

Emergent and Instrumental Institutions in English Constitutional History

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Abstract: This paper examines the relationship between the emergent order of Anglo-American common law and representative government, with the instrumental organizations which act within them, particularly parliament and statute law. Much like the sensory order emerges through our efforts to make use of a complex of experiential data, one step removed, the complex adaptive system of the social order emerges through the interaction among developing instrumental institutions. Greater insight can be achieved through examination of how these instrumental institutions themselves evolve over time, and how they contribute to the emergent social order most visibly manifested through government and legal administration. English constitutional history will serve as a case study of social order developing as a complex adaptive system.

Keywords: common law, positive legislation, jury inquest, constitutional political economy, spontaneous order, constitutional history (England)

1. Introduction

Much like the sensory order emerges from a complex of experiential data, one step removed, social order emerges through the interaction among a complex of developing instrumental institutions. The instrumental organizations of parliament and statute law work within the complex adaptive systems of Anglo-American common law and representative government. Greater insight into the historical development of both instrumental and emergent institutions can be achieved through examination of how instrumental institutions evolve over time, and how they contribute to the emergent social order most visibly manifested through government and legal administration. This paper will explore elements from English constitutional history as a case study.

Plato first identifies the legal order as a adaptive self-organizing system, when he claims that no human being can arbitrarily create laws, which evolve over time as human circumstances evolve for the laws to address, and individual human legislators add minor practical innovations (*The Laws*: IV 4). Montesquieu (*Spirit of the Laws*: I 1) adopts a similar position, though he recognizes positive legislation also helps shape state institutions. In his view these institutions are self-organizing systems because they derive their fundamental character and basic legitimacy from social custom and evolution. Burke describes the emergence of spontaneous legal and political orders:

From magna charta to the declaration of right, it has been the uniform policy of our constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity (1792: III 58).

Ancient and medieval law were thought to embody concepts of right and wrong: "What is right is not derived from the rule but the rule derives from our knowledge of what is right (Julius Paulus, *Digests*: 50.17.1)." Hayek relates how early law-giving consisted only of the practice of recording and disseminating laws conceived of as being unalterably given (Hayek 1973 [hereafter LLL I]: 81).

A 'legislator' might endeavour to purge the law of supposed corruptions, but it was not thought that he could make new law... changes which did occur were not the result of intention or design of a law-maker.... The idea that law might be created by men is alien to the thinking of early people (LLL I: 81).

Justinian's *Corpus Juris Civilis* was based on classical Roman civil law, which was predominantly the product of law-finding by jurists and includes very little positive legislation. In the early middle ages, the Code of Justinian was wrongly supposed to have been imposed by the ruler and expressive of his

will. Thus, although Justinian's code originated as an emergent, self-organizing system, it was mistakenly introduced as a model of positive legislation.

Until the rediscovery of Aristotle's *Politics* in the thirteenth century and the reception of Justinian's code in the fifteenth, however, Western Europe passed through another epoch of nearly a thousand years when law was again regarded as something given independently of human will, something to be discovered, not made, and when the conception that law could be deliberately made or altered seemed almost sacrilegious (LLL I: 83).

When new law was made, it was in the belief that what was being revealed was good old law, not expressly handed down, but tacitly immanent. The law was not felt to have been made, but "discovered."

There is, in the Middle Ages, no such thing as the 'first application of a legal rule.' Law is old; new law is a contradiction in terms; for either new law is derived explicitly or implicitly from the old, or it conflicts with the old, in which case it is not lawful.... The old law is the true law, and the true law is the old law.... all legislation and legal reform is conceived of as the restoration of the good old law which has been violated (Kern 1939: 151).

