The Review of Austrian Economics, 17:1, 41–65, 2004.

Spontaneously Evolved Social Order versus Positive Legislation in English Constitutional History

ROBERT F. MULLIGAN mulligan@wcu.edu
Department of Business Computer Information Systems and Economics, Western Carolina University College of Business, Cullowhee, NC 28723, USA; Department of Economics, State University of New York at Binghamton

Abstract. Medieval institutions contain an important strain of spontaneous order, especially from the pre-Christian period. A series of irregular successions after the Norman conquest made royal charters increasingly important in establishing the sovereign's legitimacy. Henry I's coronation charter (1100) formed the basis of Henry II's aggressive program of reform legislation, as well as for Magna Carta (1215). Henry II aimed at restoring the legal and political institutions of his grandfather Henry I after a period of civil strife and social degeneration. The fact that almost all later charters grew out of Henry I's charter, combined with the fact that later charters expanded and refined legal and political institutions, establishes the evolution of spontaneous order in the English charters. This evolution continued throughout the middle ages as subsequent kings confirmed Magna Carta.

Key Words: spontaneous order, English constitutional history, common law, positive legislation, liberal order

JEL classification: K11, N43, P16.

> How slender the basis must be on which the absolute monarch rears his selfish designs; how little the strongest will can direct the future course of events; how intrinsically treacherous is the most perfect system and order that results from external will rather than from permanent organisation under an internal law. . . .
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> William Stubbs (1874), *Constitutional History of England* 1:318

Introduction

The doctrine of spontaneous order achieved a central place in economic and legal science when Adam Smith (1776) described the interaction of market forces coordinating processes of production, distribution, and consumption as the working of an invisible hand. Carl Menger (1871) extended the application of spontaneous order to the emergence of commodity money in a primitive barter economy and Ludwig von Mises (1912) contributed a highly sophisticated theory explaining how fiat money can evolve from commodity money. Mises' regression theorem filled an important gap in prevailing macromonetary economics, which was unable to understand how fiat money could circulate at all. Hayek (1960, 1973, 1976, 1979) developed a theory of the evolution of democratic political and legal institutions responding to historical influences without the intelligent design of an authoritative legislator.

More recent scholarship (Berman 1983, Rizzo 1985, Friedman 1989, 2000, Benson 1990, 1998, 2002, Stringham 1999, 2002, 2003) analyzes the evolution of laws and other social

institutions from a public choice perspective. These researchers find that spontaneously emergent institutions change more slowly over time and have other characteristics that better encourage economic activity. Rizzo (1985:882) showed how spontaneously emergent and value-neutral Anglo-American common law is superior from a welfare perspective to policy-oriented positive legislation or activist jurisprudence based on balancing competing social and economic interests. Entrepreneurial planning is frustrated far less frequently by slowly and predictably evolving, spontaneously emergent laws—such as common law—than by consciously designed administrative institutions subject to abrupt change. Because spontaneous order best supports entrepreneurial innovation, it also promotes social and economic progress.

The distinction between the spontaneous order of common law, and the designed order of positive legislation, can be likened to the distinction between market and centrally planned economies (Sugden 1998:489–490). Positive law contrasts with the restatement of received or accepted customary law, and consists of essentially new and innovative commands issued on the authority of the legislative authority (Hayek 1976:44–48). As the division of labor progresses, the spontaneous order becomes capable of much higher degrees of complexity and sophistication than anything that can be designed by an authoritative legislator. In this sense, spontaneously evolved and designed orders are analogs of market and command economies. More importantly, the spontaneous order of the market and the spontaneous legal and political order both respond to subjective needs of many individual actors, unlike a designed order expressing the *weltanschauungen* of an elite of charismatic social engineers. Hayek's theory of spontaneous order has been criticized as internally inconsistent, employing flawed classification schemes, and poorly or inconsistently defined concepts (Khalil 1995, 1996, 1997) or as not fitting the facts of an evolutionary process (Steele 1987). Nevertheless, historical experience seems to call for some understanding of the process of social evolution. Like the market order, "law formation is a complex and dynamic process grounded in social realities that are beyond the comprehensive control of any authority. Despite its best efforts, the state has failed to monopolize the enterprise of law" (Ratnapala 2001:52).

This paper interprets English constitutional history, the foundation for the modern democratic order, through Hayek's concept of spontaneously evolving social order. Spontaneous order can come about through positive legislation, when individual components of that legislation are designed to implement or restore accepted custom. Historical evidence suggests less of an underlying tension between spontaneous order and the design order of positive legislation, than one working through the other. If the time under consideration is sufficiently long, the legal and governmental order nearly always evolves spontaneously, even though that evolution may include a succession of intelligently designed acts of positive legislation. This principle does not apply to positive legislation that is adopted and overthrown in rapid succession. In that event, the aberrant legislation would be seen as a departure from both static and evolving custom. Designed orders appear to be ineffective over the long run if they operate at a variance with the evolutionary process of a spontaneous order. Thus a spontaneous order can evolve through acts of positive legislation, though not all acts of positive legislation persist and give expression to the spontaneous order. Evidence for spontaneous order includes the following, which may be considered provisional stylized

facts of spontaneous order:

(a) prominent reference to past custom, especially maintenance or restoration of past custom, placing current practice or innovation in an evolutionary context (Hayek 1973:82–84, 98),
(b) accumulation of a large number of small, incremental changes,
(c) value neutrality, allowing individuals free choice of internal subjective value hierarchies, ends, and means for attainment (Hayek 1973:85–86, 103; 1976:5),
(d) focus on intelligent design of process, as opposed to outcome, which remains free to actualize individuals' freely-chosen, subjective preferences (Hayek 1973:116–117; Rizzo 1985:871),
(e) some level of vagueness and indeterminacy in allowing final outcomes to be determined by participants (Hayek 1973:86),
(f) respect for tradition (Hayek 1973:84), and
(g) natural selection among competing institutions (Hayek 1973:99), or a process analogous to natural selection (Steele 1987:188–190).

Common law is the archetypal spontaneous order, though it is possible for a legal system or form of government to evolve spontaneously without a common law system. Then it is necessary to be able to trace the evolutionary process to identify spontaneous order. Contrasting with the stylized facts of spontaneous order, evidence against spontaneous order might include:

(a) discontinuity and dramatic changes in social custom, frustrating subjective comparisons among different societies within an evolutionary continuum,
(b) social change which is the accumulation of a small number of drastic, large changes, interspersed between periods of stagnation in social practice,
(c) explicitly designed social institutions which impose external objective value hierarchies on individuals, overriding individual choice of values, ends, and means for attainment,
(d) focus on intelligent design of intended ends of social institutions, as opposed to process, disregarding diversity of individual preferences,
(e) exceedingly detailed specification of regulations,[1] especially when not generally relevant to broadly accepted social imperatives,
(f) general lack of respect for tradition, or contextual basis for positively designed institutions, and
(g) artificial selection or intelligent design.

The rest of this paper is organized as follows. Hayek's concept of spontaneous evolution of social order is further developed in light of several criticisms in Section 1, "Hayek and his Critics." Spontaneous order as an organizing principle in historical analysis, discussing its application to English constitutional history, is further developed in Section 2, "Spontaneous Order in English Constitutional History." A chronological analysis of various legal enactments and political developments, focusing on the medieval period from 1100–1307, is presented in Section 3, "Applying Spontaneous Order to English Constitutional History." Section 4, "Conclusion," provides concluding remarks.

