

## Epistocracy vs constitutional democracy: A Hayekian response to Jason Brannan

## Epistocracy vs demokrasi konstitusi: Respon Hayekian terhadap Jason Brannan

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### Abstract

Jason Brennan, who proposes assessing democratic decisions based on non-procedural expert knowledge from a pure utilitarian standpoint, holds a prominent position among libertarian critiques of democracy. Brennan contends that epistocratic regimes can outperform democracies since democracies perform badly due to the phenomena of rational ignorance and deliberative democratic methods cannot solve this problem. Brennan, who compares epistocratic institutions to constitutional institutions, wants to tame democracies using negative externality arguments. In this study, we demonstrate that constitutional democracies cannot be assessed by the Brennanian metrics and that epistocracy will erode the libertarian political successes of constitutional democracy. Two important arguments back up this conclusion. First, transforming libertarian ideals beyond constitutional rules into the standard for daily politics allows experts tremendous discretion. Even with good intentions, the unchecked discretion of experts would most likely undermine the general, abstract, and egalitarian rules required by a complex society. Second, taking the concept of rational choice out of its original context will make the distinction between constitutional and unconstitutional governments unclear. Therefore, the libertarian ideal of the limited government established by the separation of powers and the procedures of checks and balances would lose its significance, giving place to the unchecked discretion of expert rule.

**Keywords:** constitutional democracy; epistocracy; libertarianism; procedural democracy; rule utilitarianism

### Abstrak

Jason Brennan, yang mengusulkan penilaian keputusan demokratis berdasarkan pengetahuan ahli non-prosedural dari sudut pandang utilitarian murni, memegang posisi menonjol di antara kritik libertarian demokrasi. Brennan berpendapat bahwa rezim epistokrat dapat mengungguli demokrasi karena demokrasi berkinerja buruk disebabkan oleh fenomena ketidaktahuan rasional dan metode demokrasi deliberatif tidak dapat menyelesaikan masalah ini. Brennan, yang membandingkan lembaga epistokrat dengan lembaga konstitusional, ingin menjinakkan demokrasi dengan menggunakan argumen eksternalitas negatif. Dalam studi ini, kami menunjukkan bahwa demokrasi konstitusional tidak dapat dinilai dengan metrik Brennanian dan bahwa epistokrasi akan mengikis keberhasilan politik libertarian demokrasi konstitusional. Dua argumen penting mendukung kesimpulan ini. Pertama, mengubah cita-cita libertarian di luar aturan konstitusional menjadi standar kebijakan sehari-hari memungkinkan para ahli memiliki diskresi yang luar biasa. Bahkan dengan niat baik, kebijaksanaan para ahli yang tidak terkendali kemungkinan besar akan merusak aturan umum, abstrak, dan egaliter yang dibutuhkan oleh masyarakat yang kompleks. Kedua, mengeluarkan konsep pilihan rasional dari konteks aslinya akan membuat perbedaan antara pemerintahan konstitusional dan inkonstitusional menjadi tidak jelas. Oleh karena itu, cita-cita libertarian tentang pemerintahan terbatas yang dibentuk oleh pemisahan kekuasaan dan prosedur checks and balances akan kehilangan signifikansinya, memberi tempat pada diskresi yang tidak terkendali dari aturan ahli.

**Kata kunci:** demokrasi konstitusional, epistokrasi, libertarianisme, demokrasi prosedural, utilitarianisme aturan

## Introduction

In the past two decades, the libertarian/classical liberal tradition has witnessed the emergence of a novel form of democracy critique, centered on the concept of rational ignorance. The public choice theory argues that, in representative democracies, there is no rational reason for citizens to gain the knowledge necessary to make sound political judgments (Downs 1957, Buchanan & Tullock 1962). Although

the one-person-one-vote principle is the formal manifestation of political equality, it does not provide individuals equal power over political decisions. Knowing that the acquisition of political knowledge cannot affect political decisions, rational individuals may choose to remain ignorant about political issues.

Consequently, tests of people's political knowledge consistently reveal that they lack the ability to reason adequately on key political topics (Somin 2016:17-43). These studies have shed light on an essential issue facing representative democracies. How can citizens successfully choose the right people to lead the country or promote the right policies if they lack the ability to accurately think about political issues?

The books by Bryan Caplan (2008), Ilya Somin (2016, 2020), and Jason Brennan (2016, 2022) argue that, despite the ideal of democracy, the democratic political decision process leads to the pursuit of erroneous/unjust policies in practice, based on numerous arguments derived from the rational ignorance argument. Somin offers alternative political solutions to the knowledge problem in democracies without categorically rejecting democracy, whereas Kaplan's criticism of democracy is limited to the defense of free-market economy. Brennan's epistocracy defense gives a new meaning to the issue of rational ignorance by shifting objections to the categorical rejection of democracy and tries to alter libertarians' traditional attitudes, beliefs, and theoretical perspectives toward democracy.