Although this medieval customary law was conceived of as ontologic and unchanging, since it did in fact change over time, it constituted a complex adaptive system of the kind Hayek calls a spontaneous order. It seems equally valid to regard the body of customary laws, accepted rules of behavior, and the societies they allowed to prosper, as complex adaptive systems. Rules, laws, and societies faced the historical selection test of survivability. Menger (1883: 223-234) addresses the emergence of a spontaneous social order, arguing against the prevailing view of the German historical school. Menger's view is that law originated with implicit rules of action which promoted security in early societies, and which came to be acknowledged as binding on individual conduct. Later generations, sufficiently removed from the factual origin of the law, might posit the inspiration of a higher divine wisdom. Menger recognizes a second source of the law in authority, which can impose rules on the governed without consent, obtaining submission from fear. Menger describes this kind of positive legislation as statute, not law (229). Interestingly, Menger also suggests positive legislation becomes more necessary as civilization progresses and social organization becomes more sophisticated. He insists the true aim of jurisprudence is not the absolute avoidance of positive legislation, but the construction of positive legislation informed by and embodying whatever is best in the common law (234).

Hayek notes that England was the only country that succeeded in preserving the medieval common-law tradition of "liberties" in its modern

conception of liberty under the law. This was partly because England avoided a massive influx of later Roman law in the form of the Code of Justinian and the accompanying *misconception* of law as the arbitrary dictate of an omnipotent ruler. A further circumstance Hayek cites is that English common-law jurists developed something similar to the natural law doctrine of the late Spanish schoolmen, who used "natural" in a technical sense to describe that which was not artificial, "what had never been invented or deliberately designed but had evolved in response to the necessity of the situation (LLL I: 84)." Hayek notes natural law later came to mean law designed according to natural reason, often applying to positive law.

The political freedom of the United Kingdom in the eighteenth century was clearly not a product of a designed separation of powers between the legislature and the executive, as Montesquieu believed. To the extent this separation of powers was real, in England it was the product of evolution, not design. Hayek claims the real source of British freedom was the fact that common law existed independent of the will of any jurist or legislator; this law was binding on and at the same time developed by the courts independently of the legislature. This kind of value-free framework in which individual actors freely pursue their own, freely-chosen ends, is necessary for the society to evolve as a complex adaptive system. The framework of value-free, procedural rules and laws may be instrumentally-designed or may itself be a complex adaptive system. Until the twentieth century, parliament rarely interfered with the common law and did so mainly to address doubtful points. Hayek says "a sort of separation of powers had grown up in England, not because the 'legislature' alone made law, but because it did not (LLL I: 85)."

The remainder of the paper is organized as follows: part 2. discusses "Saxon justice as a complex adaptive system;" part 3. "The Norman conquest: introduction of jury inquests" discusses the importation of the jury system from France and its expansion in England; part 4. "The possessory assizes," discusses the introduction of those actions protecting possession of real property by the common people; part 5. discusses "The rise of parliament;" part 6. "The riddle of *De Tallagio non Concedendo*" discusses the significance of that document, of controversial and somewhat mysterious origin; part 7. discusses "The Petition of Right (1628);" part 8. discusses "The Bill of Rights (1689);" finally, part 9. presents concluding comments.

2. Saxon Justice as a Complex Adaptive System

The earliest judicial/legislative institutions in the historical record are folk assemblies like the Saxon *witanagemot*, which purported to interpret and apply natural law. Because their origin is obscure, the classification of folk

assemblies as either emergent or instrumental institutions is arbitrary, but it is clear that they acted to provide instrumental structure and context for the emerging legal-governmental order. Traditional Saxon justice was based on restitution, with little distinction between civil and criminal wrongs (Hallam 1846a: 199; Stephenson and Marcham 1937: 2-24).

Like later medieval charter assemblies, the *witanagemot* could be convened to address nearly any issue deemed necessary. Appeals to tradition were uncontroversial, and in retrospect were the most likely to have been successfully upheld over the long run. The *witanagemot* was normally only convened by the king, chief, or elders, and generally if it was convened in defiance of the leader's wishes, it represented an attempt to circumvent or limit his authority (Hallam 1846a: II 69).

Christian missionaries typically produced written codifications for the Frankish and Germanic kingdoms they converted, combining local law and custom with Judeo-Christian moral principles and Roman civil law (Hallam 1846a: II 473-477). English common law evolved from a body of general legal principles applying to the whole country, many of which were codified in Roman civil and canon law, to the more technical definition of judge-made law familiar today. Even prior to the Conquest, the principle of restitution was progressively replaced by forms of justice which provided the government revenue in the form of judicial rents, but refrained from attempting to make victims whole.

