The Politics of Prescription: Kirk's Fifth Canon of Conservative Thought

Defending tradition is a difficult task in an age that is predisposed to innovation and change. Yet that has been the challenge to conservatives in the modern age. Modernity inverts the conservative prejudice for prescriptive wisdom; it favors change and innovation as the instruments of progress; it places faith in what Edmund Burke called the "naked reason"; it arrogates a wide array of abstract rights divorced from the concrete moorings of historical experience, prescriptive wisdom, and expedience; it has lost faith in a divinely inspired order that limits the extent of moral, political, and social progress and makes politics the art of the possible. There is a spirit to the modern mind that is infused with Rousseauian sentiment; it rejects the sober classical/Judeo-Christian view of the human condition and posits the natural goodness of man. To the Rousseauist and Marxist alike, traditional conventions are mere chains that prevent individuals from creating a new age of freedom and equality. To the positivist, much of religious tradition and social convention is superstition that impedes social and scientific progress. These characteristics of modernity are not easily defeated in favor of tradition. They appeal to the modern desire to escape from the bonds of prescription and set men free to follow their inclinations or the abstractions of unaided reason.

Edmund Burke's political theory was engendered in the context of the unfolding drama of modernity. In particular, his political ideas were a response to the rise of radical ideologies like Jacobinism. But the circumstances of the eighteenth century may have been worse than Burke surmised. Irving Babbitt recognized

by the early twentieth century that Burke had underestimated the spiritual strength of radical ideologies bent on uprooting traditional ideas and the prescriptive institutions of Western Civilization. Burke dismissed the radicals of the eighteenth century as "half a dozen grasshoppers...with their importunate chink." The men of tradition he compared to "thousands of great cattle, reposed beneath the shadow of the British oak." Although they are silent, they outnumber and outweigh in character the "little, shrivelled, meager, hopping, though loud and troublesome, insects of the hour." Babbitt, however, replies that "the little, meager, hopping insects of the hour were representatives of an international movement of a vast scope, a movement destined finally to prevail over the prejudice and prescription that Burke was defending."[1]

Russell Kirk was a student of both Burke and Babbitt. Whatever the case may have been in the eighteenth century, Kirk characterized the battle between radicalism and conservatism as a rout. The modern age is defined, in part, by the triumph of innovation over conservation. Yet, Kirk found reasons for hope. His works make a significant contribution to the restoration of historical consciousness through which the experiences of the past can become a living force in the present. As he once stated, "my endeavor is to help refurbish what Edmund Burke called 'the wardrobe of a moral imagination.'"[2] If the modern age has stripped human consciousness of prescriptive wisdom, then Kirk was intent on restoring to memory the wisdom of the ages.

In *The Conservative Mind*, Kirk defends the conservation of prejudice and prescription against ideologies of radical change. He, like Burke and Babbitt in earlier ages, understood the consequences of giving way to a Rousseauian and Baconian spirit of change that have united in the twentieth century under the mantle of humanitarianism. The spiritual union of romanticism and scientism makes defending tradition even more difficult than it was for Burke. The promise of science and technology animated by humanitarian sympathy makes those who defend tradition appear to be obstacles to social and scientific progress. Conser-

vatives, it is said, defend tradition and custom because they are unenlightened; they wish to maintain the conventional order because it preserves their undeserved privileges and keeps the lower classes from rising. The result is social and economic inequality that must be dismantled by a state that is adequately empowered to redistribute wealth and reorganize society in accordance with ideologically-driven theories of universal rights.

