, N. (1972). On Alf Ross's alleged puzzle in constitutional law. *Mind*, *1972*, 422 ff–426. https://doi.org/10.1093/mind/LXXXI.323.422
Hofstadter, D. R. (1986). *Metamagical Themas*. Basic Books.
Homans, G. C. (1967). *The nature of social science*. Harcourt, Brace & World, Inc.
Hume, D. (1739, 1896). *A treatise of human nature (1896 ed.)—Online library of liberty*. https://oll.libertyfund.org/titles/hume-a-treatise-of-human-nature#Hume_0213_1107
Jasay, A. (1998). *The state*. Liberty Fund.
Jasay, A. (2008), Social Contract, Free Ride: A Study of the Public Goods Problem (Indianapolis. Liberty Fund).
Jasay, A. (2011). *Against politics (reprint)*. Routledge.
Kliemt, H. (1978). Can there be any constitutional limits to constitutional powers. *Munich Social Science Review*, *4*, 99–108.
Kliemt, H. (1993). On justifying a minimum welfare state. *Constitutional Political Economy*, *4*(2), 159–172. https://doi.org/10.1007/BF02393078
Kliemt, H. (2011). Bukantianism—Buchanan's philosophical economics. *Journal of Economic Behavior & Organization*, *80*(2), 275–279. https://doi.org/10.1016/j.jebo.2011.07.013
Kliemt, H. (2015). The defensive state. *The Independent Review*, *20*(1), 11–21.

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kyki.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

Krueger, A. O. (1974). The political economy of the rent-seeking society. *The American Economic Review*, *64*(3), 291–303.
Legal Vice Presidency, World Bank. (2003). *Legal and judicial reform: Strategic directions* (p. 77). World Bank. https://openknowledge.worldbank.org/bitstream/handle/10986/25880/9781464809507.pdf
Lehto, O., & Meadowcroft, J. (2021). Welfare without rent seeking? Buchanan's demogrant proposal and the possibility of a constitutional welfare state. *Constitutional Political Economy*, *32*(2), 145–164. https://doi.org/10.1007/s10602-020-09321-7
Lemieux, P. (2018, March 13). *Against tribal instincts*. Cato Institute. https://www.cato.org/regulation/spring-2018/fatal-conceit
Lumsden, C. J., & Wilson, E. O. (1981). *Genes, mind, and culture. The Coevolutionary process*. Harvard University Press.
Lutz, D. (1994). Toward a theory of constitutional amendment. *American Political Science Review*, *88*(2), 1–16. https://doi.org/10.2307/2944709
Mackie, J. L. (1977). *Ethics*. Inventing Right and Wrong.
Maravall, J. M. (2003). *Democracy and the rule of law*. Cambridge University Press. https://doi.org/10.1017/CBO9780511610066
Marsilius of Padua. (2005). *The defender of the peace (new Ed)*. Cambridge University Press. https://doi.org/10.1017/CBO9780511810664
Meadowcroft, J. (2006). Why I am, too, not a concervative: Comment on Buchanan. *Economic Affairs - Econ Aff*, *26*, 85–86. https://doi.org/10.1111/j.0265-0665.2006.660_5.x
Mestmäcker, E.-J. (2007). *A legal theory without law: Posner v. Hayek on economic analysis of law. In Beiträge zur Ordnungstheorie und Ordnungspolitik*. Mohr Siebeck.
Musgrave, A. (1993). *Common sense, science, and scepticism: A historical introduction to the theory of knowledge/Alan Musgrave*. Cambridge University Press.
Nientiedt, D. (2021). Hayek's treatment of legal positivism. *European Journal of Law and Economics*, *51*(3), 563–576. https://doi.org/10.1007/s10657-021-09684-8
Niskanen, W. A. (2006). Why I, too, am not a conservative: The normative vision of classical liberalism James M. Buchanan. *Cato Journal*, *26*(3), 612–613.
North, D. C., Wallis, J. J., & Weingast, B. R. (2013). *Violence and social orders: A conceptual framework for interpreting recorded human history (reprint)*. Cambridge University Press.
Ostrom, E. (1990). *Governing the commons*. Cambridge University Press. https://doi.org/10.1017/CBO9780511807763
Pavel, C. E. (2014). *Divided sovereignty: International institutions and the limits of state authority*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199376346.001.0001
Peters, C. J. (2011). Introduction: A Government of Laws. In C. J. Peters (Ed.), *A matter of dispute: Morality, democracy, and law (p. 0)*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780195387223.003.0002
Pinker, S. (2012). *The better angels of our nature: Why violence has declined (reprint)*. Penguin Books.
Popper, K. R. (2020). *The open society and its enemies*. Princeton University Press.
Posner, R. A. (1998). *Values and consequences: An introduction to economic analysis of law*. Coase-Sandor. Working Paper Series in Law and Economics
Postema, G. J. (2022). *Law's rule: The nature, value, and viability of the rule of law*. Oxford University Press Inc.
Rawls, J. (1951). Outline of a decision procedure for ethics. *Philosophical Review*, *60*, 177–190. https://doi.org/10.2307/2181696
Rawls, J. (1971). *A theory of justice*. Oxford University Press. https://doi.org/10.4159/9780674042605
Raz, J. (1972). Professor A. Ross and some legal puzzles. *Mind*, *1972*, 415. ff
Rehfeldt, B. (1951). *Die Wurzeln des Rechts*. Duncker & Humblot. https://books.google.de/books?id=NYQpAQAAMAAJ
Robbins, L. (1933). *An essay on the nature and significance of economic science*. Macmillan.
Ross, A. (1969). On self-reference and a puzzle in constitutional law. *Mind*, *1969*, 1 ff–24. https://doi.org/10.1093/mind/LXXVIII.309.1
Rowley, C. K., Tollison, R. D., & Tullock, G. (1988). *The political economy of rent-seeking*. Kluwer Academic Publishers. https://doi.org/10.1007/978-1-4757-1963-5
Selten, R. (1999). Response to Shepsle and Laitin. In J. Alt, M. Levi, & E. Ostrom (Eds.), *Competition and cooperation: Conversations with Nobelists about economics and political science* (pp. 303–308). Russel Sage Foundation.
Suber, P. (1990). *The paradox of self-amendment*. Peter Lang.
Sugden, R. (2024). *Hayek, Buchanan and the justification of the market*. Kyklos, 77(4), 1069–1083. https://doi.org/10.1111/kykl.12406
Surowiecki, J. (2005). *The wisdom of crowds (new ed. trade paperback.)*. Anchor.
Taylor, M. (1976). *Anarchy and cooperation*. John Wiley.
Tullock, G. (1993). Rent seeking. In C. Rowley (Ed.), *Property rights and the limits of democracy*. Edward Elgar. https://doi.org/10.4337/9781035305896.00007