3. The Norman Conquest: Introduction of Jury Inquests

After the Norman conquest councils and charter assemblies were convened more frequently, and starting with the *Domesday Survey*, jury inquests, an instrumental innovation imported from France, increasingly addressed questions of law as often as questions of fact. The purpose of the Domesday juries was to apportion real property for taxation and military service, based on established English custom. The administration of justice evolved through the instrumental institution of juries, introduced first to provide testimony on ownership of real property and crop yields, later to legitimize acts and decisions of sheriffs and justicars, still later to give verdicts in civil cases, and finally in criminal cases. Even in later Saxon times, twelve of the larger landowners in each district assisted sheriffs as judicial assessors (Hallam 1846a: II 66). The transition to jury inquests, and later to jury trials, may not have been as drastic as it at first seems.

Initially juries performed only administrative functions, giving testimony in the form of a sworn verdict about past ownership and possession of land tenures, the tax revenues they generated, and the military service obligations

which were traditionally associated with each tenure in the district, of which the jurors normally had direct knowledge. In the context of the times, military service was a form of taxation in kind. Changes of venue would have been inconceivable under this arrangement, because a jury was exploited not for its impartial judgment or knowledge of the law, but for its experience and local memory. It was recognized that juries could be partial to some tenants and against others, but the composition of six or twelve jurors, who had to swear to unanimous verdicts, seems intelligently designed to minimize bias, and to the extent bias remained, it was considered a valuable incentive for tenants to remain on good terms with their neighbors in the potential jury pool. There may have also been an instrumental intention to introduce bias in favor of the king. Juries were rapidly introduced also to settle civil disputes among private individuals, where the crown was not a party.

Criminal offenses, in contrast, were often punished summarily where the culprit was discovered *in flagrante delicto*, but if a criminal trial was necessary, it was normally by combat for knights and nobles, and by ordeal for commoners. Under Henry II (1154-89), the royal charter known as the Grand Assize of Windsor (1179) made trial by combat voluntary on defendants who were not common, and provided they could choose trial by jury (Harding 1966: 45). Up to this time, sworn jury inquests were used to accuse criminal defendants, similar to modern grand juries, but the trial was by ordeal or combat. The accused was presumed to be guilty – and thus would suffer the ordeal – if twelve of his neighbors would swear the accusation that he either was guilty of an offense in this or any other instance to their personal knowledge, or merely that they thought he was probably guilty. Notorious scofflaws might be subjected to the dread triple ordeal (Hallam 1846a: II 76)—English justice may have been primitive, but it was thorough.

There were two kinds of ordeal originating in ancient Babylonian justice (Zane 1927: 75): fire and water, with two forms of each. Higher-ranking defendants were subjected to the somewhat less pleasant ordeal of fire in which they were either made to hold a red-hot iron, or walk blind-folded and barefoot over nine red-hot ploughshares. Common defendants suffered the marginally less onerous ordeal of water. Hot-water ordeal consisted of plunging one's arm into boiling water up to the elbow. An innocent person was thought to escape unharmed. Cold-water ordeal—actually the most benign form—consisted of immersing the accused in a stream or pond. If they floated without trying to swim, they were considered guilty as the water was rejecting a sinful person. The accused was considered innocent if they sank, but then incurred significant danger of drowning (Blackstone 1765-1769: IV 343).

The Grand Assize was a major part of Henry's effort to supplant primitive superstitious practices with jury trials (Mulligan 2004). Stubbs (1887:

87) suggests jury trials and inquests provided the people experience in self-government and limited arbitrary discretion of royal functionaries like county sheriffs. The Grand Assize also provided a procedure to remove civil suits from feudal honor courts to the royal assizes, providing the crown judicial rents. In feudal honor courts civil property suits were settled by combat between champions of the two parties. In royal assizes, judgment was given by a jury of twelve knights, chosen by four knights chosen by the sheriff (Stenton 1926: 587). Henry issued the Grand Assize on the advice of his barons, who may have regretted limiting their own share of judicial authority, but must also have recognized the shortcomings of the feudal procedure. Path dependency is illustrated by Henry's choice of the juries, an existing institution imported from Normandie but already used extensively for the Domesday inquests, and bearing strong resemblance to later Saxon practices, to realize his reform of secular justice.

