Hayek’s Theory of Spontaneous Order and the Normative Development of the Free Market and Common Law

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ABSTRACT:

The work of F.A. Hayek outlining spontaneous order is a frequent element of debates about political economy, but in that context the argument is frequently ideological rather than practical and helpful. Hayek also described the role of spontaneous order in the development of common law, making both descriptive and normative observations about jurisprudence. An exploration of the role of spontaneous order in debates about both political economy and common law highlights the limitations that even Hayek placed on the application of spontaneous order: laws of conduct should develop without legislation or central design, while organizational laws need to be steered more intentionally. Similarly, organizational and structural management of commercial activity may be appropriate even as—and so that—free markets encourage economic growth and prosperity. These connections reframe an important set of debates and clarify critical detail about politics, society, policy, and the underlying theory and philosophy.

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I. INTRODUCTION:

The debate over the development and proper management of the free market underlies virtually every discussion on the political landscape. It is such a hot debate that productive discussion is deeply challenging. What if a reasoned discussion of common law—a less fiery field of inquiry—would enable progress in the more burning questions of political economy?

Common law evolved out of 12th and 13th century reforms in the English legal system initiated by edicts or assizes of Plantagenet King Henry II. The questions presented with any historical development include “how?” and “why?” these developments occurred. Was there an evolutionary process at play or was it intentional design? Friedrich von Hayek⁴ advances the hypothesis that the common law is the result of spontaneous order.⁵ He advances this theory along with the twin theory that the evolution of the laissez faire market also evolved out of “spontaneous order.”

Hayek, of course, is better known for his work on spontaneous order in the markets than for his work on common law, so the appeal to Hayek connects common law with the debates over political economy that shape civic dialogue and behavior across the world at this very moment. For analysts of either law or political economy, one of the primary questions is how much the systems should be shaped positively and how much they should be allowed to develop organically. It often seems that proponents of one view of the other not only disagree with, but indeed find it impossible to conceive of, the other side of the argument. Perhaps the law, which has been developing longer than the free markets, can

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⁵ A.I. Ogus, Law and Spontaneous Order: Hayek’s Contribution to Legal Theory, 16 J.L. & SOC’Y 393–409, 393 (1989) in which Ogus writes “After a short account of Hayek’s approach to social science methodology, I saw how he uses an epistemological theory to develop two models of social organization: spontaneous order, which he identifies with the market and with common law, and rational constructivism, which is associated with a planned economy and regulatory law.”
be an important context: the balance of powers in the common law may contribute to a fuller understanding of one of the primary questions of political economy.

Hayek’s theory of spontaneous order is the connective tissue, and this paper explores Hayek’s theory. One hypothesis disputing Hayek’s theory would claim that left to workings of “spontaneous order,” and only “spontaneous order,” both the common law and laissez faire markets would evolve into unworkable or undesirable processes. If, according to Hayek, the common law process evolved out of “spontaneous order,” how does Hayek address, for example, that without the application of reason, logic, and analogical deduction, *stare decisis* would not have evolved and continue to evolve today as the foundation of judicial decision-making? Or, might reason, logic, and analogical deduction not be a conscious activity of human design and subsequent human intervention, but instead be imbedded in the nature of spontaneous order?

There is one aspect of Hayek’s theory that does permit the interjection of human intervention.

...Hayek is asking us consciously to design the general rules of the economic system so that spontaneous order induced by these rules can be expected to promote the general welfare...he is asking us to adopt a policy of using the spontaneous ordering forces of human behavior to bring about desirable (but, in detail, unpredictable) results. All this is very different from appealing to group selection to justify long-established rules. 6

The hypothesis of this paper is that Hayek is correct in identifying spontaneous order as an origin of various societal “institutions” such as the common law or the free market. But, to claim that rational “interference” in such spontaneous ordered institutions is a corrupting and damaging exercise is the significant question on the table.

Hayek may have fallen into the trap of attempting to construct one theory to explain everything. Coincidentally, it is similar to a judge adopting one legal precedent to apply to all similar situations without permitting variance by rationally cognitive human intervention. We need to explore not just the theory itself but the context of both the times and applications.

