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Reclaiming the Conservative Constitution

By Senator Spencer Abraham

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Reclaiming the Conservative Constitution

The Honorable Spencer Abraham

I appreciate the chance to be with you today and to speak in this distinguished series of lectures, named after a true friend and great scholar, Russell Kirk. Russell affected the lives of many people, both through his writings and through personal contact. I remember my first meeting with him. At that time, I was joined by a not-yet-famous State Representative and a number of other political hopefuls as we traveled to Mecosta for a meeting with the Kirks. I came away with a number of books, of course, which I still treasure.

The State Representative who joined me has gone on to become rather well-known as Governor John Engler, and whatever success I have had I also owe to experiences like the one I had in Mecosta.

My relationship with Russell and his wife Annette Kirk did not end with that meeting, however. Russell helped in many ways with the founding of the Federalist Society and the *Harvard Journal of Law & Public Policy*. What is more, when I was the Michigan State GOP Chair, Russell and Annette were extremely helpful in putting out the fires that threatened party unity during the 1988 election. We were successful in bringing the party together, and ultimately successful in the election. I will always remember those years with fondness and gratitude.

Kirk left us three years ago today, and it was a great loss, but I think that we should be celebrating his legacy. And it is an important—and in important ways hopeful—legacy. He left us well over 30 books, and thanks to his wife, Annette, we can look forward to seeing still more of his work in collections of his most important essays.

Central to his work is the belief that we must help preserve the "permanent things." In daily life, perhaps the most important of these are religious truth, individual virtue, our duty to care for one another, and maintenance of traditions that help us learn to act as we ought to act. Also key was Kirk's recognition that politics cannot give us these permanent things. Politics is the art of the possible. It should aim at balancing the needs of freedom and order by protecting society's fundamental institutions.

A primary means by which we organize our political life is our Constitution. Kirk once said that "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." Maintaining this harmony does not entail a "war on poverty" or any other utopian project. It means protecting the institutions that allow people to go about their lives, following permanent standards of good conduct.

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Today we face dangers to our way of life from an intrusive federal government, taking for itself powers that belong to the states or the people; from an activist judiciary that interferes with the ability of the people to deal with one another as they should; and from the breakdown of public standards of civility. In addressing these challenges, I think we would do well to look at the vision of a Conservative Constitution that is so much a part of Russell Kirk's legacy.

I would like to talk about three fundamental aspects of the Conservative Constitution that we have begun to lose, as well as some reforms I think can help us reclaim them. These fundamental aspects are federalism, or what Kirk called "territorial democracy"; our unwritten constitution, the shared customs and practices on which public peace and well-being rely; and, finally, order itself, for without order there can be no freedom, no prosperity, no real nation.

FEDERALISM

The first aspect of a Conservative Constitution we must reclaim is federalism. Local governments are familiar with the circumstances of their people. They know best what policies will work and will be accepted; they know best how to follow the will of the governed effectively. Unfortunately, for decades now, the federal government in Washington, D.C., has been usurping powers that belong to our states and localities.

Thankfully, in its last session, Congress finally returned control over significant welfare policy decisions to the states. States now can set up work requirements, time limits, and other programs to encourage people to get back into the workforce so that they can lead productive lives.

At least as important, the federal government no longer forbids states and localities to cooperate with faith-based nonprofit organizations. For too long, Americans who need help have been forced to look to the government and its bureaucratic forms. It is time we returned some responsibility to faith-based organizations that can actually help people lead better lives.

No longer will faith-based groups have to give up their religious character to receive government money as they seek to help people who need them. Also, by returning control over important issues to the local level, these reforms will help revitalize local government and make it important, once again, to the people.

