Russell Kirk: A Centennial Symposium

The Chartered Rights of Americans: A Kirkian Case for the Incorporation of First Amendment Rights

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Traditionalist conservatives have often expressed hostility to the Supreme Court's First Amendment jurisprudence, perceiving it as an attempt to accomplish social change undertaken by the court's current justices while disregarding the original meaning of the Bill of Rights.[1] According to this account, rather than recognizing the provisions of the First Amendment to be part of a larger constitutional project that upholds social order and traditional institutions, the court interprets First Amendment clauses so as to undermine the basic structural logic of the Constitution itself. An advocate of this position is the figure many consider to be the godfather of American intellectual conservatism, Russell Kirk.

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[1] For examples, see L. Brent Bozell, *The Warren Revolution: Reflections on the Consensus Society* (New York: Arlington House, 1966); Lino A. Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (Ithaca, NY: Cornell University Press, 1976); Stephen B. Presser, *Recapturing the Constitution: Race, Religion, and Abortion Reconsidered* (Washington, DC: Regnery Publishing, 1994); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis, IN: Liberty Fund, 1997); and Raoul Berger, *Federalism: The Founders' Design* (Norman, OK: University of Oklahoma Press, 1987). For a more recent conservative approach see Jesse Merriam, "Originalism's Legal Turn as a Libertarian Turn," *Law and Liberty*, May 8, 2018. https://www.lawliberty.org/2018/05/08/libertarian-originalism.

Kirk made a substantial contribution to a variety of scholarly and literary fields including political theory, history, fiction (especially Gothic horror), educational policy, and social commentary. An elaboration of conservative sentiment and thought provided unity to Kirk's disparate interests and direction to his prolific writing and thinking. In the area of constitutional history and theory, for example, Kirk declared that the American Constitution "has been the most successful conservative device in the history of the world."[2] But, though viewing the Constitution as a distinctly conservative achievement in general, Kirk took sharp issue with the Supreme Court's interpretation of the Bill of Rights, beginning in the early twentieth century, as applying not only to the federal government but to the state governments as well. For Kirk, the court's so-called "incorporation doctrine"—the notion that the Bill of Rights, including the First Amendment, were made binding on the states by the due process clause of the Fourteenth Amendment—undermined the conservative nature of the original constitutional order, introducing instability and discontinuity into the American constitutional system.

This article explores Kirk's interpretation of the First Amendment in light of his constitutional thought as a whole and proposes a way that conservatives may understand First Amendment rights as upholding Kirk's constitutional principles. It does not argue that incorporation is, contra Kirk, a conservative development, nor does it counter Kirk's position by appealing to the necessity of the Fourteenth Amendment to "complete the Constitution."[3] Rather, it suggests that despite some of its clearly unconservative jurisprudential origins and effects, the incorporation of the First Amendment may be interpreted and defended as a conservative development upon grounds amenable to traditionalist conservativism.

The crux of my argument is that the First Amendment rights of religion, speech, press, assembly, and petition were rights long taken for granted by the American people and practiced as if they had significant protection from federal, state, or even local regulation. In this way they

[2] Russell Kirk, *The Conservative Mind: From Burke to Eliot*, 7th ed (Washington, DC: Regnery Publishing, 1985), 110.

[3] See Michael P. Zuckert, "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights," *Publius*, Vol. 22, No. 2, *Rights in America's Constitutional Traditions* (Spring 1992), pp. 69-91. Zuckert is plotting what he sees as a moderate course between those who advocate a reading of the Fourteenth Amendment as revolutionizing the original constitution and those who see it as but a moderate adjustment to long-standing principles. For scholars taking sides in this debate, see Zuckert, "Completing the Constitution," 71, n. 7 and 8.

are what we might call the "Chartered Rights of Americans," taking the term from Burke's famous description of rights in the unwritten English constitution as the "Chartered Rights of Englishmen."[4] They are rights that arose in the historic context of the American colonial experience and the early republic and ones that Americans have long enjoyed largely free of government censorship.

Even while conceiving of First Amendment rights as "chartered," as prescriptive in the unwritten American constitution, it is important to recognize that the manner in which the judiciary incorporated First Amendment rights and the arguments made on their behalf reflect liberal or even radical philosophical notions. Consider the following quotes from two of the court's prominent free speech cases: "[I]t is nevertheless often true that one man's vulgarity is another's lyric"[5] and "[free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[6] Both of these statements are anathema to traditional conservatism. The first reflects a relativism regarding moral standards for speech and manners, and the second suggests that instability is better than stability, implying in a manner reminiscent of Rousseau that disrupting a stable traditional political order will, *ipso facto*, unleash something better. In the liberal and radical mind First Amendment rights are essential to enabling such social disruption.

What is a conservative to do? An essential principle of conservatism as it relates to such developments is encapsulated in Kirk's dictum that "salvaging is a great part of conservatism."[7] Change happens—and not always for the better. Conservatives must be prepared to adapt to and, where possible, shape social and political fluctuations as they occur. As Kirk writes, "[c]onservatism is never more admirable than when it accepts changes that it disapproves, with good grace, for the sake of a general conciliation."[8] In this case, incorporation is a fact of modern jurisprudence; it is now interwoven into Supreme Court case history, having produced nearly a century of judicial precedents. Allegations of damage to the structural elements of the constitutional order are not questioned here. The doctrine of incorporation *did* contribute to the abrogation of the original constitutional relationship between the federal

[4] Russell Kirk, *Rights and Duties: Reflections on Our Conservative Constitution* (Dallas, TX: Spence Publishing Company, 1997), 110-125.

[5] *Cohen* v. *California*, 403 U.S. 15, 25 (1971).