Yet, Russell Kirk did more than reject radical political ideologies that destroy established institutions. Like Burke, he was not an antiquarian. His defense of tradition is theoretically substantive; it is grounded in historical knowledge. He rejects neither sentiment nor reason but he insists that each should be tethered to historical experience in the form of prescriptive wisdom. His numerous books and articles address various aspects of the tension between the preservation of tradition and radical change. He understood that historical experience lives in the historical consciousness of individuals and the political, religious, and social institutions of the living generation. Therefore, they can be recalled to memory with the help of artists, poets, novelists, historians, philosophers, and men of letters, who have the imaginative power to bring them to life in the present age. In short, historical experience has an indelible quality to it; as much as reformers and radicals may try to escape it, they are bound by history. This is not to say that change and reform were impossible or unnecessary. But for Kirk, like Edmund Burke, prudent change must maintain continuity with the past. To break radically from the past, as the Jacobins did, is to deny one the advantage of prescriptive wisdom and experience. It is, as Burke noted, to put one on his own private stock of reason as opposed to availing the bank and capital of the ages. He added that, "man is a most unwise and a most wise being. The individual is foolish; the multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and, when time is given to it, as a species, it almost always acts right."[3]

Kirk provided a wealth of historical and theoretical evidence to demonstrate the connection between tradition and civilized

life. In particular, he focused on three central aspects of tradition that emanate from the human condition and that explain why tradition is necessary. A man of exceptional learning and rational power, Kirk knew the limits of reason and the power of imagination. He also understood the moral duality of human nature; human beings are divided between good and evil inclinations. That permanent condition limits political and social progress. As Kirk wrote, "poverty, brutality, and misfortune are indeed portions of the eternal order of things; sin is a terribly real and demonstrable fact, the consequence of our depravity, not of erring institutions."[4] While Kirk recognized the existence of universality, he argued that universality was found in particularity. Tradition and custom were man's way of grasping on to those instances when universality was revealed or discovered in specific experiences. Historical experience with universality, then, provides an understanding of universality that can be used to recognize truth, beauty, and good in different historical circumstances. Abandoning tradition meant discarding these concrete experiences of order, truth, and beauty. Without recourse to concrete historical experience, individuals are prone to following abstract ideologies like Marxism or liberal progressivism that inspire men to war against the constitution of being.

Why is Prescription Necessary?

Prescription is necessary because of the human condition. Human beings are born into a world that is ordered. Kirk, like Aristotle, Cicero, and Aquinas, was aware that men are born into a moral universe. The mundane order of political and social life is inextricably bound to a higher universal order. Human beings are powerless to change the laws of moral nature; they must abide by their dictates or face the consequences of disorder: despair, loneliness, misery, and anguish. Yet, human beings control human law and it varies in its reflection of universality. How are human beings to navigate the complexities of life given an imperfect understanding of this universal moral order? In short, human experience and the social and political conventions that embody

it are the guide. As Kirk writes, "Providence has furnished means by which mankind may apprehend this moral universe. Tradition and prescription are the guiding lights of the civil social man."[5] Kirk notes that Burke was influenced by Hooker on the necessity of prescription. Burke could quote from memory Hooker's line that "'The reason first why we admire those things which are greatest, and second those things which are ancientest, is because the one are the least distant from the infinite substance, the other from the infinite continuance, of God.'" Kirk notes that this sentence "expresses the soul of their prescriptive philosophy."[6] Tradition is not, however, self-interpreting. Tradition must be combined with prudent judgment and expediency. In other words, tradition is not a stagnant, abstract, reified blueprint that individuals can simply imitate. Tradition and custom are rather living vibrant ways of life that require renewal and restoration, creativity and change. They must be followed in the same spirit in which they were engendered and it is that spirit, as much as the content of tradition, that breeds civilization. Burke called this disposition "the spirit of a gentleman, and the spirit of religion."[7]

Kirk attributed the lack of moral progress in the modern age to several factors but chief among them was modern man's revolt from tradition. The modern mind is hubristic; it places too much faith in its capacity to know truth or it has abandoned the pursuit of truth in favor of ideological dogma. In short, modern man has lost historical consciousness of the experiences and lessons of past generations, what Burke called the wisdom of the ages. The future depends on preserving continuity between the past and the present. In fact, Kirk explains that the present and the past, regardless of the current generation's recognition of it, are inextricably linked. Everything which the living possess has roots in the spiritual and intellectual achievements of the past. Everything man has—his body, his mind, his social order—is in large part an inheritance from people long dead.