Therefore, we argue in this paper that Brennan's epistocracy, which he proposes as an alternative to democracy or at least as a suitable and essential addition to constitutional democracy, is incompatible with the core values upon which liberal constitutionalism is founded. The fundamental approach of liberal constitutionalism for protecting individual liberty is to divide and balance power. Constitutional norms are also codified in order to offer a set of rules that citizens with differing viewpoints and interests may agree on as a society. Brennan's expert rule weakens the libertarian emphasis on the limitation of power in the face of the assertion that rulers and voters must be knowledgeable. In addition, the technical knowledge of experts in epistocracies must be replaced with the abstract, general, egalitarian set of rules required by complex societies. This study demonstrates, however, that epistocracy cannot provide sufficient evidence and argument for defending individual liberty more effectively than a constitutional democracy.

The re-popularization of rational ignorance, which public choice theorists have utilized for decades to defend the concept of constitutional government, as the fatal flaw of democracy has profound implications for libertarian political theory. The content and policy recommendations of 21st-century libertarian critiques of democracy differ from those of prior libertarians in two ways, particularly those of Brennan.

First, while the problem of knowledge in democracies is treated as a secondary issue within the context of constitutional political mechanisms in the libertarian tradition, the primary criticism of the aforementioned libertarian critique of democracy is based on rational ignorance. This shift in emphasis in the critique of democracy alters the libertarian answer to the underlying problem of knowledge in democracy. Because if the most significant challenge for democracy is the ignorance of voters, it is necessary to discover an alternative to democracy rather than fixing democracy with constitutional institutions. Consequently, these libertarians can forsake the conventional defense of constitutional/liberal democracy. It is significant that Brennan (2016, 2022) provides epistocracy as an alternative to democracy in this regard. In addition, the lack of meaningful opposition to such arguments within the libertarian tradition indicates that the classical defense of constitutional democracy has been undermined.

Second, the emphasis on the ignorance of citizens implies a larger role for experts in political decision-making processes. If the main libertarian political problem is not the constitutional control of political power but rather the ignorance of citizens, then the libertarians' primary political objective is for the knowledgeable to make political decisions. Despite the fact that this claim has not created substantial controversy among libertarians, it is an essential subject for debate. The discussion of the difficulty of socialist economic planning, beginning with Ludwig von Mises and continuing with Hayek, enabled libertarians of the 20th century to resist the rule of experts. In addition, criticism of the rule of experts has been urged not only as a stance against socialist economic planning but also as a vital tenet for the

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preservation of a free society. In particular, Hayek’s work in this approach inspired the mainstream libertarianism of the 20th century (Caldwell 2004, Boettke 2018).

Hayek developed a comprehensive social theory incorporating legal, political, and economic theories to oppose socialist economic planning (Hayek 1960, 1973, 1976, 1979, 1989, 1994). Hayek’s political theory is founded on the assertions that the knowledge that enables the functioning of modern society/extended order cannot be centralized and that complex cooperation in society can only be organized through abstract rules/rules of conduct. Due to the extended order’s complex network of cooperation, it advises that political decisions be made according to rule utilitarianism rather than particularist/act utilitarianism (Hayek 1976:1-30).

In the case of a market economy, the objective is to expand the scope and efficacy of economic cooperation through the use of abstract rules, such as property rights, that make the price mechanism function. However, when it comes to political rule, the issue is not only economic efficiency, but also enabling the emergence of social cooperation through permanent and largely agreed-upon rules among a community of individuals with diverse interests and values. In light of this, political knowledge comprises not just of scientific and technical knowledge, but also of value-laden knowledge that can be accepted by all people. People with differing values are more likely to agree on norms that are general, equal, and abstract, without specific goals (Hayek 1960, 1979).

The political implications of rule utilitarianism are that constitutional rules cannot be utilized to accomplish concrete, foreseen outcomes. Through this rule, utilitarianism, the conventional constitutional theory is likewise founded on the emergence of an abstract order. In contrast, Brennan rejects this rule of utilitarianism and departs from the concept of constitutionalism by requiring the calculation of the particular outcome of each rule/policy. Since his understanding of democracy is based on act utilitarianism, Brennan makes a categorical distinction between political and civil rights and sees no harm in canceling the voting rights of those who do not have extensive knowledge of the social sciences (Brennan 2016:9-10).

How should we interpret Brennan’s dismissal of libertarian theories and discourses founded on the interrelationship between constitutional government, the rule of law, and free markets, at least since John Locke? The rational ignorance phenomenon, a partially insignificant occurrence in libertarian philosophy, appears to be Brennan’s primary reason for epistocracy due to his wish to respond to the growing number of advocates for deliberative democracy. In fact, following the voter ignorance, the argument that fills the most space in *Against Democracy* is that these voters are incapable of reaching mature, well-informed political judgments through negotiation (Brennan 2016:54-73).

Examining the arguments against Brennan reveals that the primary dispute centers on the viability of deliberative democracy. Many responses to Brennan attempt to demonstrate that his criticisms of deliberative democracy are incorrect and biased (Moraro 2017:911-912, Chambers 2018:503-504, Soon 2018:6, Stone 2019:88-89, Umbers 2019:290). In addition, it has been thoroughly argued that limiting the right to vote and depending on competence to justify political rights will result in social inequality and class conflicts (Soon 2018:4, Klocksiam 2019:26, Klijnman 2021:93-94).

