The standing of F. A. Hayek (1899–1992) as one of the most important social and legal theorists of the twentieth century rests largely on the depth and insight of his challenge to two presumptions that dominated most twentieth-century social and legal thought. The first is the presumption that rational and beneficial social order must be intentionally planned or designed order; the second is that law must be the (intentional) command of an authority that, as the source of law, cannot itself be subject to law. This chapter presents the crucial elements of Hayek’s challenge to these commonly held presumptions. Combined with an appreciation of the alternative conceptions of social order and law that Hayek offers, the recognition of the nature, pervasiveness, and falsity of these commonly held presumptions supports a radical and illuminating transformation in our understanding of the nature and value of social, economic, and legal order.

Any more extensive discussion of Hayek than is possible in this chapter would explore the connections between Hayek’s “scientific” investigations of the nature of social order and law and his various attempts to restate the case for the fundamental values or principles of liberal individualism. The two most sustained and important attempts at such a vindication are Hayek’s defense of individual liberty in *The Constitution of Liberty* and his defense of fundamental rules of just conduct in *Law, Legislation, and Liberty*. Any exploration of these defenses would have to examine the extent to which Hayek succumbs to, manages to circumvent, or unknowingly challenges another central presupposition of twentieth-century thought: that there is a radical divide between “factual” or “scientific” judgments and normative judgments, such that no normative judgments can ever be grounded in

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by some measure of the common good, will draw up and enforce such a central plan. The basic appeal of any such scheme reflects a surprisingly pervasive disposition among human beings to believe that order must be the product of organization, that systems cannot be self-ordering but must be ordered by some external organizer. Order cannot be endogenous; it must be exogenous.

Is such rational socialist calculation possible? Hayek's economic mentor, Ludwig von Mises (1881–1973), provided a remarkably elegant argument against the possibility of rational socialist planning. How can planners know which prospective inputs ought to be devoted to which prospective outputs (many of which outputs would be possible inputs for further possible outputs)? Roughly, the answer is that the planner should select the array of allocations of inputs to outputs such that the ultimate value of the outputs most exceeds the value of the inputs. However, Mises and subsequently Hayek pointed out that the planner can act in accordance with this answer only if he or she knows the market values—that is, the market prices—of all the relevant inputs and outputs. For only market prices encapsulate otherwise totally dispersed information about the scarcity of and the demand for the priced resources. For example, only the knowledge of market values reveals the irrationality of devoting all of society's titanium to the production of license plates. However, because the institution of central planning eliminates market prices, that institution makes rational central planning impossible. Hayek added to this Misesian critique by emphasizing the existence of another batch of crucial information beyond what would be encapsulated in market prices, were markets to be allowed to operate. This is the highly local and often only tacitly grasped information that is scattered among individuals and not yet reflected in market prices (even supposing that market prices are allowed to emerge). This scattered information and the effective right of individuals to act on it are essential to beneficial economic innovation. Yet this information is also necessarily unavailable to the central planner, and even if it were available, the central planner would have to forbid individuals from acting on it.

Hence, rational economic order cannot be designed and exogenously imposed. Yet is non-designed, endogenous, self-organizing rational economic order possible? Hayek endorses the understanding of Adam Smith (1723–90) that economic order arises out of particular economic agents deploying their personal resources in pursuit of their separate ends and on
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the basis of their own inventory of knowledge, including their knowledge about others’ preferences, resources, and likely actions. Order arises not through the imposition of any overall plan but rather through the ongoing mutual adjustment of elements that make up the order to their local and changing circumstances. Without any particular individual or authority intending it, an economic order arises by “invisible hand” processes. The order that results from such processes is, in the language of Smith’s contemporary Adam Ferguson (1723–1816), “the result of human actions, but not of human design.” Within such a spontaneous economic order, individuals advance their private ends through production activities, trade, or the formation of new forms of property or economic relationships that move resources from low-value to high-value uses; hence, the economic rationality of the overall spontaneous economic order.