1. Hayek and his Critics

The principle of accumulation of design in biological evolution helps explain the process of spontaneously evolved social order. Accumulation of design, which can be considered an extreme, nearly irreversible, form of path dependence, also helps explain why custom, tradition, and social context are so useful for interpreting evolutionary processes. Ratnapala (2001:55–59) cites Hale (1713), Mandeville (1729), Hume (1739, 1777, 1779), Smith (1759, 1776), and Ferguson (1767) as having applied accumulation of design to social institutions even before Darwin and Wallace applied the concept to biological evolution. Legal scholars have long identified primitive customary law, which is neither natural nor artificial, as "the result of human action, but not the execution of any human design" (Ferguson 1767:122).

Path dependency provides one impetus for positive legislation. Once custom evolves to the point where practice is seen as inefficient, immoral, or merely inconsistent with ends chosen by current legislators, the temptation to legislate often proves irresistible, even to the point of imposing constraints on the future evolution (Hayek 1973:88–89). The state may be inevitable, along with its growth and centralization of its authority.

Several scholars criticize practical aspects of Hayek's scheme of governmental reform or his interpretation of existing institutions (Shenfield 1980:414; Hamowy 1982). Hamowy (1978:296) views the rule of law, the principle that both the government and the citizen are equally subject to legal constraints on their behavior, as at best, a potential necessary condition for human liberty. He criticizes Hayek's view that liberty is dependent on, and inseparable from, the rule of law, rather than being, as Hamowy prefers, definitionally independent. To Hayek, the rule of law is a sufficient condition for human freedom. Hayek accepts the need for the state to enforce negative obligations, but not positive ones (1976:101–103). In Hayek's view, bills of rights enumerate particular applications of, and might be replaced with, a more comprehensive rule that coercion can only be applied to enforce generic, preexisting rules. This is quite different from merely prohibiting the initiation of force.

Hamowy (1978) and Steele (1987) argue with the significance Hayek attaches to the distinction between negative versus positive rules of conduct. In Hamowy's view the distinction is inadequate because negative rules can be coercive. Clearly, positive rules, commands that one must do something, are necessarily coercive. Negative rules, forbidding specified acts, may not be coercive, and some negative rules are necessary to define and protect individual rights. For example, it is necessary to prohibit acts which initiate the use of force. Hayek's proposed prohibition of positive rules is a necessary, though not a sufficient, precondition for the liberal order. Hayek fails to draw this distinction clearly, and it seems possible Hamowy and Steele take issue with it simply because of its flawed expression.

Khalil (2002) criticizes Hayek based on the viability of his classification schema. The market order depends on information, including facts like prices, and is opposed to a planned order. The liberal order, as opposed to a command order, depends on subjective knowledge (Dewey and Bentley 1973) which expresses beliefs. In Khalil's view, Hayek's arguments cannot be conclusively derived from his theories of information and knowledge. The market order requires dispersed information, as opposed to dispersed knowledge. In the Deweyan

sense Khalil adopts, knowledge is always subjective but can never be dispersed, because it can only reside in individuals. The uniqueness of each individual's subjective beliefs or knowledge necessitates the liberal order. In contrast, information must be dispersed, necessitating the market order. Khalil reformulates Hayek's theory of objective knowledge, which is philosophically allied to logical positivism in spite of Hayek's many criticisms of that school, as a subjective theory. Khalil is critical of Hayek's fundamental classification, not his model of social order.

Khalil (1997) views natural orders as including designed firms and spontaneously-emergent markets. Khalil sets these two kinds of natural orders apart from artificial or design orders. Socialist states are designed like radios or firms. Thus it becomes difficult to say whether firms or command economies should be regarded as artificial or spontaneously emergent. Hayek regards firms as part of artificial or design order. Khalil argues that while firms are designed, like centralized states and centralized economies, after a military organizational model, once organized, the firm takes on a life of its own through ongoing transactions among the entrepreneurial manager, employees, and individuals outside the firm, including customers and suppliers.

In Khalil's view, the firm is part of the natural order, because once set in motion, the successful firm evolves on its own. The enlightened entrepreneur accepts this and take advantage of it. Khalil (1995) notes that organizations, such as firms and states, have preferences and objectives, while institutions are constraints on realizing preferences and objectives. Artifacts like radios lack preferences and objectives, and are merely means to the ends of others. Khalil (1996:188) observes that both design and insight play roles in the process of undesigned evolution. In his view, while organizations involve design, they cannot be seen as artifacts because they acquire a life of their own through development and evolution.

In general, Hayek's critics aim at improving the rigor and consistency of his theory of spontaneous order. Hamowy (1982), in particular, is critical of how Hayek interprets some evidence for the liberal social order and its evolution. None of Hayek's critics seem to take much issue with the desirability of the liberal order.

2. Spontaneous Order in English Constitutional History

Medieval legal-governmental institutions contain an important and obvious strain of spontaneous order, especially from the pre-Christian period. 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 the Roman civil law contained in Justinian's *Corpus Juris Civilis*. Before the Norman conquest, England's Saxon kings granted charters stating prevailing laws and customs, with the advice and consent of a great council, the Saxon witan. It was not thought that the king could alter existing customs of the English people. These charters or dooms were tangilble, explicit, and written manifestations of the social contract. Considered as social contract, a charter purports to grant the citizen more-or-less specific rights and privileges. Although the king is implicitly assumed to deserve obedience, loyalty, military service, tax revenue, etc., the citizen's obligations are never specified, and thus can be considered open-ended. The king's

obligations are explicit, though generally vague, and signed by the king, witnessed by nobles and clergy. After the conquest the Norman kings continued this practice. Because of a series of irregular successions, coronation charters became increasingly important in establishing the sovereign's legitimacy. Henry I's coronation charter (1100) formed the basis for Henry II's aggressive program of reform implemented through a series of charters, as well as the basis for Magna Carta (1215).

Henry II aimed at restoring the legal and political institutions of his grandfather Henry I after a period of civil strife and social degeneration. Later, in the reign of John, Archbishop Stephen Langton based Magna Carta on Henry I's charter. The fact that almost all later charters grew out of Henry I's charter, combined with the fact that later charters expanded and refined legal and political institutions, establishes the evolution of spontaneous order in the English charters. This evolution continued throughout the middle ages as subsequent kings confirmed Magna Carta, which evolved as it was reissued and confirmed. This evolutionary process illustrates the emergence of spontaneous social order in medieval legal and political institutions. Because Magna Carta provides a foundation for due process and the rule of law, an examination of its evolution holds special interest. The initial development of parliament as a positive-law-making legislature occurred later during the reigns of Henry III and Edward I, and partly displaced royal charters as legislative instruments.

English charters often acted to correct or restore customary practice. This can be seen, for example, in the preamble to the Constitutions of Clarendon (1164), which asserts "... some part of the customs and liberties and dignities of his [Henry II's] predecessors, viz., of king Henry [I] his grandfather and others, which ought to be observed and kept in the kingdom" (Stephenson and Marcham 1937:73). Stable rules provide one of the necessary conditions for entrepreneurial activity and economic planning. "When some basic principles of the law have been accepted for a long time, they will govern the whole system of law, its general spirit as well as every single rule and application within it. At such times it will possess great inherent stability" (Hayek 1973:66).

