**Hayek on the Ethical and Economic Importance of the Rule of Law:
Answering the Razian Challenge**

1. **Introduction**
	1. **Hayek on rule of law [ROL]:** *Constitution of Liberty, Road to Serfdom*, etc.
		1. ROL: “government in all its actions is bound by rules fixed and announced beforehand--rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge”[[1]](#footnote-1)
		2. Two claims about ROL—
			1. ROL is necessary for protecting individual freedom
			2. State should not adopt economic policies which violate ROL (e.g. price controls)
	2. **The ‘Razian challenge’:** Hayek’s argument does not establish that ROL’s value in protecting freedom is so important as to justify opposition to state economic policies which violate ROL. Indeed, those policies might promote freedom despite violating ROL.
		1. Joseph Raz (1977)[[2]](#footnote-2), Jeremy Waldron (1989)[[3]](#footnote-3), Steven Wall (2018)[[4]](#footnote-4)
	3. **Answer:** Razian challenge fails b/c it: (1) depends on attributing to Hayek an account of freedom which he explicitly rejects and (2) assumes that the entirety of Hayek’s opposition to economic policies which violate ROL is grounded in ROL’s role in protecting freedom
		1. Re: (1), proponents of Razian challenge attribute to Hayek conception of freedom on which one’s freedom consists simply in non-interferencewith one’s actions, but he actually identifies a person’s freedom with the extent to which others do not interfere with her ability to make independent choices**[[5]](#footnote-5)**
			1. Re: (2), Hayek also offers separate, economic arguments against economic policies which violate ROL
				1. In particular, I focus here on two—

State’s poor epistemic position to predict the outcomes of economic policies which violate ROL

A functioning market economy depends on a reliable coordination of expectations, which is undermined by ROL violations