I believe welfare reform should be the beginning of a rebirth of local control and federalism in our country. That is why I am re-introducing legislation to require that a Constitutional Authority Clause be included in every bill considered by Congress. The clause would state which section of the Constitution grants Congress the authority to pass each particular bill. This will help us recapture the limits on federal power given us by the Constitution's Article I and the Tenth Amendment. It will perform three important functions:

- **First,** it will encourage Members of Congress to consider whether the action they are considering should be taken by the states or left to the people rather than being carried out by the federal government.
- **Second,** it will put Congress's view concerning its proper powers on the record for the people to judge. This will encourage politicians and citizens to reflect on the proper distribution of powers in our federal system.

- **Finally,** this statement will help courts evaluate legislation's constitutionality. Convincing statements of authority will clear up many questions. Unconvincing ones will help courts and the people hold Congress responsible for overreaching its proper powers.

OUR UNWRITTEN CONSTITUTION

The Constitutional Authority Clause would help us regain the limits on central authority built into our written Constitution. But we should be just as concerned to preserve our unwritten constitution.

Our written Constitution rests on centuries of law and political experience. It incorporates our legal, religious, and practical traditions, and we allow these traditions to atrophy at the risk of losing our constitutional order.

Kirk argued that "no 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." I agree with Kirk on this point, and I find it ironic that some people are misinterpreting our written Constitution in such a way as to undermine the unwritten constitution that gives it life.

One of the fundamental bases of our moral order—recognized by Judaism, Christianity, and Islam alike—is the Ten Commandments. The moral principles laid out in these commandments, including love of God as well as rules against murder and perjury, literally gave birth to our society. We ignore them at our peril. Unfortunately, at least one judge has sought to bar expression of these principles from our public square.

Recently, an Alabama judge ordered his colleague, Judge Roy S. Moore, to stop displaying the Ten Commandments in his courtroom. This ruling, now on hold, rests on the mistaken belief that the Constitution's Religion Clause forbids such displays. It also rests on hostility toward public affirmations of our religious and legal heritage. It can only undermine our adherence to the principles underlying our legal order.

A resolution introduced by my colleague, Jeff Sessions, would state that Judge Moore should be allowed to continue displaying the Ten Commandments in his courtroom. I believe that this is the appropriate response.

CONSERVATIVE DISPUTE RESOLUTION

By attacking public displays of religious belief without sound bases, courts undermine the public civility they claim to seek. Civility and community cannot exist without trust, and trust requires common rules of conduct. The Ten Commandments are at the base of such rules in our society, but our rules also include numerous customs, including those governing how we settle disputes.

Since I became a United States Senator, I have been particularly concerned about the litigation explosion because I believe that lawsuit abuse is tearing our society apart. It is destroying mutual trust and undermining our ability to help one another and maintain a decent society. It is turning neighbors into potential plaintiffs and defendants.

Frivolous litigation is expensive. The research group Tillinghast reports that Americans spent $132 billion on civil courts in 1991 alone. Tort costs add 2.2 percent, on average, to a product's price. They add $500 to the price of a new car and $170 for a motorized wheelchair.

Concerned by these costs, I have sponsored broad civil justice reform. Unfortunately, no broad reform has made it past the President. This is unfortunate for our country, particularly because a primary victim of the litigation explosion is our nonprofit sector. Let me tell you what I mean.

The United States has a network of 114,000 nonprofit organizations, ranging from schools to hospitals to food programs. All told, they engaged in $465 billion worth of nonprofit activity in 1990 alone. Nonprofits care for the poor and the sick, counsel the troubled, comfort the weary, and teach all of us how to care for our fellow man. They rely heavily on volunteers, who become the backbone of our civil society. According to Independent Sector, Americans donated 9.7 billion hours of their time to nonprofits in 1993.

Unfortunately, the percentage of Americans volunteering dropped from 54 percent in 1989 to 48 percent in 1993. Combined with rising costs, this loss of volunteers is hurting our nonprofits. Even if government could take over the roles of these volunteers—which it cannot—this would be a tragedy. As the noted French observer of American politics Alexis de Tocqueville noted long ago, "The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of voluntary associations."

