

RADICALISING HAYEKIAN CONSTITUTIONALISM

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The work of Friedrich A Hayek presents a compelling theory of the normative basis for constitutionalism and other related notions, such as the rule of law. Suri Ratnapala has undertaken much valuable work on Hayekian constitutionalism and its application to specific questions of constitutional design.¹ I am privileged to have been his collaborator in applying Hayekian ideas to the Australian constitutional system.² It is difficult, however, to avoid a sense of incongruity when seeking to apply Hayekian notions within the context of the modern administrative state. Hayek is widely regarded as a conservative figure, although he famously rejected the label.³ A comparison between Hayek's theory and modern modes of governance makes Hayek seem more radical than conservative, since deep reforms would be needed to instantiate anything like his preferred model. How radical, then, is Hayekian constitutionalism? That is the question I wish to explore in this article.

The article begins by unpacking the normative foundations for Hayek's theory of constitutionalism. I then examine the wider implications of the theory for politics and governance, focusing particularly on the role of the state in securing important social goods. Hayek is widely known for his robust defence of the rule of law and private property rights. His conception of the rule of law owes much to his theory of the emergence and uses of knowledge in society, which emphasises both the evolutionary processes that produce sustained advances in knowledge and the fallibility of human agents. Hayek's theory of private property, meanwhile, rests on a view of property as a social construction that helps to delineate a private sphere of action that allows individual innovation and autonomy.

Hayek therefore does not give natural rights to liberty and self-ownership the prominent place they find in the theories of libertarian authors such as Robert Nozick and Murray Rothbard.⁴ He recognises that individuals cannot flourish outside a rich framework of social institutions. I argue that Hayek provides a nuanced account of the place of the rule of law in social governance. However, despite his resistance to a strong view of natural rights, his account of constitutionalism turns out to have more

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¹ See, for example, Suri Ratnapala, 'Securing Constitutional Government: The Perpetual Challenge' (2003) 8 *Independent Review* 5; Suri Ratnapala, 'Moral Capital and Commercial Society' (2003) 8 *Independent Review* 213; Suri Ratnapala, 'The Idea of a Constitution and Why Constitutions Matter' (1999) 15(4) *Policy* 3; Suri Ratnapala, 'Law as a Knowledge Process' in Suri Ratnapala and G A Moens (ed), *Jurisprudence of Liberty* (Butterworths, 1996); Suri Ratnapala, 'The Trident Case and the Evolutionary Theory of F A Hayek' (1993) 13 *Oxford Journal of Legal Studies* 201; Suri Ratnapala, *Welfare State or Constitutional State?* (Centre for Independent Studies, 1990).

² Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012); Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175; Jonathan Crowe and Suri Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial' (2012) 40 *Federal Law Review* 161.

³ Friedrich A Hayek, 'Why I am Not a Conservative' in *The Constitution of Liberty* (University of Chicago Press, 1960).

⁴ Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974); Murray Rothbard, *The Ethics of Liberty* (New York University Press, 1998).

radical implications than even he acknowledges. I seek to illustrate this point at the end of the article by examining the relationship of Hayekian constitutionalism to the anarchist tradition in political philosophy. I argue that Hayek's arguments, considered in light of the striking failures of the contemporary corporatist state, give us reason to question his commitment to statism. Hayekian constitutionalists in the contemporary era may have to become reluctant anarchists.

I THE KNOWLEDGE PROBLEM

The foundation of Hayek's theory of constitutionalism can be found in his analysis of the nature and uses of human knowledge.⁵ Hayek makes two intertwined points in this context. The first concerns the inherently limited nature of human knowledge, while the second examines how we can best make use of the knowledge we have. Hayek notes that human knowledge and understanding about social institutions is subject to severe and intractable limitations. This is partly because humans have limited capacity to acquire, store and process complex information. More importantly, however, it is because of the complexity and dynamism of human society. The task of designing social institutions involves coordinating a diverse set of human actors, each with their own intricate sets of nested preferences. The process of identifying and aggregating these preferences is therefore deeply complex.