When we continue to explore the literature, we find that Brennan’s responses have little to do with the discussions within libertarianism. For instance, the second sort of criticism leveled against Brennan centers on the argument that he does not adequately explain epistocracy. Even though Brennan provides a severe critique of democracy, it is argued that we cannot compare epistocracy with democracy because Brennan’s arguments are mostly based on controversial assumptions and there is no epistocracy in the existing political order (Crain 2016, Moraro 2017:912, Illing 2018, Soon 2018:3-8, Gunn 2019:27, Stone 2019:85-94, Thomas 2019, Umbers 2019:290). Although we find the statements in these publications to be credible, they are of secondary relevance to libertarianism in comparison to the concerns we have described above. In contrast to these arguments, we take Brennan’s claim that epistocratic institutions are a logical continuation of constitutional institutions seriously.

The rejection of the notion that only the competent should vote becomes the basis for the second group of more severe criticisms of Brennan. For instance, Klockslem (2019:24-35) argues that abuse of restricted suffrage in an epistocracy is entirely plausible. In addition, there are solid arguments for why voter's knowledge is insufficient to make sound decisions (Arvan 2010, González-Ricoy 2012:50, Moraro 2017:913, Salter 2017:172, Illing 2018, Reiss 2019:183-186, Thomas 2019). Although it is conceivable to analyze the economic rents and collective action problems that restricted voters can cause in the setting of public choice, we examine the knowledge problem in terms of Hayekian social theory.

In addition to these concerns, Brennan's idea for a citizenship test has attracted numerous criticisms. In the absence of absolute competency or universal knowledge, the citizenship test has also been criticized for being susceptible to manipulation (Crain 2016, Bøyum 2018:130-134, Wakeling 2020). We deem these criticisms to be of the utmost importance. Regardless of whether or not we accept the possibility of universal knowledge, our attention is on the political challenges that may develop in epistocracies in terms of the extended order.

Current criticisms lead directly to the subject that Brennan seeks to address. Brennan, with minimal effort, contends that epistocracy protects individual liberty more effectively than a constitutional democracy. Consequently, Brennan readily grounds the crux of the discussion on the deliberative critique of democracy. The majority of Brennan's critics are, therefore, proponents of participatory/deliberative democracy.

Nevertheless, the historical and theoretical contributions of constitutional democracy to the defense of individual liberty are not discussed. Brennan's dialogue with procedural democrats impedes the emergence of discourse over the implications of Brennan's critique of democracy for libertarianism. The question that Brennan's works do not answer, but is of more importance to libertarians, is how to retain epistocracy within constitutional boundaries.

Therefore, we do not examine Brennan's criticisms of procedural democracy in this paper. However, we argue that Brennan's pure instrumentalist approach to democracy will not be as effective at safeguarding libertarian ideals as conventional constitutional democracies. Constitutional democracy is not merely a restriction of democratic decision-making processes, but rather a reinterpretation of democracy according to individual liberty. Thus, rejecting democracy or separating political rights from civil rights cannot be comprehended with pure/act/particularist utilitarian point of view as Brennan argues. We suggest that voter ignorance cannot justify the rejection of this well-established philosophical perspective.

### **Brennan's perception of democracy: Instrumentalism versus proceduralism**

Brennan's claim that epistocracies will outperform democracies is supported by two assumptions. The first is that only those who are knowledgeable should have political rights, and the second is that those who are knowledgeable will be citizens of goodwill who favor libertarian policies. Although Brennan (2016:19) claims to be agnostic about supporting limited government as a remedy for rational ignorance, his informed voters support abortion and birth control, have less prejudice against gays (Brennan 2016:34), and favor free trade over protectionism (Brennan 2016:28, 34, 193).

Evidently, the claim that the knowledgeable should rule and that the knowledgeable are also virtuous had been perfected by Plato (1968) and has been the subject of debate for the past 2500 years. It is questionable to us why epistocracies will not evolve into Poperian totalitarianism (Popper 1991) rather than a limited government. Brennan's claims regarding the competence and virtue of informed/knowledgeable voters, however, have been adequately refuted by other authors (Arvan 2010, González-Ricoy 2012:50, Moraro 2017:913, Salter 2017:172, Illing 2018, Klockslem 2019:24-35, Reiss 2019:183-186, Thomas 2019), so we will focus on a different, more significant issue.

Brennan's distinction between instrumental democracy and procedural democracy is crucial to our research. Because, according to Brennan, the value of democracy is measured merely by the consistency between the goals and outcomes of democratic decisions (Brennan 2016:11). In addition, apart from

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instrumental rationality, there is no need for any other value by which the legitimacy of democracy can be measured. According to Brennan, in this regard, policies based on social scientific analysis are rational and will be implemented in good faith by knowledgeable (Brennan 2016:33-34, 42-43, 49-50).

