

## The Unwritten Constitution and the Conservative's Dilemma

In the Foreword to *The Conservative Constitution* (1990), Russell Kirk wrote:

Today the United States is the great conservative power in a world that has been falling to ruin since 1914. To apprehend this country's conservative duties and opportunities in defense of civilization, it is well first to become acquainted with the conservative intent and function of America's constitution, both written and unwritten.<sup>1</sup>

We should bear in mind that Dr. Kirk wrote these words during the twilight of the Reagan-Bush era. On questions of foreign and domestic policy, the country seemed to be taking a "conservative" turn. Dr. Kirk observed that "[i]n the past few years, the Supreme Court of the United States has begun, if somewhat uncertainly, to undo mischief-making decisions of the 1960s and 1970s."<sup>2</sup> Indeed, he was emboldened to warn, "The temper of public opinion will not abide much more eccentricity or perversity of Supreme Court decisions."<sup>3</sup>

In retrospect, of course, we know that those years brought a rapid erosion of conservative constitutional principles. The fiasco of Robert Bork's 1987 nomination symbolized the political, if not the intellectual, failure of the conservative movement to persuade the body politic of its case on

constitutional order. With the exception of Justices Scalia and Thomas, the Reagan-Bush administrations nominated justices (O'Connor, Kennedy, and Souter) who unapologetically helped themselves to the most discredited "substantive due process" analysis (*viz.*, discovering unenumerated rights in the due process clause of the 14th Amendment); who consistently applied the most radical dicta and precedents of the Warren and Burger courts on matters of religion; who not only upheld justice Blackmun's handiwork in *Roe v. Wade* (1973), but who went further in *Planned Parenthood v. Casey* (1992) to declare a fundamental right of liberty so sweeping as to implicitly enfranchise citizens with an immunity against all positive laws: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Nor was this to be a merely inert piece of judicial dictum. In *Roe v. Washington*

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(1994), Judge Barbara Rothstein held that the liberty right in *Casey* invalidates the state of Washington’s prohibition against physician-assisted euthanasia—a prohibition upheld by referendum only one year earlier.

During the years leading up to and following publication of *The Conservative Constitution*, the bumper crop of administrative law (the Federal Register continues annually at over 80,000 pages) yielded new and bizarre injunctions against gender, age, and religious discrimination. From crime to health care, the federal government continued to find and exercise new powers. Like squatters in a gold rush, the various departments of government, as well as the two political parties, have not debated the constitutional pedigree of the powers exercised by government, but rather squabbled over their own claim to the usurped booty. Questions of law became issues of policy. The derogation of law filtered throughout the legal culture, even corrupting the most venerable institution of Anglo-American law, the jury. Deferring to pop psychologists rather than to the law, juries throughout the polity refused to convict or punish thugs and murderers. If federal officials can make the law a malleable instrument of political policy, why shouldn’t juries make the law an exercise in political entertainment?

In any case, during the dozen years of the Reagan-Bush administration, there was no successful resistance to the despoliation of constitutional order. With the exception of the Court’s adjudication of the religion clauses of the First Amendment, which continues to ignite popular discontent, the body politic seems to have acquiesced in the changes wrought within the constitutional order. Between 1910 and 1930 the Constitution was amended six times. But it is surely a sign of the new attitude about the Constitution that no one bothered to amend

it during the past two decades.

Did Dr. Kirk completely miss the mark in his 1990 assessment? Not entirely. In *The Conservative Constitution*, he pointed out that the constitutional order was not altogether healthy. “In many respects, the great American Republic of 1990 is more like the imperial Britain of 1790 than it resembles the infant federation of liberated British North American provinces early in 1790. The problems of modern society transcend simple questions of governmental structure. An appeal to the pristine purity of the Constitution of the United States will not suffice as a barrier against the destructive power of fanatic ideology.”<sup>4</sup> These words could be construed to suggest that the decadence of constitutional practice must be addressed by extra-constitutional means. Fairly read, however, Dr. Kirk meant nothing of this sort. Rather, he meant to argue that the doctrine of original intent, without a deeper understanding of the first principles of a constitutional order, will not remedy the decline of the legal order. Of course, history proved him correct.