Trial by jury is an excellent example of a spontaneously evolved social institution. In the middle ages, jury inquests were not always used for trials, but often to collect information, such as for the *Domesday Survey*. It was not until 1215 that the Fourth Lateran Council prohibited clerical participation in ordeal (Harding 1966: 61; Berman 1983: 251). This effectively ended the practice, because an essential part of trial by ordeal or combat was a priest's prayer for justice.

4. The Possessory Assizes

Under Henry II, the four possessory assizes introduced jury trials into routine civil proceedings. They provided an unprecedentedly rapid remedy to protect the lawful possession of real property by tenants. The writs associated with these actions are recorded by Ranulph de Glanville (1187-89; Stephenson and Marcham 1937: 82-84.)

Utrum (1164—"whether") was instituted as the first article of the Constitutions of Clarendon (Mulligan 2005), giving civil courts exclusive jurisdiction over issues of advowson, the right of lay nobles to present a candidate for installation to a vacant church office within their domain. Suits involving these rights had to be determined in civil courts, though prior to the Constitutions, they were often settled in canon law courts. The civil courts would determine these issues and the Church would be subject to their rulings. Advowson was a jealously guarded privilege in the middle ages. Hume (1778: I 495) relates a particularly barbaric penalty imposed by Henry II's father Count Geoffrey of Anjou to assert this right. In Magna Carta (1215), John (1199-1216) was forced renounce this privilege. As the Great Charter was reissued by successive kings, advowson was eventually abandoned. Article 2 of the

Constitutions preserved the king's property rights in churches on his personal lands. *Utrum* empowered lay juries in county courts to make a determination as to whether land was encumbered to the Church and thus subject to canon law. This mitigated the conflict of interest ecclesiastical courts faced—the pecuniary incentive to rule that disputed land was pledged to the Church.

Novel disseisin (1166—"new dispossession" or "recent eviction") was introduced by the Assize of Clarendon. It provided a remedy to free tenants wrongly dispossessed from their lands. A jury was to swear who had held the land in the past, for how long, and when and how they were evicted. The land was to be restored to the plaintiff if the jury granted him a verdict, though he would still owe the owner rent. Prior to *novel disseisin*, it was possible for nobles to dispossess their tenants without due process, and there was clearly no remedy to be sought in the landlord's own honor court. This situation was corrected by removing jurisdiction to the county assizes, a royal court, incidentally creating a source of judicial revenue in the form of filing and service fees, fines, and other penalties. Instrumental design may have resulted here from the desire to transfer judicial rents to the crown, but the larger accomplishment was to protect the tenure of freemen.

The Assize of Clarendon was an act of positive legislation that made great changes in the administration of criminal law (Pollock and Maitland 1898: 137). Its twenty-two articles were intended to guide itinerant justices embarking on county visitations. The term assize means a meeting, and can refer to the great council which approved the charter, the charter itself, or to courts it authorized. The judicial visitations may have been intended as a unique and unrepeatable undertaking, sufficiently unprecedented to call for consent from a great council. The first six articles of the Assize address how juries of presentment or accusation, similar to modern grand juries, would be required to approve charges against criminal defendants. The remaining articles describe subjects' obligation to participate in the jury system. In this document Henry bypassed the feudal honor courts of his nobles, co-opting traditional Germanic shire- and hundred-moots and absorbing them into the royal legal system by inserting royal judicial officers. County sheriffs and reeves were always royal officers, but now the traditional local legal institutions were subsumed into a royal legal system which could operate with the king's authority even in the king's absence. There was probably better justice in county assizes when Henry was in France, than there ever could have been under his predecessor Stephen when he was in England.

It is particularly noteworthy that although the Assize of Clarendon and the later Assize of Northampton present significant and unprecedented positive legislation, both operated by merging local judicial institutions, which were Germanic and very ancient in origin, with officials of the *curia regis*. The royal

judiciary was also an organically evolved institution, but one imported from France a century earlier. These two measures provide a clear example of highly successful *positive* legislation contributing to the efficiency of both the law and the society as complex adaptive systems. Two likely explanations for this success are:

- (a) the implementation through established traditional institutions, and
- (b) the positive measure aims at effecting traditional, accepted rules and procedures.

