



Neo-Liberal Constitutionalism: Ideology, Government and the Rule of Law

Rachel S. Turner

Research Institute for Law, Politics and Justice, Keele University

Keele, Staffordshire, ST5 5BG, UK

E-mail: r.turner@ilpj.keele.ac.uk

Abstract

This article explores the centrality of constitutionalism and the rule of law in neo-liberal ideology. It argues that neo-liberalism is not simply a one-dimensional set of economic ideas directed at promoting the free market, but is an ideology with broader political dimensions. At the core of neo-liberalism is a serious doctrine about politics and the proper role of government. Neo-liberals like F.A. Hayek, Milton Friedman and James Buchanan recognised that in order to have a functioning market order, a corresponding political order is a vital corollary. However, the article points out that a number of contradictions and tensions sit at the heart of the neo-liberal conception of politics: those that exist between freedom and the state, liberty and democracy, and law and legislation. The article suggests that one of the most daunting tasks facing neo-liberal politicians and theorists in the twenty-first century will be to overcome the constitutional 'ignorance' of Western democracies and institute a framework of rules, conventions or procedures through which the powers of government can be adequately constrained.

Keywords: Neo-liberalism, Constitution, Rechtsstaat, Law, Legislation

1. Introduction

Neo-liberalism acknowledges the need for government, but is, at the same time, acutely aware of the dangers that government embodies. The constitution is a fundamental concept for neo-liberalism as it represents the only acceptable means through which the powers of government and other state officials may be curtailed. In neo-liberalism, constitutional government is equated with limited government and so it is believed that only through the application of constitutional constraints and the supremacy of law can individual liberty be safeguarded. There is thus a significant ambivalence in neo-liberal ideology towards the state and politics. Neo-liberals such as F.A. Hayek recognise that they must, somewhat paradoxically, emphatically engage in politics in order to free society from politics. Neo-liberalism's interpretation of what it considers to be the political, however, takes a definite form. A liberal constitution, it maintains, depends on a strict separation of powers, a government bound by law and the establishment of the rule of law. This article will outline the principles and operating procedures of a specific neo-liberal model of constitutional order that represents the only acceptable means of both limiting the coercive powers of government and upholding the rule of law.

At the heart of neo-liberalism's conception of constitutionalism is its interpretation of the rule of law. In neo-liberalism, the powers of government are constrained by the rule of law underpinning the constitution. The rule of law represents the fundamental fixed rules that stand over and above the political community. According to Dicey's classic exposition, the rule of law 'means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government' (1905, 198). For neo-liberalism, the rule of law is crucial to the proper functioning of a market order as it prevents government from stultifying individual incentives to pursue individual ends or desires. It starkly contrasts its liberal ideal of the rule of law with collectivist economic planning which, as Hayek states, 'cannot tie itself down in advance to the general and formal rules which prevent arbitrariness' (1944, 79). In this view, the rule of law, unlike the legislation of central government, not only guarantees equality before the law, but also individual liberty by restricting the arbitrary exercise of government powers to those determined by a permanent framework of formal laws.

This article sets out in detail neo-liberalism's ideal constitutional state. It argues that neo-liberalism's uncompromising adherence to government bounded by the law, embedded in the rule of law, creates contradictions that strike at the heart of the ideology. Principally, its attempt to construct a constitutional discourse that encourages the 'dethronement of

politics' where discretionary authority is replaced by general rules attaches a high level of importance to politics. The constitutional limitations on the capacities of legislatures that neo-liberals such as Hayek, James Buchanan and Milton Friedman advocate are themselves inherently political in the sense that to a greater or lesser degree they embody different views about desirable forms of social organisation. Not only does this incorporate politics into the core of neo-liberalism, but it also raises a number of important tensions that exist in the ideology between the freedom and the state, law and legislation, and liberty and democracy.

The first section of the article examines the constitutional traditions that neo-liberalism has drawn inspiration from. It argues that neo-liberalism does not endorse all constitutional frameworks, rather it has carefully selected principles from constitutional traditions from different countries and different periods of history and incorporated them into its own constitutional system. The main constitutional traditions that the article claims neo-liberalism has drawn upon are the ancient Roman Law tradition of individualist private law the early American Constitution and the German liberal *Rechtsstaat*. The second section of the article explores the complex relationship that exists within neo-liberalism between law and legislation. It looks at the tensions that exist between private law and public law and 'liberalism' and democracy, and the centrality of the principle of the rule of law in the resolution of these conflicts. The third part of the article sets out neo-liberalism's ideal constitution. It examines the 'New Madisonian' vision of public choice theorists such as James Buchanan, Gordon Tullock and Robert Wagner, and the Hayekian constitutional model set out in his *Law, Legislation and Liberty*. This section of the article closes by highlighting some of the problems that arise when a neo-liberal constitutional order is practised at the global level. The article concludes by contending that neo-liberalism's so-called detachment from politics can be called into question when instituting the constitutional framework of rules, conventions and procedures that it aspires to.

