

FRIEDRICH A. HAYEK, THE U.S. CONSTITUTION, AND INSTITUTIONAL DESIGN

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In their article, *Against Design*, Caryn Devins, Roger Koppl, Stuart Kauffman, and Teppo Felin argue that it is impossible for any lawmaker to successfully design a Constitution or a law so that it will produce the ends that the legislator wishes to enact.¹ The authors argue that institutional design is impossible because every such design in law sets in motion a Spontaneous System of Order, which then develops the law or institution in ways the Framers of such laws and institutions could never have imagined.² This is the case because changing circumstances and unforeseeable inventions and developments render all laws and institutions infinitely malleable.³ The authors thus challenge the use of Original Public Meaning in constitutional interpretation saying that the theory fails because the Framers never even imagined the complex inventions and technologies available to Americans today,⁴ nor did they anticipate the expansion of the country from thirteen to fifty states and the growth of its population from about 3 million people to 320 million people.⁵ Originalism is thus denounced as being impossible even if it were theoretically desirable, which it cannot be since it does not take into account radically changed circumstances.⁶

The authors cite in support of their theory the centrally important work of the late economist Friedrich A. Hayek⁷—work, which until now has been quite wrongly ignored in the institutional design and constitutional interpretation literature. They note that Hayek analogized the common law to languages and to the free market describing all these systems as being

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1. Caryn Devins et al., *Against Design*, 47 ARIZ. ST. L.J. 609, 622–23 (2015).

2. *Id.* at 613–14.

3. *Id.* at 624–25.

4. *Id.* at 656–57 (explaining the problems with originalism and supporting the perspective of “living constitutionalists”).

5. *Id.* at 620 (quoting DAVID STRAUSS, *THE LIVING CONSTITUTION* 1–2 (2010)).

6. *Id.* at 661.

7. *Id.* at 612–13, 624 (citing FRIEDRICH A. HAYEK, 3 *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 108–09 (1979); FRIEDRICH A. HAYEK, 2 *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 108–09 (1976); Friedrich A. Hayek, *The Principles of a Liberal Social Order*, in *LIBERALISM: IDEAS OF FREEDOM* 44 (G. W. Smith ed., 2002)).

systems of spontaneous order.⁸ Such orders are characterized by the absence of a central planner and by their gradual evolutionary nature.⁹ Hayek argues that systems of spontaneous order like the common law, languages, and the free market are epistemically superior to systems of planned order because they draw on the crowd wisdom of countless numbers of people.¹⁰ The authors cite Hayek's work as suggesting that not only is institutional design not desirable but that it is actually impossible.¹¹ No matter what the framers say in designing a legal institution or in passing a constitution or law, unanticipated developments will produce countless outcomes the framers would not have liked nor which they could have anticipated. The authors conclusion is thus almost nihilistic in its opposition to institutional design or constitutionalism or law. No matter what the design, constitution, or law provides, it will eventually produce mainly unintended consequences.

I think the authors are overly pessimistic about the possibilities of successful constitutional design, in part, because they have not applied Hayek's work as a whole, and, in part, because they overlook some of the most successful and enduring features of the U.S. constitutional design by focusing instead on the Commerce Clause and on procedural due process. I will address each of these two points briefly in the two sections, which follow below.

I. THE HAYEKIAN SCHEME OF PLANNED AND SPONTANEOUS SYSTEMS OF ORDER

In his three volume magnum opus, *Law, Legislation, and Liberty*, Friedrich A. Hayek argues that there are two very different kinds of order one can observe as a sociologist in observing human affairs.¹² The first kind of order and the one that is most understandable to the average human being is a Planned System of Order.¹³ In a Planned System of Order, there is a central planner who designs and constructs the system of order to accomplish some designed purpose or purposes.¹⁴ The system is run by a commander who makes sure that the system accomplishes its goal by issuing orders to subordinates who are accountable to the commander and who can be fired by

8. *Id.* at 612–13.

9. *Id.* at 613 (quoting Hayek, *supra* note 7, at 44).

10. FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 51 (1973).

11. Devins et al., *supra* note 1, at 613 (citing Hayek, *supra* note 7, at 44).

12. HAYEK, *supra* note 10, at 35–37.

13. *Id.* at 38.