[6] *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

[7] Russell Kirk, *The Politics of Prudence* (Wilmington, DE: ISI Books,1993), 32.

[8] Kirk, *Conservative Mind*, 47.

government and the states, and it was inspired by liberal and radical mindsets. But a conservative cannot be limited to lamenting changes with which he disapproves. He must make the best of his circumstances. An incorporated First Amendment is part of the circumstances within which a constitutionalist must work.

Below, I will describe the essential elements of Kirk's constitutional thought, including his defense of judicial interpretation as a means of constitutional change. Then I will outline the four principles that he describes as essential to a "desirable constitution." After that I will turn to a defense of an incorporated First Amendment, linking my points to elements of Kirk's constitutional thought, especially the four qualities he attached to a good constitution.

Kirk's Constitutional Thought

Kirk's constitutional thought, like the rest of his work, is animated by his conservative philosophy. While he barely mentions the United States Constitution in *The Conservative Mind*, a fact he explicitly notes,[9] he devotes several other works to an elaboration of the conservative nature of the American constitutional order. In *The Roots of American Order*,[10] Kirk argues that the story of American order, including its constitutional order, is the story of five cities: Jerusalem, Athens, Rome, London, and Philadelphia. Only by understanding that history can one understand the elements of the unwritten constitution that undergird American political existence, including the articles and clauses of the written Constitution. *The Conservative Constitution*,[11] re-published posthumously in a somewhat different form as *Rights and Duties: Reflections on our Conservative Constitution*, contains a series of essays that explore the intellectual influences and historical context of the American Constitution as well as judicial controversies over property rights, freedom of speech, religious liberty, and the like. Finally, in *America's British Culture*,[12] Kirk explains the profound influence of British literature, legal history, governmental structure, and mores in American life. According to Kirk, American culture is effectively British culture, and by extension American consti-

[9] One of the only times he mentions the U.S. Constitution in *The Conservative Mind* is toward the end of the second chapter, where he writes: "In this chapter on Federalists, their great monument has barely been mentioned: the Constitution of the United States of America." Kirk, *Conservative Mind*, 110.

[10] Russell Kirk, *The Roots of American Order*, 4th ed. (Wilmington, DE: ISI Books, 2003).

[11] Russell Kirk, *The Conservative Constitution* (Washington, DC: Regnery Gateway, 1990).

[12] Russell Kirk, *America's British Culture* (New Brunswick, NJ: Transaction Publishers, 1993).

tutionalism is essentially a particular late development of British constitutionalism.

Kirk believed that "every country possesses two constitutions, existing side by side, yet distinct. One of those is the formal constitution of modern times; the other constitution is the old 'unwritten' one of political compromises, conventions, habits, and ways of living together that have developed among a people over the centuries."[13] In the American Constitution Kirk perceived a culmination of previous centuries of constitutional and political development. This was for Kirk its essential strength. At the center of Kirk's argument is the contention that the success of the *written* American Constitution, the one sent to the states for ratification in 1787, is due to the fact that it is consonant with its *unwritten* constitution.

When forming the written constitution, a country must take into account the whole body of social institutions, political habits, and social mores that provide the foundational order upon which political society depends for stability and longevity. Only by carefully adhering to the underlying unwritten constitution can the written constitution "achieve in a society a high degree of political harmony, so that order and justice and freedom may be maintained."[14] The basic function of preserving political order makes all constitutions conservative. They must be conservative in this way to be constitutions at all. "But," Kirk writes, "the Constitution of the United States, over two centuries old, is especially and deliberately conservative of a social inheritance."[15]

Conservative Constitutional Change and Judicial Interpretation

No order is unchanging, as if it were passed down by a Lycurgus never to be altered. Whatever the patrimony of Jerusalem, Athens, and Rome, Western order changed as it filtered through London's historical experience. Likewise, the American inheritance of London's historical experience was not uniform. It was sifted as that experience crossed the Atlantic, mostly through the dissenters of English political and religious conflicts. Such change continues to this day, Kirk writes. "This American order is not immutable, for it will change in one respect or another as the circumstances of social existence alter."[16] Change happens, but, Kirk warns in his second canon of conservatism in *The Conservative Mind*,

[13] Kirk, *Rights and Duties*, 4.
[14] Ibid., 5.
[15] Ibid., 6.
[16] Kirk, *Roots*, 9.

the conservative "[recognizes] that change may not be salutary reform: hasty innovation may be a devouring conflagration, rather than a torch of progress."[17] When change occurs contrary to conservative principles a conservative must practice prudence in adapting to change, engaging in a salvaging effort, finding good in the present political and constitutional order and reforming accordingly.

While the Fourteenth Amendment arguably incorporated the First Amendment upon the former's adoption in 1868,[18] the actual change in jurisprudence did not effectively take place until 1925, and the mode of change was judicial interpretation of the due process clause of the Fourteenth Amendment.[19] Kirk acknowledges that judicial interpretation is an acceptable means of constitutional change. He quotes Edmund Burke that "Change is the means of our preservation" to support this point, adding: "No matter how plainly and lucidly written, any statute—let alone any constitution—requires interpretation by judges."[20] For Kirk, this was not a defense of the progressive "living constitution," which seeks to impose social change through judicial fiat, but a recognition that change in the unwritten constitution is a social and historical reality and that such change may be either salutary or destructive. When the unwritten constitution changes, the written constitution must change with it.

Judicial interpretation is one means by which the written constitution may be adjusted to account for changes in the unwritten constitution. "It seems preferable usually to permit judges to modify laws by degrees," Kirk writes, "rather than to take the risk of damaging the whole frame

[17] Kirk, *Conservative Mind*, 9.

