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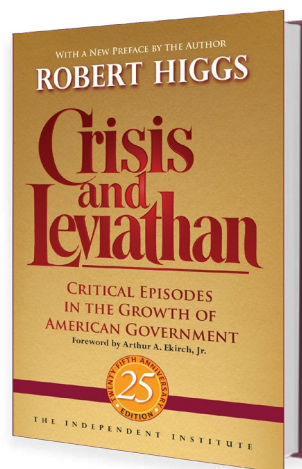
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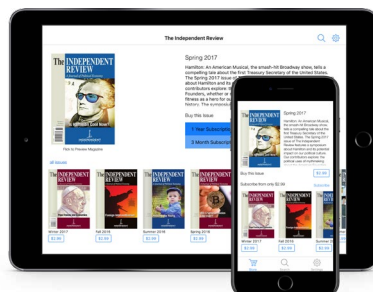
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# The Mirage of Democratic Excesses

## *Hayek's* Law, Legislation, and Liberty

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LEONIDAS ZELMANOVITZ

In the 1950s, Friedrich Hayek (1899–1992) was already a well-respected intellectual, with important contributions to monetary theory, the theory of business cycles, the methodology of economics, and capital theory. Furthermore, he had already begun his contributions to epistemology, psychology, and moral and political philosophy that went well beyond the narrow confines of political economy.

His intellectual journey and the political circumstances of his time led him from his native Austria to a position at the London School of Economics and in 1950 to a post as professor of social and moral sciences at the University of Chicago, where he remained until 1962. It was there that he started focusing on the topics of political philosophy that would occupy most of his attention for the rest of his life.

At the London School of Economics, Hayek engaged with John Maynard Keynes and others in debates about economic policy with wide sociopolitical consequences and deep philosophical underpinnings. His classical liberal ideas were perceived, rightly so, to be critical of his peers' more constructivist, rationalistic, interventionist views. As a result, some of his interlocutors challenged him to offer a positive statement of what

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would be the features of this classical liberal order in contrast to their more interventionist prescriptions. What would be the contours of a liberal regime that would be attuned with the times and not simply a nostalgic and impractical return to the liberal-conservative regime destroyed by the Great War, the Great Depression, and World War II? How would his principles of political organization cope with the socioeconomic problems of the post–World War II period?

Hayek answered the challenge of proposing a liberal positive program with *The Constitution of Liberty* (1960), where the rule of law is highlighted as the main instrument to limit the discretionary powers of government (Caldwell 2005, 289).

The need to use the knowledge dispersed among the individual members of society is an essential feature of any human society because the efficiency of their interactions depends on their ability to harness that dispersed knowledge. Hayek attributes the relative success of any human society in allowing its members to prosper, if compared with other societies, to the extent to which that society is able to establish limits on the state’s coercive powers. As the central argument of his article “The Use of Knowledge in Society” (1945) goes, the central economic problem is “how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know” (519). For Hayek, to allow for cooperation among individuals, human societies have just three possible systems, and the answer to the question of “which of these systems (competition, central planning, or monopoly) is likely to be more efficient, depends mainly on the question under which of them we can expect that fuller use will be made of the existing knowledge” (1945, 519). His answer: it is only in a system in which private-property rights are protected that individuals are free to engage in exchanges and that a price system is established that will convey all the information needed for the most efficient coordination possible among the myriad individuals, each one pursuing his own ends in the open society. The progress of civilization is based on the relation between the social institutions of a free society and the market order, between the political and economic freedom and the creation of wealth. Therefore, our well-being depends on the creation of a sphere of individual freedom in which individuals are free to exercise the use of their particular knowledge and to benefit from such exercise. The rule of law, in this context, basically gives the criteria by which government’s rule making should be judged and by which good interventions are separated from bad interventions (Caldwell 2005, 290). With the rule of law, the legal institutions on which the market order depends are separated from the privileges and rent-seeking arrangements that in the end simply destroy the conditions and the incentives under which individuals may strive for their advancement in a non-zero-sum game. For instance, “equity” (equality before the law) is part of the rule of law. If one accepts that, all redistribution of income becomes unacceptable (Caldwell 2005, 291). In practical terms, the spontaneous order is mostly upheld by rules, but rules are not commands—a distinction that is crucial in *The Constitution of Liberty*.