II. COMPETING TWENTIETH CENTURY THEORIES

We begin with the primary system to which Hayek was responding: a socialist-inclined managed economy. Almost from its inception, socialism proved to be a failed system. Ideologically pristine, socialism, as an economic system, has not been effective except in limited use in highly homogenous societies such as the Scandinavian countries. Even there, the economic system is a blend or hybrid of capitalistic and socialistic principles. However, on a broader scale and with a far more heterogenous national demography, the Soviet Union was one failed socialistic attempt after another. These continued failures awarded the default economic position of the twentieth century to capitalism – but which “flavor” of capitalism?

A.  **Hayek versus Keynes, both capitalists but different flavors or opponents?**

Hayek and John Maynard Keynes\(^\text{10}\) were the combatants in the quintessential free market economic battle of the twentieth century. Both were capitalists but disagreed vehemently on the government’s role in the economy. Hayek took the “classical liberal” view of Adam Smith that the invisible hand served as the exclusive guiding force behind laissez faire economics. Keynes took the view that governmental intervention in the dual form of regulator and participant to guide the economy when it deviated from normative behavior. In the Keynesian universe, government could enter into the market with stimulus programs, such as a jobs bill or infrastructure bill, to influence economic growth. Likewise, government could regulate the economy with regulatory schemes, such as taxation, market regulation, international sanctions, or the like. Hayek opposed such schemes as a deviance from his view of normative market activities.

The intriguing aspect of Hayek’s thinking is the foundation of what he believes to be normative results. This foundation is his theory of “spontaneous order.” Succinctly, this theory postulates that, “what is, is right” in Alexander Pope’s words.\(^\text{11}\) If society is left unfettered by governmental, positive, or constructivist intervention, it will “spontaneously” evolve those practices, policies, and institutions which should evolve.

The doctrine of spontaneous order achieved a central place in economic and legal science when Adam Smith described the interaction of market forces coordinating processes of production, distribution, and consumption as the working of an invisible hand. Carl Menger extended the application of spontaneous order to the emergence of commodity money in a primitive barter economy and Ludwig von Mises contributed a highly sophisticated theory explaining how fiat money can evolve from commodity money. Mises' regression theorem filled an important gap in prevailing macro monetary economics, which was unable to understand how fiat money could circulate at all. Hayek developed a theory of the evolution of democratic political and legal institutions responding to

\(^{10}\) 1883–1946.


As Mulligan connects Hayek’s spontaneous order with 19\textsuperscript{th} century laissez-faire markets, it is worth considering the failings of those markets alongside their broad successes. Wealth disparity, market manipulation, and employee oppression were, at best, side effects of 19\textsuperscript{th} century laissez-faire economics.\footnote{As Louis Hunt notes in \textit{Louis Hunt \& Peter McNamara, Liberalism, Conservatism, and Hayek’s Idea of Spontaneous Order} (2007), “…Hayek conceives of the market as simply one of a number of different social and political institutions that have arisen spontaneously in response to the exigencies of human life. This may be fair enough as a description of the market in the eighteenth, or even nineteenth century, but, as many observers have noted, the market in contemporary advanced industrial societies appears to be expanding rapidly at the expense of other social and political institutions. One does not have to be a Marxist, or believe in collective planning, to share Jurgen Habermas’s concern about the tendency of the market to ‘colonize’ almost every aspect of modern society.” p. 61.} With the advent of governmental regulations of market monopolies in 1890 with Sherman Act anti-trust laws\footnote{\textit{Sherman Antitrust Act}, 15 USC §§ 1–7 (1890).} and then regulation of consumer protection with the Federal Trade Commission Act\footnote{Federal Trade Commission Act, 15 USC §§ 41–58 (1914).} in 1914, the federal government, and subsequently state governments, limited the laissez faire “spontaneous order” evolution of the market which then became affected by positive governmental influences. The paradox of the Sherman Act was that regulation was needed to protect the freedom of a laissez faire market. But does this kind of governmental intervention really contradict Hayek’s spontaneous order theory?

