

POPPER AND HAYEK: ON DEMOCRACY AND OPEN SOCIETY

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Karl Popper and Friedrich von Hayek are widely regarded as two of the 20th century's greatest proponents of democracy and open society, and many people—with some reason¹—regard their ideas about them as more or less the same. But the terms 'democracy' and 'open society' mean different things to different people, and my sense is that Popper and Hayek might not be regarded as proponents, let alone defenders, of democracy and open society in the way in which many, if not most, people seem to understand these terms today. Neither Popper nor Hayek regarded democracy as an end in itself, and neither of them were proponents of popular sovereignty or advocates of majority rule. This, however, is not the main part of my story. Popper and Hayek no doubt agreed about many things pertaining to democracy and open society. But in what follows, I will argue that they actually had very different *concepts* of democracy and open society—and that the differences between them were so great that Hayek proposed electoral reforms to strengthen democracy that would have transformed a democracy into a form of government that Popper would have, or should have, regarded as a tyranny. Indeed, Hayek's ideas about legal and political change raise questions about whether and to what extent he was a proponent of what Popper regarded as open society at all. In what follows, I will try to explain these ideas in greater detail.

Majority Rule

Most people who value democracy regard it as majority rule and, indeed, value it because they value majority rule. They may think that 'democracy' means rule by the people, and that 'rule by the people' means rule by the majority of the people. They may think that rule by

¹ Hayek himself promoted this idea. He told interviewers, late in life, that he and Popper were "very close friends" and that "to a very large extent I have agreed with him, although not always immediately"—adding that "on the whole I agree with him more than with anybody else on philosophical matters" (Hayek 1994, 51). He also told James Buchanan in an interview in 1978 that he and Popper "see completely eye-to-eye on practically all issues" (Hayek 1978).

the majority of the people is better than rule by a king or dictator; or that the majority is always right; or that the whole point of democracy, and government more generally, is to act in the best interests of the majority. Or they may simply believe that majority rule is a good in itself, or an end in itself, and should thus be pursued whenever and wherever possible—for its own sake—not only in making political decisions, but also in deciding what to eat or where to go for vacation.

Hayek believed that ‘democracy’ means majority rule, but he did not share any of the beliefs I just mentioned. He did not think that majority rule is a good in itself, or an end in itself. He did not value it for its own sake. And he did not believe that the majority is always right, or always wise, or that it should always get its way about any and all things. He wrote “One may have profound respect for the convention of arriving at political decisions via majority rule, but little respect at all for the wisdom of the majority.”² He wrote “I firmly believe that government ought to be conducted according to principles approved by a majority of the people, and must be so run if we are to preserve peace and freedom.” But he also wrote “*if* democracy is taken to mean government by the unrestricted will of the majority I am not a democrat, and even regard such government as pernicious and in the long run unworkable.”³

Popper, on the other hand, did not believe that democracy is majority rule at all. He said that democracy has never been—and neither can nor should be—rule by the people.⁴ He even thought that there is a danger in teaching that democracy is rule by the people—since the people will feel deceived and cheated and become disillusioned with democracy when they discover it is not. “Democracies,” he said, “are not popular sovereignties, but, above all, institutions equipped to defend themselves from dictatorship.” He said that democracies “do not permit dictatorial rule, an accumulation of power, but seek to limit the power of the state.”⁵ And he thought that the role of ‘the people’ in a democracy is not to rule or govern or to make policy choices—but

2 (Hayek [1960]1992,109).

3 (Hayek 1979, 39) Hayek thought that the authors of the American constitution had tried to construct a system that would protect individual freedom. But he also thought that their attempt had failed, largely due to majority rule, as majorities found and exploited constitutional means to attack the individual freedoms he wanted to preserve.

4 (Popper 1997, 68).

5 (Popper 1997, 70).

to judge how well their elected officials are doing it and to vote them out of office if they are not doing it well enough.

Popper and Hayek agreed that the primary virtue of democracy is that it has institutional mechanisms that enable people to remove their political leaders from power without violence and bloodshed. They agreed that democracy concerns itself with the process of making collective decisions and achieving collective ends, instead of the decisions we are trying to make and the ends we are trying to achieve. And they agreed that large societies are seldom able to agree about the ends they want to achieve, because their members have different concerns, beliefs, values, interests, and goals.

Popper and Hayek also agreed that democracy should be concerned with limiting the powers of government, that majority rule can all too easily lead to tyranny, and that talk about ‘the public interest’ or ‘the common good’ is often a rhetorical device that people use to persuade other people that they should agree to some policy that they themselves favor—and that it typically belies the fact that the people whom they want to persuade do not regard that policy as either a common good or in the public interest.

Finally, Popper and Hayek agreed that the proper use of majority rule is to facilitate collective decisions; that using it in this way may help us to make decisions and resolve disputes that we otherwise might not be able to make or resolve; that the more political majorities use it as a tool to achieve their own goals, interests, and ideological ends, the more political minorities will feel tyrannized by it; and that the more political minorities feel tyrannized by it, the less effective it will be in helping us to make collective decisions, or to resolve disputes we might not otherwise be able to resolve.

But for all this, Popper’s concept of democracy is very different from Hayek’s. And this difference has important implications when it comes to their concepts of open society.

