

REVIEWS

Law, Legislation and Liberty (Volume 3) — The Political Order of a Free People. F. A. HAYEK. University of Chicago Press, Chicago, 1979. Pp. xvi, 244. \$14.00.

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Friedrich August von Hayek, a winner of the 1974 Nobel Memorial Prize for Economic Science¹ and a Professor Emeritus of the University of Chicago, concludes with this book a three-volume treatise entitled *Law, Legislation and Liberty*. This particular volume, *The Political Order of a Free People*,² is an opaque, obscure, and occasionally contradictory work; it is an uncompromising rejection of the political structure of every modern democratic society.

In his two previous volumes,³ Hayek argued that theorists and policymakers, by regulating the economic order to bring about social justice, create grave threats to individual liberty. With this volume, he directs our attention beyond the activities of the policymakers to the political structure of the systems in which they operate. Hayek considers the organization of modern democracies destructive not only of individual liberty, but of democracy itself, and accordingly presents his alternative Political Order of a Free People.

Before examining the path of Hayek's analysis, it may be helpful to point out the ideological basis of his criticisms. Hayek has established himself as an unyielding advocate of the free-market economy; he appears to distrust government in an almost passionate manner. He seems to tolerate virtually no governmental restrictions on the economic freedom of individuals, and thus deplors any and all attempts to redistribute wealth or income by legislation.

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¹ The 1974 prize was awarded both to Hayek and to Gunnar Myrdal of Sweden. *E.g.*, H. ZUCKERMAN, *SCIENTIFIC ELITE* 290 (1977).

² F. HAYEK, *THE POLITICAL ORDER OF A FREE PEOPLE* (1979) [hereinafter cited without cross-reference as HAYEK].

³ F. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* (1976); F. HAYEK, *RULES AND ORDER* (1973).

The philosophical basis of Hayek's ideological position is his belief that there are virtually no common moral ideals that unite the members of modern democratic societies. He seems to believe that a government would not be justified in enacting laws to protect particular individuals or groups unless it were founded on some central moral premise to which all its constituents adhered. Apparently convinced that the members of modern Western society could truly agree only on the desirability of preserving individual freedom, Hayek rejects almost all legislation designed to protect vulnerable persons and groups as violative of that freedom.

The clarity of Hayek's arguments and precision of his language suffer as a result of his unswerving devotion to this ideological stance. Regrettably, the suggestions he provides for the improvement of democratic governments are based more in the passion of his convictions than in reasoned analysis.

I

Hayek bases much of his argument on the distinction he perceives between the process of legislation and the process of government. He does not explicitly define either of these terms, but it is safe to conclude that he considers "legislation" as something like "the articulation and approval of general rules of conduct" and "government" as "the direction of the measures of government concerning particular matters."⁴ The circularity of his description of "government" may be reduced by considering that Hayek is creating an additional usage of the word rather than attempting to divest it entirely of its more common meaning. Hayek's "government" apparently involves rules of specific scope and particular application; it consists of "specific commands or privileges referring to particular individuals and groups";⁵ the word can apparently be used with, and indeed be defined in terms of, "government" in the broader, more customary sense.

Hayek believes that each of these processes should be limited by restrictions imposed by the other. Legislation, confined to the

⁴ HAYEK at 22. The descriptions that Hayek uses for these two terms vary throughout the volume, but the paraphrases here seem fairly representative. Elsewhere in the book, "legislation" is treated as "only such universal and uniform rules of just conduct as would limit all arbitrary coercion," *id.* at 105, as well as "recognized rules of just conduct designed to define and protect the individual domain of each [person]," *id.* at 109. Government is also described as the "[a]dministration of common means for public purposes" requiring "agreement on the relative importance of particular ends." *Id.* at 24.