[18] There has long been a great debate over whether and to what extent this statement is true. Some scholars and jurists have argued for full incorporation of the Bill of Rights, others for selective incorporation, incorporation plus, selective incorporation plus, and the like. See David O'Brien, *Constitutional Law and Politics* Vol. II, 9th ed. (New York, NY: W.W. Norton & Co., 2014), 336-45, for a brief overview of the contours of the debate and case law. See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986) for the case that the "privileges and immunities" protected by the Fourteenth Amendment referred to the Bill of Rights.

[19] *Gitlow* v. *New York*, 268 U.S. 652 (1925). The court wrote in dictum: "[W]e may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." While the court acknowledged that the right to freedom of speech was enforceable against the states, it upheld the conviction of four men for speech advocating the violent overthrow of the government.

[20] Kirk, *Rights and Duties*, 18.

and spirit of law by frequent legislative and executive intervention."[21] The same is true of interpretation of constitutional clauses. What is primarily required is that new judicial interpretations cohere with changes in the unwritten constitution, the social fabric, while remaining in fundamental continuity with the past.[22] Kirk writes that one of the strengths of the American Constitution is that it "may be adapted to altered social circumstances without resort to force or even to extreme language."[23]

Kirk's concern is that the court's interpretations of the First Amendment in the twentieth century are what Russell Hittinger calls constitution*alizing*, not constitution*al*.[24] Constitutionalizing is the practice of judicial-led social change, altering interpretations of constitutional clauses to promote social and academic fads. Kirk's prime example of this sort of constitutional interpretation is the court's obscenity cases which constitution*alized* cultural and academic trends toward permissive sexual mores with the intent of achieving a particular cultural outcome. While Kirk felt similarly about the incorporated First Amendment as a general matter, an incorporated First Amendment may be constitution*al* in the unwritten sense, adapting the court's jurisprudence to a changing social landscape in a manner not all that dissimilar from the American adaptation of English constitutional principles in the Constitution of 1787 and the original Bill of Rights. While the circumstances of incorporation and many of its effects may not be to the Kirkian traditionalists' liking, there is still a fundamental continuity with the old order and with the unwritten constitution. The conservative's task, then, is to home in on that connection to the past and to strengthen it.

This calls into play Kirk's dictum that "salvaging is a great part of conservatism."[25] Conservatives ought to respond to incorporation by accepting it and seeking to shape First Amendment jurisprudence in a manner consistent with conservative concerns and to make it align as far as is possible with the spirit if not the letter of the old Constitution. In this way, the incorporation of the First Amendment against the states may be so interpreted that the Old Constitution still stands even if in altered form. While the structural integrity of the original Constitution may be compromised, its fundamental tenets, the basic principles that

[21] Ibid., 27.

[22] The formulation of this standard is vulnerable to much conservative criticism. It requires caveats and definitions that are beyond the scope of this article. But it does capture in a preliminary way Kirk's practical conservative approach to change.

[23] Kirk, *Rights and Duties*, 244.

[24] Russell Hittinger, "Introduction," in Kirk, *Rights and Duties*, xvii-xviii.

[25] Kirk, *Politics of Prudence*, 32.

make it a good constitution, may be preserved.

Characteristics of a Good Written Constitution

Kirk lays out four primary characteristics of a good written constitution.[26] First, "a good constitution should provide for stability and continuity in governing a country." Stability includes the requirement that citizens should be able to live ordered lives and be protected from the exercise of arbitrary power. Continuity means that the constitution has grown out of past institutional instantiations of good order. Second, "a good constitution should divide political power among different branches of government and should restrain government from assuming powers that belong to other social organizations, social classes or individuals." This feature of a good constitution includes two parts, one political and the other social. The first includes federalism, the delegation of power to local governments, and the separation of legislative, executive, and judicial powers in the general government among various branches. The second part refers to an even more fundamental divide between political power on the one hand—exercised by governments at the federal, state, and local levels—and social authorities on the other, often religious and civic organizations. Third, "a good constitution should establish a permanent arrangement by which holders of political authority are representative of the people they govern." There are various institutional arrangements that may embody this principle. It by no means requires direct democracy or proportional representation or even popular elections. The point is that there are procedures and institutional arrangements to ensure that those in power "have the best interests of the majority of the people at heart." Fourth, "a good constitution should hold accountable the persons who govern a state or a country." This too does not require direct democracy or even elections, although regular elections are one way to ensure that those who wield political power have to answer for their actions. The possibility of impeachment is another.

According to Kirk, the American Constitution fulfills each of these requirements. First, with the exception of the Civil War in the middle of the nineteenth century, it has provided relative stability and continuity on this side of the Atlantic for over two centuries. Furthermore, it is a continuation of institutional order and culture derived from Britain and rooted more broadly in the Western inheritance of Israel, Greece, and Rome. Rule of law has been the norm and the exercise of arbitrary power

[26] Kirk, *Rights and Duties*, 14-15.

the exception, the latter largely curtailed through the avenues of constitutional government. Second, whatever shifts in power between the states and the federal government and among Congress, the presidency, and the Supreme Court that have taken place since the late eighteenth century, these institutional arrangements still exist in basically the same form regardless of the massive growth of population and expansion of the United States from thirteen states to fifty. Third, through the design of election to the House from local districts, to the Senate from each state, and to the presidency by the nation as a whole,[27] the Constitution assures that those who exercise political power represent various constituencies throughout the country at local, state, and a general national level. Fourth, the American Constitution makes the president and all members of the Congress stand for regular elections. The president and the justices of the Supreme Court are also subject to impeachment.

