

## **“The Classical Liberal Tradition, Hayek and Political Competition” \***

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**Abstract:** In a prior work (Salinas, August 2006) I read Hayek’s writings on epistemology as a conceptual basis for a theory of political competition, and briefly analyzed his idea of democracy as a competitive process. In this work, I align his political thought with mainstream classical liberals, and I explore the nature of his critics to modern representative systems, highlighting his contribution to the idea of political competition, as well as his shortcomings in the field of institutional design.

### **Introduction**

Classical liberalism has always been concerned with the problem of limiting political power (hereon, power). If individual liberties are to be protected from the abuses of government, it argues, governments ought to be structured in a way so as to prevent any single person or body of persons from using the power of the government against the life and properties of the people. In this light, the history of classical liberal institutional theories can be seen as the attempt to assure protection for the people from the very institution that is supposed to protect them.

In order to achieve the goal of limiting power -so these theories go- the structure of government needs to be subject to checks and balances, to contrasts and oppositions and to controls through votes and elections; in other words, it requires an institutional setting characterized as one of competition among all political forces. Broadly speaking, the concept of political competition relates to a system where all forces, formal or informal, are allowed to intervene in the supply or demand of proposals and actions related to collective decisions, within a constitutional frame of respect for individual liberties. In a narrower sense, political competition is the activity where political agents compete against each other so as to be elected to office and/or see their policy proposals or preferences adopted.<sup>1</sup>

Political competition thus understood applies both to the sphere of decisions of public officials as well as to the more general democratic setting in which other political agents compete to advance their proposals. In the case of public officials, competition is associated to elections and divided jurisdictions; in the case of other political agents

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\* Paper to be delivered at the Second International Congress on the Austrian School of Economics, Rosario, 2008. This is a revised version of a research that was translated and partly included in my doctoral dissertation (Salinas, March 2006). Whereas in the latter I looked at political participation by means of direct voting devices such as the referendum and the initiative, here I emphasize the argumentative continuity between authors engaged in the enhancement and protection of individual liberty by means of political competition.

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<sup>1</sup> This formula is intentionally ample enough to be applicable to situations such as elections, popular initiatives, voting in referendums, legislative voting of bills, executive decrees and vetoes, etc. In this regard, it extends the notion of electoral competition (Schumpeter, 1947) to all legal instances related to the processes of collective decision-making, not only to candidate elections. See Gordon, 1999, for an idea of controlling power through its distribution among competitive institutions. The antinomy of political competition would be any form of regime where competitive political activities, electoral and non-electoral, are restricted or impaired by the government, legally or factually, degrees going from total prohibition (as in communist regimes) to mild restrictions (as those introduced by electoral systems).

competition implies the freedom or possibility to introduce additions, complements or corrections to governmental decisions.

Immersed in the processes of competition within a given framework of rules, political forces often clash to capture others' attention and support for their proposals; in doing so they use arguments, rhetoric and other instruments of persuasion to outdo their competitors in winning the necessary consent. This dynamics of competition, intended to gain supporters by non-violent means, serves as an instrument by which none of those forces could prevail abusively.<sup>2</sup>

It is precisely the feature of competition-as-prevention of abuse that appeals to the classical liberal concern with the extension of power and one that draws my attention in this work. In the next section I present the main arguments associated with classical liberalism in defence of political competition, which pivots mainly around the theory of the separation of powers. In section II, I give an account of Hayek's views on political competition by addressing both his enduring contributions and his shortcomings in the field of institutional design. I conclude by pointing to the main continuities between the classical liberal tradition and the Austrian thinker.

## **I. The Classical Liberal Tradition**

Since Aristotle's statement that the best political regime is one in which every citizen is allowed to prosper and live a happy life (Politics, Book VII: 2) theorists have debated which regime comes closer to that goal. The theories have differed according to the extent that the government, the individuals or intermediary associations were given the main role in fostering prosperity and creating the conditions for generating happiness. In turn, this role depended on the visions of the motivations for human actions: are men capable and willing of pursuing common goals by political associations? Are they basically antagonistic and selfish and need a strong actor to guide them forcefully towards a life in common? Or must that selfishness be checked by competitive mechanisms other than a strong actor, whose own selfishness would obstruct the purpose of its existence?

I deal here with political theories as the cornerstone on which the institutions of government are built, political practices are framed and social outcomes are achieved. Political theory addresses some aspects of the human needs and aspirations that are organized by means of collective decisions. The mode of organization will vary with the principles that inspire it: liberalism recognizes to individuals the freedom to carry out their life plans as they consider appropriate, and hence aims at a minimum of government intervention in the design and execution of these plans. In the classical liberal view, the best political regime is that in which people are left free to pursue their private and public goals without infringing on individual rights. Its main political axiom –to use Toqueville's term- is that individual liberty is best protected by dividing power in several functions, and by checking each power with the others, so as to make it difficult that any one of them encroaches on the other or violates individuals' rights. This institutional setting obeyed to the belief that a republic based on the separation of

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<sup>2</sup> Several scholars have argued against the notion of politics as competition, in the understanding that politics is also about cooperation and agreement (for example Mansbridge, 1980). The argument seems to underestimate the competitiveness implicit in reaching a particular agreement, which "competes" to discard other alternatives for cooperative outcomes. The argument also overestimates the capacity of any one agreement to overcome, even initially, the competitive human nature in politics.

powers would best assure the efficiency of government while at the same time binding it to the people's consent expressed in elections.