⁵ *Id.* at 100.

sphere of "recognized rules of just conduct,"⁶ would be incapable of imposing particularized rules and regulations, the type of governmental activity resulting most frequently in undue interference with individual liberty. Although government, on the other hand, would be charged with the administration of such activities, they would always be carried out within the restrictions set by the legislative "general rules of just conduct."⁷

The point of Hayek's distinction is that government and legislation must be effectuated by two separate entities—in this way, the only organ capable of directly influencing specific programs and regulations would be limited by general rules of conduct not of its own making. In all modern Western democracies, however, the same representative body both legislates *and* directs government.⁸

Hayek contends that this arrangement invites an especially repugnant kind of abuse. Under the present system a particular minority "special-interest group" can form a temporary alliance with other special-interest groups to ensure enactment of laws favorable to it in exchange for providing support for the cooperating groups. Thus, a proposal or program unpopular with the bulk of the populace can become law simply because its supporters happened to combine with enough other interests to exert sufficient pressure to form a temporary majority. Hayek views this result as stemming directly from the essentially limitless scope of power enjoyed by modern legislatures, and refers to it as "'bargaining' democracy":

[A]n omnipotent democratic government simply cannot . . . confine itself to serving the agreed views of the majority of the electorate. It will be forced to bring together and keep together a majority by satisfying the demands of a multitude of special interests, each of which will consent to the special benefits granted to other groups only at the price of their own special interests being equally considered. Such a bargaining democracy has nothing to do with the conceptions used to justify the principle of democracy.⁹

Hayek advocates the establishment of two distinct representative assemblies, a "Legislative Assembly" and a "Governmental Assembly," each designed to carry out only its assigned function.¹⁰

⁶ *Id.* at 109.

⁷ *Id.*

⁸ *Id.* at 1.

⁹ *Id.* at 99.

¹⁰ *Id.* at 109-10. Hayek devotes an entire chapter to the "Model Constitution" that

With the two different functions assigned to two different entities, the reader is led to assume that the body deciding on the specific measures of government, the Governmental Assembly, would be powerless to satisfy the demands of alliances of special interests. Its activities would be limited by the Legislative Assembly's "general rules of just conduct," and these rules would presumably render special-interest government impossible. Similarly, special-interest groups would be unsuccessful in any approach to Hayek's Legislative Assembly, since that body would be precluded from issuing the particularized rules of greatest interest to such groups.

Hayek's distinction between legislation and government poses obvious problems of definition and interpretation,¹¹ but a more significant flaw relates to his concern over coalitions of minority interests depriving the majority of the exercise of its will. Any minority-sponsored rule that is enacted through an alliance of special interests must be perceived by each of the complying members of the alliance as "worth the price." Furthermore, no such rule is truly contrary to the majority will because, of necessity, a majority of the representatives must have supported passage of the rule. True, the support of the majority thus achieved may sometimes be the result of a bargain, but it is a bargain that each party believed was to its own advantage. Although particular members of the alliance may not wholeheartedly support some of the measures passed through its activities, each member desires that each measure be passed, in that each member considers the passage of its own measure so important that it will support actively those of all the others. And, to this degree, even a bargain rule is a rule fully consistent with the will of the majority. "Bargaining democracy," although disparaged by Hayek, seems to be nothing more sinister than the process of political compromise that is necessary in a complex society.

It may be that it is the substantive trend of certain compromises to which Hayek objects; it may be that Hayek resents particular special-interest rules less for any lack of majority approval than for their incompatibility with his political philosophy. But this is not the substance of his argument. Instead, he has cho-

would embrace such an arrangement. *Id.* at 105-27.

¹¹ Indeed, Hayek provides room in his Model Constitution, see note 10 *supra*, for a "Constitutional Court." He concedes: "Though we have endeavored to make the principle of the distinction clear, . . . in practice the application of the distinction would undoubtedly raise many difficult problems, and all its implications could be worked out only through the continuous efforts of a special court." HAYEK at 120-21.

sen to base his objections on the supposedly nonmajoritarian nature of legislative compromise and on the need to distinguish between government and legislation—a distinction he never develops.

