

A Word for Christian Lawyers: Remember Russell Kirk

By Allen Mendenhall

Christian belief is not the only source of ethical principle behind law, but it is the most powerful and popular source. If all connection between the Christian religion and the verdicts of courts of law is severed in this country, the law will become erratic and unpredictable at best.

—Russell Kirk (147)

Most remember Russell Kirk, if at all, as the Dean of Conservative Letters, an erudite, bespectacled man with an aw-shucks grin and Anglophile tastes. Few remember Kirk as a jurist or constitutional commentator. But Kirk's *Rights and Duties*, first published in 1990 as *The Conservative Constitution*, is a sweeping, Burkean-informed survey of the American legal order. Portions of the book draw from Kirk's previous essays in, among others, *The Notre Dame Law Review*, *The Journal of Christian Jurisprudence*, *Law and Contemporary Problems*, *The World & I*, *Modern Age*, *The Intercollegiate Studies Review*, and *The Presidential Studies Quarterly*.

Some on the left and right may be alarmed by Kirk's mission, to "understand the Constitution of the United States as a framework for a conservative political order," will ring alarm bells (vii).¹ After all, any call to enlist the Constitution in the ranks of conservatives or liberals seems self-defeating. Yet Kirk's notion of conservatism and liberalism is nothing like the infantile movement politics of the current Republican and Democratic parties. His notion is cultivated and historically informed, drawing parallels to ideals of sober-sided, Old Whig statesmen on the one hand, and to Lockean, Enlightenment *philosophes* on the other. A conservative, for Kirk, is the former, one who appreciates the rootedness of institutions and who rejects ideology of any stripe. Kirk's objective, then, is to show that the U.S. Constitution does not have as its *telos*



the emancipation of the individual from historical and social convention. To that end, he contrasts the American Constitution and the French Declaration of the Rights of Man and of the Citizen, which was more or less a vehicle for radical and often militant change. (It bears asking why Kirk compares this French document with the U.S. Constitution while downplaying the Declaration of Independence, which gushes with abstractions and revolutionary ferment.) Jefferson and Jacobins notwithstanding, Kirk's argument is that the virtues of the U.S. Constitution are, above all, its permanence and continuity, which would not exist without the ongoing consent and reverence of the citizenry.

Kirk's definition of *constitution*—"a system of fundamental institutions and principles, a body of basic laws, for governing the commonwealth"—may sound strange to some conservatives (3). Strange, I say, because this interpretation implies that a constitution is not a fixed and knowable text, as originalists proclaim; rather, a constitution is a set of values and mores that transcends written words. A constitution, in other words, is "made up of old customs, conventions, charters, statutes, and habits of thought," including religious customs, conventions, and so on (4). A constitution is by nature conservative because its purpose is to endure for generations, although in practice it is as mutable as its adherents. The problem with this position is that not all constitutions are meant to endure—some are

1 All citations come from RUSSELL KIRK, *RIGHTS AND DUTIES* (Ed. Mitchell S. Muncy, Intro. Russell Hittinger) (Dallas, TX: Spence Publishing Company, 1997).

