

INTRODUCTION

*“Never pull down a fence until you know why
it was put up” -Robert Frost¹*

In *Law, Legislation, and Liberty*,² the late eminent scholar Friedrich August von Hayek (1899-1992), and what some deem the “Austrian revival,”³ arguably begins and conceivably concludes a genuinely, original discourse concerning the taxis and cosmos (*Kosmos*)⁴ of institution building. A neglected aspect of Hayek’s contribution to the science of law (jurisprudence) may be his discourses on rules and order, and the sources of power. For this reason, this article primarily focuses on Hayek’s *Law, Legislation, and Liberty* and his discourse on taxis, cosmos (*Kosmos*) and spontaneous order, and not other aspects of this writing or other writings. Because in this respect, his contribution to legal scholarship stands apart and risk being neglected by many, especially *Law, Legislation, and Liberty*.⁵ In understanding modern Western development taxonomies, Hayek’s contributions, albeit arguably inadvertent to the

¹ Julian L. Simon, *Hayek’s Road Comes to an End*, The Independent Institute, Commentary April 13, 1992, at <http://www.independent.org/newsroom/article.asp?id=311>. Following Hume, Hayek told us that we can never know why many valuable and important customs and systems evolved. Hence he hoped that we give vestigial practices the benefit of our doubt, and perhaps a bit more. His view may be summed up in a phrase attributed to Robert Frost: Never pull down a fence until you know why it was put up.

² See F. A. Hayek, *Law, Legislation, and Liberty*, Three volumes, (Chicago: University of Chicago Press - 1973-79) [hereinafter Hayek].

³ Peter G. Klein, *Biography F. A. Hayek (1899-1992)*, Ludwig Von Mises Institute, (Last accessed October 6, 2004), <http://www.mises.org/content/hayekbio.asp>. Hayek’s work is also known in political philosophy (Hayek, 1960), legal theory (Hayek 1973-79), and psychology (Hayek, 1952). Within the Austrian school of economics, Hayek’s influence, while undeniably immense, has very recently become the subject of some controversy. His emphasis on spontaneous order and his work on complex systems has been widely influential among many Austrians. Others have preferred to stress Hayek’s work in technical economics, particularly on capital and the business cycle, citing a tension between some of Hayek and Mises’s views on the social order. (While Mises was a rationalist and a utilitarian, Hayek focused on the limits to reason, basing his defense of capitalism on its ability to use limited knowledge and learning by trial and error).

⁴ Hayek, *Id.*

⁵ *Id.*

understanding of institution building, constitution building, inclusive, remain relevant today,⁶ but are still for the most part seemingly ignored and neglected.

As one source notes, “Yet despite the ultimate vindication of his work by a Nobel Prize in 1974 and the discrediting of both socialism and Keynes, the man who predicted it all so very long ago remains largely ignored, at least in the America that was for some time his home.”⁷ No one better understood than Hayek did the link between economic freedom and political freedom, and liberty and civilization.⁸ In the 1970s, Margaret Thatcher when planning for her revolution thumped down a copy of Hayek's *The Constitution of Liberty* before a group of Tory researchers, expounding, “This is what we believe.” Only a year earlier in 1998, in Beijing, though earlier banned, a new Chinese translation of *The Constitution of Liberty* became a best-seller, with a subsequent conference attracting a veritable Who's Who of Chinese dissidents.⁹

In *Law, Legislation, and Liberty*, Hayek dissected the inner workings of institution building and constitution building in that by subtle and meticulous piecemeal fashion he presented for us the essential cogs and wheels of requisite rules and sources of order for a functioning society vis-à-vis spontaneous order in antiquity and modernity. These meticulous revelations also lend understanding to contemporary problems of institution building and constitution modeling, especially for those non-Western cultures and nation-states currently undergoing institutional and constitutional reform such as the People's Republic of China (China), Afghanistan, Iraq, and other nation-states. In terms of Western institution building, institution building can be generally categorized as institution

⁶ John Eatwell, Murray Milgate, and Peter Newman, (eds.), *The New Palgrave: A Dictionary of Economics*, London: Macmillan Press Ltd., 1987, Roger W. Garrison and Israel Kirzner, *Friedrich August von Hayek*, at 609-614, also available at <http://www.auburn.edu/~garriro/e4hayek.htm>. Hayek's scholarly output spans more than six decades. Still growing in the mid 1980s, his bibliography (Gray, 1984) includes eighteen books, twenty-five pamphlets, sixteen books edited or introduced, and two hundred thirty-five articles. Although these publications have brought Hayek international renown and honors in several disciplines, his contributions to other social sciences emerged, to a significant degree, as extensions of his scholarship in the field of economics and its methodological foundations.

⁷ *Hayek's Revolution*, *The Wall Street Journal*, May 7, 1999. In 1945, Hayek's “The Road to Serfdom” was kept out of Berlin by the Allies lest it offend the Soviets, one of the occupying powers. Mao's China was also quick to ban his works, though the government did publish restricted, pirate editions to keep high-ranking cadres abreast of what he was saying; the Chinese introduction to “The Road to Serfdom” describes it as “full of poison.” Closer to home, a just-published Modern Library list of the 20th century's 100 most influential works of nonfiction found room for Rachel Carson's “Silent Spring” in the top 10, but left Hayek unmentioned.

⁸ Hayek's *Revolution*, *Id.*

⁹ *Id.*

building prompted by either military force or non-military force that is by the forces of politics, economic, military, or combination thereof.

Hayek's discourse also lends understanding to an evolving international law, as manifest in the appearance of increasingly more international law bodies and international intergovernmental organizations (IGOs) such as the European Union (EU), the Organization of American States (OAS)¹⁰ and Mercosur (South American Common Market, Mercado Comun del Cono Sur or Southern Cone Common Market).¹¹ In terms of IGOs, a prime example of evolving international law is the World Trade Organization (WTO).¹² Hayek's discourse equally lends to assisting us in understanding the WTO as a world constitution for global trade. If the WTO as representative of a world constitution for global trade embodies positive law, if not international law legal positivism,¹³ then supposed legal borrowing pursuant to policies and goals of institution building may negatively affect both donors and recipients. However, and most importantly, Hayek's discourse helps us to understand and possibly resolve problems attendant to the transplant, integration and evolution of Western law in non-Western cultures and nation-states such as China, Afghanistan, Iraq and other nation-states.

¹⁰ See Organization of American States, <http://www.oas.org>. "The Organization of American States (OAS) brings together the countries of the Western Hemisphere [. . .] It is the region's premier forum for multilateral dialogue and concerted action. At the core of the OAS mission is an unequivocal commitment to democracy, as expressed in the Inter-American Democratic Charter."

¹¹ See The official site of the Mercosur secretariat, at <http://www.mercosur.org.uy/>. See also The EU's Relation with Mercosur – Overview, available at http://europa.eu.int/comm/external_relations/mercosur/intro/. Mercosur was created by Argentina, Brazil, Paraguay and Uruguay in March 1991 with the signing of the Treaty of Asuncion. It originally was set up with the ambitious goal of creating a common market/customs union between the participating countries. A transition phase was set to begin in 1995 and to last until 2006 with a view to constituting the common market.

¹² See Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹³ See Ellis Washington, *Reply to Judge Richard A. Posner on the Inseparability of Law and Morality*, 3 Rutgers J. Law & Relig. 1, (2001 / 2002). Although usage of the word "Positive" can be traced in the English language as far back as the fourteenth century, this term did not develop into an independent, coherent legal theory until the late eighteenth and early nineteenth centuries. Historically, this also corresponded to the height of the secular revival movement called, "The Enlightenment Period." During this time, men of learning consciously sought to discover knowledge solely through the use and development of their own natural faculties, apart from acknowledging any divine source. The two major theorists of Positive law were the British philosophers, John Austin (1790-1859) and Jeremy Bentham (1748-1832). The common theme throughout their writings insisted that "law as it is" is not necessarily the same as "law as it should be." In other words, law and morals were viewed as distinct and separated entities.

In addition, as previously mentioned there is the problem of institution building by force and coercion, generally brought about by military and non-military impetus. Western developed nation-states have employed political, economic and military power pursuant to goals of institution building. Notwithstanding problems attendant to a mixture of part market systems and part commands systems,¹⁴ and problems of neo-imperialism,¹⁵ institution building by force and coercion complicates this issue while further attenuating the problem. Although presenting more so a problem of international relations, Hayek's discourse may also lend itself to possibly understanding and resolving the use of force and coercion in institution building in that his discourse offers alternative international relations policies in goals designed to transplant Western institutional designs in non-Western cultures and nation-states.

For purposes of this article, institution building is considered within a broad context. Ugo Mattei generally described three historical patterns, or models, for transplanting law in intended recipient countries. "A first model is direct imperialistic/colonial rule, or imposition of legal patterns by military force." Classic examples are military conquest such as the Napoleonic Code imposed in Belgium and McArthur's reforms in post-World War II Japan. A second model is imposition by bargaining such as acceptance of a legal model by a sort of subtle blackmail. In order to gain access to international markets, nations change their laws according to Western standards. Examples can be seen in China, Japan and Egypt. This is the way IGOs such as the World Bank, International Monetary Fund (IMF), WTO and EU effect change in developing countries. A third model is fully consensual, and is presented "as diffusion by prestige, focusing on a deliberate process of institutional admiration that leads to the reception of law."¹⁶

¹⁴ Wu Zhong, *Command economy ghosts haunt China*, The Standard China's Greater China Business Newspaper, Online Edition, (10 May 2004), at http://www.thestandard.com.hk/news_detail_frame.cfm?articleid=47442&intcatid=1. "Although 15 years of reform have increased China's orientation towards the free market, the residual mechanisms of a command economy are still functioning, particularly at regional levels, and driving Beijing to resort to administrative means to try to rein in its runaway economy. The increasingly infamous case of Jiangsu Tieben Steel & Iron Company, a privately run steelmaker based in Changzhou, Jiangsu province, is a typical example of how the command economy is still functioning and how Beijing's policies are ignored and defied in the provinces. In a free-market economy, it is hard to imagine how a company like Tieben, with registered capital of about 600 million yuan (HK\$565.56 million), could run a 10.6-billion-yuan investment project."

¹⁵ See generally John Carlos Rowe, *Literary Culture and U.S. Imperialism: From Revolution to World War II*, Oxford, Oxford UP (2002). (Rowe sees American imperialism as developing along lines similar to its Eastern Europe counter-part).

¹⁶ See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Global Leg. Stud. 383, 388-89, (Winter, 2003).

As previously mentioned, for our purposes institution building includes constitution building, or constitution modeling for developing countries and economies such as in the present case of Iraq. Moreover, given a greater breathe in definitional meaning; institution building equally encompasses the changing role of international law as it arguably strives to transform itself into a more transnational law. A prime example of the latter role of changing international law can be seen in the force of the dynamics of WTO accession. It is here that China presents a classic example because of its on-going legal and economic reforms, or institutional reforms, that are prompted, at least in part,¹⁷ by both the Protocol on Accession and Trade Review Mechanism (TRM).¹⁸ While economic in nature, rather than military, the ultimate effect of accession to the WTO has meant for China institution building prompted by non-military impetus, which is political and economic, rather than by military impetus as seen in the case of Iraq.¹⁹ Regardless of impetus employed, the result remains the same in both the cases of China and Iraq. Both countries and other developing countries are in the midst of institution building, including constitution building, which is for the most part dictated on Western terms of development and by Western theories of development.²⁰ The latter begs the question of whether democracy can be imposed on a country from without.²¹

¹⁷ See generally Nicholas R. Lardy, *Integrating China into the Global Economy*, at ch. 2, China's Pre-WTO Trade Reforms, 29-62 (Brookings Institute, 2002). "China's trade reforms before entry into the World Trade Organization were far reaching but incomplete." *Id.*, at 61.

¹⁸ *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001) art. 18.4. See also The Transitional Review Mechanism (TRM) or process is unique to China, and is required by Article 18 of the Protocol on Accession, [http://www.uscc.gov/researchreports/2004/stewartpaper/transitionalreviewmechanism\(II-b\).htm](http://www.uscc.gov/researchreports/2004/stewartpaper/transitionalreviewmechanism(II-b).htm).

¹⁹ See generally A. Kevin Reinhart and Gilbert S. Merritt, *Reconstruction and constitution building in Iraq*, vol. 37:3 *Vanderbilt Journal of Transnational Law*, 765, May 2004. ("That is the society into which we stepped when we occupied Iraq and the idea that we can import democracy in the same sense that you might import a radio or a power plant, is simply a mistake.")

²⁰ Mattei, *supra* note 16, at 388-89.

²¹ See Paul W. Kahn, *The Question of Sovereignty*, 40 *Stan. J Int'l L.* 259, 260-61 (Summer, 2004), *citing* at n. 8, John Stuart Mill, *A Few Words on Non-Intervention*, in *Dissertations and Discussions*, 238-63 (1883). See also Michael Walzer, *Just and Unjust War*, 87-91 (1977).