\textbf{B. What is Hayek’s identification of “rational constructivism”?}

Hayek contrasts his spontaneous order model of social organization with “rational constructivism,” which assumes that human institutions are capable of serving human purposes by intentional design.\footnote{Ogus, \textit{supra} note 5 at 395.} For Hayek, rational constructivism is deeply fallacious...
despite its infusion in Western thought since Descartes.\textsuperscript{17} In describing the difficulties of a centrally-managed world, Hayek describes the unavailability of adequate information to manage a society, calling it a “fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order.”\textsuperscript{18} To this end, Hayek argues that the spontaneous order process is indeed normative. However, does the evidence show the contrary in both market and legal evolution?

III. SPONTANEOUS ORDER AS A DESCRIPTIVE PROCESS IN MARKET EVOLUTION

Robert Sugden notes that, “[h]aving recognized that such institutions as language, law, markets, and money are the product of evolution and not of reason, [Hayek argues that] we must take the final step of accepting that morality is just another institution of the same kind: “Ethics is the last fortress in which human pride must bow in recognition of its origins.”\textsuperscript{19} Let’s test this axiom with the fundamental market concept of the West: capitalism.

Hayek argues that capitalism arose as a result of spontaneous order, or an order among persons that emerges from self-motivated individual actions that combine into a larger sequence of coordinated activity, without any central direction. A spontaneous order is one that is the product of human action but not human design.\textsuperscript{20}

\textsuperscript{17} Id. at 395.
\textsuperscript{18} Id. at 395., citing F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 15 (2012).
\textsuperscript{20} Though it is beyond the scope of this paper, this conjures up notions of Noam Chomsky’s espousal of nativism. Which cognitive skills are innate, and which are acquired? Consider this paper’s first example stare decisis in the second paragraph. Did stare decisis evolve from an innate desire for fairness, cooperation, predictability? Did it result from conscious human decision-making or as Hayek might identify “rational
However, Hayek does not dismiss intentional human intervention. Instead, Hayek looks at human nature and concludes that humans are innately “rule followers.”\textsuperscript{21} As such, humans indeed do create rules. But these rules lay out general guideline in which unintended and beneficial spontaneous orders evolve.\textsuperscript{22}

\textbf{A. Is capitalism the “better” system?}

Capitalism has proven to be an economic system more beneficial to the human race than any other economic system in history.\textsuperscript{23} By process of elimination, capitalism’s chief rival, socialism, has failed, at least in large, heterogeneous societies, such as the Soviet Union. Moreover, socialism failed dramatically in the former eastern-bloc European nations. Socialist elements of policy as applied in the much more homogeneous Scandinavian countries have proven successful. But, do those failures, Scandinavian societies notwithstanding, require us to accept unregulated capitalism as the default victor?

Hayek started from an evolutionary perspective from the natural sciences. He ended his career with an evolutionary account of the development of human civilizations, where in the societies with the most materially productive rules, laws, morals, customs, and traditions will reproduce most in the end. Societal selection operates both within and among societies and is driven not by the selection of genetically influences attributes but by the selection of societal practices to economic productivity, prosperity, and peace. Hayek saw life as a competition to extend itself most, whether in the biological or social realm.\textsuperscript{24}

\textsuperscript{21} Sugden, \textit{supra} note 6 at 395.
\textsuperscript{22} \textit{Id.} at 395.
Thomas Friedman in his book *The Lexus and the Olive Tree* would agree with Hayek’s conclusion. “Nearly two decades ago, Thomas Friedman came up with his ‘Golden Arches Theory of Conflict Prevention.’ No two countries that had McDonald’s restaurants would go to war. The idea suited the heady post-cold war 1990s when people thought humanity would turn to post-ideological goals, like ending hunger. It offered the prospect of ‘homo economicus’ replacing its appetite for war with a Big Mac and fries.” Perhaps Friedman’s line of thinking proves Hayek’s premise that allowing capitalism to run its course will lead to globalization and a shared economy resulting in *economic productivity, prosperity, and peace*. Further, the threats of interference of tariffs and trade wars being touted by the current American administration and implied by Brexit would further bolster Hayek’s claim that constructive rationalism interferes with the natural evolution of the free market.

