

Burkean Conservatism and the Presumption in Favor of Tradition

At the heart of conservative political thought lies its plea for deference to the political structure, particular laws, and moral norms of a society that are old and established. Burkean conservatism (BC) does not oppose all social change, but insists that it be gradual and unplanned. It opposes radical change imposed on a society by utopian visionaries on the basis of a sweeping theory of “social justice.” The radical’s confidence that certain long established social practices are irrational or unjust and that the practices with which he would replace them would be better is supposed to make him both arrogant and irresponsible. After examining BC’s presumption more closely, this paper identifies three possible ways to defend it—the entrenchment thesis; a historical survey that supports the backlash principle; and the optimality thesis—and argues that all of them fail.

Burke; What the Conservative Presumption Entails

A plea for deference to tradition is one of the outstanding themes of Edmund Burke’s *Reflections on the Revolution in France*. France’s *philosophes* propounded many theories that contributed to the French Revolution (e.g. Abbé Sieyès is supposed to have instructed the French Assembly to “act like men just emerging from the state of nature and coming together for the purpose of signing a social contract”¹), and Burke objected that their theories were both false and dangerous. One of the most famous passages in his *Reflections* is where he contrasts the intellectual hubris of France’s revolutionaries to the humility of the English:

We are not the converts of Rousseau; we are not the disciples of Voltaire; Helvetius has made no progress amongst us. Atheists are not our preachers; madmen are not our lawgivers. We know that we have made no discoveries; and we think that no discoveries are to be made, in morality; nor many in the great principles of government [W]e are generally men of untaught feelings; ... instead of casting away all our old prejudices, we cherish them to a very considerable degree.... [W]e cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed,

the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would be better to avail themselves of the general bank and capital of nations, and of ages.... Your literary men, and your politicians, and so do the whole clan of the enlightened among us, essentially differ in these points. They have no respect for the wisdom of others; but they pay it off by a very full measure of confidence in their own. With them it is sufficient motive to destroy an old scheme of things, because it is an old one. As to the new, they are in no sort of fear with regard to the duration of a building run up in haste....²

BC's presumption in favor of tradition obviously implies that violent revolution should be avoided. A rebellion against a tyrant who usurps power in some unconstitutional way and then trammels on people's long recognized rights is okay. But a revolution isn't simply armed rebellion; it is (as in the French and Russian cases) a radical transformation of a society's political structure. Revolutions unleash forces that can easily spin out of control and lead to anarchy, or even worse, an *organized* reign of terror.

The presumption in favor of political and legal tradition applies not just to society's political structure, but its particular laws too. Recently the Florida legislature enacted a statute that amends the common law requirements for self-defense. "Necessity" has always been a requirement for the justified use of lethal force; where flight is possible, this requirement for self-defense is not met. (An exception is if one is attacked in one's home). The Florida law (dubbed by its supporters the "Stand Your Ground" law) essentially does away with the "flee if you can" requirement altogether, eliminating the duty to prefer escape to a lethal response if one is attacked in a public place. Florida's action surely violates BC's presumption of deference to long standing legal traditions. Its legislature overrode an old, evolved, common law principle of justified homicide not in response to any urgent need, but because Second Amendment, gun rights ideologues felt that the "flee if you safely can" principle imposed an undue burden on law-abiding citizens. BC condemns Florida's action on the grounds that it is likely to have many bad consequences, some unforeseeable and some (e.g. an increase in the deaths of innocent bystanders caught in the crossfire) not.

Deference to tradition requires that judges (at least in Great Britain and the U.S.) uphold *stare decisis* and common law principles that have evolved over several centuries. It also requires citizens to obey the law and abide by the norms of their society's positive morality. Some examples of radicals whom BC condemns from their willingness to discard long established moral and legal traditions are the socialist who wants to abolish inheritance, the libertarian who wants to legalize prostitution, and the feminist who wants to abolish beauty pageants and replace traditional, patriarchal gender roles with more egalitarian ones.

