

## Think Inside the Box

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Scott Scheall has done an admirable job of making the occasionally dry and complicated issues of Hayekian political theory readable and even amusing. And he shows that he is an attentive student of Friedrich Hayek, particularly in the emphasis he places on epistemic humility which is certainly Hayek's own principal teaching. But the result of Scheall's skillful presentation is to lay bare just how flimsy that teaching really is as a guide to political wisdom, shorn of a normative framework.

### 1. Constructed vs. spontaneous orders

The major difficulty in applying Hayek's distinction between constructed and spontaneous orders to any practical policy discussion is that there is no *qualitative* distinction between the two.<sup>1</sup> When examined up close, every spontaneous order turns out to be comprised of constructed orders, and when seen from a distance, every constructed order turns out to be just one ingredient in an ongoing process of spontaneous ordering (and is also itself made up of smaller spontaneous orders). It is tempting, of course, to use a factor such as *the presence of coercion* to qualitatively differentiate constructed from spontaneous orders, or political decision-making from private decision-

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<sup>1</sup> Timothy Sandefur, "Some Problems with Spontaneous Order," *The Independent Review* 14, no. 1 (2009), pp. 5-25.

making, but Hayek himself does not do this,<sup>2</sup> and Scheall cannot, because that would be a normative consideration, and pursuant to his argument we must confine ourselves to epistemological factors only, at least for present purposes (e.g., 19) which would be out of bounds.<sup>3</sup>

Hayekian spontaneity is only a useful concept of *observational* political taxonomy. It is basically the theory of evolution. But that means it is useless as a guide to action. Darwin cannot purport to tell any particular lion whether to eat any particular antelope, because if the lion does eat the antelope, that serves the process of evolution, and if the lion does not eat the antelope, that, too, serves the process of evolution. For the same reason, a policymaker who does P is playing his part in the spontaneous order of society, and the policymaker who does not-P is also playing his part in the spontaneous order of society, and so is a policymaker who does Q.

Scheall hopes we might “learn more about how to divide the class of potential policy ends between those that can be deliberately realized via political action and those that can be realized, if at all, only if spontaneous forces intervene” (173), but the fact that there is no qualitative difference between spontaneous and constructed orders means that any such hope is futile. There are no *exclusively* political actions or *exclusively* spontaneous forces; even on a collective farm in a totalitarian communist state, the actual work of weeding the tomato beds still consists of spontaneous decisions by Comrade Farmer—and even the voluntary decision of a stockbroker in Galt’s Gulch to buy copper instead of gold depends on prices that reflect whether or not the People’s State of Mexico has nationalized the San Sebastián mines. Because spontaneous and constructed orders are in principle

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<sup>2</sup> Hayek acknowledged that there was no principled distinction between spontaneous and constructed order, and—with notable equivocations—admitted that this means his distinction provides no foundation for a normative argument against constructed, or in favor of spontaneous, orders (or vice versa). Then, in a notable self-contradiction, he (correctly) declared that we must impose constructed, normative values on spontaneous orders. Friedrich Hayek, *Law, Legislation, and Liberty Vol. 1: Rules and Order*. Chicago: University of Chicago Press, 1978), p. 89.

<sup>3</sup> Scott Scheall, *F. A. Hayek and the Epistemology of Politics: The Curious Task of Economics* (Abingdon, UK and New York: Routledge, 2020). All references to the book in this symposium are by page numbers in parentheses.

inextricable, it is impossible *in principle* to distinguish between matters on which political means will be effective, and matters that should be left to spontaneous forces.

Hayek—and Scheall—are biased in favor of spontaneous ordering, and against constructed ordering, but that bias cannot be justified on *purely epistemological* grounds. There are two possible ways of attempting to do so, but neither work: First, perhaps some goals are only within the reach of spontaneous but not constructed ordering. This is untenable because the lack of any *qualitative* distinction between spontaneous and constructed ordering makes it impossible to determine this. Imagine a conscientious Hayekian legislator trying to decide how to address the problem of street crime. Should he choose a constructed order—i.e., regular foot-patrols by policemen enforcing a “broken windows” policy? Or should he choose a spontaneous order?—i.e., leaving it to vigilante groups to duke it out for themselves? It is impossible to answer this question *purely* on the basis of epistemology. Because spontaneous and constructed orders cannot be differentiated in principle, whatever answer he chooses will necessarily involve an interaction between both, and *either* will be plausibly describable as spontaneous or constructed. Even if the legislator implements a rigid police state, with checkpoints and random searches of pedestrians, the officers involved will rely on tips from local informants and their own knowledge of neighborhoods—thereby incorporating spontaneous elements into what appears to be a textbook example of a constructed order.

