



**HAYEK'S RELEVANCE:**

**A COMMENT ON RICHARD A.  
POSNER'S, HAYEK, LAW, AND  
COGNITION**

**Donald J. Boudreaux\***

Frankness demands that I open my comment on Richard Posner's essay<sup>1</sup> on F.A. Hayek by revealing that I blog at Café Hayek<sup>2</sup> and that the wall-hanging displayed most prominently in my office is a photograph of Hayek. I have long considered myself to be not an Austrian economist, not a Chicagoan, not a Public Choicer, not an anything—except a Hayekian. So much of my vision of reality, of economics, and of law is influenced by Hayek's works that I cannot imagine how I would see the world had I not encountered Hayek as an undergraduate economics student.

I do not always agree with Hayek. I don't share, for example, his skepticism of flexible exchange rates. But my world view—my weltanschauung—is solidly Hayekian.

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\* Chairman and Professor, Department of Economics, George Mason University. B.A. Nicholls State University, Ph.D. Auburn University, J.D. University of Virginia. I thank Karol Boudreaux for very useful comments on an earlier draft.

<sup>1</sup> Richard A. Posner, *Hayek, Law, and Cognition*, 1 NYU J. L. & LIBERTY 147 (2005).

<sup>2</sup> <http://www.cafehayek.com> (last visited July 26, 2006).

I have also long admired Judge Posner's work. (Indeed, I regard Posner's *Economic Analysis of Law*<sup>3</sup> as an indispensable resource.) Like so many other people, I can only admire—usually with my jaw to the ground—Posner's vast range of knowledge, his genius, and his ability to spit out fascinating insights much like I imagine Vesuvius spitting out lava.

And so it is with some trepidation that I dissent from Judge Posner's tepid evaluation of Hayek's importance. But dissent I do.

### I. Custom, Law, and Legislation

Most fundamentally, I dissent from Judge Posner's skepticism of evolved law. Hayek—along with scholars such as Bruce Benson,<sup>4</sup> Lon Fuller,<sup>5</sup> and Bruno Leoni<sup>6</sup>—made a powerful case that law need not spring from the barrel of a gun or from the mind of a law-giver. Law can and often does evolve from the actions and expectations—the customs—of ordinary people going about their daily business. So far, Judge Posner would agree. But Posner is far more skeptical than Hayek (and I) that this evolved law is optimal (that is, the best that we can reasonably hope for). In Posner's opinion, Hayek

is insufficiently critical of the limitations of custom as a normative order. He puts too much weight on evolution, neglecting the fact that, lacking a teleology, evolution cannot be assumed to lead to normatively attractive results.<sup>7</sup>

Posner's examples on this point are weak. He says, for instance, that "manufacturers could be expected to evolve a custom of ignoring the pollution they create; that custom could not be made the basis of environmental law."<sup>8</sup> Indeed, if manufacturers had to contend only with each other, then the law that evolved out of custom might have been one that permitted manufacturers to dump waste willy-nilly into the air and water. From early on, however,

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<sup>3</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

<sup>4</sup> *THE ENTERPRISE OF LAW* (1990).

<sup>5</sup> *THE MORALITY OF LAW* (1964).

<sup>6</sup> *FREEDOM AND THE LAW* (1961).

<sup>7</sup> Posner, *supra* note 1, at 151 (citations omitted).

<sup>8</sup> *Id.*

manufacturers had to contend with surrounding landowners. Once this fact is realized, it is no longer so clear that we would expect manufacturers to “evolve a custom of ignoring the pollution they create.”

So what happened? In fact, the common law did evolve legal rules to protect landowners from water pollution produced by factories.<sup>9</sup> Indeed, this common law arguably protected against water pollution more reliably than did the statutory regime that superseded it.<sup>10</sup>

With respect to air pollution, contrary to Posner's reading, Hayek would concede<sup>11</sup> (as would I, although less readily) that legislative intervention might improve matters. It is important to be aware, however – as Hayek always was<sup>12</sup> – of the breadth of details to consider when evaluating outcomes.

