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BEYOND HAYEKIAN EQUALITY

By Stefanie Haeffele, and Virgil Henry Storr*

Abstract: *Friedrich A. Hayek argues that "equality of the general rules of law and conduct" is the only kind of equality compatible with liberty and, moreover, that attempting to pursue equality along any other dimension is likely to destroy liberty. For Hayek, then, as a social philosopher and political economist who was principally concerned with understanding and promoting liberal order, the question "What kind of equality?" has a straightforward answer. Equality before the law, perhaps equality of opportunity in a procedural sense, is the equality that we should pursue, not material equality and certainly not equality of outcomes. One wonders, though, whether Hayek dismisses too quickly the more substantive forms of equality and, more importantly, whether we can achieve the liberal society that Hayek envisions without concerning ourselves with more than just the presence or absence of equality of the general rules of law and conduct. This essay will explore, criticize, and expand upon the way that Hayek makes use of equality in his conception of a free society. Specifically, we argue that Hayek may need a more substantive conception of equality than he is willing to deploy in order to arrive at the liberal society he hopes to bring about.*

KEY WORDS: equality, freedom, Hayek, governance, rules

I. Introduction

Equality and the consequences of inequality are at the forefront of many current social and public-policy debates. For example, institutional racism is said to explain a range of socioeconomic disparities, ranging from the disproportionate impact of the war on drugs and the criminal justice system in general on certain communities to systematic differences in access to housing and health care. Similarly, the political system appears to be rigged. It seems that a small number of elites with inherited wealth and political connections and power not only can craft policy, but also may navigate the political and judicial systems to their advantage. Furthermore, crises such as natural disasters and the recent COVID-19 pandemic disproportionately affect poor, isolated, or otherwise vulnerable individuals and communities. These examples highlight that there are many forms of equality that might matter. The power to avoid legal consequences and the persistent discrimination against certain groups undermine equality before the law, policies that disproportionately impact certain groups over others undermine

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equality of opportunity, and vast differences in wealth and health undermine equality of outcomes.

Like the many different forms of equality, advocates of equality also differ, sometimes widely, on what they mean by equality, the dimensions along which they believe (certain) people should be equal, who they believe should be treated equally, and what institutions are the root cause of inequality. Some egalitarians, for instance, seek equality of outcomes through redistribution of wealth or an overhaul of our economic and political systems toward more communitarian or socialist orders.[1]

One scholar who has been critical of egalitarianism but who has also taken this line of inquiry seriously is Friedrich A. Hayek.[2] A Nobel Prize-winning economist, Hayek was arguably the central proponent of classical liberalism in the twentieth century. His writings on the institutions necessary to promote human flourishing continue to inform and inspire modern advocates of that perspective. For Hayek, there are significant limitations on the knowledge that human beings can command and utilize to control the world around them. Instead, we must rely on institutional arrangements that best utilize the dispersed, contextual, and tacit knowledge across society in ways that promote exchange, innovation, and prosperity. Peter Boettke explains that, according to Hayek, the market order—buttressed by a legal order that upholds property rights, contracts, and exchange as well as punishes theft, coercion, and harm—is *the* institutional arrangement that best funnels individual plans and purposes toward social progress.[3] Through his research, Hayek explores the economic, political, social, and philosophical aspects of liberalism as well as the theoretical and practical implications of those ideas in order to develop an approach to liberalism that highlights the value of the market order while also articulating the (limited) role of the state in preserving that order.[4] This approach is procedural in attempting to outline the conditions—including the rules and notions of justice—that best lead to progress.[5]

Embedded in this approach is a type of equality that Sandra Peart and David Levy call "analytical egalitarianism," which holds that all people are

[1] See, for instance, Christine Sypnowich, "A New Approach to Equality," in *Political Neutrality: A Re-Evaluation*, ed. Roberto Merrill and Daniel Weinstock (London: Palgrave Macmillan, 2014), 178–209; Christine Sypnowich, *Equality Renewed: Justice, Flourishing, and the Egalitarian Ideal* (New York: Routledge, 2017). For an assessment of the evolving notion of egalitarianism, see Richard W. Miller, "Too Much Inequality," *Social Philosophy & Policy* 19, no. 1 (2002): 275–313.

[2] Peter Boettke has called Hayek's approach to examining the institutions that best bring about a liberal order "epistemic institutionalism." Peter J. Boettke, *F. A. Hayek: Economics, Political Economy, and Social Philosophy* (London: Palgrave Macmillan, 2019). See also John Gray, *Hayek on Liberty*, 3rd ed. (London: Routledge, 1998).

[3] Boettke, *F. A. Hayek*.

[4] See Chandran Kukathas, *Hayek and Modern Liberalism* (Oxford: Clarendon Press, 1989).

[5] Gray, *Hayek on Liberty*.

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equal in moral standing and capacity to interact in society.[6] Stated another way, Hayek's approach assumes that no individual or group is inferior to others.[7] Steve Horwitz, in discussing Hayek's liberalism, asserts that this sort of equality underscores the liberty of individuals to pursue their own plans and that preserving liberty requires preserving equality before the law.[8] Indeed, Hayek argues that equality of the general rules of law and conduct, which allows individuals to interact within their own spheres of freedom, is the only kind of equality compatible with liberty and, moreover, that attempting to pursue equality along any other dimension is likely to destroy liberty.[9] For Hayek, then, as a social philosopher and political economist who was principally concerned with understanding and promoting liberal order, the question "What kind of equality?" has a fairly straightforward answer. Equality before the law, perhaps equality of opportunity in a procedural sense, is the equality that we should pursue, not material equality and certainly not equality of outcomes.

One wonders, though, whether Hayek dismisses too quickly the more substantive forms of equality and, more importantly, whether we can achieve the liberal society that Hayek envisions without concerning ourselves with more than just the presence or absence of equality of the general rules of law and conduct. Shouldn't, for instance, the size and scope of the sphere of freedom that we are being given equal access to matter? Doesn't it matter who is considered a full member of society, and thus deserving of equal access and equal protection? Don't systematically unequal outcomes suggest something about whether there really is equality before the law or whether the law is biased in some way? Answering these questions seems critical to determining the kind of equality that liberty may require.

This essay will explore, criticize, and expand upon the way that Hayek makes use of equality in his conception of a free society. Specifically, we argue that Hayek may need a more substantive conception of equality than he is willing to deploy in order to arrive at the liberal society he hopes to bring about. First, while Hayek argues that citizens need their own private

[6] Sandra J. Peart and David M. Levy, *The "Vanity of the Philosopher": From Equality to Hierarchy in Post-Classical Economics* (Ann Arbor, MI: University of Michigan Press, 2005). This approach, especially in regard to equality before the law, is similar to the notion of political neutrality.

[7] James Buchanan also explores the distinction between viewing society as made of "natural equals" or a "natural hierarchy"; he holds that until these conflicting approaches are reconciled, there cannot be a sort of universal justice agreed upon and enforced across countries. James M. Buchanan, "Equality, Hierarchy, and Global Justice," *Social Philosophy & Policy* 23, no. 1 (2006): 255–65.