Inferring the Presumption from the Entrenchment Thesis

One might try to justify BC's presumption, especially the claim that individuals in their public and private lives should obey the positive morality of their society, by appeal to ethical relativism. But while such a conservatism is possible, the normative foundations of BC lie in an objectivist, roughly utilitarian ethic.³ Its objection to radicals willing to set aside tradition is that they are a threat to our *interests* in life, liberty, and prosperity. To justify the presumption, defenders of BC need to prove that: i) radical politics is more likely to reduce than increase human welfare; and ii) moral nonconformists tend to do more harm than people who defer unreflectively to the norms of traditional morality (Burke's "prejudices").

It will not do to criticize the radical for holding that old and established traditions are presumptively bad. Even if it is a mistake to make that presumption, it does not follow that we ought to make the conservative's presumption that attempts to abolish or modify such traditions are likely to be harmful. Moreover, contrary to Burke's assertion that "with them it is sufficient motive to destroy an old scheme of things, because it is an old one," most radicals do not suppose that established norms and laws are presumptively bad. The presumption that the radical supports is one in favor of reforms that are likely to increase equality, liberty, or some other moral ideal. Old laws and moral norms that seem needlessly to restrict liberty (e.g. the legal prohibition of

prostitution for the libertarian) should be amended not because they are old, but because they restrict liberty.⁴

Two ways of defending the presumption are by inferring it from either the “optimality thesis” (OT) or the “entrenchment thesis” (ET). According to OT, long standing social practices got to be long standing because they served the needs of society and its members better than any other practices could. They were and continue to be optimal. ET, in contrast, admits that many social practices became established due to historical contingencies and are unlikely to be optimific in the promotion of welfare. Still, long standing social practices have become integral parts of the social order, part of its foundations, and any attempt to modify them is likely to damage the social edifice which rests on them. A common way of developing ET is in conjunction with a communitarian sociology. It alleges that while the radical’s intent may be to replace one set of norms with a different set, the more likely effect of his actions is to destroy the existing ones without replacing them with anything viable. That produces anomic, rudderless individuals who act in anti-social ways. A society with too many such persons is likely to experience increased divorce, drug and alcohol abuse, and teenage pregnancy; higher dropout rates; less saving (due to an unwillingness to delay gratification); more violent crime; and other social pathologies. BC sees traditional morality buttressed by traditional theistic religious belief as society’s most effective way of staving off these maladies. Not only does fear of punishment in the afterlife deter socially destructive acts in the here and now, but the communal aspect of organized religious worship encourages a sense of responsibility to a larger social group.

Given the desirability of preventing the harm caused by more divorce, higher crime, and the rest, ET (if true) justifies criminalizing acts that threaten to weaken or destroy any of society’s long standing moral or religious traditions. Patrick Devlin accepted this implication of ET with his defense of traditional morals legislation (e.g. anti-sodomy laws). Devlin held that “society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.”⁵ Criminalizing acts that are repugnant to the moral sensibilities of

the average person (“the man in the Clapham omnibus”) is permissible, Devlin held, for the same reason that criminalizing attempts at political subversion is.

ET has anti-liberal implications more extreme than either Devlin or the defender of BC intends. Traditional Judeo-Christian views about “unnatural sex” are surely in greater danger of being undermined by public criticism that they reflect mere homophobia than by clandestine homosexual couplings. Hence, his argument should lead him to support a ban on any public criticism of established moral norms. But Devlin only wanted to defend anti-sodomy laws, not the censorship of moral debate too. This implication of ET prevents BC from appealing to it to justify its presumption. BC might support some traditional morals laws, but it certainly opposes any use of the criminal law to punish criticism of traditional morals or the advocacy of nontraditional moral views. Indeed, it has to oppose it, since a rejection of viewpoint-based censorship is a long standing legal tradition in countries like the U.S. and Great Britain.