Implicit in the theory of the elective republic is the idea of political competition or opposition, that is, the idea that by opposing opinions, actions and decisions the governmental apparatus would be best limited. In the past this institutional limitation was two-fold: first, varying interests and groups ought to be represented in separate branches of government, and secondly, each branch ought to play a part in the other's functions so as to exercise an internal direct control over each other.<sup>3</sup>

As early as 1603, Althusius wrote that power is elected with the consent and command of the people, who also have the power of judging and deposing them. It followed, for him, that people can also exercise power, for "Why give authority to the people and then deny them the use of it?" Althusius defended the idea of a mixed power against absolute governments on the basis that the weakness of human nature would make of an unchecked power a despotic one. He concluded that every type of government should mix the monarchic, aristocratic and democratic elements so as to restrain power: "what is monarchic conserves and restrains, what is aristocratic and democratic checks and restrains".<sup>4</sup> By opposing these elements, in this early account political competition would thus serve to achieve a balanced government; more importantly, that balance would work in favor of liberty by impairing despotic decisions. The proof of the extent to which the idea of a balanced institutional design was revolutionary and threatening (in those times, as today) was the execution of Algernon Sidney in 1683, for having expressed ideas such as "the nations who care for liberty think it a small matter to destroy a tyrant unless you can also destroy the tyranny",<sup>5</sup> or that corruption emerges every time the ruler "turns the law, which was made for the public good, to the private advantage of one of a few men".<sup>6</sup>

The political ideas developed throughout the XVII century were incorporated by Locke in his *Second Treatise on Government* (1690), which served as guide for the republican constitutionalism of the XVIII century. Locke's concern was to prevent the emergence of an absolutist power by separating the legislative power from the executive in order to preserve liberty. The legislative power is originally delegated by the people to a body of legislators who cannot transfer it to other bodies, and who are not allowed to affect the liberties and properties of the people, for it is with the purpose of "enjoying their properties in peace and safety" that men institute government. Locke further developed the idea that the legislative power is a "fiduciary" power given by the people to the legislators, to act for the achievement of certain ends –peace, safety and the public good. Should the legislators act contrary to "the trust reposed in them", or against the people's liberties and properties, the people are entitled to remove or alter the

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<sup>3</sup> For an in-depth account of the evolution of the theory of separation of powers see Vile, 1998.

<sup>4</sup> Althusius, 1995 (1603), pp. 191-207.

<sup>5</sup> Sidney 1999 (1698), pp. 551. See McClellan (2000: 39-45) for an account of his trial and execution, and his posterior influence on the American founders.

<sup>6</sup> Op. Cit, pp. 570.

legislative power.<sup>7</sup> The people could also decide to alter the form of government in those cases where the executive would act counter to their interest.<sup>8</sup>

The idea that the consent of the governed would both legitimize and control the exercise of political power spread rapidly among political theorists in Europe, of which Montesquieu was the most influential. In the *Spirit of the Laws* (1748) the French aristocrat expresses the fear that passions lead men to immoderation and that power tends to be abused, and advocates the need to temper and regulate the exercise of power. He takes the idea of a divided power further than Locke, by envisioning a legislative body composed of two parts, both restrained by the executive power, which in turn is checked by the legislature. In Book VI Montesquieu states the need for a judiciary power separated from the legislative and the executive; he proposed that this power be exercised by a group of persons drawn from the people on an *ad hoc* basis, and for fixed periods of short duration. Also, he feared that the private opinion of the judges might render the laws uncertain and therefore he saw a passive role for the judges in the legal system.

Montesquieu's language of mutual checks and judicial control transpired the core idea that political institutions should compete and check each other if liberty was to be protected, and he inspired to a great extent the institutional setting of the modern republic, first instantiated in America.

James Madison was one of the most influential exponents of these ideas during the U.S. first Federal Convention. In *Federalist 10*, he wonders how to control the effects of factions, understood as any number of citizens whose actions are "adverse to the rights of other citizens or to the permanent and aggregate interests of the community". Based on the capacity of a popular government to control factions, Madison distinguishes two institutional modes: the pure democracy and a representative republic. The main difference between the two is that a republic delegates the government to a small number of elected citizens, who govern over a larger number of people in an extended territory, whereas in a democracy people exercise the power by themselves and therefore the territorial units need to be smaller. For Madison, the advantages of a republic over a democracy are manifold: its greater extension presents the society with more options and with a greater probability of a fit choice; a larger number of suffrages are more likely to choose the best representatives; a federal Constitution concentrates the aggregated interests on the national level and leaves the local issues and the particularities to the State level so that, in the event of "improper or wicked projects" they will be less apt to pervade the whole body of the political union.