Given the achievements of *The Constitution of Liberty*, what was Hayek's intention in writing the massive three-volume work *Law, Legislation, and Liberty* (hereafter *LL&L*) immediately after finishing that book? Bruce Caldwell explains why Hayek undertook the latter project: "Hayek felt that the constitutional constraints that he praised so highly in the earlier book had failed in practice to limit the growth of government" (2005,312). The goal of the new work was to find an explanation for that failure, and Caldwell, quoting Hayek from *Rules and Order* (1973), the first volume of *LL&L*, writes that "'governments everywhere have obtained by constitutional means powers' that the architects of liberal constitutionalism had expressly meant to deny them (Hayek, 1973, 1)" (2005, 312–13, citation in the original). The purpose of *LL&L* was therefore to restate the *ideals* of constitutionalism that have failed in practice, and Hayek would do that using this new language of rules, order, and evolution.

The *LL&L* trilogy consists of *Rules and Order* (volume 1, 1973), *The Mirage of Social Justice* (volume 2, 1976), and *The Political Order of a Free People* (volume 3, 1979).

In *Rules and Order*, Hayek describes how political society has evolved from its most primitive forms, when human beings "stumble[d] upon" arrangements that allowed for the introduction and expansion of the division of labor. As I argue in *The Ontology and Function of Money* (2015), concurrently with the evolution of social organization (from the clan to the state) and the evolution of technology (from gathering to metallurgy)—which occurred over thousands of years with different beginnings in different places through a process of trial and error—other purely spontaneous social institutions arose: languages as we know them today, for instance (16). There is no better example of a spontaneously generated social institution than language to draw an analogy with markets. Languages were created many tens of thousands of years before the first states; they appeared to supply a human necessity, and no one commanded their use because doing so was not necessary. The ability to speak is so intrinsically a human attribute that some perceive it as *the* distinctive human attribute. This link between human nature and a spontaneously generated social institution can be perceived in the markets as well. Hayek differentiates two kinds of social orders: orders by command (*taxis*), like an army, and spontaneous orders (*kosmos*), like languages. Both orders are human creations, arranging some social interactions. It is important to note that the main distinction between them does not rely on the presence or absence of coercion in each. For instance, a spontaneous order can be quite coercive (a hierarchy of caste or sex), and freedom can be achieved through an order of command where markets and the rule of law are established by deliberate design and imposition, as in the United States. The main distinctions between the two kinds of social orders need to be found elsewhere. Among the distinguishing properties of spontaneous orders are that (a) their degree of complexity is not limited to what a human mind can master, (b) their existence can be based on purely abstract relations, and (c) because they are not consciously created, they cannot be said to have a purpose. An individual can act according to such orders, but that is obviously a different thing, and it is a key factor to

keep in mind when analyzing the role of money in society, for instance. When human beings need to coordinate efforts to reach the same goal, command orders are usually preferred, but when individuals need to coordinate their efforts to allow themselves to pursue their own individual goals, spontaneous orders usually are a more suitable form of social coordination. It is this characteristic of spontaneous orders, that they create the conditions of the normal life of individual agents inside them—that is, of the life according to norms of their own choosing—that may be named their “metanormative” character. For Hayek, “[s]ociety can thus exist only if by a process of selection rules have evolved which lead individuals to behave in a manner which makes social life possible” (1973, 44).

In *The Fatal Conceit*, Hayek explains the emergence and evolution of the spontaneous order of the open society in the West over the centuries from the end of classical antiquity to the middle of the twentieth century and its spread to the most developed parts of the globe, which adopted institutions of limited and representative government:

To understand our civilization, one must appreciate that the extended order resulted not from human design or intention but spontaneously: it arose from unintentionally conforming to certain traditional and largely *moral* practices, many of which men tend to dislike, whose significance they usually fail to understand, whose validity they cannot prove, and which have nonetheless fairly rapidly spread by means of an evolutionary selection—the comparative increase of population and wealth—of those groups that happened to follow them. (1988, 6, emphasis in original)

The establishment of the most efficient social order to promote the flourishing of all its members may be understood, in the most benevolent interpretation possible, as the goal of those for whom social justice is not a mirage. For Hayek, however, as he explains in the second volume of *LL&L*, *The Mirage of Social Justice* (1976), the only equality possible among men is equality before the law. Any attempt to reduce the inequality of men in their endowments in the hope of reducing the disparity of outcomes would result in the destruction of equity, the only equality possible: “Since people will differ in many attributes which government cannot alter, to secure for them the same material position would require that government treat them very differently” (Hayek 1976, 82).

So the stage is set for what Hayek proposes in *LL&L* volume three, *The Political Order of a Free People* (1979). Human society is both the product of rules and commands, of the rule of law and the rule of men. Once granted unlimited power, the majority is tempted to give power to those who promise to transfer wealth to them, and when that happens, the metanorm of society, justice, is infringed, and the classical liberal political arrangements responsible for our success in the past two hundred years—arrangements at which we have arrived by trial and error—are compromised and cease to perform as expected.