We cannot draw the proposed line based on policymaker ignorance, either, given that citizens are ignorant, too, and their ignorance is not comparable to that of policymakers. Policymakers know more, let us say, about a neighboring nation’s secret military buildup and plans for invasion—whereas local citizens know more about domestic food supplies, manpower shortages, and national morale. Both groups also know a little about all these things, and neither knows what the other knows or doesn’t know. So if we confine ourselves to epistemological considerations alone, it can never be clear which group is in the best position to decide whether to go to war.<sup>4</sup>

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<sup>4</sup> This issue came up in the late 1930s, in debates over the Ludlow Amendment, which would have required a national referendum to declare war except in case

And war is a relatively clean example. On matters of economic regulation or environmental protection, it is truly impossible on purely epistemological grounds to specify a category where policymakers, in Scheall's phrase, "know enough" or a category on which citizens "know enough" (20). Therefore this first possible basis for justifying a pro-spontaneity bias must fail.

Second, perhaps spontaneous orders are more fragile than constructed orders, and *require* non-interference, whereas constructed orders are more robust and can exist even in a world of pervasive state interference. But is this true? The history of black markets suggests that, on the contrary, spontaneous ordering is *extremely* robust. And constructed ordering can be quite fragile, liable to obstruction either by spontaneous forces or by other, competing constructed orders. (Witness the entire history of the New Deal.) Remember that constructed orders are constructed out of spontaneous orders, and spontaneous orders grow up spontaneously around constructed orders, in a dynamic back-and-forth process. That means it is not obvious—absent introduction of a normative principle—that we should presume in favor of allowing spontaneous orders to flourish. In fact, we do the opposite all the time—taking steps to prevent spontaneous orders from developing in response to constructed ones. We call this “closing loopholes.” We do it for *normative* reasons—not reasons of political epistemology.

## 2. The paralysis of ignorance

Of course, the Hayekian believes that the reason for presuming in favor of spontaneity is that spontaneous ordering allows for the use of local knowledge, so policymakers should presume in favor of spontaneity in light of their own limitations. But here another problem arises: there is no point at which ignorance entirely vanishes.<sup>5</sup> Hayek's

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of actual invasion. Opponents emphasized that government officials are privy to important secret intelligence about other nations and must therefore be trusted with the question of war; advocates argued that the people are in a better position to know the national circumstances and that they should enjoy that power.

<sup>5</sup> It might seem an exaggeration to say that under Hayek's knowledge problem

observation that no central planner can know or make use of all of the information necessary to organize an economy applies not only to the complexity of large-scale social problems considered in the abstract—it is, more importantly, an indictment of attempts to control *dynamic* social phenomena. Even if it were possible for Laplace’s Demonic Bureaucrat to know at one instant every factor that goes into an industry, and all the economic consequences of its behaviors, he would nevertheless be paralyzed by the fact that all that information will be obsolete tomorrow. What’s more, every action consists of an infinite number of sub-actions, so that like Zeno’s Paradox, any constructed order can be infinitely subdivided along the axis of time or any number of other axes—and questions of ignorance arise at every stage.

That is why rigid adherence to such a guideline as “look before you leap” or “don’t interfere with spontaneous orders” would, if consistently followed, lead to paralysis. No action the state could ever undertake could be justified on that basis, or even comprehended to begin with. We obviously do not and cannot act only when we have perfect knowledge of the consequences of our actions. Yet we *must* act.

Scheall says that “even a pure do-nothing policy bears an epistemic burden when it is intended to manifest particular results” (164). True! But he adds—and rightly so, on his premises—that a policymaker who aims to pursue such a do-nothing policy must “know [before not acting] that there are no hindrances in the environment to the effective operation of spontaneous forces” (164). This is impossible, for two reasons. First, because of the knowledge problem: the economy is too complex to know what will end up hindering the operation of spontaneous forces; if that were possible, the forces would not be spontaneous. Second, any such “hindrances” are themselves presumably the result either of a spontaneous order—and should, *ex hypothesi*, be preserved—or of constructed orders, which, again, are simply comprised of spontaneous orders (which, again, should be preserved). To wipe them away without at least a full—and

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argument, ignorance must entirely vanish before the state can act, but given that spontaneous orders are merely aggregates of constructed orders, and that constructed orders are built out of spontaneous orders, that does seem to be what his argument would demand. See my “sidewalk” example in Sandefur, “Some Problems with Spontaneous Order,” p. 8.

unattainable—account of their role and consequences “cannot succeed” (xi).