Democracy and Liberalism

Hayek regarded himself as a proponent of both limited democracy and liberalism. But he was more committed to liberalism than he was to democracy. He taught that liberalism believes in limited government, in the limitation of all powers, in a law that is the same for all people, and in the elimination of any and all legal privilege. He said that “liberalism came to be closely associated with the movement for

democracy”—and that “in the struggle for constitutional government in the nineteenth century, the liberal and the democratic movements indeed were often indistinguishable.”⁶ But he also said that democracy and liberalism are ultimately concerned with different things. Hayek said that “Liberalism is concerned with the functions of government and particularly with the limitation of all its powers”⁷ and that “Democracy is concerned with the question of who is to direct government.”⁸ He said that liberalism is a doctrine about what the law should be and democracy is a doctrine about how to determine what the law will be.⁹

Hayek said that democracy entails nothing about the specific aims or goals of government, and that liberalism is but one among many political doctrines that are compatible with it. He said that the opposite of democracy is authoritarianism, that the opposite of liberalism is totalitarianism, and that neither one of them excludes the other—so that an authoritarian government may act according to liberal principles, and a democratic government may wield totalitarian powers.¹⁰ And he said that liberalism may accept majority rule as a way of deciding what the law will be, but not as an authority about what the law should be. Hayek thought that it was the gradual expansion of the powers of democratic governments and the majorities that direct them that led to the fission between democracy and liberalism, and to the rise of what he called ‘dogmatic democracy’: the idea that majority rule is good in itself and should thus be extended as far as possible as an end in itself. He thus distinguished the liberal democracy that he supported from the dogmatic democracy he opposed. He said that liberalism “is concerned mainly with limiting the coercive powers of all government, whether democratic or not, whereas the dogmatic democrat knows only one limit to government—current majority opinion.”¹¹ He said that dogmatic democrats think that as many issues as possible should be decided by majority rule and that liberals believe there are definite limits to the range of questions it should decide.¹² He noted two ways in which dogmatic democrats thought

6 (Hayek 1978, 142).

7 (Hayek 1978, 142).

8 (Hayek 1978, 143).

9 (Hayek [1960] 1992, 103).

10 (Hayek [1960] 1992, 103).

11 (Hayek [1960] 1992, 103).

12 (Hayek [1960] 1992, 106).

democracy could be extended—the first by increasing the number of people who are entitled to vote, and the second by extending the range of issues to be decided by vote.¹³ And he pointed to limitations that liberals might place on the extension of the right to vote—not only to the usual limits pertaining to age, citizenship, and criminality; but also to more controversial and disputed limits, such as denying the right to vote to government employees and recipients of ‘public charity’.¹⁴ He said that the democratic and liberal traditions agree that decisions ought to be made by the majority whenever state action is required, but that they differ about the scope of state action that should be guided by democratic decision.¹⁵ And he drew a distinction between liberal democracy and unlimited democracy.

Unlimited democracy is closely related to dogmatic democracy. The two, however, are somewhat different.

Dogmatic democracy is the *belief* that majority rule should be extended as far as possible. An unlimited democracy is a system that actually does it. Hayek described it as “a form of government in which any temporary majority can decide that any matter it likes should be regarded as ‘common affairs’ subject to its control.”¹⁶ He thought that democracy in the West had devolved into unlimited democracy. And he called it “an abomination.”¹⁷ He thought that only limited government can be decent government, and it would seem to follow that only limited democracy can be decent democracy. He thought that we take the first step from limited democracy to unlimited democracy when we move from the belief that *only* what the majority approves should be binding on all to the belief that *whatever* the majority approves should be binding on all.¹⁸ And he said “it is not democracy or representative government as such, but the particular institution, chosen by us, of a single omnipotent ‘legislature’ that makes it necessarily corrupt.”¹⁹

This idea, that unlimited democracy is necessarily corrupt, is not a critique of democracy *per se*. For Hayek’s whole point is that democracy need not be unlimited. But it is a damning critique of democ-

13 (Hayek [1960] 1992, 106).

14 (Hayek [1960] 1992, 105).

15 (Hayek [1960] 1992, 106).

16 (Hayek 1978^b, 153).

17 (Hayek 1978^b, 152).

18 (Hayek 1979, 6).

19 (Hayek 1979, 11).

racy as it has developed in the twentieth century. Hayek thought that the separation of powers was the greatest and most important of the limitations imposed upon the powers of democracy, and that it was 'swept away' by the rise of omnipotent representative assemblies that operate with unlimited powers²⁰ that enable them to do whatever their members find expedient to do in order to be reelected. He thought that this had destroyed liberalism's ideals of rule of law and government under the law.²¹

Hayek wrote that democratic decisions in such assemblies rest upon a state sanctioned process of blackmail and corruption; that it is easy for legislators to withhold their support, even from measures that they would otherwise approve, unless their votes are rewarded with special concessions to the groups they represent; and that majorities in democratically elected assemblies with unlimited powers can be formed only by conferring special benefits upon certain groups, thereby buying their support at the expense of certain minorities, and imposing special burdens on others.²²

Market Democracy

Hayek, so far as I know, never used the term 'market democracy'. But I think that it aptly captures two different aspects of his thinking about democracy. For it describes what he thought a true democracy should be, namely, a form of government that supports and protects markets. And it also describes what he thought democracy has become, namely, a marketplace for peddling political power and influence.²³ Hayek did not think that this is the nature of 'democracy as such'.²⁴ But he did think that the majority in a representative assembly *must*, in order to remain a majority in such a system, do whatever it can to buy the support of special interests by granting them special benefits.²⁵ And here it is clear that Hayek's commitment is not so much to democracy as to liberalism. Indeed, Hayek is committed to democracy only to the extent to which it enacts liberal principles into

20 (Hayek 1978^b, 153).

21 (Hayek 1978^b, 153).

22 (Hayek 1978^b, 156).

23 Hayek thus wrote that: Democracy, so far as the term is not used simply as a synonym for egalitarianism, is increasingly becoming the name for the very process of vote-buying, for placating and remunerating those special interests which in more naïve times were described as the 'sinister interests'. (Hayek 1979, 32).

24 (Hayek 1979, 32).

25 (Hayek 1979, 5).

law and implements them in practice, only to the extent to which it protects and preserves liberalism's vision of individual freedom, and only to the extent to which it supports and protects free markets.