[8] Steven Horwitz, *Hayek's Modern Family: Classical Liberalism and the Evolution of Social Institutions* (London: Palgrave Macmillan, 2015), 246–47.

[9] Friedrich A. Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, (1978), 85. There is a sense in which liberty, equality, and justice are all paths to the same ends; all offer escape from the same fate. It is clear that human dignity and flourishing are not possible in the absence of some measure of all three. Hayek can be understood as arguing that liberty is foundational, that above all no one can or should feel empowered to subjugate others in pursuit of their ends, however noble those ends. We are grateful to David Schmidtz for highlighting this implication of Hayek's position.

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spheres of freedom, the size and scope of those spheres of freedom matters a great deal more than Hayek admits. Second, Hayek does not pay enough attention to the problem of who receives and who does not receive a respected and protected private sphere of freedom. Third, Hayek largely ignores the possibility that systematically unequal outcomes might in fact alert us to a problem with the rules and that reforms may be needed to remedy those inequities. Pushing Hayek along these lines has implications for how to assess, from a Hayekian perspective, current calls for social justice and equality. Doing so also may bridge the gap between egalitarians and classical liberals when assessing current challenges in ways that both acknowledge inequality and consider the need for workable reforms that promote human flourishing.[10]

The essay proceeds as follows. Section II delves into Hayek's argument about equality, equal opportunity, and social justice in his *The Constitution of Liberty* and *Law, Legislation, and Liberty*.[11] In Section III, we then argue that being concerned with equality beyond confirming the existence of equality before the law is not only consistent with liberty, but also might be important for liberty as Hayek understands it. We offer concluding remarks in Section IV.

II. According to Hayek, What Kind of Equality Does Liberty Require?

In *The Constitution of Liberty*, Hayek sets out his vision for a liberal society where the "condition of men in which coercion of some by others is reduced as much as is possible in society."[12] For Hayek, such a free society unleashes the creative and progressive capabilities of citizens. When people are free to pursue their interests, innovate, and exchange with one another, knowledge dispersed across society can be utilized and expanded upon in ways that increase wealth and improve well-being. The nature, trajectory, and pace of this sort of progress cannot be known ex ante. As Hayek notes, "If we are to advance, we must leave room for a continuous revision of our present conceptions and ideals which will be necessitated by further experience."[13] Progress requires learning and learning requires "leav[ing] room for the

[10] For a discussion on the role of equal respect and its connection to equal shares as another way to bridge this gap, see David Schmidtz, "Equal Respect and Equal Shares," *Social Philosophy & Policy* 19, no. 1 (2002): 244–74.

[11] Hayek, *The Constitution of Liberty*; Friedrich A. Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, Volume 2: The Mirage of Social Justice* (Chicago, IL: The University of Chicago Press, 1978).

[12] Hayek, *The Constitution of Liberty*, 11. Also see a discussion on this definition in Kukathas, *Hayek and Modern Liberalism*, 142. For correspondence about Hayek's articulation of coercion and its relationship to freedom, see Ronald Hamowy, "Hayek's Concept of Freedom: A Critique," *New Individualist Review* 1, no. 1 (1961): 28–30; and Friedrich A. Hayek, "Freedom and Coercion: Some Comments and Mr. Hamowy's Criticism," *New Individualist Review* 1, no. 2 (1961): 28–32.

[13] Hayek, *The Constitution of Liberty*, 23.

unforeseeable and unpredictable."[14] According to Hayek, "it is one of the characteristics of a free society that men's goals are open, that new ends of conscious effort can spring up, first with a few individuals, to become in time the ends of most."[15]

This "room" to act, innovate, and change can be conceived of as each individual's private sphere of freedom, in which they can choose how, where, when, and with whom to live and interact. Hayek argues: "What distinguishes a free from an unfree society is that in the former each individual has a recognized private sphere clearly distinct from the public sphere, and the private individual cannot be ordered about but is expected to obey only the rules which are equally applicable to all."[16] For Hayek, then, the existence of a private sphere in which individuals can fulfill their preferences, pursue their projects, utilize their skills, and contribute (or fail to contribute) to society, so long as they obey rules that are "equally applicable to all," is *the* distinguishing feature of a free society.[17]

It is worth unpacking what Hayek means by equality before the law. "That the law should apply equally to all," Hayek explains, "means more than that it should be general."[18] As Hayek acknowledges, even general laws (that is, laws that do not refer to particular individuals, but only to formal characteristics of people) could be crafted in such a way that one class or even one individual is singled out. Still, insisting on generality, by reducing discretion, lessens as much as possible the concern that the law will advantage or disadvantage one class or individual.[19] Indeed, underlying equality before the law is the notion that individuals should be treated as equals in capability and moral standing (also known as analytical egalitarianism).[20] Hayek suggests three additional safeguards against unequal laws: (1) laws should be abstract, referring to future, unknown situations and people; (2) laws should be codified, understandable, known, and predictable; and (3) the rulers should not be exempt from the laws.[21] Hayek was mostly silent on the content of these rules beyond indicating that they should punish theft and other forms of harm as well as protect property rights and contracts, thus enabling individuals to exchange and otherwise live peaceably with one another.[22]

[14] Hayek, *The Constitution of Liberty*, 29.
[15] Hayek, *The Constitution of Liberty*, 35.
[16] Hayek, *The Constitution of Liberty*, 207–8.
[17] For a critique of Hayek's emphasis on general rules applied equally to all as the best arrangement for limiting government encroachment on freedom, see Ronald Hamowy, "Law and the Liberal Society: F. A. Hayek's Constitution of Liberty," *Journal of Libertarian Studies* 2, no. 4 (1978): 287–97.
[18] Hayek, *The Constitution of Liberty*, 209.
[19] Hayek, "Freedom and Coercion."
[20] Horwitz, *Hayek's Modern Family*.
[21] See Kukathas, *Hayek and Modern Liberalism*, 155.
[22] There is some debate about how expansive and static Hayek believes these rules should be. See Kukathas, *Hayek and Modern Liberalism*. Hayek also limits the rule of law to constricting

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Hayek argues that a free society is not about ensuring "equal starts" and equal outcomes, but that "all should be allowed to try."[23] Such freedom, he explains, is necessary for progress and must be granted because of the limited knowledge that any one individual holds as well as the inability of individuals to direct their peers in ways that consistently result in social progress. Once individuals are free to choose, their various efforts, skills, and capabilities will, Hayek concedes, likely lead to inequality of wealth. Individuals who contribute positively to society will likely receive profits, esteem, and other rewards; those who steal and swindle, however, will likely receive monetary losses, damages to their reputation, and other punishments. This feedback enables those individuals and others in society to learn from their successes and failures.

However, the successes and failures of free association are not always based on merit.[24] Sometimes, rewards and punishments have more to do with luck than with desert. While individuals may feel wronged by such outcomes, in Hayek's view, there is likely no one to blame for the inequality of results when even praiseworthy efforts do not necessarily lead to positive outcomes. Hayek candidly warns that, "If really all unfulfilled desires have a claim on the community, individual responsibility is at an end."[25] In other words, focusing on equality of outcomes would undermine a free society.