II

Imprecise though the analysis may be, Hayek's insistence that legislation and government (as he views them) be kept separate forms the basis of his criticism of the modern democratic order. He is convinced that the combination of legislative and governmental power in the same assembly unavoidably leads to a "bargaining democracy," and that such bargains, which inevitably impose the will of minorities on the majority, are essentially undemocratic. But since Hayek can point to no democratic government currently in existence that explicitly utilizes his bifurcated scheme, he is forced to dismiss all modern democratic governments (including that of the United States) as undemocratic:

Buying majority support by deals with special interests, though this is what contemporary democracy has come to mean, has nothing to do with the original ideal of democracy, and is certainly contrary to the more fundamental moral conception that all use of force ought to be guided and limited by the opinion of the majority. The vote-buying process which we have come to accept as a necessary part of the democracy we know, and which indeed is inevitable in a representative assembly which has the power both to pass general laws and to issue commands, is morally indefensible and produces all that which to the outsider appears as contemptible in politics.

. . . .

So long as the present form of democracy persists, decent government cannot exist, even if the politicians are angels or profoundly convinced of the supreme value of personal freedom.¹²

Although Hayek's contention possesses challenging and stimulating elements, on the whole it evinces two weaknesses: a preoccupation with ideology at the expense of clarity, and an insufficient consideration of important aspects of the governments he criticizes.

¹² *Id.* at 134-35.

A

The branding of modern democracies as structurally undemocratic must in large part rest on a definitional argument, and Hayek implicitly acknowledges that questions of definition are at the root of his analysis. He contends that "the influence of socialist agitation" during the last century has so corrupted the meaning of words such as "liberty," "justice," "democracy," and "law" that "they no longer convey the meaning they once did."¹³ Viewing modern usages of the key terms of his argument as contaminated by an ideology he abhors, Hayek proceeds to define these terms in ways that best advance his argument.¹⁴ Democracy, for example, is solely "a procedure of arriving at agreements on common action," and is not to be confused with "a substantive content prescribing what the aims of those acti[ons] ought to be."¹⁵ Thus, presumably, only a certain type of electoral *process* truly deserves the name "democracy," and the *substantive* results of such a process—for example, granting universal suffrage or prohibiting adherents of a certain religion from holding certain types of property—have nothing to do with the term.

Redefinition is a common rhetorical device, and there is of course nothing wrong with its use in argumentation when we are presented with concrete reasons for the insufficiency of existing meanings. The basis for Hayek's redefinitions, however, is nothing more specific than a profound rejection of socialist ideas and the mere assertion that such ideas have corrupted the fundamental terminology of the modern political order. Hayek deplors what he calls the "decay of language,"¹⁶ a process he seems to consider symptomatic of a type of "creeping" socialism—sentiments unpleasantly reminiscent of an earlier era:

Socialist ideas have so deeply penetrated general thought that it is not even only those pseudo-liberals who merely disguise their socialism by the name they have assumed, but also many conservatives who have assumed socialist ideas and language and constantly employ them in the belief that they are an

¹³ *Id.* at 135.

¹⁴ Hayek contends that his distinction between legislation and government is "not entirely new." He maintains that his narrow concepts of "legislation" and the "legislature" are related to the ancient Athenian understandings of "nomos" and the "nomothetae." *Id.* at 111 & n.3.

¹⁵ *Id.* at 137.

¹⁶ *Id.* at 135.

established part of current thought.¹⁷

We are simply expected to accept on faith, and adopt as our own, Hayek's fear that socialism has so influenced modern language as to render redefinition of its most important terms obligatory. We are also expected to agree that the definitions Hayek provides are the most suitable replacements. Hayek relies almost exclusively on ideology to support his shrill assertions; he provides no convincing evidence either that the book's evaluation of the current situation is accurate or that its proposed linguistic revisions are necessary.

B

The second major weakness of Hayek's argument is that it apparently does not take into sufficient consideration American processes of judicial review and administrative law. This is understandable, since Hayek is writing out of his European civil-law background, but it would seem that until these important aspects of the American legal system are examined, his rejection of all modern democratic orders is premature.