Why is the past, then, so vital to the living generation? Without the benefit of historical experience, individuals live without guidance and the tested judgment of previous genera-

tions. In Kirk's words, "unless men know the past, they are unable to understand distinctions between what is permanent and what is transient in their lives."[8] Tradition, then, provides standards and norms by which the current generation can judge the social, political, and intellectual currents of their time and discover their moral responsibilities. As Kirk writes, "Many of our duties are not voluntary; they are prescribed by the moral law."[9] Kirk means by "norm" something specific. Norms are derived from the natural law. They are rules of conduct that measure public virtue. They attune individuals and societies to the universal moral order. Living by these norms is the way that social harmony is created. To violate norms is to set oneself against the grace of God, to plunge into the depths of the moral abyss, and to cause social discord.

Ideology is destructive to genuine norms for two basic reasons. First, ideology ends the search for the true, the good, and the beautiful because it claims to represent the ultimate truth in its ahistorical dogmas. It ends the process of reconstituting the human understanding of universality. What is normative is replaced by what serves the specific ideology's doctrines. Second, ideology destroys normative consciousness. Historical experiences with universality are erased from memory either by state control of ideas or by a concerted effort to recast them as destructive to progress. Consider the plight of Winston Smith in George Orwell's *1984*. Oceania is a society governed by a totalitarian authority that aims to create complete obedience to the state. To accomplish this objective, it is necessary to destroy historical consciousness and old ways of life. Most everyone in Oceania has lost memory of historical life. Big Brother can make any claim about the past without concern that it will be revealed as a lie or prevarication. The abstract dogmas of Insoc, the state ideology, shape the imaginations of party members to ensure that they see life through the eyes of Big Brother. Language symbols are constantly being reduced by the Ministry of Truth to limit human consciousness of reality. Winston Smith maintains a shred of historical memory and consequently he resists the totalitarian order. He remembers past experiences that serve as standards

against which he can measure the claims of Big Brother. He remembers a time when life was different, when social life was not controlled by the state. He remembers concrete experiences, the love of his mother and the taste of good food. He has maintained an imaginative grasp of a higher form of life even though there is little if anything in his contemporary society that refreshes and reinforces that experience. The institutions that embody prescriptive wisdom have been destroyed but they have not been completely erased from human memory. Winston must fight against the fear of state terror and social alienation in order to maintain his precarious grip on historical experience. What he holds in imaginative memory is enough to inspire his resistance to a state that is defined by dehumanizing everyday life. His imagination conceives of a higher quality of life that is historically grounded. Without historical consciousness, it is impossible to sort out what is real and what is mere delusion. Winston Smith's experience in Oceania recalls David Hume's comment about custom. In *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, Hume wrote that custom,

> is the great guide of human life. It is that principle alone which renders our experience useful to us, and makes us expect, for the future, a similar train of events with those which have appeared in the past. Without the influence of custom, we should be entirely ignorant of every matter of fact beyond what is immediately present to the memory and senses.[10]

Without the aid of historical experience—the prescriptive wisdom embodied in traditions and customs—reason becomes the plaything of momentary passion and ideology; it loses contact with the ground of human experience and sends reason wandering into the world of metaphysical abstraction divorced from the concreteness of past experiences of order.

Kirk suggests that human beings are capable of a range of experiences. Some contribute to happiness (*eudamonia*), some are trivial, and some are destructive to human happiness and the

good life. Human beings experience, as part of their nature, contrary inclinations. They are often inclined to act in a way that destroys happiness, social harmony, and civilization. Civilization, itself, is an act of will that is dependent on an imaginative vision of what is real and possible; it requires the rejection of inclinations that destroy social harmony, beauty, and truth. Civilizations have ways of preserving their experiences with this eternal quest for order. Traditions, customs, and prejudice properly understood provide a rich body of experience that Kirk calls "prescriptive wisdom." It is hubristic to assume that human beings can build and preserve civilization without the benefit of prescriptive wisdom. The forces of momentary passion and the limits of one generation's wisdom and experience confine the horizon of the imagination to the limits of contemporary life. Without the benefit of historical experience, individuals do not stand on the shoulders of giants; like the Jacobins, they move about blinded by their passions and oblivious to the effects of their reckless uprooting of prescriptive institutions.