14. *Id.* at 36–38, 48–49 (distinguishing “taxis” or made orders from Spontaneous Systems of Order or “kosmos”).

him for failure to follow his orders, which are designed according to the plan.¹⁵

Examples of Planned Systems of Order include military units and in market economies, the firm or a corporation or business.¹⁶ Businesses and firms are centrally run by a chief executive officer or CEO who can fire subordinates and who is hired to make the firm profitable to shareholders.¹⁷ Planned Systems of Order are most understandable by laymen who tend to think mistakenly that they are the only system of order. Families are in many respects Planned Systems of Order in which fathers and mothers direct and shape the upbringing of children. Military brigades run by an officer are also examples of Planned Systems of Order.

The second type of system of order described by Hayek is a Spontaneous System of Order.¹⁸ Examples of Spontaneous Systems of Order, according to Hayek, include the free market, languages, and the common law.¹⁹ In a Spontaneous System of Order, there is no central planner and the system arises spontaneously because it is needed to fulfill the desires of those who use it.²⁰ Consider the example of languages. No one person or committee of persons ever devised the English or the French languages, and yet there is a right way and a wrong way to speak French.²¹ The words and grammar of the French language arose spontaneously to fulfill the needs of all those who speak French.

Nonetheless, there is a right and wrong way to speak French even though it was never devised by a central planner. The Spontaneous System of Order, which we call the French language, has right and wrong ways to use words to say something, and it has a right and wrong way to grammatically string words into sentences. The French language thus *is* a system of order, but it is a system of order, which arose spontaneously without a central planner. Other examples of similar spontaneous systems of order identified by Friedrich A. Hayek include the free market and Anglo-American common law.²² No one designed or planned the free market or the common law, but, like languages, these things are undeniably a system of order.²³

15. *Id.* at 77.

16. *Id.* at 46–47.

17. *See generally* Peter F. Drucker, *The American CEO*, WALL STREET J. (Dec. 30, 2004), <http://www.wsj.com/articles/SB113207479262897747>.

18. HAYEK, *supra* note 10, at 37.

19. *Id.* at 37–38, 85–88, 95.

20. *Id.* at 43.

21. *Id.* at 37.

22. *Id.* at 37–38, 85–88, 95.

23. *Id.* at 83, 122–23.

Nonetheless, since they are not Planned Systems of Order, Hayek calls them Spontaneous Systems of Order.²⁴ Spontaneous Systems of Order are epistemically superior to Planned Systems of Order because they incorporated the knowledge not only available to the Central Planned but also the crowd wisdom available to all the users.²⁵ For crowd wisdom to work, it is critical that information be derived independently by each member of the crowd acting on his own and unaware of what other members of the crowd are doing.²⁶ Absent these conditions one gets an information cascade, which leads to what the Scottish journalist Charles Mackay described as *Extraordinary Popular Delusions and the Madness of Crowds*.²⁷ James Madison described the Mackay phenomenon in The Federalist No. 55 where Madison explicitly says that “[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”²⁸ The difference between a crowd attaining crowd wisdom and a crowd becoming a mob depends critically on decisions being independently arrived at with each member of the crowd ignorant of what other members of the crowd are deciding.²⁹ This stringent requirement is quite hard to meet, which is why crowds so often turn into mobs and other ugly things.

There are additional caveats to the Hayekian scheme, which Hayek himself did not clearly mention. The most important such caveat is that it is in the nature of human society that the two systems of order will coexist with one another in complex forms.³⁰ Thus, firms or corporations, which are Planned Systems of Order, and which are centrally run by a CEO, exist like islands of Planned Order within the Spontaneous System of Order of the free market, and they compete with one another for dominance. Firms produce the goods that can be most efficiently produced in house by a Planned System of Order, and they contract in the free market to buy the goods that can most profitably be obtained by buying them in the free market from other firms rather than producing them in house. Thus, an automobile company may assemble an automobile, but it will contract out to buy from a third party those parts of the automobile that are most profitably constructed by a third party rather than being constructed in house by the automobile company

24. *Id.* at 45–47.

25. JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* 10, 70–72 (2004).

26. *Id.* at 10, 101–07.