Incorporation and the Good Constitution

The incorporation of the First Amendment undermines the first two of Kirk's basic qualities of a desirable constitution in important ways. First, incorporation is discontinuous with the traditional legal understanding of the First Amendment, producing instability by substituting the rule of judges for the rule of the people's representatives.[28] Second, it violates the division of powers between federal, state, and local governments.

Kirk's most frequently cited example of judicial overreach in incorporating First Amendment rights is the Court's obscenity jurisprudence. In the American legal tradition that Kirk discusses, freedoms of religion, speech, and press were those recognized by the English common law. The article "the" that precedes "freedom of speech" in the text of the First Amendment indicates that it is referring not to a general right of expression, but a particular legal doctrine of free speech as it had developed in the common law where there was no protection for obscene speech. Local censor boards were responsible for censoring publications considered indecent or obscene and were free to do so.

No federal court questioned this arrangement until the late 1940s. Even through the 1950s the High Court had a spotty record on upholding obscenity statutes, sometimes ruling for, sometimes against. But in *Memoirs* v. *Massachusetts* (1966),[29] the Court ruled that for material to be

[27] Through the Electoral College, of course.

[28] Kirk, *Rights and Duties*, 31.

[29] 383 U.S. 413 (1966).

legally obscene it must have a dominant appeal to a prurient interest in sex and be patently offensive to contemporary community standards as well as "utterly without redeeming social value,"[30] a virtually impossible test to fail. This requirement bolstered pornographers' ability to sell their material as long as it included some form of social commentary. In *Miller* v. *California* (1973),[31] the court pulled back from the *Memoirs* standard, referring instead to material appealing to what "the average person" would consider a prurient interest in sex considering "contemporary community standards" and further depicting sex in a "patently offensive way" that, taken as a whole, lacks serious literary, artistic, or scientific value. This standard, while imprecise, at least does not allow a publisher to avoid censorship merely by appending a vague and often mocking "social value" statement to a piece of obscene material.

In addition to undermining long-standing local authority to regulate obscene materials, the court's obscenity jurisprudence has produced social instability. What content is punishable, and what is not? The court's standards evolved between *Memoirs* and *Miller*, from one of absolute constitutional protection to something permissive but more nuanced. What are concerned citizens and pornographers alike to do? Kirk writes that the obscenity rulings demonstrate "the inefficacy of substituting personal and shifting value judgments of nine justices—who can form no consensus among themselves—for enduring moral standards derived from religion, philosophy, and a people's customs and conventions."[32] He would say the same of many of the court's other rulings applying the First Amendment to the states. They undermined continuity and stability in American political society.

The incorporation of the First Amendment also violates Kirk's second aspect of the good constitution by obscuring the division of powers, especially between the federal government and the state and local governments. This objection goes to the very heart of the text of the Fourteenth Amendment. Kirk's views of the Fourteenth Amendment were heavily influenced by the nineteenth century Catholic political philosopher Orestes Brownson. Writing in the late 1860s, Brownson "denounced the Fourteenth and Fifteenth Amendments as destructive of the old Constitution's purpose."[33] Brownson was virulently anti-slavery, but he believed that the anti-slavery cause should be won through constitutional

[30] Kirk, *Rights and Duties*, 205.
[31] 413 U.S. 15 (1973).
[32] Kirk, *Rights and Duties*, 208.
[33] Ibid., 229.

channels. Instead, passage of these amendments was accomplished through "political trickery and intimidation," according to Brownson, and not through proper constitutional acquiescence. The very purpose of these amendments was to diminish the power of the states in favor of the federal government, to erase the very distinction between state and federal powers that had been at the structural heart of the American constitutional order.[34] The Fourteenth Amendment even quotes verbatim the Fifth Amendment's due process clause, making it clear that the provisions of the Fifth Amendment, initially intended only to restrain federal power, also restrain state power.[35] This was the rationale the court used to justify its intervention in economic legislation of the states.[36] Later, it would use the same mechanism to apply the First Amendment to the states.[37]

The Fifteenth Amendment similarly violates the structure of the original constitution by depriving the states of the prerogative to determine who is allowed to vote, thereby, in Brownson's words, "destroy[ing] the state as a body politic."[38] One of the primary characteristics of a sovereign entity is its ability to decide who its citizens are. Prior to the Fifteenth Amendment, the states had that sovereign prerogative. After its passage that prerogative lay with the federal government. Kirk further quotes Brownson that these two Amendments "are revolutionary in their character and tendency, and destructive of the providential or unwritten constitution of the American people, according to which, though one people, they are organized as a union, not of individuals, but of states, or political societies, each with an autonomy of its own."[39]

I have granted two points that are essential to Kirk's arguments. First, in an important way incorporation breaks with the continuity of British and American constitutional development, especially in terms of legal precedent. Second, incorporation does violate the structure of the original constitution and the relation between the federal government

[34] Ibid., 231.

[35] The Fifth Amendment says, "no person shall...be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment likewise says, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

[36] Kirk, *Rights and Duties*, 230.

[37] The court abandoned its intervention in states' economic legislation in *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937). The following year it famously noted in dictum that violations of "fundamental rights" may be enforced against the states, retaining the use of the Fourteenth Amendment for incorporation purposes. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

[38] Kirk, *Rights and Duties*, 231.