A further challenge is posed by the fact that individual preferences and social arrangements are constantly changing. Even if, *per impossibile*, a person was somehow able to compile a complete list of the preferences of individuals in a given society, this information would immediately be out of date. The preference set would have changed in response to new information before the list could be compiled, let alone used as the basis for a calculation of utility. These difficulties are then compounded by a third challenge: that of translating subjective value preferences into the objective information needed to coordinate delivery of goods throughout the community. This exercise is beyond the capabilities of any centralised authority charged with planning social institutions, while decentralised processes raise a new problem of coordinating the decisions made by each authority.⁶

How, then, can we make most effective use of the highly complex and dispersed knowledge that exists throughout society? Hayek's solution centres on the coordinating role of evolved social norms. His best known example is the price system. Hayek argues that the price system is best understood as a method for communicating information.⁷ Prices aggregate the information available to discrete actors in the market and expressed in individual transactions. The price system is highly dynamic – it adjusts constantly as players in the market take account of new information and use it to guide their choices. Hayek recognises that the price system will probably never lead to perfect coordination of preferences under actual market conditions, but he argues that it plays this role more effectively than any other method available, given the deep challenges presented by economic coordination.⁸

The price system, as discussed by Hayek, is a form of spontaneous order. The customs governing a spontaneous order are not planned in advance. Rather, they emerge over time from the actions of diverse individuals pursuing their own objectives.

⁵ See particularly Friedrich A Hayek, 'The Use of Knowledge in Society' (1945) 35 *American Economic Review* 519; Friedrich A Hayek, *Law, Legislation and Liberty* (Routledge, 1982) vol 1, ch 1-3.

⁶ Compare Ludwig von Mises, *Socialism* (Liberty Fund, 1981) ch 10-11; Ludwig von Mises, *Human Action* (Foundation for Economic Education, 1996) ch 26.

⁷ Hayek, 'The Use of Knowledge in Society', above n 5, 526.

⁸ *Ibid* 527.

The idea that prices and other market information play a coordinating function without any deliberate planning is most famously expressed in Adam Smith's image of the invisible hand.⁹ Hayek describes the price system as a mechanism that humans have learned to use having 'stumbled upon it without understanding it'.¹⁰ As Smith's contemporary Adam Ferguson puts it, many human institutions are 'the result of human action, but not ... of any human design'.¹¹

Hayek's later work discusses other forms of spontaneous order involving different kinds of evolved social norms. An example is the common law system of judicial decision-making.¹² Judges in the common law tradition are bound by the doctrine of *stare decisis* to follow prior decisions. They look at the underlying principles in previous cases to decide what outcome is most consistent with social expectations. Hayek argues that the common law approach brings stability to the law. The law changes gradually, through the development of precedent, rather than suddenly, through fundamental or radical change. The common law method therefore ensures law reflects evolved standards of acceptable conduct, rather than being imposed upon society from above by a central planner. It makes use of the evolved social norms that characterise a spontaneous order.

Hayek builds on this analysis to present two distinct claims about law. I have described them elsewhere as his *descriptive thesis* and his *normative thesis*.¹³ Hayek's descriptive thesis is that law generally *is* a spontaneous order, rather than the product of deliberate planning. Hayek's normative thesis is that, as far as possible, law *ought* to be spontaneous, rather than planned. State law necessarily includes some planned elements in the form of legislation. However, Hayek argues that these should be minimised. This is because evolved social norms solve the knowledge problem more effectively than central planning. The point holds whether one is talking about the economy or social orders more broadly.

II HAYEK'S HOLISTIC LIBERALISM

Spontaneous order – exemplified by the evolved social norms that make up the price system and underpin the common law – is the closest human societies can get to solving the knowledge problem. If we allow social norms to evolve over time, we are effectively drawing on the wisdom of the entire population, rather than just the ideas of a select few. As Hayek puts it:

It is because every individual knows so little and, in particular, because we rarely know which of us knows best that we trust the independent and competitive efforts of many to induce the emergence of what we shall want when we see it.¹⁴

Hayek's response to the knowledge problem raises a further question as to how we should order society to allow a spontaneous order to function most effectively. His answer is that we should recognise a basic set of general, end-independent rules concerning such matters as the protection of private property, the enforcement of contracts, the inviolability of the physical person and the sanctity of key areas of

⁹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Cadell, 1776) bk IV, ch 2.