There is resistance to the appeal to tradition and past experience. In the spirit of modernity, claims are commonly made that the past embodies ways of life that the living generation rejects. History progresses. It moves toward a superior understanding of truth and beauty. Some, like Francis Fukuyama, claim that history has led to the final evolution of political forms; it is, in his view, inconceivable that a form of government could be more prudent and just than democracy. Others, like Herbert Croly, believe that democracy would perfect human nature and give birth to a new age of freedom, peace, and prosperity. He concludes *The Promise of American Life* by stating that

> Democracy must stand or fall on a platform of possible human perfectibility. If human nature cannot be improved by institutions, democracy is at best a more than usually safe form of political organization.... But if it is to work better as well as longer, it must have some leavening effect on human nature; and the sincere democrat is obliged to assume the power of the leaven.[11]

Those, like Croly, who refuse to learn from the past are forced to witness the folly of their idyllic imaginations. In the frenzied embrace of progress, little attention is paid to preserving the genuine progress of civilization. Consequently, the wisdom of the past slips from human consciousness.

Prescriptive wisdom is important because it provides contact with concrete human experiences rather than abstract principles. The range and depth of historical experience is far greater than the experience of one man or one generation. Universality for Kirk and Burke was known in the particular experiences of history. Tradition and custom embody particular experiences with universality but they do not exhaust it. The true, the good, and the beautiful must be rediscovered in every generation. The past must become a living past. For this to happen, tradition must be examined and reconstituted; the experiences of the past that contributed to civilization must be imaginatively relived and prudently applied.

Kirk also believed that no one tradition could provide a universal understanding of the good. The American tradition, for example, had limited application outside Western Civilization. Building and maintaining a civilization is not a matter of creating dogmatic principles but a living tradition requires reform, rearticulation, and creative regeneration. Traditions must fit the circumstances and exigencies of a particular civilization. A living tradition is not didactic. Tradition can be sharpened as new experiences and circumstances enrich the imagination with new possibilities.

A worthy tradition, then, requires a certain disposition of character that can reconcile preservation and change. Men of letters and natural aristocrats are obligated to preserve and reconstitute tradition. Social and political leaders are obligated to exercise prudence in the affairs of state and community. For prudence joins prescription and expedience; it is the primary virtue that guides individuals in the quest for moderation. Change must avoid radical separation from long established practices.

Tradition shapes imagination and creates a prejudice that

prepares individuals for action. Burke explains the point in *Reflections*:

> prejudice is of ready application in the emergency; it previously engages the mind in a steady course of wisdom and virtue, and does not leave the man hesitating in the moment of decision, sceptical, puzzled, and unresolved. Prejudice renders a man's virtue his habit; and not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature.[12]

A contrast can be made between adherence to prescriptive wisdom and adherence to ideology. An ideologue is not left hesitating in the moment either because he stands firm on ideological principle. The difference between Burke's prejudice and ideology is that the former is part of a never-ending search for truth and the latter claims to have discovered the truth for all time. They differ, as well, in philosophical substance. Burkean prejudice is grounded in historical experience; ideology is grounded in abstract metaphysical reason, half-truths, or what Plato called *doxa*. Burke also understood that prejudice was not itself the end of the quest for the true, the good, and the beautiful. It rather inclined individuals to favor certain ways of life and to help them resist radical change; it was part of the maintenance of civilization not the final sum of what it could produce. There is no escaping expedience and moral judgment.

Tradition provides the substance that maintains a civilization. Societies must have common beliefs in order to exist as political communities. The self-understanding of a society depends on its formative experiences of order. Walter Lippmann referred to these common beliefs as the public philosophy.[13] Tradition provides the constitution of a society. It creates limits and boundaries for human action and even thought. It provides a check against anarchy and tyranny and it makes individuals suspicious of radical reformers and ideologies. It implants in men a humility captured in Burke's dictum that the individual is foolish but the species is wise. The collective wisdom of generations is a substantial brake

on the inclination to remake society by tearing up its long established roots. Yet, tradition also provides examples of the spirit that animates prudent reform. Burke, for example, was no ideologue. In India and America he opposed British expansion, but when necessary he favored using the full might of the empire to destroy Jacobin influence. His reaction to the specific challenges of his day was not to apply some ridged ideological principle but to exercise prudent judgment that was inspired by prescriptive wisdom.