A contrasting situation had developed between the reigns of Henry I and Henry II, during the civil disturbances of the reign of Stephen, where the situation maintained which Hayek describes: "... a general philosophy of law which is not in accord with the greater part of the existing law has recently gained ascendancy. The same lawyers... become a revolutionary force, as effective in transforming the law down to every detail as they were before in preserving it" (Hayek 1973:66). Revolutionary change may be necessary for social progress but clearly frustrates entrepreneurs in forming expectations and planning economic activity. Though all change introduces entrepreneurial opportunities, the social order fulfilling the most entrepreneurial expectations promotes the greatest volume and coordination of economic activity (Harper 1998:254–256).

3. Applying Spontaneous Order to English Constitutional History

This section applies the doctrine of spontaneous evolution to the analysis of English constitutional history of the twelfth and thirteenth centuries. Starting with the fourteenth century, Parliament's positive law-making and the judiciary's contributions to the common law largely displaced royal charters as legislative instruments.

3.1. Henry I (1100–1135): The Lion of Justice

William the Conqueror was succeeded not by his oldest son Robert, but his second-oldest son William II. Though William I had not been a particularly popular king, ruling through military conquest, extensive land confiscation, and an imported Norman clergy and feudal system, William II was even more harsh and less popular. In particular, William II confiscated additional lands as royal forests for his personal hunting, though many people lived on these lands, and under him new taxes proliferated. Many abuses of Norman rule were associated with the imported feudal system, extensive land confiscation, and frictions between Saxon and Norman custom (Robertson 1925:282, Barlow 1970:178). William II was succeeded by his next-younger brother Henry I, though again the older brother Robert should have inherited the throne.

Henry I sought to gain support for his accession by issuing a coronation charter in 1100 granting liberties and renouncing various predatory practices of William II (Freeman 1882 II:349–352). The first three of the charter's fourteen articles deal with wardship, inheritance, and marriages among the aristocracy, disavowing practices which allowed the first two Williams to profit in these cases. The king promised to forego this particular form of innovative rent-extraction because it was contrary to English custom, though it could have been argued that Norman nobility were bound by Norman custom. Certain new taxes, fines, and debts were also discontinued, unpunished murders were pardoned, and forest lands confiscated by William II were relinquised. Some new taxes Henry renounced, *monetagium*, a levy on monetary transactions in cities and towns, actually were discontinued, but others, *amercement*, judicial fines, continued in spite of the promise to return to traditional Saxon *bot* and *wite* forms (Stubbs 1913:116–119, Stephenson and Marcham 1937:46–48, Mitchell 1951:160, 243). Traditional Saxon justice was largely consensual, based on restitution and social ostracism, but had already been partly displaced by coercive state-administered justice before the Norman conquest, which greatly accelerated the eclipse of consensual Saxon justice. This abandonment of traditional, consensual justice gives a strong illustration of path dependency. Once the state began collecting judicial rents, coercive justice could only grow in extent. There is no mechanism for turning back the clock.

The charter includes a statement restoring the laws of Edward the Confessor, effectively repealing all enactments of the two Williams, but such a vague and general promise was meaningless and unenforceable (Freeman 1882 II:356–357). No mention was made of Harold, who ruled between Edward and William I. His short reign had not contributed much to Saxon jurisprudence, and William I always claimed lawful succession from Edward. The coronation charter was issued and seems designed to address a situation of political expediency. It helped Henry find acceptance and legitimacy from the barons and people through an offer of new or newly restored liberties and the promise of fairer justice. The offer implicit in the charter suggests accepting Henry as king would guarantee better government as well as respect for, and restoration of, distinctively English practices. Robert never attempted a counter offer.

Henry's charter is highly significant in English constitutional history and the theory of spontaneous order for two reasons. First, it revived the Saxon practice of issuing general charters of liberties addressed to the realm as a whole. Saxon kings had issued such charters

in the form of dooms deliberated and witnessed by the Saxon great council or witan as early as 601 (Stephenson and Marcham 1937:2, Smith 1955:13–14). Charter issue manifests path dependent development, because by construction, charters express received custom, but generally do not prescribe new custom. Although implementation of Henry I's charter was sketchy at best, it began to restore, extend, and establish the principle of the rule of law, the idea that the government, as well as the citizen, is subject to legal limitations on its behavior (Hogue 1966:53–54, 252–253). The coronation charter was essentially a conservative document, either restoring established customs, or formulating new ones rooted firmly in existing custom. Though the charter grants or restores significant liberties, its imperfect, partial enforcement and implementation further strengthens the interpretation of this document as essentially conservative, particularly since its implementation clearly appears to have been at a sharp variance with its design.

Second, the charter establishes a context for future enactments, particulary Henry II's program of reform legislation, explicitly designed to restore the customs and liberties of the time of Henry I, as well as for Magna Carta and its reissues and confirmations, all of which refer implicitly to Henry I's charter. The coronation charter reflects an abandonment of positive law implemented by the first two Williams on their authority as military conquerors. Implicitly, it asserts the king's authority depends on lawful succession from Edward the Confessor, both a Saxon king and a saint of the Church. Thus the practices and principles restored by the coronation charter were drawn from a context of naturally evolving social custom, which had been temporarily and articially disrupted by the Norman conquest. This evolution would be largely path dependent, building on earlier documents. Subsequent Norman rulers found, through trial and error informed by political expediency, that often the best way to rule was to respect this naturally evolving social context.

The charter incorporates some degree of value neutrality, particularly in the reforms of wardship administration and taxation. Wardship reforms are specified in great detail, clearly promoting attainment of ends chosen by deceased nobles and their families rather than the king. Transference of the Norman nobility from Norman to English wardship and inheritance customs implied recognition of the territoriality of English or local custom. More likely the king recognized realpolitik, hoping to attract the nobility to his party by granting the more liberal and value-neutral English customs. Abandonment of *monetagium* and putative abandonment of *amercement* taxation increased the sphere of personal property rights, allowing more resources to be used for ends chosen by individuals rather than the government. Taxation reforms benefited commoners as well as nobles, but it is interesting the king continued to collect one of the two repudiated taxes.

3.2. Stephen (1135–1154): The Anarchy

Henry was succeeded by his nephew Stephen, though there was some support among the barons for Henry's daughter Matilda, widow of the Holy Roman Emperor Henry V and now wife of the count of Anjou, Geoffrey Plantagenet. Stephen was able to gain minimal support for his accession, though he was never a popular king. He was unsuccessful in administering justice throughout most of the kingdom for most of his reign.

3.2.1. Coronation Charter (1135). In marked contrast to Henry I's charter, Stephen's first charter is entirely vague and general, granting a series of high-sounding but unenforceable liberties to the clergy, barons, and common people (Stubbs 1913:142). Few barons and clergy participated in the election preceding Stephen's coronation, and when a relatively large number of nobles attended his first great council the next year, he issued a more extensive charter. Because Stephen, though brave, was a weak and generous king, he granted additional, more specific liberties in his second charter.