In terms of a broad definitional meaning, the ambit is diverse and wide, ranging from seeking assistance from Bretton Woods institutions²² as in the case of China to proposed democratic elections under military (marshal) law as in the case of Iraq. The overriding commonality confronting non-Western cultures, developing countries, and economies are the conflicts of Western international law, Western rule of law and especially Western institution building.

This article explores Hayek's postulations concerning both taxis and cosmos, in terms of understanding institution and constitution building. Specifically this article analyzes the importance of his contributions to understanding institution and constitution building in non-Western cultures and developing countries and economies.

Part I of this article begins by addressing, in terms of Ugo Mattei's generally described historical patterns, why China presents an instance of institution building by bargaining, while countries such as Iraq and Afghanistan offer instances of institution building by military force. Next, this article addresses Hayek's discourse on rules and order, by discussing sources of power in terms of taxis and cosmos (*Kosmos*), in conjunction with notions of deliberate design and spontaneous order.

Part II of this article analyzes the issues of taxis and cosmos in terms of both contemporary application and problems. This article discusses the issues of taxis and cosmos in terms of institution and constitution building, and in the context of institution building prompted by military and non-military impetus, or by politics, economics and military force and coercion. In doing so, this article will juxtapose Western institution building models with economic, political and legal particularities of non-Western institutions with emphasis directed toward institutional and constitutional reform and an evolution of Western law in non-Western cultures and developing nation-states, such as, China, Afghanistan and Iraq. In conclusion, this article discusses the importance of Hayek's contributions

²² Generally, the WTO, IMF and World Bank. The International Monetary Fund (IMF), at <http://www.imf.org/>. "The IMF is an organization of 184 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty." The International Bank for Reconstruction and Development (IBRD) or (World Bank), See The World Bank Group, at <http://www.worldbank.org/>. (Explaining that The World Bank consists of five institutions: International Bank for Reconstruction and Development; International Development Association; International Finance Corporation; Multilateral Investment Guarantees Agency; International Centre for Settlement of Investment Disputes. In the World Bank Group, there are also the regional development banks, such as the Inter-American Development Bank).). The General Agreement on Tariffs and Trade (GATT-1947). General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm. WTO Agreement, *supra* note 9.

to the field of institution and constitution building, and the possibilities that may stem from Hayek's discourse for new directions in Western institution building, constitution building and international relations.

I. INSTITUTIONS AND SPONTANEOUS ORDER

A. Institution Building by Bargaining

China is an example of Western institution building by non-military means. China is in the midst of economic and legal reform. The commencement of these reforms is generally attributable to the Deng Xiaoping era.²³ They are economic and legal reforms that respectively date the Deng Xiaoping era and China's entry into the WTO. The significance of reforms in light of its entry into the WTO is the influence of WTO membership on both past and present reforms, especially implementation of rule of law.

In terms of international law and politics, the most vexing issue surrounding China's entry into the WTO has been the implementation of rule of law. A problem for China and non-Western nation-states is that rule of law is a legal concept of Western origin, as equally true of international law. The WTO is an IGO serving as a constitution for global trade, grounded in Western international law and reflecting its Western origins and Western norms.²⁴

This presents a problem in constitution modeling. The United States' constitution has been hailed as a world model for constitution writing nation-states.²⁵ Despite economic and cultural variants stemming from its use as a model for world constitutionalism, it still survives as a model against which to measure constitutionalism, at least in terms of Western political economy constitutional designs. This poses problems for non-Western nation-states such as China that are undergoing process of amendments and revisions of constitutions for the

²³ See J.A.G. Roberts, *A concise history of China*, 204 (Harvard University Press) (1999). (In 1992, Deng Xiaoping visited Shenzhen in Guangdong Province and officially declared China will adopt a socialist market economy, which many actually attribute as commencing modernization.)

²⁴ See Wang Yanzhong, *Chinese Values, Governance, and International Relations: Historical Development and Present Situation*, in *Changing Values in Asia: their Impact on Governance and Development*, 19 (Han Sung-Joo ed., Japan Center for Int'l Exchange) (1999). ("Because the civilization of modern industry first appeared in Western countries and then spread to non-Western countries, the modernization of non-Western countries is, first of all, a process of accepting the civilization of Western industrialization."). *Id.* at 37.

²⁵ See Heinz Klug, *Model and Anti-Model: The United States Constitution and the Rise of the World Constitutionalism*, 2000 Wis. L. Rev. 597, 604-13, (2000).

purpose of seeking compliance with WTO reforms via Protocol on Accession, especially requirement of implementing rule of law.²⁶

The distinctiveness of China lies in fact that accession follows the 1991 breakup of the Soviet Union and Council for Mutual Economic Assistance (COMECON or CMEA), which was the economic and trading system of East European countries connected to the Soviet Union.²⁷ The breakup of the Soviet Union created possibility of additional transition economies seeking GATT membership. Because rules of accession for China would serve as a model for additional transition economies, Western developed countries implicitly created special conditions and rigorous accession terms for China.²⁸

The WTO is the most legalized, if not judicialized, IGO.²⁹ Presently, the WTO Protocol on Accession mechanism is being used to engage institution building in non-Western developing nation-states such as China. In terms of IGOs such as the WTO,³⁰ and the original goals and policies of the Bretton Woods institutions³¹ one finds institution building being attempted by means of economic and political coercion, rather than by military force and coercion. Another example in terms of China may well be America's use of economic and political coercion in addressing the China yuan controversy, which is a U.S. – China trade controversy.³²

²⁶ WTO, *Protocol on the Accession of the People's Republic of China*, Art. 2(A)3 reads, "China shall administer in a uniform, impartial and reasonable manner all its laws, regulations, rules, decrees, directives, administrative guidance, policies and other measures...pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange."

²⁷ THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE [Excerpted from Czechoslovakia: A Country Study, Glenn E. Curtis, ed. (Washington, D. C.: Federal Research Division of the Library of Congress, 1992).], at http://www.shsu.edu/~his_ncp/CMEA.html. THE FOUNDING of the Council for Mutual Economic Assistance (also referred to as Comecon, CMEA, CEMA, or the Council) dates from a 1949 communiqué agreed upon by the Soviet Union, Bulgaria, Czechoslovakia, Hungary, Poland, and Romania. The precise reasons for Comecon's formation in the aftermath of World War II are quite complex, given the political and economic turmoil of that time.

²⁸ Lardy, *supra* note 17, at 63.

²⁹ See Dirk De Bièvre, *International Institutions and Domestic Coalitions: The Differential Effects of Negotiations and Judicialization in European Trade Policy*, European University Institute, Florence, EUI Working Party SPS No. 2003/17, at 9-10, at <http://www.iue.it/PUB/sps2003-17.pdf>.

³⁰ See WTO Agreement.

³¹ See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 7th ed. 1997), at 223–25.

³² See *Focus: Escalating pressure on yuan revaluation*, ChinaDaily HK Edition (4 November 2004), available at http://www1.chinadaily.com.cn/en/doc/200311/04/content_278165.htm.

The United States, in conjunction with other Western dominant powers, effects Chinese institution building, constitution building, inclusive, via the WTO and its Protocol on Accession mechanism³³ and TRM.³⁴ The process of engaging institution building in especially China has been enhanced by the TRM.³⁵ China's 2001 accession to the WTO was not the culmination of the transformation of its trading system and accession obligations. Other WTO members assessing that China needed to accomplish substantial changes over a period of years before it would be in full compliance with all of the WTO obligations established an annual monitoring mechanism, which focused on China's compliance progress with its WTO commitments.³⁶ In the Protocol on Accession, China agreed to an annual review of the implementation process.³⁷ The Protocol on Accession also refers to this annual process as the TRM. Commenced in 2002, the TRM will operate for eight consecutive years followed by with one final review of China's compliance and implementation process in the tenth year subsequent to accession.³⁸

B. Institution Building by Military Force

Prime examples of institution building, including constitution building, by military force and coercion are arguably demonstrated by the cases of

³³ *Wto Accessions: Work In The Wto*, Protocols of accession for new members since 1995, including commitments in goods and services, (October 2004), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

³⁴ See *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001). See also The Transitional Review Mechanism (TRM) or process is unique to China, and is required by Article 18 of the Protocol on Accession, available at [http://www.uscc.gov/researchreports/2004/stewartpaper/transitionalreviewmechanism\(II-b\).htm](http://www.uscc.gov/researchreports/2004/stewartpaper/transitionalreviewmechanism(II-b).htm).

³⁵ *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001) art. 18.4.

³⁶ See Pub. L. 106-286, div. B, Title IV, § 401, Oct. 10, 2000, 114 STAT. 900. The United States, for example, explicitly made an annual review of China's compliance with its WTO obligations an element of its national trade policy. In the bill that extended nondiscriminatory treatment (normal trade relations treatment) to the People's Republic of China, Congress expressly provided: 'It shall be the objective of the United States to obtain as part of the Protocol of Accession of the People's Republic of China to the WTO, an annual review within the WTO of the compliance by the People's Republic of China with its terms of accession to the WTO.'

³⁷ *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001) art. 18.4.

³⁸ *Id.*

Afghanistan³⁹ and Iraq,⁴⁰ especially in their bid for democratically elected legislatures. In both cases institution building, constitution building, inclusive, was prompted by military impetus. In terms of success or failure, it is hoped that democratic elections in Afghanistan will be hailed as a model of success that Iraq will subsequently follow.⁴¹

Admittedly, there are pundits subscribing to a theory that an America-led war, in conjunction with coalition forces, against Iraq is illegal in terms of international law. The latter presents issue of whether war against Iraq, especially for purpose of institution building, is illegal under the principle of *justum bellos*,⁴² if not *jus ad bellum* (just war). Nonetheless, a problem for these pundits is that a so-call international law community, the United Nations (UN), arguably

³⁹ The Whitehouse, President George Bush, *Three Years of Progress in the War on Terror*, Fact Sheet, For Immediate Release, Office of the Press Secretary, September 11, 2004, at <http://www.whitehouse.gov/news/releases/2004/09/20040911.html>. Three Years of Progress: We have followed this strategy -- defending the peace, protecting the peace, and extending the peace -- for nearly three years, and the results are now clear for all to see. Afghanistan: Three years ago, Afghanistan was the home base of al-Qaida -- a country ruled by the Taliban, one of the most backward and brutal regimes of modern history. Today, a presidential election is scheduled for this fall, the terror camps are closed, and the Afghan government is helping us to hunt the Taliban and terrorists in remote regions. Today, because we acted to liberate Afghanistan, a threat has been removed, and the American people are safer.

⁴⁰ *Id.* Today, the dictator who caused decades of death and turmoil -- who twice invaded his neighbors, who harbored terrorist leaders, and used chemical weapons, is finally before the bar of justice. Iraq is now becoming an example of reform to the region. Iraqi security forces are fighting beside coalition troops to defeat terrorists and foreign fighters. Today, because America and our coalition helped to end the violent regime of Saddam Hussein, and because we are helping to raise a peaceful democracy in its place, the American people are safer.

⁴¹ See Jim Hoagland, *Elections in Iraq and Afghanistan*, The Washington Post, (June 20, 2004), available at http://www.signonsandiego.com/uniontrib/20040620/news_1e20hoagland.html. "Perelli, director of the U.N.'s electoral assistance division, announced last month that she would recommend postponing the crucial Iraqi national elections scheduled for January 2005 'if the security situation does not improve.'"

⁴² See Hans Kelsen, (transl. Max Knight), *The Pure Theory of Law*, The Regents of the University of California 1967), at 321-22. The first holds that according to general international law, war is neither a delict nor a sanction, every state may go to war for whatever reason, without violating international law. The second holds that war, even according to general international law, is permissible only as a reaction against a violation of international law. War, like reprisal, is itself a delict, unless it is a sanction. This is the so-called principle of *bellum iustum*.

sanctioned and authorized war against Iraq.⁴³ On September 12, 2001, President Bush announced the Bush doctrine of pre-emptive first strike,⁴⁴ which the UN General Assembly and Security Council arguably authorized by resolution.⁴⁵ The issues surrounding principle of *justum bellos* are necessarily related to the legality of Western institution building in non-Western cultures and nation-states, especially when the impetus for reconstruction is military force and coercion.

A problem of an American-led war against Iraq directly relates to issue of purposeful Western institution building. An issue still in dispute is whether the Bush Administration entered office with an original intent of institution building in Iraq, that is, determined to effect a change in the governmental regime of Iraq.⁴⁶ In 1998, The Project of the New American Century, an organization comprising prominent citizens, requested that President Clinton “enunciate a new strategy that would secure the interests of the U.S. and our friends and allies around the world. That strategy should aim, above all, at the removal of Saddam Hussein's regime from power.” Some of those signatories were Defense Secretary Donald Rumsfeld and Deputy Defense Secretary Paul Wolfowitz, who become senior cabinet members in the Bush Administration.⁴⁷ In terms of institution building by military impetus, war may well be what Carl von Clausewitz described over one hundred and seventy-five years ago as a “continuation of politics (*Politik*) by other means.”⁴⁸

⁴³ See Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 Emory Int'l L. Rev. 1, 13-14, Spring, 2004. According to the Attorney General, “all of these resolutions were adopted under Chapter VII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security.” Resolution 678 (1990) provided the underlying authority for the use of force to eject Iraq from Kuwait (“all necessary means”) and to restore Kuwait's sovereignty, with the goal of reinstating international peace and security in the area. According to Lord Goldsmith, Resolution 687 (1991) “suspended but did not terminate” the authority to use force under Resolution 678, and imposed numerous obligations on Iraq. . . . “A material breach of Resolution 687,” in Lord Goldsmith's view, “revives the authority to use force under 678.” Resolution 1441 declared Iraq in “material breach” of its obligations under previous Security Council resolutions, gave it a final opportunity to comply with those obligations, and warned of “serious consequences” if it failed to comply fully.