Economic order is not the only sort of emergent, designed order. Other highly salient examples include the order that obtains among the elements that make up any particular living organism and among those that make up an ecological system. There was a time at which most people thought that such complex orders had to be the products of an exogenous designing intelligence and, indeed, that such orders were the primary evidence for the existence of such an intelligence. These design arguments for the existence of God have been dethroned by our understanding of biological orders as grown, emergent, unintended orders.

Undesigned, emergent economic and biological orders are concrete and factual in the sense that their coordinated elements are particular observable entities; for example, human activities, material resources, biological organs, and colonies of this or that species. However, Hayek, following Ferguson and Carl Menger (1840–1921), also emphasizes the existence of more abstract evolved and unintended orders. The elements that make up these more abstract orders are norms or patterns of conduct. Two outstanding examples of such abstract orders are money and language. As has been the case with concrete economic and biological orders, people have been strongly disposed to think that abstract orders such as money and language must be the product of design. Money and language must have been invented by some very smart individual or been intentionally instituted through some agreement among brainy individuals. Surely, the thought goes, such beneficial order can no more be the product of chance than can the striking coordination of the parts of the human eye. Yet Hayek argues that such beneficial abstract orders are no more the product of intelligent design than are beneficial emergent concrete orders. Just as no aspiring central planner could have the information needed to design a concrete rational economic order, no individual or committee could have had the extraordinary innovative genius to think up money or language. Such abstract orders arise neither by intentional design nor by chance, but rather by an evolutionary process of primarily cultural mutation, modification, and selection. Abstract orders of norms or patterns of conduct emerge and survive insofar as they facilitate — in ways normally not appreciated by their beneficiaries — the formation of advantageous and more concrete orders.

According to Hayek, morality is also an abstract order of norms that is a product of human action but not of human design. A subset of these norms and compliance with them are especially crucial to the formation of mutually advantageous spontaneous concrete orders. These “rules of just conduct” are general negative prohibitions — which will take somewhat different forms at different times and in different places — against interference with individuals’ chosen deployment of their persons, talents, energy, and (legitimately acquired) possessions and against violation of persons’ valid contractual claims. A unifying feature of these norms is that others’ compliance with them constitutes one’s freedom. For, according to Hayek, an individual’s freedom consists in not being precluded from “using” his own knowledge for his purposes” (LLL 1:56), and each of these norms prohibits a way of precluding individuals from using their knowledge for their own respective purposes. Recall here Hayek’s emphasis on the fact that the knowledge needed for successful action is radically scattered among individuals. It follows that only in a realm of freedom in which individuals are allowed to act on their own particular insights and preferences will the possibilities for successful action be maximized. In The Constitution of Liberty, Hayek suggests that this freedom is to be respected because coercion is in itself evil; yet he argues more extensively that this freedom is to be respected because of its beneficial consequences. In any case, we should not think that the norms that constitute freedom have been adopted because people understood the fruitfulness of freedom. Rather, where such norms have been allowed to develop, they have emerged and taken hold because general compliance with them has facilitated successful human action and interaction, and hence the societies in which they have emerged and taken hold have had greater fitness for survival. Just as concrete spontaneous economic

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order has what Robert Nozick calls an “invisible-hand explanation,” so too does the abstract order of morality and, more specifically, the rules of just conduct.

In contrast to other moral norms, these rules of just conduct are understood to be eligible for coercive enforcement. People’s settled expectations that others and they themselves will be required to abide by the rules of just conduct (as they have developed within their respective societies) are a necessary condition for the sort of private-property, free-market economic order that Hayek takes to be the rational alternative to central economic planning. Indeed, the settled expectation that the rules of just conduct will be complied with is the crucial precondition for the development and advancement of that complex of spontaneous concrete social orders that add up to the ever-evolving, dynamic, pluralist Great Society. The more particular social and economic institutions and relationships that make up the Great Society emerge only insofar as that society’s background norms—especially the rules of just conduct as they have been articulated in that society’s history—are respected and known to be respected.