¹⁰ Hayek, 'The Use of Knowledge in Society', above n 5, 528.

¹¹ Adam Ferguson, *An Essay on the History of Civil Society* (Boulter Grierson, 1767) pt III, sect II.

¹² Hayek, *Law, Legislation and Liberty*, above n 5, vol 1, ch 4-6.

¹³ Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2nd ed, 2014) 108.

¹⁴ Hayek, *The Constitution of Liberty*, above n 3, 29.

personal expression. These standards will then provide a framework within which other norms can evolve over time.

Some authors have identified a potential tension in this response.¹⁵ Suppose social norms evolve in a particular society to the point where there is a general consensus against limiting legal regulation to the types of open-ended rules identified above. There might, for example, be a general consensus in the community that market activities should be heavily regulated or even centrally planned. Should the Hayekian embrace this evolved consensus or stick with her own preferences about the way society should be organised? The Hayekian might, of course, argue that such an evolved consensus is unlikely. Central planning is economically inefficient, so the trial and error process of spontaneous order is unlikely to yield a consensus in its favour. However, it seems possible that people might form a consensus in favour of central planning as a matter of principle, perhaps without even realising that this commitment is in tension with the role of price signals in the market. There would then be a tension between social norms and market mechanisms.

The Hayekian could reply at this point that a social preference in favour of central planning should be ruled out because it undermines the social use of knowledge on which the consensus rests. An evolved preference for central planning is, in this sense, self-defeating. A further appeal could also be made here to other constitutional values.¹⁶ Hayek does not favour a system of end-independent legal rules just because it makes the best use of dispersed social knowledge. He also argues that a system of this kind best respects the value of liberty. Hayek defines liberty as freedom from arbitrary coercion.¹⁷ Any system of legal rules restricts liberty in the sense that it deprives people of the freedom to act contrary to the rules.¹⁸ Hayek acknowledges that 'in defining coercion we cannot take for granted the arrangements intended to prevent it.'¹⁹ However, a system of general, open-ended rules provides a stable structure within which individuals can live without the need for ongoing, complex discrimination between competing preferences.

Hayek therefore argues that, in order to prevent arbitrary coercion, it is necessary first to enable 'the individual to secure for [herself] some private sphere where [she] is protected against such interference.'²⁰ The best way to accomplish this, in practical terms, is to recognise a stable set of 'general rules governing the conditions under which objects or circumstances become part of the protected sphere of a person or persons.'²¹ This protected sphere then allows each person a range of actions within which they can express their preferences, giving rise to evolved social norms. Hayek further notes that 'only in a society that has already attempted to prevent coercion by some demarcation of the protected sphere can a concept like "arbitrary interference" have a definite meaning.'²² Liberty, then, is best understood as freedom from arbitrary coercion beyond the protected sphere. It 'can mean only that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all.'²³

¹⁵ See, for example, Neil MacCormick, 'Spontaneous Order and the Rule of Law: Some Problems' (1989) 2 *Ratio Juris* 41.

¹⁶ Contrast *ibid* 49-50.

¹⁷ Hayek, *The Constitution of Liberty*, above n 3, 134-5.

¹⁸ G A Cohen, *Self-Ownership, Freedom and Equality* (Cambridge University Press, 1995) 55-6.

¹⁹ Hayek, *The Constitution of Liberty*, above n 3, 139.

²⁰ *Ibid*.

²¹ *Ibid* 140.

²² *Ibid* 139.

²³ *Ibid* 155.