**B. Is capitalism an evolutionary process?**

Supporting this claim objectively is difficult because what is viewed as beneficial to the human race varies from individual to individual. Ultimately, what is being strived for in each individual’s mind is civilization: “the stage of human social development and organization which is considered most advanced.” Unfortunately, clarifying this does nothing to more explicitly define the objective; some might consider the society which labors least to be the most advanced. Others might consider the society which has the highest life expectancy to be the most advanced. Others may believe that a society with the smallest wealth disparity is most advanced. Nonetheless, we tend to maintain in the West that capitalism is most beneficial to the human race in that it has elevated billions of people out of poverty who would otherwise have remained impoverished.

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Advocates point to the structural operation by which capitalism fulfills the needs of society as a whole. It does this through necessity: if an individual player in society wishes to have his/her needs met, then the individual must fulfill needs of another in society to obtain the resources necessary to fulfill his/her need. The end result of this is that both parties are having needs met and thus a fraction of society’s total needs (the sum of all individual needs) is met. Other economic systems, such as feudalism or socialism, have inherent systemic issues that prevent benefits to multiple parties from existing, whether those issues be a lack of leverage for certain parties in negotiation (feudalism), or the lack of mutual benefit in a transaction (socialism).

The fundamental reason that capitalism serves the needs of society better is that capitalism is a spontaneously evolved—but rule-governed—system, much like common law. Spontaneously evolved systems beget more efficiency and less waste in their operations, at least according to Hayek. The reason for this is that centrally planned systems only take into account factors and variables that the planner considers when creating the model and asserting treatment to the model to achieve a desired result. The collection of all immaterial or ignored factors then results in error between expected result and actual result. Spontaneously evolved systems have a self-creating model whose result is by its very nature affected by all variables, no matter how small. Both systems have the goal of benefiting society, but centrally-planned systems are inferior because their model contains limited information.

C. Can a spontaneously-evolved system also require constructive rationalism?

All of this having been said, capitalism needs some central planning or constructive rationalism in order to uphold the integrity of the economic system itself. This is the case because the success of capitalism depends on two assumptions in a laissez faire market: 1) perfect information for all decision-making individuals in the economic system and 2) competition among producers and consumers within an economic system.
The former assumption centers around buyers and sellers having a complete understanding at the time of transaction of what they are getting or giving up. However, if left unregulated this assumption proves false, with marketers in a business creating misleading advertisements, in the extreme leaving uneducated individuals to make purchases based on outright lies. The latter assumption would be more aptly described as a principle; while models of the capitalist system include representations of noncompetitive behavior through the existence of monopolies, the existence of certain monopolies brings about such harsh realities so as to threaten the health of capitalism in the long term. Therefore, in these circumstances, and only these circumstances, central planning is necessary to uphold the integrity of the economic system.

D. **What is the cost benefit analysis: risk versus reward?**

Further interference in the economic system beyond those two ends will pose more possible risk than possible reward. This is the case because while interference into other aspects of the economy may pose short-term benefits when the intervention is made with good intent by a benevolent central planner, the additional delegation of power poses too great a risk for the day in the long term when a less than well-intentioned central planner takes power.

For instance, say that a central planning institution awards itself the right to redistribute income, in order to reallocate income from the wealthiest 1% and give it to the poorest 10%. Now the central planning authority has the right to redistribute income. Twenty years later another party seizes control of the central planning authority and has an agenda to reduce the power of manufacturing in the economy because of special interests. With the power to redistribute income, it targets manufacturing companies, seizing their wealth and redistributing it to the service sector of the economy. Now, an important (and socially beneficial) economic function is not being fulfilled by the capitalist system, and efficiency of the market economy is reduced. While this is a very extreme example, it holds true on
the smaller scale too. This danger is compounded by the concerns that even with the best
of intentions, central planning introduces inefficiencies that sap the benefits that such
planning would hope to produce.