In the ensuing years, Kirk often returned to the subject of how to correctly understand the principles of constitutional government. Indeed, in his last article on constitutional law, given at the Notre Dame Law School less than a year before his death, Kirk strongly criticized the Court’s use of “higher law,” which substituted private judgment for the written Constitution.<sup>5</sup> “What natural law provides,” he insisted, “is the authority for positive law, not an alternative to positive law.” Throughout his later writings and lectures, Kirk repeatedly cited Orestes Brownson’s 1851 essay “Higher Law.” Brownson’s essay still stands as one of the strongest cases ever made against substituting private moral judgment against the Constitution. To call attention to natural law as a principle of jurisprudence is not

to authorize just anyone to change or disregard the fundamental law of the Constitution on the basis of their understanding of the moral requirements of law. Proper authority to make law is itself a moral principle (the common good) which cannot be disregarded. In short, Kirk certainly called attention to the principle of natural law, yet he had nothing but contempt for mere private judgment in matters of jurisprudence.<sup>6</sup>

It also must be said that Kirk rejected the doctrine of incorporation. However much he stressed the moral importance of natural law, he certainly did not hold that the Bill of Rights should be pressed against the states.<sup>7</sup> Interestingly, in the Notre Dame lecture, in the last two paragraphs he was ever to write on this problem, Kirk called upon the other branches of government to use their powers to compel the Court to abide by the text of the Constitution.

Having said these things in Dr. Kirk's favor, we cannot overlook the fact that the devolution of constitutional order in our time poses a dilemma for the conservative. The dilemma is too complicated to treat at its proper level of detail in this brief essay. But to state it simply for our purposes here, the dilemma is that the changes in the constitutional order have generally followed the principles which conservatives themselves have emphasized. The great, humanistic tradition of Western jurisprudence has rejected legal positivism; and yet it is "natural law" (even if a parody of it) that has been the key to undermining the traditional legal order. Conservatives have usually championed the organic relationship between the blackletter law and the myriad of cultural habits and customs of a people; and yet the deepest and most destructive changes of the constitutional order in our time have come from the so-called "living" or unwritten constitution.

Dr. Kirk insisted that every country pos-

sesses two constitutions, written and unwritten.<sup>8</sup> In order to understand the real life of a constitutional polity, one must understand how culture and the habits of a people influence the making, administering, and adjudicating of blackletter law. Kirk often cited Edmund Burke on the point that "change is the means of our preservation."<sup>9</sup> Change is not brought about only by written rules, but also by unwritten ones embedded in experience informed by tradi-



Kirk at the time *A Program for Conservatives* was published (1954).

tion. Hence, when he wrote on the American political and legal order, Kirk stressed the need to understand and to affirm the unwritten "roots" of the *lex scripta*—once again, not that the unwritten roots are a substitute for the written law; nor even less, that the unwritten cultural habits are a substitute for the truly permanent things. *The Conservative Mind* (1953), *The Roots of American Order* (1975), and *America's British Culture* (1993), to name only a few

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works, examine both legal and philosophical principles from a cultural and historical point of view.

From the cultural and historical point of view, we see that legal systems contain two sorts of propositions. On the one hand, a legal system consists of explicit, doctrinal propositions of the law. These include such propositions as are found in written constitutions, statutes, administrative orders, and judicial pronouncements. Doctrinal propositions say what the law is; thus for example: "Congress shall make no law respecting an establishment of religion." At another level, however, a legal system continually draws upon unwritten propositions about moral and social reality. The First Amendment does not tell us what religion is, much less why it is of such value, or perhaps of such political danger, that Congress ought not to legislate its establishment. The positive law of torts contains explicit rules about harms and damages, but the doctrinal propositions of the *lex scripta* must rely upon a myriad of unwritten judgments not only about the nature of moral and social responsibility, but also about what the real world is like.<sup>10</sup> Is an electric washing machine more dangerous than brain surgery? Legal issues of liability always move back and forth between written and unwritten rules and measures. It would be impossible to codify all of the unwritten propositions upon which relies a sane and well-ordered legal system.

For Kirk, the conservative intent and function of America's constitution is reflected in the fact that the American Revolution and Constitution were not aimed at the creation of an entirely new social order. Unlike the French revolutionaries, who went so far as to legally reinvent the calendar, the American framers did not use the positive law to uproot all of the unwritten suppositions about moral and social order.<sup>11</sup> Kirk em-

phasized that American institutions drew, like a tree drawing sap, from a vast repertoire of wisdom. Indeed, the lean and abstemious presentation of principles in the Constitution shows only the surface of political and legal order. For the framers and ratifiers did not feel the need to translate the entire body of received legal, political, and moral wisdom into positive law, much less into the fundamental law of the Constitution.