According to Hayek, there is no common end or set of commensurable ends that all individuals and, hence, society as a whole ought to serve. Human beings have come to have many different sorts of life-defining ends, and there is no way of ranking alternative concatenations of this diversity of ends. Or, if there is a way of achieving such rankings, we are ignorant of it. Thus, the deepest error of central planners is that they believe that they can identify the common end or set of commensurable ends that their plan should aim to maximize. The Great Society is not itself planned, and like other spontaneous orders, it has no determinate purpose of its own: “A Great Society has nothing to do with, and is in fact irreconcilable with ‘solidarity’ in the true sense of uniteness in the pursuit of known common goals” (LLL 2:111). However, general compliance with such a society’s rules of just conduct and the many avenues for the attainment of personal ends that arise within such a society provide individuals with unprecedented opportunities to plan their own lives.

Nevertheless, Hayek does not maintain that all beneficial human order is emergent and unintended. Rather, he holds that there is a vital place for intentionally created, designed orders—that is, “organizations”—within the larger, encompassing, spontaneous order that is the Great Society. Firms, unions, churches, teams, and armies are just a sampling of such organizations. Such organizations have determinate purposes—for instance, profit maximization, increased remuneration, salvation, championships, and the utter destruction of the enemy—that are shared by the individuals who join them. Within any such organization, individuals are expected to proceed in accordance with its program for the attainment of its respective purpose; they are expected to recognize and abide by that organization’s plan. The Hayekian free society is richly layered with such intentional communities and the various networks that they form—precisely because individuals are free to choose their own array of associations on the basis of their own diverse knowledge and preferences.

As Hayek sees it, the modern “rationalist” belief that society itself must and should be designed is only one of the two main enemies of the open, pluralist, and voluntarist society that he favors. The other main enemy is our premodern—indeed, tribal—disposition to want to be members of intense communities of shared values and to insist that all others whom we encounter pay allegiance to those specific values and serve those communities. According to Hayek, the great psychological challenge for individuals within modern liberal societies is to reap the rewards of participation in particular combinations of these communities of shared values while appreciating that it is the protection of everyone against the legal imposition of any set of substantive values that makes possible this rich array of available communities of shared values.

One rather special organization within spontaneous society is government. As an organization, government has a purpose or set of (putatively) compatible purposes. For Hayek, not surprisingly, the primary purpose of government is the clarifying articulation and the enforcement of the rules of just conduct. Hayek also frequently assigns to government the roles of (1) producing (or financing the production of) those public goods that would not be provided via voluntary market transactions and (2) providing a social safety net for “some unfortunate minorities, the weak or those unable to provide for themselves” (LLL 1:141–2). However, we should note that Hayek believes that some of the goods commonly thought to require governmental provision really can be (better) provided privately, and he is

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8 Hayek repeatedly claims that only coercion that is directed against coercion is justifiable. Yet he also claims that coercion is justifiable whenever it is in accordance with general rules.
9 Hayek’s assertion of this pluralism of incommensurable ends is most explicit in “Freedom and the Economic System.”

concerned that within the dynamic of democratic politics the call for the provision of that safety net will open "the floodgates" to a redistributive state that advances the interests of some ruling political coalition at the expense of all other members of society (LLL 2:140). Without resolving the question of precisely how much government Hayek favors or should favor, it is clear that for him government ought to be a particular organization within society with specific, narrowly defined, purposes. Whom, then, may government direct for the sake of those purposes? The Hayekian answer is that, in a free society, government will have certain means for achieving its ends. These means will include (to a certain extent) those individuals who have become members of that organization, but "these means do not include the private citizen" (133).

Two conceptions of law

According to Hayek, there are two fundamentally divergent conceptions of law: the command conception and the coordinating norm conception. Even though many theorists have argued that it is simply a conceptual truth that law is the command of the (divine or temporal) sovereign, it is important to see that this command conception of law is also the natural accompaniment of the design conception of rational social order. If one subscribes to this understanding of rational social order, one must hold that there is some determinate end that the order is supposed to serve and that the elements within the order must be organized exogenously for that end best to be served. As we have already seen, the designer of that social order will have the task of surveying all the resources (economic and otherwise) within the society, determining which concatenations of which uses of these resources will best advance the (supposed) purpose of that society, and issuing directives to all the other members of society about how they should deploy themselves and particular nonhuman resources so that the conjunction of their actions maximally achieves that society's (supposed) purpose. Individuals who receive these directions will not generally see how the actions respectively required of them will contribute to that end, because they will only have their separate fragments of information, not the synoptic vision of the whole that the designer is imagined to possess. In addition, they are likely to be more concerned with their private purposes than with the attainment of the radiant societal goal to which the designer is devoted. Thus, it cannot be left up to the recipients of these directives to decide whether they will comply with them. Instead, the directives must be understood as placing those individuals under a legal duty to carry them out simply because they have been issued by the "sovereign" authority. Citizens will be understood to have a duty to comply with the positive law—that is, the law posited by political authority—simply because it has been posited. The commands of this authority themselves provide citizens with reasons for compliance.