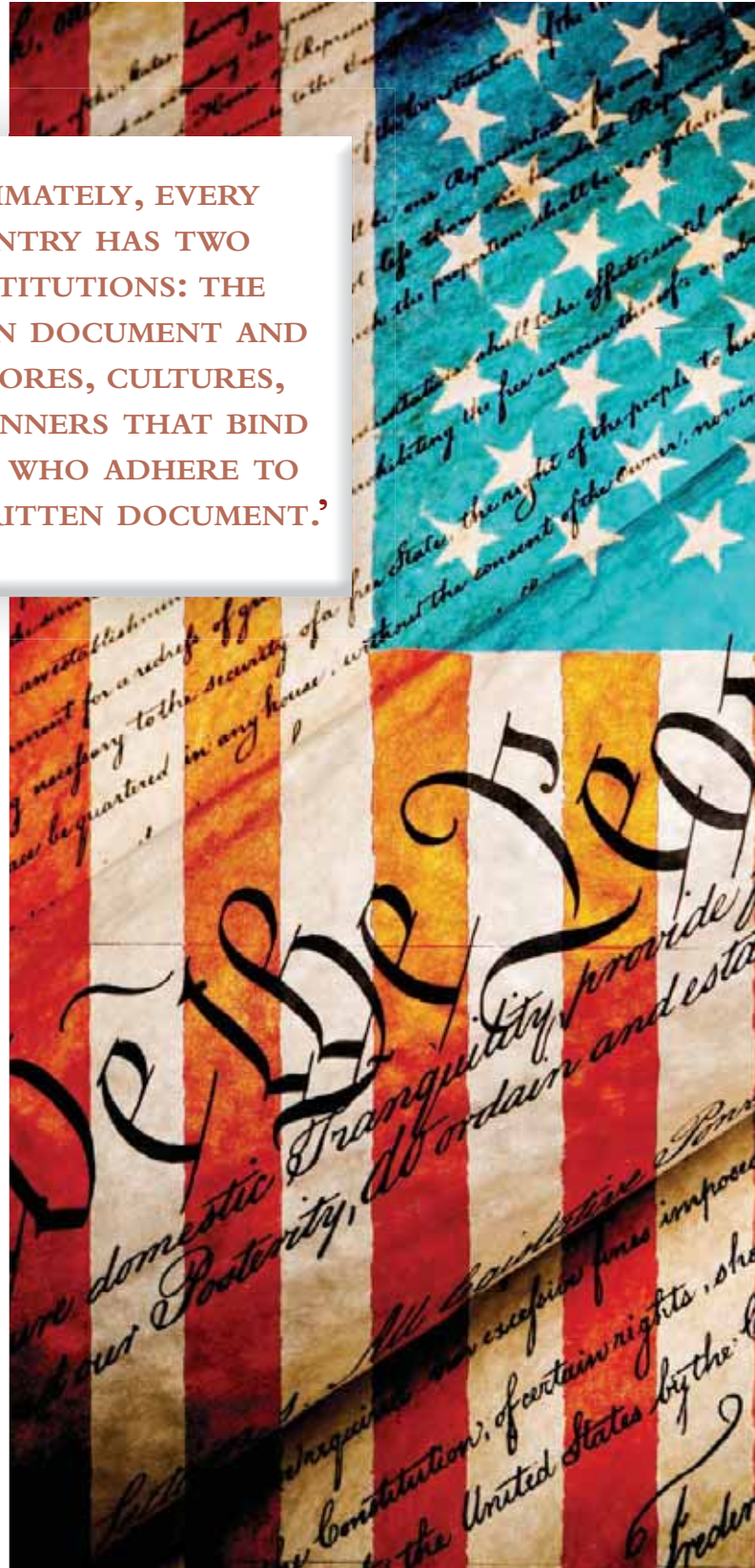
merely placemarkers, temporary solutions to be supplanted later, when the populace has had more time to deliberate about various provisions. To address this tangle in his reasoning, Kirk distinguishes successful and unsuccessful constitutions. Some constitutions, though conservative, have not endured as has the U.S. Constitution, which allows for changing opinions but which resists spur-of-the-moment trends. “The Constitution of the United States,” Kirk proclaims, “has endured for two centuries because it arose from the healthy roots of a century and a half of colonial experience and of several centuries of British experience” (110). Kirk mentions the constitutions of other nations only in passing. His is not a comparative treatise but a dissertation on the order and tradition of an Anglo-influenced American document, which embodies an Anglo-American ethos. One may be left wanting more comparisons—that is, more evidence about what makes the U.S. Constitution and its several constituents different from others.

Ultimately, every country has two constitutions: the written document and the mores, cultures, and manners that bind people who adhere to that written document. The aim of these twin structures is political harmony. Without political harmony, a constitution cannot last. The fact that the U.S. Constitution has survived so long testifies to the general content and accord among the American people throughout history. A populace will not continue to follow a constitution that is too rigid; nor will a constitution that is too flexible restrain the exercise of arbitrary power, either of tyrants or of elites. Thus, a good constitution must be organic, not evolving. The difference between these adjectives, though slight, is essential: the former abides by tradition whereas the latter serves, or has the potential to serve, fashionable ideologies.

Kirk argues for the necessity of original intent, coupled with a careful study of history (58), as a hermeneutic methodology. He acknowledges, however, the difficulties of ascertaining such intent. A “reasonable attachment” to the written text of the Constitution, not a “blinkered literalism,” is his standard of interpretation (29). Any significant departure from this standard could lead judges down the road towards archonocracy, or a “national domination of judges” (31), because it would give judges an infinite “power to do mischief” (30). This conclusion, though probably true, is somewhat figurative, lacking in any concrete examples. It begs the question: how much departure is too much? Which raises other questions: how will we know when judges have gone too far? Who or what must check the power of tyrannical judges? How will judges vest power in the judicial branch despite overwhelming public opposition to their practices? Kirk leaves these and other, similar questions unanswered.

Kirk’s conservatism has little to do with Robert Bork’s

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positivism in that Kirk, according to Russell Hittinger, “subscribed to the dicta of Roman and English-speaking jurists, who held that the natural law enters into the organic laws of a people through customs and usages, and eventually through the many judgments which go into the making of statutory law” (xxvi). Recognizing the vagaries that trouble most notions of natural law—evidenced by public objections, during Senate nomination hearings, to Bork’s positive law convictions and shortly thereafter



President Ronald Reagan with Russell Kirk.

to Clarence Thomas's natural law convictions—Kirk suggests that law is not absolutely natural or absolutely positive but that natural law authorizes positive law. Accordingly, positive law is not divorced from but married to natural law; it derives its lexicon of intelligibility from a discourse of higher principles. In this respect, Kirk subscribes to a long and venerable tradition: that of classical and Catholic natural law. To avoid laboring the point, suffice it to say that this “old tradition of natural law comes down from Christian divines” (131). Implementation of this tradition involves “moral law” that “should not be taken for graven tables of governance, to be followed to jot and title,” but for guiding precepts that must “be appealed to in different circumstances, and applied with prudence” (131). It does not follow that judges may substitute their views of natural law for the law of the land; but views of natural law that are in keeping with history, tradition, and the sacred may—indeed should—inform judges' application of written law.