I have little doubt that legislation has improved air quality; today's air is probably cleaner than it would be without the Clean Air Act<sup>13</sup> and other statutes and administrative regulations aimed at reducing air pollution. But was the pre-statutory common law inefficient? Did legislative intervention improve matters overall? Perhaps, but how would we know? Given the political distortions that inevitably infect legislative rule-making and enforcement, and the limitations on legislators' and regulators' knowledge, how do we know that today's air isn't so clean that the costs of achieving it through legislative intervention outweigh its benefits?

Most readers (and Posner, too, I suspect)<sup>14</sup> will find these questions silly, but why? Can we be sure that we aren't paying too

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<sup>9</sup> See Roger E. Meiners & Bruce Yandle, *Constitutional Choice for the Control of Water Pollution*, 3 CONST. POL. ECON. 262 (1992).

<sup>10</sup> *Id.*

<sup>11</sup> 1 F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY 124-126 (1973).

<sup>12</sup> See, e.g., F.A. HAYEK, *Individualism: True and False*, in INDIVIDUALISM AND ECONOMIC ORDER 1 (1948).

<sup>13</sup> 42 U.S.C. §§ 7401-7661 (2005).

<sup>14</sup> Posner identifies as a “danger” the possibility that “economists inclined by temperament or life experience to favor a weak and passive government will overlook opportunities for fruitful government interventions. It is difficult to believe for example that the entire problem of pollution can be left to be sorted out by the market,

high a price for pollution reduction? The classic case for government intervention to deal with problems such as pollution is straightforward, but it is also surprisingly self-destructive.

The classic case is the familiar one of public goods, externalities, and free-rider problems: If some desirable outcome, once produced, cannot easily be withheld from those who contribute nothing to produce it, then it is a safe prediction that a suboptimal quantity of such a “public good” will be produced. It is not worth paying for something if others will free-ride off of your payments, or if you can get it by free-riding on others’ payments.<sup>15</sup>

Pollution reduction is a classic public good. If each individual could purchase his own pollution reduction from nearby factories, then there would be no problem, and thus no case for government regulation. Of course, such individualized escape from air pollution is very difficult. So the case for government regulation—for collective action—is vibrant.

## II. Government Failure

Government, however, creates its own collective-action and free-rider problems. The very act of voting gives each voter a say in determining the amount of taxes that other people pay and the extent to which other people will be subjected to government regulation. This say is not conditioned, as are market exchanges, upon a tit exchanged voluntarily for a tat. Instead, the say that each voter has over the lives of third parties is free, given to a voter simply by virtue of his or her being a citizen of voting age. Anyone eligible to vote has a say in the way other people will live their lives. Thus, casting ballots in democratic elections is akin to emitting pollutants into the atmosphere, insofar as voting and polluting involve the voter/polluter choosing and acting without being obliged to take account of the consequences that his choices and actions have on third parties.

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or even by the market plus the common law of nuisance.” RICHARD A. POSNER, *OVERCOMING LAW* 414 (1995).

<sup>15</sup> A clear and concise review of public goods and externalities is Tyler Cowen, *Public Goods and Externalities*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS*, <http://www.econlib.org/library/Enc/PublicGoodsandExternalities.html> (last visited July 26, 2006).

This argument might be countered by saying that, because everyone has a vote, each person has a say in the collective outcome and, therefore, the outcome of each election is internalized on all citizens (or at least on all voters). The fact that everyone has a vote, though, is irrelevant. Each voting choice is made by each individual voter. To determine its economic integrity—that is, how likely it is that a vote is cast in an informed, non-free-riding manner—requires investigating the constraints and opportunities facing each voter as he or she casts a ballot. Because each voter enjoys the privilege of voting in every election by virtue of being a voting-age citizen, each voter is unconstrained in casting ballots for candidates and policies that will worsen others' lives. Furthermore, because no single voter expects his vote to determine the outcome of the election, each voter has little incentive to consider the consequences that any election outcome will have on even his own material well-being.<sup>16</sup>

Nothing about the voting situation compels any voter to modify his views in light of other people's preferences, or to take careful account of the ways that his vote and the collective outcome of the election will affect other people or even himself. In short, voters have little incentive not to behave as uninformed, careless busy-bodies.