Madison acknowledges that most representatives seek office for ambition and personal interest more than for the pursuit of the public good. In this context, he realizes that elections do not suffice to replace ambitious and selfish men, for "how easily are base and selfish measures masked by pretexts of public good and apparent expediency?" The repetition of the deceit will prevail, and even the honest representative will give in to the practice of "varnishing his sophistical arguments with the glowing colors of

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<sup>7</sup> Locke, 1954 (1690), pp. 84. In the final paragraph of the book, Locke concluded that the legislative power could never revert to the people unless those holding authority forfeit it. In that case, "the people have a right to act as supreme and continue the legislative in themselves, or erect a new form, or under the old form place it in new hands, as they think good", pp. 139.

<sup>8</sup> Op. Cit., pp. 124. For a differing view on Locke's treatment of legislative and executive duties and deviances see Manent (1987:49-54), who highlights the insufficiency of any discourse that privileges representation and deliberation over greatness and unity. Manent may have overlooked the fact that at Locke's time there was an excess of (absolutist) unity over societal deliberation, which helps to explain the tone and direction of his work.

popular eloquence?”<sup>9</sup> Eventually, his persistent fear of the dangers to liberty in a popular government led him to agree with Jefferson that a Bill of Rights was needed on the basis that there would be no other force to oppose them other than the fundamental maxims of free Government listed in a document to counteract the impulses of interest and passion.<sup>10</sup>

Like Madison, Jefferson was also opposed to any concentration of power by the government, for it would tend to harm individual rights and destroy liberty. To prevent this oppression, the powers of government should be divided so that “no one can transcend their legal limits, without being effectually checked and restrained by others”.<sup>11</sup> As with his intellectual predecessors, Jefferson’s view of the corrupting nature of political power led him to the conclusion that, by balancing the authority among three branches of government, the occasion for corruption would be less likely to happen.

The Virginian was concerned about the lack of barriers between the three departments and foresaw that the legislative power might predominate, so he proposed establishing different houses of legislation in order “to introduce the influence of different interests or principles”.<sup>12</sup> His fear was placed in the danger of a few of becoming a permanent political force pursuing their own interests. For him, the tyranny of special class interest in the legislative power was “the most formidable threat at present and at future”.<sup>13</sup> His distrust of unchecked minorities is also well illustrated by his ideas on the role of the judiciary and his position in regard to the judicial review of the constitutionality of the actions of the two other branches of government. Yet, the judiciary itself would be subject to abuse power, hence he advanced the view that a judge should be a “mere machine” dispensing law equally and impartially.

The working of the American republic as designed by Madison and Jefferson and implemented thereafter was described comprehensively by Tocqueville in 1835, for whom the general principles and institutions set forth in seventeenth-century political theories were first applied there. Tocqueville observed that the American political system was designed to conciliate competing interests rather than on a strict functional basis: “when the federal Constitution was shaped, there were still only two interests opposed: interests in its individuality for each State and interest in union for the whole nation” so that “it was necessary to come to a compromise”. Yet, for all the benefits that the conciliation of interests brought into American political life, it was not without its dangers, for it would incline democracy to concentrate all power in the legislative branch, thus establishing the omnipotence of the majority, which may run counter to justice and liberty. Hence, in order to preserve liberty from the abuses of the majority, Tocqueville places great importance in the fact that the judicial power is invested with ample political powers: “the power granted to American courts to pronounce on the constitutionality of laws is yet one of the most powerful barriers ever erected against the tyranny of political assemblies”.<sup>14</sup>

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<sup>9</sup> Madison, “Vices of the Political System”, April 1788, in *The Papers of James Madison*, pp. 355.

<sup>10</sup> “Letter to Thomas Jefferson”, 10/17/88.

<sup>11</sup> “Letter to Joseph Cabell”, 1816, in Eicholz, pp.91.

<sup>12</sup> Unlike Great Britain - Jefferson wrote- in America “wealth and wisdom have equal chance of admission in both houses”, the people being represented in the House of Representatives, and the property of the State in the Senate (“Notes on the State of Virginia”, Query XIII, in *Thomas Jefferson: Writings*, pp. 245).

<sup>13</sup> Letter to James Madison, 3/15/89.

<sup>14</sup> *Democracy in America*, 1969/1835, pp. 103-4.

