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## First Place

### *What Hayek’s Liberalism Adds to Burke’s Conservatism*

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#### Introduction

Edmund Burke and Friedrich Hayek are both invoked as intellectual champions of the conservative tradition. In his *Reflections on the Revolution in France*, Burke establishes a stalwart case for slow and incremental governmental reform. Standing opposed to the wholesale revolution advocated by the French radicals and proclaiming that “the march of the human mind is slow,” Burke admonishes adherence to tradition, faith in the accumulated wisdom of preceding generations, and the importance of stability in protecting liberty. Similarly, in Chapter Four of Hayek’s *The Constitution of Liberty*, “Freedom, Reason, and Tradition,” Hayek hopes to “find the origin of institutions, not in contrivance or design, but in the survival of the successful.”<sup>1</sup> Decrying his socialist opponents’ dogmatic faith in the practicality and ethicality of “planning,” Hayek asserts that, “purposive institutions might grow up which owe little to design, which were not invented but arose from the separate actions of many men who did not know what they were doing.”<sup>2</sup>

Yet to marry Hayek and Burke in advocacy of the same ideology, to mention them even in the same breath as brothers in arms against socialism or radical change,

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<sup>1</sup> Hayek, F. A. (2011). Freedom, Reason, and Tradition. In R. Hamowy (Ed.), *The Constitution of Liberty* (Vol. 17, pp. 107-132). Oxon, England: Routledge Publishing.

<sup>2</sup> Ibid.

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appears fraught with tension. Burke, defender of the British monarchy, would seem to stand opposed to Hayek, the man who famously championed methodological individualism and decentralized authority. To what degree then can it be said that Burke and Hayek are compatriots in advocating the conservative tradition?

It is my contention that Hayek reflects the core of Burke's belief in institutional conservatism. Burke and Hayek both value three things: 1.) stability as a means of realizing the good, 2.) the inability and immorality of man, acting alone, to "plan" society, and 3.) the belief that wisdom is accumulated over generations. In this vein, both are conservatives in conservatism's most basic form—both value slow and incremental changes, as opposed to radical shifts. There is a key distinction to be made, however, between these three areas of overlap and each thinker's views on the nature of change itself. Hayek did not fear change so long as that change moved society more towards a liberal, unplanned structure, something Burke was never an explicit advocate of to the same degree as Hayek. It is this qualification to conservatism writ large that Hayek reflects in his famous essay *Why I Am Not A Conservative*, and it is this qualification that rightly places Hayek in the pantheon of liberal, not conservative, intellectuals. Hayek might have been a conservative with respect to practicality, in terms of the *speed* by which reform should take place. But he embodied liberalism in his overarching ideology, in terms of the *direction* in which that reform should orient.

In the following analysis I elucidate the overlapping beliefs of Burke and Hayek with respect to stability, planning, and accumulated wisdom (Part I), compare these overlapping beliefs to Hayek's arguments in *Why I Am Not A Conservative* (Part II), and

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discuss the implications of Burke and Hayek’s conclusions on constitutional design (Part III).

Before proceeding, however, it is important to define some terms of which I will make frequent use (or have already made use), and which, at least in the modern arena of partisan politics, have less-than-clear meaning. When invoking the term “liberal,” I do so as Hayek invoked it—in its classical sense. Similarly, when invoking the term “conservative,” I reflect simply the belief in *conserving* the status quo—whatever that status quo may be. In other words, for the sake of clarity, I use both terms in their non-partisan formulations.

**Part I—Overlapping faith in the value of tradition**

*The Philosophy of Edmund Burke*

To understand Edmund Burke, it is first imperative to appreciate the context in which he wrote. Burke served as a member of British Parliament for almost thirty years. He did not publish any formal treatises, but almost everything he wrote was in reference to a specific issue of his time, primarily the American Revolution, French Revolution, and British trade with Ireland and India. His primary ideological opponents were Thomas Paine and Jean-Jacques Rousseau, whose philosophies advocated against the established European order on the basis of the natural rights of man. In this sense, Burke is known as a defender of the aristocracy, monarchy, and other long-established societal institutions, at a time when Enlightenment philosophers used natural law to argue for a wholesale restructuring of these conventions.<sup>3</sup>

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<sup>3</sup> Canavan, F., &, (1968). Edmund Burke. In L. Strauss & J. Cropsey (Eds.), *History of Political Philosophy* (4th ed., pp. 601-620). Chicago: Rand McNally & Company.