Given Hayek’s neutrality—or vacillation<sup>6</sup>—with regard to the legitimacy of spontaneous versus constructed orders, one wonders whether it is even viable to use the pejorative term “hindrances” at all. Spontaneous orders, *by their very existence as orders*, “hinder” spontaneity, and lead to the development of different orders than would have existed in their absence. This is not a bad thing—it’s just how spontaneity works—but using the term “hindrance” prejudices us by implying that there is some qualitative distinction between a universe of pure spontaneity and a universe of pure construction. But that would be what Scheall calls “floating in the air” (6). The reality is that constructed orders swiftly inspire spontaneous developments,<sup>7</sup> and spontaneous orders routinely serve as foundations for constructed orders.<sup>8</sup>

Let us clarify this point with an example of recent vintage: how should restaurants in a community stricken by a highly contagious, deadly respiratory disease, reopen after an initial “lockdown” period? The governor of my (and Scheall’s) home state of Arizona issued an executive order that took heed of Hayek’s advice: it required businesses to establish rules for operating safely, and expressly prohibited cities and counties from adopting local ordinances that mandated standards of their own.<sup>9</sup> In other words, the Governor left it to the business community to design its own rules by reference to its specific capacities and needs (i.e., a spontaneous order, taking advantage of local knowledge) by shielding businesses from the almost instinctual desire of local politicians to interfere by creating and mandating their own rules out of thin air (i.e., a constructed order suffering from the knowledge problem).<sup>10</sup>

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<sup>6</sup> Sandefur, “Some Problems with Spontaneous Order,” pp. 11-12.

<sup>7</sup> For example, panhandlers who stand on freeway offramps, or the entire tax preparation services industry.

<sup>8</sup> For example, laws regulating ride-sharing.

<sup>9</sup> Arizona Executive Order 2020-43 (June 29, 2020).

<sup>10</sup> I am simplifying for purposes of argument; in fact, Gov. Ducey’s order required businesses to comply with federal and state government guidelines for sanitation and therefore probably cannot be fairly described as allowing a *truly*

Now, suppose that, following Scheall's recommendation, the Governor's office looked for a "hindrance" before announcing this policy. One that comes to mind is existing anti-discrimination legislation that prohibits restaurants from checking customers for signs of illness or requiring them to wear facemasks.<sup>11</sup> What should be done? It's tempting to regard such laws as obstacles to the development of a spontaneous solution to a policy problem, and to sweep them away with some magical Repeal Wand. But that would be fallacious.

First, relative to the Governor's order, these laws are *not* hindrances. They are simply background factors around which the spontaneous order must grow, no different from other factors, such as the price of beef or the location of the nearest interstate. Second, these laws, while "constructed," are also aggregates of spontaneous orders—that is to say, legislators wrote them in light of the then-existing common law rules governing liability and discrimination. So waving the Repeal Wand would *itself* be a form of "constructivism"—and if the Governor were to wave it, the consequences would be far-reaching, potentially infinite. If that obligates<sup>12</sup> the policymaker to have a theory about the consequences, and of the consequences of those consequences, etc., then it would be impossible to act. Repealing the antidiscrimination laws would, let us say, destroy the business of lawyers who make a living suing restaurants. That would harm the businesses of accountants who do the payroll for those law firms. That would hurt the baker and the glazier and the tailor—in a sort of "little old lady who swallowed the fly" cascade that would necessarily paralyze any policymaker before he gets started. And, as Scheall says, the same considerations also apply to decisions *not* to act.

Scheall offers two answers to this objection. "Given the experientially contingent and culturally conditioned nature of the success or failure of different social institutions," there is no One Best

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spontaneous order.

<sup>11</sup> Walter Olson, "Temperature Checks at Businesses: Sued if You Do, Sued if You Don't," *Cato at Liberty*, May 20, 2020, <https://www.cato.org/blog/temperature-checks-businesses-sued-you-do-sued-you-dont>.