In any case, even if the majority does not impose its uniformity by force, the practical political consequences of its prevalence were still worrisome for the French writer. For one, his impression that democracy lacks the ability to elect men of merit to govern poses a problem, because “charlatans of every sort come to power”.<sup>15</sup> Tocqueville found a partial corrective for this situation in the bicameral legislative power, where Representatives were elected directly by the people and Senators were elected with the mediation of a body of electors. Thus appointed, the Senators act as filters and refiners, representing the “lofty thoughts and generous instincts” and leaving aside the “petty passions and vices” of the popular will.<sup>16</sup> Secondly, in a democracy the rotation of officers in power makes the majority believe that there is no fear of them abusing their power, and hence the majority let the magistrates “to follow their own devices rather than to bind them with invariable rules which, in restraining them, would also in a sense control itself”.<sup>17</sup> This mechanism places a high degree of arbitrary power in the magistrates of democratic republics, which together with the mutability of laws fostered by a system of frequent elections<sup>18</sup>, works in detriment of justice and liberty.

Tocqueville diagnosed the perils of an unrestrained majority based on a uniform and stifling majority opinion; although he admired the American love of liberty and sense of individualism, he was concerned that the love of equality, and its political arm, the despotism of a majority, would eventually prevail.

Tocqueville’s book was widely read in Europe and exerted great influence on a number of writers concerned with individual liberty against the danger of political abuses. When John Stuart Mill, to take an illustrative example, defended representative government against despotism, he asserted that the principle of representative government is that power will be abused to promote the particular purpose of the holder. He employed the word “particular purpose” to refer to the same phenomenon that the American Founders and Tocqueville had described as the interest of the rulers in opposition to the public interest. For Mill, men tend to pursue the selfish and immediate rather than the common and remote interests, especially when they are in power. Hence governments have to be established in such a way that acknowledges the general human trend, that is, the fact that altruist men are scant and most men look first at their personal, short-run interests. That is why one of the dangers of any regime for him consists in the selfish interests of the rulers influencing government decisions, and consequently he wrote that the first thing when establishing a representative government is to avoid the possibility of selfish class legislation. In this way, the best form of government in his view is one in which popular sovereignty is understood as the right of every citizen not only to have a voice in the constitution of power but also to participate in the functions of government. The other premise underlying this assertion is that each person is the best guardian of the individual rights and interests, and that, when power resides in only one class, the interest of the excluded classes runs the risk of oblivion.<sup>19</sup>

The variety of interests to be represented was nonetheless not as wide as we might expect. Mill identified two interests or “classes”, labor and labor providers; a small group within each class, he argued, would have more elevated considerations than their peers so as to obstruct obscure class interests from prevailing. These small groups, whose interest is the good of the whole and justice, would support the opposition in

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<sup>15</sup> Op. cit., pp. 198.

<sup>16</sup> Op. cit., pp. 201.

<sup>17</sup> Op. cit., pp. 205.

<sup>18</sup> Tocqueville quotes Hamilton, Madison and Jefferson in their agreement that an excess of legislation and the mutability of laws was a “great evil”, op. cit., pp. 202.

<sup>19</sup> John Stuart Mill, 1965 (1861), pp. 182.

Parliament if they found that their own interest should not prevail.<sup>20</sup> Mill's suggestion of balancing the forces of labor and capital was undoubtedly influenced by the spirit of the times, agitated by the changes that industrialization and economies of scale had brought about. But although he acknowledged the need to provide a political space for the social force of labor, he perceived that this new type of majority would need restrictions, and designed an electoral system of plural votes in which the more skilled and educated would have more weight in Parliament.

Although Mill's latter recommendation was not followed, his insights on institutional design permeated the views of other classical liberals who were committed, like him, to the joint defense of democracy and liberty. One of the main exponents of these ideas in the twentieth century was Hayek, to whom I now turn my attention.

## II. Hayek on democracy and political competition

Hayek's views on democratic theory are dispersed in a variety of writings where he expressed the need for the separation of powers as a means to limit the actions of the government,<sup>21</sup> in the belief that intelligent institutional designs are essential for the welfare for society as a whole. For him, constitutionalism was the great American contribution to the classic liberal goal of containing power. Two institutions in particular provided reassurances against the abuses of power by dividing and balancing its functions. For one, the adoption of federalism and its two levels of competences had provided both internal checks as well as a protection of individual liberty against coercion: "The reason why a division of powers between different authorities always reduces the power that anybody can exercise is not always understood. It is not merely that the separate authorities will, through mutual jealousy, prevent one another from exceeding their authority. More important is the fact that certain kinds of coercion require the joint and coordinated use of different powers or the employment of different means, and, if these means are in separate hands, nobody can exercise those kinds of coercion."<sup>22</sup> In regard to the other constitutional provision, the judicial review of the constitutionality of the laws, he considered that in American constitutionalism this judicial vigilance was directed to restrain legislatures by binding them to the "constitutional rules meant to control substantive legislation".<sup>23</sup> Notwithstanding the constitutional provisions and its jealous vigilance of liberty, the development of modern political systems had not gone in the direction desired by Hayek. His discontent arises from what he characterizes as the unlimited expansion of democratic government in the hands of unrestrained legislatures.