There is an important philosophical insight embodied in Kirk's faith in tradition. Reason is flawed; as Hume stated, it is a slave to passion. But an appeal to tradition is coupled with an abhorrence of metaphysical abstraction. Tradition anchors one in the concrete experience of history. Abstraction, by contrast, sends men's imaginations into fits of idyllic fancy, unable to distinguish reality from utopian dreaming. Set on a course of abstraction, anything is possible. The established customs and institutions that provide checks on human will and appetite are seen as obstacles to progress. The imperfection in tradition and the institutions that embody it are exaggerated. The imperfection in reason and human nature itself are either ignored or rationalized. Kirk's defense of prescriptive wisdom is an alternative to modern ideology. It is a sober account of the human condition that appreciates the great achievements of history.

The Human Condition and the Need for Prescription

To discuss the need for prescription outside the context of the human condition is to base one's understanding on ahistorical abstraction and not human experience. Kirk insisted that important insights into human nature were embodied in the Western heritage. Aristotle, Cicero, Augustine, and Burke, to name a few, agreed that human nature is divided by good and evil inclinations. Evil is a permanent part of life on earth and consequently political and social life must contend with the lower passions of men and women who, intentionally or not, do harm to others and themselves. This basic insight into human nature provides a check

against radical change. It cautions one to reject utopian schemes that begin by claiming the power to perfect man and society. The gnostic impulse to remake the world depends on a rejection of the older sober view of man. A certain tolerance for evil must be cultivated because the devil we know is apt to be better than the devil that radical change engenders. The hubris of the modern mind is to assume that the existing generation knows better than previous generations and that reason and science can create a new world. Gone from this way of thinking is the notion that mystery is part of life. Even Machiavelli understood that roughly half of life is out of our control. The modern error, however, is to attempt to control too much of life in the belief that the more we try to control and change the better off we will be. How can one not try to fix evils wherever they exist? The evils of the world can be a great diversion from the evils of one's soul. Civilization depends on individual men and women ordering their own life before they venture into the world to save mankind.

Kirk and the Constitution

Just as Burke opposed radical ideology by defending the British constitutional order, Kirk opposed the radical ideologies of his day by defending the American constitutional order. Both fought for the preservation of the constitution of civilization. As Burke explained, "each contract of each particular state is but a clause in the great primaeval contract of eternal society."[14] The content of the constitution of civilization includes "reverence for the divine origin of social disposition; reliance upon tradition and prejudice for public and private guidance; conviction that men are equal in the sight of God, but equal only so; devotion to personal freedom and private property; opposition to doctrinaire alteration."[15] Their respective defense of the British and American constitutions is not surprising given that both constitutions embody the prescriptive wisdom and experience that Burke and Kirk defended. But it is important to understand that their defense of constitutionalism was not a romantic yearning for a past that could be frozen in time. Burke and Kirk saw the necessity

of change and reform. The quality of conservative reform, however, differs greatly from radical reform. This is evident from Kirk's constitutional theory. An examination of Kirk's constitutionalism will illuminate the meaning of the politics of prescription.

In Kirk's *Rights and Duties: Reflections on Our Conservative Constitution*, he indicates that the purpose of the American Constitution was to create and maintain "a conservative political order."[16] The conservative nature of the American constitutional order is illustrated by Edmund Burke's influence on the American mind and imagination and the consistency between Burke's political theory and the constitutional theory of the American Framers. Kirk's emphasis on Burke separates him from those who identify Locke as the greatest influence on the Framers.[17] Locke separates rights and duties. Kirk and Burke saw them as inseparable parts of the quest for ordered liberty.