Russell Kirk rejected any sort of reductionistic or simplistic account of American's constitutional order. Forever a Burkean, he insisted that legal order consists of both written and unwritten rules; to reduce order exclusively to one or the other is madness. Kirk had a classical notion of jurisprudence.

But what happens if the unwritten constitution changes in an unfavorable way? Kirk worried about this prospect. In *The Conservative Constitution*, he wrote:

The American constitution of the government survives, with some alterations—or at least the Articles and the Amendments survive on paper; however courts may interpret them. Yet how much of the providential constitution, the unwritten constitution, still operates within American society? Is the providential constitution a ghost merely? If so, can the written Constitution be long for this world.<sup>12</sup>

The question probably answers itself. John C. Calhoun maintained that "[a] constitution, to succeed, must spring from the bosom of the community, and be adapted to the intelligence and character of the people...." Calhoun's point holds equally well, descriptively of course not prescriptively, for the liberal culture. One could propose that the unwritten constitution has evolved the way a conservative might have predicted.<sup>13</sup> When, over a long time, the culture no longer avows the principles of the old tradition, the unwritten constitution changes accordingly.<sup>14</sup>

If we recall the canons of conservative

thought, outlined by Dr. Kirk some forty years ago, we must at least hesitate before saying that any of them still constitute the unwritten constitution: In the seventh edition of *The Conservative Mind* (1987), the six canons are put as follows: (i) "Belief in a transcendent order, or body of natural law, which rules society as well as conscience..."; (ii) "Affection for the proliferating variety and mystery of human existence, as opposed to the narrowing uniformity, egalitarianism, and utilitarian aims of most radical systems..."; (iii) "Conviction that civilized society requires orders and classes, as against the notion of a 'classless society'"; (iv) "Economic levelling...is not economic progress"; (v) "...distrust of 'sophisters, calculators, and economists' who would reconstruct society upon abstract designs"; (vi) "Recognition that change may not be salutary reform..."<sup>15</sup>

If one hesitates to affirm that these canons still constitute the unwritten principles of our legal and political order, then one can appreciate the conservative's dilemma. In *The Roots of American Order*, Kirk concluded that: "whatever America's incertitudes today, it is difficult to find American citizens who can sketch any convincing ideal new order as an alternative to the one long rooted here."<sup>16</sup> The conservative agrees that there is no "convincing" alternative. Unfortunately, the flesh and blood of culture has a life of its own, and there is no guarantee that the conservative's understanding of right reason will be en-rooted in the body of unwritten propositions. The conservative finds himself in the rather awkward position of having to defend the traditional order not only in more abstract terms and arguments, but perhaps even in the mode of prophesy.

## Notes

1. Russell Kirk, *The Conservative Constitution* (Washington, DC: Regnery, 1990), p.xi.
2. *Ibid.*, p.95.
3. *Ibid.*, p.113.
4. *Ibid.*, p.xi.
5. Kirk, "Natural Law and the Constitution of the United States," 5 *Notre Dame Law Review*, (Summer 1994).
6. Kirk allowed for the judge sitting in equity to use natural law for making the positive law effective, but he was careful to insist that the natural law is a set of background conditions somehow already embodied in the positive law, not a code of higher positive law that trumps the fundamental law of the Constitution. The giving of equity is not a judgment upon the positive law; rather it is an effort to assist the law in reaching the individual case. Thus, when a judge declares that the law is immoral, or unconstitutional, or even stupid, the judge is not giving equity—he is making a new law. So when Kirk approved of equity he was not approving of what is ordinarily meant by "judicial activism." See "The Case For and Against Natural Law." *The Heritage Lectures*, #469 (1993), p.5.
7. *The Conservative Constitution*, chapters IX and X.
8. *Ibid.*, p.4.
9. *Ibid.*, p.5.
10. I borrow this distinction between doctrinal and social propositions of the law from Melvin A. Eisenberg, *The Nature of the Common Law*, (Cambridge: Harvard University Press, 1988).
11. *The Conservative Constitution*, p.21.
12. *Ibid.*, p.186.
13. I say "could propose" as a matter of analysis, not however as a justification for how judges or other legal officials have interpreted the written Constitution.
14. For a sociological analysis of the problem, see Lawrence M. Friedman, *Total Justice*, (New York: Russell Sage Foundation, 1985).
15. Kirk, *The Conservative Mind*, 7th Revised Edition (Washington, DC: Regnery, 1987), pp.8-9.
16. Kirk, *The Roots of American Order*, 3rd Edition, (Washington, DC: Regnery, 1991), p.471.