Institutional Control

But if Hayek thought that democracy is concerned with the question 'Who should rule?', Popper thought that Plato had set western political philosophy on the wrong track by asking that question in the first place. Popper thought that we have little choice, once we ask this question, but to answer 'the best' or 'the wisest' or 'the most virtuous'—and that this only leads to endless arguments about who the best or the wisest or the most virtuous among us might actually be. More important, Popper thought that '*Who should rule?*' is simply the wrong question to ask. He thought that democracy is, '*above all*', a set of institutions designed to prevent the rise of dictators, dictatorships, and dictatorial rule—or, in other words, a system of government with institutional controls to prevent tyranny and the rise of tyrants—and that any system designed to prevent tyranny and the rise of tyrants must have institutional controls that enable the ruled to dismiss their rulers. He thus thought that the more pressing political problem is not who should rule, but *how to get rid of leaders* who are corrupt, or incompetent, or just not right for what we need them to do.

Popper thus thought that the problem of how to get rid of one's leaders is implicit in the very nature of government, and that it is a utopian fantasy to think that we can solve this problem by getting 'the best' or 'the wisest' or 'the most virtuous' to do the job. He thought that the power that the best and the wisest and the most virtuous acquire by being elected to public office is a legitimate power that they must have in order to do the things that we have elected them to do. But he also thought that the best and the wisest and the most virtuous are also human and would thus tend to be corruptible, and corrupted, like all the rest, no matter how good or wise or virtuous they may once have been. Indeed, the futility of this approach can already be seen in Plato's *Republic*. For Plato is clear that the philosopher king who will rule the republic must be chosen for his devotion to truth and his inability to tolerate falsehoods of any kind. And he is just as clear that the very first thing the philosopher king must do to ensure 'justice' is to tell the 'noble lie'.²⁶

²⁶ 'Justice' in the *Republic* means staying in one's own place. And the 'noble lie' is

Popper said that people who approach political theory with the question ‘Who should rule?’ generally assume that political power is unchecked or unlimited, and that the rulers can thus do whatever they want to do. He said that if we assume that the rulers can do whatever they want, then ‘Who should rule?’ might well be the only question to ask. But he also said that once we begin to limit political power, we can approach political theory from a somewhat different angle and ask a very different and far more useful question. Instead of asking ourselves ‘Who should rule?’ we could ask ourselves ‘How can we organize our political institutions in a way that will prevent bad and incompetent leaders from doing too much damage?’²⁷

Popper said that we need to distinguish between two *and only two* main forms of government—democracies and tyrannies—and that the difference between the two is that democracies have institutions, such as elections,²⁸ that enable ‘the people’ to dismiss their leaders without violence and bloodshed. He said that it is democracy’s institutional check upon tyranny and violence, and not its ability to elect the best or wisest or most virtuous leaders that is the primary reason why we should value it.

If we conceive of democracy in this way we can begin to see it less as a political tool that enables people to get what they want, and more as a way to avoid dictatorships and tyrannies. We can, in other words, begin to see it less as a market for political exchange, and more as a system of controls that prevent people and groups from acquiring too much power, or from imposing their views too much upon others, or from staying in power too long past the time that the people who put them in power would have liked them to leave.

Here we should pause to reflect upon two ironies that emerge from Popper’s and Hayek’s views about democracy.

We have seen that neither Popper nor Hayek were advocates of unlimited government or unrestricted majority rule—and that they agreed instead that political power should be limited, that majority rule should be too, and that rulers should not be able to do whatever

that humans are born of bronze, silver, and gold—and that this is what accounts for their place in society. Popper argued that the philosopher king’s defense of ‘justice’ was thus a racially based defense of his own power.

27 (Popper 1945b [1999], 161).

28 Elections are not the only such institutions. “Nothing demonstrated the democratic character of the United States more clearly than the resignation, in effect the removal, of President Nixon.” (Popper 1997, 71).

they want to do. But we have also seen that Popper believed that the idea that democracy is majority rule is largely a myth, and that Hayek believed that it is not only real but debilitating in the hands of dogmatic democrats who favor majority rule in an unrestricted and unlimited form. So it is ironic that, while they largely agreed in their opposition to unlimited democracy, Popper argued that majority rule and popular sovereignty—and hence unlimited democracy—do not really exist, and Hayek argued that we actually have too much of it already.

The second irony is more subtle. Dogmatic democrats would clearly reject Hayek's critique of unrestricted majority rule and unlimited democracy. For unrestricted majority rule and unlimited democracy is, after all, what dogmatic democrats regard as *real* democracy—and very few of them would agree with Hayek that we are anywhere near reaching their goal of achieving it. So they might, for this reason, actually regard Popper's idea that popular sovereignty and majority rule are largely a myth as a point in favor of their own critique of democracy—which, simply put, is that majority rule and popular sovereignty are largely a myth. But Popper, unlike the dogmatic democrats, was very far from offering his idea that popular sovereignty and majority rule is largely a myth as a critique of democracy. He intended it, instead, as a critique of what he regarded as a common, widespread, but incredibly naïve concept of democracy—and as an attempt to understand democracy instead of idealizing it.

Popper was very clear that majority rule is an institutional mechanism that might be useful for avoiding tyranny and dictatorship. But he was also wary that it could very easily devolve into a tyranny of the majority. Hayek, of course, also worried that unrestricted majority rule and unlimited democracy could devolve into a tyranny of the majority. And this, I think, is the second irony.

For in what follows, I will argue that it was not so much the possibility of a *tyranny* of the majority that worried him, as it was the possibility of a tyranny of the *wrong* majority.

Tyranny

The term 'tyranny' is most often used today to mean a cruel and oppressive government. It was often used that way in the past, and I will sometimes use it that way here too. It is, however, important to understand that Popper used it in a somewhat more classical sense to refer to a government that cannot be removed without violence and

bloodshed, regardless of whether it was cruel or oppressive.²⁹ What makes a ruler a tyrant, according to this view, is not that her rule is cruel or oppressive, but that she is not and cannot be reined in by any law other than her own. This is because tyrants do not recognize or submit to any law other than their own—which means that they do not recognize or submit to any law at all.

