Democratic Capture by Sectional Interests: Public Choice Critiques of F. A. Hayek's Constitutional Political Economy

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Abstract: State capture by special interest groups is widely understood as a profound issue facing democracies. F. A. Hayek, and other 'classical liberal' writers such as James M. Buchanan and the public choice theorists, despite being commonly labelled as anti-democratic, take this problem seriously. Hayek and others can provide key insights into this critical weakness of democracy by reframing the way we commonly understand democracy and participation in political decision making. First, I aim to establish the intellectual lineage between Austrian economics and rational choice theory, covering a breadth of material that deals explicitly with group-based capture. Second, I will reconstruct Hayek's model constitution, made to minimise the impact of sectional interests in democratic decision-making, alongside public choice theories. Finally, I will use public choice models to apply pressure to Hayek's constitutional framework and reveal potential points of failure. By shedding more light on the theoretical aporias to which Hayek's constitutionalism is prone, I hope to spur on more qualified discussions on the difficulties at large democracy faces in withstanding group capture.

INTRODUCTION

Robert Higgs (1989) criticised F. A. Hayek's final major work, *The Fatal Conceit*, as ignorant of breakthroughs in public choice theory made in the preceding near-three decades. Hayek's description of the political system, he claimed, had no room for 'the most significant debates now occurring in political economy' (Higgs 1989, p. 9) on special-interest groups or public goods. However true this claim may be for *The Fatal Conceit*, it is inapplicable as a generalised critique of Hayek's work. In this article, I will demonstrate the susceptibility of democratic systems to sectional interests, and what challenges one faces in attempting to make a secure democratic model. Hayek was explicitly and consistently concerned with a constitution liable to group capture, and subsequently put his hat in the ring by devising his own system. However, fleshing out a full vision of Hayek's model is difficult for two reasons. First, Hayek tinkers with his ideas over a number of years. They are first explicated in *The Constitution of Liberty* (1960) but are revisited and revised through numerous essays and the three-volume *Law, Legislation and Liberty* (1973-1979). Second, his model is based on an idiosyncratic understanding of political economy, economic methodology, legal history, and system of socio-political values. As a result, Hayek's work on his model constitution can seem scattered and weak compared to his typically rigorous intellectual style.

Though much has changed in the sixty-five years since the publication of *The Constitution of Liberty*, analysing Hayek's constitutional view still provides a crucial lens for critically assessing our current democratic systems. Indeed, his unique approach can reinvigorate our staid understanding of democracy, refresh our minds for what can be achieved through democratic systems, and refocus our attention to the

keen threat that sectional capture poses. Commemorating his political economy after more than a half-century is an important reminder that we ought to be alive to the possibility that our political systems have become more brittle and further decayed in the intervening period. Hence, I have dual aims in this article. One is a broad and systematic reconstruction of Hayek's model constitution. The other is to scrutinise this constitutional design to highlight not only issues with his model, but the strong headwinds of group capture that democracy is buffeted by, irrespective of the constitutional design. Democratic backsliding owing to sectional interests is an ingrained weakness of democracies. Critiquing a model such as Hayek's that build up an entire system to suppress this weakness and still fall short is an attempt to indicate this perennial challenge. In the following section, I will draw out Hayek's headline concerns on democratic capture. I will also justify how public choice critiques are not only a theoretically but historically appropriate heuristic for simultaneously reconstructing and critiquing Hayek's model.

I: HAYEK AND THE PUBLIC CHOICE THEORISTS

The claim that must be laid front and centre of Hayek's constitutional model is a seemingly alarming one: democracy is of second-order importance to liberalism. Democracy's prized attribute is that it most effectively supports a liberal system in guaranteeing a peaceful transfer of power, not that the system or morals of democracy are inherently desirable (Hayek 1978d, p. 414). An illiberal democracy is subsequently possible, as 'a democracy may well wield totalitarian powers, and it is at least conceivable that an authoritarian government might act on liberal principles' (Hayek 1978a, p. 31). Democracy is useful to Hayek merely as a vessel to deliver the 'higher' end of liberalism.[1] Consequently, much of the reconstruction of his model constitution rests on questioning the ability of institutional safeguards to deliver on protecting Hayek's core values.

As a result, a popular modern-day claim against Hayek and associated thinkers is that they were, and are increasingly, 'profoundly anti-democratic' (Harvey 2005, p. 205).[2] Hayek's relationship with democracy is often similarly problematised. Despite this, I do not consider Hayek an anti-democratic thinker. The tendency for totalitarian dynamics to emerge in unconstrained democracies, and Hayek's call to constrain democracy in certain ways, should not lead critics to overrate the 'enemy of democracy' angle. *The Road to Serfdom* can further be read as a singular defence of the importance of economic and political freedom. Whilst critiques of this nature are not invalid, as Hayek's relationship with democracy is complex and sometimes strained, I would warn against defaulting to an overly simplistic position where critics of democracy are subsequently anti-democratic. Perhaps owing to this position that is therefore commonly taken, some theorists have attempted to nuance the characterisation of Hayek as an 'anti-democrat' by reconciling his liberal ideal with democracy. For example, Bellamy (1994, p. 420) considers how democracy and liberalism in Hayek's political thought could be married to create a legitimate method of social governance. A 'constitutional framework of democracy […] rethought in a manner that employs the procedures and reasoning of the democratic process' would achieve this reconciliation. However, that Hayek is comfortable in cleaving apart liberalism and democracy cannot be ignored. To understand fully Hayek's approach, we must first step out of the paradigm that democracy and liberalism are fused at an atomic level. Understanding democracy in this way reveals our bias to only understand democracy in its most modern iteration—an idea I will revisit throughout this article.

Modern democratic systems fuel the 'misconception that ultimate 'sovereign' power must be unlimited [in democracy as] power can be checked only by another power' (Hayek 1978c, p. 293). A system, such as American bicameralism, 'in which a majority of a representative body lays down the law *and* directs government' (Hayek 1979, p. 1) is liable to invite the most 'repugnant kind of abuse' (Drinan 1980, p. 623).[3] This abuse exists as influence from special interest groups. Directives from sectional interests, in Hayek's analysis, jeopardises liberalism. Given that liberalism, not democracy, is Hayek's ultimate end, then a democracy that fails to deliver liberalism is unfit for purpose. Incentives to secure advantages for small interest groups forces the electoral machine to operate on a 'process of vote-buying, for placating

and remunerating those special interests' (Hayek 1979, p. 32). Representative democracy is thus reduced to a 'playball of group interests' (Hayek 1979, p. 99) parading as the will of the majority. Although the frustration of seeing unlimited democratic power antagonise liberalism is shared by many scholars,[4] his epistemological position sets him apart. His belief that spontaneous social order has an inbuilt ability to resist arbitrary power fuels his frustrations regarding unlimited democracy. Subsequently, the disproportionate exertion of special interests through centralised powers are an especially pertinent concern.[5]

Rational choice theory approaches these concerns from the same direction. Early Virginia School public choice theorists share an undeniable intellectual relationship with Hayek and the Austrian School. They are joined not just by shared methodological choices, but also through ideological concerns that lead them to similarly consider sectional interests as a much-overlooked radical danger to government. The application of economic analysis to political decision-making embodies the ethos of public choice that was arguably predated by the continental economists. Contextual and historical narratives can be established that tie together the Austrian and Virginia schools. Boettke and Leeson (2004, p. 28) claim that a shared praxeological approach conjoins the two traditions. Praxeology, the overarching study of human action under which economics and other social science analysis occurs, is to understand social phenomena 'in the context of the actor's intent'. Though generally disregarded in modern social science, the fundamental axiom of such an approach is that actors are deliberate, purposive, and rational. Utilisation of the praxeological method reframes complex social and political phenomena in the context of conscious actions by actors.