Inferring the Presumption from a Historical Survey

We’ll consider OT shortly. Another possible way to defend the causal claims [(i) and ii) above] that underlie BC’s presumption is to argue that a historical survey of radical political reforms and of individuals’ moral nonconformism reveals that they are almost always followed by bad consequences, and these correlations are strong evidence for the corresponding causal claims. But this strategy encounters a problem: how do we know whether the long term effects of any example of a radical political action were on balance good or bad for society? The French Revolution, for example, did unleash a Reign of Terror, one of its bad consequences, but it also eliminated many feudal obstacles to capitalist economic development and spread a Napoleonic legal code throughout much of Europe—two of its good ones. Did those good consequences outweigh the bad ones? The difficulty presented by this example is that not only are we unsure which of the events following the French Revolution were caused by it rather than other,

concurrent historical forces, but it is very difficult to know how the history of Europe would have gone had this epochal event never occurred. Yet we would need to have both sorts of knowledge in order to perform accurate and complete cost-benefit analyses that prove that it did more harm than good.

Perhaps a supporter of BC can be justified in believing that a historical survey supports the causal claims that underlie the presumption. But surely the epistemic burdens that he carries if he tries to defend them in this way are no lighter than the radical's. He must assume that he has examined all of the relevant evidence and performed accurate cost-benefit analyses for each of the cases in the survey. The degree of trust that he needs to have in his rational faculties is no less than what the radical needs in order to rely on the results of his cost-benefit calculations. If the radical is supposed to be guilty of intellectual arrogance because of his confidence that the reforms he proposes would benefit society, then the conservative who defends the presumption by means of a historical survey is no less arrogant.

The Backlash Principle

Radical political actions or programs often have one predictable negative consequence. "Humanitarian" military interventions in other countries tend to create strong patriotic discontent among the natives at seeing foreigners occupying their country. In the domestic case the top-down efforts of the radical to arrest moral decline or accelerate moral progress are more likely than not to elicit anger and resentment. They are likely to be counterproductive, provoking a popular reaction against the very ideals that the radical is promoting. In both foreign and domestic policy, the radical uses coercive, heavy-handed means to promote changes that are supposedly good for a people. Whether or not the changes really would be good, the people on whom they are foisted are likely to resist them simply because they resent the coercion and/or the assault on their values. Call this the "backlash principle."⁶ The defender of BC might argue that

a historical survey of past radical actions supports the backlash principle, and the desirability of avoiding sometimes violent backlashes supports the presumption in favor of tradition.

There are two problems with such an argument. First, any critique of radical politics that's based on the backlash principle is too limited for BC. For example, it will be unable to explain what's wrong with Florida's "Stand Your Ground" law. What makes that law radical is its willingness to disregard common law principles that have evolved over hundreds of years, not its attempt to ram any moral ideals currently rejected by Floridians down their throats. BC implies that this law is likely to have bad consequences even if it does not provoke a strong backlash (which seems unlikely in any case). A critique of radical politics based solely on the backlash principle cannot account for BC's disapproval of laws like it.

Second, there is no reason why the radical has to be blind to the potential that his reforms, if wrongly implemented, will provoke a backlash. And even if a backlash is unavoidable, it is only one cost that the prudent radical will be sure to include in his cost-benefit calculations. The radical can say that some radical reforms are likely to elicit strong backlashes, others weak ones, and we should decide on a case-by-case basis whether the negative effects of the backlash are likely to outweigh the positive effects of the radical reform.

Compare *Brown v. Board of Education* and a possible ruling by the U.S. Supreme Court that state bans on gay marriage violate Equal Protection. Both are examples of "radical" politics. The first did produce a strong backlash, and the second probably would too were the Court ever to deliver it. With the first we have the benefit of historical hindsight, and in hindsight we can say that even though *Brown* provoked an often violent backlash from racist whites determined to hold on to their traditions of *de jure* racial segregation, it played an important role in weakening the racial caste system. My sense is that *even before* the *Brown* ruling was handed down, opponents of segregation were justified in believing that Supreme Court invalidation of Jim Crow laws would be best for the country in the long run, despite the violent backlash that such a ruling was certain to cause. Is the same true of a Supreme Court ruling requiring all states to recognize

gay marriage? Cass Sunstein, a strong advocate of gay rights and no champion of “judicial conservatism,” thinks not. He writes “under contemporary conditions, a judicial holding of this sort would probably be a large mistake, even though the basic principle is sound.... [In] producing social reform in this area, public officials should be selective, strategic, and occasionally cautious.”⁷ I agree with Sunstein: the likelihood of an extreme backlash against gay rights is too great to risk such a ruling at this time. The cause of gay rights is better served by a more gradualist approach. These judgments about *Brown* and a gay marriage ruling are based on a cautious, strategic radicalism that acknowledges the political reality of backlashes.