Brennan assumes that knowledgeable individuals will have a tendency for libertarian politics, will not violate individual freedoms, and will not support policies that will create negative externalities on individuals. At least, he concedes that epistocracy outperforms democracies on these metrics (Brennan 2016:114). Therefore, Brennan provides only two justifications for epistocracy. First, the rational ignorance assumption asserts that citizen ignorance is a built-in flaw of democracy. Second, procedural/deliberative/participative democracy practices cannot help to overcome the ignorance of citizens. Brennan contends that once citizen ignorance and its persistence in democracies are proven, there is no reason not to give a chance to epistocracy (Brennan 2016:205-207, Brennan & Landemore 2022:94-120). Brennan, however, does not address the issue of what political rules and institutions we will rely on to prevent a small number of voters from abusing their political power for their own economic and political goals.

Brennan’s distinction between instrumental democracy and procedural democracy, which he drew at the beginning of his book, is crucial for this reason. While Brennan’s critique of procedural democracy has been heavily debated, the relationship between instrumental democracy and constitutional democracy has received almost no attention. To be fair, it is unacceptable for libertarians that what is just can be determined through the democratic procedure. We concur with Brennan that the evaluation of democracy requires non-democratic procedural values and knowledge (Brennan 2016:33). However, we cannot agree with the claims that pure instrumentalism shapes constitutional democracy or that libertarians can understand democracy through the hammer metaphor.

According to Brennan’s instrumentalist notion of democracy, good outcomes are determined outside of democratic decision-making that is, based on different non-procedural values. Brennan argues that regardless of the procedure, governments should distribute just results to advance the right goals (Brennan 2016:11). In this respect, Brennan establishes a similarity between democracy and hammer in terms of instrumentality. Democracy supposes to have specific daily purposes, just as the task of a hammer is to ensure that the nail is driven into the wall. Democracy is analogous to a “hammer” because it ought to effectively produce just results (Brennan 2016:8-14). In reality, however, democratic regimes are unable to live up to these lofty expectations and typically implement incompetent and irrational policies. Therefore, there is no justified reason to favor democracy over epistocracy. If epistocracy is more effective and produces more just outcomes than democracy, it should be adopted. Here, the principles of justice can be understood as individual liberty and rights. Because the examples of incompetent democratic policies provided by Brennan clearly support this perception.

Nevertheless, our primary argument is that the political framework of a limited government favored by libertarians cannot be achieved by day-to-day just purpose/policy following, but rather by ensuring the government does not abuse its power through constitutional rules and checks-and-balances. Therefore, epistocracy necessitates the rule of experts, whereas constitutionalism necessitates the rule of law. There are certain tensions and conflicts between the rule of man/women and the rule of law that Brennan has not discussed yet.

### **Epistocratic limits versus constitutional limits**

The argument that epistocracy can be more successful than democracies is based on the limitations that epistocracy places on democratic decision-making processes in order to secure justice. In other words, either the knowledgeable will make political decisions, or political decisions not supported by the knowledgeable will be ruled out. Although Brennan compares epistocratic measures to constitutional rules, there are significant differences in both purpose and method between the two.

Brennan implies that epistocracy will pave the way for a libertarian government, but he does not identify protecting individual rights and liberties as the goal of epistocracy. The goal of an epistocracy is to make every political decision, from the law to the smallest regulation, based on the principles of non-

procedural justice (Brennan 2016:217-218). There is a significant gap between these two objectives. The former goal is the conventional justification of constitutional government. By limiting political power over time, liberal constitutionalism seeks to prevent the irreversible infringement of individual rights and liberties. The primary mechanisms of constitutionalism are the separation of powers, the checks and balances system, and the rule of law. These political and legal mechanisms are accepted at the constitutional level, and it is sought to keep daily politics as much as possible within these boundaries (Hayek 1979, Buchanan 1998, Buratti 2019).

On the other hand, in order for informed and virtuous decisions to be taken every day, the universal standards of knowledge must be known by voters and rulers. In fact, knowledge should also cultivate virtue in voters and rulers, exactly as Plato suggested. Brennan proposes less ambitious models of epistocracy due to the fact that Plato's philosopher-king is too qualified to be real: restricted suffrage, plural voting, enfranchisement lottery, epistocratic veto, weighted voting/government by simulated oracle (Brennan 2016:14-15). All of these arguments point to two distinct epistocratic regimes. The first is that only the knowledgeable may vote and be elected (restricted suffrage, plural voting, enfranchisement lottery, and weighted voting), and the second is that all political decisions of the elected may be vetoed by the epistocratic council, an elite body, without altering the principle of universal suffrage.

Our main purpose here is to discuss the constitutional nature of the epistocratic council. Brennan compares the epistocratic council to judicial review and argues that the epistocratic council can be regarded as democratic in the same manner as a constitutional mechanism (Brennan 2016:218-219). This claim is consistent with Brennan's instrumental democracy perspective, as described previously. We contend, however, that the epistocratic council is unconstitutional, and therefore undemocratic.