Therefore, once government decisions are reconsidered under this viewpoint, the economic way of thinking previously only applied to market exchange can be extended further afield. (Gary Becker's 1968 'Crime and Punishment: An Economic Approach' famously does so by stepping into the field of criminology).[6] Public choice is therefore just one example of a discipline within a broader praxeological approach, an approach pioneered by the Austrian economists. Mises's analysis of bureaucracy, Hayek's concerns on the pressure of special interest groups, and Schumpeter's prediction of rational voter ignorance, are all areas in which the Austrian school predates and underpins early public choice. The similarities in their work and reveal why 'Austrian economists, in short, possess deep methodological, analytical and ideological affinities with their public choice brethren' (Boettke and Leeson, 2004, p. 31).[7]

Historical narratives can also be excavated from a range of sources that demonstrate the ties between public choice and Austrian academics on an individual level. James Buchanan, the eminent Virginia-schooler that typified this economics-in-politics approach, interviewed Hayek in 1978 on his constitutional and political philosophy. Their discussion primarily regarding Hayek's *Law, Legislation and Liberty* project (Buchanan and Hayek 1983), was an important record of one of their many interactions.[8] Buchanan's later work, *Politics by Principle, Not Interest*, opens with an epigraph from Hayek taken from the same interview (Buchanan and Congleton 1998, p. vi). The book is arguably related in content to his work co-authored with Gordon Tullock some thirty-five years earlier, *The Calculus of Consent*, that will be the primary public choice text drawn on to evaluate Hayek's constitutional model in this article. Both focus on the issues facing democratic politics, and attempt to analyse and solve those issues within a framework of constitutional political economy.

That Buchanan quoted Hayek from their discussion on constitutional philosophy is not solely an homage to the Austrian economist. As the telling subtitle of the book, *Toward Non-discriminatory Democracy* suggests, Buchanan grapples with how to manage the imposition of constitutional constraints on majoritarian democracies while upholding classical liberal ideals. Such an uncomfortable difficulty is certainly one that plagues many of the thinkers in the Austrian and Virginia schools. Nor is it one that managed to muster a united front among those who believed in the same principles. While the concerns expressed by Buchanan in this work respond to similar concerns as Hayek in *The Constitution of Liberty*, it would be an error to assume their stances could be bundled together and summarised. Indeed, Hayek's scepticism of constitutional reform is not one that Buchanan shares in this work; or, as Kliemt aptly summarises, Buchanan's ally in the management of the rough-and-tumble of daily politics is 'Hayek the "Whig revi-

sionist" rather than Hayek the "Conservative evolutionist"' (Buchanan and Congleton 1998, p. xv). Nevertheless, even with a brief historiography of their works, the shared intellectual origin of the main cast of characters in this article begins to emerge.

Though Hayek had entered the twilight years of his academic career by the time public choice entered its prime, both were certainly involved in a reciprocal understanding and critical dialogue with the other. Hayek (1979, p. 143) acknowledges admiringly the existence of the emerging discipline, strongly praising Mancur Olson's *The Logic of Collective Action* as a 'masterly description of the mechanism of this process of government by coalitions of organized interests', indicating not only an awareness but engagement and support for the economisation of political analysis. This reciprocal relationship that included the likes of Buchanan, Tullock, and Olson, have led some to argue that there is a 'natural affinity between neoliberalism and public choice theory' (Hay 2007, p. 97).[9] Such a conclusion is surely true, as outlined through their shared historical background (though Hay may be concluding this from a different angle).

Buchanan and Tullock's *The Calculus of Consent* is an example of a public choice monograph dealing specifically with the constitutional issues posed by group interests. Much like how Buchanan's 1998 work opens with a quote from his interview with Hayek, *The Constitution of Liberty* is appealed to repeatedly in footnotes throughout *The Calculus of Consent*. For example, when the authors concede that individual utility must be conceived more generally within defined rules, they refer to Hayek in the footnotes. Hayek's work fills in the theoretical gap as to what those rules might be, outlining what general constitutional rules guiding a collective-choice framework may entail (Buchanan and Tullock 1962, p. 7). *The Calculus* opens with an explicit statement that they 'are not attempting to write an "ideal" political constitution for society […omitting discussions on] division of powers, judicial review, executive veto, or political parties'(Buchanan and Tullock 1962, p. xxii). A handoff to Hayek, who does pitch his ideal political constitution across numerous works, is therefore not entirely surprising.

My reconstruction of Hayek's model constitution, as did Buchanan's interview, uses Hayek's later work including *The Political Order of a Free People* and other relevant essays primarily from 1967 onwards, with *The Constitution of Liberty* and *Law, Legislation and Liberty* bookmarking the timeframe of my analysis. A common claim among Hayek scholars is that from 1960 onwards, Hayek's work enters a separate chapter from his work in the previous two decades. As Dietze (1977, p.110) notes, Hayek's later work realised more concrete principles than his earlier theories posed in *The Constitution of Liberty*. Given the continued development of his ideas, Hayek (1973, p. 3) himself conceded that *The Constitution of Liberty* was a more apt name for the work undertaken in *Law, Legislation and Liberty*. Buchanan (1992) appears to agree, claiming the somewhat dated insights of the former motivated Hayek to produce fresh ideas related to the liberal order in the latter (pp. 131-132). Consequently, I cover a breadth of Hayek's work to ensure sufficient evidence has been provided in reconstructing his model that was built up piecemeal.

Hayek's model constitution is divided into three main parts: the basic clause, division of powers, and demographic makeup. In the next section I will expound on the wide-reaching clause, and in the third section will handle the ideas of divisions of power and the demographics of separated assemblies. At each layer of his constitutional system, there is a relevant public choice model that can be used to push Hayek's assumptions to the limit. Owing to the similar umbrella approach of praxeology, these public choice critiques both begin with similar concerns to Hayek and methodological approaches that echo some of the early work carried out by himself, Mises, and Schumpeter. The upshot of reconstructing Hayek's political and economic thought in tandem with the rational choice theorists' arguments for placing restraints on popular sovereignty is that it offers us critical insights into the range of possible rationales for doing so. Given their shared starting point, that there are incisive critiques to challenge Hayek's approach is not only a point of interest, but offers hopefully fresh insights into understanding core features of his model and the difficulty of legislative capture by group interests.

I will highlight through comparisons with Hayek and his interlocutors the problem of special interest groups forming within bodies tasked with enacting constitutional restraints. In doing so, the internal struggle between constructivism and evolutionism in Hayek's broader thought can presented more clearly.

