
Hayek on Spontaneous Order and Constitutional Design

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Friedrich A. Hayek is well known for his use of the concept of spontaneous order to praise the market, reject socialism, and argue that moral traditions are the products of evolution. Less understood is the relationship between Hayek's idea of spontaneous order and his constitutionalism. His work here differs from the school of constitutional political economy, which proposes structures to limit governmental power chosen by self-interested persons (see, for example, Buchanan and Tullock 1962). In Hayek's view, the mechanics of the separation of powers will limit intervention in market and cultural competition only where the evolved opinion in a society regarding justice demands limited government. Deliberate constitutional design can place opinion in a position to curtail intervention and leave room for competitive social processes, but constitutional planning is no substitute for evolved beliefs that limit government's authority. Although constitutional design can facilitate and take advantage of spontaneous order, cultural evolution, which is a type of generation of spontaneous order, ultimately determines the constraints on public power.

Hayek's political thought rests on the concept of spontaneous order: unplanned social order generated by goal-directed individual action. He uses this concept to offer accounts of market competition and cultural evolution, and he argues that these self-organizing social phenomena are useful because they transmit more information than can be conveyed through conscious design. The concept of spontaneous order is

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also the basis of his liberal political theory, in which individual freedom is the central value. Hayek's work has received increased attention in recent years, but his constitutional writings have not received much critical notice, which is unfortunate because this element of his thought illuminates the relationship he establishes between spontaneous order and conscious design.

He outlines an ideal constitution that features a version of the separation of powers intended both to grant political primacy to evolved cultural rules and to limit the influence of groups that demand state interference with competitive social processes. For more than two centuries, liberal constitutionalists have championed the separation of powers as a means of constraining self-interested political activity that erodes personal freedom, and although Hayek is at one with this tradition on the worth of the separation of powers, he also contends that cultural rules that restrict public authority are requisite to preserving limited government. Because culture is, in Hayek's account, the product of spontaneous evolution, the rules that restrain power are fashioned by an invisible hand. The visible hand of constitutional design should place evolved rules in a position to govern egoistic political action, so Hayek's separation of powers subordinates particular interests to such rules. His scheme suggests that cultural rules must favor limited government because, if they do not, the separation of powers is insufficient to prevent intrusions on individual liberty. Liberalism and cultural evolution are thus closely associated in his political thought; his writings indicate that if cultural rules do not demand limited government, structural constraints on power will prove ineffectual.

The Market, Evolution, and Liberalism

Hayek argues that spontaneous order promotes cooperation without central direction by enabling individuals to coordinate their actions through the impersonal mechanisms of market prices and cultural rules. Because spontaneous order is the by-product of individuals' decisions, it is end independent; that is, it aims toward no collective goal or outcome. Instead, it generates abstract signals that provide information individuals can use in pursuing their aims. Such signals reduce the quantity of concrete information that individuals must collect to coordinate their plans with those of other persons. Whether in prices, which convey information concerning the demand for and supply of goods and services, or in evolved rules, which give rise to rational expectations regarding conduct, spontaneous order enables individuals to act on information they do not explicitly possess (Hayek 1973, 17–39). Because no one can know all the facts that determine prices or evolved rules, no one is in a position to plan economic activity or cultural change using as much information as is transmitted through market competition and cultural evolution. Public officials cannot determine the outcomes of economic activity without inhibiting the flow of information; a society's cultural traditions contain elements that cannot be articulated by anyone or productively tinkered with by government. Hayek rejects "constructivism," which is the assumption that "since man has himself created the institutions of society and civilization, he must also be able to

alter them at will so as to satisfy his desires or wishes" (1978, 3). Neither a society's economy nor its culture can be effectively planned.

The spontaneous order of the market takes advantage of the "division of knowledge" in a society, coordinating the actions of persons who do not share the same information (Hayek 1948, 50). Most of the data used in the market is "knowledge of the particular circumstances of time and place" that requires decentralized planning for its efficient use (1948, 80). Market prices condense concrete information in an abstract, flexible form that can be rapidly transmitted. The price mechanism makes communication more efficient and puts resources to their most desired use; as a result, individuals are more productive than under any alternative economic arrangement (Hayek 1976, 115–20).

