

LAW'S CULTURE: CONSERVATISM AND THE AMERICAN CONSTITUTIONAL ORDER

BRUCE P. FROHNEN*

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| I. | THE CONSERVATIVE PERSUASION | 461 |
| II. | CONSERVATISM AND THE AMERICAN FOUNDING | 463 |
| III. | LAW'S CULTURE | 470 |
| IV. | JUDICIAL INTERPRETATION AND THE LIMITS OF LAW..... | 474 |
| V. | INTEGRATING THE TRANSCENDENT WITH THE CONCRETE..... | 481 |
| VI. | CONCLUSION: POLITICS, CULTURE, AND LAW | 485 |

In an important article on *Judicial Activism and Conservative Politics*,¹ Ernest A. Young argues that it is not possible to define the Rehnquist Court as consistently conservative. This is due in part to the significant doctrinal inconsistencies in the Court's decisions and in part to the fact that "some areas of constitutional law—such as free speech—have gotten so ideologically turned-around that it is very difficult to say what is 'conservative' and 'liberal' anymore."² There is indeed significant confusion as to what it means to be "conservative" in the field of law. At least in part this is because the term is used as shorthand for one who is merely anti-poor people,³ pro-creditor,⁴ "extremely deferential and partial to the state,"⁵ or

* Bruce P. Frohnen is Assistant Professor of Law at Ave Maria School of Law in Ann Arbor, Michigan and Senior Fellow at the Russell Kirk Center for Cultural Renewal.

1. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

2. *Id.* at 1213 (citation omitted).

3. James Wilson, *Why a Fundamental Right to a Quality Education Is Not Enough*, 34 AKRON L. REV. 383, 389 (2000) (asserting that conservative jurists allowed for inequalities of school spending as part of an "agenda to stop the liberals from interpreting the Constitution to protect the poor").

4. Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1456 (equating "conservative" with "creditor-oriented").

5. David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 111 (2001).

possessed of “a political preference for majoritarian power over individual rights and liberty.”⁶ This article seeks to add coherent content to the term “conservative” in the legal context by setting forth the traditional conservative vision of law in general and of American constitutionalism in particular. The goal is not an iron-clad formula for predicting the Court’s decisions on the basis of political philosophy. Rather, it seeks greater understanding of the general conservative viewpoint to provide greater conceptual clarity and the basis for developing more reliable predictive criteria.

The article begins with a brief introduction to traditional conservative thought, emphasizing the work of Russell Kirk, a leading founder of post-World War II conservatism in America⁷ who did much to shape that body of thought.⁸ It proceeds to outline the conservative view of the American Founding era—contrasting it with the more ideological vision of the origins of American constitutional government provided by neoconservatives, the ideological competitors of traditional conservatives. Then, it outlines the historical and cultural factors shaping American constitutionalism, the limits of law and constitutionalism—including the conservative groundings for a jurisprudence of original intent—and, finally, the conservative approach to integrating natural law principles with historical experience. The resulting picture is one of law in general and the American Constitution in particular as a culturally-rooted set of rules intended to preserve the permanent, universal, and interdependent goods of order, justice, and freedom.⁹ For conservatives, law and its interpreters play relatively limited roles in the organization of society; roles necessitating adherence to standards

6. STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 23 (rev. ed. 1987).

7. “Russell Kirk was a principal architect of the modern resurgence of American conservatism, which emerged in the years following the Second World War.” Gerald J. Russello, *Timeless Prescription for the Ills of Our Time*, 10 *HUMANITAS* 108, 108 (reviewing RUSSELL KIRK, *REDEEMING THE TIME* (1996)).

8. See Jeffrey O. Nelson, *Introduction to Russell Kirk: Man of Letters—A Tribute Issue*, *INTERCOLLEGIATE REV.*, Fall 1994, at 3, 3 (“Kirk is perhaps best known as America’s leading exponent of conservative principles . . .”).

9. RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 6 (1974) [hereinafter *KIRK, ROOTS OF AMERICAN ORDER*] (“The good society is marked by a high degree of order, justice, and freedom. Among these, order has primacy: for justice cannot be enforced until a tolerable civil social order is attained, nor can freedom be anything better than violence until order gives us laws.”); see also RUSSELL KIRK, *RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION* 5 (Mitchell S. Muncy ed., 1997) [hereinafter *KIRK, RIGHTS AND DUTIES*] (“The aim of a good constitution is to achieve in a society a high degree of political harmony, so that order and justice and freedom may be maintained.”).

and interpretations embedded in the culture and history of the people.¹⁰ Thus, the conservative vision is opposed in fundamental respects to prevalent forms of modern jurisprudence, but is nonetheless deserving of greater understanding in the interest of conceptual clarity and fair debate.¹¹

I. THE CONSERVATIVE PERSUASION

Kirk's *Conservative Mind* is often credited with forging an intellectual tradition for modern American conservatism.¹² In it, Kirk traces conservatism's roots to British statesman Edmund Burke and sets forth six "canons of conservative thought." These canons can be summarized as follows: (1) "[b]elief in a transcendent order, or body of natural law, which rules society as well as conscience;" (2) attachment to diversity in human lives and social relations "as opposed to the narrowing uniformity, egalitarianism, and utilitarian aims of most radical systems;" (3) "[c]onviction that civilized society requires orders and classes, as against the notion of a 'classless society;" (4) respect for private property as a bastion of liberty; (5) trust in "custom, convention, and old prescription" as protections against both anarchy and tyranny; and (6) commitment to prudent change combined with opposition to hasty or overzealous reform.¹³

These canons do not produce a blueprint for a perfect society or posit any single overriding value to which social action must aim. Indeed, Kirk rejects such programs as dangerously "ideological," by which he means overly abstract, simplistic, and likely to lead to political zealotry.¹⁴ Yet Kirk's canons do provide a general picture of

10. See KIRK, RIGHTS AND DUTIES, *supra* note 9, at 20-21 (asserting that only adherence to the original intent of the framers can ensure maintenance of the public peace because more liberal interpretations would undermine shared understanding of the terms of the social compact, precipitating political warfare-over the terms of government).

11. See Young, *supra* note 1, at 1216 ("I hope to have shown that by being more precise about both 'conservatism' and 'judicial activism,' we can recover meanings that helpfully advance our present constitutional debates. At the least, in debating 'conservative judicial activism,' we should be careful to say what we mean.").

12. See, e.g., George H. Nash, *The Conservative Mind in America*, INTERCOLLEGIATE REV., Fall 1994, at 27, 27 ("It [*The Conservative Mind*] stimulated the development of a self-conscious conservative intellectual movement in the early years of the Cold War. It is not too much to say that without this book we, the conservative intellectual community, would not exist today.").

13. RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* 8-9 (7th rev. ed. 1986).

14. See KIRK, ROOTS OF AMERICAN ORDER, *supra* note 9, at 9 (explaining that ideologies are "fanatic political creeds," and "[b]y definition, 'ideology' means servitude to political dogmas, abstract ideas not founded upon historical experience").

conservatism as a "persuasion" supportive of habit, tradition, and accustomed ways of life.¹⁵ They show an attachment to pre-existing institutions, beliefs, and practices, combined with a determination to use prudence in applying general precepts of a moral, universal natural law to the particular needs of one's given society.¹⁶

Kirk, self-consciously following Burke, translates conservative political precepts into specifically constitutional principles. First among these is the principle "that a good constitution grows out of the common experience of a people over a considerable elapse of time."¹⁷ Constitutions capable of protecting "order, justice and freedom"¹⁸ in this view are not manufactured, but develop out of the habits and social relations of the people.¹⁹ Second among Kirk's Burkean constitutional principles is the religious nature of mankind and the necessity for the Constitution and public order to uphold transcendent standards, impressing on those in power their duties to a power higher than themselves or the state.²⁰ Kirk's third constitutional principle is society's need for a "natural aristocracy" combining those with personal, demonstrated talent and those who have inherited power, position, and responsibility to the public.²¹ Finally, Kirk asserts the principle that a good constitution will maintain "a balance or tension between the claims of freedom and the claims of order."²² In order to protect the rights of individuals as it ought, the constitution also must protect the order of society such that anarchy will not result.²³

Like his canons of conservative thought, Kirk's constitutional principles stop short of providing a blueprint for the one best society. Instead they provide a sketch of general goals—again summed up as order, justice, and freedom²⁴—and an argument that these goals

15. See CLINTON ROSSITER, *CONSERVATISM IN AMERICA: THE THANKLESS PERSUASION* 6-10 (2d ed., rev. 1962) (delineating temperamental, possessive, practical and philosophical aspects of conservatism, each of which inclines one to support pre-existing social structures).