Hayek views rights as socially constructed standards whose function is to delineate the protected sphere of individual liberty. Property rights play an important role in this picture, since they not only help to define the protected sphere, but also make possible the dissemination of price signals through the operation of the market. Property rights are therefore critical in enabling human societies to address the knowledge problem. They also provide a simple but flexible mechanism for defining the sphere within which each person may control her own environment. However, Hayek does not conceive property rights as a species of natural right: they are an evolved social institution that serves the twin goals of knowledge and liberty. Hayek's view of property therefore differs importantly from libertarian natural rights viewpoints, such as those of Nozick and Rothbard, which endorse a broadly Lockean account of the link between property and self-ownership.²⁴

Charles Taylor famously criticised what he called *atomistic* varieties of liberalism that see rights as attaching to individuals without regard to social context.²⁵ The concept of liberty, Taylor argues, makes no sense unless it is considered against a backdrop of social judgments about what kinds of actions are meaningful for human flourishing. '[F]reedom is important to us', he contends, 'because we are purposive beings'; we therefore make 'distinctions in the significance of different kinds of freedom based on the distinction in the significance of different purposes.'²⁶ Taylor's critique of acontextual liberalism has considerable purchase against naïve natural rights views such as Rothbard's. Hayek, however, does not advance an atomistic liberalism of this kind. Rather, he offers us a *holistic* liberalism, which takes seriously the normative social judgments that ground individual rights. Hayek would agree with Taylor that individual entitlements, such as the right to private property, make no sense outside a broader context of social norms. It is these social norms, not any putative natural rights, that set the baseline for acceptable conduct.

Hayekian constitutionalism, then, rests on the idea that a stable set of general rules outlining the personal sphere of each individual is the best social framework to advance both knowledge and liberty. It helps defuse the knowledge problem by allowing evolved social norms to direct economic and social action. It also facilitates human flourishing by allowing people to live their lives without the constant threat of arbitrary interference. Hayek argues that this framework is best realised by a classical liberal model of government involving a minimal state constrained by reliable and transparent constitutional rules. Hayek is not dogmatic about the limits of the state – for example, he supports a guaranteed minimum income for those who cannot provide for themselves²⁷ – but he insists that state action be subject to stable limitations. A developed system of constitutional law is crucial in maintaining these boundaries. Constitutional values – such as the rule of law and the separation of powers – help to keep the state within its proper role.

²⁴ Nozick, *Anarchy, State and Utopia*, above n 4, 171, 174-82; Rothbard, *The Ethics of Liberty*, above n 4, ch 8. Nozick's account is by far the more nuanced of the two.

²⁵ Charles Taylor, 'What's Wrong with Negative Liberty' in Alan Ryan (ed), *The Idea of Freedom* (Oxford University Press, 1979).

²⁶ Ibid 183.

²⁷ Hayek, *Law, Legislation and Liberty*, above n 5, vol 3, 395; Hayek, *The Constitution of Liberty*, above n 3, ch 19.

III THE PROBLEM OF THE STATE

Hayek offers a sophisticated and compelling defence of constitutional values such as property rights and the rule of law. I have argued that his theory rests on two intertwined foundations: his response to the knowledge problem and his account of liberty as freedom from arbitrary coercion. It bears noting that Hayek's commitment to the classical liberal minimum state, as explored above, is already very radical when compared to modern modes of governance. No existing state comes close to satisfying his model. The contemporary administrative state found in all developed democracies regulates a wide range of matters that Hayek argues would be better left to evolved social norms. Nonetheless, I wish to conclude this article by asking whether Hayek's theory has even more radical conclusions than he recognises. Are Hayekian constitutionalists justified in endorsing a classical liberal conception of the state – or should they become full blown anarchists?

Anarchism is the view that the state is unjustified and should be abolished. There is both a negative and a positive dimension to the Hayekian case for anarchism. The negative argument maintains that the Hayekian vision of a classical liberal state limited by law is unsustainable, while the positive argument contends that Hayek's normative vision is better realised by a stateless society. Let us begin with the negative argument. The establishment of the state involves creating a concentration of coercive power in a small segment of the community. This concentration of power is inherently subject to expansion and abuse. Hayek's vision of a minimal state assumes that it is possible to keep state power within rigid constitutional boundaries. However, there are both historical and conceptual reasons to doubt this assumption. The historical evidence can easily be seen by examining the modes of governance prevailing in modern constitutional democracies. There is not a single case of a modern state where constitutional government and the rule of law has prevented the imposition of a vast array of administrative regulations.