2. Constitutional Traditions

The constitution has a dual responsibility to both institute and curtail the powers of government. Whilst in principle neo-liberals support most models of liberal constitutionalism which lay down rules to limit the activities of the state, this article argues that they subscribe to particular constitution traditions which embody their ideal of a rule of law state.

2.1 Ancient Roman Law

Neo-liberalism draws inspiration from the ancient Athenian constitution and the individualist private law of ancient Rome. Indeed, in Hayek's work there is a strong sense of looking back to the law of early civilizations. In *Law, Liberty and Legislation*, he cites the early law of the Medes and Persians 'that changeth not'; law that was conceived as 'unalterably given'. Early 'law-givers', he points out, 'from Ur-Nammu and Hammurabi to Solon, Lykurgus and authors of the Roman Twelve Tables, did not intend to create new law but merely to state what law was and had always been' (1973, 81). Hayek maintains that the law of these early civilisations did not remain static; law continued to develop, and the changes that were permitted could not be a result of the intention or design of the law-maker. It was through the development of customs rather than the direction of rulers in these ancient societies, Hayek observes that the general rules of just conduct came to be accepted (*ibid*, 83). (Note 1) The classical period of Roman law, Hayek shows in his *Constitution of Liberty*, was fundamental for the development of modern liberalism. Roman civil law, like the later English common law, he states was almost entirely regarded as a product of 'law-finding' by the jurists; that is, 'law grew up through the gradual articulation of prevailing conceptions of justice rather than by legislation'. In particular, he points to the writings of Cicero which offer 'many of the most effective formulations of freedom under the law'. 'To him', Hayek writes, 'is due the conception of general rules or *leges legum*, which govern legislation, the conception that we obey the law in order to be free, and the conception that the judge ought to be merely the mouth through whom the law speaks' (1960, 166). He goes on that 'no other author shows more clearly that during the classical period of Roman law it was fully understood that there was no conflict between law and freedom and that freedom is dependent on certain attributes of law, generality and certainty, and the restrictions it places on the discretion of authority' (*ibid*, 167). This respect for law in classical Rome Hayek points out led to a period of complete economic freedom, and had a profound influence over the development of Western law.

2.2 The American Constitution

The American Constitution of 1787 is held up by many neo-liberals as a 'liberal' constitution which in theory safeguards the freedom of the individual. Milton Friedman proclaims that it embodies two broad principles which are fundamental for liberalism: first, 'the scope of government must be limited - its major functions must be to protect our freedom both from the enemies outside our gates and from our fellow citizens'; second, 'government power must be dispersed - if government is to exercise power, better in the county than the state, better in the state than in Washington' (1962, 2-3). The Constitution was drafted by Thomas Jefferson's contemporaries to embody 'a national government strong enough to defend the country and promote general welfare, but at the same time sufficiently limited in power to protect the individual citizen, and the separate state governments, from domination by national government' (Friedman and Friedman, 1979, 130). Ultimately the framers of the constitution sought to reconcile republican government and social stability by diffusing power, enforcing property rights, and balancing the interests of conflicting social groups.

Liberalism was, therefore, at the heart of the Constitution. The culminating purpose stated in the preamble of the Constitution was that it was to 'secure the blessings of liberty to ourselves and our posterity' (Ketcham, 1993, 38).

The intention of the framers of the American Constitution to create a liberal constitution by decentralising political power is reflected in the American Bill of Rights. The American Bill of Rights set out a number of 'fundamental' and 'inalienable' rights that were not to be infringed by legislative majorities (Foner, 1999, 25). For Hayek, the founding of the American Constitution and the Bill of Rights represented a unique endeavour to bring into being a liberal government and write the rules under which it should operate. This process, he claims, 'was guided by a spirit of rationalism, a desire for deliberate construction and pragmatic procedure', which rejected tradition. Hayek argues that while constructive rationalism may have been 'more justified here than in many similar instances', it was 'still essentially mistaken' (1960, 180-1). Nevertheless, Hayek comments that the intentions of the Federal Convention in 1787 to 'limit the powers of government' and 'curb the arrogation of powers by the state legislatures' were consistent with liberal principles. The American Constitution, he argues, not only divided power between different authorities thus reducing the power that any one body may exercise but also at the same time provided adequate safeguards for private rights. Hayek goes on to cite Lord Acton's praise for the American Constitution: 'Of all checks on democracy, federalism has been the most efficacious and the most congenial...The Federal system limits and restrains sovereign power by dividing it, and by assigning government only certain defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found essential security for freedom in every genuine democracy' (*ibid*, 184).