27. CHARLES MACKAY, *EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* xx (2d ed. 1852).

28. THE FEDERALIST NO. 55 (James Madison).

29. SUROWIECKI, *supra* note 25, at 64–65, 255–58.

30. HAYEK, *supra* note 10, at 46–47.

itself. This is called the theory of the firm, and it was first identified by Ronald H. Coase in *The Nature of the Firm*.³¹

There is a flip side of the phenomenon of firms existing as Planned Systems of Order, which contract out for those items which can be more cheaply bought in the free market, which is a Spontaneous System of Order, rather than being produced in house. That flip side is that one often finds within a Spontaneous System of Order certain Planned Systems of Order, which flourish like islands of planning in a sea of spontaneous order where transaction and information costs are low enough to allow for central planning in an entity or firm, which is otherwise in competition with other centrally run firms in the free market. In other words, the two Hayekian systems of social order are not pure dichotomies such that there exist only pure centrally Planned Systems of Order and pure Spontaneous Systems of Order as Hayek's writing implies.³² Instead, as Ronald Coase shows in the article above, firms exist as an island of Planned Systems of Order within a sea of the Spontaneous System of Order which is the free market.³³

The reverse phenomenon also exists. Spontaneous Systems of Order may contain within themselves islands of planning where such planning is economically efficient.³⁴ The cost of contracting out rather than producing in-house is what describes and limits the size of these Planned Systems of Order. We are now in a position to apply the Hayekian scheme to the U.S. Constitution. The key mistake that the authors of *Against Design* make is that they describe only Spontaneous Systems of Order in the Hayekian scheme and not Planned Systems of Order.³⁵ The authors also fail to appreciate that these two systems of order usually co-exist with each other.

31. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 395 (1937) (“[A] point must be reached where the loss through the waste of resources is equal to the marketing costs of the exchange transaction in the open market or to the loss if the transaction was organized by another entrepreneur.”).

32. HAYEK, *supra* note 10, at 45–46 (“Although it is conceivable that the spontaneous order which we call society may exist without government, if the minimum of rules required for the formation of such an order is observed without an organized apparatus for their enforcement, in most circumstances the organization which we call government becomes indispensable in order to assure that those rules are obeyed.”).

33. See Coase, *supra* note 31, at 388 (discussing how firms serve as “islands of conscious power” because the complicated structure of the free market is replaced by the direction of entrepreneurs.”).

34. HAYEK, *supra* note 10, at 44 (“[I]t is possible that an order which would still have to be described as spontaneous rests on rules that are entirely the result of deliberate design.”).

35. See generally Devins et al., *supra* note 1, at 612–13 (discussing Hayek's views and only mentioning spontaneous order).

II. THE U.S. CONSTITUTION AND INSTITUTIONAL DESIGN

The U.S. Constitution,³⁶ like the French Code Napoléon³⁷ or the German Civil Code of 1900,³⁸ is a Planned System of Order. It was designed by the Philadelphia Constitutional Convention to produce certain identifiable results like a stronger national government and a stronger executive and judicial branch of the national government, while at the same time preserving and not eliminating the state governments.³⁹ Broadly speaking, the Constitution has accomplished that central planning role. Key provisions of the Central Plan of the Framers in 1787 continue to operate in exactly the same way as the central planners of 1787 specified. These key provisions are ignored in *Against Design* so it is worth reiterating them here.

The Framers of the constitutional Planned Order of 1787 specified that: (1) each state would send two and only two senators to the Senate, who would serve six year terms with one third of the Senate being up for re-election every two years;⁴⁰ (2) each state would be represented in the House of Representatives by population with the entire House of Representatives being up for re-election every two years;⁴¹ and (3) that the President would be elected by an Electoral College every four years for only a four year term.⁴² The Framers thus contemplated that the will of the American people would be sampled in three elections, two years apart, over a six year electoral cycle. This is a highly sophisticated way of sampling the popular will and of discerning between passing popular passions and genuine deep seated popular policy making desires.

The sophisticated American system for discerning the popular will can be usefully contrasted with the unsophisticated system of discerning the popular will in the United Kingdom. In the U.K., the popular will is sampled only once every five years in one winner-take-all election.⁴³ The victor in this election has not only total legislative and executive power but also total

36. See generally U.S. CONST.

37. See generally CODE CIVIL [C. CIV.] (Fr.), translated in THE CODE NAPOLEON (A Barrister of the Inner Circle trans., William Benning 1827) (2004), http://lf-oll.s3.amazonaws.com/titles/2353/CivilCode_1566_Bk.pdf.

38. See generally BÜRGERLICHES GESETZBUCH [BGB] [C. CIV.] (Ger.), translation at http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf.