According to Hayek, there are strictures we must accept if we are to believe in liberty. "Believing in freedom," he explains, "means that we do not regard ourselves as the ultimate judges of another person's values, that we do not feel entitled to prevent him from pursuing ends which we disapprove so long as he does not infringe the equally protected sphere of others."[26] Furthermore, we often lack the knowledge to be able to determine which actions will be successful ex ante, especially at a collective scale; attempting to do so through precautionary prohibitions may stymie innovation and infringe upon individuals' private sphere of freedom.[27] Instead, believing in freedom means giving everyone the space to act and then punishing or seeking redress for any harms that may result.

To further explore this point on responsibility and justice, Hayek, in *Law, Legislation, and Liberty*, compares participating in a free society, and particularly engaging in the market process, to playing a game.[28] As long as the players in the game follow the rules and do not cheat, the results of the game cannot be deemed unjust. This is true regardless of whether the winning

coercive actions by government, making room for other functions, such as foreign policy; see Hayek, *The Constitution of Liberty*, 206.

[23] Hayek, *The Constitution of Liberty*, 92.

[24] See David Schmidtz, *Elements of Justice* (New York: Cambridge University Press, 2006).

[25] Hayek, *The Constitution of Liberty*, 93.

[26] Hayek, *The Constitution of Liberty*, 79.

[27] For Hayek's anti-constructivist approach, see Gray, *Hayek on Liberty*; Kukathas, *Hayek and Modern Liberalism*; Boettke, *F. A. Hayek.*

[28] Hayek, *Law, Legislation, and Liberty, Vol. 2*, 77.

players or team are naturally talented, diligently trained, or just lucky. Likewise, the results still stand even if the losing team tried their best, were unlucky, or misinterpreted the rules of the game. These outcomes must stand because of the feedback they give to the other players in "the game" of the market. These signals, Hayek argues, are "not so much to reward people for what they *have* done as to tell them what in their own as well as in general interest they *ought* to do."[29] In other words, there are important lessons and signals about being a graceful loser, working hard and following the rules, and accepting the results of a well-played game. If a player cheats or otherwise breaks the rules of the game, however, they have been unjust and can be reprimanded accordingly.

There are at least two other reasons why Hayek thinks it is important not to aim for equality after the game has ended, even if others were found to have cheated. First, any efforts to redistribute rewards after a well-played but frustrating game will likely take place through government intervention. Such efforts will, then, necessarily expand the scope of government and enlist politicians or bureaucrats to judge and decide on the outcomes. This will lead to rent-seeking behavior (attempts to gain political favor), resulting in unequal treatment of individuals in society and ultimately undermining liberty.[30] Second, even if the post-game analysis reveals problems with fairness and justice, it can be difficult to rectify past wrongs in a way that also does not undermine liberty. Hayek concludes that "[i]t will on the whole seem preferable to accept the given position as due to accident and simply from the present onward refrain from any measures aiming at benefiting particular individuals or groups."[31] Hayek is aware that some may be systematically denied equal treatment under the law. "There are, no doubt, instances where the past development of law has introduced a bias in favour or to the disadvantage of particular groups; and such provisions ought to clearly be corrected," Hayek posits, but rectifying all the past injustices may do more to erode freedoms and progress.[32] For Hayek, focusing on fixing the issue for the future is more valuable than remedying a past injustice.

To put this in the context of the real world, consider the Olympic Russian doping scandal where it was revealed that Russian athletes were given steroids and other performance-enhancing drugs, received manipulated medical records to hide the drug use, and thus unfairly won medals in past Olympic Games. As a result, Russia was banned from competing in the

[29] Hayek, *Law, Legislation, and Liberty, Vol. 2*, 71–72 (emphases in original).
[30] Hayek, *Law, Legislation, and Liberty, Vol. 2*, 131.
[31] Hayek, *Law, Legislation, and Liberty, Vol. 2*, 131.
[32] Hayek, *Law, Legislation, and Liberty, Vol. 2*, 131. In other words, Hayek argues for correcting injustices when they are identified and very recent, but for refraining from righting past wrongs that resulted from unjust institutions or circumstances that occurred less recently. If, for instance, we learn that in a previous game a particular team rigged the system and unfairly won, we could reassign those wins or we could focus on ensuring that such an injustice does not happen in the future.

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Olympics for two years—though Russian athletes could still compete, their wins did not count toward their country's record—and some athletes were stripped of their previously obtained gold medals.[33] However, in this instance, adjustments were not made for those who received silver or bronze medals or no medals at all. Similarly, the second-place finishers in the Tours de France that Lance Armstrong won with the aid of performance-enhancing drugs over the past several decades have not been awarded those victories.[34] The same governing body, however, awarded the 2011 Tour of Spain (Vuelta a España) to Chris Froome in 2019, after stripping the title from Juan José Cobo for violating doping rules, because they identified the issue more quickly and were more confident that Froome did not violate the rules.[35] In many ways, the International Olympic Committee and the Union Cycliste International seem to be operating in line with Hayek's perspective by focusing on future ramifications rather than redistributing the results of past games, unless the games were quite recent and the path to resolving the issues is clear.

The equality that Hayek regards as necessary for a free society includes equality before the law, which consists of a set of rules that protects property rights and contracts, enabling individuals to act within their own private spheres of freedom to pursue their purposes and plans and to be rewarded or punished for their action (and inaction). The equality that Hayek upholds does not, however, support individuals being given the same opportunities—only that they have the space to pursue opportunities—nor guarantee equal outcomes, whether based on merit, luck, or redistribution. Furthermore, he rejects the notion of social injustices, although he does believe that individual injustices should be rectified. For Hayek, these types of equality promote innovation, learning, and social progress in a free society.

III. Doesn't Liberty Require More Equality than Hayek Imagines?

While Hayek's exploration into the ideas of liberty, equality, and responsibility is a thorough and nuanced discussion of the benefits and challenges of a free society, his approach has tensions. For instance, Chandran

[33] Tariq Panja and Rebecca R. Ruiz, "Russian Biathlete Loses His Medals, His Country's Latest Defeat," *The New York Times*, October 27, 2020, https://www.nytimes.com/2020/10/27/sports/olympics/russian-doping-biathlon-sochi.html; Laurel Wamsley and Merrit Kennedy, "Russia Gets Its Doping Ban Reduced But Will Miss Next 2 Olympics," *National Public Radio*, December 17, 2020, https://www.npr.org/2020/12/17/947504052/russia-suspended-from-next-2-olympic-games-over-anti-doping-violations.

[34] Though Armstrong was still stripped of his titles and medals. See William Fotheringham, "Timeline: Lance Armstrong's Journey from Deity to Disgrace," *The Guardian*, March 9, 2015, https://www.theguardian.com/sport/2015/mar/09/lance-armstrong-cycling-doping-scandal.