Here, it does not matter whether tyrants seize power or are elected by a landslide vote. And it does not matter whether the people love or hate them. *What matters is that tyrants cannot be held accountable to any law—or indeed to anything other than themselves. What matters is that tyrants at some point or another and in one way or another proclaim themselves to be beyond the law—and that nothing prevents them from doing so.* Once a tyrant consolidates power—which she does, once again, by no one preventing her from doing so—there is no non-violent way of removing her from power so long as she wants to stay. This, once again, is because tyrants do not recognize or submit to any law other than their own.

Here, the essential thing about democracy is not that it has a non-violent way to make power transitions. Every monarchy has that,

29 This is closer to the way in which the ancient Greeks understood it. They used τύραννος to refer to cases in which an individual seized power illegitimately, and typically by force, as Peisistratos did in Athens in the sixth century B.C., leaving the Athenians with no non-violent way of removing him from power. But τύραννος did not necessarily connote a cruel and oppressive government for the Greeks. For tyrants could, as in the case of Peisistratos, be more benevolent than cruel. They could seize power as champions of the people—as opposed, say, to the aristocrats and nobility—and their regimes could be characterized by projects that benefitted them. Peisistratos, for example, built not only temples and altars, but also a system of aqueducts and fountain houses that brought clean water to the people.

Aristotle, for example, wrote that: 'Peisistratos' administration of the state was, as has been said, moderate, and more constitutional than tyrannic; he was kindly and mild in everything, and in particular he was merciful to offenders and moreover he advanced loans of money to the poor for their industries. (Aristotle 1952, 16.1-2).

That: ...in all other matters too he gave the multitude no trouble during his rule but always worked for peace and safeguarded tranquility; so that men were often to be heard saying that the tyranny of Peisistratos was the Golden Age of Kronos; ... And the greatest of all the things said of him was that he was popular and kindly in temper. For he was willing to administer everything according to the laws in all matters, never giving himself any advantage. (Aristotle 1952, 16.7-9)

And that: Both the notables and the men of the people were most of them willing for him to govern, since he won over the former by his hospitality and the latter by his assistance in their private affairs and was good-natured to both. (Aristotle 1952, 16.7-9).

even when there is a problem in producing an heir. Dictators have a long tradition of choosing their own successors. And any tyrant may decide to cease being a tyrant without violence and bloodshed by abdicating her position. The issue, on the contrary, is whether there is a non-violent institutional mechanism for *removing* or *dismissing* or *firing* a government, and for doing so in cases in which the people in power do not want to go. Popper said that democracies have such mechanisms, and that tyrannies do not.

The Greeks thought that democracies have a tendency to devolve into tyrannies, and that when a democracy devolves into a tyranny it typically does so in one of two ways. The first is through the rise of political majorities that use their political power as majorities to ride roughshod over the rights of political minorities. The second is through the rise of charismatic leaders who either pander to the electorate or are able to exert undue influence through the force of their personalities. The historical record yields examples of tyrants who came to power in both of these ways. But in either case, it was thought that democracy's descent into tyranny was due to a flaw in democracy itself, i.e., to the fact that it caters to the will of the people and thus tends to become too liberal as the majority elect leaders who, at least at first, place no limits on their freedom. Far from bowing to the popular will of the people, the Athenians would actually ostracize popular leaders they thought likely to become tyrants. They ostracized them not because they did not like them, but because they thought they posed a threat to their democracy. And here, it is at least interesting to note that the Athenians would force them to leave the city, not because the people or the majority were opposed to them, but because of their popularity and charisma and influence they might exert over the majority. The Athenians feared that the people or the majority liked them so much that they might bestow power upon them for life.

Popper agreed with the Greeks that democracies have a tendency to devolve into tyrannies. But he thought that if and when a democracy devolves, it *always* devolves into tyranny—for the simple reason that he thought there are two and only two main forms of government and that the one that isn't a democracy is a tyranny. Hayek was also concerned about the rise of tyrannies, and he was especially concerned about how the pursuit and attainment of an absolute collec-

tive purpose³⁰ could lead to totalitarian democracy. He agreed with Popper that the purpose of a true or proper democracy is to prevent this from happening.³¹ And he proposed reforms to our legislative structure and to our electoral system that he hoped would prevent it from happening. There is, however, a long tradition stretching back to the Greeks that there is actually a paradox of democracy, namely, that the majority in a democracy may, in full accordance with democratic principles, actually decide to vote against democracy and elect a dictator or tyrant as their leader.

The Paradox of Democracy

Popper thought that the paradox of democracy shows a logical flaw in the idea that democracy is majority rule. For what if the majority in a democratic state should decide to do away with its own democracy and install a dictator instead? What, in other words, if it were the will of 'the people' that they should be ruled by a tyrant? And what if 'the people' in their freedom decided to give up their freedom? These are not just abstract or academic worries. For the majority in a democratic state could easily decide to do away with its own democracy and its own freedom—perhaps, for example, by electing a leader for life—and many democratic majorities have actually done so in the past. 'The people' may not have conceived of what they were doing in quite this way when they did it. They may have thought that they had found the best, or the wisest, or the most virtuous among them—and that they might as well double-down on a good thing and elect them to office for life. But history is rife with examples in which this sort of utopian thinking did not work out exactly as planned.

Popper thought that the idea that democracy is majority rule leads to self-contradiction—and that we must reject it if we want our theory of democracy to be self-consistent. For majority rule says that we should reject any rule but majority rule. But it also says that we should accept any and every decision that is made by the majority. And if the majority now decides that a tyrant should rule them, then

30 (Hayek [1960] 1992, 56).