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Burke was not himself opposed to the philosophical concept of natural rights law or social contract theory. Rather, his objections to Paine and Rousseau were more practical in nature. A statesman first and foremost, Burke shunned engagement with abstract concepts and inherently focused on the everyday. Believing that human nature could itself only be realized through civil society, he saw politics not as a means of repressing human nature but of giving life to it, writing:<sup>4</sup>

The state of civil society...is a state of nature; and much more truly so than a savage and incoherent mode of life. For man is by nature reasonable; and he is never perfectly in his natural state, but when he is placed where reason may be best cultivated, and most predominates.

In other words, Burke believed that liberty was best conceptualized as the product of an institutionally stable society.

This perception of institutions as mechanisms for maintaining human liberty was later reflected in Burke's inclination towards abhorring radical change. In arguably his most famous work, *Reflections on the Revolution in France*, he lambasted the Enlightenment philosophers and radical Jacobins who believed they could tear down and replace France's governing institutions piecemeal by virtue of Enlightenment "reason." To Burke, such a fire-sale ignored the inherent wisdom amassed over previous lifetimes that was reflected in long lasting conventions—wisdom of which it might be impossible for an individual mind alone to fully appreciate. Rather, Burke admonished caution, writing:<sup>5</sup>

We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that the stock in each man is small, and that

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<sup>4</sup> Burke, Edmund. (1791), *Further Reflections on the Revolution in France*, ed. Daniel E. Ritchie (Indianapolis: Liberty Fund 1992). Chapter 4: *An Appeal from the New to the Old Whigs August 1791*

<sup>5</sup> Burke, Edmund. (1790). *Reflections on the Revolution in France*. London, UK: Retrieved from [http://www.constitution.org/eb/rev\\_fran.htm](http://www.constitution.org/eb/rev_fran.htm)

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the individuals would do better to avail themselves of the general bank and capital of nations and of ages.

Burke advocated “social reason,” or the wisdom encapsulated in enduring institutions, against the Enlightenment philosophers individualistic reason. Burke believed that Europe, Britain especially, had a large deposit of inherited wisdom, and that for France to disdain such a collection of tradition was a fatal act of conceit. To do so was to forget that “The individual is foolish. The multitude is foolish when they act without deliberation; but the species is wise, and when [it] is given [time], it almost always acts right.”<sup>6</sup>

To understand Burkean conservatism it is important to grasp two central concepts of Burke’s philosophy: 1.) prescription and 2.) presumption. Prescription primarily deals with governmental legitimacy. Importantly, Burke did not argue for governmental legitimacy by virtue of age alone—or as one Burke scholar so aptly puts it, “Burke did not say that old institutions must be preserved merely because they are old.”<sup>7</sup> But to Burke, just as legal possession of land is indisputable if the land was held for a long period of time, a constitution existing for generations is sufficient proof of its legitimacy. Moreover, it matters not if individuals never consented to the society in which they find themselves living. Just as a son or daughter does not consent to being born, yet must recognize parental authority, so must citizens recognize the authority of the state, Burke argues.<sup>8</sup>

Presumption, the second central concept, might aptly be described as prudence. Burke wrote, “Prescription is accompanied with another ground of authority, presumption. It is a presumption in favour of any settled scheme of government against any untried

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<sup>6</sup> Burke, Edmund. (1782), *Speech on Reform of Representation in the House of Commons*

<sup>7</sup> Canavan, F., &, (1968). Edmund Burke. In L. Strauss & J. Cropsey (Eds.), *History of Political Philosophy* (4th ed., pp. 601-620). Chicago: Rand McNally & Company.

<sup>8</sup> Ibid.

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project, that a nation has long existed and flourished under it.”<sup>9</sup> Here we find Burke’s patented caution against the winds of revolution—his predilection for stability that accounts for his caution in altering the status quo.