16. See KIRK, *RIGHTS AND DUTIES*, *supra* note 9, at 131-32 (asserting that natural law provides general moral guidance which magistrates and, especially, the people must apply with prudence in organizing their lives in common).

17. *Id.* at 235.

18. KIRK, *ROOTS OF AMERICAN ORDER*, *supra* note 9, at 6 ("The good society is marked by a high degree of order, justice and freedom.").

19. See KIRK, *RIGHTS AND DUTIES*, *supra* note 9, at 253.

20. *Id.* at 253-54.

21. *Id.* at 254.

22. *Id.*

23. *Id.* at 254-55.

24. *Id.* at 250-51 (explaining that Americans have long presumed that their system of order, justice and freedom would abide for ages).

should be pursued through a diversity of communities and classes given order by traditional beliefs and customs. Yet Kirk's focus is not on discussion at this level of general principle. Instead, as befits one committed to cultural and historical roots, he focuses on conservation of his own inherited constitutional order—that of the United States.

II. CONSERVATISM AND THE AMERICAN FOUNDING

Much hinges on the question of whether America was founded out of a commitment to ideological goals or a desire to conserve an inherited way of life. The answer indicates the nature and tendency of our founding documents and our nation's intended path. If America is at its core a set of ideological beliefs we all must accept and serve, then we must constantly reshape ourselves and our way of life to fit these ideas.²⁵ But, if our nation was founded to preserve a pre-existing way of life that the Founders valued deeply, then it is this concrete way of life—the institutions, beliefs and practices central to the local communities in which we live—that we must work to conserve, rather than any abstract notion of the best political regime.²⁶

Kirk emphasizes the role of conservatives, particularly John Adams, in seeking to maintain the historical continuity of Americans' traditions and ways of life within their new nation during the Founding era. Of course, Jefferson and his followers took a different path. They sought to reform society on the basis of abstract principles akin to those promoted by the French revolutionary Jacobins.²⁷ Yet, in Kirk's view, even the abstract language of the opening of the Declaration of Independence is of limited relevance: it must be read as an appeal to French sensibilities occasioned by Americans' need for French financial and military support.²⁸ Moreover, it is to the Constitution itself that we look as our governing document, and Kirk seeks to re-emphasize the extent to which the American Constitution

25. See generally SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981) (asserting that America's failure to live up to its lofty ideals ushers in periodic "creedal passion periods" producing significant reforms, which still cannot make the nation live up to its ideals).

26. On this point, Kirk writes:

Will the moral and social order that Americans have known for two centuries and more endure throughout the twenty-first century? That may depend upon whether enough men and women in these United States, informed by study of the institutions and convictions that have been developed over three thousand years, make up their minds to stand by the Permanent Things.

KIRK, *ROOTS OF AMERICAN ORDER*, *supra* note 9, at xix.

27. KIRK, *supra* note 13, at 72.

28. See KIRK, *RIGHTS AND DUTIES*, *supra* note 9, at 57.

was drafted by men rooted in a culture of local communalism, practical religiosity, and commitment to social traditions and virtues as opposed to political ideology.²⁹

Kirk's is most decidedly a conservative Constitution. It aims at maintaining political order and, more than this, conserving Americans' "social inheritance."³⁰ This interpretation puts Kirk in a curious tension with progressive historians. A tradition of interpretation beginning with James Allen Smith³¹ and continuing through Vernon Parrington,³² Charles Beard,³³ and Herbert Croly,³⁴ has read the Constitution as a conservative document intended to preserve inegalitarian distributions of wealth and power from democratic action. These commentators see American government as fundamentally (and unjustly) liberal in the sense of privileging individuals and individualism at the expense of communal concerns.³⁵

Traditional conservatives' rivals, the neoconservatives,³⁶ have built on the individualist reading of the Constitution, interpreting it as a positive good and seeking to portray America as a truly "new nation" founded on an ideological commitment to equality, progress and an

29. *Id.* at 62 (asserting that the framers were non-philosophical men concerned with establishing a viable political order and maintaining pre-existing social norms rather than attempting to found a terrestrial paradise).

30. *Id.* at 6.

31. See JAMES ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* 29-32 (Cushing Strout ed., Belknap Press 1965) (1907) (asserting that the Framers of the Constitution distrusted the people and sought to entrench wealthy and conservative classes in power).

32. See 1 VERNON LOUIS PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 275-77 (Univ. of Okla. Press 1987) (1927) (asserting that a minority of powerful men from the propertied interest in America gained control of the Constitutional Convention and enshrined in it a self-seeking individualism tied to furtherance of commercial interests).

33. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 324-35 (Transaction Publishers 1998) (1913) (asserting that almost all the Framers were economically interested in the outcome of the Constitutional Convention and intentionally excluded non-propertied classes from it in order to draft a document protecting their own interests).

34. See HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 31-36 (Transaction Publishers 1993) (1909) (positing that the Framers were highly individualistic, committed to the rule of the upper classes, and incapable of forming a government capable of taking actions demanded by the public welfare).

35. For a full discussion of the progressive historians and their influence on later interest-group based readings of American constitutionalism, see GEORGE W. CAREY, *IN DEFENSE OF THE CONSTITUTION* 8-15 (Liberty Fund 1995) (1989) (explaining that progressive historians and their followers in political science have attacked the morality of the Constitution on the grounds that it subverts the will and interest of the people, thus justifying the courts in taking action to serve what they see as the public welfare).

36. See Irving Kristol, *The Neoconservative Persuasion*, *WKLY. STANDARD*, Aug. 25, 2003, at 23-24 (distinguishing "forward looking" and more welfare-state friendly neoconservatism from the "Tory nostalgia of, say, Russell Kirk").

abstract freedom divorced from prescriptive institutions, beliefs and practices.³⁷ Ironically, neoconservatives point to conservatives' insistence on the importance of American culture and history in shaping their constitutional order as showing that conservatives have, at best, only marginal relevance to the American constitutional experience.³⁸ Some neoconservatives have gone so far as to deny the very existence of traditional conservatism outside a few enclaves of extreme isolationism and pseudo-European pretensions.³⁹

In opposition to progressive and neoconservative readings of America's "liberal" founding, Kirk argues that ideological emphasis

37. For the paradigmatic reading of America as founded on abstract principles of equality and individual rights, see SEYMOUR MARTIN LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE* (1963). See also MICHAEL NOVAK, *GOD'S COUNTRY: TAKING THE DECLARATION SERIOUSLY* (2000); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988); *SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING* (Charles Kesler ed., 1987).

38. Charles R. Kesler, *All American?*, NAT'L REV., Dec. 7, 1998, at 52, 52-53 (referencing Kirk's use of "Burke's useful fiction that the British constitution had been the product of slow evolutionary growth and adaptation" and asserting that "[t]he most striking feature of traditionalist conservatism has always been how alienated it is from the roots of its own—that is, the American—political tradition.").