[35] Richard Windsor, "Chris Froome Officially Crowned 2011 Vuelta a España Winner as Juan José Cobo Ban Confirmed," *Cycling Weekly*, July 18, 2019, https://www.cyclingweekly.com/news/racing/vuelta-a-espana/chris-froome-officially-crowned-2011-vuelta-espana-winner-juan-jose-cobo-suspension-confirmed-431647.

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Kukathas argues that two of Hayek's influences, David Hume and Immanuel Kant, offer conflicting approaches that ultimately undermine Hayek's project.[36] Hume's emphasis on spontaneous orders and epistemic limitations counters Kant's emphasis on rational constructions of governance, which stymies Hayek's attempt to outline the necessary content of government and to advocate particular policies while trying to place limits on controlling society. John Gray, in contrast, describes Hayekian liberalism as flawed because it suffers from rationalism.[37] Yet other scholars critique Hayek by noting inconsistencies in his view of coercion in markets and politics.[38] These criticisms have not gone unanswered. Boettke, for instance, views what Kukathas sees as discussion about constructivist policy as Hayek's examination of the particular institutions and rules that impact society.[39] Horwitz, for his part, sees Hayek's view of society as more evolutionary and constantly adapting for social change than as reflecting hesitance about particular reforms or the notion of social justice.[40]

Hayek's aversion to social justice has inspired much response.[41] Some scholars examine the connections and divergences between Hayek and John Rawls on acknowledging that social injustices can come about from the spontaneous order of the market as well as political and social structural issues.[42] Others point to Hayek's advancing of a minimum social safety-net as conceding that larger social inequities occur.[43] And yet others discuss Hayek's narrow view of justice as abiding by the rules of just conduct as missing how modern views of social justice could remedy oppression.[44] While some scholars dismiss Hayek's analysis of social justice as irrelevant, others continue to grapple with the implications of his view to see when and how injustices can be remedied within a Hayekian framework.

Such discussions not only critique but also expand Hayekian notions of liberty, the rule of law, and justice by examining ideal institutional arrangements, comparing them to the real world, and identifying pragmatic reforms. We, similarly, aim to critique and expand Hayek's notion of equality. Specifically, we argue that Hayek's treatment of equality in a free society

[36] Kukathas, *Hayek and Modern Liberalism*, chap. 1.
[37] Gray, *Hayek on Liberty*, chaps. 1, 6.
[38] See Hamowy, "Hayek's Concept of Freedom"; Andrew Gamble, "Hayek and Liberty," *Critical Review: A Journal of Politics and Society* 25, nos. 3–4 (2013): 342–63.
[39] Boettke, *F. A. Hayek*.
[40] Horwitz, *Hayek's Modern Family*, chap. 1.
[41] See, e.g., David Johnston, "Hayek's Attack on Social Justice," *Critical Review: A Journal of Politics and Society* 11, no. 1 (1997): 81–100; Steven Lukes, "Social Justice: The Hayekian Challenge," *Critical Review: A Journal of Politics and Society* 11, no. 1 (1997): 65–80.
[42] See Andrew Lister, "The 'Mirage' of Social Justice: Hayek Against (and for) Rawls," *Critical Review: A Journal of Politics and Society* 25, nos. 3–4 (2013): 409–44; Jacob T. Levy, "Social Injustice and Spontaneous Orders," *The Independent Review* 24, no. 1 (2019): 49–62. Also see Johnston, "Hayek's Attack on Social Justice," on the market producing oppression.
[43] See Adam James Tebble, "Hayek and Social Justice: A Critique," *Critical Review of International Social and Political Philosophy* 12, no. 4 (2009): 581–604; Levy, "Social Injustice and Spontaneous Orders."
[44] Levy, "Social Injustice and Spontaneous Orders."

has three challenges that need to be addressed: (1) the size and scope of individual private spheres of freedom matters; (2) who receives (and who is excluded from) access to society matters; and (3) if outcomes are systematically unequal, then the rules of the game may be unjust.

A. Expanding private spheres of freedom

Hayek contends that the benefits from a free society arise because individuals are given a private sphere of freedom in which to pursue their interests, utilize their skills and abilities, and experiment. For Hayek, it is "the unforeseeable and unpredictable" possibility of the future that requires the freedom to experiment, make mistakes, and, importantly, learn.[45] This sphere is thus a space for expression, messing up, succeeding, and learning how to live better together. Recognizing the need for such a sphere requires limiting coercion—both by other individuals and the state—through protecting property rights and contracts. These general rules help ensure that individuals can "shape the content of [their] protected sphere" and allow for change and development.[46] Furthermore, these protections are not meant to "protect people against all actions by others that may be harmful to them but only to keep certain of the data of their actions from the control of others."[47]

For Hayek, therefore, one's private sphere need not include owning many things, if we can access through rent or purchase the resources and services that we need to pursue our goals and those resources are not held or controlled by one person or group of people. Competition helps ensure that no individual or group of people has undue influence over our private spheres or our ability to determine and pursue our own projects within our private spheres. One may ask, though, whether some minimum level of access to resources—such as land or money—is needed to be able to take full advantage of our private spheres. Is there some minimum size that our private spheres need to be for our freedom within them to be worthwhile? Hayek may be sensitive to this point, as he frequently advocates a minimum social safety-net—something possibly akin to universal basic income—but he does not address it directly in terms of private spheres of freedom.

Even if there is some minimum size, how individuals utilize their private sphere is varied and does not always result in success. Hayek notes: "As a society and its complexity extend, the rewards a man can hope to earn come to depend more and more, not on the skill and capacity he may possess, but on their being put to the right use."[48] He continues: "There is perhaps no more poignant grief than that arising from a sense of how useful one might

[45] Hayek, *The Constitution of Liberty*, 29.
[46] Hayek, *The Constitution of Liberty*, 139–40.
[47] Hayek, *The Constitution of Liberty*, 145.
[48] Hayek, *The Constitution of Liberty*, 80.

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have been to one's fellow men and of one's gifts having been wasted."[49] In other words, having a private sphere in which to pursue one's interests does not guarantee that individuals will contribute positively to society or be rewarded for their efforts. Moreover, such disparities in outcomes may not only distinguish the unproductive from productive, but also the unlucky from lucky. While many may merit success, Hayek contends that a free society does not and should not guarantee reward based on merit.

Hayek also contends, however, that there are reasonable constraints on our private spheres of freedom.[50] In particular, public life may require rules and norms that constrain our interactions in order to incentivize some behaviors and deter others. There may also be instances where temporary restrictions on freedom are necessary for the long-term preservation of a free society, such as in the case of war. Unfortunately, these exceptions can open the door for shrinking the scope and scale of our private spheres while also expanding the scope and scale of government interference in our economic and social lives.