Therefore, my aim in this article is to pose an open question: do Hayek's institutional remedies to alleviate democracy from group capture manage the pressures of public choice theory? I will in the following section work through the basic clause, Hayek's first line of defence against sectional groups.

II: THE BASIC CLAUSE

Hayek's model constitution is grounded on what he calls a basic clause. Similar but superior to a bill of rights, this foundational principle of his system is a broad-brush approach that not only limits the 'top-down' power of state coercion, but also of 'bottom-up' individual influence within the state (1979, pp. 109-110). Hayek claimed his ideal constitution could be summarised in one line: that government 'shall make no law authorizing government to take any discriminatory measures of coercion […making] all the other rights unnecessary' (Buchanan and Hayek 1983, pp. 208-209). The basic clause would therefore state that 'men could be restrained from doing what they wished, or coerced to do particular things, only in accordance with the *recognized rules of just conduct* designed to define and protect the individual domain of each' (Hayek 1979, p. 109, emphasis my own).

Rules of just conduct are abstract and general rules of society. They apply to all citizens equally, and protect individual liberties; in doing so, they protect spontaneous economic order. These may include the right to be free from extortion and physical coercions. Broadly, they align with many of the characteristics that we may typically understand as key elements in a modern Western rule of law. However, these rules are also crucial in coordinating disparate societies as it enables individuals to make decisions within an understood framework and act accordingly. For example, if in England over time individuals within a society built a tacit understanding to walk on the left, then this would streamline behaviour as more individuals adhere to this social behaviour—compared to a less individual, random motion of people down a street. Now it is law to drive on the left. Hence, we can see how broadly understood rules of social conduct bubbling at the social level can receive government assent and become codified.

Hayek institutes the basic clause as the crux of his model constitution for two reasons, one theoretical and one historical. The basic clause's theoretical strength is in its generality, as it protects and promotes spontaneous order and cultural evolution. Overly cumbersome and specific legislation would throttle the ability of individuals to naturally develop new social rules and mores. By outlining a general principle rather than strict boundaries, Hayek attempts to accommodate the emergent properties of a general social order. Social evolutions developing from spontaneous interactions can still be captured through this clause, without being so stringent as to require constant revisions in order to reflect inevitable cultural shifts. The basic clause therefore enables individuals to predict to a limited extent what might be possible behaviour, and what actions would be unacceptable and therefore unlikely to happen. Hence a clause that captures naturally occurring social rules allows a relatively diverse set of individuals in a complex network where people are not in direct contact with each other, or in complete knowledge of others in the same society, to establish regularities in conduct (Mack 2006, p. 261).

As a result, this system retains the freedom of individuals to make decisions along an idiosyncratic value set. Imposed boundaries therefore are primarily negative, insofar as citizens in such a system are constrained from imposing external damages onto others. Some authors assume this generality begets a leniency—that 'Hayek's ideal constitution does not enumerate substantive constraints on state power […because the basic clause] does not produce a fixed set of rules' (Boykin 2010, p. 23). However, the basic clause can in fact place substantial limits on both the state and the individual. The lack of a fixed set of rules is so the generality can capture abstract social order. This order occurs due to the fundamental constraints of the mind—one cannot comprehend and act on the vast quantities of information contained in other individuals (Hayek 1962, pp. 337-340). This is especially true when aiming to centrally impose and direct 'the formation of coherent and intelligible social structures that emerge independently of their specific intentions' (Tebble 2010, p. 29). This can be misunderstood easily, as one commentator claims:

> The distinction [between actors and institutions] is redundant because the group neither acts as an individual nor operates as a cohesive form. It is merely, given external circumstances, a mirror image of the rules adopted by individuals. Even the individuals who make up the group can be represented by their rules of just conduct (Khalil 1996, p. 194).

This is almost antithetical to the way social order is constructed from individual behaviour, for Hayek is not judging the emergent rules of conduct by observing individual actions. Macro-level trends can inform the type or range of individual actions, but can be distinguished from individual actions as individuals do not consciously act with regards to those constraints. That individuals are free to make unpredictable personal decisions without jeopardising broader social stability is why Hayek is such a believer in the strength of natural social coordination.[10] No single citizen embodies or sets the rules of just conduct as it is in the aggregate that they become conduct. Yet, social cohesion still prevails.

The *realpolitik* of the basic clause is understood within a historical story that Hayek set out. In his narrative, the gradual degradation of monarchies into representative assemblies conflated the will and opinion of a majority. When the sovereign was the head of state, they could not possibly pose as a representative of both (Hayek 1979, pp. 32-35; 1978c, p. 299). For Hayek this was in some ways positive, since the general recognition of this fact provided clarity and clear boundaries of what was involved in state decision making. There was no illusion that decisions made by a sole monarch could simultaneously be 'will', voiced by individuals, and 'opinion', by nature expressed by society as a whole.[11] In many ways this echoes Mill's discussion of how modern democracies were formed in his opening of *On Liberty*: the move away from monarchies or highly exclusionary oligarchic or aristocratic systems toward a more egalitarian society empowered society to shed shortcomings in the old social order such as unjust or arbitrary uses of state power. However, this shift realised new issues that could be as insidious as the old system, for example in the tyranny of the majority, that could mask its coercive power under the pretences of the will of the people.

When the powers of decision and representation were divested into the people via assemblies or parliamentary sovereignty, society tacitly and mistakenly accepted that the 'democratic decision-making process always is directed towards the common good—the common good being defined as the conclusions which the democratic procedures produces' (Hayek 1979, p. 35). Highlighting the circular reasoning from this botched merger of will and opinion is key to understanding why modern democracy not only has critical weaknesses, but how those weaknesses are compounded by the fact that no one has yet recognised that such a manoeuvre has occurred. Citizens were beguiled by the empowering fraternity of modern democracy without recognising the dangers posed to liberalism, even though it was liberalism that had given the individuals the freedom they now enjoyed, not democracy. Therefore, the basic clause is Hayek's way of reasserting this fundamental truth that is now assumed, but not actually present, in modern unitary democracy. 'Freedom from coercion', rather than a freedom to practice democracy or empower the 'will of the people', is Hayek's ideological hinterland.[12]

Hayek's (1967a) desire to codify these abstract rules of just conduct (from his historical justification), initially appears incongruous with his belief that such emergent behaviours are non-codifiable and would be detrimental to their evolution to do so (the basis of his theoretical justification). Constructivism works against the purported strength of cultural evolution, as explicit knowledge of tacitly understood rules is unnecessary for social order (1967a, p. 68). Hayek understands this tension, and does so anyway. Arguably, codification is simply the lesser of two evils. He recognises that codification ensures that his constitution will not fully embody the strength of a flexible social order, yet with potential risks from sectional interests, compromises such as these become necessary. Trade-offs are unavoidable thanks to historical conditions that created modern-day democracies. Hayek understands the importance of cultural conditions, and the path dependence of these historical choices means that he must work to a best solution within current institutional constraints. Any social order would be further damaged by imposing a system that bore no

similarities to the culture of the nation, and so the basic clause must work to capture social rules in any cultural context—resulting in an awkward balancing act.[13]

Public choice models highlight several issues with this approach. Hayek is conscious that when granted full administrative and law-making power, a legislature becomes subject to capture by group interests via the voting mechanism. Therefore, the implementation of the basic clause that explicates diffuse social rules, provides a constitutional superstructure separated from day-to-day administration (1979, p. 38). However, arguably Hayek has only protected the second step of the process. Even prior to democratic capture by group interests within a modern constitutional framework, rules of just conduct themselves could be subject to the sectional interests of groups. (Perhaps especially in pluralist modern societies with competing interests and values). There are three ways in which the natural social construction that Hayek relies on as the steady basis for the basic clause comes under scrutiny: the homogeneity of groups at the social stage; the way in which individuals make choices under uncertain circumstances; and the ability to aggregate will from the individual to the collective level—the key for the formation of rules of just conduct.