From this time on, visiting royal justices and officers presided at county assizes. The Assizes also specify uniform penalties and schedules of fines for different kinds of felonies, clearly a positive feature, but not dramatically different from accepted practice, though now explicitly regularized throughout the kingdom.

Mort d'ancestor ("death of ancestor") and *darrien presentment* ("last presentation") were both introduced in 1176 in the Assize of Northampton. *Mort d'ancestor* provided specific protection for inheritors of free tenancies, but not for life tenures, which were alienated on death of the holder.

Darrien presentment protected the right of the nobility to nominate clergymen to serve at churches on their land. Lay juries would swear who had nominated the last parson, and this right would pass to the last nominator's legal heir.

Taken together, the four possessory assizes effectively prevented defendants from profiting from wrongful possession of land, removing some incentives to delay judgment (Stenton 1926: 589; Hogue 1966: 161-163). Through protecting the possession of land, a right enjoyed by numerous tenants, rather than ownership, a right enjoyed by a small number of powerful magnates, the possessory assizes laid the groundwork for a massive reduction in the concentration of wealth over subsequent centuries. Once granted the security of legally-enforceable use of the land they worked, the common people's latent wealth accumulation abilities could begin to be effective. (For a modern counterpart, see de Soto 1989, 2000).

5. The Rise of Parliament

The English parliament begins to supplant general councils and charter assemblies in the thirteenth century (Maitland 1908: 74), but the function of parliament was initially limited to expressing immutable natural law (Hallam 1846a: II 144-161)—it was assumed that legislative authority did not extend to issuing positive legislation. One impetus for the evolution of representative government appears to be the relative transfer of wealth from the hands of landowners, including royal tenants-in-chief, to the rising commercial classes of

the later middle ages. Under the feudal system, free tenants paid land rents to their landlords, usually in kind as a share of the agricultural output. There might be several layers of lesser vassals below the king's tenants-in-chief. Though tenants-in-chief were the principal direct sources of royal revenue, everyone beneath them contributed indirectly. Feudal relationships increased in sophistication as society developed as a complex adaptive system, and merchants, craftsmen, free landowners, and town-dwellers began to function outside the feudal system. As their assent became meaningful, the house of commons was separated from the upper house in the fourteenth century (Hallam 1846a: II 248). Judicial and legislative functions were separated and the judicial functions were increasingly delegated to specific royal officials. The franchise for electing the commons included a highly-restrictive property qualification, resulting in a very small percentage of the population being represented—less than one percent. Parliament met fairly regularly starting in the reign of Edward I (1272-1307). Most legislation was not really approved by parliament but merely recorded their understanding of accepted custom, which the nation was deemed to have already approved in practice. Parliament was then an institutionalized grand jury that met fairly regularly and had a specific composition, though the king could expand representation when it might result in additional revenues. The charter assemblies which preceded it were convened irregularly to address specific issues, though with royal approval they often broadened their jurisdiction, and their composition was normally designed with a view toward addressing the issue at hand. Except for coronation charters, charters normally stated that they record the sworn verdict of an inquest, as if they had been a very large jury.

The greatest impetus for the growth of parliamentary influence was the government's need for tax revenue. Under ordinary circumstances, the feudal system provided the king with revenue in three special cases:

- (1) ransoming his person, which actually happened to Richard I,
- (2) knighting his oldest son, and
- (3) marriage of his oldest daughter,

though the king also received revenue from his personal estates and vassals. Any other taxes had to be approved by a great council of the kingdom. Furthermore, as a practical matter, participation, if not necessarily approval, of the nobles and clergy was generally required to collect a special tax. Kings sometimes levied taxes or seized property in emergencies like invasions, revolts, or financial mismanagement, but generally the need to convene a great council to approve new taxes was as much a practical issue as a legal one—it ensured the parties were informed of the burden they would be called on to bear.