A compelling explanation for why the creation of the state leads inexorably to an expansion of its power can be found in James Buchanan's influential work with Gordon Tullock on the economics of public choice.²⁸ Buchanan and Tullock point out that political actors can be expected to respond to incentives in the same way as other agents. They will be subject, like everyone else, to the human tendency to pursue individual self-interest.²⁹ They will wish to gain benefits for themselves and people like them, while externalising the costs on others in the community. Political actors will have incentive to make deals with other stakeholders in the decision-making process in order to obtain their desired outcomes. The incentive to seek preferential outcomes through the state is likely to lead to pervasive rent-seeking, while the advantages in striking deals will lead at best to vote-trading and at worst to graft and corruption. This process of exchanging favours for parochial gain tends to produce 'overinvestment in the public sector when the investment projects provide differential benefits or are financed from differential taxation'.³⁰

The state, then, tends to be captured by rent-seekers and special interests. It serves as a mechanism for complex and entrenched forms of discrimination between segments of the community with competing preferences. The incentives that produce this result all point to the unrealistic nature of the classical liberal state. Hayek argues that the state can be kept in check through constitutional means. However, the very mechanisms he relies on in this context – such as the separation of powers and the rule

²⁸ See, for example, James M Buchanan and Gordon Tullock, *The Calculus of Consent* (Liberty Fund, 2004).

²⁹ *Ibid* 26.

³⁰ *Ibid* 162.

of law³¹ – are themselves susceptible to becoming tools of special interests. The separation of powers allows judges to act as a check on the legislature, but authors such as Robert Dahl and Mark Graber have argued that judges themselves are subject to incentives that make them likely to back the political elite or strike expedient compromises to protect their own power.³² The rule of law, meanwhile, is only as good as the law itself, along with the mechanisms that exist to enforce it. The problem lies in the fact that the processes of law-creation and law-application are both subject to the kinds of distortions considered above.

The preceding analysis explains why the state tends to contravene Hayek's vision of limited government. This negative case against the minimal state can be further bolstered by noting the way the state harms the vulnerable. The influence of rent-seeking and vote-trading on state priorities suggests that the governmental agenda is likely to be captured by those with the numbers and influence to get their way. The most vulnerable members of the community – immigrants, prisoners, the poor, the disabled – are likely to be disadvantaged. Furthermore, the modern state harms these disempowered groups in many ways. It encourages welfare dependency, artificially inflates the price of essential goods (such as housing), increases the costs of entrepreneurship and engages in large-scale warfare.³³ The modern regulatory state is, in short, a deeply unjust institution. We therefore have an obligation to at least explore whether there is a better alternative.

The negative case against Hayek's vision of the minimal state is compelling. Hayek is far from unaware of the state's expansionary tendencies, but he seems to doubt whether there is a better option. Is there a positive case to be made for anarchism as an alternative to classical liberalism? The foundation for such an argument comes from Hayek himself. We have seen that Hayek emphasises the importance of evolved social norms in solving the knowledge problem and protecting individual liberty. He notes that customary law predates the modern state.³⁴ This provides us with reason to think that law without the state is at least possible. An anarchist society might be expected to feature customary legal norms. These norms would emerge organically through a process of spontaneous order.

People often worry that a stateless society would descend into chaos. Anarchists typically respond that this concern both *overrates* the state and *underrates* other sources of order. They point out that the desirability of a stateless society can only be properly evaluated by comparing it with a realistic picture of the effectiveness of current state institutions. It may seem obvious that the state is essential to prevent violence, promote equality, combat poverty, and ensure access to education and health care. However, the state has generally done a poor job of achieving these goals. Violence, inequality and poverty continue to be widespread under the modern state. Access to education and health care has certainly improved over time, but it remains far from universal. Even developed Western democracies face serious problems in these areas. It may, of course, turn out that a stateless society would be even worse, but it is unreasonable to simply assume this.