Politics can be divided into constitutional and post-constitutional eras in order to understand the role of constitutional politics (Hayek 1960:166-183, Buchanan 2001:79-86). On that matter, constitutional politics is a consensus on the general principles of politics and does not interfere with post-constitutional politics' day-to-day operations. This distinction addresses serious constitutional violations within the context of general, abstract, and non-discriminatory constitutional rules. When the judicial review, for instance, becomes judicial activism, the democratic nature of the judicial review becomes contested. Even if we assume that the views of Supreme Court justices are consistent with libertarian principles, it is debatable whether the judges' position as policymakers is consistent with constitutionalism.

Therefore, there is a clear distinction between judicial review in constitutional democracies and the epistocratic veto. These constitutional mechanisms and rules are not epistocratic, but rather pro-individual liberty. Constitutionalism demands to limit democratic politics without making daily political decisions. However, the primary objective of epistocracy is to intervene in daily politics and enable decisions to be made based on "non-procedural justice" in daily politics. In this regard, the claim that epistocratic institutions are constitutional is false.

Brennan has also stated in another work that constitutions are merely written texts with no real power to protect individual freedom (Brennan 2012:73-75). Therefore, Brennan's objective is not to regulate daily politics with constitutions, but to evaluate each political decision based on the epistocratic principle. Brennan's proposal is a limited Platonic regime rather than a constitutional democracy in this regard.

Brennan argues, using constitutional concepts once more, that the epistocratic council will serve as a "check" on the democratic process (Brennan 2016:208). The fact that Brennan has provided jet designs while describing the control mechanism that should be applied to democratic politics is illustrative of the issue we highlight here. According to Brennan, engineers do not design jets under the assumption that the weather will be ideal; rather, they take safety precautions by taking into account the possibilities that may arise. This "democratic" safeguard is Brennan's epistocratic veto.

As we can see, Brennan compares politics to the design of a jet (Brennan 2016:205-207). Thus, politics is viewed as an expertise that can be reduced to technical knowledge, and prospective conflicts can be anticipated. While it is evident that politics is related to technical or scientific knowledge, Brennan disregards the importance of values and different policy priorities in politics. In this context, liberal

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constitutions do not disregard values or priorities, but rather seek consensus on rules that enable the peaceful resolution of political conflicts. Brennan’s epistocratic measures cannot be justified by constitutionalism in this regard, either.

Brennan’s belief that the epistocratic veto will lead to the election of the knowledgeable is another unconstitutional position. If the epistocratic council can veto all of the political decisions of members of the parliament, the right of citizens and elected officials to participate in political decision-making is revoked. Clearly, this type of government is autocratic. While autocracies may be capable of producing libertarian policies in principle, the libertarian nature of autocracies can only originate from enlightened rulers. It is inappropriate to justify an autocratic government by reference to constitutional democracy.

Brennan’s use of the plaintiff-jury example to demonstrate that the epistocratic veto is compatible with modern democracy is similarly flawed. Judicial impartiality is one of the constitutional pillars and is supported by a distinct justification. Not all democratic systems are liberal, and it is unreasonable to expect them to be. In a Rousseauian democracy, for instance, judicial independence based on the separation of powers might be meaningless. However, constitutional democracies are inconceivable in the absence of judicial impartiality. The decisions of the judges and jury are comparable to those of a referee. His authority stems not from his knowledge, but from his impartial decision-making based on that knowledge (Locke 2003:318-330). Brennan attempts to transfer the legitimacy of constitutional democracies to epistocracy, but he rejects the fundamental principles upon which constitutional democracies are founded.

While Brennan (2016:11) indirectly depicts epistocracy as a strengthened version of constitutional democracy, he also indirectly compares procedural democracy to illiberal, or unconstitutional, democracies throughout the book. Brennan uses the following example to illustrate the violation of rights that proceduralism can cause: “*Yet if tomorrow everyone in my country decides they want to interfere with me or subject me to their collective will, my political rights provide me no more protection than a bucket provides against a flood*” (Brennan 2016:99). While we agree with Brennan that pure proceduralism can easily lead to illiberal outcomes, we believe it is not justified to illustrate hypothetical procedural democracy as the opposite of the epistocracy, since epistocracy itself does not compatible with constitutionalism. Brennan’s failure to provide a more thorough analysis of constitutional democracy results in logical fallacies.

## **Libertarian defense of democracy beyond pure instrumentalism**

It is probable that the principle of individual liberty and democracy as majority rule will frequently come into conflict. This is why libertarians hold an instrumental view of democracy. However, the instrumental interpretation of democracy is not as straightforward as Brennan indicates and is a contested issue. Conventionally, the libertarian objective of a political regime must be the protection of individual liberty. In this regard, the objective or instrumental value of constitutional democracy, from the perspective of libertarianism, is to safeguard individual liberty.

Many libertarians argue that, in the long run, constitutional democracy will better protect individual freedom than alternative governments (Hayek 1960, Holden 1993, Buchanan & Congleton 1998). In this respect, the important thing, in the long run, is not to calculate the benefits of each policy one by one but to keep the political power within its legitimate limits. However, as we explained above, Brennan advocates the rule of the knowledgeable, suggesting that in fact the value of each democratic decision or policy should be determined by comparison with expert opinion. This claim raises the question of what instrumentality the libertarian tradition should attribute to democracy.