6. The Riddle of *De Tallagio Non Concedendo*

De Tallagio non Concedendo (1297), "of not allowing tallage," was long considered a statute, and is referred to that way in the preamble to the Petition of Right. "Tallage" was a medieval tax on land tenures normally paid by tenants and assessed according to historical crop yields for each plot of agricultural land. *De Tallagio* requires the king to convene a common council to consent to any but traditionally sanctioned taxation. This famous statute (25 Edw. I.), was cited by the judges in John Hampden's case in 1637 (*Rex v. Hampden*, 3 State Trials, 825), but seems not to have been an actual statute but either a working draft or abstract of the Confirmation of the Charters. Its constitutional significance is immense, because together with article twelve of Magna Carta, it is one of the sources of the House of Commons' and the House of Representatives' privilege of originating revenue bills. After Edward I invaded Flanders, some of his English barons revolted and petitioned him, acknowledging they owed him military service even overseas, but complaining that repeated exorbitant taxes had deprived them of the resources they needed to satisfy their obligation (Mitchell 1951: 363). Stubbs (1913: 493) suggests *De Tallagio* is a draft charter submitted to Prince Edward who stayed in England as regent. If so, it formed the basis for the Confirmation of the Charters. The charter approved by Prince Edward was composed in Latin, and presumably its earlier drafts were also, possibly including *De Tallagio*. Mitchell (1951: 368) argues that the constitutional significance of *De Tallagio* cannot be much inferior to that of the Confirmation, even if it is a draft charter and not an authentic statute, because it was produced by the powerful nobles who forced the king to confirm Magna Carta.

The Confirmation of the Charters (1297) by Edward I confirmed both Magna Carta and the Charter of the Forest in order to justify an extraordinary tax levy necessitated by his overseas war in Flanders and the simultaneous revolt of some of the barons. The barons revolted because they objected to the expenses of a war in Flanders against France, the burden of which fell disproportionately on lay nobles because at just this time, Pope Boniface VIII had forbidden the clergy to pay taxes to laymen. After Prince Edward approved the Latin text in London, the Confirmation was transmitted to the king in Flanders, who confirmed it in a French document. The change in languages may simply be a consequence of the abilities of the staff the king had on hand to draft the document, or he may have had in mind future evasion of certain terms of the Confirmation. He later attempted, unsuccessfully, to take advantage of discrepancies between the two documents.

The Confirmation finally established the principles of Magna Carta (Stubbs 1887: 251). It implies judicial review, promising judgments contrary to the charters would be overturned. Magna Carta was described as common law,

unlike the forest charter, which applied only to royal forests, not the whole kingdom. Both charters were to be widely disseminated and kept in every county, like Henry I's coronation charter. All cathedrals were to be provided copies for the bishops to proclaim publicly twice each year, and violators of the charters were to be excommunicated. Edward renounced extraordinary tax levies and promised they would never form a general precedent. It is somewhat ironic that the king basically acknowledged as unconstitutional the taxes he recently levied and promised never to collect them again. He further promised to obtain assent of the whole kingdom for any except ancient customary taxes. Some specific taxes on wool were actually discontinued (Stubbs 1913: 482-493, Stephenson and Marcham 1937, p. 164-165). Because of its value, wool was an attractive source of revenue, but taxing it disproportionately discouraged a desirable industry. The Confirmation was reissued in 1301 with some qualifying language removed (Johnstone 1932: 408).

For part of the reign of Edward II (1310-1322), England was governed by the Lords Ordainers, a committee of seven bishops and six barons. The ordinances prepared by this committee were largely restatements of established custom confirming the government's obligation to observe Magna Carta (Johnstone 1932: 416). The Statute of York (1322) repealed the ordinances, but largely by incorporating them. This further reinforced the primacy of Magna Carta and gave new support to the embryonic idea of parliamentary consent to legislation and taxation. Poor commercial regulation signaled the later part of Edward II's reign. Six successive poor growing seasons led parliament to impose price controls in 1315, with predictable results. The legislation was repealed in 1316, and at the end of the famine, the price of wheat fell from three shillings four pence per bushel to six pence (Johnstone 1932: 417-418, 420).