3.2.2. Second Charter (1136). Stephen's second charter is somewhat more specific than the first. Most of its terms implicitly refernce the fourteen articles of Henry I's charter, which he is thus indirectly confirming (Stubbs 1913:142–144). The first charter had been relatively ineffective in establishing Stephen's legitimacy, and the second charter received support from a larger number of barons and virtually all the clergy. By issuing two charters in two years, Stephen helped strengthen the precedent of issuing charters of liberties to the whole nation, though their excessive vagueness and his inability to carry them out both contributed to their lack of influence on subsequent history. Apart from providing precedents for future charters, they do not seem to have contributed to path dependency because they were never effectively implemented.

During the unrest of Stephen, the secular authority was disrupted, to the point where historians refer to the nineteen-year period of his reign as the anarchy. The Peterborough Chronicle for 1137 relates how renegade warlords built unlicensed or adulturine castles, where citizens from whom wealth might be extorted were imprisoned and tortured, and from which towns, farms, and churches were plundered and burned (Stubbs 1874 I:328, 1913:137–138). In addition to new unlicensed castles, manor houses were converted to castles through addition of defensive structures. County courts were unable to function continuously, and royal justicars and sheriffs were harassed and deposed. Although the civil administration fell into anarchy, the Church continued to function, and canon-law courts attempted to fill the vacuum as an emergency measure. In response to the immorality of the times, canon-law courts engaged in an "inordinate and irregular prosecution of laity for moral offenses," and collected judicial rents in the form of penances, fees, and penalties (Barlow 1986:91, 94). In 1136 Stephen's weakness and bad faith led to open revolt in favor of Count Geoffrey and the Empress Matilda. The rebels captured Stephen and crowned Matilda in 1141, but the civil war continued until a general settlement was reached in 1153 (Corbett 1926:541–556). The settlement provided Stephen would keep the crown, but be succeeded by Henry, son of Geoffrey and Matilda, and grandson of Henry I (Stubbs 1874 I:332). When Stephen died in 1154 Henry II succeeded him without incident.

3.3. Henry II (1154–1189): Supreme Administrator of the Realm

Henry's Scheme of Reform, responding to the anarchy of Stephen, was part of the 1153 settlement of the civil war. It was agreed that when Henry assumed the throne

> (1) The royal rights, which had everywhere been usurped by the barons, are to be resumed by the king. (2) The estates which had been seized by intruders are to return

> to the lawful owners who had enjoyed them in King Henry [I]'s days. (3) The adulturine or unlicensed castles, by whomsoever erected during the present reign [of Stephen], to the number of eleven hundred and fifteen, are to be destroyed. (4) The king is to restock the desolate country, employ the husbandmen, and as far as possible restore agriculture and replace the flocks and herds of impoverished farmers. (5) The clergy are to have their peace, and not to be unduly taxed. (6) The jurisdiction of the sheriffs is to be revived, and men are to be placed in the office who will not make it a means of gratifying private friendship or hatred, but will exercise due severity and will give every man his own: thieves and robbers are to hanged. (7) The armed forces are to be disbanded and provided for: 'the knights are to turn their swords into ploughshares and their spears into pruning hooks;' the Flemings [imported by Stephen as mercenaries] are to be relegated to their workshops, there to labour for their lords, instead of exacting labor as lords from the English (Stubbs 1874 I:333–334).

Few kings' reigns have more constitutional significance than Henry II's, one of England's most literate and enlightened kings, who was also an accomplished legal theorist and historian (Stubbs 1900:136–138). His principal legislative aim was restoration of the customs of Henry I and eradication of Stephen's meager legal legacy. Enactments of this reign are strongly suggestive of spontaneous order, being filled with respect for tradition and reference to the customs of Henry I, often demonstrating path dependency in legal development. In addition, however, Henry II was also one of the most successful innovators in English constitutional history. His enactments are equally filled with innovative procedures promulgated through positive legislation. Generally these innovative positive features contribute to spontaneous order because they aim at improving protection of traditional rights and customs. Because positive legislation specifying procedure does not aim at imposing particular outcomes, the value neutrality essential for spontaneous order is also preserved through most of Henry's procedural innovations.

3.3.1. Coronation Charter (1154). Henry II's coronation charter is extremely vague, in many respects similar to Stephen's but refers explicitly to Henry I's charter (Stubbs 1913:157–158). Restoring the customs of Henry I was shorthand for undoing the damage done under Stephen. Although Stephen's two charters promise exactly the same thing, Henry assumed the more difficult task of restoring the practices of Henry I, not merely maintaining them.

Henry II's Charter of Liberties grants and confirms all the gifts, liberties, and customs granted by his grandfather Henry I, who granted fourteen specific articles in his coronation charter. Mention of Stephen or any details of his two charters is studiously avoided, similar to the avoidance of any mention of Harold in Henry I's charter. However, except for explicit reference to Henry I, Henry II's charter is nearly as vague as either of Stephen's. After his coronation, Henry embarked on a program of reducing nobles who resisted his order to knock down unlicensed castles. Although contemporary historians relate that many of these castles were havens for mischief-makers, it also seems plausible that a large number were erected to provide their owners legitimate self-defense during the anarchy. Henry went after both kinds of unlicensed castles indiscriminately. He also deported Stephen's Flemish

mercenaries (Stubbs 1874:450, 1887:43). Henry went to France in 1157 to put down a rebellion and returned to England in 1163.

3.3.2. The Constitutions of Clarendon (1164). The Constitutions govern relations between secular and canon-law legal systems. Stubbs notes that while some provisions "only state in legal form the customs which had been adopted by the Conqueror and his sons, others of them seem to be developments or expansions of such customs in forms and with applications that belong to a much more advanced state of the law" (1874:465). According to Stubbs' assessment, some degree of positive legislation must be inferred, "applications that belong to a much more advanced state of the law." Nevertheless, spontaneously evolved law seems to predominate, because some provisions "only state in legal form the customs which had been adopted" previously, and the rest "seem to be developments or expansions of" preexisting custom. Extending established custom in the Constitutions seems informed by both intelligent design and profound respect for social context and tradition, thus the Constitutions extend a path dependent evolutionary process. Positive features of the Constitutions relate to procedural institutions set up to implement accepted practice. Pollock and Maitland (1911:137) describe the Constitutions as "no ordinance," that is, not positive legislation, but a "recognition and record" of ancient custom. Henry "demands a definition of the old law and then tenders this to the prelates as a *concordat*" (ibid.) Virtually all the bishops opposed acknowledging English custom, and many felt betrayed when Archbishop Thomas Becket finally accepted the Constitutions. The bishops' position was not that the Constitutions misrepresented English custom, but that temporal custom should not bind the Church, whose jurisdiction was universal.

One provision of the Constitutions was that lay juries were given the right to determine the secular or ecclesiastic character of land tenures. It is noteworthy that these determinations were given to secular juries, not royal justices or sheriffs. William the Conqueror had introduced sworn jury inquests from France, using them extensively in the Domesday survey. Henry also attempted to insert lay juries into canon-law proceedings, which would have guarded against partiality. He greatly expanded the use of juries in secular justice. A special court, the *assize utrum*, and writ, also called *utrum* ("whether,") were later provided to make these determinations. *Utrum* became the first of the four possessory assizes Henry instituted (Hogue 1966:161–162). Secular courts were also given jurisdiction over advowson, the right of lay nobles to present candidates for church offices on the nobles' lands. In Magna Carta (1215), John was forced renounce this privilege, and as successive kings reissued Magna Carta, eventually advowson was abandoned. Article twelve specified a regular procedure for election of bishops and other church officials, which was followed until John renounced it in the Grant of Freedom of Election to the Church (1214).