Buchanan and Tullock (1962, p. 74) argue that the likelihood of agreement on general rules '*within* the confines of certain agreed-on rules' is contingent on both the dispersion of sectional interests within the collective and the uncertainty of the individual in making choices. In other words, the possibility of rules, such as relating to just conduct, being agreed within any given established political system. Support for 'constitutional provisions that are generally advantageous to all individuals and to all groups' (ibid.) requires uncertainty and equality. The utility-maximising individual must be uncertain of their relative position in society so that they act solely based on personal preferences, else they could 'game' the system by voting tactically for rules based on the likelihood of certain outcomes. The individuals must be broadly equal, as members in a dominant group would know, and continue to vote for any rules that ensured the dominance of the group.[14] This equality that drives the 'evolution of democratic constitutions from the discussion of rational individuals' (Buchanan and Tullock 1962, p. 76) is only destabilised by a society with sharp cleavages (including but not limited to race, ethnicity, wealth) 'in which one of these coalitions has a clearly advantageous position at the constitutional stage' (ibid.)—the point where the rules are given assent. Questioning the impact of the heterogeneity of the group is an important question for Hayek's constitutionalism. The existence of 'clearly predictable bases among these differences for the formation of permanent coalitions' (ibid.) is of minor concern for Buchanan and Tullock, for as long as 'some mobility among groups is guaranteed, coalitions will tend to be impermanent' (1962, p. 77) and robust constitutional agreements on rules can be discovered and implemented.

For Buchanan and Tullock this concession is easily made. However, the same cannot be said for Hayek. It is the very existence of unequal sectional groups that demands the restriction of democracy. If uneven powers of decision-making were easily dispersed, then his fear that some groups would be able to impose their hierarchy of values onto others would be misplaced (Hayek 1944, p. 142). A diverse enough society without cleavages would not lend itself to the composition of group interests that disrupt the formation of agreeable rules of just conduct. Therefore, while Hayek's model constitution operates on similar principles of uncertainty as Buchanan and Tullock, it is important that it must be rejected due to the implicit understanding that Hayek's community is a society composed of sectional interests.[15] If the concern of sectional interests dominating each other could be stamped out at the evolutionary stage as they competed with each other, then the whole construction of the model state would be unnecessary.

Olson's (1965, pp. 1-2) *The Logic of Collective Action* provides a further key insight into the relationship between the individual and the collective, in a contrasting way from Buchanan and Tullock. Closely following the tread of *The Calculus*, Olson refutes the widely held assumption that the difference between group and individual action are analytically consistent or trivial.[16] Typically, it was assumed that group action was analogous to individual rationality and self-interest. Though this has largely been understood to be false in the case of market failures of public goods, such as how clean air is valued by society but no one takes steps to provide it, Olson takes this logic further. Even in narrow-interest groups, even with self-interested actors aligning along those lines, individuals 'will still not voluntarily act to achieve that

common or group interest' (Ibid.). For example, Olson suggests that the Marxist view of class mobilisation is not handicapped by a lack of knowledge, or uncertainty as Buchanan may have it, but by the inability for large groups to move with the aim of beneficial collective action (Olson 1965, pp. 102-110). This is due to systematic free-riding incentives that plague the ability of a group to effectively coordinate their broader goals to benefit all members.

Small groups that are able to easily organise will therefore have adverse effects in social situations as they can produce a homogenous view unlike larger groups, due to the difficulty of mobilisation. This relies on the fact that 'in general, social pressure and social incentive operate only in groups of smaller size, in the groups so small that members can have face-to-face contact with one another' (Olson 1965, p. 62). Large groups as a result are captured by small group interests, even though small groups do not enjoy any form of majority and cannot abuse this power to dominate. The ease of organising to push self-interested motivations that small groups enjoy, potentially endangers the notion of a basic clause capturing the result of spontaneous order. A conclusion such as Olson's indicates that the rules of just conduct, a higher but abstract *nomos* that the basic clause attempts to formalise in writing, may simply regurgitate the sectional interests of organised groups.[17]

Buchanan and Olson's theories critique Hayek's model in a pincer manoeuvre: on the one hand, Buchanan and Tullock demonstrate that for constitutional rules to be agreed society needs to have relatively dispersed and diverse interests without forming sectional groupings, fundamentally opposed to Hayek's understanding of society; on the other, Olson proves how even small sectional groupings are fiercely capable of exercising an oversized-influence on what rules are dominant at the social stage in the first place. These public choice theories therefore demonstrate the struggles of Hayek's model in fending off group capture—pressure from multiple directions demonstrates how challenging the task can be of striking a balance between constructing a system and relying on natural forces. However, these criticisms are tempered both by external considerations, and some of Hayek's own pre-emptive moves against comments of this type. Doing so further nuances how we can understand the work of the basic clause.

There are several points of concern for the conclusions of Buchanan and Tullock based on assumptions of uncertainty and equality. Fishkin (1989, p.183) notes that Buchanan and Tullock's contractors 'operating from behind a thin veil, know too much'.[18] Buchanan's statement that public choice actors are 'modelled as making a choice among alternative decision rules without knowing how the operation of particular rules will affect his personal interests of values' (Buchanan 1989, p. 178) appears somewhat implausible. This is the individual in both Hayek and Buchanan's world, for they can only make choices within their knowledge bounds and have no ability to direct what rules arise from those choices. The potential failure of this assumption is largely inconsequential in Hayek's case, for the restraints on the powers of the system would help prevent individuals who were aware of the direct impact of their actions from undertaking choices that would allow them to centrally direct rules.

On the other hand, for Buchanan's model to hold up, the 'contractor does know his position in the distribution of income and wealth' (Fishkin 1989, p. 185) since the value of a rule to an individual is calculated within these boundaries. Individual analysis of decision-making and external costs without knowing what those costs unique to them are, would be impossible (Buchanan and Tullock 1962, pp. 43-44). Hence not only does their idea of uncertainty under constitutional frameworks come under some questioning, but also the suggestion that potential clustering of sectional groups in supposedly heterogenous samples 'should not be overemphasised' (Buchanan and Tullock 1962, p. 76). It would be sensible that if one were to know the distributions of income and wealth, citizens could use this information to their advantage to re-calculate the impact of their decisions, and act tactically to support partisan interests. Rational behaviour such as this is plausible for the actors modelled, and deliberately supporting the adoption of rules with the knowledge that they lead to unequal outcomes is recognised by the pair as a condition that would lead to a failure of agreement. The result of this could be that when there is a dominant (i.e. 51% vote share) group, with perfect alignment on preferences and policy options so that members would not exit the group,

the homogeneity of the group would make permanent coalitions, which would undermine the diversity assumption protected by the uncertainty requirement.