Importantly, Burke was not patently against all change, as some like to paint his philosophy. Rather, he was distinctly opposed to sudden and radical change. He advocated that “change occur by sensible degrees” and as much as possible in line with what preceded it—that “the reparation [be] as nearly as possible in the style of the building.”<sup>10</sup> As Burke put it, “A disposition to preserve, and an ability to improve, taken together, would be my standard of a statesman.”<sup>11</sup> Like a captain steering a great ship carrying fragile and tumultuous cargo, those seeking governmental reform must change direction slowly, lest all be capsized.

*Hayek’s Freedom, Reason, and Tradition*

As with Burke, we must begin with the context in which *Freedom, Reason, and Tradition* was written. If Burke argued primarily against Enlightenment philosophers, Hayek in *The Constitution of Liberty* is arguing against the concept of planning—the idea that man is intelligent and resourceful enough to design society’s institutions to meet his or her personal notions of the good. Building upon his work in *The Road to Serfdom* and *The Use of Knowledge in Society*, Hayek here continues the argument that a decentralized government, predicated upon the liberty of the individual and protected by constitutional constraints on political power, is both more efficient and more ethical than attempts to plan civilization. Considering that the French Revolution was itself an attempt to “design”

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<sup>9</sup> Burke, Edmund. *Miscellaneous Writings*. E. J. Payne, ed. 1990 . Library of Economics and Liberty. Retrieved December 3, 2013 from the World Wide Web: <http://www.econlib.org/library/LFBooks/Burke/brkSWv4c2.html>

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

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a new French society, Hayek’s writing in this chapter is very much a contemporary invocation of the conservative tradition of Burke.

Hayek begins with a claim that immediately appeals to Burkean conservatism, stating, “Though freedom is not a state of nature but an artifact of civilization, it did not arise from design.”<sup>12</sup> Freedom, Hayek contends, was not established because people could foresee its benefits or the benefits of that freedom would create. In this sense, institutions that gave birth to freedom are a manifestation of the “accumulation of generational wisdom” to which Burke refers and to which Hayek here seconds.

However, once the benefits of freedom were recognized, individuals began contemplating how best to promote it. According to Hayek, this led to two distinct camps:<sup>13</sup>

One empirical and unsystematic, the other speculative and rationalistic—the first based on an interpretation of traditions and institutions which had spontaneously grown up and were but imperfectly understood, the second aiming at the construction of a utopia, which has often been tried but never successfully.

Here Hayek is referring to the debate between Burke and the Enlightenment philosophers. The first camp represents the Burkean conservatives, who grew out of the British tradition of government and emphasized an empirical approach to liberty. The second camp represents the Enlightenment philosophers against whom Burke argued, who gave birth to the French tradition of government, emphasizing a rational planning approach to liberty. Hayek contends that this debate has continued from Burke’s time in to the modern era. Just as planners in Hayek’s time attempt to design a speculative society on the basis of “rationality,” so too did the French revolutionaries. Just as 20<sup>th</sup> century

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<sup>12</sup> Hayek, F. A. (2011). Freedom, Reason, and Tradition. In R. Hamowy (Ed.), *The Constitution of Liberty* (Vol. 17, pp. 107-132). Oxon, England: Routledge Publishing.

<sup>13</sup> Ibid.

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socialist planners attempt to construct a utopia, so too did the Enlightenment philosophers attempt to construct a French utopia from the ruins of the fallen state.

Hayek sides with the British tradition, holding it to be the “indispensable foundation of the argument for liberty”<sup>14</sup> and asserting that the French school is “simply and completely wrong.”<sup>15</sup> He points out that neither Athens nor Rome, the freest nations of the ancient world, conform to the empirical approach to liberty—both arose out of an unplanned tradition of institutional evolution. Sparta, on the other hand, a heavily planned state (and one of the least free), serves as the most analogous version of the rationalist approach. Hayek consequently laments that the British tradition has seemingly lost ground to the French tradition in contemporary society, writing “It has been the...argument of the French tradition that has progressively gained influence, while the less articulate and less explicit tradition of English freedom has been on the decline.”<sup>16</sup>

Just as Burke did years before, Hayek points to the respective role of tradition as the biggest difference between the two views. “While the rationalist tradition assumes that man was originally endowed with both the intellectual and the moral attributes that enabled him to fashion civilization deliberately,” he writes, “the evolutionists made it clear that civilization was the accumulated hard-earned result of trial and error; that it was the sum of experience, in part handed from generation to generation.”<sup>17</sup> In this sense Hayek mirrors Burke in the value he places on tradition in promoting liberty, even going so far as to state that “[Paradoxically] a successfully free society will always in a large measure be a tradition-bound society.”<sup>18</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.