[39] Ibid., 232.

and the states. Both of these developments have had destabilizing effects on the American constitutional and social order. An additional concern of Kirk's is that incorporation, especially in the obscenity jurisprudence, has been used to emancipate the individual from local customs that previously served as a restraint upon individual desire, thereby working mischief in the body politic, tugging at loose threads in the fabric of the unwritten constitution.[40]

Conservatism and the Salvaging of the First Amendment

Kirk's case against incorporation is consistent and compelling in the broad narrative he gives of traditionalist conservatism. Nonetheless, there are countervailing arguments that should mitigate his concerns. As noted earlier, Kirk described the work of a conservative as often that of salvaging. The remainder of this article is dedicated to demonstrating how the incorporated First Amendment may be salvaged in support of Kirk's conservative constitutionalism. My point is not that Kirk was wrong in the essentials of his constitutionalism, but that a particular understanding of the incorporation of the First Amendment and the rights it protects may contribute to the tenets of Kirk's desirable constitution and be consistent with his conservative philosophy more broadly.

First, the history of the textual freedoms of the First Amendment indicates that they were freedoms widely recognized and practiced by Americans as an essential part of the American constitutional system. While their incorporation may be a break from the legal tradition and constitutional theory of William Blackstone and English jurisprudence more broadly, their firm protection aligns with the customs and popular beliefs of many Americans who assumed for all practical purposes that freedom of religion, speech, press, petition, and assembly were essential rights. Americans largely practiced their religion, spoke and published their opinion, and associated with whom they desired as if these rights were guaranteed by law. Incorporation of the First Amendment allowed jurisprudence and constitutional theory to catch up with Americans' practice. From this perspective, an incorporated First Amendment fulfills Kirk's first feature of a desirable constitution through its cultural continuity with American customs and popular understandings of the textual freedoms of the First Amendment, an important part of the unwritten constitution.

Second, while it is true that an incorporated First Amendment ob-

[40] Ibid., 208.

scured the distinction between the states and the federal government and allowed the federal judiciary to intervene in state and local matters, it may help compensate for this damage by shielding social institutions such as religious and civic organizations from government interference. In this way an incorporated First Amendment fulfills the second part of the second feature of Kirk's good constitution, "restraining government from assuming powers that belong to other social organizations, social classes or individuals."[41]

Third, where Kirk worried that the court's First Amendment jurisprudence emancipated the individual from social restraint, the turn in First Amendment scholarship toward protecting institutionalism and assembly demonstrates how the First Amendment may protect the authority of social organizations to restrain their individual members. Kirk insisted that the order of the commonwealth depends upon order in the soul.[42] These organizations, autonomous in First Amendment law, provide the context for nurturing order in the soul through the exercise of social authority.

Free Speech and Free Press in the Unwritten Constitution

It is commonly accepted that religious liberty has been a part of the American constitutional inheritance from Britain. Kirk points out that the religious legacy in America was primarily the tolerance of the Anglican divine Sir Thomas Browne.[43] For the purposes of this article we will focus on the freedoms of speech, press, and assembly in the American unwritten constitution.

American freedom of speech, even in the colonial era, was a break with English practice if not theory. The primary justification for censorship in the English common law was libel. Blackstone defined libel as "malicious defamations of any person, and especially a magistrate, made public . . . in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule."[44] Seditious libel specifically referred to "defaming or contemning or ridiculing the government; its form, constitution, officers, laws, conduct, or policies, to the jeopardy of the public

[41] Ibid., 14.

[42] "[I]f the members of a society are disordered in spirit, the outward order of the commonwealth cannot endure." Kirk, *Roots*, 5.

[43] Kirk, *Roots*, 275-76.

[44] Quoted in Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, KS: University Press of Kansas, 1985), 48.

peace."[45] Truth was no defense for seditious libel. In fact, it was thought that truth actually exacerbated the libel on the grounds that if the criticisms were true their statement would only further degrade the government in the opinion of the people.[46] Truth as a defense was not allowed in English law until 1843.[47]

Seditious libel as a judicial concept remained salient in the theory of free speech in the American colonies and early American republic owing to the influence of Blackstone and the English common law in the colonies.[48] However, as Leonard Levy writes, "[l]aw in the books and law in practice, one must always remember, were not the same."[49] If the practice of freedom of speech and press is any indication, the American definition of seditious libel was assumed to be significantly more narrow than what was found in English common law. In other words, the *theory* of free speech and free press was restrictive, but the *practice* was expansive.[50] Furthermore, restrictions upon the common law definition of seditious libel, such as truth as a defense and trial by jury, were established much earlier in America than in England indicating that Americans had in practice a more protective definition of freedom of speech and of the press than did the English common law.

Colonial Experience

The wide influence of dissenter traditions in the colonies is typified by the popularity of *Cato's Letters*, important and influential treatises on liberty and constitutional rights, as well as a period of "salutary neglect"[51] that left the colonists convinced by the lack of interference by king or parliament that they were entitled to the rights asserted by "Cato" and other English political reformers. Published in 1720 as newspaper articles and in 1723 as a book, *Cato's Letters* defended a broad array of liberties, including freedom of speech. While originally appearing in England, *Cato's Letters* were reprinted in every newspaper in the colonies, exerting enormous influence on colonial political and constitutional

[45] Leonard Levy, *Emergence of a Free Press* (Chicago, IL: Ivan R. Dee, 1985), 8.

[46] Ibid., 7.

[47] Ibid., 212.

[48] Kirk, *Roots*, 368.

[49] Levy, *Free Press*, 15.

[50] Ibid., x. "[T]he American experience with a free press was as broad as the theoretical inheritance was narrow."

[51] "Salutary neglect" is Burke's term to describe British imperial policy toward the American colonies in the seventeenth and eighteenth centuries. Kirk used it with relish. See Kirk, *Roots*, 302-303.

thought. The language used by their authors, John Trenchard and William Gordon, became part of the American political and constitutional lexicon and appeared in state bills of rights as well as Madison's proposed national bill of rights.[52] While Cato does allow for seditious libel, he construes it narrowly,[53] arguing that freedom of speech is "essential to free government."[54] Such a view of freedom of speech was popular in the colonies despite its lack of support in English common law.