The natural selection of cultural rules is another instance of spontaneous order. Hayek contends that cultural evolution proceeds through a group selection process in which rules conducing to productivity spread at the expense of less-efficient practices. A group that observes better-adapted rules can support a larger population, so its practices displace other practices as it grows and as members of competing groups adopt these more effective behaviors. Culture is reproduced primarily through imitation because much of the information that the culture's rules contain is "tacit knowledge" not readily transmissible through overt instruction (Hayek 1979, 153–69). Cultural evolution tends toward increasing group size, and its zenith is the "extended order": a system of cooperative interaction that in its scope and complexity far exceeds the capabilities of conscious direction (Hayek 1988, 6).

Although the market process and cultural evolution are distinct processes, they are closely related. Hayek expects rules that support market practices to supersede those that underpin premarket arrangements because intergroup competition in the production of wealth drives evolution forward. Hence, cultural practices that promote the division of labor, contract, and private property should emerge through group competition. The emergence of private property and competitive markets brings about the establishment and gradual enlargement of the individual liberty that characterizes life in the extended order. Traditions that support personal freedom are thus the products of cultural evolution (Hayek 1988, 29–47).

The legal framework appropriate to the extended order conforms to the "rule of law," which Hayek describes as a "meta-legal doctrine or a political ideal" (1960, 206). The rule of law requires that laws take the form of general rules that are universally applied (1960, 208–9). General rules, according to Hayek, can establish a competitive arena in which individuals may pursue their private aims. Commands or policies that deviate from the form of general rules are necessary to determine the outcomes of economic activity, so socialist planning and market intervention intended to decide the results of competition will violate the rule of law (Hayek 1976, 123–29).

The rule of law is central to Hayek's liberalism. The state's power is limited when it can apply only general rules to individuals and has no authority to issue commands to private persons. Within the bounds of general rules, individuals can choose and pursue

their private goals and possess a liberty limited only by others' equal freedom. To Hayek, liberal equality means equality before the law, not material equality, so liberalism recognizes no standard of justice determined by the pattern of income distribution. Where force and fraud are prohibited, property is protected, and contracts are enforced, liberal justice is served. Liberalism, then, demands limited government and thus restricts the power of popular majorities in a democracy (Hayek 1978, 132–43).

Interest-Group Politics and Spontaneous Order

Hayek sees interest-group politics as a threat to liberal government and the extended order. When a democratic institution is concerned with the political distribution of economic benefits to groups, group advantage becomes the basis of legislation, and the rule of law is likely to be violated. Political parties become coalitions of interest groups, and these alliances provide the legislative majorities by which such groups gain privileges that impose costs on the public (Hayek 1979, 5–19). As government interferes with market competition on behalf of favored groups, spontaneous order is destroyed. Intervention distorts prices and misallocates resources, and these problems precipitate further state direction to coordinate economic activity (1979, 89–96). Because economic competition among groups is the mechanism of cultural evolution, extensive state control of the economy can lead to the desuetude and disappearance of the evolved practices that gave rise to the extended order and that support its large population (1979, 170–73). The level of living and even the very survival of a substantial segment of that population may eventually be threatened when state control replaces the market (Hayek 1988, 7).

Hayek argues that a legislature empowered to violate the rule of law will grant exploitative benefits to interest groups. If the institution that makes the rules can also distribute favors through the design of policy, it will abuse its lawmaking authority by serving special interests. He contends that contemporary legislative institutions have become preoccupied with policy formulation to the detriment of the general rules necessary for spontaneous order because framing policy offers legislators opportunities to acquire political support by awarding privileges to interest groups. When the power to design policy and the power to enact general rules are combined in one legislative body, the former activity will gain the upper hand, and unrestrained government will be the result (Hayek 1979, 15–25).

Hayek's Ideal Constitution

Opinion over Politics

Hayek presents an “ideal constitution” to show how the separation of powers might most effectively limit the influence of interest groups (1979, 107). The theoretical rationale of his proposal bears a resemblance to David Hume's in “Idea of a Perfect

Commonwealth,” which is significant because Hayek invokes Hume in support of his own evolutionism and anticonstructivism (Hayek 1967). Hayek does not “wish to suggest that any country with a firmly established constitutional tradition should replace its constitution by a new one drawn up on the lines suggested” (1979, 107). This cautionary note follows from his anticonstructivism because, as Hume puts it, “[A]n established government has an infinite advantage, by the very circumstance of its being established; the bulk of mankind being governed by authority, not reason, and never attributing authority to any thing that has not the recommendation of antiquity” (1985, 512).