³¹ Hayek, *Law, Legislation and Liberty*, above n 5, vol 3, ch 13; Hayek, *The Constitution of Liberty*, above n 3, ch 11.

³² Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279; Mark A Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7 *Studies in American Political Development* 35.

³³ For detailed discussion, see Gary Chartier, *Anarchy and Legal Order* (Cambridge University Press, 2013) 222-31; Gary Chartier, *The Conscience of an Anarchist* (Cobden, 2011) ch 3.

³⁴ Hayek, *Law, Legislation and Liberty*, above n 5, vol 1, ch 4.

IV IMAGINING ANARCHY

It is a complex task to identify the positive and negative consequences of a stateless society.³⁵ Concerns are often raised about the reliability and stability of legal institutions under anarchy. Customary legal norms may well arise in a stateless environment, but would people obey them? The answer to this question partially depends on why people obey the law. Does obedience to law depend upon formal means of enforcement? There is reason to doubt it. The vast majority of people in developed Western nations obey the law the vast majority of the time. However, it is hard to explain this by pointing solely to formal enforcement. It might be said that it is the *threat* of legal action that keeps people in line, rather than actually being subject to punishment. However, there are plenty of opportunities to commit crimes in everyday life without much fear of being caught.

The influential legal theorist H L A Hart sought to explain this phenomenon by emphasising the role of social pressure in securing compliance with legal rules. Hart famously argued that law does not get its force from the threat of punishment, but rather from the sense of obligation it imposes.³⁶ We do not obey the law because we are forced to do so, as suggested by earlier theorists such as John Austin.³⁷ Rather, we obey it mainly because we feel a sense of social obligation. Social pressure to comply with law gives rise to a critical reflective attitude in relation to our own behaviour. Hart's analysis suggests that people might obey customary law even without formal legal institutions. The most important factor in obedience to law is not the harshness of sanctions, but rather the stability of the associated social norms. A customary legal order without formal institutions might still be widely respected by the community if there was consistent social pressure to comply with its rules. Hayek gives us a compelling account of how such a system would emerge.

Legal obedience, then, does not necessarily depend on formal enforcement mechanisms. Nonetheless, it is important to note that a stateless society is unlikely to totally lack formal legal institutions. It will lack the centralised legal institutions maintained by the state, but a range of consent-based security and legal institutions might be expected to arise.³⁸ People sometimes worry that a market-based system for law enforcement would produce conflicts between rival security forces and court systems. However, it would be in the interests of all parties to avoid such conflicts and, in particular, to forestall the possibility of violence. Private security firms and court systems would therefore be likely to make agreements on how to resolve disputes between their clients. An obvious mechanism for resolving such disputes between private dispute resolution systems would be to refer them to a neutral third party arbitrator. These kinds of agreements might plausibly result in something functionally quite similar to a formal court hierarchy.

A number of existing models show how voluntary legal institutions might operate. Most commercial disputes are already resolved by negotiation, mediation or arbitration, rather than by the courts. Family law disputes about matters such as separation and parenting are also often resolved by mediation. Indeed, the proportion of social disputes that actually reach the formal court system is extremely low. These methods could continue to operate in much the same way without the state. There are

³⁵ This is partly due to a dearth of empirical evidence (although some case studies have been discussed in the literature). See Chartier, *The Conscience of an Anarchist*, above n 33, 19–23.

³⁶ H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 82–91.

³⁷ John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995).

³⁸ For useful discussion, see David Friedman, 'Anarchy and Efficient Law' in John Sanders and Jan Narveson (eds), *For and Against the State* (Rowman and Littlefield, 1996).

also examples of how different sets of legal institutions can resolve potential conflicts. International law is largely based on the consent of states to be bound by treaties and traditionally lacked binding courts.³⁹ It is nonetheless fairly effective at preventing serious conflicts. Similarly, the operation of federalism in Australia and many other jurisdictions shows how regional governments can agree on common rules where this is seen as serving the interests of all parties.