39. See, e.g., Francis Fukuyama, *American Conservatism Beyond Our Shores*, WALL ST. J., Dec. 24, 2002, at A10 (arguing "traditional (as opposed to American) conservatism" is a purely European phenomenon, unwelcome and almost unheard of on American soil). In America, Fukuyama claims, almost no one wants "to defend a status quo based on hierarchy, tradition and a pessimistic view of human nature." *Id.* The only American conservatives of any consequence are in fact "old" or "classical" liberals committed to "free markets, individual initiative and a democratic polity based on individual, not collective, rights" and to spreading these goods to every nation on Earth. *Id.*

Fukuyama refers to Seymour Martin Lipset as a primary source of his understanding of conservatism in America. Both have long been associated with the "neoconservative" movement of journalists, intellectuals and policymakers growing out of the decision by Irving Kristol and like-minded liberals to reject the increasing leftward tilt of the Democratic Party during the 1960s and 1970s. Fukuyama's assertions are echoed on the same editorial page, in harsher tones, by fellow neoconservative Max Boot. Claiming that conservatism is embodied in laissez-faire economics, a refusal to ban abortion or cloning, and the drive to "liberalize the Middle East" for his brand of neoconservatism, Boot dismisses criticism from his right as coming only from "paleoconservative" Patrick J. Buchanan and five followers inhabiting "fever swamps." Max Boot, *American Conservatism: What the Heck is a 'Neocon'?*, WALL ST. J., Dec. 30, 2002, at A12.

Such assertions mischaracterize traditional conservatism, ignore the role of traditional conservatives in putting together the conservative movement and its political victories, and seek to marginalize anyone who argues that culture and customary practice (rather than simply ideology) play a significant role in determining what policies and institutions best serve a given people—indeed, in determining even what constitutes a given people. The first two mischaracterizations lie outside the scope of this essay; in answering the third mischaracterization, concerning the current state of traditional conservatism, I allow conservative writers' own work to answer the racially charged overtones of neoconservatives' rejection of their culturally-based arguments.

on “abstract ideas not founded upon historical experience” belongs to one of a set of “fanatic political creeds, often advanced by violence.”⁴⁰ Meanwhile “[t]he American order of our day was not founded upon ideology. It was not manufactured: rather, it *grew*.”⁴¹ Kirk’s constitutionalism is unabashedly organic: He writes, “Deeply rooted, like some immense tree, the American Constitution grew out of a century and a half of civil social order in North America and more than seven centuries of British experience.”⁴² Indeed, in *The Roots of American Order* Kirk went further, finding the “tap-root of American order” in the establishment of a higher law tradition through revelation of the Ten Commandments.⁴³

Conservatives reject the view that the United States was founded in 1776 out of whole cloth by men determined to construct a government and a people committed to radically new ideas of political equality and individual liberty. Instead, Kirk argues,

By and large, the American Revolution was not an innovating upheaval, but a conservative restoration of colonial prerogatives. Accustomed from their beginnings to self-government, the colonials felt that by inheritance they possessed the rights of Englishmen and by prescription certain rights peculiar to themselves. When a designing king and a distant parliament presumed to extend over America powers of taxation and administration never before exercised, the colonies rose to vindicate their prescriptive freedom; and after the hour for compromise had slipped away, it was with reluctance and trepidation they declared their independence. Thus men essentially conservative found themselves triumphant rebels, and were compelled to reconcile their traditional ideas with the necessities of an independence hardly anticipated.⁴⁴

For conservatives the American Revolution itself was conservative, and the society that produced the revolution was conservative as well. Rejecting dominant Lockean liberal readings of a founding rooted in individual rights, conservatives like Barry Alan Shain look to cultural history as the source of persistent American values and modes of conduct.⁴⁵ Shain argues that American culture until the time of the

40. KIRK, *ROOTS OF AMERICAN ORDER*, *supra* note 9, at 9.

41. *Id.*

42. KIRK, *RIGHTS AND DUTIES*, *supra* note 9, at 4.

43. KIRK, *ROOTS OF AMERICAN ORDER*, *supra* note 9, at 11.

44. *See* KIRK, *supra* note 13, at 72.

45. *See* BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT*, at xv (1994) (asserting that historical practice in colonial and revolutionary America was communal, not

Founding was rooted, proximately, in traditions of communalism and reformed Protestantism.⁴⁶ Recent decades have seen a resurgence of interest in communalist beliefs and practices prevalent during the Founding era.⁴⁷ Yet Shain argues that this literature is ahistorical in its insistent secularism because it overlooks the fact that American communalist culture was deeply religious. Americans of the colonial and Revolutionary eras had "little interest in forming dialogic communities where life's meaning was gained through political activity. Most were interested in possessing everlasting life through Christ's freely given grace by serving their religious and geographical communities and their families, and by attending to agricultural matters."⁴⁸

America was neither individualist nor secular. Its people lived within close-knit communities joined by a shared cult—that is, a shared, religiously grounded vision of the meaning of life and requirements for salvation.⁴⁹ America already had the full flower of religious pluralism in its many varieties of Protestant sects (and, to a lesser extent, Catholic community). Yet the result was not a uniform, liberal "tolerance" that downplayed the importance of religion. It was, rather, a commitment among homogeneous local communities to their own rights of majoritarian self-determination.⁵⁰

Indicative of this commitment to local communities was colonial Americans' insistence, long before the formation of the federal system, on local autonomy as indispensable to a good life. Shain writes that the leaders of local towns and plantations were convinced that

[o]nly within the compass of a small community could the visible saints be known—those principally responsible for subjecting "the damned to the divine supervision of the Church" in a manner "consistent with the glory of God." From the reformed-Protestant perspective, then, any loss of corporate autonomy to extralocal religious, social, or governmental power would have made these

individualistic).

46. See *id.* at xv-xvi.

47. See generally J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

48. SHAIN, *supra* note 45, at xvi.

49. See generally RUSSELL KIRK, *AMERICA'S BRITISH CULTURE* 1-2 (1993) (asserting that a people's form of community is the product of associations developed through common worship).

50. See SHAIN, *supra* note 45, at 243 (explaining that until well after the Civil War, the dominant view in America was that liberty meant the freedom of local communities to conduct their own affairs without outside interference).

divine functions difficult to fulfill.⁵¹

The American conception of the human good, and the means necessary to attain it, in Shain's view, were conservative before that term had come into use:

Conservatives defend a theory of the good, *communalism*, which holds that individual human flourishing is best pursued through familial and communal shaping of individual character . . . through the active inculcation of corporately agreed-upon virtues. This sanctioned formation of individual character by intermediate social and political institutions is guided by an underlying moral, invariably religious, conception of a well-lived human life. This necessitates a common morality that rests on universal and absolute truth claims and by contemporary liberal sensibilities must be judged intrusive. In effect, the quest after personal virtue is not a fully private or even wholly familial project but rather a corporate and public one that involves political, social, and usually theological elements.⁵²

This conservative vision guided individual and communal conduct of a significant and immigration-prone minority in England even before the first New World landing, and had deeper roots in a reformed Protestantism. This vision still predominated in America, though in greater tension with later Enlightenment influences through the Founding era. It is a key element of Americans' cultural and constitutional heritage.⁵³

Scholars have overlooked Americans' lived philosophy of communalism, Shain argues, because it is not ideological; it is not found in the theories of the Enlightenment, but rather in daily behavior.⁵⁴ Bruce S. Thornton builds on this concern with the

51. *Id.* at 52. (citation omitted).

52. Barry Alan Shain, *American Community*, in *COMMUNITY AND TRADITION: CONSERVATIVE PERSPECTIVES ON THE AMERICAN EXPERIENCE* 39, 40 (George W. Carey & Bruce Frohnen eds., 1998) [hereinafter *COMMUNITY AND TRADITION*]. Shain also writes:

Revolutionary-Americans held to a political theory that awarded priority to the needs of the public over those of the individual and believed that the individual best flourishes when living with others in locally controlled political and social unities. This conservative understanding of the human good legitimated authoritative group intrusion into the moral choices made by individuals. Eighteenth-century Americans' lived experience continued to conform, though with increasing tension by the end of the century, to their theoretical expectations about the communal requirements for a good life.

Id. at 39.

53. See SHAIN, *supra* note 45, at 4-6 ("[W]hat a people understands the good life to be is formative in shaping its ethical and political horizons, institutions, and culture.") (citation omitted).