Hayek proposes that his constitutional model serves to illustrate the distinction between general rules and commands and indicates the former’s importance to preserving a free society (1979, 107–9). This proposal is mainly a speculative exercise, although it is plain that Hayek, like Hume, intends to indicate how existing constitutions might be improved “by such gentle alterations and innovations as may not give too great a disturbance to society” (Hume 1985, 514).¹ But Hayek also offers two practical applications for his plan, and in doing so he is following Hume’s example. Hume argues that part of the value of developing an ideal constitution is that “an opportunity might be afforded of reducing the theory to practice, either by a dissolution of some old government, or by the combination of men to form a new one, in some distant part of the world” (1985, 513). Hayek likewise suggests that newly formed democracies might profit from his scheme as a means of restraining the urge to place great power in public hands. He also proposes that international political organizations might benefit from his model in constructing institutions to perform limited functions in an effective manner. His ideal, then, is not simply speculative, but intended as a guide in designing actual political institutions.

Hayek’s ideal constitution does not enumerate substantive constraints on state power: “a constitution is essentially a superstructure erected to serve the enforcement of existing conceptions of justice but not to articulate them: it presupposes the existence of a system of rules of just conduct and merely provides a machinery for their regular enforcement” (1979, 38). His constitution’s political function is purely formal. It represents the metalegal doctrine of the rule of law because its “basic clause” defines the standards to which all law must conform, and its formality allows it to accommodate both types of spontaneous order (1979, 109). It does not produce a fixed set of rules, so it makes room for the evolution of a society’s culture, and legislation satisfying the basic clause will be in the form required for the operation of the market. There is a place for design in spontaneous order, albeit a limited one. At the level of constitution making, the purpose of design is to create institutions that support the spontaneous processes of evolution and market competition. As a formal

1. This passage is part of the motto of the chapter in which Hayek presents his ideal constitution (1979, 105).

task, deliberate constitutional design is facially consistent with Hayek's idea of spontaneous social order.

Hayek proposes that the distinction between laws and commands be embodied in a bicameral legislature. An upper chamber, the "Legislative Assembly," enacts the law that regulates individual conduct and the scope of government, and a lower chamber, the "Governmental Assembly," formulates public policy. The Legislative Assembly frames rules of conduct that must meet the rule-of-law standard. These rules govern behavior and specify individual rights. In establishing rights, laws enacted by the Legislative Assembly circumscribe the Governmental Assembly's authority over public policy. Hayek sees this arrangement as a twist on the traditional doctrine of the separation of powers that would more effectively limit the growth of government than does the doctrine found, for instance, in the U.S. Constitution (1979, 109–20).

Hayek argues that the Legislative Assembly should be elected in such a way that its membership reflects traditional ideas of just conduct and the Governmental Assembly's mode of election should make it responsive to the preferences of diverse social groups. He wants to exclude professional politicians from the Legislative Assembly, so he bars from membership those individuals who have been in political parties and the Governmental Assembly (1979, 111–14). He suggests that members of the Legislative Assembly should be "elected at a relatively mature age for fairly long periods, such as fifteen years, so that they would not have to be concerned about being re-elected" (1979, 113).² Voters can elect representatives to the Legislative Assembly only once and only when the voters themselves too have reached a mature age. Hayek adds that "only people who have already proved themselves in the ordinary business of life" should be members of the Legislative Assembly, and he remarks that "it could be expected that such a position would come to be regarded by each age class as a sort of prize to be awarded to the most highly respected of their contemporaries" (1979, 113–14). He clearly hopes that members of the Legislative Assembly will be steeped in market practices and the cultural rules of the extended order, but in any case middle-age voters are to elect their peers to the Legislative Assembly to represent their generation's conceptions of justice.

Hayek proposes the establishment of "political clubs" to aid the recruitment of candidates for election to the Legislative Assembly. These clubs would be organized according to age groups, discuss questions of political importance, and be publicly funded. He views the clubs as educational institutions meant to teach individuals citizenship, leadership, and the predominant values of their peers. They would thus provide a learning environment for future members of the Legislative Assembly as well as their electors (1979, 117–19).