31 Hayek thus wrote:

The concept of democracy has one meaning—I believe the true and original meaning—for which I hold it a high value well worth fighting for. Democracy has not proved to be a certain protection against tyranny and oppression, as once it was hoped. Nevertheless, as a convention which enables any majority to rid itself of a government it does not like, democracy is of inestimable value. (Hayek 1978^b, 152).

proponents of democracy *as majority rule* are caught between a rock and a hard place. For they simply cannot reject any rule but majority rule and at the same time accept any and every decision that the majority makes. But Popper also thought that we can avoid this paradox by rejecting the idea that ‘democracy’ means majority rule and think of it, as he did, as denoting a form of government that is designed to defend a society against tyranny and dictatorship. He thus thought that elections are not democracy itself but merely well tested and reasonably successful safeguards against tyranny and dictatorship. And he thought that if a majority should someday destroy their democracy by electing a tyrant to office, then it would not be because democracy is inconsistent but because there is simply no infallible or foolproof way to protect it.³²

Government Under the Law

Hayek thought that unlimited democracies are essentially tyrannies; that the rise of omnipotent representative assemblies enable them to do whatever they need to do to retain support of the majority;³³ that this means that majorities are subject to no law besides their own; and that this, in turn, means that they rule for all intents and purposes as tyrants. He thought that we had to find a way to bring government under the rule of law to rectify this situation. And he actually proposed a ‘model constitution’ that he thought would do the trick. Hayek’s idea, in a nutshell, is that ‘true’ democratic governments must be restrained by laws that they did not make and cannot change. Such laws may be laid down by some majority. But they cannot be laid down by the current ruling majority, and the current ruling majority must be unable to change them. Hayek thought that this restraint upon majority rule and the power of the majority—the inability of the current ruling majority to change the general laws and rules of just conduct under which it lives—is necessary to bring a democracy under the rule of law. And he thought that it would also prevent it from devolving into a tyranny of the majority. I think that these ideas are in sharp contrast with Popper’s concept of an open society. And in what immediately follows, I want to explain why.

Open Society and the Democratic State

³² (Popper [1945a] 1999a, 125).

³³ (Hayek 1978b, 153).

Open society is very often associated with democracy and democratic political, judicial, and economic institutions—such as free elections, the rule of law, and the free market. So it is not too surprising that many people regard them as one and the same thing. Popper, however, associated open society with human freedom, fallibilism, and respect for other people and their ideas. He thought that democracy is the form of government best suited to *protect* an open society. But he also thought that open societies may have non-democratic governments, that democracies are not always successful in protecting them, and that there is always a reactionary movement toward returning to the security of a closed society. There are, of course, no such things as *the* open society and *the* closed society. There are only societies that are open and closed in different ways and to different degrees. I will, nonetheless, speak of them as societal types that actual societies may approximate. And I will, in what follows, first explain Popper's vision of open society by distinguishing it from the democratic institutions with which it is often confused. I will then explain how Popper thought open and closed societies differ. And I will then explain his vision of democracy by distinguishing it from open society.

Popper distinguished a society from a state, and an open society from the democratic state. He said that a *state* is “a set of institutions, such as a constitution, a civil and criminal law, legislative and executive organs,”³⁴ and that a *society* is “a form of social life and the values which are traditionally cherished in that social life.”³⁵ He said, more specifically, that an *open* society values freedom, tolerance, justice, the right to freely pursue and disseminate knowledge, the right to choose one's own values and beliefs, and the right to pursue one's own happiness³⁶—and that a *democratic* state is characterized by institutions that enable citizens to peacefully dismiss their government and work for peaceful change.³⁷ Popper admitted that this distinction is not very sharp. But he regarded it as very important. He thought that freedom is an end in itself, and that a democratic state can be a means to that end by helping to foster and protect freedom. So he promoted democracy and defended it against authoritarian and totalitarian governments that are so typical of closed societies.

34 (Popper 2011, 240).

35 (Popper 2011, 240).

36 (Popper 2011, 240).

37 (Popper [1945^b] 1999^b, 160-61).

Popper wrote that there is no reason, without democratic control, why governments should not use their political and economic power for purposes that are different from protecting their citizens' freedom.³⁸ But he cautioned that institutions are never foolproof; that they must be both well designed and well manned; and that they may always be used to serve ends that are diametrically opposed to the ends for which they were originally designed.³⁹ And he thought that it is easy to conflate democracy with open society, to treat it as if it were an end in itself, and to lose sight of the values and social life that it is supposed to protect.

Popper also distinguished an open society from a closed society. A closed society may value freedom, rationality, and equality. But it values security more. Popper characterized it as a 'magical or tribal or collectivist' society in which each individual knows his place. He said that individuals in an open society are, by contrast, continually confronted with personal decisions, and that there is nothing quite like this in a closed society. Closed societies, on the contrary, are structured around beliefs and institutions that are supposed to be absolutely certain and immutable, and their proponents are willing to impose these beliefs and institutions upon others—by force if necessary—and to uphold them against dissent.

Popper wrote that "the transition from the closed society to the open takes place when social institutions are first consciously recognized as man-made, and when their conscious alteration is discussed in terms of their suitability for the achievement of human aims or purposes."⁴⁰ He thought, in other words, that open society begins when we first consciously recognize that our institutions are human creations, that they are not set in stone, and that we are free to change them as we see fit in an effort to achieve our own goals. Popper no doubt regarded this recognition as an important moment in human progress. But he thought that the uncertainty that it involves can be terrifying, and perhaps even paralyzing. For now, we must decide not only what our aims and purposes actually are, or should be, but also how best to achieve them. We must bear the burden of the consequences of our decisions, and the responsibility for any harm they might cause. And we must come to grips with the fact that the

38 (Popper [1945^a] 1999^a, 127).

39 (Popper [1945^a] 1999^a, 128).

40 (Popper [1945^a] 1999^a, 294).

failure to achieve our aims and our purposes is our own failure and not the failure of our leaders, or history, or blind luck.