39. U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, CONSTITUTIONAL CONVENTION AND RATIFICATION (1787–1789) (stating that the convention met to “address the problems of the weak central government.”).

40. U.S. CONST. art. I, § 3.

41. U.S. CONST. art. I, § 2.

42. U.S. CONST. art. II, § 1.

43. Fixed-term Parliaments Act, 2011, c. 14, § 1 (Eng.).

power to change the U.K. Constitution.⁴⁴ In contrast, an American popular movement must compete in three elections held two years apart in three differently sized geographic entities: (1) congressional districts, which elect the members of the House of Representatives;⁴⁵ (2) states, which elect U.S. senators;⁴⁶ and (3) the nation as a whole, which elects the President and the Vice President of the United States.⁴⁷ The U.S. electoral system is hard-wired into the Constitution and is superior to the U.K. electoral system in sampling the popular will for the same reason that rolling public opinion polls, taken daily over a period of time, are better at predicting election outcomes than are one time snapshot opinion polls. Rolling polls, like the U.S. system for sampling the popular will, are simply superior in checking the intensity and persistence of popular positions on candidates and issue preferences than are one time only elections. It is in part for this reason that the American Constitution has proven to be so durable and so much better than is the U.K. Constitution.

The authors of *Against Design* claim, citing the Commerce Clause and the doctrine of procedural due process, that the U.S. Constitution is entirely a system of judge made common law, which is a system of spontaneous order in Hayekian terms.⁴⁸ This is quite simply wrong. The Constitution is a centrally planned document, and its most important features, three elections in three different constituencies held two years apart over a six year cycle, continues to function more or less exactly as the Framers designed. Other very specific clauses of the U.S. Constitution of 1787 are also followed in 2015–2016 in exactly the way the Philadelphia Framers specified.

Thus, each of the fifty states sends two, and only two, senators to sit in the U.S. Senate. The President must still be at least thirty-five years of age.⁴⁹ Bills become law only when they are passed by both Houses of Congress and signed by the President or when two-thirds of both Houses of Congress override a presidential veto.⁵⁰ Appointments to high executive and judicial branch offices are still made by presidential nomination and senatorial

44. HOUSE OF COMMONS POLITICAL & CONSTITUTIONAL REFORM COMM., THE UK CONSTITUTION: A SUMMARY WITH OPTIONS FOR REFORM 6, 8, 10 (2015), <http://www.parliament.uk/documents/commons-committees/political-and-constitutional-reform/The-UK-Constitution.pdf> (explaining Parliament's control over executive and legislative matters).

45. U.S. CONST. art. I, § 2.

46. U.S. CONST. art. I, § 3.

47. U.S. CONST. art. II, § 1.

48. See generally Devins et al., *supra* note 1, at 622, 655–56 (discussing how the Commerce Clause and due process guarantees affect judge behavior).

49. U.S. CONST. art. II, § 1.

50. U.S. CONST. art. I, § 7.

confirmation.⁵¹ Constitutional amendments must pass by a two-thirds vote of both Houses of Congress and be ratified by three-quarters of the states.⁵² The President can only be impeached by a majority of the House of Representatives and can only be removed by a two-thirds vote of the Senate.⁵³ All of these critical features of the Constitution of 1787 are observed today in exactly the same way they have been observed since 1789 because they are hard-wired into the constitutional plan. In these respects, the U.S. Constitution is a highly successful Planned System of Order, which continues to operate today in exactly the same way as the Framers and central planners devised it to operate in 1787.

Where *Against Design* is right is in its description of the Commerce and Due Process Clauses of the U.S. Constitution, which have in fact, as *Against Design* says, given rise to little Hayekian Spontaneous Systems of Order within the confines of the overall constitutional plan.⁵⁴ The Constitution is highly specific about the six year electoral cycles, the age of the president, and other such things, and where the Constitution is highly specific, the constitutional plan continues to be followed in precisely the same way as it was followed in 1789. But, in many constitutional clauses, the constitutional text of 1789 is more or less open-ended and is subject to multiple possible interpretations, and, in these clauses, the text of the planned order of the Constitution has given rise to little Spontaneous Systems of Order, which within the confines of the text, spell out the meaning of these open ended terms. It is this phenomenon that the authors of *Against Design* observe with the Commerce Clause and with procedural due process. These clauses are ambiguous as to both their original public meaning and as to their reading today by members of the general public. As a result, the Delphic clauses of the Constitution, which is a planned order, has given rise to many little systems of spontaneous order construing the Delphic clauses of the Constitution itself.