⁴⁴ See Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-defense Under International Law*, 12 Tul. J. Int'l & Comp. L. 117, 119 (2004). (Discussing Bush's first strike doctrine).

⁴⁵ G.A. Res. 1, U.N. GAOR, 56th Sess., U.N. Doc. A/56/L.1 (2001); U.N. SCOR, 4370th mtg. at 1, U.N. Doc. S/Res/1368 (2001).

⁴⁶ Gassama, *Id.*, at 16-17.

⁴⁷ *Id.*, at note n. 56. See An Open Letter to President Clinton: “Remove Saddam from Power,” in *The Iraq War Reader 199* (Micah L. Sifry & Christopher Cerf eds., 2003).

⁴⁸ See Antulio J. Echevarria, II, *The Legacy of Clausewitz*, JFQ, at 76, 77, Winter 1995-96, available at www.dtic.mil/doctrine/jel/jfq_pubs/1810.pdf.

C. *Taxis and Cosmos (Kosmos)*

“[I]t is the concepts and the views held by individuals which are directly known to us and which form the elements from which we must build up, as it were, the more complex phenomena...” - Hayek (1952)49

The contributions of Hayek to the field of law and other disciplines are many and lasting. Many rank him among the greatest members of the Austrian school, and as one of the leading economists of the twentieth century. His work remains influential in the areas of business-cycle theory, comparative economic systems, political and social philosophy, legal theory, and even cognitive psychology.⁵⁰

The writings of Hayek, in particular, *Law, Legislation, and Liberty*, engage us, yet, while in the same moment distracts us to no end. It is perhaps for this reason he described himself as a puzzler or muddler, rather than the heir apparent master of his subject.⁵¹ Nonetheless, he remains the perceptible genius because of his writings and the continuing influence of his writings. Hayek, through his writings, continues to influence discourses in modern society. He also continues to reveal himself in different disciplines, subtle forms and ideas. The most obvious of which are his discourses on taxis and cosmos (*Kosmos*).

In terms of societal rules and order, Hayek discerns that prevailing scientific and political views are contingent on a particular conception of the formation of social institutions. The latter is labeled constructivist rationalism, which is a concept assuming that all social institutions are, and ought to be, products of deliberate design. This contention manifests an intellectual tradition that he deems false in its factual and normative conclusions. The latter is true because “all” institutions are not “all” the products of design. It is an erroneous view reflective of an intellectual tradition that connects with a false conception of the human mind as an entity positioned outside the cosmos of nature and society. Rather, he perceived the human mind as being the product of the same process of evolution that society’s institutions are due.⁵²

⁴⁹ See Frederick August von Hayek, *The Counter-Revolution Of Science: Studies On Abuse Of Reason*, Glencoe, Illinois, The Free Press (1952), at 38.

⁵⁰ Klein, *supra* note 3.

⁵¹ Klein, *Id.*

⁵² Hayek, at 5.

In terms of constructivist rationalism, Hayek distinguished between two schools of thought, both constituting a form of rationalism: evolutionary (critical) rationalism and the erroneous constructivist (naïve) rationalism.⁵³ A critical concern for him is the assumptions upon which constructivist rationalism is based. For Hayek, factually false assumptions challenge a host of scientific and political doctrines, such as, legal positivism, unlimited sovereign power, utilitarianism, sociology and other schools of thought, including the social contract theories (contractarianism) of the Enlightenment era.

When Montesquieu and the framers of the American Constitution articulated the conception of a limiting constitution that had grown up in England, they set a pattern which liberal constitutionalism has followed ever since. Their chief aim was to provide institutional safeguards of individual freedoms; and the device in which they placed their faith was the separation of powers. In the form in which we know this division of power between the legislature, the judiciary, and the administration, it has not achieved what it meant to achieve. Governments everywhere have obtained by constitutional means powers which those men had meant to deny them. The first attempt to secure individual liberty by constitutions has evidently failed⁵⁴

While announcing that the latter form of constitutionalism has failed, Hayek still recognized that constitutionalism means limited government.⁵⁵ Now, Hayek, to use his own words, begins to puzzle and muddle us. For Hayek's factually false assumptions the contributing forces are not value. Rather, these assumptions manifest a perverse misconception of the forces that made the "Great Society" and civilization possible.⁵⁶ Further writing on false assumptions, and the problem of a polity limiting popular will without placing another will above it, he wrote the following.

As soon as we recognize that the basic order of the Great Society cannot rest entirely on design, and can therefore also not aim at particular foreseeable results, we see that the requirement, as legitimation of all authority, of a commitment to general principles approved by the general opinion, may well place effective restrictions on the particular will of all authority, including that of the majority of the moment.⁵⁷

⁵³ Hayek, at 5.

⁵⁴ Hayek, at 1.

⁵⁵ Hayek, at 1.

⁵⁶ Hayek, at 6.

⁵⁷ Hayek, at 6.

It is in terms of taxis and cosmos (*Kosmos*) that he addressed his concerns with problems of the order of the Great Society resting on design, which he characterized as the problem of deliberate design.

As previously mentioned Hayek discerns between evolutionary (critical) rationalism and the erroneous constructivist (naïve) rationalism.⁵⁸ The doctrinaire, rather than doctrine, of evolutionary (critical) rationalism maintains that institutions serve human purposes only if such institutions have been deliberately designed for such purposes.⁵⁹ He largely deems false the belief underlying such propositions, “that we owe all beneficial institutions to design, and that only such design has made or can make them useful for our purpose.”⁶⁰

Conversely, Hayek perceived that the doctrinaire of erroneous constructivist (naïve) rationalism holds that a society’s orderliness that greatly increased the effectiveness of individual action is not due solely to institutions and practices invented or designed for that purpose. Rather, it is largely due to respective processes of growth and evolution. These process, albeit adopted for others reasons or by accident, are preserved since “they enabled the group in which they had arisen to prevail over others.”⁶¹

By ‘order’ we shall throughout describe a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.⁶²

Hayek’s central thesis on sources of order, and suggested synonyms of system, structure or patterns, concern the “made” and “grown” orders.⁶³ The fact of societal order is a truism because without order society would be in chaos. He considered this requisite societal order for a functioning society to be the by-product of combined intentions and expectations, which ultimately determine the actions of different individuals. It is in this form that order manifests in social life, and presents the critical question of how such an order comes about.⁶⁴

For Hayek, the answers are found in the sources of order. He addressed the notion of deliberate design such as “a deliberate *arrangement* by somebody.”

⁵⁸ Hayek, at 5.

⁵⁹ Hayek, at 8.

⁶⁰ Hayek, at 9.

⁶¹ Hayek, at 9.

⁶² Hayek, at 36.

⁶³ Hayek, at 35.

⁶⁴ Hayek, at 36.

It is a concept suffering disfavor by friends of liberty and supposedly favored by authoritarians. The authoritarian concept is based on the belief that order can only be created by forces external to the system (exogenously). Conversely, it has no application to an equilibrium created from within (endogenously) such as the general theory of the market. Spontaneous order gravely differs from made order. He described each kind of order as follows.⁶⁵

The made order which we have already referred to as an exogenous order or an arrangement may again be described as a construction, an artificial order or, especially where we have to deal with a directed social order, as an *organization*. The grown order, on the other hand, which we have referred to as a self-generating or endogenous order, is in English most conveniently described as a *spontaneous order*.⁶⁶

He further employed classical Greek to describe the two sources of order, namely, *taxis* for a made order, and *kosmos* (cosmos) for a grown order. The latter, *kosmos* (cosmos) originally meaning “a right order in a state or a community.”⁶⁷

For Hayek’s spontaneous order, a well-functioning system was constructed neither by deliberate design, nor by deliberate construction of exogenous forces and endogenous forces. Throughout *Law, Legislation, and Liberty*, he referred to spontaneous order in terms of the market, common law, custom, language, science, and society.⁶⁸

Historically, in earlier periods, man deemed language and even morals as having been invented by “some genius of the past.” Generally, it is now recognized, especially by social theorists, that they are the result or outcome of a process of evolution, not the product of deliberate design. In terms of spontaneous order, it is especially in the field of economics that it is observed to engender special concerns. A classic example of Adam Smith’s expression of the “invisible hand,” presents such a controversy because Smith described man as being led “to promote an end which was no part of his intentions.”⁶⁹ In respect, the chaos of economic affairs may well be reflective of complete absence of order.⁷⁰

The gist of Hayek’s discourse on *taxis* and *kosmos* is that spontaneous order cannot aim at concrete purposes, because an order “not made” does exist. A

⁶⁵ Hayek, at 36.

⁶⁶ Hayek, at 37.

⁶⁷ Hayek, at 37.

⁶⁸ Hayek, *Id.*

⁶⁹ Hayek, at 37.

⁷⁰ Hayek, at 37.

primary concern of Hayek was discovering why many do not readily recognize this supposed truism.⁷¹

II. THE COSMOS OF INSTITUTION BUILDING

Assuming *arguendo* the new global economy manifest “made” order rather than cosmos presents critical issue of the relationship between a possible order “not made” in non-Western cultures and developing nation-states, and Western institution building by developed nation-states and IGOs such as the WTO that are dominated by developed nation-states. It also presents issue of the consequences attaching to institution building in non-Western cultures and nation-states. Institution building, constitution building, inclusive, ultimately affects both the donor and recipients of institution building. In terms of Hayek’s categories of sources of order, it may negatively affect the arguable cosmos (*Kosmos*) of non-Western cultures and nation-states. As for Western developed nation-states, in terms of Hayek’s categories of sources of order, institution building may constitute no more in reality than an exercise in political, if not neo-realist or neo-liberalist, futility. Because his discourse challenged not only law in general, but also the very foundations of Western notions of law by contending there are factually false assumptions that challenge a host of scientific and political doctrinaires.

Hayek’s discourse offers an alternative means of gauging the success or failure of institution building in developing nation-states by developed nation-states. His cosmos may be predictive of success or failure in Western institution building. A consequence of failure, to the disdain of the Western world may produce negative consequences affecting the donors, or recipients, or both.

Moreover, it presents the critical issue of how we should define the rule of law, and what implementation strategies will advance both incorporation of the rule of law and a new global economy, or world order. Normative legal positivism appears as a ready solution due to its notion that law is a set of commands as suggested by the tradition of imperative legal positivism of John Austin,⁷² or even arguably, a Hayekian taxis by deliberate design. For John Austin a proposition of law was true if it simply reported correctly the past commands of a political society.⁷³

⁷¹ Hayek, at 38.

⁷² See John Austin, *The Province Of Jurisprudence Determined* (1832), Prometheus Books (2000).

⁷³ See Ronald Dworkin, *Laws Empire*, at 33-35, (Harvard University Press, 1986). Oxford University Press 1961.

In the event a definition for rule of law can be contained within the discipline of normative legal positivism or the normative positivist analysis of the concept of law, then rule of law presents itself as a West centric concept of law whose incorporation into non-Western cultures and developing nation-states poses certain problems. H. L. A. Hart's rejection of John Austin's imperative legal positivism arguably addressed the same problem.⁷⁴ In the *Concept of Law* (1961), Hart contended that the true grounds of law lie in the acceptance by the community as a whole of a fundamental master rule, being Hart's rule of recognition. This rule assigns to a particular person or groups the authority to make law.⁷⁵ Therefore, rules of law are true not just in virtue of commands, but, more importantly, "in virtue of social conventions that represent the community's acceptance of a scheme of rules empowering such people or groups to create valid law."⁷⁶

It is readily apparent that the issue presented is one a clash of cultures that is the invocation of West centric law, or rule of law, into non-Western nation-states. The earlier thesis of Samuel Huntington speaks to the same variety of societal and cultural issues.⁷⁷ However, the issue is viewable in a different perspective, rather than simply a clash of cultures. In terms of Hayek's discourse, the critical issue may very well lie in a clash of modern day taxis versus cosmos (*Kosmos*). It is also a modern day taxis-cosmos conflict reflecting, to a certain extent, what survives and remains of antiquity in both Western and non-Western cultures and nation-states.

There are problems in defining the rule of law. Its multifarious nature has lent to different meanings in different concepts and different legal systems. There seems not to be a consensus on what the rule of law means, or even what it stands against. One sources observes that rule of law has both a descriptive and prescriptive content. "Like the concepts of 'liberty' or 'equality,' the descriptive meaning of 'the rule of law' is dependent on the prescriptive meaning one ascribes to it; in the context of complex contemporary polities there likely will be vigorous disagreements concerning the relevant prescriptive standards at stake."