Furthermore, even when operating within Buchanan's paradigm of total uncertainty, the criticism against Hayek concerning group heterogeneity may not be as pertinent as initially considered. Witt and Schubert (2008, pp.203-205) argue that even when decisions under uncertainty are made between methods of constitutional rule, idiosyncratic risk profiles will lead individuals to necessarily alter their preferences on what 'social contract' is agreeable, based on the risks of each system. Given the claim that conclusions drawn in *The Calculus* did not depend on 'narrowly hedonistic' (Buchanan and Tullock 1962, p. 3) actors,[19] it appears reasonable to admit that Buchanan would not require a homogenous risk profile between all citizens. Consistent risk-aversion would weaken the uncertainty condition, as individuals could better predict the behaviour of others when faced with constitutional choices.[20] On the other hand, a higher risk appetite could ossify group coalitions, since risk attitudes are often characteristics of age and therefore groups may be more consistently stable (Witt and Schubert 2008, p. 205). Subsequently, Hayek's (1978b, pp.331-332) thicker understanding of uncertainty alongside the generality of the basic clause may be more accommodating to societal realities, requiring fewer assumptions and retaining some force in obtaining rules of just conduct in large societies.

Similar criticisms may extend to Olson's reliance on the rational actor. Though it is rational to free-ride, we can observe that this is often not the case—through the actions of unions, or how farmers continue to band together and dominate national agendas and domestic spending. This may be a result of Olson omitting the importance of norms in his work, that can band together incompatible personal preferences. Hayek's quasi-scientific hypothesis on a spontaneous social order that arises due to mimesis deals explicitly with the impact of cultural norms. Orders that result from the mimicking of neighbours demonstrates why, for example, we may see a footpath form in a natural path through the repeated actions of individuals, who may not even be spacio-temporally contiguous.[21] Though smaller groups with greater collective understanding can perform and enforce higher levels of adherence due to being able to spot free-riders, mimickery can still set precedents that the group at large can adopt without any specific intentions of the individuals involved. Large groups have over time created a behaviour stemming only from concerns to individual benefit: 'cutting a corner across a patch of grass will save me time'.

Considerations such as these highlight how though Hayek's implementation of a basic clause speaks to his concerns about protecting spontaneous order, his constitutional remedy may fall victim to the very same fears of group capture he set out to fix. Buchanan's (1975, p. 211) criticises Hayek of being 'so distrustful of man's explicit attempts at reforming institutions that he accepts uncritically the evolutionary alternative'. Though Hayek relies heavily on natural behaviour to fix democratic issues, Buchanan's conclusion that as a result Hayek only poses an inadequate model constitution falls short. It is true that Hayek is attempting to mix oil and water by creating institutions to capture natural social change. However, Hayek himself understands the difficulties in doing so and swallows some of the trade-offs required, in order to fortify liberalism from potential pitfalls that arise from adopting an entirely evolutionary or constructivist approach.

Nevertheless, this section has illustrated how Hayek's reliance on cultural evolution to help minimise legislative weakness to sectional interest cannot straightforwardly provide the safeguards he is looking for. Complexity of diverse groups and the organisational abilities of groups are some of the public choice insights that explain how seemingly predictable situations can lead to a greater variance between individual and societal outcomes than expected. The following section illustrates how Hayek furthers this construction of an ideal constitution through the separation of powers, and may demonstrate how Hayek is less naïve that Buchanan's work or criticisms may have us believe. We will see how Hayek's constructivist institutional framework does not exist in isolation, but rather within an edifice of strong social norm inculturation.

III: DIVISIONS OF POWER

A system of government that most effectively upholds the basic clause, Hayek believed would be split along lines of *will* and *opinion*. Divisions of power along these lines would empower government to pursue the collective will, while placing restraints on governments and people alike based on rules of just conduct; for '[d]emocratic legislation and democratic government are probably both desirable, but to place these functions in the hands of the same body destroys the safeguard of individual liberty which the separation of powers meant to provide' (1978c, p. 294). While Hayek's claim that all modern democracies in the West are unlimited democracies is too sweeping given many nations globally enact technically different government and parliamentary procedures, the nature of the statement indicates that the manner of separation in his model constitution is unique from the marginally different systems we see worldwide.[22]

To protect the *opinion* about 'what *kind* of action is right or wrong' (Hayek 1979, p. 112) a Legislative Assembly would be formed, directly relating to the rules of just conduct under the basic clause. The day-to-day affairs of the administrative side of the nation would then be managed by the Governmental Assembly, akin to existing parliamentary bodies. Carved up along party lines of votes and *will*, the Hayekian government administration would only be gutted of their ability to tamper with the legal element of rule—a power now held by the Legislative Assembly (Hayek 1979, p. 119-120). Separating power in this way 'prevent[s] legislatures from authorising coercion to secure particular benefits for particular groups' (Hayek 1978c, p. 336). Governments could still respect current issues of popular will while denying the capture of long-term social interests by factions. This essentially bi-cameral system[23] would ideally resolve confusions related to will and opinion by disconnecting them from both feeding into form of power, and re-connecting them instead into new bodies.

Splitting legislatures therefore acts as a safeguard for the basic clause by placing the codification of abstract social rules in the hands of a chamber unbothered by short-term interests. This framework is moulded on the idea that law emerges from social evolution and cannot be willed by individuals (Buchanan 1975, p. 38). The Governmental Assembly would be bound by the rules of just conduct as decided by the Legislative Assembly, and 'could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter' (Hayek 1979, p. 119). Therefore, the members of the Legislative Assembly would collectively decide what constraining rules of just conduct are to be implemented.

Members of the Legislative Assembly would supposedly not represent factional interests, instead acting in their own capacity. Crucially, this makes the members non-representative of demographic or geographic groups (Hayek 1978c, pp. 207-208). Hayek only describes in general terms how these individuals would be elevated to the Assembly, though voting is implied. Nor does he outline a specific code of conduct to ensure there is a standardised understanding of how the members would act, or reprimands for jeopardising the aims of the Legislative Assembly. Ideally, the citizens elected at 45 should have already demonstrated professional or public success, and therefore would be morally upstanding model citizens not prone to pressures or bribes (Hayek 1979, pp. 113-114). That the assembly is a hermetically sealed environment from external influence is important, as Hayek does pose an ideal assembly makeup. Therefore, it may be possible to predict and cultivate norms that would allow the good working of the assembly that are atypical from society more broadly, an idea to which Hayek is attentive.