Therefore, it is not surprising that one of the main tragedies of our time is the unfulfilled promises of Western democracies. Even if we put aside the totalitarian abuses of the French Revolution or the Fascist and Nazi lapses as things of the past, or if we attribute the Marxist-inspired institutional ruptures in Latin America from time to time to be more properly a consequence of the lack of legitimate representation and not so much of its excess, there is still much to be criticized in the political arrangements of Western and westernized countries. Such arrangements, which we may call “liberal democratic,” have been incapable of imposing effective checks and balances on the abuses of power by governing elites. As a consequence, fiscal crises, capture of the apparatuses of coercion, and coercion’s use as an instrument for the extraction of privileges have been the rule in every modern democracy. Of course, that does not mean that there is a better alternative, to paraphrase Winston Churchill. The critics of the liberal democratic order are in general from a totalitarian inspiration. Emblematic of someone wearing those stripes is the National Socialist ideologue Carl Schmitt, for whom only a totalitarian government would have the necessary power to prevent the inevitable barbaric outcome of the complete collectivization of human society proposed by the Bolsheviks. As we know, Schmitt was wrong in more than one aspect of his thought, and it was the liberal democracies that in the end mobilized the forces necessary to overcome not only Nazism in the mid–twentieth century but also Bolshevism at the end of that century. Although the totalitarian critic of liberal democracies was proved wrong, it does not mean that there are no flaws in that model of political organization if it is understood as an instrument for individual human flourishing, a tool for enabling each member of society the best possible conditions to actualize the maximum of his or her potential to try to find happiness in his or her own way.

Hayek is a different kind of critic of liberal democracies; he sees the major menace to open societies in the weakening of the checks and balances on the abuses of power *inside* the democratic order. The unjust deeds perpetrated in democratic societies by constitutionally unchecked majority rule or the mockery made of instrumental institutions originally intended to limit such abuses, once those institutions are used as means to perpetrate them, are the Achilles’ heel of modern societies, according to Hayek. To solve this problem, Hayek advocates in *The Political Order of a Free People* (1979) the construction of a new constitutional edifice that would establish a new constitutional regime called *demarchy*, with a nonpartisan legislative body as its cornerstone. Hayek became disillusioned with the advances of legislation over what would be the proper domain of spontaneously discovered rules, ideally to be discovered by an impartial judiciary. Skeptical about the possibility of putting that genie back in the bottle, he offered with that proposal what I perceive as a second-best option: the assignment of authority over those rules that we may call private law to a nonpartisan higher chamber of the legislature. It is basically this constitutional model that we may consider as the culmination of Hayek’s contribution to the constitutional debate accomplished with the publication of *Law, Legislation, and Liberty*. With the proposal of demarchy and its varied mechanisms of limited franchise, Hayek aimed to take away

from partisan meddling the rule-making power over private law in the hope that some of the essential elements of the spontaneous order in place before 1914 could emerge again.

One may go even further than Hayek in skepticism regarding the possibility of making political parties a useful element in a representative and limited regime; for some, there is no way to reconcile the corporative character of groups of people gathered with the goal of wielding political power and an adequate political representation of society in a regime of limited government. In this sense, in an assessment of current democratic institutions using as the main criterion the ideal of limited and representative government embodied in the Anglo-Saxon concept of *rule of law*, it would have to be concluded that the ideals of representation and limited government have been abused. The political representation we now have in most Western countries has failed to keep a constitutional order that prevents such abuses from happening, has failed to prevent unjust laws from destroying the foundations of Western societies, has hindered economic growth, has created perverse incentives that induce demographic suicide, and so on.

For the same reason, knowing and studying Hayek's model should be in the interest of everyone worried about the future of individual freedom in this world and not just of American intellectual elites in search of reforming our political regime in order to assure the continuous progress of the "last best hope of Earth" (to use Abraham Lincoln's phrase in another context). However, *LL&L* has a gap, a curious one. It is the constructivism of the proposal—the relation between spontaneous orders and command orders and how such a relationship operates in the establishment of the demarchy. Perhaps Hayek thought this topic outside his already ambitious project. But, even aside from the possible strengthening of his thesis that, in my judgment, such a discussion could bring, this absence is curious. Hayek accomplished an important feat with his model, an original intellectual contribution of many dimensions. First, it offers a guide to constitutional reform of a modern and large society that intends to lay a solid foundation for further progress, teaching lessons that apply well beyond American shores. Second, it offers a criticism of Western-style democracy without incurring the same methodological and substantive mistakes of totalitarian, antidemocratic critics.