First, some rules of conduct, whether voluntary social norms or formal laws, may end up constraining the role of innovation in the market and within society. For example, rules for obtaining and proving expertise, such as occupational licensing laws, may end up limiting entrance into the market and stifling innovation in impacted fields. Similarly, some rules or customs, such as a legal or customary prohibition against usury, may disincentive engagement in certain industries or the pursuit of certain opportunities. It is unclear whether, on Hayek's account, an extremely restrictive set of rules that allows little room to operate would be consistent with a free society so long as the rules were general and equally applied to all (including the rulers) in the society.

Furthermore, policies that disadvantage one group over another may make it more difficult for some to pursue their own interests. Zoning and housing laws were once designed to keep minorities from being able to own homes in certain neighborhoods, housing and educational benefits for veterans were primarily funneled to white veterans, and so on. Those policies expanded some people's spheres and shrunk or stagnated the size and content of others. While Hayek notes that it would not be "desirable to have the particular contents of a man's private sphere fixed once and for all"[51] and he advocates for general rules applied to everyone, he does not provide much discussion on the potential of supposedly general rules to have differential impacts on different groups.

Additionally, we argue that the scope and scale of our spheres of freedom must not just give space for us to act of our own will, but also must provide enough room for people to breathe, imagine, and unleash their creative

[49] Hayek, *The Constitution of Liberty*, 80.
[50] For further discussion about constraints on private spheres, see Gamble, "Hayek and Liberty."
[51] Hayek, *The Constitution of Liberty*, 139.

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powers. For example, after disasters, entrepreneurs within communities often step up to provide needed goods and services, restore disrupted social networks, and signal a commitment to recovery.[52] However, their efforts to rally community recovery can be thwarted by restrictions imposed by authorities attempting to provide aid to maintain safety. Entrepreneurs could either learn to navigate this setting and figure out how to act accordingly, circumvent directives and act as they had originally intended, or cease their efforts. Entrepreneurs arguably should be given more space to act rather than face restrictions that reduce their private sphere of action during and after disasters. Their private spheres should include being able to rebuild their livelihoods and their communities. This may be done through clear, predetermined rules—such as the general rules Hayek advocates—as well as by government stepping back or funneling resources to local communities rather than taking the lead in responding with recovery efforts.

Second, exceptions like those Hayek grants for war can lead to permanent rather than only temporary restrictions on liberty. Robert Higgs advances the notion of the "ratchet effect" where temporary expansions of government power in times of war and other crises lead to more permanent growth in government.[53] For example, after the housing and financial crisis of 2008, the U.S. federal government sought to remedy issues in the financial sector regarding issuing and handling mortgages. In order to achieve this, however, a new bureau—the Consumer Financial Protection Bureau—was created that not only sought to remedy issues highlighted by that crisis, but also to establish a permanent regulatory role. Additionally, investment in the training, technology, and art of warfare abroad can lead to decreased liberties at home, such as the increased surveillance of citizens and the militarization of police on U.S. soil in the past several decades.[54]

This is not an argument that there is some base level of capabilities essential to meaningfully take advantage of freedom, but rather, that the range of freedoms and the content of freedoms guaranteed within the private sphere matters. While Hayek stresses the need for general rules and the ability to shape the content of our own private spheres, he does not directly discuss the minimum size and scope needed to ensure that people can pursue their own purposes and plans. He also leaves open the possibility of permanently restricting private spheres of freedom through government expansion in times of crisis and war. Fleshing out the size and scope of our private spheres of freedom matters for ensuring the sort of innovation and progress that distinguishes a liberal order. Stated another

[52] Virgil Henry Storr, Stefanie Haeffele-Balch, and Laura E. Grube, *Community Revival in the Wake of Disaster: Lessons in Local Entrepreneurship* (New York: Palgrave Macmillan, 2015).

[53] Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, 25th Anniversary Edition (Oakland, CA: The Independent Institute, 2013).

[54] Christopher J. Coyne and Abigail R. Hall, *Tyranny Comes Home: The Domestic Fate of U.S. Militarism* (Stanford, CA: Stanford University Press, 2018).

way, having equal spheres of freedom is not enough to guarantee our liberty.

B. Expanding membership within society

Members of a free society, Hayek explains, are entrusted to pursue their own goals and are held responsible for the consequences. They are capable of acting on their own will and are obliged to rectify wrongs they committed, whether done in error or from malicious intent. On Hayek's view, responsibility requires individuals to be rational. For Hayek, rationality "can mean no more than some degree of coherence and consistency in a person's action, some lasting influence of knowledge or insight which, once acquired, will affect his action at a later date and in different circumstances."[55] To be considered rational, one must be able to act purposefully, understand that there are consequences for one's actions, and adapt when errors are made or circumstances change.

Yet, some people may not be able to be held to this standard of rationality. Liberty "cannot apply to infants, idiots, or the insane," bluntly argues Hayek, for "[i]t presupposes that a person is capable of learning from experience of guiding his actions by knowledge thus acquired; it is invalid for those who have not yet learned enough or are incapable of learning."[56] In instances where people cannot be held responsible for their actions, they cannot be granted the full private sphere of freedom offered to others in society; they are people "to whom the argument for liberty … cannot wholly apply."[57] When a society lacks coercion, the freedom to choose and act on one's own will, and rules that reinforce individual autonomy and accountability, some individuals may do more harm than good to themselves and others when left to their own devices. Parents, for instance, are often entrusted with caring for, acting on behalf of, and taking responsibility for the actions of their children who have yet to learn about the rules of society as well as fully develop their rational and emotional capabilities and capacity for self-governance. Furthermore, when a child commits a crime or offense, they are often subject to a different set of laws for minors that carry less weight than those for adults. Likewise, someone who is severely mentally ill may not be able to care for themselves or be fully responsible for their actions; they are either entrusted to their parents, a mental health facility, or another form of guardian.

Hayek is mindful that sorting out who can be held responsible for their actions is a difficult task. He thus proposes that "this status must not be granted at anybody's discretion but must automatically belong to all who satisfy certain objectively ascertainable tests (such as age), so long as the presumption that they possess the required minimum capacities is not

[55] Hayek, *The Constitution of Liberty*, 77.
[56] Hayek, *The Constitution of Liberty*, 77.
[57] Hayek, *The Constitution of Liberty*, 77.

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clearly disproved."[58] For instance, if infants are not capable of being held responsible, freedoms are withheld from them until they become a certain age, at which point they are assumed to have developed and learned enough to be full, free, and accountable members of society. Many countries have such an arrangement, albeit in a somewhat complex and arbitrary manner. For instance, in the United States, individuals are deemed capable of driving a vehicle at age sixteen, voting at eighteen, and drinking alcohol at twenty-one, but if they commit crimes, they can be tried as an adult as early as age thirteen (and are automatically deemed an adult at age fifteen or sixteen for certain offenses). While children are often deemed too young to shape public policy, they could—until 2005[59]—receive the death penalty for certain crimes. While the arbitrariness around any proposed objectively ascertainable test is perhaps unavoidable, it is difficult (if not impossible) to justify why any person one year, one month, one day, and certainly one hour younger than the prescribed ages of adulthood should be denied any rights that they would be granted fully a short time later.