54. See SHAIN, *supra* note 52, at 43.

practical groundings of American order. Rather than focusing upon the influence of reformed Protestantism, Thornton points to “The Greek Georgic tradition” of agriculture and land-based loyalties and concerns as motivating and shaping the goals and methods almost instinctively chosen by the American Founders.⁵⁵ Both the Greek city-state and the Roman republic had at their core the small, independent farmer, and Thornton posits that the “regimen of hard work, self-sufficiency, and distrust of merchant and aristocrat alike” that characterized these farmers produced a character and set of habits central to free government.⁵⁶ The exemplar of the Roman era, Cincinnatus, left his farm just long enough to save Rome from the Gauls, then returned to his accustomed life of material poverty and hard work; that is, to the mode of living he deemed best for man. And the Founders consistently cited examples from this tradition—Cincinnatus in particular, with whom they identified George Washington—as providing proper models for human conduct, as well as a way of life their new nation must be careful to provide.⁵⁷

E. Christian Kopff also points to the classical origins of the founding. Noting Kirk's insistence that “America's political institutions owe next to nothing to the ancient world,” he goes on to illustrate Kirk's further point, that “American modes of *thinking* about politics indeed were influenced, two centuries ago, by Greek and Roman philosophers long dead.”⁵⁸ In addition to the ever-haunting image of Cincinnatus, calling every man to hard work and a high standard of self-sacrificing virtue, classical thought provided a vocabulary of politics that formed the very minds of Americans of the Founding era.⁵⁹

Kopff does take issue with Kirk on matters of detail in making his case for classical influence on the Founders' thinking in regard to specific political institutions and theories—particularly the separation of powers and the nature and implications of political tyranny.⁶⁰ Yet Kopff's disagreements with Kirk are merely matters of emphasis. While Kopff argues that Kirk overemphasizes America's specifically

55. Bruce S. Thornton, *Founders as Farmers: The Greek Georgic Tradition and the Founders*, in VITAL REMNANTS: AMERICA'S FOUNDING AND THE WESTERN TRADITION 33, 33-36 (Gary L. Gregg II ed., 1999) [hereinafter VITAL REMNANTS].

56. *Id.* at 40.

57. *Id.* at 36. See also E. Christian Kopff, *Open Shutters on the Past: Rome and the Founders*, in VITAL REMNANTS, *supra* note 55, at 71, 77-78.

58. Kopff, *supra* note 57, at 72 (citing Kirk, *supra* note 49, at 96-99).

59. See *id.* at 73-78.

60. See *id.* at 80, 84-87.

British heritage, he also notes that “the ideas which lay behind the American Founding were understood as a continuous and coherent tradition which had developed from ancient Greek thought through its Roman successors and culminated in seventeenth century English Whig thinking.”⁶¹

Thus Kopff agrees with Kirk’s central point that the American Constitution was “designed by its Framers, in 1787, to conserve the order and the justice and the freedom to which Americans had grown accustomed.”⁶² The Constitution, on this view, was a means of preserving an already longstanding way of life and government. This is no mere antiquarian observation. The historically-rooted nature of American constitutionalism, in Kirk’s view, is a major reason for its longevity.⁶³ The written constitution is only part of a people’s constitutional order. Of like importance is the “unwritten constitution” of “political compromises, conventions, habits, and ways of living together that have developed among a people over the centuries.”⁶⁴

III. LAW’S CULTURE

It is important to note that conservatives ascribe prescriptive value to the backward-looking, conservative nature of the culture of the Founding era—in particular the culture among elites of that time.⁶⁵ According to Kirk, a central purpose of historical study is to find what is required of us by standards of conduct written into the nature of man and the universe.⁶⁶ Accordingly, Forrest McDonald and Ellen Shapiro McDonald in effect accuse contemporary intellectuals of foolish pride in calling for a new Constitution, rewritten by a convention or the Supreme Court, “to reflect the realities of the twentieth century.”⁶⁷ The assumption underlying this drive in

61. *Id.* at 88.

62. KIRK, RIGHTS AND DUTIES, *supra* note 9, at 3.

63. *Id.* at 4 (“The Constitution of the United States was and is rooted in the experience and the thought of earlier times—which is a major reason why the American Constitution has not perished or been supplanted by some different political system.”).

64. *Id.*

65. *See id.* at 63 (“[T]he politicians who framed the Constitution . . . were representatives of a class, in every former colony, that had exercised authority almost from the very early years of British settlement in North America; they were drawn from a natural aristocracy.”).

66. *See, e.g.*, RUSSELL KIRK, ENEMIES OF THE PERMANENT THINGS: OBSERVATIONS OF ABNORMITY IN LITERATURE AND POLITICS 15, 259 (1969).

67. FORREST MCDONALD & ELLEN SHAPIRO MCDONALD, REQUIEM: VARIATIONS ON EIGHTEENTH-CENTURY THEMES I (1988).

McDonald and McDonald's view is simple: 200 years of experience has made us wiser, more informed and more sophisticated than those who drafted our original Constitution. This assumption, they write, "is as presumptuous as it is uninformed."⁶⁸ Not only have 200 years failed to make us wiser—to change our flawed, limited nature—but our conduct during those intervening years has left us with such desiccated standards of learning and character that "it would be impossible in America today to assemble a group of people with anything near the combined experience, learning, and wisdom that the fifty-five authors of the Constitution took with them to Philadelphia in the summer of 1787."⁶⁹ We live in corrupt times, whereas "the formation of the republic was a product of America's Golden Age, the likes of which we shall not see again."⁷⁰

In detailing the nature of this Golden Age, McDonald and McDonald set up an example of right conduct among statesmen and seek to instill in their contemporaries respect for the Founding generation—not as abstract philosophers but as men of farsighted political action. They point out how well educated the Founders were; almost all of them could read Latin and ancient Greek as well as, often, two or more modern languages.⁷¹ Moreover, the Founders' education was steeped in understandings of human nature and the need for virtue. Plutarch's *Lives of the Noble Grecians and Romans* was the most generally read of the classics.⁷² Thus the Founders were trained from an early age to care about virtue. And they cared about a specific kind of virtue, one embedded in the Western tradition. The Founders' education made them not philosophers, but bearers of the Western tradition. The learning of the ancients, of the old Whig writers on liberty, and of the Scottish common sense school did not produce a thoroughly consistent ideology. Yet they did produce a background understanding of human limitations, capacities, and duties that "permeated the very air Americans breathed," from the newspapers to George Washington's beloved theater to public oratory; they were part of the culture.⁷³

Strongly British in character, American culture embodied traditions and institutions key to American liberty:

68. *Id.*

69. *Id.*

70. *Id.* at 2.

71. *Id.*

72. *Id.* at 7.

73. *Id.* at 10.

Among the English institutions and attitudes that were firmly planted in America were the traditional idea that government must be lawful; the common law, which was adopted selectively, colony by colony; the practice of settling disputes through juries; reliance upon militias of armed citizens for defense and for the preservation of order; and the belief that the ownership of land, or the possession of enough other property to ensure an independent livelihood, was a prerequisite to the full rights and duties of citizenship. These, together with the development of such indigenous creations as the town meeting and such virtually indigenous practices as the responsibility of church ministers to their congregations, as well as the ready availability of land, bred a citizenry that was at once self-reliant and interdependent. What is more, the scheme of things required widespread participation in public affairs through face-to-face mechanisms, largely outside the framework of formal government. The daily business of life thus schooled Americans for responsible citizenship and for statesmanship.⁷⁴

Americans were trained from an early age in the habits of self-rule. They grew up in communities formed by institutions and customs—some inherited, others developed in response to local circumstances—that emphasized local rights and duties. The Founders' educational culture further strengthened their commitment to the traditions shaping their public culture. Their most cited source of social and political as well as religious wisdom was the Bible. The vast majority of them did not read the French *philosophes*, with their radical ideologies, because "Americans were immune to the antireligious virus that had infected the French."⁷⁵

Radical individualism was therefore neither the reality nor the goal of America's founders. Wilfred McClay has argued that American individualism from colonial days relied on communitarian cultural institutions for its existence and efficacy.⁷⁶ The claim for a revolutionary or classically liberal America therefore ignores both the necessity and the virtue of Americans' lived experience and moral traditions. According to McClay, misinterpretations of America's history stem from misunderstandings of liberty itself. The identification of liberty with the mere absence of constraints on individual action is both anachronistic and inaccurate. McClay argues that a historically-informed use of the term "liberty"—one rooted in

74. *Id.* at 3.