The assertion that the market, left solely to its own devices, will always lead to a normative
result in the long run cannot be squared in the context of historical, empirical data. One
of many examples that provide evidence to the contrary can be seen in nature itself or,
more specifically, in the market’s relationship with the environment. Classical liberal
economists have repeatedly contended that consistent economic growth is sustainable
because society learns more over time about how to extract greater amounts of resources
at consistently decreasing cost, thus increasing firms’ throughput rates and supporting an
ever-increasing GDP. While this is an appealing theory for those who are invested in
stocks or have other direct incentives to see GDP values soar, the belief is based upon a
fundamentally flawed central premise: that the market exists within an environment
capable of providing infinite resources. This may have been an easy premise to accept a
few centuries ago, when the resources at society’s disposal were immense as compared to
the resources necessary to fulfill society’s most urgent needs.28 In the 21st century, however,
reality challenges the theory. Population continues to grow, with a projected population
of over 11 billion by the year 2100.29 Meanwhile, nonrenewable resources continue to be
depleted at an alarming rate.30 Oil, arguably the backbone of a globalized economy, is
estimated to have a remaining supply of approximately 1.7 trillion barrels: enough to

29 World population projected to reach 9.8 billion in 2050, and 11.2 billion in 2100 – says UN, UNITED
30 Chris Rhodes, WHAT HAPPENS WHEN THE OIL RUNS OUT? OILPRICE.COM,
24, 2018).
sustain current demand for roughly another 55 years.\textsuperscript{31} Even lithium, which is often seen as the successor to oil in the energy economy, has finite reserves.\textsuperscript{32}

\textit{E. What is the difference between allocation and scale?}

In an economic system set by its nature to attain a normative result, the scale of resource use would likely differ greatly from that used under a capitalist system. To understand this, a distinction must be made between \textit{allocation} and \textit{scale}. Allocation is simply the determination of which firms and individuals hold rights to use a resource. Economists have generally agreed that efficient resource allocation is best determined by prices, and where an inequitable or unjust distribution of such resources occurs, policies can be put in place to compensate.\textsuperscript{33}

The attainment of optimum \textit{scale} is a separate, more difficult macroeconomic goal. To define optimum scale, the goals of the economy as a whole must be ascertained. If the system is seen as anthropocentric, the optimum scale would be reached at a point where the marginal benefit to humans of manufactured capital is simply equal to the marginal cost to humans of sacrificed natural capital. On the other hand, a biocentric system would assign an intrinsic value to other species and their habitats beyond their instrumental value to humans, such that the cost to such species/habitats would be added into the marginal cost to humans. This being the case, the optimum scale for a biocentric system would be at a much lower level of resource use, since marginal cost would reach marginal benefit more quickly. We can easily accept that optimum scale must, by definition, not exceed maximum scale, with maximum scale being equal to the lesser of an ecosystem’s regenerative or absorptive capacity; to say that optimum scale exceeds maximum scale is

\textsuperscript{33} DALY, \textit{supra} note 27 at 50–51.
to claim that the best level of resource use would be at a point where the ecosystem’s ability to assume the damage is exceeded.\textsuperscript{34}

Determining the exact optimum scale beyond this simple understanding is difficult, but one thing has become apparent: no evidence exists to suggest that there is a price system or other ‘invisible-hand-driven’ mechanism within the confines of a laissez faire capitalist system which limits the use of natural resources to their optimum levels.\textsuperscript{35} While it is nearly impossible to prove the lack of existence of anything, empirical data suggests that no such mechanism exists at all; fossil fuels wreak havoc on the ecosystem, waste from consumer products builds even as production accelerates, and nonrenewable resources continue to be depleted in excessive fashion. Such could not be the case if Adam Smith’s invisible hand was capable of bringing a normative result to all areas of modern society, as Hayek claimed.

Is there a mechanism for addressing these “scale” questions that would not violate the supporting theory of spontaneous order? More generally, is there room in Hayek’s theory for addressing structural or organizational issues in the market while preserving the benefits of spontaneous order?