This must not—and, in my view, need not—happen. We can and must see legal reform as part of a larger effort to restore civility to our public life. I firmly believe that, across the United States, people have an abundance of desire to help the less fortunate, to rebuild our cities, and stop moral decay in our society. But all too often, the federal government creates impediments and fails to provide the incentives we need to spur community renewal. The federal government's War on Poverty, for example, has been an obvious failure. We spent $5.4 trillion over three decades fighting poverty, yet today's poverty rate is essentially the same as in 1966.

We must promote non-governmental solutions to human problems, inviting, encouraging, and empowering charities, families, churches, small businesses, and community organizations to be more active in the hard, essential work of social renewal. We need to reduce governmental barriers to allow the culture and private sector to renew American society.

Our civil justice system, by allowing frivolous lawsuits into court, has become a significant barrier to voluntary activity that we can and must address. Insurance costs are one problem. John Graham of the American Society of Association Executives testified before Congress last year that association liability premiums went up an average 155 percent in recent years.

What kinds of suits add to insurance costs? The ASAE reports on a New Jersey umpire forced by a court to pay a catcher $24,000. Why? While playing without a mask, the catcher was hit in the eye by a softball. He complained that the umpire should have lent him his mask.

Even insurance cannot cover all the costs of lawsuit abuse. Charles Kolb of United Way says deductibles for his organization fall into the $25,000–$30,000 range. When, as in recent years, the organization faces three or four lawsuits per year, $100,000 or more must be diverted from charitable programs.

Another problem is joint and several liability, in which one defendant is made to pay for all damages even though responsible for only a small portion. Such findings are a severe burden on United Way, a national organization sponsoring numerous local nonprofits. Although it cannot control local operations, United Way often must defend itself in suits arising from injuries caused by the local entity. Such findings also discourage large organizations from cooperating with smaller, more innovative grassroots nonprofits.

These litigation-spawned problems endanger our nonprofits and our nation. To the extent we allow our charitable organizations to be hampered by frivolous lawsuits, we impair our society's capacity to care for those in need and to teach caring to its rising generation.

Now, I know that President Clinton has been participating in an important summit on the role of volunteers in our society. I congratulate him for that, as I congratulate General Colin Powell and former President George Bush for their participation. But if the President wants to do something substantive for volunteers in this country, I would urge him to support legislation protecting them from frivolous lawsuits.

That is the intent behind the Volunteer Protection Act, legislation authored by Senator Paul Coverdell (R–GA), Senator Mitch McConnell (R–KY), and myself. This bill protects volunteers from liability when they have acted properly or in simple negligence. Volunteers who truly exceed the bounds of appropriate conduct should be liable, but in the many ridiculous cases where no wrongdoing occurs, they should not face lawsuits.

In lawsuits based on the actions of a volunteer, the bill limits punitive damage awards to cases in which the volunteer acted willfully or criminally, or showed a conscious, flagrant disregard for the rights and safety of the individual harmed. This should ensure that punitive damages, which are intended to punish a defendant and not to compensate an injured person, will be available only where the defendant's conduct merits punishment.

The bill also protects volunteers from excessive joint and several liability. It provides that the defendant volunteer, nonprofit, or government entity will be jointly and severally responsible for the full share of economic damages, but for noneconomic damages only in proportion to the harm that defendant caused.

Finally, this bill was drafted to respect the role of the states in our federal system. It does not preempt state legislation providing greater protections to volunteers. Indeed, it permits a state, in cases involving only parties from that state, to enact a statute opting out of the Volunteer Protection Act altogether. Probably no states will do so, but respect for federalism demands that they be given the option.

These reforms can help create a system in which plaintiffs sue only with good reason, and sue only those responsible for their damages—and in which only responsible parties must pay.

Such reforms will create an atmosphere in which our fear of one another is lessened and our ability to join associations in which we learn to care for one another is increased. And that will make for a better America. Protecting volunteers and restoring public rules discouraging lawsuits will help shore up the customs of mutual trust and aid crucial to our unwritten constitution.