Two of the sixteen articles deal with excommunication and indirectly provide a level of due process for this awesome penalty, without actually presuming to impose internal procedures on canon-law courts. Where the Constitutions present positive legislation by regularizing procedures, these are always implemented through the civil courts and the secular judicial administration over which the king enjoyed jurisdiction. Eight articles limit the Church's jurisdiction over property rights, and three deal with secular criminal offenses, removing the ecclesiastical privilege of benefit of clergy, and limiting church jurisdiction

over these offenses. Pope Alexander III abrogated the Constitutions and Henry renounced them in 1172 before papal legates sent to absolve him after the martyrdom of Archbishop Thomas Becket. Nevertheless, every article was well enforced, except removal of benefit of clergy (Hogue 1966:43, Berman 1983:531, Barlow 1986:273). Henry II's other reform legislation succeeded largely without opposition.

3.3.3. The Assize of Clarendon (1166). 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). Archbishop Becket was not present at the great council that passed the Assize (Stubbs 1874:469), which consists of twenty-two articles and was intended to guide itinerant justices making 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 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, and two likely reasons for this success are:

(a) the implementation through 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 regularized throughout the kingdom.

Possessory assizes were actions in the county courts authorized under this charter, called courts of assize, which protected lawful possession of land, as opposed to ownership. At this time most land was owned by a small number of nobles, and the common people were their free tenants or serfs. Freemen could possess land, but usually did not own it. This council also seems to have approved the proceeding called assize of *novel dissesin*, the second possessory assize, after *utrum*. *Novel disseisin* ("new dispossession" or "recent eviction") provided a remedy to free tenants wrongly dispossessed from their lands. A jury from the

neighborhood was to swear under oath regarding the *seisin* and *disseisin*, testifying who had possessed or held the land, 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. *Novel disseisin* established two important principles:

(a) lawful possession of land, as opposed to ownership, will be protected by an unusually rapid remedy, and
(b) possession of a free tenure will be protected by the king, regardless of who owns the land (Pollock and Maitland 1898 I:146).

The principle of *novel disseisin* is that one man, even though he claims and actually has ownership of the land, may not turn another man out of possession without first obtaining a judgment. The crown collected additional judicial rents by generating new actions for eviction and against wrongful eviction. Thus the king and the royal courts became protectors of the common people against their noble landlords, while enjoying a new source of judicial rents. *Novel disseisin* gave no protection to serfs or slaves, only benefiting free tenants.

In addition to operating through the fusion of older, naturally evolved institutions, the Assize also presents features of spontaneous order in the face of obvious positive features. The intelligent design evident in the positive legislation of the Assize specifies procedures rather than principles or outcomes. The Assize can be considered largely value neutral for this reason. Procedural rules do not necessarily predetermine the outcome of an action, thus allowing for the pursuit and attainment of freely chosen individual goals. The Assize served to guide entrepreneurial expectations, although it is not clear it was actually designed for that purpose. If it was intended as a unique enterprise, never to be repeated, the fact that it came to guide entrepreneurial expectations can only have come about spontaneously and accidentally, as an outcome of the success of the document in improving law and order, increasing tax collection, and generating judicial rents. Further judicial visitations were performed shortly afterward, and Stubbs suggests the novelty of these proceedings as well as their frequency and the amount of taxes levied led subjects to complain. Henry left for France shortly after passage of the Assize of Clarendon and stayed for four years. Complaints about the conduct of the royal sheriffs collecting taxes under the Assize and further judicial eyres reached Henry in France, and when he returned to England in 1170, the king took advantage to extend his control over legal administration.

3.3.4. The Inquest of the Sheriffs (1170). Henry removed all the sheriffs of England from office and had them account for all revenues collected through fines and taxes since the Assize of Clarendon. The commission of inquiry consists of thirteen articles specifying what information was to be sought from the sheriffs and how it was to be gathered. The sheriffs were acquitted, but Henry took this opportunity to replace them, principally with loyal officers of the exchecquer whom he knew and trusted personally. That amounted to summary dismissal without cause, but served to mollify those opposed to the judicial eyres and new taxes, while confirming Henry's supreme authority.

The king had his oldest son, also named Henry, crowned his successor shortly afterward. This revived an ancient Anglo-Saxon custom promoting loyalty to the heir. The crown prince was referred to afterward as the young king, though he did not outlive his father. Due to

the conflict with Archbishop Becket, Henry had the prince crowned by the Archbishop of York, whom Archbishop Becket promptly excommunicated. Archbishop Becket was martyred later in 1170 and canonized in 1172. Meanwhile Henry conquered Ireland with papal authority, in part to atone for Becket's murder. The degree of Henry's responsibility for the murder is still debated. Prince Henry was granted some of the authority of chief justicar (Stenton 1926:576), probably in an effort to acquaint him with the administration of government and prepare him to reign after his father's death. Unfortunately, Prince Henry became jealous of his youngest brother John, always the king's favorite. Supported by ambitious nobles and the kings of France and Scotland, the young king rebelled against his father from 1173–1175. The rebelling forces included the middle brothers Richard and Geoffrey, and several of the most important nobles. The king, supported by most of the nobility and virtually all the clergy, broke the back of the rebellion when justicar Ranulf de Glanville captured King William of Scotland in 1174 (Hume 1788 I:356). Henry pardoned his enemies, though exacting large fines and ransoms.

3.3.5. The Assize of Northampton (1176). This charter renewed and amplified the Assize of Clarendon, transforming that hitherto unique and unprecedented undertaking into a generally accepted practice. Some provisions address sheriffs' conduct unearthed by the Inquest. The Assize of Northampton consists of thirteen articles, many of which specify more severe penalties or procedures than the earlier, more liberal document. It is possible Henry was hardened by the recent civil war. Many articles make specific mention of emergency measures occasioned by the recent rebellion, and how property forfeit by rebels was to be administered.

The administration of justice had become more complicated since the Assize of Clarendon in 1166, which instructed two justicars who visited the whole kingdom. The Assize of Northampton divided the country into six circuits, each of which was visited by three judges (Stenton 1926:585). The added care and administrative support provided by the Assize of Northampton is due to the large revenue in taxes, escheats, and fines realized through the comparatively cursory earlier Assize of Clarendon. Obviously the more detailed provisions reflect practical experience gained through administering earlier rounds of judicial visitations. The Assize of Northampton established a third possessory assize, *mort d'ancestor* ("ancestor's death"), protecting possession of land by people who could prove they were descended from someone who had lawfully possessed it. Once again, the Assize is concerned mostly with value-neutral procedural issues, though the new procedures are implemented through positive legislation. The Assize also presents positive legislation in that it specifies detailed and harsher penalties for a battery of crimes.

Comparison of the Assizes of Clarendon and Northampton, which are very similar in design and intent, provides very clear, very strong evidence for spontaneous order and path dependency. Both charters exhibit intelligent design and contain significant positive legislation. But in 1166, when the Assize of Clarendon was passed, the course of future evolution could not have been perfectly anticipated. The more detailed Assize of Northampton became necessary precisely because the Assize of Clarendon had been so successful. If the Assize of Clarendon had been intended as a unique and unrepeatable undertaking, it could never have been designed as a general precedent, and if that is the case, the Assize of Clarendon

became a general precedent spontaneously and by accident, rather than by design. Even if it had been designed as a general precedent, lack of perfect foresight ensured procedures would evolve and require revision.