The transition, however, in American ideology in the late-nineteenth and early-twentieth centuries towards social responsibility and greater reliance on the state had important ramifications for the American Constitution. Friedman and Friedman observe that 'the Constitution, shaped by a very different climate of opinion, proved at most a source of delay to the growth of government power, not an obstacle' (1979, 287). The conception of the Constitution as the people's political law was promoted which advocated a transfer of responsibility for the Constitution from the Supreme Court to the legislature, and thus to the people where it democratically belonged. American liberals campaigned vigorously against the notion that the Supreme Court served as an impartial instrument for law and the preservation of the Constitution. During this period, Hayek observes that 'the prohibition that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' was, reduced to a 'practical nullity' (1960, 188). The Supreme Court, he argues, overstepped its proper judicial functions when it was presented with more and more legislation 'which seemed contrary to the spirit of the Constitution'. Hayek claims that 'the Court built a body of law concerning not only individual liberties but government control of economic life, including the use of police power and of taxation' (*ibid*, 189). The Supreme Court exhibited a new deference to economic regulation by both the states and the economy, affirming federal power to regulate various aspects of economic life such as wages, labour and production.

2.3 The German *Rechtsstaat*

The German theory of the *Rechtsstaat* places limits on all forms of government – republican, monarchical or democratic – within an all-embracing legal system. It is this emphasis on legal constraints that makes the German *Rechtsstaat* the model constitutional state for many neo-liberals. Hayek, in particular, is enthusiastic about the *Rechtsstaat*'s potential for securing freedom within a natural legal order. Indeed, the *Rechtsstaat*, he states in his *Constitution of Liberty* represents the 'ideal of the liberal movement'. In Germany in the nineteenth-century he states that the main constitutional objective for the liberal movement was not to solve problems of the political state through the advent of democracy and republican government as in America, but through 'the limitation of government by a constitution, and particularly the limitation of all administrative activity by law enforceable by the courts' (Hayek, 1960, 198-9). Hayek points to the rise of new separate administrative courts in Germany in the 1860s and 1870s which were completely independent and concerned exclusively with the application of pre-existing rules or administrative law. The creation of these new courts he comments represented an attempt to finally 'translate into practice the long-cherished ideal of the *Rechtsstaat*' (*ibid*, 201). Indeed, the new administrative courts were fundamental to the realisation of the rule of law as unlike normal judicial courts which were always concerned with the aims of the government of the day and could therefore never be fully independent, their main function was to provide a body of detailed legal rules for guiding and limiting the actions of the administration, thereby protecting the freedom of the individual. Hayek readily acknowledges that while the liberal ideal of the *Rechtsstaat* 'may never be perfectly achieved, since legislators as well as those to whom the administration of law is entrusted are fallible men, the essential point is that the discretion left to the executive organs wielding coercive power should be reduced as much as possible' (1944, 76).

Hayek, however, points out that the German conception of the *Rechtsstaat* 'proved to be more considerable in theory than in practice'. He observes that in Germany in the 1870s and 1880s, 'when the system of administrative courts received its final shape in the German states, a new movement towards state socialism and the welfare state began to gather force'. He comments that 'there was, in consequence, little willingness to implement the conception of limited

government which the new institutions had been designed to serve by gradually legislating away the discretionary powers still possessed by the administration'. The tendency Hayek argues was to exempt from judicial review those 'discretionary powers' that were required for the new tasks of government (1960, 202).

3. Law and Legislation

Neo-liberalism's strong constitutional attachment to the German *Rechtsstaat* is reflected in the important distinction that it makes between law and legislation. Hayek in his three-volume, *Law, Legislation and Liberty* famously associates the former with a spontaneous liberal order, the latter with a constructed social order. Pivotal to this distinction is Hayek's conception of the rule of law and its relationship to individual liberty and democracy. Neo-liberals' commitment to the rule of law determines the form of democracy that they are willing to accept as being compatible with liberalism. They reject the conception of popular sovereignty and instead advocate a form of restrained democratic rule that is subjected to general rules and genuine laws. Only this form of democracy they contend can uphold the market order and guarantee individual freedom.

3.1 Public Law and Private Law

In his *Law, Legislation and Liberty*, Hayek maintains that the legal order of modern states comprises two very different and conflicting sets of rules, *nomos* and *thesis*. Hayek argues that *nomos* represents a spontaneous order underpinned by universal laws and 'rules of just conduct' that have emerged from an evolutionary and adaptive process. He contrasts this form of order with *thesis* which stands for rational design implemented through the statute rules made by government – legislation (1973, 95-123). Hayek sets out three important distinctions between law and legislation or 'private law' and 'public law' that are fundamental for understanding his conception of liberal constitutionalism and the rule of law. Firstly, Hayek states that whereas law in the proper sense of the word is 'discovered' independently of human will, legislation is 'willed' or 'invented' – it is an artificial construction. Legislation consists of commands directed to the achievement of specific ends. Law, in contrast, allows individuals to pursue their own ends. Secondly, Hayek contends that while a political authority lays down legislation, law emerges from a 'judicial process'. Unlike legislation or 'public law' which is concerned with 'administrative measures', private law, he states, can only be 'taught' and 'enforced' by impartial judges. Thirdly, Hayek argues that whilst the constructed order of law-making is compatible with economic planning, positive liberty, and social justice, law is consistent with only economic freedom, negative rights and 'abstract justice' (1973, 124-44).