Hayek's scheme also features a "Constitutional Court" with the power of judicial review. It can invalidate policies of the Governmental Assembly that violate rules

2. Hayek considers forty-five years of age appropriate.

enacted by the Legislative Assembly, and it can nullify acts of either chamber that contravene the basic clause of the constitution. Members of the court are appointed by a body composed of retired members of the Legislative Assembly (1979, 120–22). Because the court is selected by retired members of the Legislative Assembly, its views are likely to change more slowly than those of the upper chamber, but nevertheless, in the long run, the court's rulings will change in accordance with the views of justice represented in the Legislative Assembly.

A Mixed Constitution

Hayek's constitution is, in a loose sense, a mixed constitution. He suggests that "in choosing somebody most likely to look after their particular interests effectively and in choosing persons whom they can trust to uphold justice impartially the people would probably elect very different persons: effectiveness in the first kind of task demands qualities very different from the probity, wisdom, and judgment that are of prime importance in the second" (1979, 112).

Members of the Legislative Assembly should not be professional politicians, but rather individuals who have been elected for the qualities they have demonstrated in the conduct of their private lives. Hayek argues that the upper chamber's mode of election, in which middle-age voters select "'the most successful member of the class,' would come nearer to producing the ideal of the political theorists, a senate of the wise, than any system yet tried" (1978, 103). The upper chamber is to comprise a natural aristocracy. His mixed constitution differs from the traditional formula, which balances social classes. Instead, it balances the desires of organized interest groups, which attempt to influence the lower chamber, against the public interest in justice, which is represented in the upper chamber. In his mixed constitution, conceptions of justice expressed in law by the upper chamber constrain the pursuit of personal interests in the lower. This arrangement reflects a "hierarchy of rules" in which principles of justice have priority. Hayek sees constitutionalism as the establishment of such a hierarchy (1960, 178).

The separation of powers does not work without checks and balances because one element of government will tend to dominate the whole. Mixed government is one means of establishing the necessary checks (Gwyn 1965, 24–27; Vile 1967, 119–41). Hayek considers the public interest to consist in the application of a society's system of evolved rules and the additional legislative rules enacted to support spontaneous order (1976, 1–30). The procedures for electing the Legislative Assembly aim to ensure that those who delimit the state's authority are imbued with traditional conceptions of justice. Members of the upper chamber are to be individuals who have most internalized their society's traditional rules, which represent the public interest. The possession of this quality is what makes them a natural aristocracy, and in this qualified sense Hayek's constitution is a mixed one.

Norman Barry (1979, 190–94) and Ronald Hamowy (1982) have quite reasonably brought into question the feasibility of Hayek's functional differentiation of the

two chambers, but the practicability of the constitution's structure is not nearly as interesting as the sociological reasoning behind it. The Legislative Assembly is to be above politics. Members have no party, must never have had one, and will serve fifteen-year terms that they begin at a mature age. They may be chosen indirectly through the participatory apparatus of clubs and are to be those persons most admired by their peers. They are Hayek's natural aristocracy: an aristocracy of traditional virtue. Their preeminence in the legislative process is intended to inhibit interest-group pressure for measures contrary to the public good. The lower chamber is likely to be composed of professional politicians who must concentrate on reelection and therefore pander to special interests, so here the struggle for interest-group advantage takes place. Whereas the upper chamber represents traditional beliefs about justice, and its mode of election slows the pace of change, the lower chamber represents special and party interests and is elected in a manner meant to make it more responsive to popular demands. Special-interest politics in the lower chamber is kept within the bounds of justice by the upper chamber's natural aristocracy.

Opinion and the Separation of Powers

Hayek intends to show how the separation of powers can best limit the scope of control that government exercises over individual conduct, leaving ample room for the spontaneous social processes of the market and cultural evolution. Political power can be restrained by principles of justice that are the products of cultural evolution, and Hayek's ideal constitution is designed to place evolved beliefs concerning the limits of public authority in a position to control policymaking. His plan does so by placing at the head of the legislative process individuals recognized by their peers as best exemplifying their generation's conceptions of justice. The principles that limit government are thus grounded in culture, but it is clear that the extent to which the powers of government are restricted depends on how demanding those principles are.