In what may be considered the most interventionist stroke, Hayek advocates for a highly specific and constrained membership of the Legislative Assembly. Whether this is incongruous with Hayek's criticism of the ability of institutional design to allocate resources and impose central plans is up for debate, and not one that will be resolved satisfactorily here. Lewis (2022, p. lxiii) advocates for a nuanced understanding of Hayek: that he justifies a restricted constitutional framework insofar as people can understand that spontaneous order ought to be protected, without certainty in what ends this would produce. Buchanan (1986) in 'Cultural Evolution and Institutional Reform' details how though Hayek becomes increasingly despondent about the possibility of success of constructivist interferences, on the topic of 'the division of functions

as between two separate elected assemblies' (Buchanan 1986, p. 76) he undeniably continues to advocate for institutional interferences. 'Government is of necessity intellectual design' (Hayek 1979, p. 152), and therefore an essential aspect of Hayek's model constitution is how to design without abusing reason and promoting free growth of society and its norms.

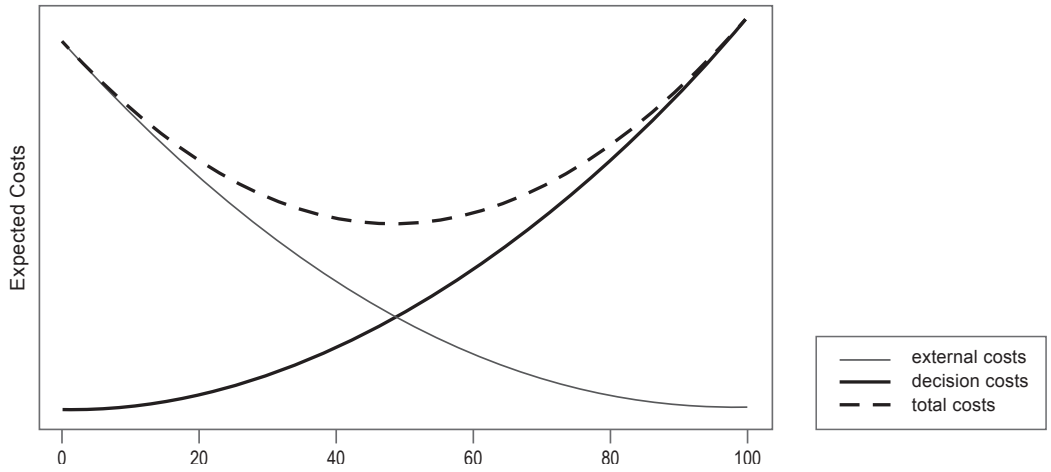
This formalised design to protect the basic clause against the undermining powers of sectional interests is most overt when electing the representatives of the Legislative Assembly. The representatives of the assembly all sit 15-year terms, from age 45-60, and every year 1/15th of the assembly is re-elected as the oldest representatives retire. So that they do not have to worry about their prospects and future, they are granted a comfortable living salary and a guarantee of a role as a lay judge following retirement (Hayek 1979, pp. 113-114).[24] Most importantly, preparation for election to the legislative assembly would likely be preceded by the formation of 'local clubs of contemporaries' (Hayek 1979, p. 117). These clubs may initially form naturally but would have a strong incentive for public financial support through the relatively low investment cost of providing meeting places and facilities, by sustaining prime locations for forming desirable future candidates for the Legislative Assembly.

There a several issues with this approach that looks to contain the negative impact of inherently short-termist group interests. First, the decision-making process within the Legislative Assembly to agree what rules ought to be codified is far from cut-and-dry. Hayek fails to outline at what point a 'rule' that has bubbled up through the ranks of social order could reasonably be judged to carry enough weight to impose restrictions on the Governmental Assembly. It seems plausible that there would not be unanimous agreement within the assembly, especially assuming that this would be a chamber of significant size (perhaps emulating a chamber such as the House of Lords). One may then ask whether the threshold would be at just over half, complete agreement, two-thirds, etc. However, Buchanan and Tullock (1962) in the most fascinating claim of their work, propose that there is no one threshold that would be more favourable than another. Though this may be an interesting claim for all democracies, we will see that it is particularly the case for Hayek's assembly based on codifying the basic clause.

They suggest that while deviation from unanimous agreement is not consistently bad, even as a 'value-free' or normative judgement we can claim they are undesirable, due to external costs incurred as a result (Buchanan and Tullock 1962, pp. 92, 271).[25] By definition, deviation from total agreement will result in less desirable outcomes for those who disagree when a decision is done to them regardless. In situations of collective action, the number of individuals required to make a decision, in this case implement and codify a rule, determines the total external costs imposed on others in the collective (Buchanan and Tullock 1962, pp. 61-62).

For example, if a single decision maker can make a choice that benefits them without consultation, then the costs imposed on the rest of society are high (the highest point of the external costs in Figure 1). This may be the case even for simple situations such as fixing a pothole outside their house, if single decision-makers could wield the entire collective without discussion by spending money from a public purse funded by collective taxes. As increasing numbers of the collective agree, the costs imposed on people reduces—due to increasing consensus on resource use. Consequently, external costs only disappear with unanimity: '[s]o long as there remains any possibility that the individual will be affected adversely by a collective decision, expected net external costs will be positive' (Buchanan and Tullock 1962, p. 64).

Figure 1: Buchanan and Tullock's illustration on the trade-off between external costs and decision making costs



Source: Dougherty, K & Ragan, R. (2016). 'An expected utility analysis of k-majority rules'. *Constitutional Political Economy*, Vol. 27, No. 3: 332-353.

Unfortunately, approaching unanimity is not a direct path towards the most desirable state of affairs, due to the existence of decision-making costs. While consensus decreases external costs, decision-making costs take their place (the upward sloping decision cost curve):

> If two or more persons are required to agree on a single decision, time and effort of another sort is introduced-that which is required to secure agreement. Moreover, these costs will increase as the size of the group required to agree increases [exponentially]. (Buchanan and Tullock 1962, p. 65).[26]

The significant implication of combining these opposed cost functions in a decision-making environment is that there is no absolute favourability of one mechanism of democratic decision making over another. At no point in Fig. 1 are total costs zero. There is nothing significant about simple majorities, as the 'rational choice will depend, in every case, on the individual's own assessment of the expected costs' (Buchanan and Tullock 1962, p. 77). Levels of interest or stake from members of the community will vary, and takes just one highly passionate involved individual to change the balances of expected costs. Hence, Fig. 1 is only one snapshot of possible curves; on some topics, the curves could slope at different gradients based on the importance or cost assessments any participant may place on that issue.

If the assembly members were representative, this would instantly reduce total costs by aggregating the number of participants demanding action without increasing deliberation costs. However, they are by definition individual actors representing their own interests. Furthermore, it is important for the function of the assembly that they are unburdened by any form of collective or regional responsibilities. That there is no process posed by Hayek in the sealed environment of the Legislative Assembly (uninfluenced by pressures to represent or succumb to lobbying interests) to determine the desirable threshold to implement a rule of just conduct is problematic. This omission poses thorny philosophical issues: at what point can a rule be judged to have broad social consent; can there be a strict threshold at which this can be judged to have reached a tipping point; and how important are personal preferences and individual consent when considering the impact of social rules imposed on them.