Truth as a defense and an expanded role for the jury in seditious libel cases were established in the famous trial of John Zenger, a printer who published criticisms of New York's royal governor in the 1730s. At trial Zenger appealed to truth as a defense for criticism. He called freedom of the press a right of "Freeborn Englishmen." The jury agreed and acquitted Zenger, violating the judge's instructions. According to English precedent, juries in cases of seditious libel ruled only on the fact of whether the accused had published the criticisms.[55] The judge decided the matter of law, whether the publication in question was seditious. The popularity of this case indicates that freedom of press was thought to constitute more in the American colonies than what was required in common law.[56] While there were some seditious libel prosecutions in the colonies after the Zenger case, they were rare. Generally, "[g]rand juries refused to indict; and petit juries refused to convict. Public pressure limited the legislators' practice of punishing those who criticized them."[57] The Continental Congress even made a declaration about free speech in its Address to the Inhabitants of Quebec.[58]

The War for Independence and the Early American Republic

After the War for Independence there was "nearly an epidemic degree of seditious libel that infected American newspapers."[59] These press outlets directed their criticism at the new governments in America with the same vitriol they had directed at George III during the War for Independence with little recognition that they could be punished under the

[52] Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham and London: Duke University Press, 2000), 37.

[53] Ibid., 39.

[54] Quoted in Ibid., 37-38.

[55] This requirement would only be removed in England by Fox's Libel Act of 1793. See Levy, *Free Press*, 212.

[56] Curtis, *Free Speech*, 41-44.

[57] Ibid., 46.

[58] Quoted in Ibid., 47.

[59] Levy, *Free Press*, x.

common law definition of seditious libel. "Whether [states had constitutional protection for the press] or not," Levy writes, "[colonial] presses operated as if the law of seditious libel did not exist."[60]

The passage of the infamous Alien and Sedition Acts of 1798 further demonstrated the expansive view that Americans took toward freedom of speech. The law broke from the traditional English understanding of seditious libel in two ways: it allowed truth as a defense and it required malice rather than simple error. Both of these stipulations were beyond the protections of common law.[61] The understanding of freedom of speech underlying the law was a modification of the English understanding, attributing to citizens the right to speak and publish in a manner and on matters that were considered parliamentary privilege in English constitutionalism.[62]

Even with these libertarian legal innovations, the law was controversial. Opponents of the Sedition Act among the Jeffersonian Republicans made two arguments against it. First, they argued that the law was beyond the power of the federal government, asserting the right of the states to protect free speech from the national government.[63] Second, they argued that limiting freedom of speech undermined popular sovereignty by limiting the ability of the people to criticize their elected representatives. Madison wrote a report for the Virginia legislature rejecting the view of free speech as no more than parliamentary privilege. He argued that the power of censorship was not appropriate to the American context since there was no sovereign parliament or king, but only a limited government that was representative of the sovereign people and accountable to them.[64] Even St. George Tucker, who tended to defend traditional English common law, noted that the republican nature of the American constitutional order required more liberty regarding speech than that allowed by England. "[J]ust as parliamentary sovereignty required freedom of debate in parliament that could not be controlled by the king, so in America popular sovereignty required a similar immunity for the sovereign American electorate."[65]

Further expansion of the common understanding of free speech developed in the debate over slavery and the experience of censorship during the Civil War. While there were many who would allow states to

[60] Ibid.
[61] Levy, *Free Press*, 45.
[62] McDonald, *Novus Ordo Seclorum*, 46.
[63] Curtis, *Free Speech*, 53.
[64] Ibid., 94-95.
[65] Ibid., 195.

censor speech, as abolitionist speech was silenced—sometimes by violent mobs—the idea of speech as an essential right of American citizens gained broad support. The killing of Elijah Lovejoy by an angry mob precipitated a groundswell of support for protections for free speech against government and mob alike, even among those who were not abolitionists.[66] Historian Michael Kent Curtis writes, "By 1837 [the year Lovejoy was killed], many people talked about the 'declaratory' nature of constitutional provisions protecting speech, press, petition, and assembly."[67] By 1856, freedom of speech had become an important tenet of the Republican Party's agenda appearing in its slogan, "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont."[68]

During the Civil War President Lincoln infamously used the military to suppress criticism of the war. One incident in particular precipitated a backlash of criticism for suppression of anti-war speech. In 1863, General Ambrose Burnside arrested Democratic politician Clement Vallandigham for a speech critical of the war. He was denied *habeas corpus*, convicted before a military tribunal, and banished to the Confederacy. The action was harshly criticized by pro-war and anti-war partisans alike.[69] The protest was so intense that Burnside offered Lincoln his resignation, which the president declined.[70]

At the heart of the public reaction to this incident was widespread rejection of the idea that the government has authority over speech. While in this case it was federal action to censor speech in time of war, the arguments against Lincoln and Burnside focused on speech as a basic right central to popular government. The right to criticize government action was thought essential to citizens of a free republic. The popular protest against Lincoln's actions in this case and others kept them from becoming more pervasive.[71]

I have focused above on the way in which an expanded understanding of free speech is essential to the unwritten constitution and therefore is consistent with Kirk's first principle of a good constitution. But the previous paragraph indicates that citizens' criticizing elected officials through the exercise of free speech and a free press also implicates Kirk's fourth principle: holding elected officials accountable.

[66] Ibid., 250.
[67] Ibid., 251.
[68] Ibid., 281.
[69] Ibid., 300-301, 330.
[70] Ibid., 314.
[71] Ibid., 352.