RESTORING ORDER

There is one final element of our Conservative Constitution that I would like to address: order. Kirk often said there can be no freedom without order. Yet for years we have allowed criminals to undermine public standards and endanger our public through improper interpretations and expansions of their rights.

Last year, I sponsored the Prison Litigation Reform Act. The PLRA, which has become law, was designed to rein in frivolous prisoner lawsuits and needless prison micromanagement by federal judges. Over 95 percent of prisoner lawsuits are found to be without merit, but they divert an enormous amount of state and local time and resources away from incarcerating dangerous offenders. The National Association of Attorneys General estimates nationwide costs at $81.3 million. At one point, there were more prisoner lawsuits in this country than there were criminal prosecutions.

To halt frivolous inmate litigation, the PLRA penalizes filers of non-meritorious cases. It also limits attorney's fees to reasonable levels and to cases in which a prisoner's rights have actually been violated.

The PLRA also limits judicial interference in our prisons. Prisons in some 39 states, including 300 of the nation's largest jails, are being micromanaged by federal courts at huge public expense. The court orders, including one rising from a lawsuit against the Michigan prison system, regulate everything from how warm the food is to whether prison barbers are licensed; they are undermining the legitimacy and the punitive and deterrent effect of prison sentences.

Even worse are decrees that "cure" prison crowding by releasing dangerous criminals. The most egregious example is in Philadelphia, where a federal judge for eight years oversaw releases of up to 600 defendants per week to keep the prison population at an "appropriate level." Even a murderer, if his current arrest were for a "non-violent crime," was freed pending trial—and "non-violent crimes" included stalking, carjacking, drug dealing, manslaughter, and terroristic threats. Thus, tragically, in one 18-month period alone, 9,723 criminals out on the streets because of the cap were rearrested for new crimes, including 79 murders, 959 robberies, 2,215 drug-dealing charges, 90 rapes, and 1,113 assaults.

All of this would be bad enough if the order were needed to correct serious constitutional violations. But it was not. A different federal judge recently found that conditions in what is widely regarded as Philadelphia's worst facility—Holmesburg Prison—met constitutional standards.

Convicted criminals, while they must be accorded their constitutional rights, deserve to be punished, and law-abiding citizens should not have to pay for prison comforts required by neither Constitution nor law merely because a federal judge finds them desirable.

The PLRA forbids courts from entering orders for prospective relief (such as regulating food temperatures) unless necessary to correct violations of individual plaintiffs' federal rights. It also requires that relief be narrowly drawn, use the least intrusive means, and take into account any adverse impact on public safety or operation of the criminal justice system. And the act forbids courts from releasing criminals unless they first ordered less intrusive relief that failed to cure the violation of federal rights. Just as important, old prospective relief orders will be terminated unless the court finds that the original rights violations still exist.

These reforms will decrease prisoner lawsuit abuse, return order to our prisons, and keep dangerous criminals off our streets. Indeed, early figures indicate that prisoner lawsuit abuse is

already on the decline. The prison reform model is working. It has succeeded in putting rational restraints on judicial power. It shows, I believe, that we can rein in judicial activism. In light of that, I believe we should look to this model in passing further reforms to correct other instances of judicial overreach, and I will be working on this in the near future with my colleagues in the Senate.

These reforms can help us regain our determination to punish crime and maintain public order, both of which are necessary if we are to protect our people and maintain the fundamental peace and stability necessary to the survival of any community.

Order is necessary for society to survive, but it would be inappropriate to end a Russell Kirk lecture on so negative a note as prison behavior. Instead, I would like to point out an obvious fact that we in the conservative camp are too likely to overlook: Our Constitution has survived the trials of a growing, industrializing nation, of a Civil War and two World Wars. It will survive its current crisis—the onslaught of judges who fail to respect its meaning and intent—provided we retain our faith in it, and in the fundamental unwritten constitution of our nation.

So long as we are willing to fight for the fundamental principles that made our people the great, free, and ordered nation we still are, renewal will be ours, and we can reclaim the Conservative Constitution that is our patrimony.