Hayek assimilates democracy with the rule by the majority, by stipulating that it is a method or electoral rule by which the majority of voters decide who will govern.<sup>24</sup> In this light, democracy does not relate to any substantive claim or purpose inspiring government but rather to the notion that all men are equal to make the law. So, although democracy shares with liberalism a common concern for equality before the law, Hayek

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<sup>20</sup> Op. cit., pp. 224.

<sup>21</sup> See Hayek 1948, 1960, 1978, 1979.

<sup>22</sup> *The Constitution of Liberty*, pp. 185.

<sup>23</sup> Op. cit., pp. 187-188.

<sup>24</sup> For Hayek the meaning of democracy is properly and specifically political and procedural and hence he excludes alternative uses of the word as applied to the spheres of education, commerce or the military, see *Law, Legislation and Liberty*, pp. 5 and *The Constitution of Liberty* pp. 443 n. 5, in which he adopts the procedural definition of democracy as stated earlier by Schumpeter (1947).

establishes an initial distinction between democracy and liberalism according to which “liberalism is a doctrine about what the law ought to be; democracy a doctrine about the manner of determining what will be the law”.<sup>25</sup> Insofar as liberalism presupposes the limitation of power by appealing to a commitment to principles, while democracy is concerned with the question of who is to direct government, in his view the two concepts belong to different, if not antagonistic, intellectual traditions.<sup>26</sup>

Yet, as he further elaborates on the relation between liberalism and democracy the initial distinction becomes blurrier. When he states that “democracy was originally intended to prevent all arbitrary power”,<sup>27</sup> he seems to be accepting the notion that democracy was thought of as a device to control government, and implicitly tying it to liberalism at least in their initial purpose.<sup>28</sup> The value of democracy, he writes later, is to serve as a precaution against an abuse of power and as a means for a peaceful political change.<sup>29</sup> His acceptance that at least historically democracy had shared interests with liberalism is also latent in the fact that it is only the “current” theory of democracy that he criticizes, on the grounds that it is based on a notion of majority with its implied assumptions of epistemological infallibility (that the vote of the majority always expresses its best interests) and moral correctness (democracy as an ultimate or absolute value).<sup>30</sup>

In sum, his complaints are directed to undermine the opinion that democracy is a good in itself and as such it has no need for limits. In any case, the three ultimate arguments that in his view justify democracy are that it allows for peaceful social change, it is a safeguard of individual liberty and an effective method of educating the majority.<sup>31</sup> Moreover, the fact that democracy originally referred to the idea of an equal law for all, and to the idea of government by rule and not by particular discretions, gives appeal to the defense of the original idea of democracy, to which Hayek refers with the word “demarchy” to contrast it with the current unrestrained meaning of democracy.<sup>32</sup>

It is useful to address at this point Hayek’s explanation of why modern democracy moved in the direction of unrestrained legislation: Was it a necessary condition of the democratic principle? Was it a consequence of an institutional design associated with democracy but not appropriate to guarantee the success of its original intent to limit power? Hayek’s argument is that what the modern interpretation of democracy has left behind is the constitutional tradition of the separation of powers as the means to limit power. In his view the modern unlimited power of democracy embedded in the legislative power, obeys to a wrong institutional set up in which the power of making the law and the power of directing government are combined in the same representative assembly. Moreover, the combination of an omni-competent assembly with an unconditional faith in it has paradoxically produced a result contrary to the original intention: “The device by which the founders of liberal constitutionalism hoped to protect individual liberty was the separation of powers”, [yet the separation of powers]

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<sup>25</sup> *The Constitution of Liberty*, pp. 103.

<sup>26</sup> On the distinction between liberalism and democracy he quotes Ortega y Gasset, Croce, Schmitt, and Kelsen, see *Op. cit.*, pp.442, n.2.

<sup>27</sup> *Op. cit.*, pp. 106.

<sup>28</sup> Moreover, elsewhere he asserts that “democratic ideals spring from the basic principles of individualism” conveying the idea that classic liberal individualism is at the roots of democracy, see “Individualism: True or False”, pp. 29.

<sup>29</sup> *Law, Legislation and Liberty*, pp. 137.

<sup>30</sup> *The Constitution of Liberty*, pp. 106.

<sup>31</sup> *Op. cit.*, pp. 107-109.

<sup>32</sup> *Law, Legislation and Liberty*, pp. 40.

“has failed to achieve this end, for its current interpretation is that whatever legislatures resolves is law. This has resulted from the rise of democratic government interpreted as unlimited government, and from the legal philosophy congenial to it, legal positivism, which attempts to trace all law to the expressed will of a legislator”.<sup>33</sup>

In this regard, democracy has become an unlimited power itself, one with the faith that “elected representatives of the majority made any other checks on the power of government unnecessary”.<sup>34</sup> The unchecked power of legislatures has transformed the workings of the legislative assembly into a “bargaining” process in which an assembly with power to vote on benefits to particular groups allows for exchanges of votes and favors among its members. It is clear by now that “It is not democracy or representative government as such, but the particular institution, chosen by us, of a single omnipotent ‘legislature’ that makes it necessarily corrupt”.<sup>35</sup>

By stating that a single monopolistic assembly is at the core of the problem of democratic excesses, Hayek seems to conclude that institutional designs are ultimately the decisive elements in any political system that will either keep common and general principles alive, or will subvert them. His diagnosis implicitly acknowledges that a mere commitment to constitutional principles without the presence of institutional devices will not be likely to achieve the goal of limiting government. The idea of countering power with power, in other words, the need to introduce more competitive elements in the structure of a limited government underlies Hayek’s proposal of a further division of the legislative tasks. In his view, given that power cannot be limited if it is not divided, the two distinct powers of legislation and administration, ought to be placed in different assemblies.