Assembly and Association in the Unwritten Constitution

There was a widespread understanding prior to the incorporation of the First Amendment that the right of assembly, the right to associate for any cause, was an essential American right.[72] This concern specifically with assembly and association dates from William Penn and the Quakers who had been forbidden from assembling more than five persons together "for any religious purpose not according to the rules of the Church of England."[73] In 1670, soldiers enforced the law and stopped Penn from entering his Quaker meeting-house. He delivered a sermon to the Quakers on the street and was arrested and brought to trial. The jury acquitted him on the charge of unlawful assembly. The case was famous on both sides of the Atlantic. Penn went on to found Pennsylvania and Delaware and write the "Pennsylvania Frame of Government," highly influential on American constitutional charters. Under his influence, colonists were dubious of the power the crown had exerted to suppress assembly for religious or other purposes.

The Assembly Clause provides only the textual limitation that assemblies be peaceable, not religious. Other entities throughout American history appealed to the assembly clause, and many more practiced the right of association with seeming impunity. In the 1790s, under the Federalist administration of President Adams, Democratic-Republican societies sprang up in various places throughout the states and consistently claimed the constitutional right to "assemble and consult upon the common good."[74] In the antebellum period abolitionists formed societies claiming protection under freedom of assembly for the formation of what in many parts of the country was a minority position.

After the civil war, assembly, like speech, was considered a declaratory right. A major theme of the 1866 presidential campaign was the protection of freedom of religion, speech, press, and *assembly* for all American citizens, especially the newly enfranchised former slaves.[75] State court decisions, constitutional provisions, and law treatises of the latter half of the nineteenth century reflected an understanding of assembly as a right essential to the formation of groups and a right that ought

[72] It is beyond the scope of this article to explain the relationship between assembly and association, but for our purposes here we shall use the two interchangeably. See John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven and London: Yale University Press, 2012), 63-117, for a discussion of the right of association in twentieth-century jurisprudence.

[73] Text of the 1664 Conventicle Act, quoted in Inazu, *Liberty's Refuge*, 24.

[74] Quoted from the Boston *Independent Chronicle* in Inazu, *Liberty's Refuge*, 26.

[75] Curtis, *Free Speech*, 363.

to receive significant protection in American society.[76]

One of the most famous and significant observations on Americans' practice of association was made by Alexis de Tocqueville in *Democracy in America*. Writing in the 1830s, he observes that "[o]f all the countries in the world, America has taken greatest advantage of association and has applied this powerful means of action to the greatest variety of objectives."[77] He writes of the pervasiveness of associations in America:

> Americans of all ages, of all conditions, of all minds, constantly unite. Not only do they have commercial and industrial associations in which they all take part, but also they have a thousand other kinds: religious, moral, serious ones, useless ones, very general and very particular ones, immense and very small ones; Americans associate to celebrate holidays, establish seminaries, build inns, erect churches, distribute books, send missionaries to the Antipodes; in this way they create hospitals, prisons, schools. If, finally, it is a matter of bringing a truth to light or of developing a sentiment with the support of a good example, they associate . . . there is scarcely so small an enterprise for which the Americans do not unite.[78]

Tocqueville's whole analysis indicates that association and assembly were essential practices, common customs of the American people from at least the early nineteenth century when Tocqueville wrote. Given the widespread practice of association, we can infer that, if they thought about it at all, nineteenth-century Americans believed they had the *right* to associate, even if they did not locate that right consciously in the First Amendment. Whether it was allowed through a sort of "salutary neglect" on the part of state and local governments or whether it was considered an essential privilege of a free people, many Americans indicated through their actions that they thought the freedom of association a given in the American system, a chartered right they practiced at will.

This brief historical overview is meant to demonstrate that the rights to free speech, press, and assembly were commonly understood to be essential rights for all Americans by a broad swath of the American public. They were from this perspective essential features of America's unwritten constitution, what conservatives would call customary rights, ones that citizens commonly practiced and commonly believed themselves to possess. This discussion suggests that an incorporated First Amendment is not a radical break with past practices, but in fact contributes to

[76] Inazu, *Liberty's Refuge*, 40-44.

[77] Alexis de Tocqueville, *Democracy in America*, trans. James T. Schleifer (Indianapolis, IN: Liberty Fund, Inc., 2012), 302-303.

[78] Ibid., 896.

the stability and continuity of American constitutionalism by protecting common customary practices of religion, speech, press, and assembly.

First Amendment Institutionalism

A third point about the unconservative nature of incorporation in general is that it emancipated individuals from social restraint through the exercise of federal judicial power. Kirk is especially concerned with this point in his discussion of the obscenity jurisprudence. But recent scholarship on First Amendment institutionalism indicates that an incorporated First Amendment, properly interpreted, may serve as a restraint upon political power while simultaneously enabling social restraint upon individual passions. This requires that the First Amendment be understood as securing corporate rights, rights that attach to social institutions.[79] The recent work of three First Amendment scholars makes the case that it does.

In *The Rise and Decline of American Religious Freedom*[80] constitutional scholar Steven Smith articulates an understanding of religious liberty as embodied in the First Amendment that is essentially the right of religious institutions to operate free from state power. Religious liberty is *libertas ecclesiae*, freedom of the church. The church in this understanding is an essentially *social* institution, one that is free of *political* interference. And the questions to which the church speaks are ones that are simply beyond the *jurisdiction* of the government.[81] Even though the First Amendment originally meant freedom of the church from *federal* jurisdiction, an application of that restriction to the states fulfills in an important way the proper meaning of the First Amendment, protecting the religious institutions from *political* interference, wherever that political power may be lodged. An important point here is that a church's protection from political interference ensures the authority of the church over its members in important ways.