* + 1. When these aspects of Hayek’s opposition to economic policies violating ROL are considered, we have solid grounds for dismissing the Razian challenge—
			1. Not only will the policies cited by proponents of the Razian challenge as instances in which violating ROL can promote freedom not promote freedom as Hayek understood it, if Hayek is right then economic policies which violate ROL are both ill-disposed to achieve their intended goals and threaten weakening the economy as a whole
			2. Though this is still a prima facie objection to economic policies that violate ROL, that objection is a far more compelling one than proponents of the Razian challenge realize.Especially with regards to policies like price controls which are themselves intended to achieve economic benefits
1. **The Razian Challenge**
	1. Core idea: though Hayek establishes that ROL protects freedom, he provides no reason to think that its role in protecting freedom is important enough to outweigh competing considerations
		1. Raz: though Hayek is right that some economic policies (e.g. price controls) are incompatible w/ ROL, and he “noted correctly [ROL’s] relevance for the protection of freedom,” ROL “possesses no more than prima facie force. It has always to be balanced against competing claims of other values. Hence Hayek's arguments, to the extent that they show no more than that some other goals inevitably conflict with the rule of law, are not the sort of arguments which could, in principle, show that pursuit of such goals by means of law is inappropriate”
	2. Meanwhile, proponents of Razian challenge read Hayek as endorsing a conception of freedom as sheer non-interference
		1. Raz: for Hayek freedom = “an effective ability to choose between as many options as possible.” Hayek is correct that ROL protects freedom so-understood because conformity to ROL enhances one’s ability to predict the consequences of one’s action, and “[p]redictability in one's environment . . . increase[s] one's power of action”
	3. If its proponents are correct that (1) Hayek conceives of freedom as non-interference and (2) the entirety of Hayek’s case against ROL violations rests on an appeal to freedom as non-interference, then Razian challenge supplies powerful objection to Hayek’s insistence that state should eschew policies which violate ROL
		1. Waldron: Hayek puts an undue emphasis on the threat to one’s freedom posed by other human beings, so he fails to recognize that freedom can be promoted through policies which enhance economic security even though they violate ROL
		2. Wall: creative destruction of the free market itself poses a threat to predictability and hence freedom
2. **Rethinking Hayek on the Importance of ROL**
	1. However, proponents of Razian challenge err on both counts
	2. First, Hayek *does not* associate freedom with non-interference, but rather with non-interference by others with one’s independence*[[6]](#footnote-6)*
		1. Indeed, Hayek explicitly denies that one’s freedom should be identified with non-interference as such[[7]](#footnote-7)
		2. Freedom in Hayek’s sense “refers solely to a relation of men to other men, and the only infringement on it is coercion by men”[[8]](#footnote-8)
			1. Freedom = others’ non-interference with one’s ability to make choices that are (rationally) independent of others’ choices
				1. Coercion= threatening to harm one unless one chooses (not) to act in the way the coercer want one to (not) act
	3. Second, Hayek opposes policies violating ROL on distinct, economic grounds
		1. Among others, two esp. compelling and uncontroversial grounds—
3. Because the information necessary to accurately predict the outcomes of discrete economic interventions is not possessed in any one place, but is dispersed among the various actors involved, the state is not in an appropriate epistemic position to reliably predict their outcomes[[9]](#footnote-9)
4. Uncertainty created by ROL violations diminishes incentives to engage in economic activity**[[10]](#footnote-10)**
5. **Answering the Razian Challenge**
	1. An appreciation of these two crucial ways in which proponents of the Razian challenge misinterpret Hayek shows why it should be rejected
	2. First, lapses in economic security, such as those caused by the creative destruction of the free market, do not constitute reductions in freedom as Hayek understands it. They are not instances in which others interfere with one’s ability to make independent choices, for they are not instances in which others threaten one with harm if one does not do as they want
	3. Second, economic policies which violate the ROL both cannot be reliably expected to achieve their intended positive outcomes –as well as carry a risk of causing unintended negative ones—and reduce incentives to engage in economic activity
	4. Together, these provide a strong reason for the state to avoid economic policies which violate ROL, particularly where those policies are intended to benefit the economy. For not only are policies which violate the ROL ill-equipped to accomplish this goal (and may very well harm it), but they have the *further*, ethical drawback of diminishing freedom
6. **Conclusion**
	1. The above establishes that the Razian challenge should be dismissed. Its proponents err in attributing to Hayek an understanding of freedom which he does not share, and fail to recognize how his economic critique of ROL violations intersects with his ethical critique
	2. Of course, important to notice that proponents of Razian challenge are correct that, by its own logic, Hayek’s case is merely a prima facie one
	3. Indeed, saliently, though his ethical critique of ROL violations does not rest on it, Hayek himself concedes that freedom conceived as sheer non-interference is “very important”[[11]](#footnote-11)
	4. Still, Hayek’s case carries much greater force than proponents of the Razian challenge recognize in misreading him as criticizing economic policies which violate ROL (solely) on the basis that they constitute interferences
	5. And this case is especially forceful with respect to economic policies implemented to strengthen the economy, for Hayek provides strong reason to think they will often be unsuccessful and even backfire
1. *Road to Serfdom* p. 54. [↑](#footnote-ref-1)
2. “The Rule of Law and its Virtue,” *Law Quarterly Review*. [↑](#footnote-ref-2)
3. “The Rule of Law in Contemporary Liberal Theory,” *Ratio Juris*. [↑](#footnote-ref-3)
4. “Planning, Freedom, and the Rule of Law,” in *The Oxford Handbook of Freedom* (Schmidtz & Pavel eds). [↑](#footnote-ref-4)
5. One tempting way of expressing this point would be to say that Hayek embraces a ‘*republican’* rather than ‘*liberal’* conception of freedom. (Cf. David Dyzenhaus, “Freedom Under an Order of Public Law: From Hobbes Through Hayek to Republicanism.” in *The Tragedy of Liberty* (Renata Uitz ed. 2015)). However, the republican conception of freedom is typically defined as a view which identifies freedom with ‘*non-domination’*. (See, e.g., Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997)). Sometimes self-described proponents of the republican conception use ‘independence’ and ‘non-domination’ interchangeably. (See, e.g., Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* p. 65 (2012)). But sometimes it is argued that an account of freedom conceived as independence should be understood as an alternative to both the republican and liberal conceptions of freedom. (See Christian List and Laura Valentini, “Freedom as Independence,” *Ethics* (2016)). Given the unnecessary complexities involved in situating Hayek within this debate, I will not attempt to do so. [↑](#footnote-ref-5)
6. See *Constitution of Liberty* ch. 1; see also “Freedom and Coercion,” in Hayek, *Studies in Philosophy, Politics, and Economics* (1967). [↑](#footnote-ref-6)
7. See *Constitution of Liberty* p. 60 [↑](#footnote-ref-7)
8. See ibid. However, Hayek later indicates that freedom in his sense is diminished through “restraint” as well as coercion, but he avoids the latter term since it does not signify that freedom can only be diminished through a “restraining *human agent.*” See ibid. 65 (emphasis added). [↑](#footnote-ref-8)
9. See *Road to Serfdom* pp. 77-8; see also “The Use of Knowledge in Society,” *American Economic Review* (1945). [↑](#footnote-ref-9)
10. See, e.g., *Constitution of Liberty* pp. 443-44. I provide a decision-theoretic analysis of Hayek’s claim in Boom “The Importance of the Thin Conception of the Rule of Law for International Development,” *Law and Development Review* pp. 311-6 (2015). See also the evolutionary rationale for risk-aversion in “Notes on the Evolution of Systems of Rules of Conduct,” in *Studies in Philosophy, Politics, and Economics* pp. 79-81. [↑](#footnote-ref-10)
11. See Constitution of Liberty p. 60 [↑](#footnote-ref-11)