Again, BC will object that it is intellectual hubris to think that one can reliably gauge the strength of a potential backlash and accurately weigh a radical action’s long term costs and benefits. But again, that charge is based on the conservative’s judgment that the dangers of making such judgments outweigh the potential benefits, and *that* judgment will be no easier to defend than ones that the radical makes. It won’t do for the conservative to respond that when he performs the historical survey of past radical actions and their consequences, he relies only on hindsight, while the radical has to rely on foresight, and hindsight is inherently more reliable than foresight. With hindsight we can know what happened, but that alone will not tell us why it happened. To be justified in believing that a historical survey supports the presumption, the conservative needs to make judgments about cause and effect and about the relative weight of costs vs. benefits that are no different in kind from the ones that the radical makes. The fact that those judgments are about events in the past does not make them any easier to defend.

The Optimality Thesis and the Invisible Hand

A third possible way to defend the presumption is by inferring it from the optimality thesis. OT proposes a functional explanation of a society’s moral and legal traditions: they exist *because* they are good for society as a whole. It implies that the radical who wants to tinker with

them is like a doctor who looks at the human body, cannot understand what good is done by one of its internal organs, thinks that it might do some harm, and so hastily concludes that it should be surgically removed. Radical social reformers are threats to societal health and welfare, just as this doctor is a threat to his patients' bodily health and welfare.

Historical materialists and others who believe in the “golden rule”—“he who has the gold makes the rules”—reject OT. The “golden rule” denies that legal traditions, moral norms, etc. serve the common good very often. It says that they are much more likely to serve the interests of some powerful social group at the expense of the common good. The defender of OT must respond that behind the clash of rival interest groups and factions lies an *invisible hand* that produces laws and moral norms that are good for society as a whole, even though none of the contending parties aimed at that result. An invisible hand mechanism of some sort is implicit in OT. OT implies, for example, that our traditional “prejudices” about the moral status of animals are the product of an invisible hand that is wiser than animal rights theorists like Peter Singer. Thus, they are likely to be better for society as a whole than their replacement by an animal rights ethic even if we cannot rationally explain or justify their superiority. Our inability to do so reflects a defect in us, not them.⁸

What is the mechanism by which the invisible hand posited by OT operates? One possible candidate is the economist's. Shortages and surpluses are bad for the public, and it turns out that an economic system based on private property and free exchange is more effective at avoiding them than a planned economy is. It achieves the most efficient outcome *via* an invisible hand, because as Adam Smith famously noted, the butcher, baker, and brewer who supply the public with their meat, bread, and beer are motivated primarily by self-interest, not benevolence. If the same invisible hand selects a society's moral and political traditions, then the radical who disregards those traditions is like the member of the Soviet Union's Gosplan committee who foolishly believes that the committee's production and price schedules will do a better job of

supplying society's myriad economic needs, with fewer shortages or surpluses, than private property and free exchange in competitive markets would.

While there's no doubt about the reality of the economist's invisible hand, it cannot provide what OT needs. The economist's invisible hand operates only *within* the legal and moral rules that create a capitalist economic system. What OT needs is an invisible hand that explains the social utility of old and established social/legal rules in *all* societies. Clearly the economist's invisible hand, which presupposes the existence and enforcement of one particular set of social/legal rules, cannot even explain how *those very rules* came about, much less the social/legal rules of noncapitalist societies.