The growth of parliamentary influence and the development of the common law led to a decline in the frequency and importance of royal charters of liberties. Stubbs (1874) concludes the fifteenth century had little significance for English constitutional history. The next English charter addressing the whole realm came three hundred years later, and was a parliamentary charter presented to the king for royal assent.

7. The Petition of Right (1628)

Under Charles I (1625-1649) parliament petitioned the king to respect Magna Carta and the ancient customs and liberties of England. The king was asked to refrain from extraordinary exactions and respect due process (Stephenson and Marcham 1937: 450-455). The Petition includes a catalog of wrongs the king is asked to renounce and discontinue. Many of these

complaints would be repeated in the Declaration of Independence, and it seems Jefferson used the Petition as a model. The expression used in the Petition, "by the laws established in this your realm, either by the customs of the same realm or by acts of parliament," reveals an understanding of both the complex adaptive system of spontaneously-evolved law and the designed order of positive law. Unfortunately, though the king gave lip service to the Petition, he was fundamentally out of sympathy with any strict limitation on his prerogative. The petition asserts that extraordinary taxes, those not justified by ancient and accepted custom, require parliamentary assent, citing *De Tallagio* as precedent. Charles I had resorted to taxation on his own authority because parliament would not agree to provide sufficient revenue to support the king's expansionary foreign policy. Mitchell (1951: 365) suggests the Petition refers to *De Tallagio* rather than the Confirmation of the Charters because the precise wording was both more relevant to the present situation, and less likely to offend the king.

In addition to taxation without parliamentary approval, Charles I had also resorted to forced loans and billeting soldiers in private homes, which the Petition decries as illegal. Citizens had been imprisoned for resisting these extra-legal measures. Thus, the Petition reminds the king of Magna Carta's guarantees:

by the statute called 'The Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

In return for his acceptance in June 1628 Charles was granted subsidies, reminiscent of medieval taxes granted in payment for reissues of Magna Carta under Henry III (1216-1272) and Edward I. Although the Petition was of importance as a safeguard and statement of civil liberties, its spirit was soon violated by Charles, who continued to collect tonnage and poundage duties without Parliament's authorization and to prosecute citizens in an arbitrary manner.

8. The Bill of Rights (1689)

Sixty years later, after James II (1685-1688) fled, the crown went to his daughter Mary II (1689-1694) and her husband William III (1689-1702) of Orange, Stadtholder of the Netherlands. The nearly bloodless Glorious Revolution of 1688 was caused largely by fears of the Catholic king's

authoritarianism. Parliament invited the Prince and Princess of Orange to assume the throne, presenting the Bill of Rights for their assent.

The English Bill of Rights is marred by anti-Catholicism. Like the Petition of Right, it catalogs the previous king's wrongs, and may also have inspired Jefferson. One right that is severely wanting in this document is freedom of religion and several anti-Catholic oaths are prescribed. The Bill of Rights asserts "the ancient rights and liberties," and denounces "the pretended power of suspending laws or the execution of laws by regal authority without consent of parliament"—interestingly, as far as the legislature was concerned, it would not necessarily have been improper for parliament to have done these things. Taxation and legislation without approval of parliament is affirmed to be illegal. A right to keep arms, the ancient privilege of the Assize of Arms of Henry II, is confirmed, but only for Protestants (Stephenson and Marcham 1937: 599-605). Various other rights are mentioned and this section obviously inspired Madison in drafting the U.S. Bill of Rights.

The English Bill of Rights is a negative statement of what the government cannot legally do: suspend laws without consent of parliament, tax without grant of parliament, maintain standing armies in peacetime, restrict the people from petitioning the government, interfere with parliamentary elections, or prosecute members for speech in parliament. Irregularities in criminal prosecutions were prohibited, including excessive bail and cruel or unusual punishment. It is specifically stated that jurors in trials for high treason must be freeholders, who are presumably more independent and impartial.