⁷⁴ See generally H. L. A. Hart, *The Concept Of Law*, ch. 1 Persistent Questions, Oxford University Press 1961.

⁷⁵ See generally Hart, *Id.*, ch. 5 Law as the Union of Primary and Secondary Rules; ch. 6 The Foundations of a Legal System.

⁷⁶ Dworkin, *Id.* Many officials of Nazi Germany obeyed Hitler's commands as law, but only out of fear. Does that mean they accepted a rule of recognition entitling him to make law? If so, then the difference between Hart's theory and Austin's becomes elusive, because there would be no difference between a group of people accepting a rule of recognition and simply falling into a self-conscious pattern of obedience out of fear.

⁷⁷ See generally Samuel P. Huntington, *The Clash Of Civilizations And The Remarking Of The World Order*, (Simon and Schuster 1997) (1996).

As a result, it has come to mean different things for different legal traditions such as Anglo-American rule of law, German *Rechtsstaat* and French *L'Etat de droit*.⁷⁸

For Hayek, the concept of law was also subject to differing interpretations, because of differing interpretations concerning the concept of the “purpose” of law.⁷⁹ He seemingly intimated that law is a necessary condition for forming a spontaneous order of actions. While doing so, he also announced it a difficult concept to formulate without required explanations of order by social theory, which was, of course, economics.⁸⁰ He is again critical of Cartesian rationalism and those that follow it.⁸¹ Because “[t]he preservation of an enduring system of abstract relationships, or of the order of a cosmos with constantly changing content, did not fit into what men ordinarily understood by a purpose, goal or end of deliberate action.”⁸² This is necessarily true because generally law does not serve any “purpose,” except for what he described as “countless different purposes of different individuals.” Since law is not a “means to any purpose,” it fit well within Hayek’s scheme of things, especially spontaneous order.⁸³

A problem of Hayek is inklings of legal positivism. He may well have been what he claimed not to be and not what he so strongly attested to being. In addressing the conception of the “purpose” of law, Hayek seems to have been balancing a need for taxis against cosmos and spontaneous order, rather than just differing “purposes” attributable to the concept of law. Although Hayek was an economist if one had to characterize him in terms of legal philosophies, he was more so, than not, a legal positivist. Because in his analysis of the concept of law, he is constantly balancing taxis against cosmos, a Kantian purposeless character of rules against Utilitarianism’s purpose as central feature of law, and natural law against positivism. Admittedly, he does not go to the extremes of legal positivism such as the imperative legal positivism of John Austin, but neither does he go to

⁷⁸ See Michel Rosenfeld, *The Rule Of Law And The Legitimacy Of Constitutional Democracy*, 74 S. Cal. L. Rev. 1307, 1308-09, (July 2001).

⁷⁹ Hayek, at 113. In the history of legal philosophy, he observed two concepts of the purpose of law. “From Immanuel Kant’s emphasis on the ‘purposefulness’ character of the rules of just conduct, to the Utilitarians from Bentham to Ihering who regard purpose as the central feature of law, the ambiguity of the concept of purpose has been a constant source of confusion.”

⁸⁰ Hayek, at 112-113.

⁸¹ Hayek, at 9-10. (From whom the great thinkers called constructivist rationalist (Cartesian rationalism), Hayek discussed René Descartes (most complete expression of constructivist rationalism), Hobbes and Rousseau (the social contract theorists)).

⁸² Hayek, at 112-113. It appears to be a mystery for Hayek that those following René Descartes, such as the social contract theorists (contractarians), did not follow David Humes, because Humes stressed the function of the system of law as a whole, which worked irrespective of particular effects. *Id.*

⁸³ Hayek, *Id.*

opposite extremes of Cartesian rationalism, if not contractarianism. In this respect, he resembled a sort of tempered positivist, perhaps in the tradition of H. L. A. Hart. In many ways, Hayek's taxis, cosmos, and spontaneous order, at least in terms of methodology, bears resemblance to Hart's primary rules and secondary rules.

In a quest for spontaneous order, Hayek insisted upon cosmos, grown order. However, grown order had to be refined, to a certain extent, by taxis, "made" order, thus allowing for abstract concepts (relations) so long as they are only defined by abstract properties.⁸⁴ There are conventional or normative rules that tell us what we ought and ought not to do. There are also rules such as the rules of law that are the "chief instrument whereby we can affect the resulting order." For Hayek the rules upon which spontaneous order rest need not always be of spontaneous origin, which are cosmos, grown order. "Although undoubtedly an order originally formed itself spontaneously because individuals followed rules which had not been deliberately made but had arisen spontaneously, people gradually learned to improve those rules; and it is at least conceivable that the formation of a spontaneous order relies entirely on rules that were deliberately made." Rules of law, mostly, but not all, will be the product of deliberate design, whereas most rules of conduct and morals will be the product of spontaneous growth. The spontaneous order produces a resulting order. Particular manifestations of rules depend on circumstances that the designers of rules did not know and could not have known. In turn, the particular content of order reflects circumstances known only to persons who obey the rules and apply them to facts only they know. "It will be through the knowledge of these individuals both of the rules and of the particular facts that both will determine the resulting order."⁸⁵

Comparatively, and methodologically resembling Hayek's taxis and cosmos, Hart in *The Concept of Law* (1961) distinguished between primary and secondary rules. The primary rules tell us what we can and cannot do, while, secondary rules allows for the creation, alteration and extinction of legal rules and legal relations.⁸⁶ Hart's secondary rules also arguably determine the future of legal institutions, in that they reflect the importance of constitutionalism in institutionalizing legal institutions, especially IGOs such as the WTO. The latter also presents the problem of constitution making at the international level, including the WTO, paralleling similar concerns of national constitutions, power

⁸⁴ Hayek, at 39

⁸⁵ Hayek, at 46.

⁸⁶ Hart, *supra* note 74, at ch. 5 Law as the Union of Primary Rules and Secondary Rules, at 77-96.

and legitimacy (recognition).⁸⁷ It is a question of power and controlling power,⁸⁸ especially determining the limits and channels of political authority and legal authority. In terms of national constitutions and constitutionalism, which applies to international organizations such as the WTO, ultimately, power, although state-centered or domestic, is controlled by what are termed meta-rules, pre-constitutional rules and meta-constitutional rules, or meta-constitutionalism and the unwritten rules that tell us how constitutions operate.⁸⁹ Hart's primary-secondary rules dichotomy strongly resembles Hayek's taxis-cosmos dichotomy.

Nonetheless, when one comes to realization that law, especially rule of law, is not merely a set of commands, a statement of the problem truly begins to take form. A form takes shape in a definitional meaning of rule of law. A worthy definition of rule of law is not simply a set of commands; rather it encompasses a reality reflective of the political and economics forces in a society. Most problematic is that given its Western origins, rule of law must necessarily be defined within the ambit of West centric political and economic forces and taxonomies. In this context, rule of law is best described as "neither a rule nor a law" in that "it is generally understood as a doctrine of political morality, which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free and civilized societies."⁹⁰ Admittedly, there are problems attendant to this definition. Assuming *arguendo* this definition correctly reflects Western jurisprudence in modernity; it also presents the critical issue of an invocation of West centric political morality into non-Western cultures and nation-states.

The problem is further attenuated by the distinction between the reality and the model of Western jurisprudence in modernity, especially in terms of American jurisprudence. A model of U.S. constitutionalism is grounded in the deliberations of the founding fathers, which is reflective of the original

⁸⁷ See John H. Jackson, *The Jurisprudence of GATT & WTO - Insights on Treaty Law and Economic Relations*, Higher Education Press 2002, at 411, 452.

⁸⁸ Jackson, *Id.*

⁸⁹ See Walker, Neil, *Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe*, Harvard Law School, Seminar and Workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO, Harvard Jean Monnet Working Paper 12/99, This paper is to be published in G. de Burca and J. Scott (eds), *The Changing Constitution of the EU:: From Uniformity to Flexibility* (Hart Publishing, 2000), available at <http://www.jeanmonnetprogram.org/papers/99/991201.html>.

⁹⁰ See Alex Carroll, *Constitutional And Administrative Law* (Financial Times Management) (1998), at 34.

Enlightenment tradition.⁹¹ Conversely, the reality of modern U.S. constitutionalism reflects a watering down effect over the years that is an evolution from original Enlightenment agenda to what one source deems a more “moderate” Enlightenment.⁹² The assumption that the original Enlightenment tradition is no more begs the question of what law or rule of law Western nation-states, who are dominant in international power politics, are intending to transplant into non-Western nation-states under the auspices of IGOs such as the WTO. American foundational values are grounded in the Enlightenment philosophies, evolved to neo-realism, eventually, manifesting American unilateralism, or America as the indispensable nation.⁹³ The problem of remnants of the Enlightenment era, as one source notes, is that “Enlightenment rationality has been so successfully ingrained in our processes, forms, and practices, that, ironically, we have (almost) completely lost the quintessentially Enlightenment capacity to question.”⁹⁴ Americans have come to believe in their own rationality in a fundamentalist manner. “The rationality of the Enlightenment has become so successful, so hegemonic, that it has become immobilized through its own institutions.”⁹⁵

As previously mentioned Hayek perceived that, an order “not made” that is grown does exist, which he deemed a readily recognizable truism.⁹⁶ Assuming an order “not made” does exist, is this equally true in terms of non-Western cultures and nation-states? In addition, what taxis will serve as an effective implementation strategy for transplanting a Western constitutional design in non-Western cultures and nation-states? The latter presents a critical problem for U.S. constitutionalism or world constitutionalism as concerns non-Western nation-

⁹¹ See generally *The Federalist Papers*, Mentor Books (June 1, 1999). It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. See *Id.*, at Federalist No. 1 (Publius by Alexander Hamilton).

⁹² See Robert Lowry Clinton, *Classical Legal Naturalism And The Politics Of John Marshall's Constitutional Jurisprudence*, 33 J. Marshall L. Rev. 935, 945 (Summer 2000), (“The modern version of the interpretive tradition we have ignored has been called a ‘moderate Enlightenment’ tradition by Carl Dibble.”).

⁹³ See generally Robert Kagan, *Of Paradise and Power – America and Europe in the New World Order*, New York: Vintage Book (2004). (The Kagan Thesis first appeared in Robert Kagan, *Power and Weakness, Why the United States and Europe see the world differently*, Policy Review, no. 113, June/ July 2002, at <http://www.policyreview.org/JUN02/kagan.html>).

⁹⁴ See Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 Boston College Law Review 227 (2003), citing Pierre Schlag, *Normativity and the Politics of Form*, in *Against the Law*, 29, 46, 93, (Paul F. Compos, et. al. eds.). (1996), at 73.

⁹⁵ Brennan, *Id.*

⁹⁶ Hayek, at 38.

states, and their incorporation, transplant, or more accurately legal borrowing,⁹⁷ of the Western rule of law.

The discourse of Hayek on taxis, cosmos (*Kosmos*) and deliberate design challenges the legitimacy of United States constitutionalism as a model for world constitutionalism, Chinese constitutionalism and Islamic constitutionalism.⁹⁸ His discourse challenges the very foundations of the American ideal, which are the ideals of the founding fathers emanating from the original Enlightenment tradition. However, the challenges of Hayek's discourse do not necessarily evolve to a factual responsibility for actually disreputing the original American Enlightenment tradition. The demise of the Enlightenment tradition from its original colonial days is arguably commenced during the gilded age of America, a period in history marked by economic and political corruption.⁹⁹ The demise of the original colonial American Enlightenment tradition parallels a period in American history known as the gilded age. The changes in American jurisprudence correspond with the changing politics and economics of an American society transitioning to a progressive era. Oliver Wendell Holmes, Jr., arguably, the paradigmatic American legal realist may have contributed to our transition from an original Enlightenment tradition to "moderate" Enlightenment. In the *Path of the Law*, Oliver Wendell Holmes, Jr., wrote the following.

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal

⁹⁷ See generally Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, CID Working Paper No. 39 (March 2000), Law and Development Paper No. 1, Working Papers, Center for International Development at Harvard University.

⁹⁸ See The Coalition Provisional Authority (CPA) (Iraq), at <http://www.iraqcoalition.org>. The Regulations and Orders of the CPA, CPA/REG/16 May 2003/01, reflect Western norms and governmental models, and most importantly, read "Regulations and Orders will remain in force until repealed by the Administrator or superseded by legislation issued by democratic institutions of Iraq." *Id.*, at COALITION PROVISIONAL AUTHORITY REGULATION NUMBER 1, Section 3 Regulations and Orders issued by the CPA, 1. at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

⁹⁹ Stanley K. Schultz, H102 Lecture 04: *The Gilded Age and the Politics of Corruption*, (© 1999 Board of Regents of the University of Wisconsin System), available at <http://us.history.wisc.edu/hist102/lectures/lecture04.html>. The term "The Gilded Age" comes from a novel of the same name published in 1873 by Mark Twain and Charles Dudley Warner, which, though fictional, is a critical examination of politics and corruption in the United States during the nineteenth century. This lecture explores how rampant economic and political corruption colored American society and culture during the Gilded Age.

it seems to me that every lawyer ought to seek an understanding of economics.¹⁰⁰

While attributing great significance to an understanding of economics, if not, the blending of law and economics, Holmes neither mentioned, nor perhaps envisioned, an admixture of politics, or political science, to this societal mix. Arguably, at the turn of the nineteenth century, he did not envision the trials and tribulations of international law and politics, in terms of modernity, if not post-modernity,¹⁰¹ and its attendant political, socio-economic and legal forces.