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Additionally, Hayek argues that man need not understand the manner in which institutions operate in order to reap their beneficence. He compares the British tradition with evolutionary theory, genetics, and the price system—all things that develop over time without any conscious planning to foster beneficence. This parallels the Burkean argument that man might, and likely is, in large part ignorant of the ways in which status-quo institutions promote stability and liberty. Hayek similarly states that generational experience is encapsulated in large part by “institutions whose significance we might discover by analysis but which will also serve men’s ends without men’s understanding them.”<sup>19</sup>

One can then see through Hayek’s *Faith, Reason, and Tradition* the overlap between the two thinkers. Both valued stability as a means through which liberty could be realized, warning against the wholesale upending of society. Both cautioned that man is less capable of planning society than he or she might like to believe. And both viewed generations of man and long-lasting institutions as arbiters of institutional wisdom that no single individual alone can fully comprehend.

## **Part II—Hayek’s *Why I Am Not A Conservative***

In *Why I Am Not A Conservative*, Hayek nonetheless forthrightly attempts to differentiate himself from the conservative movement. This essay, however, is best understood as a response to the contemporary partisan conservative movements of Hayek’s time—those that were taking root in Europe and the United States and to which Hayek had sometimes been attributed as a supporter. Thus, the conservatism to which Hayek responds is *not* best understood as the conservatism that Burke represents, though

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<sup>19</sup> Ibid.

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the two have potential similarities. The value of *Why I Am Not A Conservative*, rather, is in its display of Hayek’s ideological underpinnings concerning the nature of reform. Whereas *Freedom, Reason, and Tradition* establishes Hayek as a Burkean conservative in practicality—someone who valued the wisdom of preceding generations and slow, incremental reform—*Why I Am Not A Conservative* establishes his undergirding ideology—orienting the *direction* of that incremental reform towards liberalism.

Hayek begins by defining conservatism as “a legitimate, probably necessary, and certainly widespread attitude of opposition to drastic change.”<sup>20</sup> Hayek, therefore, re-emphasizes his loyalty to Burkean conservatism with regard to the speed of change. He goes on, however, to delineate the many differences between his liberal ideology and contemporary partisan conservatism, three of which I will analyze here.

First, and most importantly, Hayek does not object to change in all forms, whereas he contends conservatism does. Since conservatism “[cannot] by its very nature offer an alternative to the direction in which we are moving,” it inevitably “can only affect the speed, not the direction, of contemporary developments.”<sup>21</sup> To Hayek, conservatism is simply an ideology built around preserving the status quo—regardless of that status quo’s substance. Conservatism, therefore, cannot exist as an individual ideology, but “at any time depends on the direction of existing tendencies.”<sup>22</sup>

Hayek’s liberalism, on the other hand, steadfastly offers a direction of change—that which moves society more towards liberal institutions.<sup>23</sup>

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<sup>20</sup> Hayek, F. A. (2011). *Why I Am Not A Conservative*. In R. Hamowy (Ed.), *The Constitution of Liberty* (Vol. 17, pp. 107-132). Oxon, England: Routledge Publishing.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

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There has never been a time when liberal ideals were fully realized and when liberalism did not look forward to further improvement of institutions. Liberalism is not averse to evolution and change

Hayek accounts for this difference in attitude towards change between conservatives and liberals by pointing to conservative's lack of courage: "Admiration of the conservatives for free growth generally applies only to the past. They typically lack the courage to welcome the same undersigned change from which new tools of human endeavors will emerge."<sup>24</sup> Comparing this "timid distrust of the new" to the liberal attitude, Hayek writes, "the liberal position is based on courage and confidence, on a preparedness to let change runs its course even if we cannot predict where it will lead."<sup>25</sup> In this sense Hayek's argument is reminiscent of Schumpeter's "creative destruction." We must not be scared to displace the old even if we cannot foresee the new.