The Assize of Northampton illustrates the path dependency of legal evolution; it simply could not have been constructed the way it was without the clear and immediate precedents of the Assize of Clarendon and the Inquest of the Sheriffs. The Assize of Northampton revises the procedures for conducting judicial eyres, building on an evolutionary context established first by the earlier document, and second by practical experience gained through implementing the earlier document. Although both documents include significant positive legislation, the fact that a second document was called for ten years later demonstrates the inability of positive legislation to anticipate societal needs with perfect foresight. If it had been possible to anticipate and legislate future custom through positive legislation, that intelligent design would have been contained in the earlier document, and the later assize would not have been necessary.

3.4. John (1199–1216): Irresponsible Absolutist

Archbishop Hubert Walter became John's first chancellor, serving until his death in 1205. During John's reign, jury inquests were increasingly used to facilitate the local administration in the counties and shires, and in 1213 John summoned four men from each shire to discuss affairs of the realm (Powicke 1929:229–230). Such involvement of knights and burgesses, rather than nobles, in government easily paved the way for representation in parliament. At the death of Archbishop Walter, the monks of Canterbury elected their subprior Reginald, defying John's wishes and the established procedure for electing bishops. Reginald departed for Rome to be confirmed by Pope Innocent III. John then persuaded the chapter to elect John de Gray, the bishop of Norwich. The competing archbishops-elect then appealed to the pope, who set aside both elections, and suggested to the electors Cardinal Stephen Langton, an English scholar at the University of Paris, whom the pope consecrated in 1207. John resisted accepting the new archbishop, so the pope placed England under an interdict from 1208 to 1214, which John made a pretext for the confiscation of all church revenues. Church officials and lay wardens administering church property were paid allowances, with the king receiving over £100,000.00 in five years (Powicke 1929:233–235). Innocent excommunicated the king in 1209. During the interdict, John consolidated his position in England, Ireland, Flanders, and France, and was able to field an overwhelming and well-supplied force against Philip Augustus of France in 1213. Nevertheless, John's expedition in France was a disaster as Philip scattered John's allies. John demanded a *scutage*, a levy on each knight's fee, on his return to England, which the nobles resisted.

Sensing the hopelessness of his position, John sought absolution from Archbishop Langton, which the archbishop made conditional on John promising to restore the laws of Edward the Confessor. John then embarked on a new expedition in France, bringing a substantial force, though many nobles refused either to accompany him, or provide financial support. John's excommunication was lifted in 1213, and the interdict in 1214. Cardinal Pandulf the legate negotiated a financial settlement compensating the Church for lost revenue. When John returned from France, he imposed a new *scutage* of three shillings on

each knight's fee, exempting those who had accompanied him to France. Resistance to this tax was so strong the exchecquer was only able to collect about one-fifth (Mitchell 1914:112–116, Powicke 1929:242).

3.4.1. Grant of Freedom of Election to the Church (1214). In this charter, John renounced earlier customs, including those formalized by his father in the Constitutions of Clarendon. Although the established custom of secular supervision of canonical elections was well known, the Church continued to assert its independence from the temporal authority (Stubbs 1913:282–284, Stephenson and Marcham 1937:114–115). Resistance to John's high taxation and misrule forced this concession.

3.4.2. Magna Carta (1215). With sixty three articles, the Great Charter justifies its popular name; in its original form it is nearly twice as long as any other medieval charter. Henry I's charter includes only fourteen articles and the Constitutions of Clarendon, governing relations between church and state, contains only sixteen.

Magna Carta's constitutional significance cannot be overstated. Stubbs (1913:291) says "the whole of the constitutional history of England is a commentary on this charter," and it is traditionally called "the first statue of the realm," in deference to both its age and importance. Magna Carta largely restates formal obligations John had undertaken on his accession and throughout his reign, including the oath taken before Archbishop Langton as a condition of his absolution in 1213 (Powicke 1929:246). Due process is a central feature of Maga Carta (1215):

> No freeman shall be captured or imprisoned or disseised [evicted] or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice (Articles 39 and 40, Stephenson and Marcham 1937:115–126).

It is important to realize that however vague and unenforceable such promises were at the time, more specific procedural promises, for example a promise to dismantle inland fish weirs, were perfectly enforceable, because it was very clear to everyone whether the king had kept his word in this regard. Magna Carta was often ignored in the middle ages and later, but remains the original source of due process. Over time, its guarantees were repeated and confirmed, and eventually respected.

Magna Carta purports to be a restoration of the liberties of the realm in the time of Edward the Confessor. This had been promised in the coronation charters of Henry I, Stephen, and Henry II. Archbishop Langton produced Henry I's charter for assemblies in London and Bury St. Edmonds in 1214 to demonstrate the traditional liberties of the realm John had repeatedly violated. Magna Carta's lineage from these earlier charters and the focus on preconquest English custom emphasizes the path-dependent nature of legal evolution; the charter aims at preserving and expanding the nobles' rights and revenue against recent encroachment by the king, and demonstrates unintended consequences of self-interested group action leading to expanded liberty. Magna Carta, as written, allowed clergy freedom of elections, a right explicitly removed by the Constitutions of Clarendon in 1164. Likewise,

the right to leave the kingdom at will was established. No taxes could be levied except in three explicit feudal cases: captivity of a subject's lord, knighting of a lord's eldest son, and marriage of a lord's eldest daughter, without the consent of a great council. This article is one of the sources of the House of Commons' and the House of Representatives' privilege of originating revenue bills. Like the Constitutions of Clarendon, the Great Charter was abrogated by the pope, but subsequently confirmed by Henry III, Edward I, Edward II, and Edward III.

The original issue of Magna Carta signed by John at Runnymede included provisions for a supervisory council of twenty-five barons. This scheme was never implemented, except that the rebelling barons did constitute such a committee themselves. In spite of the archbishop's efforts at mediation, the rebelling nobles would not renew their allegiance to John, and invited Prince Louis, son of Philip Augustus, to conquer England. Louis invaded in May 1216. Innocent III, John's feudal overlord, abrogated the charter, and his commissioners, the legate Cardinal Guala and the bishop of Winchester, suspended Archbishop Langton, who left England to attend the Fourth Lateran Council, though he retained his office until 1228. John died the year after Magna Carta was signed, and its first three reissues were by his son Henry III.

3.5. Henry III (1216–1272): To Set a Form Shapeless

3.5.1. First reissue of Magna Carta (1216). Magna Carta was reissued in the name of nine-year-old Henry III in the face of the rebellion in favor of Prince Louis. Of the original sixty-three articles, twenty-five were removed from the reissues. Some of these authorize the supervisory council of twenty-five barons, which remains an interesting precursor to parliamentary representation, though it was essentially aristocratic and antidemocratic. It would probably have been extremely unwieldy and inefficient in practice, and might therefore have unwittingly improved governmental administration through inertia. If positive legislation can be delayed, some of its deleterious effects can be offset and the extent positive legislation can disrupt entrepreneurial plans is limited.