What is it that gives the American Constitution its conservative characteristics? At the core of both the American Framers' and Burke's constitutional theory is a view of human nature that is shaped by the ethical dualism of the ancients and Christians. The constitution of being provides the ontological context for political constitutions. Written constitutions cannot change the human condition but the human condition provides limits to what constitutions can accomplish. As both St. Augustine and James Madison understood, the human condition makes political institutions necessary. This conservative way of thinking confines government and political life to objectives far more sober and realistic than those of modern political ideologies represented by Marxism, Croly's progressivism, or the welfare state.

The nexus between human nature and government was well known to the American Framers. Men are divided in their souls by opposing inclinations. The will to do good and the will to do evil. The Framers recognized that evil was a permanent part of political life. They were not utopians or idealists. The evil tendencies of man made government necessary. This idea is captured by James Madison's *Federalist 51*: "if men were angels, no government would be necessary. If angels were to govern men, neither

external nor internal controls on government would be necessary." The context for this famous quotation has to do with Madison's defense of checks and balances and the separation of powers. These particular institutional mechanisms are derived from the Framers' moral realism.

Burke's influence is also found in the Framers' insistence on continuity. Jefferson, by contrast, was no Burkean. This is evident in his desire for a constitution that lasts for only one generation. In a letter to Madison dated September 6, 1789, Jefferson questioned "whether one generation of men has a right to bind another." He claimed it as a "self-evident" truth "'that the earth belongs in usufruct to the living;' that the dead have neither powers nor rights over it."[18] To conceive of a constitution that lasts for only one generation, Jefferson must engage in the imaginative destruction of the social fabric. He must, like other modern idealists, ignore the reality of the human condition and the particular historical circumstances of his time, in order to abstractly construct in his imagination a world that provides an escape from the harshness of life. He supposes that each generation is born, matures, and dies on the same days. Jefferson conceives of men not as Burke did as part of the eternal social contract but as flies of summer. Like social contract theorists, Jefferson searches for a theoretical construct with which he can remake the constitution of being. Madison's reaction to Jefferson's letter is Burkean (see Madison's letter to Jefferson February 4, 1790). Madison admits his "skepticism" regarding Jefferson's doctrine and suggests that it is not "in all respects compatible with the course of human affairs." Besides being impractical Madison finds Jefferson's principle unwise. He asks, "Would not a Government so often revised become too mutable and novel to retain that share of prejudice in its favor which is salutary aid to the most rational Government?" He adds that the living are indebted to the dead for their improvements. Financial debts, for example, incurred by the living generation provide benefits to future generations.[19]

Kirk's constitutionalism is consistent with his understanding

of order found in *The Conservative Mind* and *The Roots of American Order*. Political and social order cannot be reduced to positive law. A written constitution reflects the unwritten constitution but it cannot possibly capture or encompass all of the unwritten constitution. The traditions, customs, mores of a nation are not embedded in one place, e.g., the four corners of a written document. They live as part of an organic whole that changes and remains the same through time. The unwritten constitution provides the substance of law and political power; the written constitution defines the parameters and limits of the powers that are used to create law and public policy. The outcomes of law depend on the temperament, character, and imagination of political leaders, scholars, parents, and clergy who mold the substance of the law according to the quality of their minds and imaginations. In this sense, then, the American Constitution is indeed a living document. It is given life by the unwritten constitution and by judges who exercise discretion in a way that maintains continuity between the spirit of the constitution and its letter. Kirk is not an advocate of strict constructionism nor does he believe that the constitutional order is determined primarily by judicial conduct and theories of judicial interpretation. The substance of law is shaped by conscience and the many influences on conscience including natural law. In short, natural law is, in part, what gives life to a written constitution.

In Kirk's understanding of the American order, the Constitution does not give birth to a new order but the Constitution was created "to conserve the order and the justice and the freedom to which Americans had grown accustomed."[20] The American order is not a break from the past, as was the French Revolution, but an effort to preserve the experiences and wisdom that were part of the British political tradition. Constitutions exist before they are put into writing. Their particular characteristics take shape in the customs and traditions that evolve over time. This is why a written constitution can never completely capture the constitutional order. This is also why a written constitution is not an assurance that certain political practices and demarcations of power will remain

the same over time. Yet a constitution does intend to preserve.