## **Taming democracy versus constitutional democracy**

It is simple to identify the tools that are suitable for an individual’s priorities, but it is more difficult to identify the tools that are suitable for the priorities of a group. According to Kenneth Arrow (1963), under some conditions, it is impossible. Libertarians view the formation of policies that reflect the preferences of each individual member of the political community with skepticism, if not outright impossibility.

Also, libertarians take seriously the prospect that the majority may violate the rights of minorities, including individuals, by imposing a shared priority on the entire society.

Through the principles of the rule of law and constitutional mechanisms, libertarians have historically sought to defend individual liberty or prevent collective political actions from causing negative externalities on individuals. Rather than determining the sort of decisions political power will make, this approach aims to prevent political decisions that limit or eliminate individual liberty.

In particular, the constitutional democracy outlook seeks to combine political equality with the principle of legal equality. Thus, on the one hand, democracy will not self-destruct through majority despotism, and on the other, individual liberty will be able to apply the political equality and constitutional processes afforded by democracy to the political system (Hayek 1960:525, 1979:20-38). In this model of limited government, libertarian restrictions on government are not merely libertarians taming democracy. In contrast, a libertarian understanding of democracy creates linkages between democracy and libertarianism that are difficult to sever. To do this, the content of numerous democratic notions and claims must be reformulated in a libertarian manner.

It is reasonable to attribute instrumental meanings to constitutional democracy, but this instrumentality cannot be purely instrumentalist as Brennan claims. Demanding every democratic political decision to support libertarian ends will have unintended consequences. In this sense, democratic politics does not serve a defined collective objective. The utilitarian nature of democracy is implied in the expectation that it will better defend individual liberty over time compared to other forms of government. Otherwise, it is impossible to calculate the long-term benefits of how well day-to-day policies align with libertarianism.

This perspective of instrumental democracy, we believe, is best explained by Hayek's rule utilitarianism. Hayek defines particularist/act utilitarianism as the attempt to evaluate the value of a particular rule/decision in relation to a particular goal. In contrast, rule utilitarianism compares the value of rules to their long-term results. Establishing the social value of private property on a case-by-case basis, for instance, may necessitate the eradication of the right to private property in some instances (Hume 1960:497). As a result of understanding the long-term benefits of private property to human growth, it is now recognized as an essential institution of civilization.

The instrumental value of constitutional democracy does not imply that it will always provide policies that are superior to alternatives or experts. Hayek contends that only constitutional democracy, in the long term, will better guarantee individual liberty than alternatives and the rule of experts (Hayek 1960). It is insufficient to merely substantiate this claim with historical evidence. Moreover, the overlaps and conflicts between individual liberty and democratic equality must be reconsidered in light of libertarian philosophy.

The fundamental question to be answered is: How can democracy as majority rule be reconciled with individual freedom? Majority rule arises as a result of political equality and its main purpose is to prevent citizens from being dominated by a person or group. Therefore, the aim of democratic equality is not the oppression of the majority over the minority. In this regard, participation in public affairs and transparency in political action are fundamental democratic norms.

The institutions of political equality and accountability were effective in the Ancient Greek democracy, in which public officials were elected by lot annually from among various political unions (Ober 2008:60). In the Athenian democracy, the institutionalization of political equality enabled the anonymization of political power. Although the ancient Greeks were unfamiliar with concepts such as the neutral state and individual liberty, they were familiar with the use of political authority for self-interest (tyranny) and group interest (oligarchy). The administration's anonymity led to the formation of a public rather than a private power. Thus, the democratic constitution of Athens had the opportunity to bind the government to impersonal rules, and corruption could be restrained for an extended period of time and to a substantial degree (Ober 1989:53-55, 2010:270-275, 2019).



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In modern representative democracies, political equality rarely extends beyond the one-person-one-vote rule and public offices are elected, which the Athenians saw as oligarchic. This implies that in current representative democracies, it is exceedingly difficult for voters to control political power through political involvement. In democracies when political equality is insufficient to restrain political power, the fundamental duty of constitutions is, therefore, to divide, and balance the power. By focusing on the government’s impartiality, it is feasible to avert the self-destruction of representative democracies. Because in representative democracies, adopting a political stance against powerful interest groups (oligarchic groups) or obtaining information on daily political developments is fraught with several collective action problems (Olson 1982).

In this regard, Hayek contends that restricting majority rule to formal requirements of the rule of law does not violate the concept of democratic government. According to Hayek, adopting the majority rule and the circumstances in which it will be employed are two distinct matters (Hayek 1960:170). Therefore, Hayek believes that it would not violate democratic principles to exempt certain topics, such as human rights, from majority rule. The subject and context of the majority vote should be decided by other political principles. A majority vote in representative democracies may not ultimately serve democratic goals, let alone libertarian ones; if the constitutional condition is not met.