Cultural evolution generates a people's "sense of justice," which is the predominant opinion in a society concerning what kinds of conduct are acceptable. Hayek contrasts "opinion," which reflects this sense of justice, with "will," which refers to the means chosen to realize particular states of affairs. Because the sense of justice contains abstract ideas about right and wrong conduct, opinion is represented in general rules. Opinion constrains the exercise of will. In private conduct, opinion narrows the range of acceptable means for pursuing goals; in public policy, it limits the scope of state action. The form of opinion, or general rules, is one source of restraint. Another limitation issues from the substance of opinion: policies that contradict the society's sense of justice will be eliminated under a well-ordered constitution (Hayek 1978, 81–94). The political function of opinion is embodied in the structure of Hayek's bicameral legislature in that the upper chamber represents opinion and the lower chamber represents will (1979, 104). The upper chamber determines what types of private and state actions are acceptable, and the lower chamber

decides what goals shall be pursued subject to these restraints, so state power is limited by the opinion on justice found in the upper chamber (1978, 155).

Law, Opinion, and Liberty

Critics have interpreted Hayek as arguing that the rule of law is sufficient to establish the individual rights necessary to liberalism. The consensus among these critics is that this argument is a weakness of his political theory because general rules may so limit the individual's choices as to create a nonliberal society (Gray 1986, 61–71). Hayek does, however, express reservations concerning the efficacy of general rules in protecting personal freedom. He admits that “even rules which are perfectly general and abstract might still be serious and unnecessary restrictions of individual liberty,” and he attempts to fortify the rule of law by adding that only “actions towards others” should be subject to regulation (1973, 101). He recognizes that there is no obvious means of determining which actions are “other regarding,” and he concedes that this qualification is no guarantee of liberal law. He suggests, for example, that if most people believe their society will be punished for the sins of a few, sin becomes an other-regarding action (1973, 101). The classes of actions that come within the law's purview are thus culturally defined, and culture may produce distinctly illiberal general rules.

The range of actions considered other regarding must be narrowed to protect individual freedom, and this condition extends to economic as well as civil liberty: “The law evidently cannot prohibit all actions which may harm others. . . . [S]ome harm knowingly caused to others is even essential for the preservation of a spontaneous order: the law does not prohibit the setting up of a new business even if this is done in the expectation that it will lead to the failure of another” (1973, 101–2). If market competition and sin are culturally defined as other-regarding actions, Hayek's qualified rule of law can permit illiberal intrusions on individual liberty. Contrary to his critics' assertions, however, he does not believe that the rule of law is a guarantee of liberal rights, but rather that although “[this principle] leaves open possibilities of enforcement of oppressive rules . . . [it] seems to be as effective a method of minimizing coercion as mankind has yet discovered” (1967, 350).

He sees the rule of law as a necessary but not a sufficient condition of a liberal society. Liberalism requires the substantive condition of a liberal sense of justice as well as the formal condition of the rule of law. Hayek's ideal constitution is designed to give cultural rules primacy in a society's political affairs, but an evolved sense of justice must contain specific sentiments to preserve liberal social arrangements. He argues that

liberty, to work well, requires not merely the existence of strong moral convictions but also the acceptance of particular moral views. By this I do not mean that within certain limits utilitarian considerations will contribute to alter moral views on particular issues. . . . I am concerned rather with

some more general conceptions which seem to me an essential condition of a free society and without which it cannot survive. The two crucial ones seem to me the belief in individual responsibility and the approval as just of an arrangement by which material rewards are made to correspond to the value which a person's particular services have to his fellows. (1973, 231–32)

Liberalism relies on these beliefs' being widely held; competition and moral judgment presuppose individual responsibility, and the acceptance of market distribution is necessary to avert demands for intervention to redistribute wealth. Like James Madison, Hayek argues that social diversity presents a useful barrier to the formation of majority support for oppressive measures, but he also holds that a limited cultural consensus that restricts the state's authority is essential to a liberal politics (1979, 17–19). Constitutional design and political tradition are important because in the absence of structural or traditional restraints on the exercise of power, political bargaining will generate intervention. For Hayek, however, liberalism requires not only certain political practices, but also a cultural inclination toward liberalism.