The debates in political economy continue, and the parties tend to become more entrenched rather than more competent in their understanding of opposing arguments. Political economy is not the first venue of this particular debate, though. Common law had been developing as a unique, relatively closed system for more than six hundred years when Hayek began his work. So what does common law—and particularly Hayek’s own work on common law—tell us about the opportunities and limits of spontaneous order?

\textsuperscript{34} Id. at 50–51.
\textsuperscript{35} Id. at 50–51.
IV. SPONTANEOUS ORDER AS A DESCRIPTIVE PROCESS IN COMMON LAW

Common law can be seen as the longest-running experiment with spontaneous order\(^{36}\): it predates Hayek’s own articulation of spontaneous order by at least five centuries, and so he recognized the law as an important context for exploring his theory. Hayek sees common law both as a codification of previously unarticulated rules of conduct and as providing a framework within which spontaneous orders can form.\(^{37}\)

In this sense, common law has both a cautionary and an illustrative role. Hayek notes that efforts to redesign law in a deliberate manner have not worked, cautioning us that broader efforts “to arrange deliberately all the particular activities of a Great Society according to a coherent plan”—a much broader project than law, which is but one feature of a complex society—could not possibly be successful.\(^{38}\) If law cannot be advantageously designed from whole cloth, then certainly the whole society cannot be designed, but rather must develop. What it means to design or legislate law and what it means for those efforts to be successful are among Hayek’s primary topics in his 3-volume work, *Law, Legislation and Liberty*.\(^{39}\)

More importantly for this project, common law is also illustrative of the finer points of Hayek’s theory about spontaneous order. Hayek recognizes that not all law will be—or should be—developed through spontaneous order. Hayek distinguishes between a “self-generating or spontaneous order,” like the legal tradition or, indeed, society, and an

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\(^{37}\) Sugden, *supra* note 6 at 395.


\(^{39}\) *HAYEK*, *supra* note 37.
organization. Organizational principles, or the law of governing, should be developed by design and must take the form of legislation. Administrative law simply cannot develop organically in the common law model. Laws governing conduct are different: these are the “previously unarticulated” rules that properly develop and approach order spontaneously.

### A. Differentiating between types of laws

The law with which Hayek is primarily concerned—that which properly develops through spontaneous order—governs the conduct of people in a society. These rules are not necessarily written, and the members of the society cannot necessarily articulate them, but they are shared in a very real cultural sense, as evidenced by the rarity of violations.

Of course, this law of unwritten and developing rules eventually requires some form of enforcement. The subpart of what Hayek calls a “Great Society” that handles this enforcement is the government:

This particular function of government is somewhat like that of a maintenance squad of a factory, its object being not to produce any particular services or products to be consumed by the citizens, but rather to see that the mechanism which regulates the production of those goods and services is kept in working order. The purposes for which the machinery is currently being used will be determined by those who operate its parts and in the last resort by those who buy its products.

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40 *Id.* at 2. This may be at the heart of disagreements over Hayek’s work, because even by 1973—the time of the writing of *Law, Legislation and Liberty*—the most complex organizations in western society were still relatively simple and there was lingering distrust of government and institutions. As corporations and societal organizations have become more complex on every dimension, the notion that extraordinarily complex systems can be intentionally organized has become more palatable to modern ears than it would have been to Hayek because we’ve seen organizations come closer to controlling entire systems. Whether those organizations are actually successful, of course, is another question. Hayek depends on a reflexive answer that is less broadly shared in the early 21st century.

41 *Id.* at 86.

42 *Id.* at 45. This is admittedly a bit circular, because Hayek believes “it is advisable to reserve the term ‘society’ for this spontaneous overall order....”

43 *Id.* at 42.

44 *Id.* at 46.
To put a finer point on his illustration, it is not the role of government to decide who has what rights within the “factory” of society, or which things people produce, or even in what ways those things are produced.