Because nearly every voter expresses free-of-charge opinions on how other people will live their lives, and because losing coalitions are forced to live by the rules imposed by the winning coalition, electoral outcomes are infused with externalities.

The situation is similar for elected representatives. While the legislative process differs from the citizen-voting process in a number of important ways—for example, legislation is often the product of logrolling<sup>17</sup>—the fundamental fact remains that representatives are not obliged to take account of the consequences their decisions have on every individual these decisions affect. A member of Congress, for example, who believes that voting for higher taxes will improve his re-election prospects need pay little attention

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<sup>16</sup> GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION* (1993); BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (forthcoming 2007).

<sup>17</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 134-145 (1962).

to the negative consequences that higher taxes have on the individuals who pay those taxes. Likewise, consider a member of Congress pondering how to vote on the question of whether or not to open the Alaskan National Wildlife Reserve to oil drilling. If the people negatively affected by such drilling are politically disorganized, this member of Congress can safely ignore the negative consequences that drilling in ANWR might have on them.

The bottom line is that market failures are not necessarily more prevalent or more onerous than government failures. Indeed, the number and intensity of government failures is likely greater than that of market failures given that majoritarian politics inherently involves winning coalitions forcibly imposing their wills upon losing coalitions. To assume, as Posner (like so many others) does, that legislation will more likely than not improve a market failure is unjustified.

So we come back to Hayek's sophisticated recognition of the superiority of customs and laws forged from decentralized human experiences and then incorporated into expectations. Nothing about Hayek's case for "law" over "legislation" rests on the assumption that decentralized law is ideal. The question instead is: How ought we achieve any available improvements? Hayek warned against a too-ready resort to legislation and counseled instead a reliance upon the imperfect, often slow means of discovering law through decentralized trial and error.

### III. Hayek, Posner, and the U.S. Constitution

Judge Posner's penchant for slipping into legal positivism reveals itself most starkly when he remarks that "Hayek's disapproval of law founded on 'constructivist rationalism' rather than on custom is in considerable tension with his great admiration for the Constitution of the United States."<sup>18</sup>

Not at all. The U.S. Constitution is not a code of law; it is a framework of government. Originally, it was a compact among different polities (the states), each with much de facto plenary power.

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<sup>18</sup> Posner, *supra* note 1, at 151.

The leaders of these political units sought a better, mutually advantageous arrangement for confederating than what they had under the Articles of Confederation. The delegates to the Philadelphia Constitutional Convention of 1787 did not seek to create all or even most law de novo; they did not seek to replace wholesale one set of laws with another. The evolved common law rooted in English experience and modified by the more recent experience in the colonies<sup>19</sup> remained the law of the land. This law governed property, contract, commercial, tort, and criminal matters; the Constitution only modestly impacted this body of law. What Hayek admired about the U.S. Constitution was that it instituted a national government of limited, enumerated powers, all in a framework aimed at keeping the powers of this national government in check. Indeed, Hayek's admiration for the limitations-by-design aspect of the Constitution was probably intensified by his recognition that a national government kept relatively small and limited is less likely to upend the common-law rules and processes that he so respected.

### Conclusion: Is Hayek Relevant?

So is Hayek relevant today? Judge Posner, while applauding the power of Hayek's criticisms of Soviet-style central planning,<sup>20</sup> finds Hayek's scholarship to be of little relevance to today's issues.<sup>21</sup> One reason, I suspect, that Posner overlooks Hayek's relevance is that he cannot escape the presumption that good law is ultimately the product of conscious decisions and conscious designs by legislators and judges. As long as lawmakers don't overreach by trying to plan entire economies, Posner believes that the smaller tasks confronting judges and legislators are not only doable, but essential. Legislatures—and judges applying legislation—correct an externality here, adjust the application of Rule 10(b)(5) there, and generally nudge society along toward a more optimal state of af-

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<sup>19</sup> PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* (1970) (explaining how English common law took root in Britain's North American colonies and then evolved over the years to reflect the unique circumstances of life and commerce in colonial America).