75. *Id.* at 6.

76. See, e.g., Wilfred M. McClay, *Mr. Emerson's Tombstone*, in COMMUNITY AND TRADITION, *supra* note 52, at 90.

early American usage—refers to

a form of *political* freedom, whose existence is predicated upon an entire system of structures and constraints, without whose presence “liberty” is said to devolve into “license.” The “freedom” of modern liberalism and libertarianism, which presumes the moral autonomy of the self-validating individual, could not have been further from the Founders’ thinking. When Patrick Henry declared, “Give me liberty or give me death,” he was not holding out for the expressive liberties of Robert Mapplethorpe.⁷⁷

“Liberty,” in McClay’s understanding, “enables the individual to act freely within a larger context of moral accountability.”⁷⁸ The more radical notion of “freedom” refers to the simple absence of constraints on the individual will. Moreover, liberty assumes “that we can identify a moral order that is not merely subjective and arbitrary.”⁷⁹ It requires common adherence to a law higher than the individual’s own will. The Constitution itself presumed “a moral and religious people.”⁸⁰

Political liberty, and even an ordered, sustainable individual freedom, must be constrained by cultural institutions and by individual virtues rooted in recognition of one’s duties to others. In an essay on Ralph Waldo Emerson and the nature of Transcendentalist individualism, McClay points out that even the radical selfhood explored by Emerson “silently presupposed—indeed, it took utterly for granted—a profound degree of social order and a wide range of social, institutional, cultural, and moral supports provided by the family and community life into which he was born.”⁸¹

Social traditions of thought and action are necessary to maintain the constrained individualism that is the only form of individualism human beings can attain; indeed, the American system of ordered liberty was founded on them. McClay argues that the essentially liberal view of America’s politicized, reformist founding

ignores the distinct and powerful elements of civic humanist or “republican” thinking in colonial and revolutionary America, elements that stressed the individual’s necessary involvement in, and dedication to, the polity. It downplays the wide influence of

77. WILFRED M. MCCLAY, *A STUDENT’S GUIDE TO U.S. HISTORY* 54-55 (2000). Mapplethorpe was a photographer whose graphic depictions of sado-masochistic homosexual acts gained some notoriety on account of his receipt of federal arts funding.

78. *Id.* at 55.

79. *Id.*

80. McClay, *supra* note 76, at 91.

81. *Id.* at 7.

Scottish moral philosophy, with its emphasis on the inherent sociality of human nature, and of faculty psychology, which stressed the need to subject the human passions to rational and social control. It gives short shrift to the elements of English institutional and legal tradition that profoundly shaped North American colonial life. But most of all, it downplays the immense and pervasive influence of reformed Protestant Christianity, especially as embodied in Calvinistic covenant theology and congregational church polity.⁸²

Traditions, social institutions and above all religion have shaped Americans' character and way of life since before their nation's beginning. As Kirk often remarked, culture comes from the cult.⁸³ A people's social institutions grow from its common beliefs and practices, responding to new circumstances as they seek to maintain continuity with their past. Without this basis in common, historically rooted beliefs and practices, Americans would never have become a free people. If this common basis is lost, American liberty will be lost as well.⁸⁴

IV. JUDICIAL INTERPRETATION AND THE LIMITS OF LAW

The conservative, contextual view of liberty is akin to and reinforces the conservative reading of law. Law, while not unimportant, is properly subordinate to the general order of society: "Laws arise out of a social order; they are the general rules which make possible the tolerable functioning of an order. Nevertheless an order is bigger than its laws, and many aspects of any social order are determined by beliefs and customs, rather than being governed by positive laws."⁸⁵ Constitutions themselves are limited in proper influence and effect because a constitution, according to Kirk, is merely a set of particularly important general laws, "a body of basic laws, for the governing of a commonwealth."⁸⁶

Conservatives are legal instrumentalists in the limited sense that they value laws for what they provide—physical safety and the continuation of the social order.⁸⁷ Key to this protective role, on the

82. *Id.* at 89.

83. *See, eg.*, KIRK, *supra* note 49, at 1.

84. *See id.* at 11 (stating that should America's essentially British cultural inheritance be lost, "the American nation would drift toward brutishness in private life, anarchy or the mailed fist in public life.").

85. KIRK, *ROOTS OF AMERICAN ORDER*, *supra* note 9, at 5.

86. KIRK, *RIGHTS AND DUTIES*, *supra* note 9, at 3.

87. *See id.* at 4 ("[W]ithout a regular pattern of basic law, a people could not live

conservative view, is recognition of both the importance and the limitations of laws and constitutions. In protecting a localist, communalist and traditional social order, conservatives focus on local communities.⁸⁸ And, as George Carey argues,

Conservatives recognize that constitutions play a limited role in fostering and nourishing communities. This role, moreover, is largely passive. Genuine communities evolve naturally; they are complexes of voluntary associations bound together by ties of loyalty, affection, and purpose. Consequently, constitutions, no matter how well crafted, play little, if any, role in their origins and growth.⁸⁹

In other words, no matter how conservative in nature, no matter how well crafted to fit the people's character and culture, a constitution is by nature an abstract document. It sets forth general rules intended to shape the behavior of those in positions of power in the government. And those rules are the product of rational consideration, of a reasoning process that at best integrates the results of rational study with the bare facts of human experience. Because a constitution is a set of rules rather than an embodied model of behavior, it can provide only a partial vision and guide for conduct.

A constitution can neither replace nor create vital, character-forming communities.⁹⁰ As Carey notes, "communities can be created, but to be vital and functional, and to operate in conformance with their goals, they must have their origins in some shared and genuine human interest or need, not the dreams or aspirations of social planners."⁹¹ Carey argues against reading *The Federalist* in particular, or any writings of the Founding generation more generally, as emphasizing the role of mere political mechanisms over good character in maintaining peace, order and freedom. He writes:

Crucial positions and arguments in *The Federalist* are based on the presumption of a people sufficiently virtuous for self-government. At one point Madison even acknowledges that "Republican government" depends to a greater degree "than any other form" on

together in peace.").

88. See KIRK, *supra* note 13, at 104 ("Liberty, practically speaking, is made of particular local and personal liberties . . .").

89. George W. Carey, *The Constitution and Community, in* COMMUNITY AND TRADITION, *supra* note 52, at 63.

90. GEORGE W. CAREY, *THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC* 158 (Illini Books ed. 1994) (1989) ("[F]or Publius, society, not government, is the source and generator of values. . . . [T]he state and local governments would bear the primary responsibility for any public education deemed necessary . . .")

91. Carey, *supra* note 89, at 63.

those “qualities in human nature” that “justify a certain portion of esteem and confidence.” He also recognizes that those backing the Constitution are assuming a “sufficient virtue among men for self-government.”⁹²

Regardless of how cleverly their constitution is constructed, in the long run only a virtuous people can be free. But whence will come the people’s virtue? The American Constitution cannot, any more than any other constitution, provide the people with virtue, and the Founders knew this. They were convinced that character formation, the shaping of individuals into virtuous citizens and members of society, is by nature the task of local associations. The Founders acted on the belief that as much responsibility as possible must be left to the most local and most private (or, more precisely, most social) level possible.⁹³

But what, then, can and must a constitution do? A constitution should allow those in power to carry out their tasks without allowing them to usurp power properly belonging to others in general, and to local associations in particular. Local communities should therefore take precedence over the national government in shaping individual lives. Nevertheless, in an antagonist world of potential internal and international conflict there always will be a role, a “job” for the central government. Thus, as Carey points out, “[C]ommunities fare best and enjoy free and spontaneous development under political constitutions that allow ‘space’ or ‘room’ for their functioning and development, as well as for their adjustments to the social, economic, and technological factors that affect them.”⁹⁴

By providing “space” for local associations and communities to form and develop, the Constitution does all it can to promote freedom, its own survival, and the source of a decent and virtuous character in the people. This means that limited, decentralized government is best for community and therefore most likely to perpetuate the people’s virtue and freedom: “The reasons for this seem clear enough: the more confined the scope of the central government, the greater the need and opportunity for the spontaneous

92. *Id.* at 76. See generally Graham Walker, *Virtue and the Constitution: Augustinian Theology and the Frame of American Common Sense*, in VITAL REMNANTS, *supra* note 55, at 98 (explaining the Founders’ attachment to and reliance on virtue in the people as the foundation of free constitutional government).