The two parliamentary charters provide especially compelling evidence for spontaneously-evolved social order constituting a complex adaptive system. Their constant reference to ancient customs and liberties of the nation, particularly those recorded in Magna Carta and other ancient documents, points to an evolutionary continuity of legal custom and governmental institutions, or at the very least, a heartfelt desire to infer such continuity in addressing contemporary issues. The parliamentary charters are not so much a consummation of the complex-adaptive governmental order, but an intermediate stage. The next stages in this evolution occur in Philadelphia in the second Continental Congress and the Constitutional Convention.

It is interesting to contrast the unwritten constitution of the United Kingdom with the written U.S. Constitution. Because there was never a specific, dated document to serve as evidence for a design order, it is easy to conclude that the British constitution is a complex adaptive system. Parliament can overthrow the constitution in one act. Though parliament has this authority, it is not likely they could devise such an enactment, successfully pass it, or successfully stay in office after passing it. The written U.S. Constitution, with its explicit and cumbersome amendment process, provides an intelligently-

designed institutional barrier against too rapid, too revolutionary change. Numerous features like the amendment process, the separation of powers, the electoral college, and the explicit Bill of Rights, were designed, but only with the intention of fostering the complex adaptive system of an evolving order. Congress enjoys more limited authority than Parliament. As a consequence of federalism, consent of three-fourths of the states is also required to amend the Constitution. This amendment procedure was an intelligently designed element of positive legislation, though one that focuses on procedure instead of ends, ensuring the value-neutrality necessary for a complex adaptive system.

9. Conclusion

English constitutional history offers a succession of illustrations of Hayek's theory of spontaneously evolved social order. After introducing Hayek's concept of spontaneous evolution of social order and discussing its application to English constitutional history, this paper presented a chronological analysis of various legal enactments and political developments, focusing on the medieval period from 1100-1327, but also addressing some later significant documents, such as the English Bill of Rights. The development of Anglo-American jurisprudence has been traced from Saxon custom through Henry II's reform legislation aimed at restoring those customs after the anarchy of Stephen, culminating with the parliamentary charters of the seventeenth century.

Hayek's account of the evolution of democratic political and legal institutions responding to historical influences without the intelligent design of an authoritative legislator, built on and was anticipated by such eighteenth-century legal and political philosophers as Adam Ferguson, who rejected contemporary authoritarian and contractarian theories of government that "ascribe to a previous design, what came to be known only by experience, what no human wisdom could foresee, and what, without the concurring humor and disposition of his age, no authority could enable an individual to execute (Ferguson 1767: 122)."

Because complex adaptive systems are not under the direction of a design intelligence, they change more slowly over time and better facilitate the formation of entrepreneurial expectations and planning. Entrepreneurial activity is frustrated far less frequently by slowly and predictably evolving, spontaneously-emergent institutions like Anglo-American common law, than by consciously designed institutions subject to change at the whim of the legislative authority. More importantly, the complex adaptive systems of the market and the spontaneous legal and political order both respond to the

diverse needs of many individual actors, unlike a design order serving the wants of a social elite.

Because the process of spontaneous evolution calls for the participation of many individuals, often widely separated in time, the evolutionary process must have some coordination mechanism permitting a particular, path-dependent outcome, to facilitate the satisfaction of many unique and diverse individual preferences. Like the market order, which requires the voluntary participation of many individuals, each of whom competes to best satisfy the wants of others, self-organizing social order also coordinates the actions of individuals in society. It does this by providing us a basis for forming expectations, and if the institutions of social order are primarily procedural and value-neutral, this complex adaptive system allows individuals freedom to pursue their chosen ends, rather than ends chosen for them, and imposed on individuals by the social order.

English constitutional history provides some examples of a complex adaptive system arising through positive legislation, when individual components of that legislation were designed to implement or restore established custom. Several constitutional developments were interpreted as emerging spontaneously over very long time periods, even though the short-term presented a succession of intelligently-designed acts of positive legislation.

English common law presents the archetypal example spontaneously evolved social order, though it is possible for a legal system or form of government to evolve spontaneously without a common law system. Such evolution seems to have been present in early customary law predating common law. The role of path dependency has been emphasized. It was repeatedly shown that innovations extending, respecting, or working through established institutions were often successful because they could be understood as organic and acceptable, forming a part of a complex adaptive system, and thus not outraging expectations. Truly novel innovations were less likely to achieve social acceptance.

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