<sup>12</sup> Again, note the oddity of discussing "obligation" at a point in the argument where we are purposely withholding any normative considerations.

Way to design social institutions, and therefore no need for a clear line here; rather, we muddle through the complexity of political decision-making as best we can in light of the wisdom to go slowly, with incremental improvements (172). Also, Scheall says, the objection is ill-formed because the question is not where to draw the line, but where *not* to draw it: “In particular, to the extent that we care about realizing our goals, we should avoid assigning goals to policymaking that are more effectively realized spontaneously, and we should avoid leaving goals to spontaneous forces that are more effectively realized via policymaking” (173).

But here we crash into the barrier we have tried so hard to avoid: normativity. Scheall says that “empirical political epistemology is non-normative” (172), and that we should address “ought” only after “can.” The attempt at prioritizing the epistemological over the normative must fail, however. It is not possible to determine whether our “goals” can be more effectively realized spontaneously or some other way (Scheall’s second proposed answer) without having “goals” to start with, and goals are by definition normative.<sup>13</sup> Nor can we muddle through (Scheall’s first proposed answer) without having *some* normative goal, given that policymaking virtually always aims not at a single goal but at some acceptable tradeoff between several competing goals. In reopening restaurants, we seek to ensure that consumers get food, that they are safe, that restaurant owners can make a living, etc.—and we draw lines in light of those purposes. If “in order to determine the better and worse ways for a society to delineate the public and private realms—the demarcations that ‘work’ more or less well for the society and its members—requires extensive empirical and historical analysis” (172), then what guides that analysis? It is not possible to answer that question without crossing into the normative.

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<sup>13</sup> Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press, 2001). It also seems unlikely that political epistemology can be non-normative at all. There must be at least some meta-ethical stage at which we ask whether we should devote our time to political epistemology in the first place, and that question is itself normative. Epistemology itself is shot through with normative considerations, as well. Paul W. Ludwig, “Public Spiritedness.” *Claremont Review of Books*. 20, no. 2 (Spring 2020), <https://claremontreviewofbooks.com/public-spiritedness/>; J. Bronowski, *Science and Human Values* (London: Faber & Faber, 2011 [1965]).



### 3. The costs of finding the limits of the epistemic

This is problematic because Scheall's entire project is an attempt to shift away from contentious normative considerations back to what he views as the logically prior question of epistemology: *is the project possible?* before *should we attempt it?* But this seems overly tidy.

For one thing, there is the problem of "unknown unknowns" (180). We are often blind to our own ignorance, and this is probably where we are most vulnerable. Yet while Scheall refers to this "second-order ignorance" problem (3, 27-28), he makes no attempt to discuss it in depth, and that is troubling, given that it is both impossible for a policymaker *ever* to be fully aware of his own ignorance, and because of the crying-wolf hazard that occurs if we too frequently invoke it. While every conscientious policymaker is aware of his own fallibility, he cannot be expected to await perfect knowledge before acting.

Second-order ignorance is *always* with us. As a consequence, policymakers will *have* to act at some point, despite being consciously aware of the shadow of second-order ignorance. Indeed, there are times when it is better to leap before looking, even when doing so imposes extraordinary costs. Policymakers who hesitate in times of crisis, out of fear of their own second-order ignorance, are often poor leaders. Isn't that what General George McClellan is best remembered for? And to insist too often in discussions with policymakers that there might be *some* unknown detail they failed to consider—one they cannot possibly have considered, since it is by definition beyond their horizon—is more likely to render them deaf to such warnings in the future than to make them more hesitant. As *Federalist* No. 25 warns, we should be:

cautious about fettering government with restrictions that cannot be observed, because [we] know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the constitution of a country, and forms

a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.<sup>14</sup>

Also, determining our epistemic limits requires us to take steps, and those steps would presumably have to satisfy our criteria for taking steps. How should we decide whether to devote resources to the problem of figuring out what our limits are? The way Scheall has framed the dilemma creates an unjustifiable one-way ratchet in the direction of more and more constructive policymaking. If we must determine the limits of our knowledge before taking any policy step, this will militate in *every* case in favor of more epistemological analysis and research, and more centralization on *that* question, at every iteration. Absent any possibility of taking the path of spontaneity on *this* matter—and there is none in Scheall’s argument—policymakers who are trying to decide whether to devote more resources to measuring their epistemological capacities must first determine their capacity to answer *that* question, and then *that* question—and the answer will always be yes. They will spiral in favor of more and more research into epistemological capacities, which would mean ever-growing investigation and surveillance powers for the government, and full employment for think-tankers. (Lucky for us!) This is particularly true, given that the set of “unknown unknowns” will necessarily include the subset of *unknowable* unknowns—things we can *never* know, but whose unknowability cannot be determined in advance. This suggests an infinite regress that will keep lawmakers doing their homework in perpetuity—on the taxpayer’s dime.