That government is also an organization, and an increasingly complex one at that. To govern its own behavior, it needs a set of laws that cannot reasonably develop through spontaneous order. The rules within an organization—those rules that govern the organization itself rather than those rules which enforce broader standards of society and might be administered by the organization—relate to procedure. They do not assign or protect rights, but rather dictate processes. In other words, they are a kind of algorithm for determining what the governing authority would dictate in each individual situation. Since they are a way of deriving implied commands, they are subject to override by the governing authority.45

The distinction between organizational rules and rules (or laws) of conduct is that in an organization, rules are a proxy for individual commands. Therefore, in a conflict between a command from a senior officer in an organization and an organizational rule, the command wins. The rule existed to predict the command, and when that prediction fails, the rule should be disregarded (or effectively sublimated) in favor of the command.46

Hayek believed that once enough power to legislate organizational laws is vested in a given body, that body will lose track of its representative role. Those bodies will begin working to shape public sentiment rather than to represent it in the authoring of laws.47 The centralization of power that is likely to result is clear enough—Hayek specifically referred

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45 Id. at 47.
46 Id. at 47.
47 Id. at 3.
to “organized interests and their hired experts.”48 In other words, once legislation emerged as a method of law-making, the distinction between administrative and conduct law began to break down.

B. Different types of development for different types of laws

Hayek’s conviction with regard to the development of laws governing society is consistent with his approach to pricing and markets: “From the insight that the benefits of civilization rest on the use of more knowledge than can be used in any deliberately concerted effort, it follows that it is not in our power to build a desirable society by simply putting together the particular elements that by themselves appear desirable.”49

The idea that it is challenging to reach larger goals through many small decisions is the same impulse that leads governing authorities to develop administrative rules so that tasks can be achieved at lower levels. Hayek is pointing out what he perceives to be the hypocrisy of a governing authority who sets guiding rules rather than dictating granular decisions, but who would attempt to design the nature of society by central administration rather than enforcing general principles that come from the governed and develop over time as the interests of the governed and the methods of achieving their goals develop over time.50

For Hayek, the underlying problem when legislatures start to develop laws of conduct is that they cannot possibly be working with all the information that informs the spontaneous order.

The legislation of society does not yield positive results. Hayek doesn’t believe that this is mere theory, but rather the record of history. Legislation is frequently justified as necessary

48 Id. at 3.
49 Id. at 54.
50 Id. at 54.
to correct some errant outcome in society. First of all, Hayek attributes these errant outcomes to prior intrusion in the development of society’s law, not the product of spontaneous order.\footnote{Id. at 56–57.} Second, correction of any particular ill will create additional unintended outcomes, and these are difficult to measure, even if a legislature actively attempts to measure, and they frequently do not. Correction of a perceived ill is much more salient than the negative unintended consequences: “We will rarely know what we lose through a particular restriction of freedom.”\footnote{Id. at 55.}

The shift of legislatures from a representative role toward a manipulative role will mean that legislatures block the natural development of laws that enable prosperity and success in spontaneous orders.\footnote{Id. at 3.}

C. The meaning of the distinctions between types of laws

Say what you will about Hayek, but he understood the challenges to his beloved spontaneous order. New legislation often offers—or even guarantees—positive benefits, but like the imagined townspeople in Bastiat’s famous allegory who dismiss the costs of a broken window because of the benefit of employment for the glazier\footnote{Frédéric Bastiat, What Is Seen and What Is Not Seen, in ECONOMIC SOPHISMS AND “WHAT IS SEEN AND WHAT IS NOT SEEN” 401–452, 405 (Jacques de Guenin ed., Jane Willems & Michel Willems trans., 2016), http://oll.libertyfund.org/titles/the-collected-works-of-frederic-bastiat-vol-3-economic-sophisms-and-what-is-seen-and-what-is-not-seen.}—the proverbial silver lining—we have a hard time understanding the costs.\footnote{Hayek, supra note 37 at 59.} Spontaneous order develops within a set of general rules, and the advantages—or ‘freedoms’—inherent in that system depend on those general rules or principles. Any attractive new legislative manner promises some positive results, and the argument that such promises come at the cost of valued principles is not very compelling.\footnote{Id. at 59.}
Modern society is not in the habit of distinguishing between laws of conduct and laws of organization. In part, this stems from the dizzying complexity of the modern world, which is often taken to be unique in history and therefore able to justify much more administrative approaches to society’s law.57