Hayek points to the changing concept of law in contemporary society, in particular the confusion of law with legislation. He argues that the spontaneous order of the Great Society has since the late-nineteenth-century gradually become part of the constructivist rationalism of an organised social order. Legislative bodies, he maintains, that had always existed in some shape or form for the creation of public law, 'gradually accrued the power of changing also the rules of just conduct as the necessity of such changes became recognised. Since those rules of conduct had to be enforced by the organisation of government, it seemed natural that those who determined that organisation should also determine the rules it was to enforce' (Ibid, 90). This development Hayek contends is detrimental for individual liberty as it 'gives into the hands of men an instrument of great power' capable of producing an even 'greater evil'. He argues that such a development 'necessarily leads to a gradual transformation of the spontaneous order of free society into a totalitarian system conducted in the service of some coalition of interests' (Ibid, 72).

3.2 Liberty and the Rule of Law

The ideal constitutional order for neo-liberals, which distinguishes law from legislation, is the rule of law. The rule of law constitutes the political essence of neo-liberal ideology. It restricts the coercive powers of government, encourages economically productive behaviour, both safeguards and embodies the liberty of the individual, and ensures equality and justice by making every individual accountable to law and by preserving the legal system.

As argued above, neo-liberalism's conception of the rule of law draws inspiration from the German *Rechtsstaat* and English common law tradition. Neo-liberals like Hayek conceive the rule of law as a legal system based upon economic freedom. As in the German *Rechtsstaat*, in neo-liberalism the rule of law is considered to be a comprehensive and systematic legal framework of rules that exist prior to the state. The rule of law subjects government to comply with universal 'rules of just conduct' or *nomos* that oversee the ordinary relations between individuals, which are independent of a particular political stance or policy. In Hayek's account, the rule of law requires a separation of powers, which denies the legislature the right to alter law as it sees fit. He explains that like English common law, the rule of law is not commanded by any one individual, but has evolved from custom and adapted to its changing circumstances; it is an embodiment of tradition. Indeed, in a 1967 article, 'The Results of Human Action but not of Human Design', Hayek describes the spontaneous legal order created through law. 'Law', he argues, 'is not only much older than legislation or even the organised state: the whole authority of the legislator and of the state derives from pre-existing conceptions of justice, and no system of articulated law can be applied except within a framework of generally recognised but often unarticulated rules of justice' (1967, 102). (Note 2)

The rule of law is fundamental for Hayek and other neo-liberals as it represents 'the law of liberty'. In his *Constitution of Liberty* Hayek argues that law and liberty could not exist apart from one another, and thus maintains that 'law is the basis of freedom' (1960, 148). Liberty for Hayek is the purpose of law, and law is a means for the achievement of freedom as an end. Law, then, in Hayek's constitutional scheme exists for the protection of liberty. Indeed, he writes in his *Road to Serfdom* he contrasts the liberal *Rechtsstaat* with communist, fascist, socialist and national socialist states. He writes that 'nothing distinguishes more clearly the conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the rule of law' (1944, 82). Gottfried Dietze, therefore, points out that Hayek disputes Carl Schmitt's 'Pure Theory of Law' assertion that 'every state, no matter how despotic, is in tune with the rule of law; that even the Third Reich was a *Rechtsstaat*' (1977, 132). Hayek makes it explicit that planning in any shape or form leads down the 'road to serfdom' where rule of law and its liberal values is replaced by 'democratic' legislation and administrative regulations.

3.3 Neo-Liberalism and Democratic Government

A major challenge facing the rule of law in modern societies, Hayek argues, is the rise of majoritarian democracy. Hayek's distrust of majoritarian democracy or popular sovereignty is based on its identification of law with the will of the sovereign majority. In such a democratic system there is no room for law other than that that is made by the demos. Hayek warns of the inherent dangers in this form of democratic rule. The danger of popular sovereignty, he writes, 'lies not in the belief that whatever power there is should be in the hands of the people, and that their wishes will have to be expressed in majority decisions, but in the belief that this ultimate source of power must be unlimited, that is the idea of sovereignty itself'. Popular sovereignty he argues is a product of a false constructivist interpretation of common rules – he maintains that there can be no justification for the unlimited exercise of power that has derived from some purposive will (Hayek, 1979, 33). What Hayek refers to as 'dogmatic' or 'doctrinaire' democrats advocate unrestrained and 'unlimitable' democracy. These democrats argue that since power is in the hands of the people, no safeguards are needed for limiting that power. Thus Hayek states that 'ideal of democracy, originally intended to prevent all arbitrary power, becomes the justification for a new arbitrary power' (1960: 107). Democracy simply becomes a channel for the abuse of government power. The root of the problem, Hayek states, is that 'in an unlimited democracy the holders of discretionary powers are forced to use them, whether they wish it or not, to favour particular groups, on whose swing-vote their powers depends'. He says that this applies as equally to organisations like trade unions as it does central government. The end result Hayek argues is a 'democratic' system which rather than serving the interests of the majority, is forced to serve those select interests with the greatest access to political power (1979, 139).