Admittedly, Hayek is aware of these potential problems. For instance, he insists that in our political and legal dealings the decision over who gets to enjoy liberty and who does not "must be sharp and definite and be determined by general and impersonal rules if freedom is to be effective."[60] He also contends that "[t]hough in the intimate relations of private life we may adjust our conduct to the personality of our partners, in public life freedom requires that we be regarded as types, not as unique individuals, and treated on the presumption that normal motives and deterrents will be effective, whether this be true in the particular instance or not."[61] Sharp distinctions and definitive types can still be arbitrary and discriminatory, however, and should be addressed in order to ensure equality before the law and to promote a free society.

Hayek is not the only one who worries about this issue. For instance, John Stuart Mill thinks that children and "barbarians" need to be excluded from a free society; he states that "those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury" and "despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end."[62] Similarly, James M. Buchanan states: "I have assumed that the social group is composed of reasonable men, capable of recognizing what they want, of acting on this recognition, and of being convinced of their own advantage after reasonable

[58] Hayek, *The Constitution of Liberty*, 77.
[59] At which time the U.S. Supreme Court deemed the death penalty for minors to be a form of cruel and unusual punishment. See *Roper v. Simmons* 543 U.S. 551 (2005).
[60] Hayek, *The Constitution of Liberty*, 78.
[61] Hayek, *The Constitution of Liberty*, 78.
[62] John Stuart Mill, *On Liberty and Other Writings*, ed. Stefan Collini (New York: Cambridge University Press, 1989), 13.

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discussion," and he goes on to argue that "[g]overnmental action, at the important margins of decision, is assumed to arise when such individuals agree that certain tasks should be collectively performed."[63] For Buchanan, reasonable men are needed for coming to consensus over the rules of society. Being unreasonable threatens the democratic project:

> I am aware of the limitations of this conception of society, and I can appreciate the force of the objection that may be raised on these grounds. Societies in the real world are not made up exclusively of reasonable men, and this fact introduces disturbing complications in any attempt to discuss the formation of social policy. … Insofar as "antisocial" or unreasonable individuals are members of the group, consensus, even where genuine "mutual gains" might be present, may be impossible.[64]

All of these scholars are wrestling with real challenges to forming and maintaining a free society. When a society includes individuals who cannot learn from or be accountable for their actions, are unreasonable, or thwart freedom for their personal gain, it can undermine the very notion of a free society by promoting the special privileges a free society attempts to be free from.

However, such exclusions can have dangerous implications.[65] First, excluding particular categories of individuals from society reduces the heterogeneity of society, which can further reduce opportunities for innovation and progress. It is because individuals within a society have different preferences, goals, and experiences that we are able to engage in mutually beneficial trade and to discover new and better goods, services, and ways of engaging in collective life. Such diversity and the potential for mistakes and grievances also provide the space to adapt, innovate, and contribute positively to society. Hayek recognizes this tension:

> It is because freedom means the renunciation of direct control of individual efforts that a free society can make use of so much more knowledge than the mind of the wisest ruler could comprehend. From this foundation of the argument for liberty it follows that we shall not achieve its ends if we confine liberty to the particular instances where we know it will do good. *If we knew how freedom would be used, the case for it would largely disappear.* We shall never get the benefits of freedom,

[63] James M. Buchanan, "Positive Economics, Welfare Economics, and Political Economy," in *The Collected Works of James M. Buchanan, Volume 1: The Logical Foundations of Constitutional Liberty* (Indianapolis, IN: Liberty Fund, 1999), 204.

[64] Buchanan, "Positive Economics, Welfare Economics, and Political Economy," 204.

[65] Stefanie Haeffele and Virgil Henry Storr, "Unreasonableness and Heterogeneity in Buchanan's Constitutional Project," in *Buchanan's Tensions: Reexamining the Political Economy and Philosophy of James M. Buchanan*, ed. Peter J. Boettke and Solomon Stein (Arlington, VA: Mercatus Center at George Mason University, 2018), chap. 5.

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> never obtain those unforeseeable new developments for which it provides the opportunity, if it is not also granted where the uses made of it by some do not seem desirable.[66]

In other words, excluding the most difficult individuals—such as those deemed irresponsible or unreasonable—limits a free society to the most straightforward case where securing the benefits of freedom, differences, and discovery through equal protection may not be necessary because those left to participate are homogeneous.[67]

Second, Hayek offers little discussion about "what would constitute intolerable levels of unreasonableness and heterogeneity."[68] While he contends that there should be general categories and that no individual or group should be the one to decide what those are, he fails to specify how that determination process should come about.

This leads us to a third challenge: "opening the door for political actors to legitimately disregard or exclude certain individuals on the basis of their unreasonableness creates an incentive to define certain individuals as unreasonable because they may make social choice complicated or costly."[69] Over time, individuals and groups of people have been deemed irresponsible and excluded from society and have subsequently had to fight for their civil liberties and for access to their own private spheres of freedom. For instance, in the United States, Blacks and women were for a long time deemed unable to vote, own property (and were even treated as another person's property), and so on because they were viewed as less capable than white men. They have had to work hard to gain those liberties over time. Allowing the exclusion of certain groups of people because they are deemed incapable can, thus, open the door for discrimination.

Hayek's own words open the door for the interpretation of who is unintelligent (an "idiot") or mentally ill (the "insane"). While mental illness diagnoses have evolved over time, leading to less invasive treatments and a reduction of institutionalization, there is still the possibility of overreach when determining who is mentally fit. For example, in Florida the government can require mental evaluations if they think someone has a mental illness and could do harm to themselves or others. Recently, a Florida school district was reported to have involuntarily committed over one thousand students, some of whom were in elementary school, over a four-year period without their parents' consent, a phenomenon they tie to the increased

[66] Hayek, *The Constitution of Liberty*, 31 (emphasis added).
[67] Haeffele and Storr, "Unreasonableness and Heterogeneity in Buchanan's Constitutional Project." For a useful discussion of this, see Gerald Gaus, *The Tyranny of the Ideal: Justice in a Diverse Society* (Princeton, NJ: Princeton University Press, 2016).
[68] Haeffele and Storr, "Unreasonableness and Heterogeneity in Buchanan's Constitutional Project," 112.
[69] Haeffele and Storr, "Unreasonableness and Heterogeneity in Buchanan's Constitutional Project," 112.

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presence of police in schools.[70] Furthermore, children of color appeared to be disproportionately affected. A lawsuit argues that many of the students were merely behaving childishly, which might require punishment but not necessarily institutionalization.[71] Additionally, with the recognition of ableism (that is, discrimination that favors the able-bodied), advocates are shedding light on the capabilities of those with conditions once deemed permanently restrictive, such as cerebral palsy and Down syndrome. Categorizing people in such ways can be rife with human error as well as used to discriminate against certain groups; Hayek sought to minimize these forms of control.