Another possible candidate for the invisible hand mechanism needed by OT is one that is the social analogue of Darwinian natural selection in biology. The social analogue of natural selection wouldn't require that societies have "offspring" that inherit some of their traits. It only implies that they are in competition with one another and that the ones with rules that promote solidarity, technological progress, military prowess, and so forth are more likely to prevail in that competition. The fact that a society has survived for centuries is evidence that its rules are adaptive to its survival. F.A. Hayek has defended an invisible hand mechanism of this sort, though the one he defends is supposed to operate only on voluntary moral norms, not coercive laws.⁹

Perhaps the main problem with trying to defend BC's presumption by appealing to a sociological analogue to Darwinian natural selection is that it requires an inference from "group A with its norm forbidding X has over time grown more numerous/stronger, while group B with no proscription on X has over time fared less well" to "group A has grown bigger and stronger *because of* its proscription on X." That inference either commits the *post hoc, ergo propter hoc* fallacy, or it makes the same mistake that "Panglossian adaptationism" makes in biology.¹⁰ The latter is the mistake of supposing that *every* trait of an organism has been selected because it somehow enhances its fitness. The fact is that some of our traits (e.g. the birth canal) are

imperfectly adaptive and others (e.g. the appendix) are maladaptive. If social evolution is similar to natural selection, then traditional morality's proscription on homosexuality, for example, could be more like the human birth canal or the panda's thumb (a bone spur rather than an opposable digit, which just barely serves the panda's needs) or even our appendix than a highly adaptive trait like the echolocation of bats. The invisible hand of social evolution no more guarantees that all gradually evolved practices are beneficial to society than Darwinian natural selection guarantees that every single one of our inherited traits enhances our biological fitness.

Recall that OT, if true, supports an analogy between the radical social reformer eager to abolish some long standing practice, on the one hand, and the doctor who wants to remove my spleen because he can't see what good it does me. That analogy is flawed, however, because we know that the spleen plays a role in the immune system, making possession of it adaptive. Why not think that the radical social reformer is at least sometimes is more like the surgeon who wants to perform an appendectomy before the patient's appendix ruptures? To push the analogy a bit further, opposition to *all* radical politics, based on the conviction that *all* old and established laws benefit society in ways that we can't fully understand, looks like the dogmatic insistence that "natural" therapies are *always* better for the patient than surgery and drugs.

A third candidate for the mechanism by which OT's invisible hand operates is divine providence. If an omniscient and benevolent God guides the selection of norms and laws in any society, then OT is true and BC's presumption is warranted. In that case the radical reformer is analogous not so much to the economic planner in a command economy or the doctor who wants to remove my spleen, but the impious and arrogant fool who doubts that God exists and knows what He is doing.¹¹

The objection to this view is obvious. Many tradition bound societies *seem* to have honor codes that hinder their ability to modernize. In some very patriarchal societies (e.g. rural Afghanistan) fathers and brothers have the duty to kill a daughter or sister who has brought dishonor to the family by carrying on an illicit romance. In other societies young women must

undergo genital mutilation in order to be deemed good, honorable, eligible brides. The sort of faith required to believe that an omniscient and benevolent God oversees the evolution of norms like these must be an exceptionally robust one. If we *knew* that the deity guided their evolution, then we would have to admit that they *must* be good for the society in ways that we cannot fathom owing to our limited reason and information. But if we don't know that to be the case, then surely it's reasonable to regard examples of this sort as providing strong evidence that OT is simply false and there is no invisible hand, based on divine providence or anything else, that guides their evolution.¹²

Historically many conservatives have been happy to embrace the invisible hand of divine providence as the reason why deference should be shown to long standing tradition. Joseph de Maistre is an example. Such conservatives will naturally regard tradition with veneration and radicals as akin to desecrators. Still, most conservatives in the Burkean tradition would resist the suggestion that religion plays this foundational role in their political philosophy. They are strong supporters of religion, of course, holding that it is crucial to sustaining social order. Many of them insist that religion of some sort is not only *good* for society but *true*. But surely many of them believe that BC and its presumption are defensible on rational grounds, and thus, would be disappointed if it turned out that they were wrong about this and their political views rested ultimately on religious faith.¹³

Conclusion

We considered three possible ways that BC might defend its presumption in favor of long standing moral and legal tradition and its charge that radicals are arrogant and irresponsible for disregarding that presumption: 1) inferring it from the entrenchment thesis, 2) via a historical survey of past radical political reforms and their consequences, and 3) inferring it from an

optimality thesis that posits an invisible hand. The failure of all three defenses suggests that BC cannot sustain its charge of arrogance and irresponsibility against the radical.