Second, Hayek objects to conservatism's "fondness for authority" and its lack of objection to "coercion or arbitrary power so long as it is used for what [the conservative] regards as the right purposes."<sup>26</sup> Just as socialists place too much stock in the ability of men to centrally plan the economy, conservatives place too much stock in the ability of the "right" leaders to use government power for the promotion of moral values. Writes Hayek, "Like the socialist, he is less concerned with the problem of how the powers of government should be limited than with that of who wields them."<sup>27</sup>

This misuse of governmental authority for the preservation of moral values stands opposed to the liberal tradition, Hayek argues, as liberalism "requires an intellectual commitment to a type of order in which, even on issues which to one are fundamental,

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

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others are allowed to pursue different ends.”<sup>28</sup> Whereas conservatism would hold that some people are morally superior, and thus gain the right to impose their superior moral values, the liberal disagrees that any such right exists. Liberals are not moral egalitarians. As Hayek wrote, “the liberal does not deny that there are some superior people.” But the liberal simply “denies that anyone has authority to decide who [the] superior people are.”<sup>29</sup>

Moreover, Hayek applies this objection not only to the use of governmental authority to implement change, but to the use of governmental authority to stand against impending change. Hayek writes, “the most objectionable feature of the conservative attitude is its propensity to reject well-substantiated new knowledge because it dislikes some of the consequences which seem to follow from it.”<sup>30</sup> In this vein, Hayek refers to conservatives who stand opposed to conclusions or science or the scientific inquiry itself—those who “regard it as irreverent or impious to ask certain questions at all.”<sup>31</sup> He is primarily speaking of those in his time who stood opposed to the concept of evolution based upon religious or moral reason, but one easily sees this very same argument applied by libertarian’s to today’s social-conservative movement and climate doubters.

Third, Hayek displays a concern not only with the direction of change but the origin of the status quo itself. It is here where Hayek arguably comes closest to directly opposing Burkean conservatism. As has been stated, Hayek and Burke both place value in generational wisdom, stability, and the inability of man to plan society. But whereas Hayek agrees with Burke’s principle of “presumption,” in *Why I Am Not A Conservative* he opposes Burke’s principle of “prescription.” In other words, Hayek, unlike Burke,

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

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does not believe a government is legitimate solely by virtue of that government having existed for a long period of time. While Hayek might advocate incremental change away from the status quo, that should not be confused for a normative endorsement of the status quo itself. Rather, Hayek assesses governmental legitimacy with regard to the liberal tradition, writing that “where spontaneous change has been smothered by government control, [the liberal] wants a great deal of change of policy.”

### **Part III—Implications of Burke and Hayek’s conclusions on constitutional design**

Having established Burke and Hayek’s philosophies, it is appropriate to ask what implications follow from their conclusions. Put differently, if we accept Hayek and Burke’s conclusions as normatively and empirically plausible, what ramifications should guide society’s actions? Most obvious are the general principles on which both agree—that stable government is important, that long-lasting institutions encapsulate inherent generational wisdom. But here I choose one specific topic, constitutional design, to explore in more specific detail than vague generalities. In doing so, I hope to shed light on specific, practical conclusions that might guide philosophers in this arena.

*Should constitutional design take place?*

Given that Burke and Hayek both critique and elaborate at length on the ordering of society, it is fitting to inquire as to the manner in which their writing informs constitutional design. But before we even begin down this path, it must first be acknowledged that such inquiry itself might directly contradict Hayek and Burke’s arguments; both were against the idea that individuals should override long lasting institutions to impose societal design predicated upon “rationality.” Yet is that not *exactly*

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what those who design Constitutions do when they draft governing documents? Did James Madison, the “Father” of the United States Constitution, act inappropriately according to Hayek?

There are reasons to believe both Burke and Hayek would stand opposed to constitutional design. Hayek repeatedly notes a key distinction between legislation and law, seeing the former as a matter of design and the latter as the outgrowth of custom and tradition. Legislation, to Hayek, should be avoided or abhorred, whereas law was a natural outgrowth of society. Legislation might attempt to mimic law, but insofar as no legislator can fully comprehend the goings-on of society, legislation will always fail to fully encapsulate traditions and customs. Following this thought, Hayek lauded the common-law system of governance in Britain over the French system of codification, seeing the common law as analogous to the evolutionary and incremental development of law that Burke and he championed.<sup>32</sup> The common law system did not arise from design, nor was it maintained by design. Rather it represented Hayek’s concept of “spontaneous order,” analogous in his thinking to the price system and genetic evolution.