<sup>20</sup> Posner, *supra* note 1, at 148.

<sup>21</sup> *Id.* at 161 ("A mixed system is what we and our peer nations have; what help Hayek's thought offers to someone trying to evaluate such a system is unclear.").

fairs. Without such tinkering, Posner seems to think, society would drift aimlessly into deeper and choppier waters in the sea of suboptimality.

Hayek dissented from this widely held opinion. For Hayek, legislation is a last resort, not a tool for fine-tuning society. But today, of course, legislation is the chief daily business of government. Today's frequent legislative interventions into every nook and cranny of our lives are built on a "pretense of knowledge"<sup>22</sup> that misleads people to imagine that legislation is a panacea for many real (and many merely perceived) imperfections.

Are prices in the aftermath of natural disasters too high? Legislate them down. Might children encounter unsavory programming on television? Legislate decency in broadcasting. Worried that too few people will save adequately for retirement? Legislate forced saving. The list goes on and on. Hayek's criticisms of piecemeal interventions such as these would differ little from those offered by mainstream economics, especially the Chicago variety.

But the central-planning mindset has not been completely defeated and replaced by "mixed-economy" interventions. Consider, for example, the loud and frequent calls today from the American left for nationalization of healthcare.<sup>23</sup> While not as ambitious as nationalization of the entire economy, nationalization of the single largest sector of the U.S. economy—constituting about 15 percent of U.S. GDP<sup>24</sup>—would create many of the very same problems that Hayek identified with central planning. Likewise with rebuilding the city of New Orleans and the Gulf coast region destroyed in 2005 by hurricanes Katrina and Rita. The amount of knowledge that government officials would have to acquire, process, and act upon in order to run a nationalized healthcare system

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<sup>22</sup> This is the title of Hayek's 1974 Nobel Prize lecture. F.A. HAYEK, *The Pretense of Knowledge*, reprinted in *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS* 23 (1978).

<sup>23</sup> Economist and *New York Times* columnist Paul Krugman is among the most vocal proponents for nationalized health care. See, e.g., <http://www.nybooks.com/articles/18802> (last visited July 26, 2006).

<sup>24</sup> [http://www.rand.org/pubs/corporate\\_pubs/CP484.1/index.html](http://www.rand.org/pubs/corporate_pubs/CP484.1/index.html) (last visited July 26, 2006).

successfully, or to rebuild a city according to a conscious plan, boggles the mind.

The problems with such massive interventions run much deeper than increased corruption, the failure of markets to clear, and other problems that mainstream economists attribute to routine interventions like rent control. Massive interventions pose precisely the sort of problems that Hayek warned would inevitably result from central planning. These problems spring from centralized, administrative control of massive amounts of resources—a situation that denies even the brightest and best-intentioned of bureaucratic agencies sufficient knowledge about how best to structure economic arrangements. If Hayek indeed was, as Posner says, “prescient”<sup>25</sup> in understanding and explaining the problems that plague central planning, then surely Hayek’s work remains relevant for understanding the problems that are ignored by champions of nationalized health care and other massive government programs—including rebuilding New Orleans here in the U.S. and “building” nations abroad.<sup>26</sup>

I sincerely wish that Judge Posner were correct that Hayek’s work is no longer relevant. But the blitheness with which so many very smart people today call not only for routine legislative interventions but also for massive, centralized government action to solve this or that Big Problem is striking evidence of the importance that Hayek’s work still holds for us today.

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<sup>25</sup> Posner, *supra* note 1, *Hayek*, at 148.

<sup>26</sup> Hayek’s insights into the problems with central planning are also relevant to recent discussions about using contingent-valuation studies as economically informed means of determining the value of various aspects of the natural environment. See Donald J. Boudreaux, Roger E. Meiners & Todd J. Zywicki, *Talk is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765 (1999).