At the heart of Hayek’s theory of separation of powers is the recognition of the different nature of the governmental functions, the laying down of general rules on one hand and their application to particular cases on the other.<sup>36</sup> Moreover, given that legislation is different from constitution-making and from governing, “A three-tiered system of representative bodies is needed, of which one would be concerned with the semi-permanent framework of the constitution and need only act at long intervals when changes in that framework are considered necessary, another with the continuous task of the gradual improvement of the general rules of just conduct, and the third with the current conduct of government, that is, the administration of the resources entrusted to it.”<sup>37</sup>

When explaining this model constitution, Hayek distinguishes between the functions and the composition of the governmental assembly and those of the legislative assembly. The former would represent the varying interests and would operate with majority vote, while the latter would legislate on general and permanent rules. The requirements for each task follow the different nature of the assemblies so that, if the governmental assembly needs effectiveness, the qualities in the legislative assembly are “probity, wisdom and judgment”, for “legislation should not be governed by interests but by opinion about what kind of action is right or wrong”.<sup>38</sup> The principles of representation would also need to be different: the members of the legislative assembly would be selected for their personal qualities, based on a public recognition of their expertise and professional success, while the members of the government assembly

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<sup>33</sup> “The Constitution of a Liberal State”, in *New Studies...*, pp. 98.

<sup>34</sup> *Law, Legislation and Liberty*, pp. 153.

<sup>35</sup> *Op. cit.*, pp. 11.

<sup>36</sup> *The Constitution of Liberty*, pp. 210.

<sup>37</sup> *Op. cit.*, pp. 38.

<sup>38</sup> *Op. cit.*, pp. 112.

need only meet the usual conditions to hold a public office. Accordingly, the members of the legislative assembly would be elected by an indirect method and “at a relatively mature age for fairly long periods, such as fifteen years, so that they would not have to be concerned about being reelected”. They would be granted continued public employment after their service as legislators so that they do not have concerns about their personal future, and they would only be removable by a senate of former members. The tasks of the legislative assembly “include not only the principles of taxation but also those regulations of safety and health, including regulations of production or construction, which have to be enforced in the general interest and should be stated in the form of general rules”.<sup>39</sup>

To make the model constitution complete, a Constitutional Court, for those cases where a conflict of competence arises, or in which undue coercive measures are undertaken, could check both assemblies. Former members of the legislative assembly might appoint the members of the Court, who could be drawn from the judiciary, the legislative and the governmental assemblies.<sup>40</sup> In addition to the three-tiered level of the central government, the reduction of the size of government to smaller units would also provide checks to the central authority, revive the communal spirit, and provide men with the chance to participate in local political affairs.<sup>41</sup>

So who governs?

When Hayek first describes democracy as the rule of the majority, he alternatively refers to the method in which a certain range of voters in any political unit decide who will govern,<sup>42</sup> the territorial units in which the right of the citizens at large is exerted,<sup>43</sup> or, more generally, the only political system so far that allows for the peaceful change of governments, the protection of individual liberty against the abuses of power, and the education of the majority for the understanding of the public affairs.<sup>44</sup> In this first sense in which he defines democracy, the focus is placed on the people, so that in order to be successful politicians need to follow the public opinion held by large numbers of people,<sup>45</sup> thus carrying out the “will of the majority”.<sup>46</sup>

Yet, later on Hayek employs another, an altogether antagonistic, notion of the majority by referring, not to the voters or the people, but to the majority in a representative assembly. The main reason why both notions are opposed is that in the workings of modern democracies, this type of majority “owes its existence and power to the gratifying of the special interests of numerous small groups...” and, by “buying majority support by deals with special interests has nothing to do with the original idea of democracy”. The conclusion is categorical: “A majority of the representative of the people based on bargaining over group demands can never represent the opinion of the majority of the people”.<sup>47</sup>

It is this second notion of the majority understood as a majority of representatives that receives the bulk of Hayek’s criticism. If he first concedes that democracy is the

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<sup>39</sup> Op. cit., pp. 115.

<sup>40</sup> Op. cit., pp. 120-121.

<sup>41</sup> Op. cit., pp. 132-146.

<sup>42</sup> *The Constitution of Liberty*, pp. 104.

<sup>43</sup> Op. cit., pp. 105.

<sup>44</sup> Op. cit., pp. 107-108; *Law, Legislation and Liberty*, pp.5.