#### 4. The intertwining of the normative and epistemological

But differentiating between normative and epistemological seems problematic anyway, given that in policymaking, the relationship between the two is highly interactive.<sup>15</sup> We do not cleanly

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<sup>14</sup> Benjamin Wright, ed., *The Federalist*. New York: Barnes and Noble, 1996), p. 213.

<sup>15</sup> Scheall’s introspective argument (21-22) seems to give insufficient weight to improvement, or the role of aspiration, which play important roles in normative considerations. It may be true that nobody “seriously considers as an option marrying an extraterrestrial alien spouse” (21), but a great many young men put

ask first whether a political solution is possible, and then whether it is right; instead we are born into a world of existing policies, and seek to shift toward preferable ones while invariably straddling the fuzzy line between epistemological and normative. On one hand, epistemological barriers can often be overcome by the investment of resources, but that would divert resources from addressing other social problems. We could presumably find a cure for cancer if we cancelled all social programs, disbanded the military, confiscated all private wealth, and devoted all that money to cancer research. But would that be the *right* thing to do? On the other hand, we cannot know all the costs even of policies that are indisputably justified—we might save people from the onrushing trolley, only to learn later that one of them is the next Hitler—but that epistemological limit surely cannot bar us from doing what is right given our present knowledge.

Scheall suggests that the constitution should restrict policymakers to addressing only those matters within their competency. But there are three problems here. First, it is unclear how exactly they can do this, beset as they will invariably be by the kinds of incentives Scheall mentions (168-69). If “approval, popularity, praise, power, whatever,” is likely to push policymakers into erroneously evaluating the costs and benefits of do-nothing versus do-something strategies, then how much likelier are they to correctly evaluate their own epistemological capacities—even if that were a static, objectively determinable matter, instead of the dynamic, moving target that it really is? A thorough discussion of second-order ignorance would address this problem, but is absent from Scheall’s analysis.

Second, in real life, policymakers—i.e., legislators—have an answer to offer: administrative agencies. Policymakers deputize

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up posters of Bar Rafaeli in the secret belief that they might marry *her* some day. The blues musician B.B. King once said his distinctive guitar style resulted from his failed efforts to mimic the musicians he admired. “If I could have played identically like [T-Bone Walker or Blind Lemon Jefferson] I would have,” he said. But “[I] have stupid fingers that just don’t work.” Richard Kostelanetz, ed., *The B.B. King Reader* (Milwaukee, WI: Hal Leonard Corp., 2005), p. 121. To put the point less jocularly, normative thinking less often consists of evaluating our realistic options and more often of projecting an ideal—even if unlikely or even impossible—in front of us, and then striving our best to attain it. See, e.g., Matthew 5:48.

experts and take advantage of their expertise while shielding them from political responsibility so they can impose their expert judgment with the broadest possible discretion. Remaining firmly in the non-normative, epistemological world, the solution would seem to be an infinite number of sub-agencies, and sub-sub-agencies, so as to bring more and more local knowledge to bear on more and more problems. This is, of course, just another name for totalitarianism.

In real life, the results of the Administrative State have not been amenable to political liberty, to say the least. Yet it seems essentially immune from Scheall's argument that the constitution should "limit [legislators'] policy options to those pursuits with respect to which their epistemic capacities are sufficient to make a positive contribution and keep them away from policy pursuits with respect to which their epistemic capacities are inadequate" (175). Few doubt that agencies are, on the whole, staffed by competent and public-spirited people.<sup>16</sup> The question, rather, is one of goals—that is, the inherently normative issue of whether it is right to, e.g., deprive people of their property rights in the manner that the EPA routinely does, a question that involves not just the morality of inflicting violence on individual persons, but the costs and benefits of the whole bureaucratic enterprise, relative to the other things the state could be doing with public resources.<sup>17</sup>