A stateless approach to legal institutions would have pluralistic tendencies. It seems likely that multiple providers of security and dispute resolution services would arise in any given community.⁴⁰ The infrastructure costs involved in providing such services are not obviously such as to create the likelihood of natural monopolies, although economies of scale might cause the number of providers to decrease over time. Different security agencies and dispute resolution services might choose to recognise different legal rules. We can imagine that people may choose to subscribe to an agency based at least partly on the rules it recognises. People might also choose their place of residence based on the rules prevailing in the local community. There are some obvious advantages to this. Legal rules could be responsive to local conditions or community values. People could exit communities with inefficient or unfair rules and move elsewhere, creating a competitive market in legal regimes. This would represent an efficient way of resolving the knowledge problem involved in choosing between different legal rules and processes.

It nonetheless seems likely that legal systems under anarchy would converge over time on a set of common basic rules. The theory of spontaneous order offered by Hayek suggests that trial and error tends to lead communities to settle on shared rules of conduct over time.⁴¹ Ineffective and unfair legal rules are likely to be modified or abandoned, especially if they are subject to competition from more effective and equitable approaches. Convergence between different legal regimes would also make interaction between regimes easier. Dispute resolution providers would therefore have an incentive to standardise their rules.

What if a person refused to join any of the available private security services or legal systems, preferring to rely on their own means of protection and remain outside the reach of the law? A person like this would be a free rider, as they would benefit from the social stability provided by security and dispute resolution services without paying the fees. However, the existence of such free riders may not present a serious problem so long as they remain uncommon compared to fee-paying subscribers.⁴² Security groups could make their own decisions about how to deal with those who decline their services. This might include choosing not to protect such people from aggression. This would create a strong incentive for individuals to join one of the available services. Outlaws would probably be uncommon, since it would be a perilous existence. However, if enough people declined to subscribe to local security services, this might indicate a problem with how the services are provided. It could encourage the service providers to be more responsive to local needs.

There might be some organised groups that would flout community laws and rely on their own means of protection. These outlaw gangs could pose a threat to social order. However, there is no obvious reason this problem would be more pronounced in a stateless society than it is under the state. Outlaw gangs currently present significant social challenges. The state is far from immune from this problem: indeed, it commits

³⁹ For discussion, see Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) ch 7.

⁴⁰ For helpful discussion, see Chartier, *Anarchy and Legal Order*, above n 33, 244–8.

⁴¹ Hayek, *Law, Legislation and Liberty*, above n 5, vol 1, ch 1-4.

⁴² See, for example, James M Buchanan, 'What Should Economists Do?' (1964) 30 *Southern Economic Journal* 213, 220.

enormous resources to combating organised crime – not to mention the threat posed by terrorist groups. The state arguably exacerbates the problem of organised crime by aggressively pursuing drug prohibition, thereby increasing both the risks and the gains from illegal conduct. A similar point can be made about the link between state aggression and terrorism. The incentive structures for outlaws might be significantly different in a stateless environment.

There is another potential concern about law in a stateless society. Even those who are sympathetic to market provision of legal services often worry about people falling through the gaps. What about those who can't afford to pay for protection and dispute resolution? A similar worry is often raised about access to essential goods such as education and health care. There is reason to think that market provision of these goods would render them generally accessible across the community. The importance of security, education and health care to human flourishing means that there will be wide demand for these goods at a variety of price points. Market incentives would exist for service providers to offer the best possible service to segments of the community based on their resources. People might also voluntarily subsidise the needy through cooperative and pro bono programs.

