



Rule of Law versus Legislative Orders

BY WALTER E. WILLIAMS

Webster's dictionary defines law as all the rules of conduct established and enforced by the authority, legislation, or custom of a given community or group. Why are there laws in the first place? The most apparent answer is, were there not a particular law, some people would not conduct themselves according to the law in question. But is that entirely true?

For example, were there no law regarding which side of the road we should drive on, one imagines that self-interest would lead to a spontaneous emergence of a custom to drive, say, on the right-hand side of the road—at least in the United States. But there would probably be some who would drive on the left; therefore, a law, with associated penalties, is needed to enforce concurrence among would-be outliers.

There are other standards of human conduct not codified in law, such as men taking their hats off in Christian churches and wearing hats in synagogues, eating with utensils rather than one's hands, and giving the appropriate greeting. It is tempting to trivialize these standards by suggesting they are not as important as laws mandating which side of the road to drive on. But that is untrue. A nasty remark, discourtesy, or show of disrespect that is not apologized for can lead to violent conflict.

What should be the characteristics of laws in a free society? Think about baseball rules (laws). Through no fault of their own, some players hit fewer home runs than others. To create baseball justice, how about a rule requiring pitchers to throw easier pitches to poorer home run hitters, or one that would treat a double like an inside-the-park home run? Some pitchers aren't as

good as others. How about allowing them to stand closer to the batter? Better yet, we could rule their first pitch to each batter a strike no matter what. In the interest of baseball justice we might make other special rules to level the playing field between old players and young players, black and white, and fast and slow.

You say, "Williams, you can't be serious! Can you imagine the conflict that would emerge: players lobbying umpires, umpires deciding who gets what favor,

lawsuits, not to mention fighting?" You're absolutely right. The reason baseball games end peaceably, and players and team owners are generally satisfied with the process, whether they win or lose, is that baseball rules are known in advance. They apply to all players. They are fixed, and umpires don't make up rules as they go along. In other words, baseball rules meet the test of "abstractness." They envision no particular outcome in terms of winners and losers. Baseball rules simply create a framework in which the game is played.

Laws, or rules that govern a free society, should have similar features. There should be a "rule of law." The

Rule of law means laws are certain and known in advance. Laws envision no particular outcome except that of allowing people to peaceably pursue their own objectives. Finally, and most important, laws are equally applied to everyone, including government officials.

Sir Henry Maine, probably the greatest legal historian, said, "The greatest movement of progressive soci-

The rule of law means laws are certain and known in advance, they envision no particular outcome, and most important, laws are equally applied to everyone, including government officials.

Walter Williams is the John M. Olin Distinguished Professor of Economics at George Mason University.

eties has hitherto been a movement from status to contract.” In nonprogressive societies the rule of law is absent. Laws are not general. They’re applied according to a person’s status or group membership. There’s rule, not by *legis*, the Latin word for law, but by *privilegium*, the Latin term for private law. What’s lacking is the principle summarized by English jurist A. V. Dicey: “Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”

Consider the case of a person arrested and charged with rape. Should his status—whether he’s a senator, professor, or ordinary man—play a role in the adjudication of the crime and subsequent punishment? I’m betting that the average person would answer no.

Just about every law that Congress enacts violates all the requirements for the rule of law. How do we determine violations of rule of law? It’s easy. See if the law applies to particular Americans as opposed to all Americans. See if the law exempts public officials from its application. See if the law is known in advance. See if the law takes action against a person who has taken no aggressive action against another. If you conduct such a test, you will conclude that it is difficult to find many acts of Congress that adhere to the principles of the rule of law.

A rule-of-law regime would require that we scrap the Internal Revenue Code in its entirety. What justification is there for the tax laws to treat an American differently because he has a higher income, minor children, or income from capital gains instead of wages? Equal treatment, at the minimum, would require Congress to figure out the cost of the constitutionally authorized functions of the federal government, divide it by the adult population, and send us each a bill for our share. You say, “What about the ability-to-pay principle?” That’s just a politics-of-envy concept that would be revealed as utter nonsense if applied to anything else, such as gasoline or food.

At best, the police and criminal justice system are the last desperate line of defense for a civilized society. Our increased reliance on laws to regulate behavior is a measure of how uncivilized we’ve become.

That Americans have become ruled by orders and special privileges helps explain all the lobbyists, money, and graft in Washington. We’ve moved away from a government with limited powers, as our Founders envisioned, to one with awesome powers. Therefore, it pays people to spend huge amounts of money to influence Congress in their favor. Privilege-granting is precisely what most Americans want, though they might disagree on who gets what privilege. Most Americans have no inkling of what the rule of law means. We think it means obedience to whatever laws Congress enacts and the president signs. That’s a tragedy.

Customs, traditions, mores, and rules of etiquette, not laws and government regulations, are what make for a civilized society. These behavioral norms, mostly transmitted by example, word-of-mouth, and religious teachings, represent a body of wisdom distilled through ages of experience, trial, and error. It’s the morality embodied in those thou-shalt-nots: kill, steal, lie, cheat, and so on. The importance of these behavioral norms is that people behave themselves even if nobody’s watching. There are not enough cops and laws to replace personal morality as a means to a civilized society. At best, the police and criminal justice system are the last desperate line of defense for a civilized society. Our increased reliance on laws to regulate behavior is a measure of how uncivilized we’ve become.

Twenty-five years ago, during a dinner conversation with Nobel laureate Friedrich A. Hayek, I asked if he could propose one law that would help restore, promote, and preserve liberty. Hayek answered that the law would read: Congress shall enact no law that does not apply equally to all Americans. Hayek’s suggestion would do untold wonders in fostering the liberties envisioned by our Founders. But I’m betting that most Americans would greet Hayek’s proposal with contempt after they realized it would mean Congress could not play favorites.

FEE