¹ Quoted by F.A. Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960), p. 57. Hayek cites J.L. Talmon, *The Origins of Totalitarian Democracy* (London, 1952), p. 73.

² Edmund Burke, *Reflections on the Revolution in France* (Penguin Books, 1982), pp. 114-15.

³ Burke in particular has been described as an “indirect utilitarian” by Jeremy Waldron and a “historical utilitarian” by Jerry Muller. See Jeremy Waldron, *Nonsense on Stilts* (London: Methuen, 1987), pp. 87-89 and Muller’s essay “What is Conservative Social and Political Thought?” in Jerry Z. Muller (ed.) *Conservatism* (Princeton, NJ: Princeton University Press, 1997), p. 7.

⁴ Michael Oakeshott makes the same mistake as Burke. He describes the “Rationalist” as someone who “believes that to form a habit is to fail” (p. 7) and regards “the consciously planned and deliberately executed [to be] for that reason better than what has grown up and established itself unconsciously over a period of time” (p. 26). Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, Liberty Press: 1991). It should be noted that the fact of human fallibility and limited knowledge by itself provides no argument for BC’s presumption. All that follows from it is that human actions have many unintended and unforeseen consequences. It does not follow, even if we are referring to actions that violate well-entrenched moral and legal traditions, that those consequences are more likely to be negative than positive. It’s that claim about the effects of ignoring tradition that the conservative needs to defend. Knowing that one’s judgment is fallible and one’s experience limited by itself provides no reason to believe it.

⁵ Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965), p. 11.

⁶ The “backlash principle” is related to what Albert O. Hirshman has called the “thesis of the perverse effect,” which he has argued is a recurrent theme of reactionary politics over several centuries.

⁷ Cass Sunstein, “Homosexuality and the Constitution,” in David M. Estlund and Martha Nussbaum (eds.), *Sex, Preference, and Family* (Oxford Univ. Press, 1997); anthologized in David M. Adams, *Philosophical Problems in the Law* 4th ed (Wadsworth Press, 2005), p. 326.

⁸ Conservatism, according to Irving Kristol, assumes that “institutions which have existed over a long period of time have a reason and a purpose inherent in them, a collective wisdom incarnate in them, and the fact that we don’t perfectly understand or cannot perfectly explain why they ‘work’ is no defect in them but merely a limitation in us.” Irving Kristol, “Utopianism, Ancient and Modern,” in *Two Cheers for Capitalism* (New York, 1978), p. 161. Kristol’s conservatism, I claim, requires a commitment to OT and belief in an invisible hand.

⁹ Hayek, *The Constitution of Liberty*, Chapters Four and Five.

¹⁰ See Stephen J. Gould and Richard Lewontin, “The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme,” *Proceedings of the Royal Society* v. B205 (1979), pp. 581-598.

¹¹ This view should not be confused with the patriotic myth that America has been the object of divine favor since its Founding and been given the responsibility to spread democracy and capitalism throughout the world (its “Manifest Destiny”). America’s Founding myth implies that God shows favor only to *some* societies. OT based on a divine providence invisible hand mechanism implies that God is at work in *all* societies to ensure that only socially beneficial moral and legal traditions get to be old and established.

¹² This objection parallels David Hume’s objection to what might be called the “Book of Job” reply that some theists give to the problem of evil. See Hume’s *Dialogues Concerning Natural Religion* (Indianapolis: Hackett Publishing Co, 1985), Part XI, pp 67-8.

¹³ Consider that many support anti-sodomy laws on the grounds that homosexuality is an “abomination” to God and for that reason alone deserving of criminal sanctions. That argument rests on what Joel Feinberg has called “pure legal moralism.” The BC argument for such laws is *supposed* to be different: they have been on the books for centuries, and thus, repealing them would probably (in the long run) do more harm than good for society as a whole. That argument appeals to the “harm principle.” But if it turns out that the inference from “violates long standing tradition” to “probably harms society” depends on the assumption of divine providence, then the BC argument based on the harm principle is not so different from the overtly religious one based on pure legal moralism, after all.