Further questions arise when considering how assemblies are stuffed with only members that meet certain demographic requirements. The simple objection here is that Hayek is trading in one form of sectional interest for another. Instead of income and industry, local clubs from which members are gener-

ated would simply uphold the interests of local groups and age. However, I believe this trade-off is not so simple. In a world structured via divisions of labour, special interests are often stratified along lines of income and industry, with individuals working to preserve rules that protect income stability. Clubs could therefore offer an opposing force. Hayek believes that these groups would not be formed on lines of social class, instead 'serving to provide contacts cutting across all other stratifications' (Hayek 1979, pp. 117-118). An unfamiliarly structured form of sociability allows people to step back from their daily commitments and dedicate time to sincerely consider the questions of 'opinion'. Buchanan and Tullock (1962, p. 92) are at points concerned with commitment to norms besides those that may dictate the strength and unity of homogenous groups. They recognise that deviation from the unanimity rule can take the form of a 'practical expedient [in State decision-making…] analogous to many that are to be found in personal, social, and business life'.

Despite this, deviation in the name of expediency may present a further difficulty for Hayek's Legislative Assembly. Decision-making members as non-representatives have incentives to promote their own interests. However, through discussion and debate individuals are willing to settle for less than a perfect match with their desired outcomes if the amount invested is smaller—i.e. lower total costs despite deviation from unanimity increasing external costs (Buchanan and Tullock 1962, pp. 94-95). Each rational actor in this haggling game is incentivised to not reveal their preferences in the hope of achieving better outcomes, yet as preferences are gradually revealed through the bargaining process, 'everyone in the group will be able to see that he would have been better off had the investment in "bargaining" not taken place at all' (Buchanan and Tullock 1962, p. 95). With some guarantees that the decision would not be harmful, many individuals would prefer a single 'dictatorial' decision-maker to determine the appropriate allocation, giving all the upside but none of the loss in wasted decision investment.

The decision-maker, in this case the elected member, can therefore improve their outcomes if they concede more heavily on areas they care less about, and argue/bargain more heavily in areas of interest. If the members of the assembly were homogenous and unanimous in correctly identifying the rule, then the deliberative process would be a wasteful investment that would have been sensible to delegate to a single member (Ibid.). Yet members are formed in club groups, aiming to capture the zeitgeist of their generation or locality rather than embodying occupational or class distinctions, making homogeneity unlikely (Hayek 1979, p. 118). Strong requirements for unanimity or large-scale consent, therefore, can lead to an 'over-investment' in deliberation and bargaining relative to the impact of the decision taken (Buchanan and Tullock 1962, p. 141).

To subsequently characterise the existence of bargaining as altogether bad would still be misguided. Allowing some degree of vote-trading and pandering to sectional interests may be desirable, even if the democratic decision-making process appears to be more cumbersome as a result. 'Permitting those citizens who feels strongly about an issue to compensate in some way those who opinion is only feebly held can result in a great increase in the well-being of both groups' (Buchanan and Tullock 1962, p. 129), so vote-trading may be permissible in the name of social optimisation. Individuals with particularly strong opinions or those who are adversely impacted by decisions taken by the collective, may have an undersized influence in the decision-making process. Bargaining can help express the individual assessment of cost and achieve outcomes that are not initially available.

Minority groups, who disproportionately feel the impact of a decision due to the intensity of their preferences, may find many that a near-unanimous votes one way by a 'feebly held' bloc, insufficient to trump their extreme vested interest the other way (Buchanan and Tullock 1962, pp. 122-123). An example of this may be tax, which is considered both by Hayek (1979, pp. 51-73, 127), as deciding tax burdens and rules is a remit of the Legislative Assembly, and in *The Calculus*. Financing a good that provides general non-excludable public benefits, such as military or police protection, Buchanan and Tullock predict will result in a relatively high-burden tax riddled with exemptions. This occurs due to vote-trading that drives piecemeal concessions, resulting in 'greatly reducing the efficacy of any generally accepted norms for fiscal organization (such as progression in taxes) that are supposedly adopted' (Buchanan and Tullock 1962, p. 141).

On the other hand, unanimity may find it difficult to implement rules other than a general tax, which Hayek (1979, p. 127) himself recognises may be regressive. The unanimity rule allows even one dissenting member to hinder the efforts of the whole consistently, making the assembly beholden to a sectional interest in an alternative form. On the other hand, weakening this requirement would encourage rational bargaining and vote-trading, and despite their efficiency in identifying intensity of preferences, would make the Legislative Assembly another arena of sectional interests vying for club benefits. Hence, much like the trade-offs seen from deviating from the unanimity rule as outlined by Buchanan and Tullock, the Legislative Assembly may be subject to similar difficulties.[1]

Understanding public choice that characterises problems in this way may undermine the norms that encourage people to act in cooperative ways. Yet this value-free analysis that indicates people would act accordingly does not mesh with the adherence to tradition and customs Hayek supports. A view that 'within primitive human society 'sharing' is a way of life … The sharing is not limited to food, but extends to all kinds of resources' (Hayek 1979, pp. 161-162) endorsed by Hayek demonstrates that individual assessments of cost does not have to adhere to the modern model of narrow self-interest. Buchanan and Tullock (1962, p. 272) further concede that '[i]f, in fact, the individual could be "trusted" not to follow economic interest, and if all pressure groups could be assumed away […there may be] considerably less strength in the argument for many of the checks and balances that characterize modern democratic process'. Acting in this manner may overly abstract from the actions of citizen under institutional structures—the powerful conclusions of public choice explaining societal outcomes as 'the outcome of strategic interactions between intentional actors […depends] on an implicit structural determinism with regard to actors' forms of thought' (Hindess 1988, p. 93). Bearing in mind the concerns given to sectional interests, it is worth considering how adhering to social, cultural, and other ideological constraints explain patterned group actions external to the instrumentally rational behaviours in public choice, especially considering the importance of local tradition for Hayek (1979, pp. 107-108). Scholars may therefore be justified in believing that 'it is doubtful if any worthwhile political conclusions can be drawn from an analysis that deliberately abstracts from the forms of thought employed by the actors concerned in their deliberations' (Hindess 1988, p. 8).

CONCLUSION

Ultimately, Hayek's model constitution is torn between his conviction in the strength of cultural evolution from spontaneous order to provide the most efficient outcome, and the necessity of rational constructivism to provide frameworks that best enable free interaction. The protection and cultivation of societal norms are undermined by a decision-making system prone to group interest capture, yet public choice theory has demonstrated that trying to avoid these issues leads one into a quagmire, and is more complex than initially perceived. Detailing through public choice interlocutors the core of Hayek's schema, more clearly demarcates what values Hayek is minded to protect and where those limits lie—despite his over-idealised emphasis on the strengths of cultural evolution. This reconstruction of Hayek's model has touched on wider debates regarding evolution versus construction of modern societies, and attempted to fill ostensibly large conceptual holes with an evidenced account of his later work.