Kirk quotes James Bryce's *The American Commonwealth* to explain why constitutions do not guarantee ordered liberty.

> To expect any form of words, however weightily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you cannot protect the people against themselves any more than you can, to use a familiar American expression, lift yourself from the ground by your own bootstraps.[21]

The quotation is reminiscent of comments in the *Federalist* papers that speak to the dangers of democracy and the threat of government tyranny. Human nature guarantees that whatever specific institutional limits will be formed in the written constitution, the usurpation of powers will occur. Minimizing and checking these usurpations makes for a tolerable political order but it does not promise the transforming ends that radical ideologies claim are possible. Custom and tradition are important to the underlying civility that makes constitutional government possible. They provide a cultural ethos that inculcates the disposition of civility that is necessary for ordered life. Custom and tradition also provide the cultural context for law and government. While setting boundaries and parameters to government power, they provide a cultural check against tyranny. Lawmaking, for example, occurs in a context with preexisting customs and traditions. Legislators must gauge the force of custom before they craft laws and public policies. The efficacy of law depends, in part, on its compatibility with custom and tradition.

The connection between the written and unwritten constitutions explains why Kirk was skeptical about the exportation of the American Constitution. While other nations may benefit from emulating the spirit of the American Constitution, Kirk warned that "it is not possible for the politicians of very different cultures to emulate thoroughly the American framework of institutions, for their circumstances and necessities are very different from

ours. Even if they were so to copy the details of the American Constitution, that house of cards would fall to its ruin within a few years, at most."[22] To preserve the American constitutional order, the written constitution must be followed and the unwritten constitution must maintain a spirit within the leadership class, especially, that fosters constitutional character. Kirk is no legal fundamentalist. He understands that universality, the permanent things, require flexibility and change. But change must be gradual and most importantly change must maintain continuity with the past as it is embodied in American traditions and customs. Continuity also means that the spirit of constitutionalism is what guides change and reform. Kirk is willing to concede to judges a certain degree of discretion in interpreting the law and meaning of the Constitution but legitimate discretion is not the same as ideologically driven law making by judges. The living constitution of the New Deal and Warren Courts was not consistent with the spirit of authentic American constitutionalism for it destroyed in significant ways the very fabric of the American political and social order. The welfare state that those courts helped to engender and constitutionally legitimate is incompatible with authentic American constitutionalism. An example will suffice to illustrate the constitutional revolution of the twentieth century. The Commerce Clause in Article I, section 8 of the Constitution gives the Congress the power to regulate commerce between the states but it reserves the power to regulate commerce within states to the states. The 10th Amendment, added in 1791, merely makes explicit what was evident from the original Constitution.

In a short period of time, the Supreme Court's interpretation of the Commerce Clause radically changed. The dramatic change only makes sense if understood as part of a larger ideological shift away from the Framers' constitutional ethos and toward a progressive liberal world view. This evolution can be marked by the Court's decisions in *Schechter Poultry Co. v. United States* (1935), *NLRB v. Jones and Laughlin Steel* (1937), and *Wickard v. Filburn* (1942). The last case illustrates the erosion of constitutional standards.