A cultural disposition favoring liberalism will also include support for the rule of law. Public authority can be limited by "the existence of a state of opinion which commands implicit obedience to the legislator so long as he commits himself to a general rule, but refuses obedience when he orders particular actions" (1973, 93). Opinion, however, can also support unlimited government. "That all power rests on opinion in this sense is no less true of the powers of an absolute dictator than those of any other authority. As dictators themselves have known best at all times, even the most powerful dictatorship crumbles if the support of opinion is withdrawn" (1973, 92).

As Hume, whom Hayek is clearly following here, stated, it is "on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as the most free and most popular" (1985, 32). Hume means that coercion is not sufficient to control an uncooperative population indefinitely, so a supportive opinion is necessary for any regime's long-term survival. Hayek follows Hume this far, but he goes beyond Hume by assigning a more constructive role to opinion. Hayek is concerned not only with the sources of political stability, but also with the means of preserving liberalism. The function of his constitution's upper chamber is to articulate cultural rules and defend the rule of law, but the degree to which it limits government turns on the opinion it represents. In Hayek's view, liberal opinion is requisite to liberal government.

Hayek's ideal constitution illustrates the significance of opinion. The Legislative Assembly and Constitutional Court are responsible for defining the limits of public authority. The Legislative Assembly is an elective institution, and its retired members appoint the court. Hayek recognizes that "judicial review is not an absolute obstacle to change," and his plan ensures that each generation's view of justice will eventually be reflected in both the upper chamber and the court, so the qualities of the laws these bodies enact or uphold will depend on the opinion they represent (1960, 192).

If opinion does not demand that legislation conform to the rule of law, or if opinion wants oppressive general rules, nothing can preserve liberalism in the long run.³ In the lower chamber, interest groups and electoral competition exert a constant pressure for market intervention and deprivations of liberty, so the extent of restraint on state power hangs on the opinion represented in the Legislative Assembly and the Constitutional Court.

The rule of law and constitutional practice or structure are necessary but not jointly sufficient conditions for a liberal politics. A body of opinion that demands limited government is an additional necessary condition for the persistence of liberalism over the long run. Liberalism thus has both formal and substantive requirements, and in the absence of either, it will falter.

Illustrations and Some Difficulties

Hayek does not mean to offer his ideal as a replacement for all constitutions; if opinion supports a nonideal constitution that effectively limits political power, there is no reason to replace it. He does, however, suggest two practical applications for which his constitution might be employed: newly formed democracies and international political institutions. The difficulties these applications present stem from the importance Hayek places on a liberal sense of justice. In either case, a consensus favoring liberal political principles is necessary if his plan is to be applied successfully. Hayek's anticonstructivism leads to the conclusion that there is a disconcerting unpredictability in the prospects for liberalism because liberalism depends on a particular cultural inclination whose existence no one can control.

New Democracies

Hayek suggests that a new democracy "without a tradition even remotely similar to the ideal of the Rule of Law" might profit from using his scheme as a guide in constitutional design (1979, 108). A basic clause that explicitly states the rule-of-law standard is essential here because "the particular institutions which for a time worked tolerably well in the West presuppose the tacit acceptance of certain other principles which were in some measure observed there but which, where they are not yet recognized, must be made as much a part of the written constitution as the rest" (1979, 108).

It is arguable that this proposition conflicts with Hayek's anticonstructivism. One might wish that a new democracy observe the rule of law, but if the people do not believe in the value of a Hayekian basic clause, that clause will be a dead letter

3. The long run is Hayek's definite perspective. An abiding concern with the long-term effects of moral and political practices forms the background of his thought. See his disdainful words on John Maynard Keynes's remark that "in the long run we are all dead" in Hayek 1988, 57.

before long. It would be constructivistic, in his sense, to assume that constitutional design will provide what cultural evolution has not.

However, a new democracy's deliberate adoption of the rule of law need not run counter to Hayek's evolutionary theory, which holds that evolved rules are transmitted by imitation and that practices proven successful in a group may be taken up by others. Hayek expressly contends that developing states may consciously imitate the market rules evolved in the industrialized countries (1988, 134). His anticonstructivism leads him to expect that such progressive change will more likely succeed where it is shaped by the experiences of the society in which it occurs. Concerning the prospects for German liberal democracy in 1945, he argued that "if there is to be any lasting change in the moral and political doctrines dominating Germany, it must come from within" (1992, 227–28).