Articles limiting the king's powers of taxation were conveniently omitted. During Henry's minority, the kingdom was actually ruled by a council of barons led by the earl of Pembroke William Marshal and the bishop of Winchester Peter des Roches. These were all loyalists who had nothing to do with the council of rebelling barons. Stubbs (1913:335) suggests the barons-regent anticipated a need for extraordinary levies due to the civil war, and did not want their hands tied. Some articles were omitted because they referred to righting wrongs of John's misrule, and once this was actually accomplished, there was no need to restate them, or remind the young king's subjects of his father's misdeeds. Several omitted articles relate to Scotland and Wales. These were removed because the reissue only concerns England. Several articles were shortened (Stubbs 1913:333–339, Stephenson and Marcham 1937:115–121, notes 1, 6, 8, 12, 13, 15, 23, 27, 28, 37).

The principal motivation for reissuing Magna Carta was to mollify the nation so additional tax revenues could be raised. Though the principles of the charter became ingrained through repetition, at this early stage a certain amount of hypocrisy remains apparent. Article forty-two of the reissued charter, an elastic clause, states omitted articles remain in force, but

this was clearly not the case. The civil war ended in a treaty by which Henry paid Louis a secret indemnity of 10,000 marks to compensate him for expenses of the invasion, and all rebels were pardoned conditional on swearing allegiance to Henry. This treaty required many loyalists to relinquish estates captured from the rebels, disaffecting those nobles who had just proved the most loyal (Jacob 1929:254–255).

3.5.2. Second Reissue of Magna Carta (1217?). Magna Carta was reissued after Louis abandoned his claim to the English throne and the warring parties signed a peace treaty. Articles relating to county court sessions and gifts of land to the Church were modified (Stubbs 1913:340–344, Stephenson and Marcham 1937:117–123, notes 11, 12, 17, 19, 26, 29, 34, 39, 41, 42, 45). Article forty-two from the first reissue was replaced with a briefer blanket statement that older terms remain in force. The second reissue includes a directive that adulturine castles be knocked down, similar to the provision in Henry II's coronation charter. The brief civil war was compared to the much longer unrest of Stephen.

3.5.3. Third Reissue of Magna Carta (1225). Magna Carta was reissued again when Henry III came of age. This became the official Magna Carta confirmed in subsequent reigns. The only substantive difference between this reissue and the second was a minor clarification of the privilege to avoid trial by combat (Stubbs 1913:349–351, Stephenson and Marcham 1937:121 n. 32). Two other changes had far-reaching political and constitutional significance: Henry's third reissue was made "freely and with good will" instead of on the advice of his council, as with the first and second, and, most significantly, a tax was exacted as the price of granting the charter. The revenue financed an expedition to France.

Henry III was remarkable for extravagant spending to support his political aspirations in Europe and patronize foreign visitors, especially papal legates. He was also an unprecedented patron of the arts. Records of this period are replete with exactions of diverse taxes: *carucage*, *scutage*, tallage, poll tax, *dona*, aid, *auxilium*, tenth, fifteenth (the price of the third reissue of Magna Carta), twentieth, thirtieth, fortieth, etc. (Mitchell 1914). Mathew Paris records in his *History*, an absolute refusal by parliament in response to a request for additional revenues in 1242 (Stubbs 1913:360).

3.5.4. The Provisions of Oxford (1258). Exorbitant taxation aimed at having Henry's youngest son Edmund named king of Sicily led to refusal and open revolt under the leadership of Simon de Montfort. Henry agreed to assume papal debts of over 130,000.00 marks in return for a payment of £100,000.00 to finance the Sicilian campaign. Henry paid the pope's debts, but agreed to forgo the £100,000.00 when Alexander IV succeeded Innocent IV (Jacob 1929:270). Faced with fiscal insolvency, Henry agreed to a governing committee (Stubbs 1913:369–394, Stephenson and Marcham 1937:143–146), but began to chafe under the arrangement almost immediately. The Provisions set up a committee of twenty-four, twelve appointed by the king, twelve elected by the barons. This contrasted with the unrealized Magna Carta terms of 1215, where all twenty-five barons would have been from the revolting party.

The pope granted Henry absolution from his oath to observe the Provisions in 1261, but the document was reissued in 1263. Louis IX of France was named arbitrator between the two parties, but when he found in favor of Henry in 1264, the barons revolted again

and captured Henry and his oldest son Edward. Simon de Montfort ruled England from 1264–1265, having the king appear in parliament in 1264 with a council of nine nominated by three electors chosen by the barons. Prince Edward escaped, raised an army, and defeated and killed Simon in 1265. Too much evidence for spontaneous order shoud not be read into the Provisions because they never formed a general precedent. However, it is interesting to compare the council of twenty-five barons envisioned in the original Magna Carta, and the actual governing council of twenty-four barons-regent who governed in the king's name during Henry III's minority, with the committee proposed in the Provisions.

3.5.5. The Dictum of Kenilworth (1266). The leaderless baronial party, their estates confiscated, was besieged by the king. This document, negotiated by the legate Cardinal Ottobono, was their instrument of surrender ending the disorder. The rebels were permitted to pay large fines in lieu of confiscation, in accordance with their degree of guilt, judicially determined (Jacob 1929:280–282). Nevertheless the king was forced to accept significant limitations on his authority and to promise to observe Magna Carta (Stubbs 1913:407–411, Stephenson and Marcham 1937:149–150). Judicial eyres were conducted to ensure compliance with the Dictum, in many cases uncovering legitimate grievances of the knights and lesser gentry. There are two important features of constitutional significance in the Dictum. First, the fines were not to be set solely at the discretion of the king or the royal party, but determined through judicial inquests. Second, the king again acknowledged the importance of Magna Carta, this time without managing new taxes, though he did receive fines from the rebels.

3.6. Edward I (1272–1307) Pragmatic Warrior

One of Edward's first official acts was to send out commissioners to every county with a list of forty questions to make jury inquests regarding royal privileges, revenues, and possessions, the value, product, and extent of private landholdings, the quality of judicial administration, and carelessness or cheating by public officials, "even servants of the king himself" (Johnstone 1932:394). These inquests resulted in the First Statute of Westminster (1275), which included a restatement of Magna Carta's prohibition against excessive fines, and the Statute of Winchester (1285). Confirming, extending, and possibly to some extent modernizing these venerable documents, contributed to the process of developing a spontaneously evolving social and legal order.

In 1279, the new archbishop of Canturbury, John Pecham, a Franciscan nominated by the pope, convened a provincial council in Reading, which published eleven articles or constitutions, including a process to publicly announce sentences of excommunication against anyone using a royal writ of prohibition to remove a lawsuit or criminal case from a canon law court into a secular court, and against anyone who violated Magna Carta. Magna Carta was to be prominently displayed in every cathedral and collegiate church, and the copy was to be replaced with a freshly drawn one every year. It becomes obvious Magna Carta had captured the imagination of the clergy by this time, and was accepted as an ancient and venerable statute. The resolution to suppress writs of prohibition with excommunication is clearly motivated by rent-seeking in canon-law courts. The king made the archbishop

renounce the measure against writs of prohibition and remove the copies of Magna Carta from the churches.