Consequently, one might think of governmental systems existing along a spectrum—with common law representing one extreme and complete legislative codification another. The American Constitution, with its unique blending of judicial precedent and Congressional statutory power, represents a middle course that Hayek would judge not the best, but not the worst either. Burke, as well, supported the American

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<sup>32</sup> Hayek, F. A. (2011). Freedom, Reason, and Tradition. In R. Hamowy (Ed.), *The Constitution of Liberty* (Vol. 17, pp. 107-132). Oxon, England: Routledge Publishing.

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Revolution and thus arguably tacitly supported the subsequent United States Constitution that followed.<sup>33</sup>

In asking whether constitutions should be designed, however, it is important to make distinctions with regard to two factors, each of which demonstrate that constitutional design is valid in at least some situations: 1.) the origination of a given society almost certainly requires design, and 2.) taking an imperfect status quo as a given implicates the possibility of improvement through design.

First, the origination of a society is significant, and something for which Hayek and Burke never fully account. While both thinkers argue that the status quo should be cautiously altered, if at all, neither takes into account the importance of the origination of the status quo. While Hayek lauds the British common law in comparison to the French statutory custom, he presupposes the existence of the British society that gave birth to that common law in the first place. In Hayekian scholar Roger Scruton’s terminology, Hayek and Burke fail to explain membership—that which first makes a group of people band together before custom and tradition can even begin to work their magic.<sup>34</sup>

Hayek wrote that “a group of men become a society not by giving themselves laws but by obeying the same rules of conduct.”<sup>35</sup> But do the rules of conduct develop from the group or does the group develop from the rules of conduct? As Scruton notes, “Only when [a] sense of membership is in place are people disposed to submit to a common rule of law and willing to place contractual obligations to strangers above tribal

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<sup>33</sup> To clarify a potential area of confusion, Burke supported the American Revolution because he saw the colonists as arguing for the proper application of British law. In this sense, Burke perceived the American Revolution as advocating for the proper application of tradition and the long-lasting institutions he championed. The French Revolution, on the other hand, did not argue for proper application of law but rather a wholesale rewriting of law, leading Burke to steadfastly oppose it.

<sup>34</sup> Scruton, R. (2007). Hayek and conservatism. In E. Feser (Ed.), *The Cambridge Companion to Hayek* (pp. 208-231). Cambridge, UK: Cambridge University Press.

<sup>35</sup> Hayek, F. A. (2011). Majority Rule. In R. Hamowy (Ed.), *The Constitution of Liberty* (Vol. 17, pp. 107-132). Oxon, England: Routledge Publishing.

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and family ties.”<sup>36</sup> While conventional factors such as “love, gratitude, and fear—love of country, language, neighbors, family, religion, customs, and home”<sup>37</sup> might act as motives of pre-political membership that eventually evolve into a nation-state, it is not inconceivable that conscious design plays a part at some point along the birth of a society to provide membership criteria. This is especially relevant in the modern day, where the concept of the nation-state is firmly established and new countries are continuously being born and dissolved. As just a few examples, over the last century alone we have seen the birth of Israel, Russia, Bosnia, and Pakistan, and the rebirth of many nations amidst the Arab Spring uprisings. In each of these cases, conscious constitutional design was needed to establish the stability of the respective countries, despite or in place of any tradition or custom that might have existed beforehand.

Second, when asking the question of whether constitutional design should occur, it is significant to remember that, in the words of Duke professor Michael Munger, “we begin where we are.”<sup>38</sup> While Hayek might laud the British common law system, it is almost extinct as a form of governance today. The United Kingdom itself has limited its use. It is appropriate to consider, given how far these countries might be in structure from Hayek’s ideal liberal state, whether Hayek would endorse the use of constitutional design to bring a state closer to his liberal paragon. In this regard it would seem that Hayek most certainly agrees; indeed, in *Why I Am Not A Conservative* he explicitly endorses change if that change takes society in the direction of liberal governance.