93. See *id.* at 73-74 (explaining that Federalists and Anti-Federalists were agreed that the central government should concern itself only with external objects such as defense, leaving the states with powers relating to commerce, property, liberty, and local life).

94. *Id.* at 63.

growth of communities and associations at the local level—the only place, after all, where they can grow.”⁹⁵

Carey does not end with the observation that local, cultural institutions are necessary for the perpetuation of liberty. He observes that it is in these institutions, in these communities, that any decent life is formed and lived. Centralization, in the end, is not merely unwise; it does more, even, than make human beings unfree; it dehumanizes them.

Centralization in violation of the subsidiary principle not only leads to the degeneration of society but also eventually weakens (if not destroys) the individual's inherent and distinctive capacities as a human being. Specifically, unnecessary centralization deprives the individual of meaningful participation at those levels most important for developing a sense of initiative, obligation, and responsibility. The feelings of achievement, the sense of reward or accomplishment, would not be his, nor would he develop friendships through cooperative enterprises. His growth as a human being with creative potential, free choice, and dignity would be stunted. This situation, in sum, would not be unlike that of children whose parents have continually protected and coddled them at every turn throughout their lives, making all decisions for them, providing for their every want, thereby depriving them of the opportunity to develop and assume the responsibility of adults.⁹⁶

There is, then, a moral grounding for conservatives' insistence that judges “govern themselves in their interpretation by the intentions of the Framers of constitution or statute.” the goodness of the social order that produced and is preserved by the laws, and the American Constitution in particular.⁹⁷ To be sure, one might put a merely instrumentalist cast on Kirk's assertion that “judges are not supposed to exercise legislative or executive functions.”⁹⁸ Yet this assertion itself is made at the opening of an essay intended to show the original understanding, and limits, of judicial review.⁹⁹ Kirk's justification for original intent is straightforward: “In 1787 and 1788 no political faction denied that a constitution must possess ascertainable original intentions”¹⁰⁰ The Constitution is therefore “a solemn agreement

95. *Id.* at 64.

96. *Id.* at 74.

97. See KIRK, RIGHTS AND DUTIES, *supra* note 9, at 18.

98. *Id.*

99. *Id.* at 18-19 (outlining the necessity for, difficulty of ascertaining, means of interpreting, and alternatives to, original intent).

100. *Id.* at 20.

on a national scale as to how the American people shall live together in peace,” and its terms must be sustained against temporary majorities, or strong-willed minorities, seeking to subvert or set them aside.¹⁰¹ Should factions succeed in twisting the Constitution’s words to their own use, “the terms of the Constitution would fall null and void, the fundamental law would crumble for lack of an enduring consensus, and every faction or interest would feel free, or perhaps obliged, to pursue its own objects in disregard of the general public interest.”¹⁰²

This is not to say that determining the original intent of the Constitution’s framers is easy, or that it can be achieved solely from within the four corners of the document. The Framers’ intent is difficult to ascertain in many instances on account of factional differences at the Constitutional Convention and ambiguous language, arrived at by political compromise, in the Constitution itself.¹⁰³ Moreover, “‘literal interpretation’ and ‘original intent’ may not always coincide.”¹⁰⁴ Kirk points to the issue of state immunity from suits brought by citizens of other states as an example in which the plain language of the Constitution indicated one thing—state liability to suit—and any reasonable understanding of the intent of the Framers indicated just as clearly the opposite.¹⁰⁵ And Kirk leaves no doubt by which interpretation he believes the Supreme Court should be guided: the historically informed understanding to be gleaned from reading historical and interpretive documents of the time.¹⁰⁶

Being rooted in culture and history, laws and constitutions should be interpreted in light of the historical and cultural context that produced them. Adaptations will be necessary to meet with technological and other changes in society, but they should be undertaken piecemeal and with caution, not all at once or on a large scale.¹⁰⁷ According to Kirk, should the courts aim too much at tearing the Constitution from its historical and cultural roots, Congress or the President should step in through their respective pre-existing constitutional powers, including the power of impeachment, to restore

101. *Id.*

102. *Id.* at 20-21.

103. *Id.* at 21.

104. *Id.* at 24.

105. *Id.* at 24-26.

106. *Id.* at 25-26.

107. *Id.* at 26-27.

order.¹⁰⁸

Conservatives see much of the turmoil of contemporary society stemming from the current tendency of the Supreme Court to substitute its own reasoning for that of the Framers. According to Carey, the Supreme Court has imposed its ideological vision of a national community on states and localities, stripping them of their proper functions, undermining their ways of life, and forging a centralized, tutelary state.¹⁰⁹ This is not to say that judicial politics alone are to blame for the corruption of American society and the evisceration of local communities. Carey argues that communities must respond to "social, economic, and technological" factors.¹¹⁰ Thus "[t]he reasons for our problems today are numerous and go well beyond politics as normally defined,"¹¹¹ and even the political factors themselves are part of a wider-ranging degradation of American culture.¹¹²

But the root of the problem, in the conservative view, is ideology. The Supreme Court's hostility toward local communities has seized issues of morality, religion, and even daily self-rule from the associations in which people traditionally have joined to address them, depositing them with the federal government, and generally with the Court itself.¹¹³ Court decisions regarding local concerns are rooted in ideology by their nature. From the beginning, the principles guiding the Court's decisions were ideological; they were not

developed over the years through the trials and tribulations of communities, local governments, or private associations in dealing with concerns closest to them. On the contrary, the creed to which the Court subscribes in dictating to communities and local governments. . . . bears a close affinity to the standards and morality that attach to the progressive vision of a national "community" marked by "enlightened" norms and principles whose inherent worth should be evident to all.¹¹⁴

The Supreme Court has rejected organic community development, along with the diversity of local customs it spawns, as insufficiently rational and too likely to allow forms of behavior it dislikes. Thus it

108. *Id.* at 30-31.

109. Carey, *supra* note 89, at 83.

110. *Id.* at 63.

111. *Id.* at 78.

112. *Id.* at 82.

113. *Id.*

114. *Id.* at 83.

has put a stop to the independent life of communities, subjecting them to abstract, universal standards of legalistic form and egalitarian substance deemed fair by progressive ideology:

As a consequence, one of the major difficulties in our present constitutional order can be put as follows: Whereas in the past the breeding ground for virtue and morality was the family, the church, voluntary associations, and the community, the source is now to be found at the national level, principally in the institution, the Supreme Court, that is most removed from an understanding of local concerns and problems.¹¹⁵

The new constitutional disposition concentrates power in the national government, which is a “synthetic institution lacking the wherewithal to operate as a substitute source of morality” replacing society and local communities.¹¹⁶ Carey criticizes the Court’s ideology for its abstraction from any organic tradition, but also argues that the Court’s actions are part of a tradition of sorts—truncated and culturally barren though it may be.¹¹⁷ That tradition is the source of the political tension in America to which Kirk points in contrasting Adams with Jefferson and conservatives with followers of the Enlightenment thought at the root of the French Revolution.¹¹⁸ Carey sees the same conflict at the root of debates over the nature and proper role of culture in American public life:

[T]he present conflict over the character and the destiny of our nation is principally an extension of the basic divisions that separated Burke from the *philosophes* of the French Revolution. Whereas Burke could see the vital and indispensable roles of traditions for the society to become an organic “partnership in every virtue, and all perfection,” the *philosophes* were antagonistic towards traditions, convinced that society could be torn apart to be built anew by the use of “reason.”¹¹⁹

Over the course of over 200 years even the hyper-rationalism of Enlightenment ideology has hardened into habits of thought and action that properly are termed a tradition. Carey explains that the *philosophes*’ positions have been

differentiated and refined, their major elements now constituting well-established traditions in their own right. Modern American progressivism, with its quest for equality, its view that more and

115. *Id.*

116. *Id.* at 78.