Hayek's Open Society

Hayek's idea of open society is somewhat different. Earlier we saw that Hayek valued liberalism and liberal democracy as a means to preserve freedom and open society, that he thought of liberalism and democracy as answering questions about the proper role of government and about who should rule in a state, and that he believed that democracy should be government under the law. So it may come as no great surprise that he conceived of open society more in terms of the laws that govern a state, or perhaps more accurately, the *kinds* of law that govern a state. Where Popper drew a distinction between a state and a society, Hayek thought of both liberalism and liberal values as pertaining to government, and hence to the state. And where Popper thought that the transition from a closed society to an open society occurs when we recognize that we are free to change our laws and our institutions as we see fit, Hayek thought that the transition occurs when we accept the idea that everyone within a society should be governed by the same laws, which we should not try to change.

Hayek conceived of an open society as a 'great society'⁴¹ in which there are too many people for them all to know each other personally, let alone for them to know what ends each of them might have or how they can best achieve them. He thought that the rules that govern such a society may be an extension of the rules that govern an 'end-connected tribal society', but he also thought that they must ultimately shed their dependence on concrete tribal ends and become abstract and negative. And he thought that any legislator who undertakes to lay down laws for a great society must subject the laws that he wants to implement to the test of their universalization.⁴²

Hayek thus thought that the ideal underlying open society is that the same rules should apply to everyone, or at least to everyone in the society.⁴³ He wrote that the concept of justice as we currently understand it—the idea, he meant, of treating everyone according to the same rules—emerged only gradually in the course of the transition

41 Hayek tells us that he frequently uses the term 'great society' in the same sense in which he uses Popper's term 'open society'. (Hayek 1976, 148).

42 (Hayek 1976, 39).

43 (Hayek 1976, 57).

from a closed to an open society before it became the progressive approach to an open society of free individuals who are all equal before the law. And he said that it is this idea—the idea that we should judge a person's actions by abstract rules and not by their particular results—that makes open society possible.⁴⁴

Here, it seems clear that Hayek conceived of open society as a great society consisting of free individuals who are all equal before the law. It also seems clear that he thought that the idea that our actions should be judged by universal rules and not by their particular results is a prerequisite for it. And I think that this marks a difference in the way in which he and Popper thought about open society. Where Popper thought that it is the recognition that we are free to change the laws under which we live that marks the transition to an open society, and that it is the particular results of the laws under which we live that might lead us to change them; Hayek thought that it is the recognition that we are all equally bound by the same universal rules of just conduct, which we cannot or should not change, that does the trick. Where Popper thought that it is the recognition that people are free to change their laws that marks the end of a closed society, Hayek thought that it is a change in the way in which we conceive of laws—as abstract negative rules that apply to all people equally rather than concrete positive commands that apply only to specific people—that does it. And where Popper thought that it is the fabric of a society that shapes the laws and institutions of its state, Hayek seems to have thought that it is the laws and institutions of a state that shape the fabric of its society.

Hayek, like Popper, distinguished between a society and a state. But Hayek described a state as “the organization of the people of a territory under a single government,” and a society as “the multiplicity of grown and self-generating structures of men.” He said that the state is a necessary prerequisite for the development of an advanced society.⁴⁵ He thought that democracy in the true and original sense of the term is government under the law, that the law that government is under consists of ‘rules of just conduct’, and that rules of just conduct are *found* by judges and legislators rather than being *made* by them. And this, perhaps more than anything else, is what distinguishes his views about laws and open society from Popper's.

44 (Hayek 1976, 39).

45 (Hayek 1979, 140).

The Rule of Hayekian Law

Popper thought that open society begins with a clear awareness of the distinction between *natural laws* on the one hand, and *normative laws* on the other—and with an equally clear awareness of the fact that the normative laws of human societies, unlike the laws of nature, are the product of human decisions, regardless of whether or not they are consciously made.

Popper thought that closed societies tend to blur this distinction, if they recognize it at all,⁴⁶ and to regard their laws, norms, customs, and, social taboos as laws of nature—if not laws of God—that are written in stone and cannot, or at least should not, be changed. And he thought that open societies, by contrast, are consciously aware that their laws, norms, customs, and social taboos are human conventions that are written by humans, and can be rewritten by humans on the shifting sands of human experience.

The distinction that Popper drew between natural laws and normative laws is part and parcel of the distinction between facts and values. It is implicit in the idea that we cannot derive an 'is' from an 'ought' or an 'ought' from an 'is'. Natural laws, in Popper's sense, *describe* unvarying regularities in nature. They are unalterable and beyond human control. And the statements that purport to express them are either true (if the regularity holds) or false (if it does not). But what is, perhaps, more important is that there are no exceptions to them. To discover that a purported law of nature does not hold under certain circumstances is simply to discover that it is not really a law of nature. Normative laws, by contrast, *prescribe* human behavior instead of trying to describe it. They say how we *should* act, and not necessarily how we actually do act. Popper thought that normative laws might be good or bad, right or wrong, acceptable or unacceptable. But he argued that they do not describe facts and thus should not be regarded as true or false. It may be a fact that certain societies abide by certain normative laws. But the laws themselves, according to Popper, are human conventions. They are made by humans,

46 Popper wrote:

It is one of the characteristics of the magical attitude of a primitive tribal or 'closed' society that it lives in a charmed circle of unchanging taboos, of laws and customs which are felt to be as inevitable as the rising of the sun, or the cycle of the seasons, or similar obvious regularities of nature. And it is only after this magical 'closed society' has actually broken down that a theoretical understanding of the difference between 'nature' and 'society' can develop. (Popper [1945^a] 1999^a, 57).

and they can be broken by humans. Indeed, the fact that they can be broken is the very reason why they exist. To say that a law of nature has been broken in this or that instance is, once again, to say that it is not really a law of nature. But there is no sense at all in having a normative law unless it can be broken. We thus have normative laws that say that we should not murder, or lie, or steal, or sleep with our neighbors' wives, or take the name of the Lord, our God, in vain. But we have these laws precisely because we can, and in fact often do, break them. We do not, by contrast, have normative laws that say that we should eat or breathe—for the simple reason that we could not break them for very long without ceasing to exist.