Hayek presents an alternative 'liberal' interpretation of democracy in his work that is compatible with the rule of law – what David Held refers to as 'legal democracy' (Held, 1996, 243). Like law, Hayek maintains that democracy has become an 'undiscriminating' term used by modern states to the point where it ceases to have any proper meaning. Hayek seeks to bring democracy back to its authentic roots by limiting its coercive powers and subjecting it to the rule of law. He states that while both the dogmatic democrat and liberal may agree that wherever coercive rules have to be laid down they should be decided by the majority, where they differ is 'in the scope of state action that is to guided by democratic decision' (1960, 107). In Hayek's liberal conception of democracy, the majority does not construct law, but they 'discover' it in the internalised general rules of conduct that underpin the spontaneous order of liberal society. In Hayek's scheme the majority are not morally entitled to do as they please. Their 'power is limited by commonly held principles and there is no legitimate power beyond them'. There are therefore definite limits to questions that should be decided by the majority. He acknowledges that while it may be necessary for a majority to come to some form of common agreement on how to perform certain tasks, this does not imply that it also has the legitimate power to make decisions which threaten to undermine the spontaneous order of society. 'Democracy's limits' Hayek writes, 'must be determined in the light of the purpose we want to serve'. He states that 'the limits imposed on democracy by the liberal are those within which it can work effectively and within which the majority can truly direct and control the actions of government. So long as democracy constrains the individual only by general rules of its own making, it controls the power of coercion'. He warns that 'to disregard these limits will, in the long run, destroy not only prosperity but democracy itself' (*Ibid*, 115-6).

Democracy therefore needs to be constrained by a constitution that can limit the powers of government. The liberal tradition of shared values, Hayek argues, must underlie constitutional limitations. This liberal constitution he explains must recognise society as a 'living organism': 'it will have to deal with a self-maintaining whole which is kept going by forces which we cannot replace and which we must therefore use in all we try to achieve'. Changes in liberal society must be made by 'working with these forces rather than against them; they must occur within the confines of established rules of just conduct rather than being democratically determined. Changes where they occur should therefore be piecemeal rather wholesale (*Ibid*, 70).

4. The Constitution of a 'Liberal' State

Neo-liberalism's constitutional ideal of government under the law is set out by liberal economists from the Virginia

School such as James M. Buchanan and Gordon Tullock and economists from Austrian School, in particular Hayek. While differing in many important respects, Buchanan and Hayek both put forward radical peripheral concepts or policy proposals for limiting the scope of government interference that is permitted under the constitution. The 'ultra-liberal' constitutional state that they advocate as an ideal would curtail oppressive bureaucratic government, preserve the rule of law, provide limited public goods and maintain collective security against external threats. This constitutional ideal is fundamental for neo-liberalism as it outlines the necessary legal and political structures for a functioning market order.

4.1 The 'New Madisonians'

James M. Buchanan and other prominent members of the Virginia School of Economics have drawn a great deal of inspiration from the American Constitution. Buchanan traces the roots of his public choice perspective on constitutional reform back to the ideas displayed in James Madison's *Federalist Papers* and in this respect Nick Bosanquet argues can be regarded as a 'New Madisonian' (1983, 71). He retains an admiration for a constitution in which voting systems and constitutional rules curb the power of the executive. Buchanan's central claim, however, is that the American Constitution, traditionally seen in terms of the checks and balances between executive, legislature, and judiciary, has in the twentieth-century deviated from its founding rules and principles that once constituted part of the American political order (1986, 26).

Constitutional reform proposals advocated by public choice theorists like Buchanan, Gordon Tullock and Robert Wagner have focused on measures which will re-set limits to government interference. In their *Calculus of Consent* Buchanan and Tullock apply the individualistic calculus of micro-economics to public action, demonstrating that utility-maximising politicians do not necessarily maximise the public interest (Buchanan and Tullock, 1962). Their subsequent efforts to find the appropriate rules to constrain public figures brought the problem of constitutionalism onto the political agenda in America. They favour, in particular, a 'fiscal constitution' which comprises the set of constitutional rules which regulate government decisions on expenditure and finance. Buchanan states that he wishes to see a 'constitutional requirement that the federal government balance outlays with revenues except in extraordinary times' (Buchanan and Wagner, 1977, 178). To overcome the inherent bias of majority voting in favour of high demand groups Tullock suggests a greater use of the two-thirds voting rule for all appropriations (1965, 47-56).

In *The Consequences of Mr Keynes*, Buchanan, John Burton and Wagner consider similar ideas in the British context. In Britain they point out there is no written fiscal constitution outlining the rules that provide constitutional checks upon excessive expenditure or excessive resort to deficit finance by the government. The political actors that implemented Keynesian economic policies were simply unable to 'fine tune' the economy under the conditions of a competitive party democracy. Vote-maximising politicians were responsive to the demands of electoral politics rather than the policy prescriptions of Keynesian economic rationality. These politicians taking into account the electoral timetable pursued 'lax' monetary and fiscal policies in order to secure favourable but temporary economic conditions, especially increases in employment. They simply failed to act as the 'public-interest maximising politicians and officials, the far-sighted statesmen and trustees of the future' envisioned by Keynesian presuppositions. Faced with the reality of the politico-bureaucratic process, politicians pushed forward with plans to increase public expenditure programmes and avoid cuts without regard for theories of economic policy or for total budget size (Buchanan *et al*, 1978, 58-61).