Hayek seems to think that modern representative assemblies, exercising what he considers to be powers of government, are in need of another representative assembly to limit their powers of coercion. Of the two new representative bodies he envisions, he apparently regards the Legislative Assembly as a necessarily conservative influence. Its members would be of "relatively mature age," would be elected for "fairly long periods,"¹⁸ would receive generous salaries,¹⁹ and would be guaranteed ample incomes upon retirement.²⁰ He fully expects them to be objective in their outlook, unmoved by considerations of the selfish interests of their

¹⁷ *Id.* at 137. Hayek proceeds to upbraid the "hundreds of thousands of businessmen all over the world" who "still allow over their doorsteps" such journals as *Time* magazine, which have been known to "ridicule capitalism." *Id.* & n.9. He concludes: "Though the principle of freedom requires that we tolerate such scandalous scurrilities, one might have hoped that the good sense of the readers would soon learn what publications they could trust." *Id.* at 137.

¹⁸ *Id.* at 113.

¹⁹ *Id.* at 114.

²⁰ *Id.* In particular, Hayek suggests that legislators serve terms of at least 15 years, be at least 45 years old, and be paid a certain percentage of the average of the 20 most highly paid posts in government. *Id.* at 113-14. Interestingly, he also suggests that a citizen's vote for such legislators be a once-in-a-lifetime event, to take place when each citizen attains the age of 45. *Id.* at 113.

constituencies:

In choosing somebody most likely to look effectively after their particular interests and in choosing persons whom they can trust to uphold justice impartially the people would probably elect very different persons: effectiveness in the first kind of task demands qualities very different from the probity, wisdom, and judgment which are of prime importance in the second.

. . . .

To expect from an assembly of representatives charged with looking after particular interests the qualities which were expected by the classical theorists of democracy from a representative sample of the people at large is unreasonable. But this does not mean that if the people were asked to elect representatives who had no power to grant them particular favours they could not be induced to respond by designating those whose judgment they have learnt most to respect.²¹

The phrase in the passage quoted above indicating that the function of the Legislative Assembly might be largely "to uphold justice impartially" suggests that at least part of the functions Hayek would bestow on that body are those already performed by American appellate courts. The supremacy of the Legislative Assembly's "generally recognized rules of just conduct" over the Governmental Assembly's activities in Hayek's scheme has at least an approximate analogue in the supremacy of the Constitution's procedural and substantive safeguards over the statutes and common-law rules in American state and federal jurisdictions. In much the same way that Hayek's Legislative Assembly is to limit the coercive powers of government, American appellate courts are expected to limit the activities of states and the federal government when they violate the Constitution.

Admittedly, the analogy may be imperfect. The courts do not always fulfill admirably their constitutional duties, but institutional imperfections are as likely to exist in Hayek's Legislative Assembly. American constitutional guarantees may vary substantively from Hayek's proposed rules of just conduct, but since Hayek's rules are never defined or outlined, it is impossible to make a full comparison. Judges do not have a role in the explicit

²¹ *Id.* at 112-13.

creation of statutes, as do Hayek's legislators, but their role as interpreters of statutes can be nearly legislative in character. Additionally, Hayek's notions as to maturity, length of term of office, and salary plans for his legislators conform closely to prevailing ideas about the proper circumstances of judicial employment. Even though Hayek might consider the discrepancies important, we are never told why they should be so considered; the impact of judicial review on modern American democracy is never adequately addressed. There is a strong argument to be made that judicial review of American constitutional issues has until now done a reasonably satisfactory job of protecting individuals from undue governmental coercion. Until Hayek explains why such review is fundamentally inadequate to fulfill his purposes, it seems unnecessary to uproot the constitutional structure of the American Congress to make way for a new scheme of dual assemblies.