*If constitutional design takes place, how then should it proceed?*

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<sup>36</sup> Scruton, R. (2007). Hayek and conservatism. In E. Feser (Ed.), *The Cambridge Companion to Hayek* (pp. 208-231). Cambridge, UK: Cambridge University Press.

<sup>37</sup> Ibid.

<sup>38</sup> Munger, Michael. Interview by \*\*\*the author\*\*\*\*. In-Person Interview. Duke University, 21 November 2013.



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If constitutional design is appropriate in certain situations, whether to establish the membership of a society or reform a society in the direction of liberalism, our attention must turn then to how then that design should proceed. Scruton summed up the challenge perfectly when writing:<sup>39</sup>

The primary task for the classical liberal thinker is to devise a constitution that will both permit the effective exercise of political power, and also limit the areas in which it can be asserted, so that society can flourish according to its innate and “spontaneous” principles.

The constitution must, in other words, establish an arena in which civil society can effectively emerge and evolve free of government influence. It must establish a society that, paradoxically, establishes the stability of instability—where markets and civil society might constantly upend themselves and each other in tumultuous competition. In this regard, Hayek would endorse governing principles that limit state encroachment and therefore leave room for the growth of the spontaneous order of civil society. I here delineate principles to which “Hayek’s Constitution” would likely conform.

First and foremost, Hayek’s constitution would allow for a minimum of legislation. Whereas the Napoleonic Code sought to codify in law all the rules governing its respective society, Hayek would trust in contractual enforcement and clearly delineated property rights as the primary means of resolving disputes. And, as opposed to specific laws or legislation, Hayek would advocate for abstract and general laws, granting all the more space to civil society in which to operate and evolve.

Second, Hayek’s constitution would establish the government as one of clearly delineated powers. Hayek defines the “Rule of Law” in *The Road to Serfdom*, writing:<sup>40</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Hayek, F. (2001). *The Road to Serfdom*. Routledge Publishing.

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Government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan ones individual affairs on the basis of this knowledge

In the first clause Hayek establishes his belief in a limited government of delegated powers, free to do only what is delegated as within its scope and no more.

Third, Hayek would advocate for traditional governmental institutions that limit the ability of the state to intervene in the affairs of civil society. These include checks and balances; separation of powers; a Bill of Rights to protect both economic and social liberty; and likely multiple layers of federalism. The last is of special significance to Hayek’s ideology and those, such as James Buchanan,<sup>41</sup> who have followed in his tradition. Federalism, by nature, decentralizes authority. But as an additional benefit, it allows for a greater ability of citizens to choose which societies to be a part—further enhancing the competition that Hayek believes leads to “spontaneous order.”

Fourth, Hayek would seek measures to limit the ability of any one group to monopolize power. Though he favored the British common law system above all, were he forced to choose a statutory system, Hayek would likely prefer a one that allowed for a dynamic, competitive process. In this regard, a Parliamentary System, as opposed to the United States two-party system, would be more in keeping with Hayek’s conception of a liberal state, where political parties are repeatedly forced to compete with each other to gain control. Additionally, Hayek would likely oppose rules that allow for the edification of power, such as partisan redistricting and “big money” in campaign finance politics.

Fifth, Hayek did, and would, support a state with a minimum of taxation—just enough to provide a social safety net, courts to ensure contractual enforcement, and state

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<sup>41</sup> For a compilation of James Buchanan’s work on Federalism, see <http://econpapers.repec.org/paper/adlwpaper/1994-02.htm>

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and national security. With decreased taxation comes decreased opportunity for governmental influence and encroachment, something personified in today's government subsidies to numerous industries. Additionally, decreased taxation provides less of an incentive for any single third party to seek control of the government; if the government lacks revenue, it lacks the means to favor any one single industry.

### *A Brief Note on Nation Building*

Nation building is perhaps the most fitting example of modern day constitutional design. On March 20<sup>th</sup>, 2003 the United States invaded Iraq. It wasn't until December 2011, a full eight years and 4,487 U.S. lives later that the conflict was finally brought to a close (though thousands of civilians still die in Iraq each year). Over this period and in to the present day, the United States has been involved in an attempt to rebuild Iraqi society, essentially rewriting the Iraqi Constitution and imposing an entirely new governmental structure. What would Burke and Hayek say about such endeavors?