Using Hayek’s distinction, agricultural quotas or trade restrictions are clearly laws regulating conduct that would better be optimized through spontaneous order. And, in a less business-oriented sense, laws about violent behavior (assault, robbery, murder) would continue to form in the spontaneous, common-law manner. On the other hand, laws about how searches are performed at the airport or about how criminal charges should proceed through the justice system are organizational and should be addressed through legislation. Of course, the distinctions are not always clear. At first glance, tax law would be organizational: it is the way the government classifies income or transactions and applies a tax. But we know that when the government classifies a particular kind of economic income as taxable, there is the unintended consequence of taxpayers shifting to other kinds of income. Recalling Hayek’s factory maintenance crew example, it is as if the maintenance crew announces that it will help more quickly when fire erupts than when equipment fails, so factory workers who saw sparks as equipment began to fail are more likely to beg for help with a “fire” than with failing equipment.

V. PRELIMINARY CONCLUSIONS

Consideration of the common law points to the complexity of spontaneous order and development in the real world.

57 Cf. Id. at 66.
Particularly in the context of political economy, Hayek’s theory of spontaneous order has an attractiveness to it that is beguiling. A surface-level reading of Hayek would suggest that we should “just do nothing and the evolutionary forces at play will work wonders and come up with the desired, normative result.” In fact, there is a paradox at work here. Social evolutionary arcs must be directed. But, are they directed through knowing or subconscious drives? Consider that “nearly 150 years ago, Charles Darwin proposed that morality was a byproduct of evolution, a human trait that arose as natural selection shaped man into a highly social species—and the capacity for morality, he argued, lay in small, subtle differences between us and our closest animal relatives. ‘The difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind,’ he wrote in his 1871 book The Descent of Man.\(^{58}\)

The limitations of spontaneous order are clearer in the law. Even non-lawyers are used to thinking about laws in different ways: just ask anyone who has ever condemned a murderer while regularly breaking the speed limit. More critical differences are obvious in the law as well. Organizational laws—civil procedure, for example—are vital to the successful and just operation of the broader legal system, but practical concerns mandate the rational construction of these laws rather than their graduate development through spontaneous order. A devotee of common law can, along with Hayek, admit that some constructed law is necessary for such purposes without abandoning commitment to the advantages of common law for laws of conduct.\(^{59}\)

The clarity of the division between laws of organization and laws of conduct, not to mention the relative lack of debate among lawyers about the advantages of the


\(^{59}\) HAYEK, supra note 37 at 84.
development of both kinds of law, opens a window into ongoing debates in political
economy. Advocates of spontaneous order cannot claim to follow in Hayek’s footsteps
while eschewing any kind of rational constructivism. Just as importantly, advocates of
rational constructivism should at least be prepared to answer Hayekian criticism when they
advocate legislation to change developed rules of conduct. (They cannot simply offer an
example of a rule or policy that has developed in unfortunate ways to say that spontaneous
order never works, particularly when that rule or policy is an organizational principle.)

The goal is not to end debate, but rather to make debate more productive. This clearer
framing for the debate may also make possible a range of interesting future work. Complex
pieces of legislation and public policy can be broken down and analyzed by their nature as
either organizational or conduct-oriented rather than taken, for the purposes of analysis
and debate, as a legislative or political whole. Policies and laws that have been authored or
developed outside Hayek’s model—organizational rules that developed over time or
conduct rules that were legislated—can be explored as potential counterarguments to
Hayek.

In addition to framing debate and offering future ideas for analysis, these arguments
highlight an additional way that lawyers and legal scholars can contribute to public policy
under the broad analytical umbrella of law and economics. Hayek’s maintenance example
makes clear that the distinction between organizational and conduct-oriented rules is not
always so clear, and lawyers have a unique ability to pick apart complex proposals to
support further analysis.

The best developments for both common law and political economy will result when the
two fields work together to frame and conduct sophisticated analysis rather than merely
lobbying criticisms that make the critic feel good and the target feel confused. Given that
the same could be said for a broad range of debates in contemporary society, this is an
approach worth perfecting over time: the most important spontaneous order we could hope for.