Even if a constitution is imposed from without, the opinion needed to support it must be available if it is to endure, and opinion will grow in its own way. Hayek's constitutional thought is consistent with his anticonstructivism because he does not believe that liberalism can be imposed on a society by a paper constitution, but rather that liberal political practices depend on culture. His ideal constitution requires an opinion that favors the rule of law and limited government to sustain a liberal politics. If the new democracy lacks this kind of opinion, contrary views will be represented in the upper chamber, and liberal safeguards will break down. In the long run, everything depends on opinion. The political implications of Hayek's anticonstructivism seem relevant as one considers the chances for liberalism in light of the recent wave of democratization.

International Organizations

Hayek's ideal international political organization would establish collective security and develop a system of international law prohibiting aggression. It would, in addition, establish global free trade, removing all obstacles to the free movement of labor, capital, goods, and services. Hayek views free trade as a prerequisite of an effective global security arrangement because it will create a harmony of interests among states, thus eliminating economic sources of political conflict. International economic policy should meet the rule-of-law standard, so policies aimed at promoting the interests of particular states or groups would be disqualified. Many interventionist policies would become irrational. States could not, for example, increase the prices of domestic goods by buying surplus stock. Heavy regulation, moreover, would place domestic producers at a disadvantage in international competition, and high taxes would inhibit productive investment and induce a free labor force to move elsewhere (Hayek 1944, 219–40; 1948, 255–72).

Hayek acknowledges that this proposal is a visionary scheme (1944, 237). The international organization he outlines would work only if most of the world's population adopted liberal values. National governments would have to open their markets

to universal competition and severely reduce domestic intervention; such radical policy change would require a supportive opinion to remain in place. If Hayek's ideal constitution is used as a guide in constructing the international organization he has in mind, the emergence and persistence of a liberal world system would turn on the opinion its institutions represent. In international as well as domestic politics, liberalism depends on opinion.

Preserving Liberalism in the Extended Order

Apart from the challenges presented by Hayek's proposed applications for his scheme, the reproduction of a liberal sense of justice raises another kind of problem. Hayek suggests that even where a liberal tradition exists, spontaneous developments may undermine the belief system on which liberalism depends. He remarks that one source of intervention in the advanced industrial states is that "an ever increasing part of the population of the Western World grow up as members of large organizations and thus as strangers to those rules of the market which have made the great open society possible. To them the market economy is largely incomprehensible; they have never practised the rules on which it rests, and its results seem to them irrational and immoral. They often see in it merely an arbitrary structure maintained by some sinister power" (1979, 165).

His point is reminiscent of Joseph Schumpeter's contention that capitalism will destroy itself in spite of its economic accomplishments because it engenders a culture hostile to the market (1950, 121–63). The emergence of large firms is a spontaneous development brought on by the needs of the extended order and fosters cultural changes inimical to capitalism. Note that these changes, favoring practices well suited to employment in large organizations, might be accounted for by their propensity to increase group productivity and therefore fit well into Hayek's theory of cultural evolution. In other words, there is no guarantee that a liberal sense of justice will reproduce itself, and the market's spontaneous order may disturbingly generate cultural changes that threaten to annihilate the market itself.

Government versus Spontaneous Order

The foregoing considerations suggest that under Hayek's approach, a liberal political order is in fact quite fragile and that its persistence depends in large part on chance. This conclusion points toward a more fundamental problem with Hayek's constitutional theory: it underscores the notion that the governmental enforcement of some rules is inconsistent with his theory of social evolution.

The rule of law in Hayek's thought pertains only to the form, not the content, of the law. The formality of his rule-of-law criteria is necessary to his legal and political thought because he intends to leave the law open to evolved change. But his distinction between spontaneously evolved change and constructivist intervention does not

withstand scrutiny when one attempts to apply the contrast to a specific political act or decision (Sandefur 2009). As Timothy Sandefur argues, what may appear to one person as the application of an evolved rule may just as readily appear to another as constructivist intervention. The production and implementation of law involve competitive processes that differ entirely from the group competition envisioned by Hayek's evolutionary social theory. Group competition in politics is both different from and in conflict with spontaneous social evolution. This fact is vitally important to Hayek's constitutional theory because although he seeks to establish the intellectual framework for a liberal political order, his reliance on spontaneously evolved social rules prevents him from doing so.