Perceiving a bias in the British fiscal constitution towards excessive government expenditure and deficit finance, Buchanan, Burton and Wagner argue for a balanced-budget rule. Britain's fiscal constitution, they contend, has historically kept in check the manipulations of those in power, but 'contains a potentially fatal deficiency once the balanced budget rule is usurped and replaced by the Keynesian legitimisation of deficit finance'. 'It retains no rule to prevent vote-buying government manipulation of government expenditure and finance by an Executive that has, through the party system, a (working) majority of votes in the House of Commons' (*Ibid*, 73-5). They maintain that the Keynesian revolution has undermined those shackles on government action – the Gold Standard, and balanced budgets – that were understood by the classical economists as a necessary to contain the tendency of representative government towards deficit finance and uncontrolled growth of government expenditure. Thus they assert that 'the danger of government manipulation is far stronger now that it was in the nineteenth-century' (*Ibid*, 82). They argue for the amendment of the British (and American) fiscal constitution to include the balanced-budget principle where no government would be permitted to function by means of a budget deficit. Adopting this principle is the only means through which to eradicate government's ability to manipulate the fiscal system and economy for short-term political gain. (Note 3)

4.2 Hayek's Model Constitution

Hayek sets out a comprehensive neo-liberal vision of the ideal constitution in his *Law, Legislation and Liberty*. Like the Virginia School's conception of a liberal constitution, Hayek's constitutional order is concerned with establishing a constitutional framework that is capable of holding the power of the state in check, whilst respecting the general rules that underpin the market order. Hayek argues that traditional constitutional mechanisms for limiting government through the separation of powers have been rendered redundant by the doctrine of parliamentary sovereignty, uniting

executive, legislative and to some extent judicial power in the hands of the governing administration (1978, 98-104). Hayek outlines his own tri-cameral system comprising a 'Legislative Assembly', a 'Governmental Assembly' and a 'Constitutional Court'. He makes it explicit that it is not his intention 'to present a constitutional scheme for present application', but rather to 'discover' how 'the power of legislation, in the sense in which it was understood by those who believed in the separation of powers, can be effectively separated from the powers of government' (1979, 107). Hayek's central aim is to present a constitutional model that will secure 'the containment of power and the dethronement of politics' more effectively than traditional liberal constitutions have done (*Ibid*, 109).

The first representative body in Hayek's model constitution is what he confusingly terms a 'Legislative Assembly'. This assembly would be charged with the task of upholding and gradually improving the rules of just conduct or 'law'. Its function would be the articulation of moral norms – 'the views about what kind of action is right or wrong' – that underpin the market order. It would enforce the rules of just conduct, revise private (including commercial and criminal) law, define the principles of taxation and state regulations on matters such as health and safety and production or construction. These tasks would be substantial and difficult as they would involve 'the preservation of an abstract order whose concrete principles were unforeseeable' and the exclusion of 'all provisions intended or known to affect principally particular identifiable individuals or groups' (*Ibid*, 109). Hayek, however, makes it explicit that the function of Legislative Assembly would not be to define the functions of government, but 'merely to define the limits of its coercive powers'. He states that 'though it would restrict the means that government could employ in rendering services to the citizens, it would place no direct limit on the content of the services government might render' (*Ibid*, 109-110).

Because of the significance of its task, Hayek suggests that membership of the Legislative Assembly should be severely restricted to particular individuals capable of carrying out its responsibilities. Hayek (1944, 76) states in his *Road to Serfdom* that the liberal notion of an assembly of independent and infallible men entrusted with the task of maintaining the rule of law is an 'ideal that can never be perfectly achieved'. He, however, goes on to claim in his *Law, Legislation and Liberty* that it would be possible to select specific members of the community for the Legislative Assembly that could be paid and pensioned sufficiently to be independent of any interest group pressure. Hayek suggests that membership should be limited to those 'mature' members of the community aged between forty-five and sixty, who would be elected by their peers for a 'fairly long period' such as fifteen years, 'so that they would not be concerned with being re-elected, after which period, to make them wholly independent of party discipline, they should not be re-eligible nor forced to return to earn a living in the market but be assured of continued public employment in such honorific but neutral positions as lay judges'. This Hayek states would ensure that members tenure as legislatures 'would be neither dependent on party support nor concerned about their personal future'. As an additional safeguard, he maintains that the '*nomothetae*' elected to the Legislative Assembly will not have served in the Governmental Assembly or party organizations (*Ibid*, 113-4).