Hayek, on the other hand, sharply criticized the view that our normative laws are laws by convention. He defended a version of natural law theory that characterized our rules of just conduct as laws that legislators and judges *find* rather than laws that they make.⁴⁷ He did not regard the laws of just conduct as self-evident in the sense that we can all say exactly what they are, where they come from, what their theoretical justification is, or why they are important. But he thought it was clear that what is and is not law precedes legislation and legislators. He recognized the possibility that judges and legislators might change their minds about what the laws of just conduct actually are, but he argued that it is right for them to do so only when they find inconsistencies among them and only when the changes they propose eliminate those inconsistencies by finding which normative laws take precedence over which. This means that he thought that changes in the laws of just conduct are not so much changes in our normative laws themselves as changes in our beliefs about what they are. They are, in other words, an acknowledgement that we were mistaken in our previous beliefs about what the laws of just conduct are, and a clarification of what they really are.

I think that these different positions regarding the nature of normative laws—whether they are laws by convention or laws by nature—reveal very different attitudes toward change. I think that these different attitudes largely coincide with what Popper regarded as the difference in the ways in which open and closed societies try to cope with it. And I think that they also coincide with the very different ways in which Popper and Hayek thought that a democratic state could protect an open society and freedom. Hayek seemed to agree

47 (Hayek, 1973).

with Popper that democracy, done right, is the form of government that is best able to protect a free and open society. But he also placed very specific economic, political, and legal conditions on how to do democracy right.

Popper thought that democracy could protect an open society by providing governmental institutions with institutional mechanisms that enable the ruled to change their rulers—not only their elected officials, but also the laws under which they live, their governmental institutions and their institutional mechanisms—without a violent revolution. But Hayek thought that the way in which democracy can protect an open society is by embedding it within a permanent legal framework that is grounded in the principles of classical liberalism, and that embedding democracy within a legal framework grounded in the principles of classical liberalism would preserve individual freedom by preventing people and their democratic legislative representatives from changing that permanent legal framework in any way that might lead to socialism.

This, to my mind, is a sharp difference in the ways in which Popper and Hayek thought that democracy could protect a free and open society. Popper thought that democracy could protect a free and open society by enabling it to change its laws in a peaceful way. But Hayek thought that democracy, done right, could protect and preserve an open society by preventing it from changing its laws in any fundamental way at all—and that any democracy that allows society to change its laws in a fundamental way is not worth doing. Popper thus focused upon getting democracies to devise institutional mechanisms that would enable a society to change its leaders and laws without violence and bloodshed. But Hayek focused upon getting leaders and laws that would prevent a society from making such changes at all. And this, if we remember the plot of *The Open Society and Its Enemies*, might suggest that Popper should have regarded Hayek as one of its enemies.

Hayek's Electoral Reforms

Earlier I said that Hayek proposed electoral reforms that would have transformed a democracy into a government that Popper would have, or should have, regarded as a tyranny. I am now in a position to say why. Hayek thought that the problem with contemporary democracy is that it forces our elected legislative representatives to pander to the electorate to ensure their reelections. He thought that we could

solve this problem by electing representatives for a period of fifteen years, without possibility of reelection. And he proposed electoral reforms to ensure that legislatures be composed of representatives elected, in effect, for life by members of their own age groups, who would vote once and only once in their lifetimes at the age of forty-five.⁴⁸

Hayek characterized this proposal as ‘utopian’, and there are at least two utopian features that distinguish it from the way Popper thought about democracy. The first is that it is an attempt to solve the problem ‘Who should rule?’ This might not be obvious at first glance, since Hayek presents it as an attempt to solve the problem of legislators pandering to their electorates in order to be reelected. And it is true that Hayek elsewhere acknowledged that democracy does not put the wisest and the best-informed in power, and that our preference for it need not depend upon its ability to do so.⁴⁹ But his proposed electoral reforms would not even be a tentative solution to the problem, were it not for his assumption that an electorate voting at the age of forty-five, and voting only for candidates in its own age group, is more likely than otherwise to elect the best and wisest leaders.

And Hayek, in any event, argued for it by saying that people are more likely to know who is best qualified to lead among those within their own age group, and that people at the age of forty-five are both experienced enough and mature enough to make such judgments.⁵⁰

This preoccupation with finding a way to get the best rulers may seem innocuous or even beneficial at first glance. But it leads directly to a second utopian feature of Hayek’s proposal that is far more dangerous. For if we can design an electoral system that enables us to get the best and wisest leaders, then there would be no reason why we should think about how to get rid of them if something goes wrong. For even if something did go wrong, we would not be likely to fix it by dismissing them and installing new leaders—since we would, after all, have every reason to think that we already had the best. And whi-

48 (Hayek 1978^b, 160-61).

49 (Hayek [1960] 1992, 108-9).

50 (Hayek 1979, 111-119) (Hayek, 1978^b, 159-62) It is difficult, however, to ignore the possibility that limiting the members of the legislative assembly to people forty-five years or older would be more likely to produce an assembly that is much less inclined to articulate rules of just conduct that support socialism. There is, in any event, a well-known old saw that says: ‘Show me a twenty-five year old who is not a socialist and I will show you a person without a heart—but show me a forty-five year old who is still a socialist and I will show you a person without a brain’.

le Hayek does acknowledge the possibility of removing a member of the legislative assembly for gross misconduct or neglect of duty,⁵¹ his proposal, so far as I can see, offers no institutional method for doing so and does not allow their dismissal for any other reason. On the contrary, the whole point of his proposal is to ensure that the members of the legislative assembly would not have to run for reelection.

But what if an overwhelming majority of ‘the people’ strongly disapproved of the laws that the legislative assembly found?