3.6.1. The Statute of Mortmain (1279). This statute was an added part of the king's counteroffensive (Johnstone 1932:398–399), prohibiting a fraudulent practice where a property owner would give land to the Church, but then hold it as a vassal of the Church, thus avoiding taxes and feudal service (Stubbs 1913:450–452, Stephenson and Marcham 1937:169–170). A second ecclesiastic council held at Lambeth in 1281 renewed the eleven articles from the earlier council. The king had anticipated trouble, and issued writs ordering each participant not to hold counsel regarding the rights of the king or the kingdom. The only concession to the king was that copies of Magna Carta were not to be posted, but the clergy were to impress on their flocks the importance of the eleven articles, reminding them that violators of the Charter would be excommunicated and should not be followed by obedient Christians. The archbishop wrote the king a letter which can be interpreted equally well as apology or defiance. Unlike Henry II, Edward responded largely by ignoring the council. Writs of prohibition continued to be issued.

3.6.2. The Second Statute of Westminster (1285). Chapter 24 of the Second Statute of Westminster, also known as *De donis conditionalibus* ("of conditional gifts"), instructs royal chancery clerks to use their own initiative in preparing judicial writs in new and unforeseen cases. They can do this on their own authority when the clerks are substantially in agreement about how to proceed, but even when no consensus is apparent, they are to refer the case to the next parliament, which is to produce a new form of writ to provide a remedy (Record Commission 1810 I:71, Stubbs 1913:462–469, Adams and Stephens 1921:76, Stephenson and Marcham 1937:173–174, Hogue 1966:21). To some extent, the regularization of writs under Henry II had held back legal evolution. Glanville (1187–1189?) gave thirty-nine forms of writ, but new forms had proliferated throughout the reign of Henry III. There were fifty-eight early in Henry's reign, and this had grown to one hundred and twenty-one before the Provisions of Oxford (Jacob 1929:272).

War broke out between France and England from 1294–1297, which was settled by treaty in 1303. The king had his sheriffs seize all wool and leather to finance the war. The materiel was to be returned if merchants paid a customs duty of forty shillings, otherwise the crown kept the commodities. In 1275, a customs duty on these commodities had been granted by Edward's first parliament of a half mark on the sack, approximately six shillings eight pence. Suddenly the merchants considered the old lower exaction "ancient" and venerable, though it had been hotly opposed when first enacted (Johnstone 1932:404). The clergy were similarly shorn, forced to contribute one-half their revenues. Parliament granted taxes on moveable personal property: a tenth from the counties and a sixth from the cities and towns, the highest tax collected during the reign (Mitchell 1951:230). In 1295 parliament reluctantly agreed to a tax on movables of one-seventh in cities and towns and one-eleventh in the country. The clergy agreed to pay a tenth for the first year, and a second tenth the next year if the war lasted that long.

In 1296 Pope Boniface VIII, in the bull *Clericis laicos*, forbade rulers to demand, or clergy to pay, extraordinary taxes not sanctioned by long-standing custom, without papal permission, precisely the principle of Magna Carta. When the clergy balked at contributing

their promised second tenth, Edward confiscated their secular fiefs. The clergy threatened excommunication. This conflict was not resolved until the pope rescinded the requirement with the bull *Etsi de statu* in 1297.

3.6.3. De Tallagio non Concedendo (1297). This document, "of not allowing tallage," was long considered to be a statute, and is referred to that way in the preamble to the Petition of Right (1628), where it is cited alongside Magna Carta. It requires the king to convene a common council to consent to any but traditionally sanctioned taxation. 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. The barons acknowledged they owed the king military service, even overseas in Flanders, but complained 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. If so, it formed the basis for the Confirmation of the Charters. The document 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.

3.6.4. The Confirmation of the Charters (1297). Edward confirmed Magna Carta to justify an extraordinary tax levy necessitated by a 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 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. Magna Carta was to be widely disseminated and kept in every county, like Henry I's coronation charter. As Archbishop Pecham wanted back in 1279, 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 discontinued (Stubbs 1913:482–493, Stephenson and Marcham 1937:164–165). The Confirmation was reissued in 1301 with some qualifying language removed (Johnstone 1932:408). The king may have attempted to moderate some of the guarantees of the Confirmation in his French document.

Parliament met fairly regularly starting in the reign of Edward I. Most legislation was not really approved by parliament but merely recorded accepted custom, which the nation was deemed to have approved already. Parliament evolved from primitive folk assemblies predating Christianity. The greatest impetus for the growth of parliamentary influence was the government's need for tax revenue. Participation of the nobles and clergy was generally required to collect a special tax, if not their approval. Kings sometimes levied taxes or seized property in emergencies like invasions or revolts, but generally the need to convene a great council to approve new taxes was as much a practical issue as a legal one.

4. 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 1100–1307. The evolution of spontaneous order has been traced from Saxon custom and Henry I's Charter of Liberties, through Henry II's reform legislation aimed at restoring those customs after the anarchy of Stephen, through Magna Carta, which also aimed at restoration of the customs of Henry I's charter, and subsequent reissues of Magna Carta, culminating with the Confirmation of the Charters by Edward I in 1297. In addition to illustrating Hayek through English constitutional history, this paper offers insight into Hayek by examining actual evolutionary processes through their most tangible assets, written charters and associated documents, which dominate English constitutional history before the emergence of Parliament as a positive law-making body.

Hayek's account of the evolution of democratic political and legal institutions responding to historical influences without the intelligent design of a 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 forsee, and what, without the concurring humor and disposition of his age, no authority could enable an individual to execute" (Ferguson 1767:122).

Because spontaneously emergent institutions change more slowly over time, they better facilitate the formation of entrepreneurial plans, while minimizing the disappointment of entrepreneurial expectations. 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 spontaneous order of the market and the spontaneous legal and political order both respond to the needs of many individual actors, unlike a designed 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, spontaneously evolved social order also coordinates the actions of individuals in society. It does this by providing a basis for forming expectations, and if the institutions of social order are primarily procedural and value-neutral, the spontaneous order 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 spontaneous order 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.

A set of proposed stylized facts of spontaneous social evolution were presented and used to interpret various written enactments and constitutional developments. Contrasting stylized facts of non-spontaneous order were also proposed. 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. In other kinds of legal systems, especially those with legislative, quasi-legislative, or authoritarian character, it is necessary to be able to trace the evolutionary process to identify spontaneous order.

Acknowledgments

Support from the American Institute for Economic Research in the form of a Visiting Research Fellowship is gratefully acknowledged. Thanks are also due to Scott Beaulier, Bruce L. Benson, Bridget Butkevich, John V. Duca, Horst Feldmann, Stephen B. Jarrell, Elias L. Khalil, Gary A. Lombardo, C. Edgar Murray, Benjamin Powell, Edward Stringham, Walker F. Todd, John Wood, and an anonymous referee of the *Review of Austrian Economics*, who commented on earlier versions of this paper. I remain responsible for errors.

Note

1. Benson (2002:234–236) cites a similar phenomenon as evidence for spontaneous order. When market participants respond to regulation in a manner unforeseen by the legislator, the legislator responds by imposing successive rounds of new regulation, exceeding the bounds of the original design. In Benson's view the successive accretion of new layers of regulation is a spontaneous order, partly because it was not, and could not have been, designed as a whole by the legislator and promulgated in one act, and partly because it is (at least indirectly) an unintended consequence of the initial regulation. The alternative interpretation proposed here is that each item of legislation is primarily an instrument of design order, even though over time they may be coordinated by little more than the legislator's evolving intent, but the unforeseen responses of market participants constitute spontaneous order.

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