In terms of China, this is especially true when one considers the dynamics of Chinese politics and its history of constitutional government dating from the Sino-British post-Opium War (1839-1842) to modernity, with its many twists and turns, especially in terms of sovereignty and nationalism.¹⁰² For China, this historical journey of political growth parallels a history of international law and trade, from the original preferential trading arrangements of the British Empire (Opium War),¹⁰³ to the WTO and its dialectic and economic visions of world order.¹⁰⁴ China's historical journal, at least in the sense of classical international law (1648-1918)¹⁰⁵ and modern international law, presents problems for Western institution building such as that undertaken by the United States and other developed countries.

In terms of distinguishable historical, cultural and legal particularities, the situation is no less dramatic with other non-Western cultures and developing countries such as Afghanistan and Iraq. One source noted that Chinese, Indian, Egyptian and Greek civilizations manifest anachronisms in modernity, offering at

¹⁰⁰ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harvard Law Review* 457 (1897), available at Project Gutenberg, <http://digital.library.upenn.edu/webbin/gutbook/lookup?num=2373>.

¹⁰¹ See Paul Harris, *The Birth of the Postmodern, the Rebirth of the Tribe: Contradiction and Change in Contemporary New Zealand*, University of New Zealand, University of Waikota, Hamilton, New Zealand available at <http://employees.csbsju.edu/jmakepeace/perspectives2001/Harris2001.jmm.html>. "Postmodernity is a 'purportedly new state of world affairs' which has been emerging since the 1960's . . . For some analysts, postmodernity is but the latest phase of capitalism."

¹⁰² See Suiseheng Zhao, *Chinese Nationalism and Its International Orientations*, *Political Science Quarterly*, vol. 115, no. 1 (Spring 2000).

¹⁰³ See William Travis Hanes and Frank Sanello, *The Opium Wars: The Addiction of One Empire and the Corruption of Another*, Sourcebooks Trade (November 2002). Twice, from 1839 to 1842 and again from 1856 until 1860, the Chinese government sought to oust the British trade.

¹⁰⁴ See Steven Chan, *Problematic Approaches Versus Feasible Emphasis*, Affairs, Spring 1999.

¹⁰⁵ Malanczuk, *supra* note 31, at 10.

best marginally, practical working political and legal ideologies in today's world.¹⁰⁶

There are, of course, many religious, psychological, and political reasons for this, but all of these reasons derive from a sense that so far as the West is concerned, Islam represents not only a formidable competitor but also a latecoming challenge to Christianity. . . . Islam was believed to be a demonic religion of apostasy, blasphemy, and obscurity. . . . It was as if a younger, more virile and energetic version of Christianity had arisen in the East. . . . Only Islam seemed never to have submitted completely to the West; and when, after the dramatic oil-price rises of the early 1970s, the Muslim world seemed once more on the verge of repeating its early conquests, the whole West seemed to shudder.¹⁰⁷

Problematic for Western institution building is that Islamic political ideology is a worldwide phenomenon, representing a “complex iteration of Quranic inspiration and reformist, fundamental orientation.”¹⁰⁸

Hayek perceived the problem of institution building, especially in terms of law, as one of a “complex relationship between values and facts.” It is a problem of blending these values and facts, and a resulting complex social structure “that exist only because the individuals composing them hold certain values.” Assuming *arguendo* applicability to Western institution building, he further posits in terms of proposed modifications or improvements of existing orders that, “he [social scientist] will have to accept the values which are indispensable for its existence, as it would clearly be inconsistent to try to improve some particular aspect of the order and at the same time propose means that would destroy the values on which the whole order rests.”¹⁰⁹ Hayek is addressing the problem confronted by social scientists seeking to study complex social structures, which only exist because individuals hold certain values.¹¹⁰

A problem of the disciples of political science, economics and law, is that they are social sciences, if not moral sciences,¹¹¹ rather than pure sciences, such as,

¹⁰⁶ See Maimul Ahsan Khan, *Human Rights in the Muslim World Fundamentalism, Constitutionalism, and International Politics*, (Carolina Academic Press 2003).

¹⁰⁷ *Id.*, citing Edward W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World*, 4-5 (rev.ed. 1997).

¹⁰⁸ *Id.*

¹⁰⁹ Hayek, at 111-112.

¹¹⁰ Hayek, *Id.*

¹¹¹ See Richard F. Crespo, *Controversy: Is Economics a Moral Science?*, *Journal of Markets & Morality* 1, no. 2 (Center for Economic Personalism: October 1998), 204-211, available at http://www.acton.org/publicat/m_and_m/1998_oct/pdf/mm-v1n2-crespo1.pdf.

engineering, physics and math.¹¹² Moreover, even pure science does not use “observation or experiments in the world, but instead uses only reason and logic in the form of non-specific generalities,” providing a “foundation in the form of theorems or statements about what is true and what is not,” which “can be known as certain and true for all time,” so long as “reason and logic as we understand them remain valid.”¹¹³ Richard A. Posner assesses danger of positive economics and positive economic theory of law as simply the opposite of reductionism, occurring when economic analyst seeking to make simple economic models more complex introduces additional factors such as risk aversion and information costs.¹¹⁴ The greater complexity enhances difficulty of refutation and substantiation by empirical observation.¹¹⁵

Hayek made a sharper distinction, however, requiring a higher proof from the sciences. Thus, Hayek assures us once again of the need for spontaneous order. Admittedly, he made a distinction between the domains of private law and public law. By doing so, he allows space for the development of “made” law in the affairs of organizations such as governments and their IGOs. The effect of which serves as a possible justification for the persistency and evolution of positive law (legal positivism), despite the alleged factually false assumptions of constructivist rationalists.

Non-Western developing countries pose distinctively different problems, however, when considering Hayek’s postulations. The scenario of non-Western developing countries does not fit well in Hayek’s scheme of things or his discourse concerning taxis, cosmos (*Kosmos*) and deliberate design. A problem is that he does not directly address the particularities of non-Western nation-states or civilization. Even assuming his discourse bears relevancy on the issue of non-Western culture, it only does so indirectly.

Hayek recognized distinctive cultural traditions; however, after being recognized they are relegated to minimal importance. While noting that some social orders rest on complex systems of rules of conduct even among the animals very low on the evolutionary scale, innate rules (genetically transmitted) and learned rules (culturally transmitted) are given minimal attention.¹¹⁶ As opposed to a more thorough examination of cultural tradition in terms of non-Western civilizations, he leaves the subject minimized in importance. He wrote, “[S]o that new rules may rapidly spread among large groups and, in the case of isolated

¹¹² Ways of Seeing – Exploring Modern Physics, at <http://waysofseeing.net/wosch5.html>.

¹¹³ *Id.*

¹¹⁴ See Richard A. Posner, *Economic Analysis of Law*, ch. 1, The Nature of Economic Reasoning, (Reprinted from the English Edition by Little, Brown and Company 1992), at ch. 1.

¹¹⁵ *Id.*

¹¹⁶ Hayek, at 74.

groups, produce distinct ‘cultural traditions.’”¹¹⁷ Hayek when discussing cultural tradition is addressing distinguishable cultural traits of Japanese macaque monkeys, rather than individuals or persons in the sense of man on the high end of the evolutionary scale.¹¹⁸ Admittedly, he does briefly return to the subject of culture in an epilogue to *Law, Legislation and Liberty*. Hart instructs us that yet to be recognized is a present order of society that arose, not by design, but by more prevailing effective institutions in the process of competition. Although remaining critical of constructivist rationalism, or the Cartesian approach, he implicitly recognized the inherent problem of culture by design. “Culture is neither natural nor artificial, neither genetically transmitted nor rationally designed.”¹¹⁹ However, in this respect, his criticism of the Cartesian approach may be amiss because arguably a more correct interpretation of the Enlightenment is one emphasizing the distinction separating reason from both culture and tradition.¹²⁰

In this respect, Hayek’s discourse is limiting. While being harshly critical of constructivist rationalism and its attendant factually false assumptions, Hayek unnecessarily, and somewhat contradictorily, contained himself within the bounds of Western conventionalism and parochialism. The walls of his confinement are Western ideology, Western institutions, and Western conceptions of law. Nonetheless, his postulations still bear validity and relevance in terms of institution building, even as regards to institution building in non-Western nation-states. His postulates do so because they both recognized and built on the interrelationship between facts and values, and ultimately, a resulting sort of Hegelian thesis-antithesis synthesis of facts and value to a higher plane, or higher

¹¹⁷ Hayek, at 74.

¹¹⁸ Hayek, at 163-64 n. 7.

¹¹⁹ Hayek, at epilogue, 154-155.

¹²⁰ See generally Steven D. Smith, *Recovering from Enlightenment?*, Public Law and Legal Theory Research Paper Series, Research Paper No. 61 (Fall 2003), Notre Dame Law School, available at <http://ssrn.com/abstract=449060>.

synthesis.¹²¹ Hayek most importantly still addressed the problem of science and social sciences in exploring the complex social order of humankind.

Legal positivism and natural law continue to influence mainstream thinking in international law.¹²² However, legal positivism arguably has become a more dominating force in Western international law and Western domestic law, especially in American jurisprudence. Given Hayek's discourse, the supposed international law embodied, for instance, in the constitution of the WTO regime may well survive a theoretical attack for its lack of both genuine cosmos and spontaneous order. Nonetheless, even assuming its theoretical survival from such attack, in the terms of the science of law, a donor WTO regime manifesting positive law (legal positivism) still engenders problems of the transplant, integration and evolution in the recipient domestic law of non-Western cultures and nation-states.

This dilemma is also not readily dismissed or resolved by prevailing international law theories of dualism and monism.¹²³ An assumed international positive law (legal positivism) tolerated in Hayek's discourse under the public law exception must still confront and integrate with the private laws of non-Western cultures and nation-states. As a result the problem of an inevitable clash between taxis and cosmos, and the need or lack of spontaneous order in law remains. The theories of dualism and monism, coordination theory,¹²⁴ inclusive, address issues of legal hierarchy, which ultimately leaves in place, rather than resolving problems of both transplanting donor laws and evolution of recipient domestic laws of non-Western cultures and nation-states.

¹²¹ See J. Bronowski and Bruce Mazlish, *The Western Intellectual Tradition From Leonardo to Hegel* (Harper and Row: 1975), ch. 26, Kant and Hegel: The Emergence of History. In terms of Hegel's thesis-antithesis synthesis conflicts should resolve by a step of synthesis, which fuses such conflict to a higher plane, or higher synthesis; see also Harry Landreth, *History Of Economic Theory Scope, Method, And Content*, 157, Houghton Mifflin Company Boston, 1976. At any given time, according to Hegel, an accepted idea, or thesis, exists which is soon contradicted by its opposite, or antithesis. Out of this conflict of ideas, a synthesis, representing a higher form of truth, is formed, which becomes a new thesis. This new thesis is likewise opposed by its antithesis and transformed into a new synthesis, and so on and on. Thus in a never-ending chain of ideas, each one approaching closer to truth, history evolves in an endless process in which all things become gradually more perfect by means of conflict-induced change.

¹²² Malanczuk, *supra* note 31.

¹²³ See Kelsen, *supra* note 42, at 328-344. (Discussing the monistic conviction of international legal order as being inevitable). See also Hans Kelsen, *General Theory of Law and the States*, (1945), at 363-380.

¹²⁴ See generally Gerald Fitzmaurice, *General Principles of International Law* (1957). (Discussing coordinationism in international law).

Admittedly, in terms of dualism and monism, there are other viewpoints. One source subscribes to international law as a sort of evolving, systemic-cybernetic phenomena. The legal systems of individual nation-states are seen as becoming more interconnected with international legal systems. The result is a connectedness supposedly leading to a world or global legal system. One source, implicitly, contends that notions of modern international law are the by-product of an evolution from primitive law as embodied in the principle of *comita gentium* (international courtesy) and *pacta sunt servanda* (agreements must be fulfilled) that resulted in more complex, intricate and structured organizations such as the UN, EU, OAS and Mercosur. As a result, there are now international legal systems extending jurisdiction over not only nation-states, but also individuals.¹²⁵ In this respect, theories of dualism and monism are considered more prevalent and more capable of responding to the changing juridical needs of a more international law oriented, international community.