117. See George W. Carey, *Traditions at War*, 36 MODERN AGE 237, 237 (1994).

118. See KIRK, *supra* note 13, at 72.

119. See Carey, *supra* note 117, at 237.

bigger government is the cure for whatever ails us, its propensity for blaming society for the wrongs or shortcomings of individuals, and, *inter alia*, its anti-traditionalist stance in the name of freedom, progress, and tolerance, is unmistakably the outgrowth of the Enlightenment.¹²⁰

The Enlightenment-based tradition of progressivism is inherently opposed to the tradition that informed the American Founding.¹²¹ Thus it is not surprising that attempts to further the progressive tradition have included revisionist attacks on our understanding of the Founding era. Overt attempts to delegitimize the American Founding as inherently unjust have met with little success.¹²² In contrast, anti-traditionalists have been extremely successful in convincing people to reinterpret the American Founding as a radical event establishing liberal, progressive values of equality, toleration, and freedom unconstrained by the dictates of virtue.¹²³ To counter this success, conservatives strive to show that the Constitution is conservative, and to reinvigorate appreciation for the normative force of history.

V. INTEGRATING THE TRANSCENDENT WITH THE CONCRETE

According to Kirk, the Framers were possessed of an historical consciousness. They looked to their "political inheritance from Britain, and their social development during the colonial era" rather than to abstract philosophical doctrines in guiding their conduct and decision making.¹²⁴ Kirk argues that we must strive to inculcate such a consciousness in ourselves. To the extent that Americans forget the cultural underpinnings of their system of ordered liberty they cease defending the customs and institutions central to their way of life, leaving them at the mercy of progressive ideologues intent on reforming society along rationalist lines.¹²⁵

Kirk described the modern age as one of "virulent ideology."¹²⁶ An

120. *Id.*

121. *Id.*

122. *Id.* at 241.

123. *Id.* at 241-42.

124. KIRK, RIGHTS AND DUTIES, *supra* note 9, at 38.

125. *See, e.g.*, KIRK, *supra* note 66, at 276 (noting that "it is history which teaches us the principles of order." In this chapter, an essay on the work of Eric Voegelin, Kirk argues that the distortion of history by the partisans of a rationalism that denies the importance of transcendent standards is the root of much moral confusion, perhaps the most poisonous root affecting modern society).

126. KIRK, RIGHTS AND DUTIES, *supra* note 9, at 124.

important reason for the rise of ideology has been the prominence of specifically political concerns in Enlightenment thought. Neither virtue nor salvation has dominated; specifically, political concepts of liberty and equality have. Yet even the political emphases of modernity have their roots in deeper understandings, or misunderstandings, of the nature of the human person and the proper goals of life. For the moderns, that nature is radically atomistic, and those purposes are purely subjective. In short, modernity rejects both culture and transcendent norms in the name of individualism. Peter Augustine Lawler has argued that modernity is distinguished by the view

that a human being is an *individual*, and the modern individual is an abstraction, an invention of the human mind. That individual is made more free from social and political constraints, and less directed toward duty and goodness by God and nature, than a real human being ever could be The modern individual is liberated from the philosopher's duty to know the truth about nature, from the citizen's selfless devotion to his country, from the creator's love and fear of God, and even from the loving responsibilities that are inseparable from family life. Conservatives today oppose liberal individualism both because its understanding of the human being is untrue and because that definition erodes all that is good about distinctively human existence.¹²⁷

The insistence of the modern ideologue that the individual be treated solely as a monad, an unconnected product of its own radically free choice, has produced the myth of an autonomous political sphere. Moderns, both despots and democrats, have come to believe that human nature can be changed through political means, if only that individual is stripped of non-political attachments.¹²⁸ As a result, modern politics has been characterized by overt hostility toward the institutions in which people actually live and toward the customs that allow these institutions to function.¹²⁹

Lawler argues that de-integration of politics from culture has brought about the disintegration of society and an age of atomistic individualism, peppered by outbursts of unmediated mass movements. Stripped of their natural relationships as families, churches and local associations have fallen apart under political pressures, people have been forced to seek out association and empowerment in overtly

127. Peter Augustine Lawler, *Conservative Postmodernism, Postmodern Conservatism*, 38 INTERCOLLEGIATE REV. 16, 16 (2002).

128. *Id.*

129. See Carey, *supra* note 117, at 239.

political associations. And the people have found themselves endowed with great power to destroy, though little power to reconstruct what has been destroyed. The modern "intention to transform human nature has failed. Its project of transforming the human person into the autonomous individual was and remains unrealistic; we can now see the limits of being an individual because we remain more than individuals."¹³⁰ But the attempt has had deep effects on our culture: "The world created by modern individuals to make themselves fully at home turns out to have made human beings less at home than ever."¹³¹

Of particular importance has been the attack on religion. Culture not only comes from the cult or religion of a people, it also points them back to the reality of transcendent, religious truth, and helps them order society according to such truths.¹³² Cultural life is intimately tied to religion, and so the modern attempt to strip culture from humanity has entailed the rejection of God and religious belief. Lawler asserts that "[t]he individual really did try to replace the God of the Bible in the modern world—with the individual himself."¹³³ Of course, as a mere abstraction, "the individual" cannot act because it is a mere abstraction. But political elites, acting in a society atomized by individualism, in which people are stripped of their natural attachments, amass for themselves great power. And this power leads them to believe that they can change human nature, even as it produces in the people a moral and intellectual degeneration that allows them to forget that they are created beings, dependent on God and religion to make sense of their lives. Further, according to Lawler, the Christian heaven has been replaced by moderns, even supposedly "different" moderns like Marx, by "a world-to-come where we can do whatever we want, whenever we want, without any constraint by or guidance from nature, other human beings, or God."¹³⁴ Government and society itself must wither away, on this view, so that each individual can act truly "autonomously"—that is, with radical free choice, unconstrained by human attachments or any higher purpose.

According to Lawler, pursuit of this earthly heaven of autonomous

130. Lawler, *supra* note 127, at 17.

131. *Id.*

132. See KIRK, *supra* note 49, at 2 (quoting Christopher Dawson to the effect that social cultures are ordered by common religious beliefs and notions of the good).

133. Lawler, *supra* note 127, at 18.

134. *Id.* at 19.

individualism has produced a hellish existence of loneliness and enslavement to one's passions, drives, and political rulers. And so those empowered by the state to look after our well-being—the psychologists, psychiatrists, social workers and other “facilitators” who have replaced our priestly class and our parents—have sought to ease our minds. Their goal has been to eliminate the pains of modern life by destroying our last human attachments, our desire for love and fear of death. Mindless fornication and euthanasia will eliminate the final constraints on radical autonomy, leaving us without any goals to unsettle our post-human minds.¹³⁵

Lawler's answer to the meaningless existence of modern individualism is the reintegration of human beings into their communities. A world that has put the pathologies of modernity behind it will begin with “the replacement of the individual by the whole human being, and the using of our natural capabilities for thought and action to make the world worthy of him.”¹³⁶ As usual, for a conservative, Lawler eschews any specific ideological program. He points out that conservatism is quite compatible with constitutional liberty, and that no “particular changes to our form of government” should be seen as central to a plan of reformation.¹³⁷

However, conservatives' lack of a specific ideological program does not leave them without standards by which to judge current practice. Despite his insistence on the prescriptive value of history, Kirk insists that we can lead good lives only by recognizing certain “permanent things” or goods written into the nature of being.¹³⁸ He wrote, “The reason first why we do 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.”¹³⁹ In *The Conservative Mind* Kirk noted approvingly that Burke could repeat this sentence of Hooker's from memory.¹⁴⁰ It points to what conservatives see as the need to integrate the transcendent—the “great” things closest to God's substance, and the historical, the “ancient” things closest to God's continuance.