The second representative body in Hayek's constitutional scheme, the 'Governmental Assembly', is entrusted with administration and what he refers to as 'legislation'. The Governmental Assembly Hayek states is representative of existing parliamentary bodies. Its central tasks would be very considerable; it would organise the apparatus of government, decide the use of personal resources entrusted to the government and mobilise popular support around policy measures. Hayek, however, makes it clear that the Governmental Assembly would be 'bound by the rules of just conduct laid down by the Legislative Assembly, and that, in particular, it could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter' (*Ibid*, 119). Unlike the Legislative Assembly which is guided by opinion, Hayek believes that the Governmental Assembly should be based on a competitive party system and should be guided by the will of the majority. Indeed, he maintains that 'for the purpose of government proper it seems desirable that the concrete wishes of the citizens for particular results should find expression or that their particular interests should be represented' (*Ibid*, 112).

Hayek acknowledges that the idea of entrusting the task of stating the general rules of just conduct to a representative body distinct from the body that is entrusted with the task of government is not entirely new. The ancient Athenians who kept the '*nomothetae*' distinct from the governing body, he points out, attempted a system based on these lines. In his article 'The Constitution of a Liberal State', he comments, however, that in the modern world 'the separation of powers has never been achieved because from the beginning of the modern development of constitutional government the power of making law and the power of directing government were combined in the same representative assemblies' (1978, 101). The basic purpose of Hayek's scheme is to achieve a distinct separation of powers within a democratic system by setting up two distinct representative assemblies charged with altogether different tasks and acting independently of each other. John Gray has argued that Hayek's liberal constitutional state has the form of a 'common law *Rechtsstaat*' (1986, 69). Like common law judges, the representatives of the Legislative Assembly would have the ability to 'discover' what justice demands in the spontaneous order of market society, and the capacity to correct disorders in to order maintain the stability of the system of law as a whole. Through a process of judicial review, it would also have the ability to contain the power of the Governmental Assembly within the confines of the rule of law (Hayek, 1979, 128-9).

The third body in Hayek's model constitution is the Constitutional Court. Its membership would include professional judges, former members of the Legislative Assembly and perhaps, Hayek suggests former members of the Governmental Assembly as well. The Constitutional Court Hayek argues would be concerned with the mediation of conflicts between the two main assemblies. It would address 'problems that would arise chiefly in the form of a conflict of competence between the two assemblies, generally through the questioning by one of the validity of the resolution passed by the other'. The main point to stress Hayek states is that 'its decisions often would have to be, not that either of the two assemblies were competent rather than the other to take certain kinds of action, but that nobody at all is entitled to take certain kinds of coercive measures' not provided for by the general rules of just conduct (1979, 121). In periods of emergency Hayek states that it may be necessary to grant limited coercive powers, but makes it clear that these powers should never be possessed by the same agency that has the power to declare a state of emergency. In Hayek's scheme, the Legislative Assembly would be allotted the right to declare a state of emergency and would thus have to confer upon the Governmental Assembly powers that in normal circumstances it would not normally possess. The Legislative Assembly would, however, be free at all times to restrict the powers granted to the Governmental Assembly, and at the end of the emergency revoke its powers (*Ibid*, 125).

4.3 Neo-Liberal Constitutionalism and the Global Order

In his *Law, Legislation and Liberty* Hayek sets out detailed proposals for a model neo-liberal constitution for nation states. However, he also sees his model as being appropriate for a federated global system in which the Legislative Assembly and Constitutional Court would be international bodies and Governmental Assemblies highly localised 'quasi-commercial corporations competing for citizens' (*Ibid*, 132). David Held states that what Hayek advocates is an 'international market order' accompanied by a 'federation of ultra-liberal states where all interaction is conducted between individuals unimpeded by state boundaries'. Such a federation would be bound by a 'higher authority' – a Legislative Assembly - which 'would specify and help guarantee the rules of international trade and commerce'. In line with Hayek's constitutional model, this authority would be above particular group interests and 'its brief restricted to the possibility of ensuring the rule of law in international terms'. Hayek does not believe that an international Legislative Assembly can be formed on a transnational basis in the short term, but that like-minded nations can begin to form such an assembly, such as a regional authority (Held, 1996, 244).

Hayek's work, therefore, envisions a global neo-liberal constitutional order. Certainly neo-liberals have reservations about the construction of supranational institutions, in particular a supranational government beyond some pure service agency, embodied, for example, in an organisation like the European Union. What neo-liberals strive for is an international body like Hayek's Legislative Assembly that is limited to the negative task of restraining the actions of national governments that are harmful to the market order, and upholding the international rule of law. (Note 4)

5. Conclusion

This article has argued that the constitution and its accompanying concepts such as private law, legal responsibility, abstract order, 'rules of just conduct', and evolution are fundamental concepts of neo-liberalism that strike at the heart of liberal debates on the separation of powers, the protection of individual liberty, and the primacy of law. The main dilemma for neo-liberals is establishing legal structures that do not interfere with the market order. They reject nearly all constitutional models in Western democracies in particular the so-called 'liberal' constitution of America on the grounds that it has no more prevented legislators from making greater inroads into liberty in America than many other Western countries. In no democratic country, neo-liberals contend, has the ultimate power of government ever been under the law; it has always been in the hands of a body free to make whatever laws it wanted to achieve its particular.