Law, then, is understood as the expressed will of some authority that is backed by threats of punishment for noncompliance. Because the agency that expresses and coercively enforces this will is itself the source of law, that agency cannot itself be subject to law. Nothing that this agency wills and enforces can be contrary to law; everything that it wills and enforces is law. There can be no genuine legal constraints on this law-creating authority. As this doctrine was put in the seventeenth century, first comes the king, then comes the law. Indeed, when this view was articulated in the seventeenth century in service of the authority of absolute monarchs, it was often said that somewhat general and written laws came to be issued by monarchs simply because they had become too busy to direct in detail all the activities of their subjects. On this view of law, when judges seek to find and apply the law in particular cases, what they are really trying to do is to ascertain and enforce the will of the monarch whose lieutenants they are.

Because not even the most avid advocate of designed social order believes on reflection that the social engineer will be able to gather up all the relevant detailed local information that individuals will have, the advocate of such an order will envision a central plan that leaves some room for the agent on the scene to adjust action to his or her knowledge of the local facts. The brigade commander directs the platoon lieutenant to capture Pork Chop Hill. The platoon lieutenant then incorporates some of his local knowledge (about, for instance, the strengths of his squads) into his commands to his various squad commanders. The squad commanders employ further (and yet more local) information in their commands to the squad members. And so on. Similarly, the factory manager in a planned economy is directed to produce 5,000 pairs of boots with the material that others are directed to supply to him. The manager incorporates local information into his more specific directives to his foremen, and so on. (Whatever success central plans seem to enjoy will often be the product of enterprising individuals exercising discretion well beyond its planned limits.) Nevertheless, even if the societal plan is adjusted to the fact that the subjects of its directives must have some

11 Some hold to this view of law while embracing the fantasy that the true sovereign is the People.
discretion in their choice of how to carry out their assigned tasks, the plan must take the form of assigning varying sets of more or less specific tasks to individuals. The law of the designed social order must be an enormous set of different task assignments that individuals are commanded to carry out. (Among the tasks assigned to nearly everyone will be that of not preventing others from carrying out their assigned tasks.)

Against this command conception, Hayek maintains that law in its most fundamental sense precedes and is conceptually independent of governing authority; law in this sense is historically antecedent to legislation. Law in its essence is a set of norms general compliance with which makes social order among a group of individuals (or families or clans) possible. Or, to differentiate law from the totality of such norms, one can say that law in its most fundamental sense is the subset of those rules that function in part through the expectation and acceptance of their coercive enforcement. Law is the set of norms that people — perhaps only dimly — perceive must be abided by in their interactions with their societal fellows if the social order they are nested within and its benefits are to be maintained. People find themselves in social orders in which such rules are complied with and are generally perceived as necessary to their beneficial interaction precisely because no social order can survive without the existence of such compliance and perception. If such norms and perceptions of them do not emerge, neither does social order.

Although at some point specific members of the evolved society may be assigned the task of enforcing these norms when necessary, the norms themselves are not, and ought not to be seen to be, the results of any societal member's will or design. Though legislation may further codify these norms, the norms themselves and their prescriptive force are not the product of legislation. Indeed, it is because these norms are in fact a product of unintended cultural evolution and not any agent’s will that they have often been perceived to be permanent, God-given laws that are akin to unbreachable laws of nature.