In terms of non-Western cultures and Western institution building, West centric taxonomies when applied to non-West-specific political, socio-economic and legal issues, especially economic theory, because of myopic perspectives necessarily limited by abstract theory and assumptions often calls into question both reliability and practicability of explanation offered by the sciences to explain real life phenomenon.¹²⁶ Assuming distinctively non-Western-uniquenesses, assumptions employed as descriptors of unconventional economic actors such as non-Western cultures and nations, are one-dimensional and pallid.¹²⁷ Any science void of real world observation and experiments, arguably, will neglect the dimensions and dynamics of culture. The latter result is no less dramatic when social sciences ignore the advent of real world observations and experiments. Developing countries and economies in the midst of a supposed transition from socialism to capitalism, at least in terms of an American consensus or Washington consensus,¹²⁸ presents, if not produced, the every increasing issue of an ideology

¹²⁵ See Ernesto Grün, *Globalization of Law: A Systemic and Cybernetic Phenomenon (La globalización del Derecho: un fenómeno sistémico y cibernético)*, (Last visited 17 November 2004), at http://www.filosofiyderecho.com/rtdf/numero2/global_english.htm. These are legal institutions that even have courts with jurisdiction—of various degrees of intensity—not only over nation-states, but also over legal persons (whether individuals or entities) within those states. Thus occurs in Europe, the Argentine constitutional reform—evident in many of the constitutional rules,—and in the decisions of the Argentine Supreme Court.

¹²⁶ Posner, *supra* note 114, (Discussing the realism of the economist's assumptions).

¹²⁷ *Id.*, (Discussing assumptions employed as descriptors of unconventional economic actors).

¹²⁸ See Dickson Eyoh and Richard Sandbrook, *Pragmatic Neo-liberalism and Just Development in Africa*, University of Toronto, CIS Working Paper 2001-1, available at http://www.utoronto.ca/cis/working_papers/2001-1.pdf. “This Consensus assumes that the greater good is served by adjusting firms, governments, employees, farmers, and citizens in general to the exigencies of competition within increasingly deregulated and global markets.”

of cultural exceptionalism. The political economy of reforms presents a scenario of uncertain theorems for the West, in its universalistic presumptions of West centric logic and reason, as opposed to recognition of arguably existentialistic non-Western uniquenesses, and distinctive ontological bases in tradition.

In particular, the latter presents an *impasse* in advancing the original goals of the Bretton Woods institutions such as the WTO, IMF and World Bank. It does so because it engenders problems of both the genuine integration of developing non-Western nation-states, and creation of appropriate norms that will lend efficacy and legitimacy, for instance, to a WTO constitution, if not an international legal order. In terms of WTO, without appropriate norms resulting in an effective integration and legitimacy, the plight of non-Western nation-states is best described as prospective post-WTO memberships that are quasi-in-nature, rather than the more equilateral, full entitlement memberships enjoyed by dominant Western developed nation-states. In terms of the accession mechanism, a resolution of such issues may warrant a change in WTO, IMF and World Bank methodologies and taxonomies, especially West centric models for development and integration.

It is perhaps an issue of a Western evolution to an *emic*, instead of *etic*, understanding of Sinicism, Islamism and other non-Western cultures.¹²⁹ Linguistic anthropologist Kenneth Pike coined the neologisms of *emic* and *etic*, and distinguished the two as follows.¹³⁰ An *emic* “perspective focuses on the intrinsic cultural distinctions that are meaningful to the members of a given society.”¹³¹ Conversely, an *etic* perspective “relies upon the extrinsic concepts and categories that have meaning for scientific observers.”¹³² An inherent benefit of a non-West centric perspective is the resulting recognition of the forces of politics and culture, especially, cultural exceptionalism. Because the concept of *emic/emit* will “insists on the relationship of the observer to the data, as against an abstract science in which the observer is somehow eliminated in principle even when this would be impossible in fact.”¹³³ Kenneth Pike sought a greater understanding of particular cultures through the intertwining of *emic* and *emit* perspectives, not by exclusive reliance on an *emit* perspective.¹³⁴ Pike’s perceived

¹²⁹ James Lett, Excerpt from *Emic/Etic Distinctions*, *Encyclopedia of Cultural Anthropology* (1996), available at <http://faculty.ircc.cc.fl.us/faculty/jlett/Article%20on%20Emics%20and%20Etics.htm>.

¹³⁰ Lett, *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Alan S. Kaye, *An interview with Kenneth Pike* (The Wenner-Gren Foundation for Anthropological Research, 4 December 1993), available at <http://www.sil.org/klp/kayeint.htm>.

¹³⁴ Kaye, *Id.*

need for a more generalized background framework as a source of human choice led him to note what he deemed an *etic* structure observable in particular cultures. This “etic universal background pattern and emic culturally specific pattern” are noted to be intertwined. Thus, the *etic* and *emic* are not subject to separate treatment, or “first one, then the other,” or as “one outside the mind, the other inside it.”¹³⁵

The new millennium may well constitute a generation where a contest of governmental models and taxonomies are arguably dependent on distinctive cultures and economies.¹³⁶ The latter necessarily produces additional considerations exceeding the disciplines of economics and political science, especially West centric political economy taxonomies of neo-realism, neo-liberalism, and development theory (dependency theory). West centric taxonomies destine developing countries and economies to a race to the proverbial bottom, in terms of political and economic development. They do so because they seem to condemn developing countries “to subservience or worst: to a state of progressive impoverishment and dependence from which only prolonged struggle or revolutionary change provides an outlet.”¹³⁷ Moreover, race to the bottom models of globalization ultimately produces a backlash in developed economies “as business relocation threatens jobs, wages and environmental standards.”¹³⁸ Conversely, it may true for developing countries that, “Developmentalism resonates with Woodside’s suggestion that a ‘latecomer theory’ . . . dramatizes the need for a strong state and a planning intelligentsia to choose the right path to development.”¹³⁹ In terms of developing countries and Hayek’s deliberate design thesis, the latter contention may oddly translate into a justification for greater reliance on taxis, rather than cosmos, by developing countries.

Nonetheless, in terms of transplanting Western rule of law, a greater reliance on taxis, rather than cosmos presents problems, especially when anticipating a genuine evolution of Western law in non-Western cultures. Social

¹³⁵ *Id.*

¹³⁶ See Francis Fukuyama, *The Illusion of Exceptionalism*, *The East Asian Prospect*, *Journal of Democracy* 8.3 (1997) 146-149, available at <http://academic2.american.edu/~dfagel/Markets&democracyfukuyama.html>. “The success or failure of democracy depends heavily on the demonstration effect of available models of political systems.”

¹³⁷ See Louise Fawcett and Yezid Sayigh, *The Third World Beyond The Cold War Continuity and Change*, (Oxford University Press 2000), at 245.

¹³⁸ See David Wheeler, “*Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries*,” World Bank Policy Research Working Paper No. 2524, (November 30, 1999), at <http://ssrn.com/abstract=632594>.

¹³⁹ See Anita Chan, Benedict J. Tria Kerkvliet, and Jonathan Unger, *Transforming Asian Socialism China and Vietnam Compared*, Rowman & Littlefield Publishing, Inc. 1999, at 13.

science theories void of real world observations and experiments will always be based upon Western universalistic presumptions of West centric logic and reason, a certain failing resulting in certain non-Western-based biases. A genuinely real world observation of the plight of developing countries is one manifesting recognition of distinctive ontological bases in tradition. Michael Foucault calls it the “history of the present” . . . in some others “ontology of the present” . . . or even “critical ontology of ourselves”.¹⁴⁰ This critical ontology of ourselves allows an understanding of the “limitation of the present epoch,” then paves a way to escape its impasse while also helping us in the “search for new possibilities for the development of humanity.” In this sense, the critique understood is conceived as an attitude, an *ethos*. It represents a philosophical viewpoint manifesting “what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them.”¹⁴¹

Distinctive ontological bases in tradition, representative of the distinctive values and traditions of non-Western cultures constitute their histories of the present. It is from their own distinctive ontological bases in tradition that they will experiment with the possibility of going forward, especially in terms of political and economic development. Most importantly, their histories of the present will eventually evolve an appropriate constitutional design, be it non-liberal (illiberal) or liberal political economy constitutional design, or combination of both as *irredenta's*¹⁴² partial success. As for the final resting place for such an evolution in both law and constitutionalism, one can only speculate to that end.

In the final analysis, the question is whether a West centric political morality of economics and law is commensurate with a non-West centric political morality of economics and law. This presents the critical issue of whether Confucianism, Islamism and other culture phenomenon represent norms in these respective modern non-Western societies. In the event, they represent no more than what Hayek described as “articulated rules” or “descriptive rules,” rather

¹⁴⁰ See Kwok-ying Lau, *Jan Patočka: Critical Consciousness and Non-Euro-Centric Philosopher of the Phenomenological Movement*, Research Centre for Phenomenology and Human Sciences, at 10 (2002), available at <http://www.o-p-o.net/essays/LauArticle.pdf>.

¹⁴¹ *Id.*

¹⁴² Dictionary definition. Irredenta is “a region that is related ethnically or historically to one country but is controlled politically by another.”

than norms,¹⁴³ then the issue of distinctive cultures and values, in terms of integrating Western taxonomies, especially rule of law, is irrelevant. In such an event, modern debates concerning cultural values and exceptionalism have been exercises in political futility, if not mere political rhetoric. Moreover, it may serve to substantiate those distinctive cultural values of non-Western cultures and nations that are supposedly grounded in foundational values constitute no more than cliques do. Conversely, if such values genuinely portend general norms then they remain increasingly relevant as forces of culture, if not nature, deserving greater attention.

Michel Camdessus, former director of International Monetary Fund (IMF),¹⁴⁴ noted at a Financing for Development Conference, in Mexico, “If the summit could deliver one thing, it should be extending assistance to enhance institutional capacity in poor countries.” It is a problem of achieving year 2015 Millennium Goals, which were established at the September 2000 UN Millennium summit of reducing world poverty. It is generally perceived that development efforts have failed due to lack of institutional capacities to sustain economic policies. Thus, weak institutional capacity presents a major obstacle to economic development,¹⁴⁵ and advancement of new world economy. The problem of weak institutional capacities in developing countries and economies affects the original goals and policies of the Bretton Woods institutions.¹⁴⁶

A need for institution building has different consequences for developing countries and economies, as opposed to developed countries and economies. For some developing countries, one suspects that the consequence of failing to develop adequate institutions in terms of Western taxonomies is continuing poverty and lower standards of living. Comparatively, for developed countries a failure of developing countries to rebuild or re-organize its institutional capacities translates into a failure of the original goals of the Bretton Woods conference.

¹⁴³ Hayek, at 78-79. It is of some importance to recognize that, where we have to deal with non-articulated rules, a distinction that seems very clear and obvious with respect to articulated rules become much less clear and perhaps sometimes even impossible to draw. This is the distinction between descriptive rules which assert the regular recurrence of certain sequences of events (including human actions) and the normative rules which state that such sequences ‘ought’ to take place.

¹⁴⁴ See International Monetary Fund, at <http://www.imf.org/>.

¹⁴⁵ See Carol Graham, *Strengthening Institutional Capacity in Poor Countries: Shoring up Institutions, Reducing Global Poverty*, The Brookings Institute, Policy Briefs, Apr. 2002, available at <http://www.brook.edu/comm/policybriefs/pb98.htm>.

¹⁴⁶ See Malanczuk; *supra* note 31, at 223, (The objectives of the Bretton Woods Conference were two fold: First, advancing reduction of tariff and non-tariff barriers to international trade, and, secondly, creating a global framework that minimizes economic conflict between nations, which, in part, is held to have contributed to the outbreak of the Second World War).

The latter creates a need for developing countries and economies such as the United States, EU and other nation-states possessing greater material sources than developing countries to engage or promote institution building.

It is equally a problem of the means by which developed nation-states engage institution building, constitution building, inclusive. Institution building is typically engaged by means of political, economic and military power and coercion. A problem of institution building in developing countries is that it has now become almost the exclusive provenance of developed countries and economies. This is necessarily true because developed countries and economies possess the requisite greater material sources such as political, economic and military power than developing countries. As a result, they are more able to engage and promote institution building.

Moreover, development programs for institution building such as the IMF's Poverty Reduction and Growth Facility, formerly the Enhanced Structural Adjustment Facility, are by design of developed countries and their economists, and are often perceived by developing countries as not being credible. Developing countries more often than not perceive that their development agendas are bypassed in the WTO for rules benefiting the rich and powerful, the developed countries. It is a recurrent theme in international law and politics, especially in the WTO.¹⁴⁷

It is beyond dispute that the WTO is an IGO dominated by developed countries and economies, rather than developing countries and economies such as China. The latter problem is arguably evidenced by a recent failure in the 10-14 September 2003 Cancun trade ministry, which partly resulted from a Singapore-issues-induced division between developed countries and economies, and developing countries and economies.¹⁴⁸ This growing concern of developing countries is further evidenced by their grievances concerning the WTO General Council's (GC) August 1, 2004 decision on the Doha Agenda work program, the "July package," which was meant to restart trade negotiations following the failed 2003 Cancun summit.¹⁴⁹

¹⁴⁷ See Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, (Zed Books 2003) (Discussing WTO trade negotiations and dominance by the EU and US, and lack of full participation by poor countries.).