Although Kirk believes that “law necessarily is rooted in ethical assumptions or norms,” which derive “from religious convictions” (139), he does not pretend that the U.S. Constitution was or is a religious document. He is not after hagiographic renderings of the Founding Fathers. The delegates to the Constitutional Convention neither aspired to establish “some civil religion as an alternative to Judaism and Christianity,” nor set out to create a “work of politico-religious dogmata” (62). Instead, these delegates sought a “practical instrument of government” (62). They were not gods, but men. That does not mean the Founding Fathers were not religious. In fact, Kirk submits, the “religious and moral convictions of the Framers had something to do with [their] probity in prudential decisions” (85). Kirk cites M. E. Bradford's suggestion that “with no more than five exceptions (and perhaps no more than three),” the Founding Fathers “were orthodox members of one of the established Christian communions: approximately twenty-nine

Anglicans, sixteen to eighteen Calvinists (of various churches), two Methodists, two Lutherans, two Roman Catholics, one lapsed Quaker and sometime-Anglican, and one open Deist—Dr. Franklin, who attended every kind of Christian worship, called for public prayer, and contributed to all denominations” (85). Tired debates over whether the Founding Fathers meant to establish a Christian nation are beside the point. More relevant is the fact that American government arose out of the common experience of a Christian people devoted, for the most part, to a republican order anchored by religious faith. The Founding Fathers clearly did not intend to level Christian institutions—with the possible exception of Thomas Paine, whose anti-religious fervor turned Americans against him—and the U.S. Constitution was not about preserving Christian institutions, so it cannot be said that our *written* Constitution is an anti-religious or a pro-religious text. Our *unwritten* Constitution, however, is almost indisputably religious, shaped as it is by a transcendent moral order based principally on Biblical teachings. Accordingly, judicial activism may not be as pressing an issue as cultural activism, since the latter is a departure from a far more ancient constitution. Kirk believes that ideology will fill any vacuum left by the decay of religion. As more and more Americans profess themselves nonbelievers, we will see whether Kirk's predictions come true.

Although the U.S. Constitution is not a sacred text, the corpus of English and American law “cannot endure forever unless it is animated by the spirit that moved it in the beginning: that is, by religion, and specifically by the Christian people” (139). Kirk laments the attempts by some to sweep away religious beliefs from our courts of law. He therefore endeavors to demarcate boundaries between a legal system completely separating church and state, on one extreme, and a legal system conflating all laws with Christian doctrine, on the other. We deceive ourselves if we downplay the influence of Christianity on American law; likewise, we vulgarize Christianity if we equate everyday administrative procedures with a general understanding of Christian justice. Here, the line of demarcation divides law from sources of law. Kirk explains the difference in this way: “The law that judges mete out is the product of statute, convention, and precedent. Yet behind statute, convention, and precedent may be

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discerned, if mistily, the forms of Christian doctrines, by which statute and convention and precedent are much influenced—or once were so influenced” (143). Put another way, the underlying principals of the American legal order, constituted by Christian thought and practice, shape the way legislators promulgate laws as well as the way judges interpret laws. Rules and regulations emerge and exist within a field of Christian discourse dating to the English common law and perhaps even to antiquity. The meaning of certain laws depends upon a vast network of Christian interpretation that precedes those laws; and unless legislators and judges dispense with those laws altogether—an act Kirk would be loath to endorse—the Christian element will persist, even if retarded beyond quick recognition.

There can be no pure Christian polity on earth in part because humanity is imperfect and imperfectible, and in part because the Church, historically, has been either hesitant or wrong to dictate State policies. Kirk does not believe humanity will ever achieve a worldly paradise. That, however, does not stop him from championing right law and moral order. His support for religious schools and his invectives against pornography stand as two examples of his Christian “activism,” a label at which he would wince, he being a disinterested man of letters in the Arnoldian sense. Something of an armchair philosopher, albeit with ties to political organizations, Kirk does not wish to revolutionize the legal profession, which should, he thinks, “repair to Burke” (124). He declares that “in an age of virulent ideology, an age of immensely quick, unthinking communication,

old institutions everywhere require intelligent defense” (124). He is, thus, a guardian of ancestral wisdom and of the moral imagination, duty bound to teach and transmit an intellectual and spiritual inheritance that too many Americans have neglected. Christianity makes up the vast sum of this inheritance. It is the bedrock of our society and government. Try as we might, we cannot break from that foundation—not without toppling the very order that holds us in place and protects us from ourselves.

“Christian belief,” Kirk claimed, “works upon the political order in three principal ways: faith’s influence upon statesman; faith’s influence upon the mass of mankind; and faith’s shaping of the norms of the social order” (162). Kirk’s jurisprudence pivots on these three influences. It deserves our attention. In an age of secularism, we must, I think, remember it, lest we forget who we are—and why our constitution is important.



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