I agree with the authors of *Against Design* that the Commerce Clause and procedural due process are mini-systems of spontaneous order, and I would mention other constitutional clauses, which function the same way including the First Amendment's protection of freedom of speech and of the press,⁵⁵ the

51. U.S. CONST. art. II, § 2.

52. U.S. CONST. art. V.

53. U.S. CONST. art. I, §§ 2–3.

54. See Devins et al., *supra* note 1, at 658, 678 (noting that the Commerce Clause and due process requirements frustrate the possibility of an “evolving Constitution,” and stating that the Constitutional system “prevent[s] the information transfer necessary to ensure smooth adjustments in frames in response to changing circumstances”).

55. U.S. CONST. amend. I.

Eighth Amendment's ban on cruel and unusual punishments,⁵⁶ and the Fourteenth Amendment's due process and equal protection clauses.⁵⁷ In all of these instances, the Framers delegated discretion to future generations of constitutional interpreters and so those clauses have, as *Against Design* contends, become little mini systems of spontaneous order within the grand overall system of planned order, which is the Constitution of the United States.

III. CONCLUSION

Against Design is a very useful contribution to the literature because it draws on Hayek, for the first time, in an effort to better understand U.S. constitutional law. I have tried here to carry the authors' Hayekian view of the U.S. Constitution two steps further than they do by arguing that the U.S. Constitution is best understood in Hayekian terms as a system of planned order, many general clauses of which have given rise to little systems of spontaneous order over the last 225 years. The success of the Planned System of Order, which is the U.S. Constitution, is readily discernable. Thanks to our Constitution, the United States is the third largest country in the world by territory,⁵⁸ the fourth most populous country in the world,⁵⁹ and is the world's only military superpower.⁶⁰ The U.S. economy is the largest economy in the world,⁶¹ and the U.S. has by far the highest GDP per capita of any of the so-called G-20 nations.⁶² The superior constitutional design of the U.S. Constitution is in many ways responsible for all of these successes. For this reason and many others, I am a proponent of institutional design. I believe

56. U.S. CONST. amend. VIII.

57. U.S. CONST. amend. XIV, § 1.

58. CIA, THE WORLD FACTBOOK, COUNTRY COMPARISON: AREA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html> (last visited Mar. 7, 2016).

59. CIA, THE WORLD FACTBOOK, COUNTRY COMPARISON: POPULATION, <https://www.cia.gov/library/publications/resources/the-world-factbook/rankorder/2119rank.html> (last visited Mar. 7, 2016).

60. Jeremy Bender, *11 Most Powerful Militaries in the World*, BUS. INSIDER (Apr. 23, 2014, 4:00 PM), <http://www.businessinsider.com/11-most-powerful-militaries-in-the-world-2014-4> (“[T]he United States spends more money on defense than the next ten highest spending countries combined.”).

61. Prableen Bajpai, *The World's Top 10 Economies*, INVESTOPEDIA, http://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp?header_alt=c (last updated Feb. 16, 2016).

62. CIA, THE WORLD FACTBOOK, COUNTRY COMPARISON: GDP (OFFICIAL EXCHANGE RATE), <https://www.cia.gov/library/publications/resources/the-world-factbook/rankorder/2195rank.html> (last visited Mar. 7, 2016).

successful institutional designs are possible and they can improve the lot of mankind. On this point, I disagree with the authors of *Against Design*.

I do, however, agree with the authors that many clauses in the U.S. Constitution were deliberately stated at a high level of generality so that the Constitution would endure and those clauses have indeed given rise to little evolutionary or Spontaneous Systems of Order construing them. It is in part, for this reason, that the Constitution has endured for 225 years. One lesson that I hope will be drawn from this essay is that Hayekian Spontaneous Systems of Order and Planned Systems of Order do not exist separately from one another but sometimes coexist. Just as firms, which are Planned Systems of Order, exist within the Spontaneous System of Order, which is the free market, so too do Spontaneous Systems of Order grow up around the Commerce and Due Process Clauses of the planned order of the U.S. Constitution. Planned and Spontaneous Systems of Order co-exist in human society and are not wholly independent of one another.