In short, modern day nation building provides an immensely powerful argument for Burkean humility. Both Burke and Hayek would have severely questioned the ability of the United States to impose social order on an unfamiliar Iraqi people. As each proclaimed with regard to the French revolution, change—especially governmental change—must come slow and in increments. And any change must, in order to ensure stability, be in keeping as much as possible with the traditions and customs that preceded it. In this regard, the United States failed on every level. Not only did it fail to properly implement the governmental structure in increments, but it also failed, when constructing the Iraqi constitution, to take in to account the different tribal, religious, and cultural conventions that existed in Iraqi society. The result is a continuing violence between

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Shiites, Sunnis, and Kurds, that not only foments attacks against between these three factions but united attacks against United States—the supposedly benevolent nation builder.<sup>42</sup>

It is an open question whether the Iraq War was justifiable. By even the most pessimistic standards, it must still be acknowledged that a violent dictator was overthrown. But what if a situation was unambiguous—a situation in which there was no ethical question that a given state order *must* be overthrown and subsequently rebuilt. Given an unambiguously normative justifiability, would Hayek then argue that a liberal order be imposed on the society? Does such a liberal order fit all cultures, even cultures so far removed from western society as those in the Middle East?

There is reason to believe Hayek would continue to advocate for such a liberal society. As he noted in *Why I Am Not A Conservative*, his liberal state does not preference any one set of moral principles—any one specific culture. Rather, it endorses dynamism and competition—it envisions a society in which different ideas, markets, and cultures might repeatedly compete against one another to create his “spontaneous order.” His liberalism is an apolitical, a-religious, a-cultural, and amoral ideology. Rather than dictating the preferences society with regard to these factors, Hayek would simply seek to establish a *stable* environment in which differing ideologies could compete with one another—his conception of liberal society can be seen as universal in nature.

Consequently, it is therefore not so much the motive behind the Iraqi nation building to which Hayek would object—he would have supported the establishment of a liberal order in Iraq. Rather, Hayek would simply object to the inept nature in which that

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<sup>42</sup> Posen, Barry, “Pull Back – The Case for a Less Activist Foreign Policy,” *Foreign Affairs*, January/February 2013

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liberal order was pursued—a strategy that showed little if any heed for Burkean conservatism and the importance of cultural and institutional tradition.

## **Conclusion**

I cannot help but feel a sense of sadness reading the works of these two great authors. In the present day it is not a difficult task coming up with examples where the wisdom of Burke and Hayek have been ignored at society's peril. With a Tea Party movement that loves to moralize; a Democratic party that forever seeks to expand the reach of government against past tradition; and a political system devoid of party competition, held captive to big money, it seems as though Burke and Hayek would be without a home in our modern political environment. Nor would either be surprised at the governmental inefficacy that grips our nation.

There is certain attractiveness to the arguments of the rational planners—the arguments against which Burke and Hayek so adamantly opposed. The idea that the human mind can, independently and right now, remake society to fit a conception of the good, is alluring. It was alluring when the French Revolutionaries sought to remake France. It was alluring just years ago, when politicians sought to remake the United States healthcare system. It will be alluring in the future, for any number of arenas—political, moral, and economic.

But Burke and Hayek warn us to push back against such instances, and rightly so. Hayek adds an important element to Burke—he directs the slow, incremental change Burke advocated in the direction of liberalism, with its “spontaneous order” that maximizes human happiness better than any one individual could. It is this combination

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of the two, which Hayek reflects so well, that should guide our actions. It is not disdainful that planners seek to improve upon society. But it is foolish, and it is indulgent. We might wish ourselves to be that intelligent, that powerful, that we can rewrite society to fit our own image of the good. But as Hayek so rightly termed it—that is the fatal conceit. Slowly, over the course of generations, we might move society closer to the liberal ideal. Slowly, over the course of generations, we might accumulate wisdom. But as Burke and Hayek’s voices warn us through the ages: always humbly, always slowly, always cautious. The man is foolish, but the species is wise.

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