<sup>45</sup> *The Constitution of Liberty*, pp. 112.

<sup>46</sup> Op. cit., pp. 114.

<sup>47</sup> *Law, Legislation and Liberty*, pp. 134.

best form of government discovered so far, he is categorical in his condemnation of the institutional ways in which it has been set up: current democracy imposes upon government tasks on which agreement of the majority “does not and cannot exist”<sup>48</sup> given that the present-day government “is a machinery directed by ‘political necessities’ which are only remotely affected by the opinions of the majority”.<sup>49</sup> This particular democratic machinery makes it necessary for the representative “to invent a moral justification for the benefits they grant to particular interests”, and “to claim that they have been moved by considerations of justice”; yet, “the artifacts of the voting machinery which we call the will of the majority do certainly not correspond to any opinion of the majority about what is right or wrong.”<sup>50</sup>

Hayek traces the causes of this situation - the domination of legislation by coalitions of organized interests- to the unlimited powers of the government. Because the government is allowed to grant anything, his argument goes, these coalitions seize the political possibility to obtain what they want. The question that arises immediately is: but how much that is granted receives the support of the majority of the people? The fact that, as Hayek recognizes, law making in current democracies is in the hands of a majority of the representatives who operate independently of the particular decisions of their electors, calls into question his initial idea that the majority of the people rules. This is so especially considering that in electoral systems with rules of simple plurality and single-members districts, each elected legislator usually represents only the first minority of voters; and that in electoral systems with rules of proportional representation, electoral majorities are more difficult to form and lead to parliamentary majorities who often act counter to the preferences of its electors. The point to be made here is that, if the expression “majority rule” is to be used to describe the workings of current democracies, it can only make reference to the majority of the members of legislative assemblies who are enabled to make their decisions based on interests other than the people’s at large. Hence, Hayek focuses on the inherently defective design of a single omni-competent legislature: “The democracy we know [prey of special interests] is in conflict with the ideal that the opinion of the majority should rule; it means the oppression of the people and it is in conflict with the constitutional limitation of governmental power and irreconcilable with the ideal of a society of free men.”<sup>51</sup>

In turn, he acknowledges that the constitutional limitation of governmental power requires changing the current model of democracy by taking the logic of the separation of powers even further. Yet Hayek’s constitutional proposal presents a few difficulties. For one, the assumption that a separate assembly of a few wise people will be guided by opinion and not by interest does not follow from his earlier statements that a single body of legislators is more prone to be influenced by special interests. The fact that his legislators would be elected indirectly, and thus separated from the need to conquer votes demagogically, does not suffice to remove them from the temptation of deviating from the task of making general rules. Unless it can be justified in what ways the wiser and more probe men are better prepared to confront special interest groups, or why they are exempt from the attraction of factional pressures, there are no solid grounds to support the idea that a small chamber of experts will offer a guarantee against the problem of unrestrained special legislation. Hayek does not rely on the argument of political virtue associated with “wiser men”, and his reference to their expertise does not stop at considering the possibility that a success in the marketplace of professions may

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<sup>48</sup> Op. cit., pp. 150.

<sup>49</sup> Op. cit., pp. 149.

<sup>50</sup> Op. cit., pp. 10.

<sup>51</sup> *Law, Legislation and Liberty*, pp. 134-135.

not translate to the more complex world of political coercion. The objection to the intangibility of the few legislators seems stronger when considering that in his model constitution the members of the legislative assembly remain in office for a long period of time, fifteen years, during which the existence of special interest pressures could be more difficult to resist.

Secondly, the provision of a single Constitutional Court integrated with members of different sectors to supervise conflicts between the two assemblies could also suffer the clash of different interests without providing ways of resolving possible deadlocks among them. Even worse, the political necessities would force the deadlocks to be solved by ways other than the amenable discussion of opinions or the recurrence to the Court, as Hayek intends. As a consequence, the principles that the Court is supposed to protect would be also subject to the bargaining process that he depicts in modern democracies.

But the main objection to the existence of a chamber of a few, wise legislators is related to what I see as an insurmountable incompatibility with Hayek's epistemological stance, namely, that there is a dispersion of knowledge in society, as illustrated in the following paragraph: "From the awareness of the limitations of individual knowledge and from the fact that no person or small group of persons can know all that is known to somebody, individualism also derives its main practical conclusion: its demand for a strict limitation of all coercive and exclusive power".<sup>52</sup>