In *Wickard v. Filburn*[23] the Court ruled 9-0 that a farmer who grew wheat for his own consumption—wheat that never left his farm—was subject to federal quotas created under the Second Agricultural Adjustment Act (1938). Roscoe C. Filburn was a small farmer in Ohio. In addition to raising livestock, he grew wheat to feed his chickens and cattle, to feed his family, and to provide seeds for the next year's crop. Filburn did not sell any wheat; it all remained on his farm. But in 1941 he was cited for exceeding his federally-established wheat quota by 12 acres. The 12 acres yielded 239 bushels of wheat for which Filburn was fined 49 cents per bushel. Filburn challenged the fine, arguing that the federal government had no constitutional authority to regulate wheat that was neither marketed nor part of interstate commerce. Justice Jackson justified Congress's power by citing the commerce clause that stated Congress's power to "regulate Commerce…among the several states." Jackson argued that wheat that was consumed but not marketed had an effect on the wheat market. Presumably Filburn's wheat reduced the demand for wheat and thus reduced the price of wheat. Farmers like Filburn produced an estimated 20% of the wheat produced in the U.S. Their wheat, although grown and consumed on private land and never sent to market, had an effect on the price of wheat. Consequently, Jackson argued, the wheat was part of interstate commerce and fell under Congress's power. Under this reading of the commerce clause it is difficult to fathom what does not come under Congress's commerce powers. Backyard gardens, it could be argued, have a similar effect on the national tomato market and thus Congress is empowered to regulate them.

Conclusion

The conservative mind must provide alternatives to such ideological forces as those that animated the New Deal and Warren courts. To carry out this task, the conservative mind must be molded by the scholarship of men like Russell Kirk whose constitutional theory provides the foundation for a reconstituted American order that preserves the wisdom of the ages in the flux

of changing historical circumstances. We are not in search of specific forms of political ideas but the spirit that engenders them. Only then with the union of spirit and mind will we be prepared to meet the challenge of preservation and change. In this lifelong endeavor, we do well to follow the example of Russell Kirk.

Kirk's defense of prescription provides a foundation for the restoration of American and Western traditions that have been slipping from historical consciousness. The project of restoration includes rejection of ideology and its closure to the search for more differentiated understandings of reality. Prescriptive conservatism must also address the criticism that reason, not historical experience, is the foundation for truth. Providing scholarly arguments and insights that explain the limits of unaided reason and the virtues of prescription will bolster the case for traditional conservatism. In the end, Russell Kirk has done a great deal to bring the importance of this project to the attention of his many readers and students. A fitting tribute to the Sage of Mecosta is the continuation of the search for prescriptive wisdom.

Michael P. Federici
Mercyhurst College

NOTES

1. Irving Babbitt, *Democracy and Leadership* (Indianapolis: Liberty Fund, 1979) 136.

2. Russell Kirk, *Enemies of the Permanent Things: Observations of Abnormality in Literature and Politics* (La Salle: Sherwood Sugden & Company) 16.

3. Edmund Burke, "Speech on the Representation of the Commons in Parliament" in *Edmund Burke: Selected Writings and Speeches* edited by Peter J. Stanlis (Chicago: Regnery Gateway, 1963) 331.

4. Russell Kirk, *The Conservative Mind from Burke to Eliot* (South Bend: Gateway Editions, 1978) 31.

5. Ibid., 32.

6. Ibid., 33.

7. Edmund Burke, *Reflections on the Revolution in France* (New York: Penguin Books, 1979) 173.

8. Russell Kirk, *Prospects for Conservatives* (Washington, D.C.: Regnery Gateway, 1989) 229.

9. Russell Kirk, *Edmund Burke: A Genius Reconsidered* (Wilmington: Intercollegiate Studies Institute, 1997) 178.

10. David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (Oxford: Clarendon Press, 1985) 44-45.

11. Herbert Croly, *The Promise of American Life* (Boston: Northeastern University Press, 1989) 400.

12. Burke, *Reflections*, 183.

13. See Walter Lippmann, *The Public Philosophy* (New York: The New American Library of World Literature, 1955).

14. Burke, *Reflections,* 195.

15. Kirk, *Conservative Mind*, 15.

16. Russell Kirk, *Rights and Duties: Reflections on Our Conservative Constitution* (Dallas: Spence Publishing, 1997) viii.

17. The original title Kirk considered for the book was *Edmund Burke and the Constitution of the United States*.

18. Thomas Jefferson, *Writings* (New York: Library of America, 1984) 959.

19. *Letters and Other Writings of James Madison*, vol. I (1769-1793) (New York: R. Worthington, 1884) 503-504.

20. Kirk, *Rights and Duties*, 3.

21. Ibid., 12.

22. Ibid., 14.

23. 317 U.S. 111 (1942).