Hayek also fails to consider seriously the relevance of the American regime of federal administrative law to his criticisms of the governmental activities of contemporary representative assemblies. The establishment of our relatively large and complex system of administrative agencies might evidence a current awareness on the part of elected representatives of the differences between what Hayek terms legislation and government. To be sure, administrative agencies are commonly assailed for being overly restrictive in their influence on private activity, and such restrictiveness is part of Hayek's objection to a political order that enables minorities, supposedly, to impose their wills on the majority. But the present arrangement already substantially circumscribes the "law-making" role of each agency; their powers are much more limited than those of Congress. Indeed, many of the agencies owe their very existence to a congressional statute, and each type of activity it engages in generally must be authorized by an Act of Congress. Congressional supervision of administrative agencies could be loosely described as providing "general rules of conduct" for those agencies, while their administrative activities could be considered "measures of government concerning particular matters."

It thus appears that the relationship Hayek advocates between his Legislative and Governmental Assemblies shares several characteristics with the existing relationship between Congress and the administrative agencies as well as with that between the courts and Congress. Once again, the analogy may be imperfect, but since Hayek has provided no specific outline of what he considers governmental functions to be or how they should be fulfilled, it is

impossible to make a full comparison. Without such a comparison, the most that one could support as a result of Hayek's argument is some sort of reexamination of the administrative mechanisms—possibly a worthwhile objective. But this falls far short of accepting his radical revision of the legislative scheme of all existing democracies.

III

Hayek's chief aim is the limitation of the coercive power of government, and he believes the maintenance of government monopolies is an especially pervasive and destructive mode of coercion. He evidently considers the confusion of government and legislation, as he views those concepts, and the "bargaining democracy" that such confusion engenders, as productive of an inordinate degree of coercive power. Hayek sees government monopolies as another example of excessive coercion. His position on the issue is not as extreme as it might be, but as with prior aspects of the volume, his arguments and suggestions are shrill in tone, poorly substantiated, and ultimately unconvincing.

Although Hayek laments government monopolies under nearly all circumstances, he would stop short of prohibiting them completely. Hayek begins his discussion of government monopoly by rejecting notions of a "minimal state"—a government whose only concerns would be enforcement of law and defense against external enemies.²² On the contrary, he admits that personal needs of citizens ought to be fulfilled by government, but only when such services cannot be provided adequately by the market.²³ Allowing government to provide certain services, however, does not require that the government's activities be protected with legally mandated monopoly power. Hayek considers governmental activity an inferior method of providing these services;²⁴ if private firms were later able to enter the market, there would be no reason for the government's role to be exclusive.

Additionally, in some instances the government's function should be limited to that of financier, and administration of services should be left to the marketplace. Hayek cites as an example Professor Milton Friedman's plan for the financing of children's

²² *Id.* at 41.

²³ *Id.*

²⁴ *Id.* at 46.

education through the distribution of education vouchers to their parents.²⁵ Hayek agrees that since "children are not yet responsible citizens and cannot be assumed to know what they need,"²⁶ there is a strong case for government financing of general education, but maintains that it does not follow that government should manage the education itself.

Hayek even goes beyond the sphere of governmental provision of services and reluctantly endorses a certain degree of regulation of the market. He concedes that licensing of particular activities is desirable and agrees that

[b]uilding regulations, pure food laws, the certification of certain professions, the restrictions of the sale of certain dangerous goods (such as arms, explosives, poisons and drugs), as well as some safety and health regulations for the processes of production and the provision of such public institutions as theatres, sports grounds, etc., certainly assists [*sic*] intelligent choice and sometimes may be indispensable for it.²⁷

But Hayek notes in the same breath that "it is by no means obvious that only the government will command the confidence required" to execute regulatory programs.²⁸ He seems obsessed with the idea that once the government gets its hands on such a plan it will inevitably exercise its authority arbitrarily.

In Hayek's view, the modern democratic societies have gone far beyond such a limited approach to public services and regulation with the proliferation of government monopolies. He is particularly vigorous in his denunciation of the official monopolies for the issuance of money and the management of postal services. For example, one of Hayek's more remarkable statements is his conclusion that "a free economic system will never again work satisfactorily and we shall never remove its most serious defects or stop the steady growth of government, unless the monopoly of the issue of money is taken from government."²⁹ He insists that "the present national monies [be replaced] by competitive different monies offered by private enterprise."³⁰

Similarly, he denounces the United States postal services as a

²⁵ *Id.* at 61 (citing M. FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962)).