¹⁴⁸ WTO News, Summary of 14 September 2003, Day 4: Conference ends without consensus, available at http://www.wto.org/english/thewto_e/minis_e/min03_14sept_e.htm.

¹⁴⁹ See WTO General Council, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L579 (Aug. 2, 2004), available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (containing frameworks and other agreements designed to focus the negotiations and raise them to a new level).

For developing countries, the problem of creating a level playing field has been difficult. Moreover, international law and politics exasperate this on-going problem. Notwithstanding infusion of politics into international law, the gravest problem of international law is its inherent weakness. While providing an international arena, if not international playing field for developed countries and their power politics, it actually leaves much to desire for the plight of developing countries and economies.

There is a seemingly American policy and consensus of institution building, which concerns institution building in non-Western nation-states such as China, Afghanistan, Iraq, and other nation-states. However, notwithstanding institution building itself in non-Western nations, an important tangential issue is the use of force in institution building.

In terms of the United States, it is the problem of a historic, Americanization of *justum bellos*, the “just war” doctrine,¹⁵⁰ or the principle of *bellum justum*.¹⁵¹ In international law and politics, American unipolarity and its attendant unilateral exercises of military force, often accompanied by political and economic coercion, seems to be a permanent fixture in the international arena. It is a source of contention for many nation-states, including developed and developing nations.¹⁵²

Self-defense is not the only traditional criteria, condition and constraint justifying war. Given the criteria, conditions and constraint of “just cause” under *jus ad bellum*, war has been historically justified in order to defend one's nation, stop a terrible moral wrong and create supposedly just institutions.¹⁵³ One source claims that the American Revolution is the first historic instance of American institution building used as justification for war. It also presents the beginning of the Americanization of *justum bellos*. The justification for the American Revolution concerns not self-defense, rather American colonists fearing extinction by the British. A pivotal concern of American colonists is “no taxation without representation and self-government.” At least in terms of American policy and consensus, this important concern provided American colonists with the requisite criteria, conditions and constraint of “just cause” under *jus ad bellum*. As a result, Thomas Jefferson enjoys a certain fame for the proposition that *jus ad bellum* will allow war for institution building, be it to create or enhance institutions.¹⁵⁴

¹⁵⁰ See Joseph P. White, *Bellum Justum*, at <http://www.cpesbcc.net/whitebellum.htm>.

¹⁵¹ Kelsen, *supra* note 42, at 321-22.

¹⁵² Kagan, *supra* note 93.

¹⁵³ White, *Id.*

¹⁵⁴ *Id.*

In terms of modern society, at least in terms of the United States, a problem of institution building as “just cause” under *jus ad bellum* is its historical, repetitive use throughout U.S. history, and eventual extension and expansion into the Bush doctrine of pre-emptive first strike.¹⁵⁵ History is full of instances of American institution building. From the American Revolution to the War on Iraq, history provides plentiful example.

In terms of international law and politics, Hayek also offers a possible solution to the *impasse* of an American policy of institution building, including constitution building, which concerns institution building in non-Western nation-states such as China and other nation-states. Hayek’s discourse on taxis, cosmos and deliberate design offers a possible solution to the problem of what appears to be a perceived political necessity of an American polity that is the necessity of militarism by an American hegemonic military power in institution building.

Hayek’s discourse on sources of power may offer America an alternative path in international relations and international law. An alternative path that recognizes and distinguishes “made” (*taxis*) from grown (*cosmos*) sources of rules and order, and questions a staid practice of transplanting Western constitutionalism in non-Western nation-states. In this respect, Hayek’s earlier discourse in taxis, cosmos (*Kosmos*) and deliberate design may offer a new path for U.S. international relations simply because of an alternative taxonomy offered via a new understanding of world constitutionalism, including constitution and institution building. The result could be the formulation of a United States international relations theory that could conceivably evolve into an alternative preventive war strategy, as opposed to existing and historic theories grounded in a seemingly evolving and expanding pre-emptive first strike doctrine.

Notwithstanding U.S. international relations, Hayek’s discourse may equally influence international law in general. Admittedly, a nation’s intervention into the affairs of another nation-state for explicit or implicit purpose of institution building is far from being proscribed as *jus cogens*. The latter is mostly due to the inherent weaknesses in international law, especially problems attendant to enforcement of international norms. However, it remains plausible that such interventions for purposes of institution building could eventually be proscribed by rules of general international law. It is especially here that Hayek’s earlier discourse possibly offers an impetus for an evolution in international law and “just war.”

¹⁵⁵ See Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-defense Under International Law*, 12 TUL. J. INT’L & COMP. L. 117, 119 (2004). (Discussing Bush’s first strike doctrine).

Admittedly, there are several obvious problems. First, the American historical practice of institution building arguably ranges in a period from its American Revolution to War on Iraq. It presents a practice that is so engrained in American political culture that it may present a particular law in terms of international law. Moreover, in terms of President Bush's post 9/11 Doctrine and the possibility of instant customary international law, one source notes that the International Court of Justice (ICJ) expressed in the *North Sea Continental Shelf Cases*¹⁵⁶ that a short passage of time is not an absolute bar to forming new rules of customary international law.¹⁵⁷ In this respect, such practice that is intervention into affairs of a nation for purposes of institution building may enjoy the status of a legal exercise of force, albeit by economic and political coercion, and arguably by military force, in terms of international law.

Secondly, Hayek's critical discourse on rules and order, and deliberate design, calls into question well engrained and established institutional principles of an American polity. Because in America the critical concern of institution building has experienced a growth and evolution paralleling a growth and evolution of American politics and foreign affairs (international relations). Moreover, Hayek's discourse threatens an existing American polity and American ideals, all of which necessarily forces America to rethink its national priorities, international relations and, most importantly, its place in the international community.

Neo-realism, neo-liberalism and dependency theory, are all West centric taxonomies that share a commonality, in that they explicitly or implicitly pursue

¹⁵⁶ International Court of Justice (ICJ), Case Summaries, North Sea Continental Shelf Cases, Judgment of 20 February 1969, available at <http://www.icj-cij.org/icjwww/idecisions/isummaries/icssummary690220.htm>, (In the issue of two or more nations sharing the same continental shelf, the ICJ expressed that Article 1 of the 1958 Geneva Convention on the continental shelf should be regarded as crystallizing rules of Customary International Law, thereby accepting that the islands had a continental shelf that are on the same footing as land territory).

¹⁵⁷ See Benjamin Langille, *It's Instant Custom': How the Bush Doctrine Became Law After the Terrorist Attacks of September 11*, 2001, 26 Boston College International and Comparative Law Review 145 (Winter 2003), available at http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/07_TXT.htm. "Thus, however short the amount of time that elapses, a particular rule may be considered a customary international law once there is an articulation of the rule and a consistent act that follows." *Id.*, at 151. See also PARTICULAR CUSTOM, at <http://legaldictionary.thefreedictionary.com/Particular%20custom>. A particular custom is one which only affects the inhabitants of some particular district. To be good, a particular custom must possess these requisites: 1. It must have been used so long that the memory of man runneth not to the contrary. 2. It must have been continued. 3. It must have been peaceable. 4. It must be reasonable. 5. It must be certain. 6. It must be consistent with itself. 7. It must be consistent with other customs. 1 Bl. Com. 74, 79.

goal of institution building in non-Western cultures and developing countries. In terms of neo-liberalism, China presents ample example. The socio-economic environment of China begs the question of whether development is justified for the sake of development itself.¹⁵⁸ If the market is truly at work, then China is suffering from Hayek's spontaneous order, because the numbers seem to indicate a populace suffering from the negative feedback of the market system adjusting to its socio-economic environment.¹⁵⁹ Moreover, there are undoubtedly countless numbers of other such examples of the so-called negative feedback of the market in China and other developing countries seeking to make transition to market economy. Filipino academic and writer Walden Bello said: "Whether in the form of Thatcherism in Britain, Reaganism in the US or structural adjustment in Africa and Latin America, the free-market model has resulted in weak growth or stagnation accompanied by greater income inequality, a greater percentage of the people living under the poverty line and serious environmental damage."¹⁶⁰

In terms of economic theory, issues of values and *ethos*, if not ontological concerns influence distribution. Because survival and growth are dependent on human organizations, creating surpluses over immediate needs and wants. Conversely, a new world order, or new capitalism, perhaps because of an *etic-*

¹⁵⁸ SFC Headlines, Issue 17, "spoke with Professor Lynn Thiesmeyer, head of a research project involved in the sustainable development of countries in Southeast Asia such as Thailand and Vietnam." Keito University SFC Headlines, available at <http://www.sfc.keio.ac.jp/english/headlines/0208index.html>. I'm not advocating development for development's sake. Development is not as simple as creating economic growth in developing countries. . . . In short, "positive development" varies according to the needs of each country. We need carefully analyze the economic situation of our target country, find out how regional development is progressing and determine what kind of development that is appropriate to that country.

¹⁵⁹ See Huijong Wang, *Integrated Study Of China's Development And Reform Preliminary Exploration Of Social System*, 507 (Foreign Language Press 2003). China has a large population, 70% of them are in rural areas. 'Poverty' is mainly a rural phenomenon in the past. There are still more than 25 million of people in poverty after the implementation of '8-7 Poverty Alleviation Program.' As most of these people live in the mountainous or desert areas in the western part of the country with poor ecological environment and inconvenient transportation, assistance program for them is very difficult. Moreover, there is increase of regional disparity. The share of GDP of China's western region is reduced from 14.2% in 1995 to 13.7% in 1999. For poverty-ridden people living in places with fall below the poverty line again annually. In addition, urban poverty has emerged due to laid-off labor force through restructuring of SOEs. Therefore, anti-poverty and the reduction of income disparity between different regions will be a major challenge faced by China in the new millennium.

¹⁶⁰ See Aziz Choudry, *APEC and Free Trade, Seminar to Development Studies*, Massey University, Palmerston North, Aotearoa/New Zealand, May 1997), available at <http://www.islandhosting.com/~contempo/library/mai/apec.html>.

centered-perspective resulted in many people, especially non-Western cultures, becoming marginalized while new economic gains went to the few.¹⁶¹

Perhaps neo-realism is more so a concern of international relations theory, because when we are talking about political neo-realism, we are addressing American militarism, or an American hegemony employing military force in institution building.¹⁶² Therefore, if there is a negative feedback, it is perhaps a non-economic variety not envisioned by Hayek. In terms of Iraq, Afghanistan and other developing countries, the negative feedback has been the death of military personnel, civilian casualties of war, poverty and other societal ills.¹⁶³

Hayek in his writings is truly fighting the enemies of the Second World War and the cold war. His writings are arguably pro-American, pro-liberal in the sense of classical liberalism that is neo-conservatism, not of the variety of the misuse of nomenclature “liberal” by an American democratic party, anti-socialism and anti-totalitarianism. However, the contemporary importance of his writings does not lie in these seemingly obvious characterizations. His contemporary importance stems from his basic assault on the very foundations of American and Western values, and institutions, including the institution of Western constitutionalism. America and other Western countries and cultures share a commonality of so-called liberal democratic values. Western institutions such as governments and constitutions are grounded on foundational values emanating mostly from the thoughts of the sixteenth century European intellectual thinkers of the Enlightenment era such as Hobbes, Locke and Rousseau.¹⁶⁴ Hayek maintained that the doctrinaires of these great thinkers, the constructivist rationalists, social contract theorists or contractarians, were grounded on factually false assumptions. Assuming *arguendo* Hayek was correct, Western institutions and values are called into question, especially Western institution building in non-Western cultures and nation-states.

¹⁶¹ See Robin Matthews, *A New Model of Strategy Applied to the Russian Situation*, Kingston Business School Occasional Paper Series No. 38, Kingston University (December 1999), <http://business.king.ac.uk/papers/newmod38.pdf>. (Discussing values, ethics and capitalism).

¹⁶² Kagan, *supra* note 93.

¹⁶³ A. Kevin Reinhart and Gilbert S. Merritt, *supra* note 19. (Discussing the casualties of the war in Iraq).

¹⁶⁴ See generally Stephen Zelnick, *Major Themes in The Enlightenment*, at <http://oll.temple.edu/ih/IH52/Enlightenment/EnlightenmentThemes.htm>.

The problems are obvious. If Hayek was correct, then Western society must rethink its priorities and policies, if not ideologies.¹⁶⁵ It is especially ideology that may warrant re-direction because “ideologies are modes of consciousness, containing the criteria for interpreting social reality,” and thus “they help to define as well as to legitimate collective needs and interests.”¹⁶⁶ If Hayek was correct, Western society must also rethink a policy of Western institution building that intends to transplant Western institutions and Western values into non-Western cultures and nation-states.