According to Hayek, the defining characteristic of a society is not that its members share the same values, but rather the adoption and impartial implementation of impersonal rules for collective action (Hayek 1960:171, 1973:72-74). Brennan (2016:148) highlights that granting voting rights to all adults above the age of 18 is in many ways arbitrary. However, according to Hayek, this rule does not have to be rationally justifiable by all standards. If this rule can organize collective action in an impersonal manner and applies the same criterion to all citizens without discrimination, then it has achieved its intended objective (Hayek 1960:169). In this regard, society “is not from a mere act of will of the momentary majority but from a wider agreement on common principles that a majority decision derives its authority” (Hayek 1960:171). Constitutional democracy is not an external restraint on representative democracy, but rather a contextual reinterpretation of concepts such as democratic equality, sovereignty, and the public interest.

According to Hayek, these widely recognized rules are what transform a group of individuals into a community. A group of individuals becomes a community when they obey the same standards of conduct, not when they make rules by majority vote. The emphasis here is on the fact that majority voting can easily establish arbitrary rules and make it impossible to express individual priorities. For instance, a sizable portion of society may view the regular alternation of governments through elections as an impersonal rule. Nonetheless, it is improbable that the majority of the people, including those who voted for the government, will endorse or be aware of every legal rule or government policy. Therefore, it is democratic, practicable, and a good guarantee of individual freedom to agree on which principles should be bound by the government’s actions, as opposed to requiring majority approval of each policy.

### **Politics is not an expertise**

In this regard, contrary to Brennan’s (or Plato’s) claims, politics is not a specialized field like medicine. Rather, it is the art of establishing rules for how collective decisions are to be made in the face of several competing interests and agendas. As a result, the purpose of politics is not to achieve the precise objectives of experts, but rather to resolve conflicts between diverse individual objectives and get the approval of citizens for the political system. The libertarian definition of politics has developed roughly in accordance with this reasoning.

Market-based specializations, such as medicine, are primarily designed to fulfill personal needs. Nonetheless, the primary function of politics is to facilitate social cooperation by fostering trust between individuals through the exercise of political authority. Individuals can build a community, according to Hayek, to the extent that they believe in common rules. Due to diverse individual objectives and values, the rules that all persons can accept in common must be general, abstract, and equal. Aside from generality and equality, there are very few rules that members of a society can accept as unquestionably just. To

be a society, it is therefore more vital to agree on the formal characteristics of the rules than on their content. By institutionalizing these formal aspects of law through constitutional processes, libertarians want to prevent post-constitutional political actions from irreversibly compromising individual liberties.

Obviously, we like public officials to be subject matter experts. Expertise-based political institutions, such as the central bank or the judiciary, also enable political authority to be based on knowledge. Nonetheless, in this illustration, the authorities who hold political power gain their legitimacy not from their personal knowledge, but from the knowledge institutionalized within their office through rules, practices, and organizational culture. This approach grants administrative autonomy to governmental offices based on expertise. For instance, a referee in a sporting event is not legitimate because he wrote the regulations himself, but he is valid because he knows the pre-existing rules and can fairly apply them. Consequently, the objective of public officials is to use their public authority responsibly within the context of general and equal rules of conduct.

Brennan requests that we give up libertarian institutions such as constitutional government, impersonal law, and the right to political consensus in exchange for the rule of the knowledgeable. But does Brennan provide sufficient reason for this major change to libertarians? Since Locke, libertarians have found the guarantee of individual freedom on the rule of law, and the rule of law on the inability of governments to adopt discriminating and tailored rules.

Brennan appears to believe that the institutional structure of constitutional democracy may be easily transformed into epistocracy, as seen by the preceding explanations. Specifically, he aims to rid constitutional democracies of their democratic characteristics by expanding the number and influence of expertise-based political institutions within constitutional democracies. Therefore, experts will generate smarter policies by exercising greater judgment in their respective fields of expertise. In doing so, however, Brennan undermines the constitutional government and violates every principle upon which constitutional democracy is based. Brennan makes this trade-off based on the notion that the rule of expert will better ensure individual liberty.

However, here we would like to underline a fundamental problem posed by the Hayekian perspective. A departure from the constitutional tradition developed since John Locke is the formation of rules by experts expected to reach a consensus on the public good and supported by a small number of competent constituents. The concept of limited government is delegated by epistocracy to the authority of the knowledgeable, not the rule of law. This abrupt move from a rule-based approach to a knowledge-based approach requires much stronger justification. However, this cannot be observed in Brennan's writings.

In addition, it is incorrect to argue that Brennan believes that the impersonal institutional structure of constitutional democracy would persist in epistocracy and that, as a result, epistocracy will not devolve into arbitrary authority. Because Brennan does not see it necessary to discern between constitutional and non-constitutional democracies. In his book *Against Democracy*, Brennan draws the majority of his examples from the American political system. In this regard, it is evident that Brennan disapproves of the American democratic system. In terms of constitutional institutions, Brennan does not differentiate between well-performing constitutional democracies and underperforming illiberal democracies. And he simply claims that the success of liberal democracies is built on the elite's ability to exclude the public from decision-making procedures (Brennan 2016:174). Therefore, there is no substantive distinction between constitutional and illiberal democracies. Brennan asserts that the primary distinction between democracies is whether they are instrumental or procedural. Democracies could be either procedural or instrumental, but he is using constitutional political institutions, as an illustration, to help us relate epistocratic institutions to our own political experience.