Popper believed that it is ‘madness’ to base our political efforts on the faint hope that we may elect truly excellent, or even truly competent, leaders. He thought that our leaders have rarely been either morally or intellectually above average. He thought, on the contrary, that they have often been below par—both intellectually and morally—and that their acquisition of power could easily corrupt them. So he advised that while we should always try our best to get the best leaders, we should also always prepare ourselves for the possibility that we would get the worst.⁵² The electorate in Hayek’s system, however, would vote for their legislative representatives once and only once in their lifetimes. This means that they would have only one opportunity to vote them into office, but no opportunity at all to vote them out.

This means that they would not be able to exercise democratic control over the laws that their legislators found. And this means that the only way to remove them from office for the content of the laws that they find would most likely be through violence and bloodshed. But Popper, once again, thought that democratic states are distinguished from tyrannies by the existence of institutions that enable the ruled to get rid of their rulers without violence and bloodshed. And this means that Hayek’s proposal, in lieu of other institutional arrangements that might enable us to get rid of the members of the legislative assembly for the rules that they impose—and Hayek, so far as I can see, offers none—could transform a democracy into a system that Popper would have to regard as a tyranny.

There are other consequences of Hayek’s proposal that might invite tyranny as well. Thus, if the members of the electorate vote for their legislative representatives once and only once in their lifetimes, and if they all do so at the age of forty-five, and if they vote only for people who are also forty-five, and if the representatives they elect

51 (Hayek 1979, 114).

52 (Popper [1945^a] 1999^a, 122-23).

serve in the legislature for a period of fifteen years—then it would seem to follow that voters would be subject to law without democratic representation for most of their adult lives. Representative democracy already makes it difficult for voters to feel that they have a voice in determining the laws under which they live. But the idea that they can vote for or against the people who make the decisions can go a long way toward preventing violence and bloodshed if and when they disagree with the decisions that are made. And under Hayek's proposal, no adult under the age of forty-five or over the age of sixty would be able to vote for their representatives in the legislature—or, indeed, would have voted for anyone in it.

Hayek agreed with Popper that democracy is distinguished from tyranny by the presence of institutional means that enable people to dismiss their government. He wrote *in the very same context* in which he proposed his electoral reforms that democracy is of inestimable value if understood as a convention that allows any majority to rid itself of a government that it does not like; that this is the one, true, and original meaning of democracy; and that he thinks it is one well worth fighting for.⁵³ These are strong words and I believe that Hayek meant them when he wrote them. But he apparently did not recognize that if his reforms were enacted, a majority would have no peaceful way to dismiss a representative once it had elected her, and that they might well prevent them from getting rid of a government without violence and bloodshed at all.

Hayek no doubt recognized that grounding democracy in a permanent legal framework would prevent a majority from changing the laws that determine what other laws can and cannot be enacted—which are, of course, the very laws that matter most. That, indeed, was his reason for proposing it. It was also the way he thought democracy could protect an open society. He apparently did not recognize that many people might regard such a permanent legal framework as a significant encroachment upon the freedoms that they are trying to protect. But here, the point to be made is that he thought the recognition that we are bound by universal rules of just conduct that we did not make and cannot change is what marks the transition to open society, and that Popper thought it is the recognition that the normative laws under which we live are human conventions that we are free to change if and when we see fit that marks the shift.

53 (Hayek 1978^b, 152).

These are different concepts of open society and democracy, and they lead to different concepts of tyranny as well. For Popper also thought that a regime that does not enable a minority to work for peaceful change in its laws and leaders is a tyranny.⁵⁴ And this suggests that any attempt to tie democracy to a permanent legal framework based upon the principles of classical liberalism may very well result in a tyranny of liberalism.

In this paper, I have argued that

- Popper conceived of democracy as a government designed to avoid tyranny and valued it because it allows a society to change its leaders without violence and bloodshed, and
- Hayek conceived of it as 'majority rule' and proposed electoral reforms to democracy that would have prevented a society from doing just that.

I have argued that

- Popper thought that the transition from a closed society to an open society occurs as soon as people recognize that the laws under which they live are not given by God or written in stone, but are human conventions that are written by human beings and can be rewritten by human beings on the shifting sands of human experience, and
- Hayek thought that the transition from a closed society to an open society occurs as soon as people recognize that they should all be governed equally by the same laws, which are not made by legislatures but found by judges, and which legislatures cannot, or at least should not, change in any fundamental way.

And I have argued that

- Popper thought that democracy could protect an open society by providing governmental institutions with institutional mechanisms that enable the ruled to change their rulers and the laws under which they live without violent revolution, and
- Hayek thought that that democracy can protect an open society by embedding it within a permanent legal framework grounded in the principles of classical liberalism, and by preventing people and their representatives from changing that permanent legal framework in any way that might result in socialism.

54 (Popper [1945^b] 1999^b, 161).

In closing, I want to remind you that Popper wrote that “a policy of framing institutions to safeguard democracy must always proceed on the assumption that there may be anti-democratic tendencies latent among the ruled as well as among the rulers,”⁵⁵ and that there is always a danger, if not a tendency, for a free and open society to gradually slip back into a closed society—for people to become less tolerant of their fellow citizens, less respectful of their freedom and rights, and more concerned with getting what they themselves want from their government. So if we want to understand democracy instead of merely idealizing it, we must face up to the fact that it does not always work. Democracy may help us to avoid tyranny by enabling us to change our leaders and laws without violence, bloodshed, and revolution when it works. But it hasn’t always worked in the past, and we cannot guarantee that it will always work in the future.

I think that the fact that our democratic open societies have made the many difficult changes that they have made over the years without burning the house down any more than they actually had to is a real tribute to the ability of democracy to protect open society. But should we find ourselves facing new challenges in the days and years to come; if those challenges force us to rethink the changes we made in the past; if we find ourselves engaged in new public policy discussions about what to do about them; if we adopt new public policies and laws as a result, or go back to some of the policies and laws that we repudiated in the past; and if we are able to do it all, more or less, without burning the whole house down any more than we absolutely need to—then I would regard that as a real tribute to democracy’s ability to protect open society too.

55 (Popper [1945^b] 1999^b, 161).

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