First Amendment institutionalism is not limited to the free exercise clause or to the authority of religious organizations, but undergirds all First Amendment rights. So argues Paul Horwitz in his book *First*

[79] Unfortunately, as I have argued elsewhere, the court has paid little heed to this principle in its freedom of association jurisprudence. See Luke C. Sheahan, "The First Amendment Dyad and *Christian Legal Society* v. *Martinez*: Getting Past 'State' and 'Individual' to Help the Court 'See' Associations," *Kansas Journal of Law and Public Policy*, Vol. XXVII, No. 2 (Spring 2018).

[80] Steven Smith, *The Rise and Decline of American Religious Freedom* (Cambridge and London: Harvard University Press, 2014).

[81] Ibid., 70.

Amendment Institutions.[82] For Horwitz, First Amendment rights are put into practice primarily within institutions. Freedom of religion is lived out in churches, temples, mosques, and synagogues; freedom of speech is often performed in or by what the court has called "expressive associations";[83] freedom of the press is practiced in press outlets; and freedom of association or assembly is practiced in voluntary associations. Horwitz advocates a First Amendment jurisprudence that more explicitly recognizes the autonomy of First Amendment institutions.

Last, John Inazu argues in *Liberty's Refuge: The Forgotten Freedom of Assembly* that the assembly clause is a logical location for the protection of associational and institutional rights. While the assembly clause has been linked to the petition clause in a great deal of scholarly literature,[84] Inazu writes that "the text of the First Amendment and the corresponding debates over the Bill of Rights suggest that the framers understood assembly to encompass more than petition" and more than public meetings.[85] Because the assembly clause lacks the phrase "for the common good" and contains only the requirement that the assemblies be peaceful, it protects the autonomy of a vast array of social groups. While this may allow groups to be radical, to seek to undermine the political order, this protection is also essential to social conservatism, to the preservation of social institutions and their values from state interference.

While each of these scholars is arguing within the context of an incorporated First Amendment, it is one that recognizes a realm of autonomy attaching to institutions in the practice of First Amendment rights. This understanding of associational or institutional freedom provides a restraint upon political power at both the federal and state levels as well as restraint upon individuals. Implicit in the autonomy of these institutions is their ability to exert authority over the individuals who associate or assemble within them. The freedom of the church means the freedom of religious institutions to require of their adherents obedience in matters of doctrine and morals. Freedom of the press means the freedom of

[82] Paul Horwitz, *First Amendment Institutions* (Cambridge and London: Harvard University Press, 2013).

[83] "Expressive association" is the term coined by the court in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).

[84] The confusion arises from one nineteenth-century case, *Presser* v. *Illinois*, where the court wrote that "the purpose of the assembly was to petition the government for a redress of grievances." 116 U.S. 252, 267 (1886). However, many more cases define the right of assembly as the freedom to assemble for "any lawful purpose." See Inazu, *Liberty's Refuge*, 39-41.

[85] Inazu, *Liberty's Refuge*, 6.

institutions to determine *what* to publish, which means deciding *who* to publish. While the institutions may be radical in what they choose to publish, the very fact that they may exercise discretion over individual expression is a restraint upon individuals. In a similar manner "expressive associations" channel the speech rights of individuals, providing form and force to individual speech, but also chastening individual expression according to the expressive prerogatives of the group. The right of assembly is similarly a protection of the authority of associations over their members for whatever peaceable reasons they exist. The merit of incorporating the assembly clause does not assuage the problems of the obscenity jurisprudence, but one need not accept the application of incorporation to every component of the Bill of Rights to see its value in preserving a realm of social authority from political intrusion.

Conservative Objections

There are a number of conservative objections to what I have argued here. For example, by permitting "incremental change" through the interpretation of judges my jurisprudence slips too close to the "living constitutionalism" of progressive scholars. What would be the difference in practice between the conservative judicial interpretation I argue for here and that of a progressive justice such as William Brennan?[86] Kirk himself argued for a degree of "original intent" jurisprudence on the grounds that it provided some form of restraint upon federal judicial discretion.[87] It avoids "what might be termed an *archonocracy*—a national domination of judges."[88] The standard I have laid out for a judicial interpretation that "cohere[s] with changes in the unwritten constitution, while remaining in fundamental continuity with the past" needs a great deal of unpacking. I could be accused of accepting a sort of judicial "magic amendment machine"[89] comparable to Bruce Ackerman's theory of constitutional change. Ackerman relies on a theory of "higher lawmaking" outside of

[86] "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time." William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review* Vol. 27: 433, 438 (1986).

[87] Kirk, *Rights and Duties*, 18-31.

[88] Ibid., 31.

[89] See Ch. 6, "Bruce Ackerman's Magic Amendment Machine," in Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago and London: The University of Chicago Press, 2002), 97-121.

constitutional amendment by radical reformers, some of whom are in the judiciary, which is in turn ratified by popular acquiescence to the change.[90] In other words, the interpreters of the written constitution enforce upon the people changes in the unwritten constitution, which they ratify by failing to revolt. This is but one of many valid concerns for people of traditionalist conservative views.

What I have attempted to sketch here is a way in which Kirk's constitutional principles may be respected in a post-incorporation constitutionalism by seeing in First Amendment rights to religion, speech, press, and assembly part of the "chartered rights of Americans" and by opening the door for further traditionalist inquiry into the meaning of an incorporated First Amendment. I undertake this particular inquiry in the centennial year of Kirk's birth with an appreciation for the fundamental theoretical orientation of his constitutionalism.

[90] See Bruce Ackerman, *We the People: Foundations* (Cambridge and London: Belknap Press, 1991) and Bruce Ackerman, *We the People: Transformations* (Cambridge and London: Belknap Press, 1998).