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<sup>16</sup> It is not accurate to say that public choice theorists "make the assumed knavery of policymakers the *sine qua non* of their analyses" (17). On the contrary, public choice insights hold true of the far more common situation in which there is no simple right answer to a policy question, and in which unconscious biases prevail. Anyone who has dealt with administrative agencies in real life knows that they are staffed by human beings, some highly competent, most fully committed to doing what they genuinely think best. "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

<sup>17</sup> Moreover, the risks of creating such an agency of experts are precisely those identified by the public choice school: they facilitate rent-seeking and the redistribution of wealth and opportunity to those who have most influence with the experts. Scheall says such considerations "place the normative cart before

## 5. Political epistemology cannot stand on its own

This brings us to the third, and bottom-line problem: Scheall does not persuade us that it is possible or even desirable to try to separate political epistemology from normative considerations, even if doing so is only a matter of priorities. He says that

by itself, empirical political epistemology is non-normative; in isolation, it implies nothing about the best form of government or about how we ought to draw the line between government planning and individual planning. Nonetheless...[w]hen the question is which goals we should assign to policymakers and which goals should be left to individuals...it is important to determine what policymakers can and cannot deliberately achieve, a determination that can be made only through empirical political epistemology (172-73).

That is certainly true, but there is no apparent reason why that determination should—or how it *can*—be separated from normative debates. On the contrary, normative considerations should enter into *every* stage of political discussion, because every means is itself an end, and each end requires justification, and also because our technical capacities cannot substitute for—perhaps should not even be a factor in—our normative deliberations. *Can* we solve the grain shortage by liquidating the kulaks? Probably. *Should* that be within the realm of consideration? It probably degrades our liberal institutions even to

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the epistemic horse” because “they consider how policymakers *ought* to behave without first asking what policymakers *know* (or *can learn*) *enough* to do” (17). But at least in this example, that is not true: the deputizing of experts *does* address Scheall’s epistemic horse—and then leaves us with a rent-seeking problem on our hands. In any event, whatever the logical priority of these considerations, the cart is still there, and must be pulled.

spend resources calculating whether such things are doable,<sup>18</sup> at a minimum because making that calculation will *itself* require the use of resources that would be better devoted to other ends.

A superior approach to all of this is offered by Lon Fuller, who distinguishes between “managerial direction” and “contract” as principles of social ordering—a distinction more helpful than Hayek’s spontaneous/constructed distinction, in part because it is drawn *within* the framework of normative values.<sup>19</sup> In other words, Fuller, like most classical liberals, addresses questions of political structure only *after* addressing the broader questions of what the state is for, what the limits of its legitimacy are, etc. This reaps all the benefits of Hayek’s knowledge and spontaneity discussions without falling into the traps mentioned here.

Scheall seems to summarily dismiss this possibility in his excessively brief and regrettably confused reference to natural rights (79). The role of natural rights theory in classical liberalism is to focus political attention on things the state *should* do. We address first what is legitimate, and only then consider practical questions of how to accomplish legitimate goals. But Scheall hastily dismisses this possibility, in a manner that mischaracterizes natural rights and creates a straw man argument.

The word “natural” in the phrase “natural rights” refers to the fact that these are principles that depend for their validity on qualities of human nature, as opposed to deriving their validity from social convention. Are there such rights? Maybe not, but if they do exist, that is what they are. Scheall, however, says natural rights are “all well and good given circumstances conducive to mutual respect between persons,” and are “less ‘natural’ under circumstances the inhabitants of which have never known such a conception” (79). This is an incoherent statement, akin to saying “principles of proper physical exercise are all well and good given circumstances conducive to

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<sup>18</sup> A point beautifully illustrated in Mark Twain’s satirical “Cannibalism in the Cars” in *Mark Twain, Sketches New and Old* (New York: Harper & Bros, 1903), pp. 370-83.

<sup>19</sup> Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing 2001), pp. 81-141.

jogging, but are less ‘natural’ if people just sit on the couch all day.” In reality, the “circumstances” have no bearing on the (purported) truth value of the principles involved in natural rights claims. One might deny that there *are* such principles, or that such claims are valid, but one cannot refute them by mischaracterizing them or assuming away their claim to objectivity with the use of scare-quotes.