135. *See id.* at 22-23.

136. *Id.* at 25.

137. *Id.*

138. See KIRK, *supra* note 66

139. KIRK, *supra* note 13, at 37 (quoting 2 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 349 (J.M. Dent & Sons 1960) (1597)).

140. *Id.*

But how do we reconcile the eternal with the temporal? The obvious variations (and depredations) of human history with the call to a timeless, universal standard of goodness? Claes Ryn has written that, for Burke, there is "a standard of good that is not a mere creature of time and place but universal. Yet, for him, that standard becomes embodied in and known to man *in historical particulars*."¹⁴¹ Burke was instinctively aware that "[t]he transcendent reveals itself in history by becoming selectively immanent in it."¹⁴² But we have forgotten this truth and have lost even our understanding of what it means. Indeed, "[t]hat life might have an enduring purpose, but one that manifests itself differently as individuals and circumstances are different, seems a contradiction in terms."¹⁴³ For conservatives, this seeming contradiction is put to rest by the realization that the conservative goal is not any particular political regime or program, but a virtuous way of life. That way of life, in which individuals join with their fellows in local associations devoted to the common good, and to promoting good character and conduct in accordance with the dictates of religion, can exist under any number of political regimes. But it necessitates understanding that the purpose of any political regime is to protect and nurture the fundamental, cultural institutions in which human beings associate and lead their day-to-day lives.¹⁴⁴

Thus the transcendent is integrated with the concrete through social life. And law's role in this integration is limited: "[N]o matter how admirable a constitution may look upon paper, it will be ineffectual unless the unwritten constitution, the web of custom and convention, affirms an enduring moral order of obligation and personal responsibility."¹⁴⁵

VI. CONCLUSION: POLITICS, CULTURE, AND LAW

Some political systems are better than others at promoting virtue in a given set of circumstances. But politics is not, Ryn argues,

an autonomous, self-generating, self-sustaining force that shapes all other aspects of society. It is essential to understand that political beliefs and institutions are expressions of an underlying attitude toward human existence, that they are in a sense secondary

141. Claes G. Ryn, *Defining Historicism*, 11 HUMANITAS 86, 88 (1998).

142. *Id.*

143. *Id.* at 90.

144. See, e.g., BRUCE FROHNER, VIRTUE AND THE PROMISE OF CONSERVATISM: THE LEGACY OF BURKE AND TOCQUEVILLE (1993).

145. KIRK, RIGHTS AND DUTIES, *supra* note 9, at 260.

phenomena, having antecedents and roots in the life of the mind and the imagination.¹⁴⁶

Because politics is not the center of human life, it is unproductive to focus on rulers, their ideologies and their laws as the key to political—let alone more generally public or social—behavior:

Political elites do not simply impose their will on a people. Their being in power is in an important sense symptomatic of the moral-cultural-intellectual life of society, which is shaped in the long run by thinkers and artists as much as by politicians. Political elites sometimes affect the future decisively, but they can and cannot do various things depending on the moral-cultural-intellectual climate of their societies.¹⁴⁷

Society's "moral-cultural-intellectual climate" plays a dominant role in shaping its politics. Moreover, this climate embodies the spiritual health of a people. Thus, the decline of political life into mere competition for material goods is symptomatic of a deeper sickness; one caused by the people's rejection of the goals and customs of a common religious viewpoint—of their rejection, as a people, of the duty to live by permanent norms.¹⁴⁸

The rejection of transcendent norms, according to Ryn, has had its rewards: ease and a decline in moral responsibility. He writes, "In a world without a lasting higher purpose and without a commonality of meaning there is no need to struggle with conscience, the latter having been shown to be merely an arbitrary, historically bound imposition."¹⁴⁹ Thus we cannot hope for a return to a healthier, freer society through mere political action. Such a return would require nothing less than, in Ryn's phrase, "a transformation of civilization."¹⁵⁰ Indeed, "[p]olitics would of course form part of any renewal of civilization, but it is the direction of the moral and cultural life of society that will be the very heart of the matter, even for politics itself."¹⁵¹

146. Claes G. Ryn, *Dimensions of Power: The Transformation of Liberalism and the Limits of 'Politics'*, 13 HUMANITAS 4, 5 (2000). The reader may notice the emphasis on intellectual rather than practical circumstances, yet this emphasis is mitigated by the sense in which Ryn uses the term "imagination." In regard to that term, see generally IRVING BABBITT, *DEMOCRACY AND LEADERSHIP* (1978).

147. Claes G. Ryn, *Power, Again*, 15 HUMANITAS 100, 100 (2002).

148. See C.S. LEWIS, *THE ABOLITION OF MAN* 83-102 (Harper 2001) (1947) (on the universality of natural law, and of behavioral imperatives across the breadth of human religions).

149. Ryn, *supra* note 141, at 90.

150. Ryn, *supra* note 147, at 101.

151. *Id.* at 104.

Law can play only a limited role in any conservative constitutional order. Thus Carey, for example, argues both that courts deserve much of the blame for current social and political problems and that only difficult-to-obtain structural modifications could rein them in. Moreover, these structural modifications—a division of revenues among the central and state governments, establishment of a “neutral” arbiter to settle federal/state jurisdictional disputes, and return of 14th Amendment enforcement powers to Congress—do not go to the substance of public policy. Carey’s goal is the limited one of returning power and responsibility to more local governments and communities.¹⁵²

But this is the point for conservatives. There is no one, best set of public policies where the particulars of daily life are concerned. There is only the need to return society to an appreciation for tradition and a dependence on local groups for the formation of character, custom, and the rules of everyday life. Laws should not be used to shape society according to some abstract, ideological blueprint. Rather, laws can and should grow from the practices of these communities, fitting their needs and circumstances and helping them achieve their goals rather than shaping them.

The role of the judge is limited, in the conservative view. Not even natural law provides an abstract set of uniform rules to be applied to all people in all circumstances. Rather, “we have recourse to natural law, as opposed to the letter of the Constitution, only as a last resort . . . Statute, charter, and prescription ordinarily suffice to maintain the rule of law.”¹⁵³ The people’s unwritten constitution of customs, beliefs, and habits is at least as important as the written constitution for the preservation of order, justice, and freedom. Indeed, this unwritten constitution is the source of both statutory and constitutional law, rightly conceived.¹⁵⁴ Thus judges ought to decide only the issues that come before them, and those in accord with the laws and precedents effective in the locality concerned. They should respect the variety of local laws and circumstances because their job is to interpret rather than to make law.¹⁵⁵ They should therefore be striving, not toward improvement of society according to some

152. See Carey, *supra* note 89, at 83-84.

153. KIRK, RIGHTS AND DUTIES, *supra* note 9, at 136.

154. See *id.* at 137-38.

155. See *id.* at 18 (“It is presumed that judges must govern themselves in their interpretation by the intentions of the Framers of constitution or statutes; for judges are not supposed to exercise legislative or executive functions.”).

abstract theory they find appealing, but rather toward the maintenance of the rule of law within the cultural institutions, beliefs, and practices that give it both shape and content.¹⁵⁶ According to conservatives, we do not live in our government, or even in our laws, but rather in the families and other associations that make up society. And these associations, so critical for any good life, are as much if not more the product of custom and convention than of laws and judge-made rules.

156. *See id.* at 138 (asserting that court usurpation of lawmaking capacities under the guise of natural law would be akin to the revolutionary sweeping away of all law and precedent recommended by the English Puritans during the reign of Elizabeth).