Moreover, Hayek’s discourse begs Western society to rethink its seeming goal of transforming international law into a sort of transnational law that challenges the foundations of traditional state sovereignty, which has been strongly entrenched since the Peace (Treaties) of Westphalia (1648).¹⁶⁷ A West centric new world order and model presupposes agreed upon principles, if not assumptions, embracing Western and non-Western cultures and economies. China presents a classic example of the problem with this model of a new world order. The principles for a new world order proposed by China substantially differ from the vision of a new order designed by the West, especially the U.S. In particular, China proposed two specific principles embracing the issue of sovereignty. First, China proposed, “to adhere to the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression and non-interference in each others’ internal affairs.” Second, and most importantly, China proposed, “to adhere to the principle of the sovereignty equality of all the countries in the world.”¹⁶⁸ One source noted that China, as a rising power is

¹⁶⁵ See Jonathan Zasloff, *Law And The Shaping Of American Foreign Policy: From The Gilded Age To The New Era*, 78 N.Y.U.L. Rev. 239, 247-48, (April, 2003). “Ideology” is a notoriously treacherous concept. I understand the notion as David Brion Davis does: “an integrated system of beliefs, assumptions, and values, not necessarily true or false, which reflects the needs and interests of a group or class at a particular time in history.” As Davis suggests, an ideology’s impact is reciprocal: It reflects the political needs and interests of its adherents and conditions, influences, and constrains conscious belief. Davis notes that “ideologies are modes of consciousness, containing the criteria for interpreting social reality,” and thus “they help to define as well as to legitimate collective needs and interests.” Ideology, then, reflects an epistemology. It serves as a prism through which to view the world, a mentalite. It therefore legitimizes the interests of a class, party, or section by justifying, either explicitly or implicitly, actions and policies that enhance such interests.

¹⁶⁶ *Id.*

¹⁶⁷ Malanczuk, *supra* note 31, at 11.

¹⁶⁸ See Zhang Yunling & Guo Weihong, (eds), *China Us Japan And Russia In A Changing World*, (Social Sciences Documentation Publishing House: Beijing, 2000), at Zhang Yunling, *Whither the World Order?*, 12.

anxious about possible Western imposed values backed by Western, especially U.S., collective intervention.¹⁶⁹

In terms of Western institution building, one must also consider whether this seemingly on-going evolution in international law to transnational law is end-connected, and if so, to what end.¹⁷⁰ Because if the intended end-connection is a greater permeation of Western institutions in non-Western cultures and nation-states, then Western society is ultimately transplanting an entity that Hayek found to be based on the factually false assumptions of the constructivist rationalists. The result is an end-connection, in terms of Hayek's discourse that would equally be based upon false assumptions, or, in short, another road that should not have been traveled.

Admittedly, Hayek's may have been incorrect. Nonetheless, his writing begs Western society to consider its societal underpinnings, especially the Western ideal of liberal democracy, its Western universalizing cosmopolitanism, and especially Western institution building in non-Western cultures and nation-states. In terms of China, Afghanistan, Iraq and other developing countries, it seems naïve to suggest that economic development by Western institution building is justified by the assertion of development, simply, for the sake of development itself.

The reality of a new world order, or global economy, necessitates that we presuppose a purposefulness prescribing a requisite end-connection for Western institution building. Because the resulting end-connection is deliberate design based in part on the Bretton Woods conference; in part on the founding of the UN; in part on the founding of the UN predecessor, the League of Nation;¹⁷¹ and in part on the thesis of Immanuel Kant in *Perpetual Peace* (1853).¹⁷² Kant suggested a treaty of perpetual peace for republican forms of governments. Western scholarship and authority translated Kant's *Perpetual Peace* into the

¹⁶⁹ *Id.*, at 9. "It is clear that China, as a rising power, worries a US domination, or hegemony, and as a socialist country, is anxious about a possible Western imposed values backed by their 'collective intervention.'" *Id.*

¹⁷⁰ Hayek, vol. II, at 38-39. As in the extension of rules from the end-connected tribal society (or teleocracy) to the rule-connected society (or nomocracy) these rules must progressively shed their dependence on concrete ends, and by passing this test become gradually abstract and negative, so that the legislature who undertakes to lay down rules for a Great Society must subject to the test of universalization what he wants to apply to such a society.

¹⁷¹ Kagan, *supra* note 93.

¹⁷² See generally Immanuel Kant, *Perpetual Peace*, 10-23 (Lewis White Beck ed., Bobbs-Merrill 1957) (1853). See also *Kant's Perpetual Peace: A New Look at this Centuries-Old Quest*, OJPCR: The Online Journal of Peace and Conflict Resolution 5.1 Summer: 106-126 (2003), available at http://trininstitute.org/ojpcr/5_1solomon. (Democratic peace thesis is associated with Immanuel Kant's (1724-1804) discourse in *Perpetual Peace* (1795).)

democratic peace thesis that democracies do not fight each other.¹⁷³ The problem of Kant's *Perpetual Peace* as translated by Western authority, and in its application by Western authority vis-à-vis Western taxonomies, is that it does not account for the so-called illiberal nation-states, the non-Western cultures and nation-states. It was equally a problem of classical international law (1648-1918)¹⁷⁴ and perhaps a remnant manifest in modern international law.

Moreover, Hayek did not discern for us the distinctions between politics and economics, or economics and law, nor between politics and law. The latter also begs the question of whether he should have accomplished this feat. Because given a failure to do so, leaves us without a hierarchy of sorts that describes effective institution building, that is, should a polity be first built or re-built, rather than a legal system or economic system. Most problematic are the original goals of the Bretton Woods conference and especially that of a Western universalizing cosmopolitanism, because Western institution building, by bargaining or military force, is clearly based upon theories of the constructivist rationalists (Cartesian rationalism), which Hayek maintained were based upon factually false assumptions. It is here that Hayek challenged the West and its institutions, especially institution building, in a very fundamental way.

Hayek does not reveal anything new to the world, rather an extension of his earlier thesis on spontaneous order mostly concerning business-cycle theory and comparative economic systems.¹⁷⁵ He approached the subject of law as the science of law (jurisprudence) in a manner resembling his approach to the science of economics. It is a search for clarity in the obscure by means of economic methodology, an approach seemingly contradictive of his criticism of constructivist rationalists, or Cartesian rationalism. Perhaps it is the problem of economic modeling and attendant general assumption that economic actors taken individually or *en masse* are rational decision makers.

The formalism of Hayek in employing economic tools and a market order to assess societal problems leaves much to desire.¹⁷⁶ The idea of a spontaneous

¹⁷³ See James Lee Ray, *Does Democracy Cause Peace?*, *Annu. Rev. Polit. Sci.*, 1:27-46 (1998), available at <http://www.mtholyoke.edu/acad/intrel/ray.htm>. "The empirical evidence in favor of the proposition that democratic states have not initiated and are not likely to initiate interstate wars against each other is substantial."

¹⁷⁴ Malanczuk, *supra* note 31, at 10, ("International law was often regarded as applying mainly between states with a European civilization; other countries were admitted to the 'club' only if they were 'elected' by the other 'member' – and the 'election' took the form of recognition.").

¹⁷⁵ Klein, *supra* note 3.

¹⁷⁶ Hayek, vol. II, at 147. For Hayek, it is the same market order extending some three hundred years that enabled humankind to grow.

order is grounded in concepts of pure economics that searches for a world where there are perfect market systems. Adam Smith's argument against governmental intervention was grounded in a philosophy of *laissez faire* economics that assumed the existence of perfectly competitive markets. The two major thesis of Adam Smith was that government should pursue a policy of *laissez faire* and that the resulting distribution of income should be unequal. Albeit reality suggest otherwise, the latter became the economic ideology of Western civilization and culture, an ideology that Western culture has attempted to promote, if not transplant by institution building, in non-Western cultures, and underdeveloped and developing countries.¹⁷⁷

So-called capitalism, if it ever actually existed, is better referred to as the Western ideal model of economic systems. This market system experienced profound changes beginning in the 1970s because of information technology, so-called globalization and financial deregulation.¹⁷⁸ For Hayek, perhaps it was a dreaded "Rousseauesque nostalgia"¹⁷⁹ serving as reminder of the Cartesian approach that drove him to search for solutions in the balancing of society by the forces of the market order.

In a perfect production environment, the forces of positive and negative feedbacks supposedly allows a market system to act as a self-correcting system.¹⁸⁰ However, in reality, there are the negative feedbacks that are destabilizing.¹⁸¹ The problem of negative feedbacks in a real world where the target of economic theories are nation-states consisting of humankind are destabilizing feedbacks such as poverty, unemployment and war. In terms of nation-states such as China, Afghanistan and Iraq, it difficult to envision positive feedbacks, as in typical business cycles, that will ameliorate destabilizing feedbacks or vicious spirals such as poverty, unemployment and war.

¹⁷⁷ See Landreth, *supra* note 121, at 41-43. See also Adam Smith, *An Inquiry Into The Nature And Causes Of The Wealth Of Nation*, Edwin Cannan (ed.), New York: Modern Library, 1937).

¹⁷⁸ Matthews, *supra* note 158, at 1.

¹⁷⁹ Hayek, vol. 2, at 147. (Discussing the problems of "Rousseauesque nostalgia.").

¹⁸⁰ See Mason Gaffney, *Characteristics of Macro-Economics as a Field Study: A Study*, University of California, Department of Economics (orig. 5/85, rev. 1/91), at 9-10, unpublished, at <http://www.economics.ucr.edu/people/gaffney/Econ2S04FieldStudy.pdf>, ("The great thing about the market economy with flexible prices is that it is so full of self-correcting mechanisms, or thermostats. A thermostat is an example of 'negative feedback,' which is equilibrating and stabilizing and makes the system home in on optimality.").

¹⁸¹ *Id.* But economic history indicates there are also traps for the unwary. There can be lags in adjustment after mistakes. More serious is "perversity." Perversity is worse than irreversibility. Perversity means a glitch is self-aggravating. It is like the sufferer who scratches because he itches, and itches because he scratches. Such a condition is called "positive feedback," a dangerous cycle indeed. "Vicious spiral" is another name.

An answer to the societal problem of vicious spirals of poverty, unemployment and war may not lie in the science of economics such as Coase's Theorem, Pareto Efficiency and the Kaldor-Hicks Theory, and Public Choice and Arrow's Impossibility Theory.¹⁸² Economics, not unlike law, "is a biased undertaking in that the use of any particular economic model embraces specific assumptions and value statements and consequently any outcome generated by the use of such a model will be biased."¹⁸³ For Alfred Marshall (1842-1924), the father of neoclassicism, a definition of economics had to encompass the terms of political economy and economics. As a result, because the term of political economy implied that economics and politics were interrelated then economics, as a social science, was intimately connected with normative judgments.¹⁸⁴ Economic modeling, especially the neoclassical economic model, is based upon assumptions reflecting these biases.¹⁸⁵ In terms of a new world order or global economy, there are no quick fixes to the conflicts of Western international law, Western rule of law and especially Western institution building confronting non-Western cultures, developing countries and economies.

Despite the shortcomings of Hayek's spontaneous order, there is a positive side, perhaps even a positive feedback. Hayek left us with a "what if" question and returns us to that initial opening of Pandora's Box, or perhaps the initial onset of neo-realism, neo-liberalism, developmentalism, globalism, transnationalism and other concepts, precepts and adjectives justifying institution building by bargaining and military force. In terms of new world order, institution building by necessity requires fundamental changes in governmental structures in non-Western cultures and nation-states such as China, Afghanistan and Iraq. Such changes are being prompted by means of political, economic and military powers of the U.S. and other developed nation-states, and IGOs dominated by developed nation-states such as the WTO. Though arguably well intended there remains the question of what will eventually result from the introduction of Western institutions into non-Western cultures and developing countries.

¹⁸² See Robin Paul Malloy, *Law And Economics A Comparative Approach To Theory And Practice*, 34-37, West Publishing Co. 1990.

¹⁸³ *Id.*, at 51.

¹⁸⁴ Landreth, *supra* note 121, at 285.

¹⁸⁵ *Id.*, at 31, 53. (Discussing the assumptions that are made with an economic model). See also Wang, *supra* note 158, at 110. It should also be emphasized in the very beginning of this paper that there are technical difficulties to get exact results from economic mathematical modelings; this issue can be seen clearly from the criticism given by Keynes to the pioneering research of macroeconomics model of Tinbergen in that there were problems of miss clarification, multi-collinearity function forms, dynamic specification, structural stability, and the difficulties associated with the measurement of theoretical variables, etc.

CONCLUSION

Although Hayek may have had contrary intentions, his discourse on taxis and cosmos (*Kosmos*), and spontaneous order, nonetheless, challenges a modern Western world to rethink its priorities and policies, and perhaps even foundational ideologies, especially in the realm of rebuilding non-Western cultures and developing countries. The contemporary relevance of Hayek's discourse also brings one to stark realization of the changing nature of our world, especially in terms of a post-second world war and post-cold war. For Western society, the old enemies, that is, Nazism during the Second World War and communism during the cold war, are no longer at the doorstep. Our past enemies once wore the faces of Nazism and communism. Samuel Huntington foretold that modern world reality would displace the ideological conflict of the cold war with cultural conflict.¹⁸⁶ The greatest danger to Western society, if not humankind, would be Western society's replacement on the face of its enemy, the face of non-Western cultures and developing countries.

¹⁸⁶ Huntington, *supra* note 77.