It is important to face these challenges when taking theories of ideal societies and putting them into practice in the real world, as there is real diversity within communities and countries. If an ideal society overly limits who can participate, it might preclude the progress that only a more inclusive approach makes possible. A truly free society, then, may need to be more inclusive, polycentric, and adaptable than what Hayek argues. In other words, "a truly free and liberal society depends on an ability to constrain conflict and induce cooperation across all populations of society."[72]

C. Identifying unfair games

Hayek's analogy of the market as being a game helps us consider the rules of the game, individual action within the game, and the consequences of being a "good sport" about the results of the game. However, it also raises some issues with thinking about equality and justice.[73] First, when considering games, one can envision the myriad of games available and that individuals can pick the particular games that align with their interest, skills, and goals. For instance, basketball may favor height and speed, whereas chess may favor strategy without physical effort. Even if someone who is tall, fast, and strong tends to win in basketball, someone else who is short but clever may have a chance of winning in chess. If the market is properly viewed as a "constellation of games instead of … one single game and … not a game that everyone must play," there is likely not to be long-standing winners and losers.[74] If the market is only one game, however,

[70] Southern Poverty Law Center, *Costly and Cruel: How Misuse of the Baker Act Harms 37,000 Florida Children Each Year* (Montgomery, AL: Southern Poverty Law Center, 2021), https://www.splcenter.org/sites/default/files/com_special_report_baker_act_costly_and_cruel.pdf.

[71] Andrew Marra, "Palm Beach County Schools Sued over Their Use of Baker Act to Send Kids to Psych Wards," *The Palm Beach Post*, June 22, 2021, https://www.palmbeachpost.com/story/news/education/2021/06/22/palm-beach-county-schools-sued-over-use-baker-act/5307178001/.

[72] Haeffele and Storr, "Unreasonableness and Heterogeneity in Buchanan's Constitutional Project," 114.

[73] Stefanie Haeffele and Virgil Henry Storr, "Is Social Justice a Mirage?" *The Independent Review* 24, no. 1 (2019): 145–54.

[74] Haeffele and Storr, "Is Social Justice a Mirage?" 151.

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there may be groups of individuals who have little to no chance of ever winning. For example, if the economic game is like basketball, short, awkward players may not stand a chance next to teams comprised of tall, spry individuals. In this sense, general rules of the game may not necessarily be neutral.

Jessica Whyte argues that the discipline of the market, as outlined by Hayek and others such as Ludwig von Mises and Gary Becker, effectively limits human action; once people acknowledge this, they are essentially "submissive" to the market.[75] While they have "margins of freedom" within that constraint to shape their contributions, investments, and exchanges, they also must resign themselves to the fact that "the wealth-producing game is the only game in town."[76] Whyte's critique is similar to current popular complaints about capitalism that highlight its emphasis on productivity, competition, and profit over individual and collective notions of well-being. Although the liberal market order is arguably crucial not only for progress but also human flourishing, it also needs to be a game where the majority of people can succeed for them to view it as legitimate. Moreover, it is probably not helpful for something so crucial as a social system to be construed as a game at all. Indeed, alluding to social life as a game may be inappropriate and possibly even inhumane.[77] For those in society who are struggling to make ends meet, daily life can be difficult and decisions on how best to provide for oneself and one's family can have a psychological and physical toll. The analogy of a game may be too crass or jovial for such serious business. Furthermore, as David Schmidtz contends, social life is not actually a race or a game and "no one needs to win."[78] For Schmidtz, society is not about relative performance (for example, who wins a game) but about being "a good place to live."[79] On this view, individuals need good options with few barriers or, stated another way, private spheres of freedom that give enough space to act and, hopefully, prosper.

Second, Hayek's argument seems to imagine that the rules of the game could not be changed or tweaked in ways that make the game recognizable but alter which players are likely to succeed. One can, for instance, change the rules of basketball so that shorter, faster players are more likely to succeed under the new rules than the taller, stronger players who dominated under the old rules. Similarly, the rules for football have been altered to minimize head injuries because of adverse effects that concussions have on players and the rules around golf have changed so that stronger players who can drive further are not advantaged relative to more skilled players

[75] Jessica Whyte, "Hayek's Submissive Subjects: Response to Son," *Political Theory* 47, no. 2 (2019): 194–202.
[76] Whyte, "Hayek's Submissive Subjects," 200.
[77] We thank a reviewer for raising this point.
[78] Schmidtz, *Elements of Justice*, 117.
[79] Schmidtz, *Elements of Justice*, 117.

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who can navigate different terrain.[80] Changes in rules happen in sports all the time.

Because the general rules of the game are never fully neutral, we cannot avoid the question of who is advantaged and who is disadvantaged under the current rules and who would be advantaged and disadvantaged if the rules changed. Say that the rules of the "game" of society have systematically disadvantaged some groups over others, such as through long-standing political and cultural discrimination of minorities. Indeed, in the United States, there is a history of policies that have excluded certain minorities from accessing particular resources and services or disproportionately impacted certain groups. For example, the war on drugs has adversely impacted people of color, many of whom are still in prison despite growing legalization of certain drugs throughout the country.

Third, Hayek's analogy relies on referees being fair when equally enforcing the general rules of the game.[81] Even if the rules were general, known, and equally applied and even if most of the referees were fair, it seems unlikely that all referees would be fair. Hayek discusses the responsibility required for being able to utilize one's private sphere of freedom, but such accountability must also be required for the referees, judges, and fellow players in the game. For Hayek, any attempts to give some players an advantage or to begin from an unequal starting point would open the door for rent-seeking and privilege. For instance, he would likely not approve of a short basketball player getting to wear platform shoes to boost his height, but he would approve of a short player learning how to use his natural weakness to his advantage, perhaps by being able to slip under taller players or relying more on his speed. Hayek would rightfully worry that changing the rules to aid some players could lead to further control and determination of results. Furthermore, for Hayek, to call an outcome unfair would be to rely on merit or another judgment of what outcomes should be and who should rightly be considered winners. For example, one may posit that a tall basketball player can rely on natural skill, whereas a short player must exert a lot of extra effort; however, being able to discern those differences is difficult and problematic. Adding to the difficulty, some players may win or lose due to luck. If effort or intention matters more than results, then a society may result in a lot of market activity ("playing the game") without real progress.[82]

However, dismissing any potential calls of unfairness may miss genuine opportunities for reform. Extreme economic inequality, for example, may alert us to cronyism, systemic racism, systemic sexism, and other types of

[80] Commonly known as "Tiger-proofing" to make it more difficult for Tiger Woods to dominate his competition.

[81] Haeffele and Storr, "Is Social Justice a Mirage?"

[82] Christopher J. Coyne, *Doing Bad by Doing Good: Why Humanitarian Action Fails* (Stanford, CA: Stanford University Press, 2013).

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discrimination that should be rectified. Again, general and equally applied rules are not necessarily neutral. Observing that certain players always lose may signal that they are simply being outplayed or are unlucky; however, it might signal that the rules are not equal or are not being equally applied despite them being general. Over time, paying attention to unequal outcomes may make it easier to identify when outcomes are due to structural issues and need reform. While Hayek contends that the longer an injustice goes unattended, the more difficult it is to rectify, time may be needed to identify real injustices that require remedy.