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NOTES

1 Critiques that silo classical liberals as definitionally and homogenously critical of democracy are often limited by conceiving of modern democracy as a unitary administrative and legislative system are common (pace Cornelissen 2017, pp. 507-508). See Slobodian (2020, p. 20) who also considers question of how 'an overly tidy equation of neoliberalism with anti-democracy leaves open critical questions [and] obscures the diversity of neoliberal thought on the problem of democracy'.

2 Perhaps significantly, Hayek explicitly rejects this label of 'anti-democrat' in The Constitution of Liberty (1960, pp. 107-109, 115-117).

3 Hayek is certainly an anglophile, and was enthusiastic about the British system of common law and the bicameral legislature of the House of Lords and House of Commons. It may be useful to remember that in this period, the upper House would have been composed entirely of hereditary peers. The American upper house, in contrast, has always been an elected chamber, though representative in a different proportion or dimension to that of the lower.

4 Indeed, much may be owed to German ordoliberals such as Eucken who anticipated similar difficulties of managing rent-seeking behaviour by group interests within constitutional frameworks; See Nientiedt and Köhler (2016, pp. 1754, 1751-1753).

5 See Whyte (2019, pp. 156-184) for a detailed elaboration on Hayek's account of spontaneous order and knowledge distribution.

6 Often, this is a core foundation of the critique of neoliberalism's tendency to carry out 'economic imperialism'. A very rigorous and fair assessment of this approach is given in Davies 2014.

7 Boettke and Leeson's paper gives a much more full and comprehensive treatment of the ways in which Austrian economics contributed to the economics of politics than is possible here. For example, they highlight the importance of Mises as a foundational figure both in praxeology and in understanding political organisation from an economic perspective.

8 See Buchanan 1992, pp. 129-135, his contribution to Hayek's obituaries. Buchanan admits an intellectual debt to Hayek, but that their personal relationship was never close.

9 Hay 2007, pp. 99-103 sees the unifying aspects of public choice theory and neoliberalism as the

use of the process of rationalisation are depoliticising, leading to political disengagement and disenfranchisement.

10 Gaus 2006, p. 236 uses this point to emphasise that the independence of individual actions and group stability allows Hayek to advocate for an innovative and individualistic society, and hence why he is not labelled a conservative thinker.

11 Rules of just conduct are somewhat Rousseauvian in content. The notion of the diffuse general 'opinion' are the object of what the basic clause aims to encapsulate (confusingly the counterpart to the general will, rather than how Rousseau and others use will). Interestingly, Hayek echoes a sentiment similar to Rousseau in his interview with Buchanan (1983, p. 209) where he states 'I profoundly believe, that in the long run, things are being governed by opinion, and opinion just has been misled'. See Müller 2015 for further discussion on the Rousseauean content of some of Hayek's model constitution.

12 Quentin Skinner's recent monograph, Liberty as Independence: The Making and Unmaking of a Political Ideal highlights the rival views of liberty: one as independence as one as the absence of restraint. Skinner argues that the dominant understanding of liberty prior to the 18th-century is as the former. Hayek's understanding of liberty, as the absence of coercion, is however likely in the latter category, which may cast some aspersions of Hayek's understanding of his version of liberty as the dominant form of understanding the ideal.

13 Hayek (1979, p.107) does not 'suggest that any country with a firmly established constitutional tradition should replace its constitution by a new one drawn up on the lines suggested'. This would be antithetical to the need of the praxeological method to take into account the importance of individual actions. Conscious human action has its behaviour defined by cultural boundaries, and therefore constitutional thinkers such as Hayek that respect the actions of individuals would not want to rewrite a model of government adapted for local traditions. As described by Buchanan, Law, Legislation and Liberty is 'more about the structural changes in government that would be necessary before we could even hope to put in such reforms [of policy]' (Buchanan and Hayek 1983, p. 231). Each nation has their own traditions, beliefs, and culture that are varyingly conducive to the implementation of his model constitution.

14 Buchanan and Tullock (1962, p. 75) lay out in six points the conditions where 'the rational utility-maximising individual will support the adoption of rules designed specifically to further partisan interests'.

15 The philosophy of spontaneous order is why Hayek believes current Western democratic systems inevitably create sectional interests—these will always arise in abstract social order, or catallaxy, due to the impossibility of knowing the condition and status of all other people; see Hayek 1967b, pp. 275-276, 278.

16 See Rowley 1987, p. 42; See also Mitchell 2001, p. 10.

17 See Dahl, R. A. (1956). A Preface to Democratic Theory. The University of Chicago Press, who proposes that Americans have been long captured by a Madisonian theory of democracy that looks to balance majority and minority powers by way of compromise.

18 See Hindmoor and Taylor (2015, p. 32), who claim 'The veil of ignorance is for Rawls a useful analytic fiction, but the veil of uncertainty is for Buchanan a real force in the actual world'.

19 Buchanan's stance on subjectivism is generally consistent insofar as he expresses a continued commitment to the knowledge problem and the impenetrability of the minds of others (Brennan 1990, pp. 116-117), a stance similar to Hayek's.

20 Perhaps unfortunately for Hayek, the conclusion reached by Witt and Schubert (2008, p. 222) is that 'It turned out to be implausible to presume that individuals, when situated behind a "veil of ignorance" […] will unanimously opt for a laissez faire regime'.

21 See Hayek (1948, pp. 9-11; 1952) for more detailed discussions on the scientific nature of spontaneous order.

22 See Barry, 1979, p. 193.

23 There is a third element, the Constitutional Court, which would serve a similar purpose to the Legislative assembly but to a much more minor extent, tasked with 'the semi-permanent framework of the constitution and need act only at long intervals when changes in that framework are considered necessary' and therefore for the purposes of this article will largely be ignored; see Hayek 1979, p. 38.

24 In responding to more practical objections, Hayek argues the age is not an issue as at an average age of 52 ½ would be lower than many assemblies globally, and that elections could occur along the lines of regional delegation appointments or something of the sort—although he does not commit specifically to any form of election.

25 It may be worth considering this statement in light of the fact that the unanimity criteria is based on a Pareto efficient outcome where no-one can be better off without making others worse.

26 Consider for example the 'birthday paradox', the idea that in a random sample of 23 people, the probability of two individuals sharing a birthday is over 50%. This is due to the fact that each added person results in an exponentially increasing number of connections. Each new addition introduces an n-1 number of connections, with probabilities of shared birthdays increasing from around 10% at 10 people, 40% at 20 and over 50% at 23. Hence, one can see how if each member in a decision-making process

were required to discuss, barter, and agree over a decision in large societies to present a unanimous decision this would start to take an unfathomably long time with high levels of cost.

27 There may also be a degree to which understanding agreement and cooperation in economic terms may be damaging to the achievement of beneficial outcomes. Hay criticises public choice analysis on the basis that modelling the state as a 'science of political failure' (Buchanan 1988, p. 3) reinforces self-interested behaviour that ultimately makes rational choice a self-fulfilling prophecy (Hay 2007, p. 122). Interestingly, there may be some weight to the claim as Frank et.al. (1993, p. 159) predict that 'exposure to the self-interest model commonly used in economics alters the extent to which people behave in self-interested way' and promotes selfinterested behaviour.