Hayek's argument for the priority of law over willed legislation is both historical and conceptual. What we are strongly inclined to think of as law in fact existed long before legislation, that is, the explicit positing of enforceable rules. Generally, the role of established political authority was, and was perceived to be, the enforcement of preexisting and mostly only tacitly grasped law. Chronologically, first comes law, and then comes the king. Moreover, Hayek argues that command doctrines of law (and similar forms of legal positivism) need the notion of lawful authority to differentiate between lawful and obligating commands and the dictates of the highway robber. However, lawful authority can only be understood as authority that expresses and enforces rules that merit expression and enforcement in virtue of their coordinating function. It is this (often not appreciated) coordinating function that gives prescriptive force to the rules and that makes an authority that expresses and enforces them lawful. We can distinguish lawful authority from the highway robber only on the basis of the lawful content or quality of the rules that they are respectively prepared to enforce. Aspiring authorities can constitute themselves as lawful only by enforcing the law that exists independently of their will. Hence, conceptually, first comes the law; then comes the king.

Seventeenth-century opponents of the command conception and, especially, its implication that the king must be above the law often offered an argument that combines Hayek's chronological and conceptual points. The argument turned on the ubiquity of coronation oaths. At least in many European countries, a legal condition of becoming a lawful monarch was taking the established coronation oath. In the absence of this legal rule, which was not itself established by the will of any monarch, no one could become a lawful monarch. Moreover, the aspiring monarch had to swear to uphold the law of the land, that is, a body of legal norms that themselves were neither of his making nor within his authority to abrogate.

Of course, this is to return to Hayek's view that law — or at least a certain type of law — is an emergent abstract order. This sort of order arises among groups of people because of the benefits it confers on them and characteristically not because people understand how or even that the order serves their interests. Such law continually evolves as people stumble upon advantageous articulations, modifications, or extensions of their existing law. For Hayek, the primary vehicle for these evolutionary transformations is the dispute-resolution efforts of elders and judges, who must in changing social and economic circumstances continually find and apply the rules that underlie people's reasonable expectations about others' conduct and extend or refine those rules in ways that facilitate emerging forms of cooperation for mutual advantage. Societies increase their likelihood of surviving and of being imitated as more and more of their members are free to interact and transact with one another (and with members of other societies) on the basis of their own perceptions and values. This freedom for individuals to employ their own knowledge singly or jointly in pursuit of their own
purposes develops as the basic norms of a society move from rules that direct individuals to some shared (for instance, tribal) end to rules that merely place everyone under negative duties not to interfere with other people’s doing as they see fit with themselves or their possessions.

This attenuation of enforceable norms from rules that require individuals to promote certain substantive ends to rules that merely require non-interference with others is necessary to bring more and more individuals with increasingly diverse ends of their own into interlocking networks of cooperative interaction. Under this sort of attenuation of legally enforced rules, everyone is subject to and protected by the same legal rules (LLL 2:88–9). Moreover, the duty of judges is to find and enforce these general coordinating norms rather than the will of any supralegal sovereign. Hence, the elusive ideal of the rule of law is satisfied. In contrast, bodies of legal rules that conform to the command conception of law necessarily assign to different people different (and unpredictably changing) legal duties and immunities, and a judge’s search for this law amounts to an attempt to identify and enforce the sovereign’s will.

Hayek emphasizes that these general norms of just conduct are “purpose-independent” in the sense that they do not exist for the sake of advancing any determinate “societal” end; they exist merely to facilitate individuals’ pursuit of their own chosen ends. A crucial question that cannot be explored here is whether this facilitation of persons’ separate ends provides a (“rationalist”) justification for these purpose-independent norms even though the norms are (at least for the most part) not the product of any intention to provide this facilitation.  

Of course, Hayek is not saying that there is no proper or useful place for law in the sense of directives or assignments of required tasks. Law as directives is essential for the operation of organizations — for instance, firms, churches, and teams — through which individuals advance many of their diverse ends. Also recall that for Hayek government itself is a useful organization within society with special purposes of its own, chief among these being the further articulation and enforcement of the rules of just conduct. Thus, the various levels and components of government operate by issuing directives of various degrees of specificity to the members of those governmental organizations. Government employees are to carry out those instructions. Yet it is a grave and destructive error to infer that lawfulness on