While the U.S. was founded in many ways on ideals of freedom, liberty, and equal opportunity, markets and politics in America today are entangled in what could be conceived of as "political capitalism."[83] This entanglement highlights the rent-seeking and government-granted privileges awarded to large companies and well-connected elites. Disparities in economic power, which Hayek argues are inevitable in a liberal society, can be leveraged to create disparities in political power. Hayek's critique of the growth of the state in the twentieth century reflects his worry that government hinders social interaction, yet his discussion fails to address how the rules governing the political system can be manipulated and undermined by the economically powerful. He focuses primarily on minimizing government attempts to remedy the unequal outcomes of the market. However, it is not enough to appeal to freedom; instead, there might be a real cause to examine the rules and seek reform to remove such privileges. There must be, as Hayek recognizes, a continual push toward more freedom: "If we are to advance, we must leave room for a continuous revision of our present conceptions and ideals which will be necessitated by further experience."[84]

IV. Conclusion

Equality is a key feature of many scholars' visions for society and is the central goal of many efforts at social reform. Equality before the law, for instance, has been a celebrated political ideal since the time of Pericles and remains an important feature of liberal societies. A right to equal protection under the law is instantiated in the U.S. Bill of Rights, the Canadian Charter of Rights and Freedoms, the European Convention on Human Rights, and the Universal Declaration of Human Rights. Since at least the Jacobins during the French Revolution, social equality has been an organizing political ideal, with groups as diverse as communists in Europe, anti-apartheid activists in South Africa, and civil rights and women's rights activists in the United States pursuing social equality (in some form) along the lines Peart

[83] See Richard E. Wagner, *Politics as a Peculiar Business: Insights from a Theory of Entangled Political Economy* (Cheltenham, UK: Edward Elgar Publishing, 2016); Randall G. Holcombe, *Political Capitalism: How Economic and Political Power Is Made and Maintained* (Cambridge, UK: Cambridge University Press, 2018).

[84] Hayek, *The Constitution of Liberty*, 23.

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and Levy call "analytical egalitarianism."[85] Yet while the U.S. Declaration of Independence asserts that "all men are created equal," for decades after its founding only white, male landowners were truly treated as equals in the United States.[86] Arguably, the guarantee of equal protection before the law and the expansion of equal opportunities to all individuals regardless of race, gender, or identity remains an unfinished project within the United States.

Unsurprisingly, proponents of equality disagree on exactly who should be equal and what kind of equality they should enjoy, ranging from equality before the law, equality of opportunities, and equality of outcomes. Peter Singer, for instance, has proposed that if equality is a sound moral grounding for our relations with other human beings, we must also accept it as a sound moral grounding for our relations with nonhumans.[87] Others hold a more restricted view of who should be treated equally, from embracing equality before the law in a market order to liberal-egalitarian views of redistribution and socialism.

Interestingly, Karl Marx, whose program is often thought of as the inheritor of the Jacobin call for social equality, attempts to break out of the bourgeois context of equality before the law, which he views as a cover for deeper social inequality.[88] Instead, Communism seeks equality of outcomes. As William Morris states, "The aim of Communism seems to me to be the complete equality of condition for all people."[89] For Morris, this means that "every one, whatever work he did, would have the opportunity of satisfying all his reasonable needs according to the admitted standard of the society."[90] Marx and Friedrich Engels, in their *Manifesto of the Communist Party*, argue that Communism is the corrective for class-based inequalities and exploitation between the ruling bourgeois and the proletariat. The result would be a society void of class hierarchy, without private property, and thus without inequality of wealth. They contend that "[i]n place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all."[91] For Marx and Engels, however, equality before the law was only for the bourgeois, who elected the officials and received the

[85] Peart and Levy, *The "Vanity of the Philosopher."*

[86] United States of America, *Declaration of Independence* (Washington, DC: U.S. National Archives and Records Administration, 1776), https://www.archives.gov/founding-docs/declaration-transcript.

[87] Peter Singer, *Practical Ethics*, 3rd ed. (New York: Cambridge University Press, 2011).

[88] Ruth Levitas, "Beyond Bourgeois Right: Freedom, Equality, and Utopia in Marx and Morris," *The European Legacy* 9, no. 5 (2004): 605–18.

[89] William Morris, "Socialism and Anarchism," Marxists Internet Archive, 1889, https://www.marxists.org/archive/morris/works/1889/sa/sa.htm.

[90] William Morris, "Communism," Marxists Internet Archive, 1893, https://www.marxists.org/archive/morris/works/1893/commune.htm.

[91] Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, Marxists Internet Archive, 1848, 27, https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf.

privileges bestowed by those officials.[92] Egalitarianism has evolved quite a bit since Marx, however, so that it embraces redistribution within current government structures as well as more radical reforms for communitarian or socialist governance.[93]

Hayek, however, following a long tradition of classical liberalism, identifies a liberal society as the best strategy for combating privilege: "The essence of the liberal position, however, is the denial of all privilege, if privilege is understood in its proper and original meaning of the state granting and protecting rights to some which are not available on equal terms to others."[94] Along these lines, Boettke contends that "[t]he ideal is a system *absent of all privileges.*"[95] Viewed in this way, the equality of being fully oneself may mean that everyone equally lacks access to and privilege from the state. While equality seems to matter a great deal, what and who precisely is equal is thus open to debate.

Hayek provides what could be seen as one of the most thorough investigations into the challenges of equality in a free society because he tackles difficult aspects like responsibility, merit, and social justice. Furthermore, he offers a nuanced approach to equality that many others lack, distinguishing between equality of opportunity versus the space to act and equality before the law, inequality of outcomes versus unfair results, and so on. That said, there is still room for adjustment and expansion within his research project. Specifically, we argue that we must contend with the size and scope of private spheres of freedom, the level of tolerance for unreasonableness and irresponsibility in society, and the idea that systematic injustices may arise.

Hayekian equality is worth exploring in the context of today's pressing problems and it can be used to debate social justice issues and pursue reforms rather than to dismiss them. The Hayekian notion of a free society also opens the door for reforms and initiatives that are lacking in much of these debates,[96] especially the view that the market and civil society may be better suited than government to handle injustices. We contend that further engaging Hayek's complex views provides useful insight into the pressing challenges of our day.

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[92] Marx and Engels, *Manifesto of the Communist Party*, 46.
[93] See Miller, "Too Much Inequality."
[94] Friedrich A. Hayek, *The Road to Serfdom: Text and Documents: The Definitive Edition*, ed. Bruce Caldwell (Chicago, IL: University of Chicago Press, 2007), 46.
[95] Peter J. Boettke, *The Struggle for a Better World* (Arlington, VA: Mercatus Center at George Mason University, 2020), 5 (emphasis in original).
[96] See Tebble, "Hayek and Social Justice"; John Tomasi, *Free Market Fairness* (Princeton, NJ: Princeton University Press, 2012); Haeffele and Storr, "Is Social Justice a Mirage?"

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