Neo-liberalism's central claim is that too much importance is attached to the apparatus of politics both at the national and global level. Neo-liberals have thus attempted to construct a constitutional discourse that places strict limitations on politics. Hayek aspires to a constitutional model that entails the 'dethronement of politics', where discretionary authority is replaced by general rules. Buchanan and other public choice theorists have proposed more constructivist legislative measures which would require government to balance its budget in order to reduce public expenditure and deficit finance. However, as this article has shown, neo-liberalism's conception of a 'liberal' constitution is an intrinsically political one. The constitutional limitations on the capacities of legislatures that they advocate are inherently political in the sense that to a greater or lesser degree they embody different views about desirable forms of social organisation.

Neo-liberalism's core political objective is to overcome the constitutional ignorance of Western democracies by instituting a constitutional framework of rules, conventions or procedures through which the policies of government can be constrained. This framework, neo-liberals argue, is not only desirable, but is also an indispensable condition of a liberal society. The efficiency of a liberal constitution, they contend, depends on the strict separation of powers, a government under the law and an effective rule of law. They draw their inspiration from the ancient Athenian constitution, the individualist private law of ancient Rome, and the German liberal movement of the nineteenth-century that found expression in the *Rechtsstaat*. Neo-liberals are, however, acutely aware of the problems of implementing

such a constitutional system. They would need to overcome the limitations of the political system and established democratic institutions and persuade parties to adopt what Buchanan calls a 'constitutional mentality' in respect of economic policy (1979, 19). Thus the constitution is a concept that sits at the heart of an enormously ambitious neo-liberal political project that strives to resurrect the rule of law and rebuild the foundations of liberal society.

References

- Bosanquet, Nick. (1983). *After the New Right*. London: Heinemann.
- Buchanan, James. (1979). *The Limits of Liberty: Between Anarchy and Leviathan*. Chicago: University of Chicago Press.
- Buchanan, James. (1986). *Liberty, Market and State: Political Economy in the 1980s*. Sussex: Wheatsheaf.
- Buchanan, James. & Tullock, Gordon. (1962). *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. Michigan: University of Michigan Press.
- Buchanan, James. & Wagner, R. E. (1977). *Democracy in Deficit*. New York: Academic Press.
- Buchanan, James., Burton, John. & Wagner, R.E. (1978). *The Consequences of Mr Keynes*. London: IEA.
- Dicey, A. V. (1905). *Introduction to the Study of the Law of the Constitution*. London: Macmillan.
- Dietze, Gottfried. (1977). 'Hayek on the Rule of Law' in F. Machlup (ed.), *Essays on Hayek*. London: Routledge and Kegan Paul.
- Foner, E. (1999). *The Story of American Freedom*. London: Picador.
- Friedman, M. (1962). *Capitalism and Freedom*. Chicago: University of Chicago Press.
- Friedman, M. & Friedman, R. (1979). *Free to Choose*. Harmondsworth: Penguin.
- Gray, John. (1986). *Hayek on Liberty*. London: Routledge.
- Hayek, F. A. (1944). *The Road to Serfdom*. London: Routledge.
- Hayek, F. A. (1960). *The Constitution of Liberty*. London: Routledge.
- Hayek F. A. (1967). *Essays in Philosophy, Politics and Economics*. London: Routledge and Kegan Paul.
- F.A. Hayek. (1973). *Law, Legislation and Liberty, Vol.I: Rules and Order*. Chicago: University of Chicago Press.
- Hayek, F. A. (1978). *New Studies in Philosophy, Politics, Economics and the History of Ideas*. London: Routledge and Kegan Paul.
- Hayek, F. A. (1979). *Law, Legislation and Liberty, Vol.III: The Political Order of a Free People*. Chicago: University of Chicago Press.
- Held, David. (1996). *Democracy and the Global Order: From Modern State to Cosmopolitan Governance*. Cambridge: Polity.
- Ketcham, R. (1993). *Framed for Prosperity: The Enduring Philosophy of the Constitution*. Kansas: University of Kansas Press.
- Tullock, Gordon. (1965). *The Politics of Bureaucracy*. Washington D. C.: Public Affairs Press.

Notes

Note 1. These general 'rules of just conduct' and their centrality to a neo-liberal constitution are discussed at more length later in the article.

Note 2. It is this interpretation of law that makes Hayek critical of utilitarian attempts in nineteenth-century Britain to remake law on rational principles. He makes it explicit that law in the proper sense of the term can never be radically remade in the name of excessive rationalism.

Note 3. Buchanan, Burton and Wagner (1978, 82), however, argue that a 'return to a previously unwritten constitutional convention of the balanced budget may not be sufficient. Mere conventions, once broken, are too easily broken again. A written constitutional rule, rather than a convention, is therefore now called for'.

Note 4. A neo-liberal global order would thus make all socialist plans for redistribution impossible. Hayek (1979, 150), however, states that 'this is no less justified than any other constitutional limitation of power intended to make impossible the destruction of democracy and the rise of totalitarian powers'.