The political implication of the dispersion of knowledge makes it difficult to state who would be the wiser and more capable people in charge of passing the general rules required by the liberal order. In other words, "It is because every individual knows so little, and in particular, because we rarely know which of us knows best that we trust the independent and competitive efforts of many to induce the emergence of what we shall want when we see it".<sup>53</sup> It is precisely because the competitive element is altogether removed from the small legislative assembly in his model constitution that the prospects of its workings look less attractive than Hayek pretends it to be. Moreover, his case for a chamber of probity and wisdom is undermined by his other previous assertion that "All that we know is that the ultimate decision about what is good or bad will be made not by individual human wisdom but by the decline of groups that have adhered to the 'wrong' beliefs."<sup>54</sup> Hence, if social (and political) evolution is dependent not on wisdom but on the avoidance of failed examples, then all it would take for a political order to prosper is to imitate the successful, task that would pose less stringent requirements than a test of expertise and wisdom. This is so, especially if we take as valid his beliefs that success is largely dependent on accidents and chances, and that "the difference between the knowledge that the wisest and that which the most ignorant individual can deliberately employ is comparatively insignificant."<sup>55</sup>

The dislocation between his epistemological "individual humility" and his political "elitism of the wise" in my view undermines his model constitution, and leaves the door open for the same problem that he detected in the current models of representative democracies, namely, special interest pressures on a single small assembly leading into unrestrained or self-interested legislation. Yet, notwithstanding that Hayek himself does

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<sup>52</sup> "Individualism"..., pp. 16.

<sup>53</sup> *The Constitution of Liberty*, pp. 29.

<sup>54</sup> *Op. cit.*, pp. 36.

<sup>55</sup> *Op. cit.*, pp. 30.

not carry his epistemological premises into the basis of his institutional model, he did set the basis for others to do it.<sup>56</sup>

## Conclusion

Classical liberals have tirelessly argued both against the injustice and the perils that the concentration of power posits to individual liberty. For one, the concentration of power does injustice to the right of the individuals to control the political regime that rules over them; secondly, since government is instituted to guarantee peace and safety, the concentration of power undermines this purpose by excluding forces on the opposition from the peaceful mechanisms of the democratic political life. Moreover, the exclusion of competitors not only fosters a non-pacific environment, but creates the occasion for a monopolistic government to rule in its private benefit at the expense of the public good.

In this work I attempted to highlight the idea that political competition is an institutional device meant to combat these dangers. Faced with the problem of the concentration of power, the classical liberal tradition focused on its solution, competition, by means of the separation of powers, and by allowing other political forces to have a saying about collective choices.

For Montesquieu, Madison, Tocqueville and Mill, a free and competitive political order had to be organized as a representative government, in order to filter the democratic mass into a more refined and intelligent decisional structure. Montesquieu's chamber of the wise elderly found its equivalent in Mill's recommendation that a commission of few members draft the laws. A numerous assembly, Mill argued, is incapable of drafting good laws, for it lacks the skills, experience and education to do so. Years before him, Madison had upheld electoral rights only to freeholders as well as property qualifications for the representatives, on the double basis that the wealthy would be less corruptible and that they would defend the right to property.<sup>57</sup>

Aligned with the classical liberal aspiration to limit power, Hayek's concern was how to meliorate a system of political competition that had proved insufficient to limit the arbitrariness and over-extension of democratic governments. He correctly stated that the dispersion of knowledge was an inalterable human fact and, accordingly, he defended liberty and competition as the only notions that would allow for individuals to prosper. In this sense, his epistemic views can be seen as departing from the more skeptical stance of his predecessors in regard to the cognitive capacity of the people. The acknowledgment of the dispersion of knowledge and its corollary, epistemic humility, may be perhaps Hayek's most enduring contribution to the theoretical foundations of a free and competitive political order. Yet, as before stated, his late model constitution did not reflect these conceptual foundations, and therefore he fell short of applying the notion of epistemic humility to his institutional design.

Having said that, I will insist that the value of Hayek's contribution has to be seen in the light of his epistemic claims, which can be associated with a more competitive view of democratic institutions. I will conclude by quoting a passage that illustrates well the sort of association inspired by Hayek:

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<sup>56</sup> See Wohlgemuth, 2001, for a Hayekian account of democracy understood as a competitive process for discovering political options. See Salinas, march 2006, for an analysis of competitive institutional design that include direct voting.

<sup>57</sup> Madison's idea on property qualifications was not approved by the constitutional convention because the delegates could not agree on the form of such a qualification that would please both northern and southern states. See Manin, 1997:102-107.

It sometimes seems that democratic political theory is divided between those who think that the voice of the people is the voice of God, and those influenced by economics, who think the voice of the people is the voice of a collective moron. I have suggested here that the evaluation of the competency of the people depends on whom the people are being compared to, and on what questions. If we compare them to economists on predicting the economic effects of economic policies they certainly come out worse — but the economists come out bad too. The experts have an advantage, but it is not nearly as impressive as most think. If we are concerned with the competency of the people in applying basic norms of fairness and rules that evaluate processes, they seem competent and there are no moral experts who can plausibly show they do better. When we compare the weighted importance of these two competencies, I have argued, the people’s competency comes out on top. That is, they come out on top if, as Hayek argued a free society must, we base our policies on social and moral rules and principles and abjure the hopeless attempt to construct policies that efficiently promote desired ends.<sup>58</sup>

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<sup>58</sup> Gaus, 2008: Conclusion.

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