### **Who guards the epistocrats?**

Hayek penned *The Road to Serfdom* in order to make the conventional defense of the limited government against the rule of experts who claimed that constitutional liberal democracy had impeded their expert opinions. The vast majority of social scientists were passionately devoted to central economic planning

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and extreme social justice by the time the book was first published in 1949. Hayek, on the other hand, argued that the use of political power for specific social ends would demolish impersonal rules of conduct and transform democracy into serfdom (Hayek 1994). Hayek argued vehemently that libertarians should embrace democracy because, under the right institutional conditions, it is the form of government that can be converted to limited government the most readily (Hayek 1960:183). He underlined that libertarianism cannot justify personal rule.

Brennan argues that epistocratic design will improve limited government, but he misleads by ignoring the inherent tension between epistocracy and constitutionalism. For libertarians, neither deliberative nor participatory democracy is relevant to the discussion on democracy. In contrast, libertarians’ greatest struggle in the 20th century was against experts who viewed their personal rule as more successful than the impersonal rules of the market and limited government. In a democracy devoid of constitutional constraints, there is no credible evidence central banks of economists will safeguard individual liberty. Plenty of historical evidence points in the opposite direction (Scott 1998, Easterly 2015). Brennan’s dedication to rejecting procedural democracy, without addressing these topics in any way, impedes the growth of several libertarian theoretical disputes.

We are aware that the current discussion on democracy is between populist regimes and liberal democracies, not socialism and capitalism. Brennan’s discussion of epistocracy is taken with the distinction between voters who are susceptible to manipulation by charismatic leaders and those with political consciousness who are aware of populist corruption in mind. However, the populism of today and the collectivist populism of the 1950s are fundamentally the same. The central planners of yesterday undervalued the impersonal norms of politics and the market, believing they possessed the knowledge to recognize the collective priority and implement it. Today’s charismatic leaders despise impersonal norms, saying that their values mirror those of society.

Therefore, the idea of constitutional government, which Brennan sacrificed while escaping populism, gives epistocrats the authority to build a society for specific purposes, replacing rule of law with the rule of the experts again. Even if these experts are libertarians, it is impossible to call for the rule of experts and adhere to the separation of powers at the same time. Limiting individuals with political power to rules of conduct is the most well-known and experienced way of implementing just policies.

In this regard, the concept of limited government is grounded in a moral rather than a functional or instrumental premise. This moral concept seeks to enlarge the scope of individual freedom in society, regardless of whether or not the majority accepts this political ideal. It is simpler to reach a consensus on impersonal rules that are content-neutral than on rules/policies with specified objectives. Therefore, libertarians continuously differentiate between constitutional and post-constitutional politics, recognizing that post-constitutional politics cannot be regulated solely by policies that maximize individual freedom. The fundamental libertarian approach in this context is not the rule of competent libertarians, but rather the division and balance of political power.

## **Conclusion**

Brennan has always asked that his opponents judge democracies based on actual democracies as opposed to ideal democracies. Brennan asserts that it is possible to comprehend how democracies truly function by comparing political decisions with expert opinions and evaluating if individuals have the ability to discern “right” policies. In this paper, we demonstrated that constitutional democracies cannot be assessed by the Brennanian metrics and that epistocracy will erode the libertarian political successes of constitutional democracy. This claim is supported by two key arguments.

First, we argued that neither the rule of the informed nor their political oversight is the optimal method for achieving just political decisions and legislation. Viewing political decisions solely in terms of technical knowledge misses Hayekian knowledge problems originating from the complexity of social cooperation in modern societies as extended orders. Transforming libertarian principles beyond constitutional rules into the measure of day-to-day policy confers vast discretion on experts. It can remove the limits that

prevent individuals from engaging in political projects that go beyond their own capacity, even with good intentions. Despite its appeal, the rule of experts inevitably undermines the concept of limited government, the most widely accepted libertarian principle in free societies.

Second, using the phenomenon of rational ignorance, originally used to support constitutional government, to alter constitutional democracy also ignores many of the problems of collective action revealed by public choice in epistocracies. When rational choice is detached from its original context, it also blurs the distinction between constitutional and unconstitutional governments. Not surprisingly, Brennan has never deemed it important to compare constitutional vs non-constitutional democracies in terms of political power limitation. And he credits the extraordinary performance of constitutional democracies to chance or exclusion of common voters from decision-making processes.

However, Brennan attributes the future of individual liberty to the probability that libertarian experts will hold power through epistocratic mechanisms. Brennan insists we acknowledge that epistocracy is more logical than constitutional democracy. The only factor that makes this idea appear credible is the decontextualization of the concept of rational ignorance and its skillful application against proponents of procedural democracy. However, this is an illusion, and its prevalence within the libertarian tradition jeopardizes the link between individual liberty and constitutional democracy that libertarian philosophy established. As we have explained in this paper, the idea that we should relinquish our constitutional democracy ideal due to ignorant voters is unconvincing. And there is no sound justification for ignoring the contributions of libertarian politics to democracy and for libertarians to defend a marginal position.

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