Hayek supposes that evolved social rules possess efficiency properties because they have proved effective, with regard to group survival, in competition with other rules. But the competitive landscape is changed where government enforces certain rules. Once government enforcement privileges some rules, the cost of violating those rules is such that they have a decisive advantage over alternatives not because the governmentally enforced rules have inherently greater survival benefits, but because the cost of violating them makes the alternatives less advantageous to follow. The sanctions that attend violations of the law are what ultimately secure obedience to the law and loyalty to government (Higgs 2005). Thus, the survival benefits of obedience to law and government differ from the benefits that Hayek's social theory supposes evolved rules to bestow on the groups that follow them in competition with alternative rules. Government enforcement of certain rules necessarily inhibits the group competition on which Hayek's evolutionary social theory depends.

To illustrate the problem, consider, for example, Sunday Blue Laws. Such laws may prohibit a business from selling alcoholic beverages on Sundays because popular opinion opposes the practice. Persons who would like to sell alcoholic beverages on Sundays and their potential patrons are prohibited from testing the practice against alternative social rules because the governmentally enforced rule prevents them from doing so. The states in the United States, for example, possess the police power, which is the power to legislate for the health, welfare, and morals of the people and is regarded as a "substantial governmental interest."⁴ The breadth of such regulation is expansive and consistent with Hayek's rule-of-law criteria.

Hayek's legislative bodies are fatally at odds with the idea of spontaneously evolved moral rules. He intends the upper chamber to reflect evolved opinion in the society it governs, which means that it will reflect the views of the dominant social group and give that group the power to enforce its opinion on all citizens. Hence, that group effectively governs, and its governance renders the "rule of law" an abstraction and a symbol without substance. Law is made and interpreted by those who have the power to do so, and for this reason the law tends to support existing

4. See, for example, *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986), upholding regulation of advertising for casino gambling against First Amendment challenge.

power relations in a society (Hasnas 1995). Enforcement of some rules over others must interfere with the free competition among groups following different social rules on which Hayek's social theory rests. Government and law, for these reasons, do not mesh smoothly with Hayek's evolutionary social theory. His effort to build a liberal constitutional scheme to accommodate spontaneously evolved rules is ultimately self-contradictory.

Conclusion

Conscious design, in Hayek's view, can go only a short way toward establishing and maintaining a liberal constitution. Cultural rules that support economic and civil liberty are the products of evolution, and the preservation of liberal government depends on the political primacy of such rules. Traditions that restrain public power emerge through economic competition among groups; evolution, rather than conscious planning, is the source of a liberal culture. Constitutional design can provide the institutions through which liberal traditions are expressed in law and limit the state's power, but an ideal constitution is not itself a mouthpiece for political values. A society's political values are the product of a spontaneous order, and a well-designed constitution accommodates evolving traditions without seeking to shape cultural change. The only value the ideal constitution contains is a formal one: the rule of law. Beyond this, a constitution should be neutral concerning values. A society speaks through its constitution, but the constitution does not speak for society.

There are few certainties in a world driven by competition. Hayek's ideal constitution provides a social arena in which individuals and groups may compete, but it accordingly supplies little assurance of the cultural and hence the political future. His constitutional thought suggests that democratic liberalism requires for its persistence a cultural disposition favoring limited government. His evolutionary theory presents the outline of a process through which liberal rules might emerge, but it does not predict that these rules will persist indefinitely, and he recognizes that liberalism may contain self-destructive tendencies. These problems underscore that government necessarily interferes with the spontaneous social processes on which Hayek's evolutionary social theory depends. His message is that constitutional mechanics, though important, are inadequate to sustain limited government and that liberalism ultimately depends on circumstances over which we have no control.

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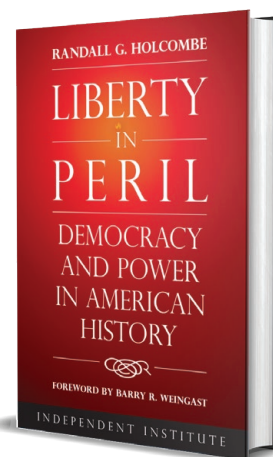
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