Scheall goes on to say that “a system of natural rights...might have manifested something like an effective liberal order in 18th-century America; it is less obvious what might have followed from a system of natural rights instituted in, say, a community in the path of the 13th-century Mongol horde” (79). Obviously it’s never “obvious” how any culture will react to any proposition—how would 13th century Mongolians have “manifested” such propositions as “smoking is bad for you,” or “a good driver always checks his mirrors,” or “putting aluminum foil in the microwave is dangerous”? But this is irrelevant to the truth value of such statements. Like these prescriptions, natural rights theory offers propositions about the best ordering of a political society to achieve human flourishing; the truth value of these propositions does not depend upon culture.<sup>20</sup> Shifting from their truth value to their cultural settings is a rhetorical sleight of hand that conceals a “naturalistic fallacy” on Scheall’s part; or, as Jefferson put it in a slightly different context, he mistakes the abusive for the natural state of humanity.<sup>21</sup>

Scheall’s disregard for natural rights theory is especially unfortunate, because it is unnecessary. His own theory appears to include all the ingredients of a natural rights theory.<sup>22</sup> His entire argument appears to be: there are *natural* limits on human knowledge and capacities, so *if we want to attain a goal*, we are *required* to act in certain ways. But natural law/natural rights theory<sup>23</sup> says no more than

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<sup>20</sup> In other words, if natural rights theory is valid, then the result of faithfully applying them in 13th century Mongolia would have been a flourishing economy and a healthy and happy populace and the saving of many lives.

<sup>21</sup> Thomas Jefferson, Letter to Samuel Kercheval (July 12, 1816) in Joyce Appleby & Terence Ball, eds., *Jefferson: Political Writings* (Cambridge: Cambridge University Press, 1999), p. 215.

<sup>22</sup> Cf. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 189-95.

<sup>23</sup> The difference between natural law and natural rights is too complex to

this. It asserts normative claims by understanding human flourishing and prescribing constraints on the state's actions in light of that understanding.<sup>24</sup> This is normative, but it is not *more* normative than Scheall's approach—given his repeated references to “goals” that we want to “attain”—and what makes it “natural” is the fact that it is (or purports to be) independent of culture, just as Scheall's approach is (or purports to be). It would be irrational for a reader to brush off Scheall's argument by saying, “who knows how this so-called ‘political epistemology’ would have manifested itself in 13th century Mongolia?” He would doubtless reply to a person who engaged in such a straw man argument that knowledge problems existed in that time and place just as they do in ours, because they are a function of human nature, and that his theory therefore holds regardless. The same is true for rights.

What do we hope to gain by avoiding the normative in politics? Do we think we can evade the intensity and complexity of debates about justice and morality, and fashion a plug-and-play political philosophy that will be accepted regardless of what people think about the good? Or have we surrendered to the idea that normative debates are unresolvable and irrational because they have no truth value at all? Whatever the motive, the effort seems not worth the candle. As for the first, attempting such a thing would initially require getting one's audience to accept relativism—which, at a minimum, means talking them out of their existing normative commitments. That seems to call for twice as much labor as just straightforwardly arguing that their moral views are wrong. As to the notion that normativity is necessarily subjective, that is simply false.<sup>25</sup> True, arguments about

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address here, and not relevant for our purposes. Fuller emphasized the distinction, and rejected natural rights while endorsing natural law, a matter on which he erred. Lon L. Fuller, *The Law in Quest of Itself* (Union, N.J.: Lawbook Exchange, 1999 [1940]).

<sup>24</sup> Randy E. Barnett, *The Structure of Liberty* (Oxford: Oxford University Press, 1998).

<sup>25</sup> Michael S. Moore, *Objectivity in Ethics and Law* (Burlington: Ashgate, 2004). Although it has long been fashionable in some quarters to regard natural rights as mere inventions, we would do well to heed the advice of (ironically enough) David Hume, who said that “Mankind is an inventive Species...and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original



morality can be complicated and exhausting, but are they any more so than discussions about political epistemology?

There is nothing less free—or, one might say, more costly—than *wertfrei* theories. Scheall’s and Hayek’s arguments about epistemological limits are helpful tools in policymaking, but only within the framework of a coherent normative theory about the proper role of the state. They simply cannot stand on their own.

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principles without the intervention of thought or reflection.” David Hume, *A Treatise of Human Nature*. New York: Longmans, Green & Co. 1909 [1740], p. 258. Rights may be “invented” in the sense that they are propositions, and are not rocks or trees, and are therefore just as “invented” as the binomial theorem or the Austrian theory of the business cycle, but given their principled basis and absolute necessity, they are nonetheless “natural” in the relevant sense.