Market provision of legal services and other important goods would no doubt lead to inequalities. Rich communities would have better services than poor ones. There would probably also still be people who fall through the gaps. However, every known legal and welfare system has gaps and inequalities. Many people cannot afford to access the state legal system – indeed, the most vulnerable are generally the least able to get legal protection. There are also significant inequalities in access to education and health care in contemporary democracies, notwithstanding extensive state involvement. The role of the state leads to rent-seeking and middle class welfare, meaning public services do not necessarily serve the most vulnerable. It seems at least possible that access to these services would be more equitable under anarchy. Competition and innovation might help reduce the gaps in the system. The result would be imperfect, but it might be better than what we have now.

V CONCLUSION

I have argued that Hayekian constitutionalists have both negative and positive reason to consider embracing anarchism. Hayek's own theory, with its emphasis on the value of evolved social norms, lends support to this conclusion. It is not, however, a conclusion that Hayek is willing to embrace. Ratnapala, for his part, also resists the temptations of anarchism. He concedes the force of the anarchist concern that 'a truly limited government is a utopian notion'.⁴³ Nonetheless, he worries that privatisation of legal processes would undermine the emergence of predictable common law rules, since private arbitrators may have limited incentive to explain their decisions in a reasoned manner and pay due attention to precedents.⁴⁴ He also notes that a privatised legal system may simply replace state coercion with alternative sources of power enshrined through custom and contract. Voluntary institutions might consolidate themselves until a monopoly arises. This would then cause problems similar to those associated with the state. However, the lack of a clearly defined constitutional system would make the power wielded by a monopoly provider of legal services even harder to constrain than state power in a democratic system.⁴⁵

⁴³ Suri Ratnapala, 'Is Law Without the State Possible?' (1993) 9(3) *Policy* 37, 40.

⁴⁴ *Ibid* 38.

⁴⁵ *Ibid* 39.

Ratnapala therefore agrees with Hayek that the minimal state favoured by classical liberalism is preferable to a stateless society from a constitutional perspective. There is much to be said for this argument. On the other hand, the modern administrative state poses serious and seemingly intractable challenges to the rule of law. We have seen that Hayek's response to the knowledge problem favours social norms over positive legal rules. It is worth asking whether the coordinating norms in question would function more effectively with or without the apparatus of the state. It is also worth asking whether constitutional values such as the rule of law would be better realised in a stateless environment than in modern democracies. These are empirical questions and it is hard to be sure. However, constitutional theorists have an important role in bringing these questions to light.

Ratnapala has devoted his career to advancing this kind of probing and critical constitutional theory. He has inspired many students and colleagues – myself included – by his fine example. His unswerving belief in the value of rigorous scholarship in promoting constitutionalism is evident in his concluding remarks on the anarchist challenge to classical liberalism:

It is true that, in recent times, constitutional restraints secured by systems of checks and balances have failed to control the expansionary inner dynamic of government. What are the causes of this failure? As a student of constitutional law and theory I cannot avoid the conclusion that a major cause must be the information failure occasioned by bad scholarship. Standard law school text books bear testimony to the defeat of the liberal ideas of limited government. These ideas have prevailed in the past without the aid of scholars. But ... they gain their brightest lustre when they are under grave threat and are least appreciated when they appear to be most secure. The erosion of constitutional values is taking place incrementally, creating an information lag that obscures the growing threat. The ongoing revival of classical liberal scholarship offers hope that this information lag may be reduced, leading to the restoration of constitutional principles before liberty is irretrievably lost.⁴⁶

Ratnapala ends by cautioning that 'the need for constitutionalism will not cease even if we succeed in wholly privatising the enterprise of law.'⁴⁷ This is surely correct. The advent of anarchism, should it ever occur, will not be the end of the struggle for liberty. The battleground may shift from public to private institutions, but the broader fight will not be over. Constitutional values will continue to need their defenders within and outside the academy. The conclusion I have defended here – that Hayekian constitutionalists may need to reluctantly embrace anarchism – is open to reasonable disagreement. However, there can be no dispute about the value and importance of the kind of classical liberal scholarship exemplified by Hayek – and, more recently, by my friend and colleague, Suri Ratnapala.

⁴⁶ Ibid 40.

⁴⁷ Ibid.