²⁶ HAYEK at 61.

²⁷ *Id.* at 62.

²⁸ *Id.*

²⁹ *Id.* at 148.

³⁰ *Id.*

"burden on the taxpayer and a serious handicap to business."³¹ He goes even farther, however, asserting that the "postal monopoly . . . owes its existence to, and has no justification other than, the government's desire to control communications between citizens."³² It has, of course, become commonplace to complain about both government postal services and monetary management, and not without reason. We can assume, however, that Hayek expected us to take his discourse more seriously than we would take mere street-corner carping, and yet his discussions contain little enabling us to do so. He does not provide us with even an inkling of what leads him to his sweeping recommendation for the abolition of government currencies.³³ He also neglects to substantiate his implication that governments control postal operations in order to control communications between citizens.

The more serious omission is his failure to consider the substantial risks that would arise if the delivery of mail or printing of money were left to private enterprise. It is entirely possible that the instability accompanying such a decentralized approach would present just as much of a "burden on the taxpayer and a serious handicap to business." At any rate, Hayek presents no evidence that it would not.

IV

Many readers of Hayek's trilogy will find his exaltation of privacy and economic and personal freedom difficult to accept. Careful readers may also find his analyses, when coherently expressed, impossible to credit. Even if his arguments were more thoroughly developed, however, the formidable complexity of today's highly technological society seems to require more extensive governmental controls than appeared necessary in an earlier era. Accordingly, most of the serious reforms of recent decades designed to foreclose the excesses of governmental coercion have been designed to work within the context of public regulation rather than against it. A call for a shift away from that approach is so jarring that it seems almost incomprehensible. Even after close examination, Hayek's abstract suggestions for reform are so unrealistic as to seem, even

³¹ *Id.* at 57.

³² *Id.*

³³ Hayek does provide, by way of partial explanation, *id.* at 148 & n.16, a reference to one of his previous works. F. HAYEK, DENATIONALIZATION OF MONEY—THE ARGUMENT REFINED (2d extended ed. 1978).

if comprehensible, irrelevant.

But Hayek is worth listening to. Although many of his arguments lack substantiation and clarity and his suggestions often seem ill conceived, the tenor of his work provides us with a valuable warning—that we must not neglect the infinite variety of individual initiatives. In condemning governmental coercion as a repressor of many of man's noblest instincts, Hayek reminds us of the central truth that our culture is based fundamentally upon the recognition of individual differences.

Unfortunately, in the epilogue to his eighteen chapters—contained in three volumes—Hayek largely abandons the comparatively self-disciplined style of the rest of the work and wildly castigates modern society in general, branding as “superstition” many of the most powerful ideas that have informed the intellectual progress of the last hundred years. Choosing to identify what he considers the moral laxity of our time with the work of Sigmund Freud, and the political egalitarianism of our society with the work of Karl Marx, he despairingly concludes:

If our civilization survives . . . I believe men will look back on our age as an age of superstition, chiefly connected with the names of Karl Marx and Sigmund Freud. I believe people will discover that the most widely held ideas which dominated the twentieth century, those of a planned economy with a just distribution, a freeing ourselves from repressions and conventional morals, of permissive education as a way to freedom, and the replacement of the market by a rational arrangement of a body with coercive powers, were all based on superstitions in the strict sense of the word.³⁴

Such dogmatic excesses must not divert our attention from the challenge of Professor Hayek's ideas. He has indicated in compelling terms the distrust of government that a free society must possess and cultivate. Although the particular points he has sought to establish are sadly uneven in clarity, precision, and persuasiveness, the passion of this monumental work serves as an invaluable reminder of the dangerously omnipotent and potentially totalitarian character of all governmental entities.

³⁴ HAYEK at 175-76.