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kykl.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

Vanberg, V. J. (2022). The economic tradition and the problem of social order: Hans Albert's critique of welfare economics and the perspective of constitutional political economy. *Homo Oeconomicus*, *39*(1), 83–111. https://doi.org/10.1007/s41412-021-00106-3

Vanberg, V. J. (2024). *Competitive federalism, individual autonomy, and citizen sovereignty*. Kyklos, 77(4), 1048–1068. https://doi.org/10.1111/kykl.12405

Viehweg, T. (1993). *Topics and law: A contribution to basic research in law*. P. Lang. https://books.google.de/books?id=f8A4AQAAIAAJ

Vining, R. (1956). *Economics in the United States of America. A review and interpretation of research*. UNESCO.

Waldron, J. (2020). The Rule of Law. In E. N. Zalta (Ed.), *The Stanford encyclopedia of philosophy (summer 2020)*. Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/

Wootton, D. (2016). *The invention of science: A new history of the scientific revolution* (1st ed.). Penguin.

World Bank. (2017). *Governance and the law* (world development report (p. 307). World Bank. https://openknowledge.worldbank.org/bitstream/handle/10986/25880/9781464809507.pdf

Zoeller, M. (2010). The antinomies of conservatism: An American-European comparison. *The SAIS Review of International Affairs*, *30*(1), 127–138. https://doi.org/10.1353/sais.0.0073

How to cite this article: Kliemt, H. (2024). The nature and significance of the political ideal of the Rule of Law: Hayek, Buchanan, and beyond. *Kyklos*, *77*(4), 1084–1102. https://doi.org/10.1111/kykl.12407

14676435, 2024, 4, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/kykl.12407 by Justus-Liebig-Universitat, Wiley Online Library on [28/11/2024]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License