The importance of Hayek's model as a template for the non-antidemocratic critics of current political arrangements in Western society can be illustrated with the recent work of one of those critics. Trustful of Friedrich Hayek's demarchy model of constitutional reform, in *China Lectures* (2014) José Stelle not only does justice to Hayek in his description of the proposal but also goes further and offers some changes to Hayek's proposal that represent significant improvements to the stated aim of improving governance of political society. The six lectures are an explicit tribute to Ludwig von Mises's six lessons on economics and purport to be their political counterpart. The six lessons are (1) "The Ideal of the Rule of Law"; (2) "The Anglo-American Model," with emphasis on the U.S. Constitution; (3) "Critique of American Constitution I: The Main Imperfection of Liberal Constitutionalism"; (4) "Critique of the American

Constitution II: Democracy, or the Illusion of Freedom”; (5) “The Republican Model Redefined I: Hayek’s Constitutional ‘Reinvention’”; and (6) “The Republican Model Redefined II: Beyond Hayek’s Constitutional ‘Reinvention.’” Such a structure serves a double purpose; not only can the six lectures be read as a primer for constitutional theory from a perspective profoundly influenced by Hayek, but they can also serve as a guide for further research programs in the field.

To begin with the rule of law makes perfect sense because it is the central principle of a constitutional system. The lecture on the Anglo-American model stresses the continuity between the British and U.S. Constitutions, in which the common law is not a minor part, and accurately points out that the rupture between the American colonies and the United Kingdom was a war against the British Parliament and its absolutist conception of sovereignty. With the third lecture, Stelle critiques liberal constitutionalism from the perspective of methodological individualism. The fourth lecture has its focus on the “democratic flaw” of the U.S. Constitution and the illusive freedom brought by unchecked majority rule to any polity that accepts it instead of (constitutionally) limited and representative government. The fifth lecture explores the divide between the theory and the practice of constitutionalism in the United States and argues the case that this divide is a flaw common to all Western democracies. Finally, the sixth lecture offers the extent of Stelle’s skepticism about the compatibility of republican forms of government and unlimited majority rule. The focus of this lecture’s criticism is the recurrent capture of political power by vested interests seeking privileges for themselves and imposing unjust outcomes by legal means.

In coming to a finish here, we may ask ourselves how successful Hayek was in answering the challenge of his critics to propose a classical liberal program for the postwar world. The answer must be, “Not successful enough.” One may agree with Hayek on the important balance between spontaneous and rational arrangements for the establishment of an open society. One may agree with him on the prerequisite of justice for the other norms to hold society together. We may agree with him that attempts to create equality of opportunities and equality of outcomes cannot be performed without compromising equality before the law and therefore compromising the entire edifice of the open society. One may even agree that political parties represent a problem for political representation. Yet the solution has always been to convince the majority that justice is paramount and to increase the franchise of the people for their voice to be heard, not to reduce it. Hayek’s mistake, the same mistake made by his nontotalitarian critics, was to indulge in elitism and in a skepticism regarding what the people would decide if given the chance.

A sober appreciation of most of the political problems faced by Western democratic regimes today may be attributed to a democratic *deficit*, not to a democratic excess: the lack of representation in the European Union and the encroachments by the “deep state” (public-sector bureaucracies and vested interests) through the administrative state on the checks and balances of the U.S. Constitution. Political parties are groups of people united in the purpose of gaining political power in order to exercise it.



Treating them as if they were part of the public institutions of government is to give them monopolistic power, and nothing is more evident of this than the duopoly of political representation in the United States. The fact that “no man’s life, liberty or property are safe while the Legislature is in session” is a consequence not of an excess of representation but of the lack of limits self-imposed by the legislature. And to think that those limits may be imposed if you reduce the franchise is the nostalgic and impractical wish to return to the liberal-conservative regime of the belle époque, however disguised it may be in the garb of demarchy. If political parties are abusing their market dominance, open the market for competition. If the administrative state is captured by vested interests, do not give those interests the power to become even less accountable, as was done at the creation of the Consumer Financial Protection Bureau. Even if you give only lip service to the ideal of self-government for practical reasons—and I emphatically believe that Hayek was not among those who do that—given the instability of any political regime that is not supported by the majority, we need to be open to majority rule and be merciful, as Portia says in *The Merchant of Venice*:

Though justice be thy plea, consider this—  
That in the course of justice none of us  
Should see salvation. We do pray for mercy. (act 4, scene 1)

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