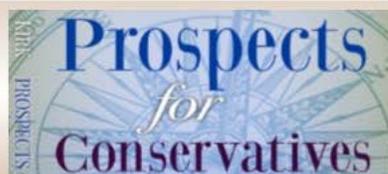


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## The Next President and the Supreme Court

■ Politics ■ Government ■ Presidency ■ Supreme Court by [Allen Porter Mendenhall](#)

It's campaign season again. Rand Paul, Ted Cruz, Hillary Clinton, and Marco Rubio have already announced their bid to become president. More politicians are expected to follow suit.

These candidates will, we can be sure, equivocate, pontificate, prevaricate, and grandstand about any number of issues in the coming months, but the one that should be the most important to voters—the one that has the potential to reshape the domestic landscape for decades to come—is judicial philosophy.



That's because the next president is likely to nominate up to three, possibly even four, candidates to the U.S. Supreme Court. In January 2017, when the next president takes office, Justice Ginsburg will be just shy of 84, Justices Scalia and Kennedy will be 80, and Justice Breyer will be 78. Of the current justices, Justice Ginsburg and Justice Scalia are, arguably, the farthest from one another on the spectrum of left to right. Replacing either of them would have a substantial impact on future decisions of the Court and, hence, on the rules and institutions that govern our country.

If a Republican were elected in 2016, he or she could offset the loss of Justice Scalia with a conservative nomination and then gain a seat with a conservative replacement for Justice Ginsburg. If Justice Breyer

were to retire as well, then a Republican president could change the makeup of the court: Justice Kennedy would remain the swing vote, but only Justice Sonya Sotomayor and Justice Elena Kagan would occupy the left wing of the Court. That would mean, in the most momentous cases, there would be a predictable conservative majority of six, with Justice Kennedy, who often sides with the conservatives, likely adding a seventh conservative vote.

A consistent 7-2 majority on the Court under a Republican president and a Republican Congress could go great lengths toward restoring conservative principles to our constitutional order. However, a Democratic president could tip the balance of the Court to the left by replacing Justices Ginsburg and Breyer with stock liberals and then filling Justice Scalia's seat with a liberal. Although unlikely, Justice Kennedy could retire during the next president's term, making possible four seats to be filled by liberal justices, who might gain a 6-3 majority on the Court. Justice Ginsburg insists she isn't stepping down until she's unable to complete her duties, so the chances that President Obama will choose another nominee for the High Bench are getting slimmer by the day.

The Senate Judiciary is made up of 11 Republicans and 9 Democrats, a majority that reflects the 54-member majority which Republicans enjoy in the Senate body. A Republican president, with these numbers in the Senate, could push through more traditionalist and philosophical conservatives and not simply confirmable moderates such as Chief Justice John Roberts, who has repeatedly disappointed conservatives, most notably in his ruling that Obamacare's individual mandate constituted a "tax."

All of this begs the question: What, exactly, is a conservative jurist? The answer isn't clear in our constitutional system. The operative rule in any given case depends on a complex of facts colored by the slanted narratives and technical arguments of lawyers who mine case precedents for relevant legal trends and patterns. Most cases involve issues that cannot be described in any unqualified sense as "political."

Robert Bork energized Republicans around the doctrine of judicial restraint, which is most recognizable in the teachings of James Bradley Thayer and the writings of Justice Oliver Wendell Holmes, Jr., and Justice Felix Frankfurter, who are not widely accepted as conservatives. Rand Paul recently joined a growing chorus of libertarians who reject Bork's enthusiasm for judicial restraint. Paul has praised what he calls "judicial activism," a mode of judging at odds with Bork's tempered approach. Perhaps under advisement, Paul has distanced himself from his remarks about judicial activism and lately decried "out-of-control, unelected federal judges."

It won't be long before the Republican candidates square off during the spectacle of televised debates. Conservatives ought to press their candidates on judicial philosophy and challenge those candidates to articulate views on judges, landmark cases, and schools of jurisprudence.



Confidence in the U.S. Supreme Court has dropped in recent years, yet voters have not prioritized the makeup of the Court or judicial philosophy in the past two presidential elections. As Chief Justice Earl Warren and Justice David Souter demonstrated, presidents can lack the foresight to nominate reliable justices.

No conservative should put faith in any set of candidates willing to ingratiate themselves with voters at the expense of principles and ideas, but the fact of the matter is that there will be a president who succeeds President Obama. That president, for better or worse, will have the power to nominate individuals for seats on the High Court. If

conservative voters would place judicial philosophy and Supreme Court nominations high on the list of priorities during this relatively short election season, they might just ward off long-term problems and aggravations that, once embedded in the legal system, are difficult to undo.

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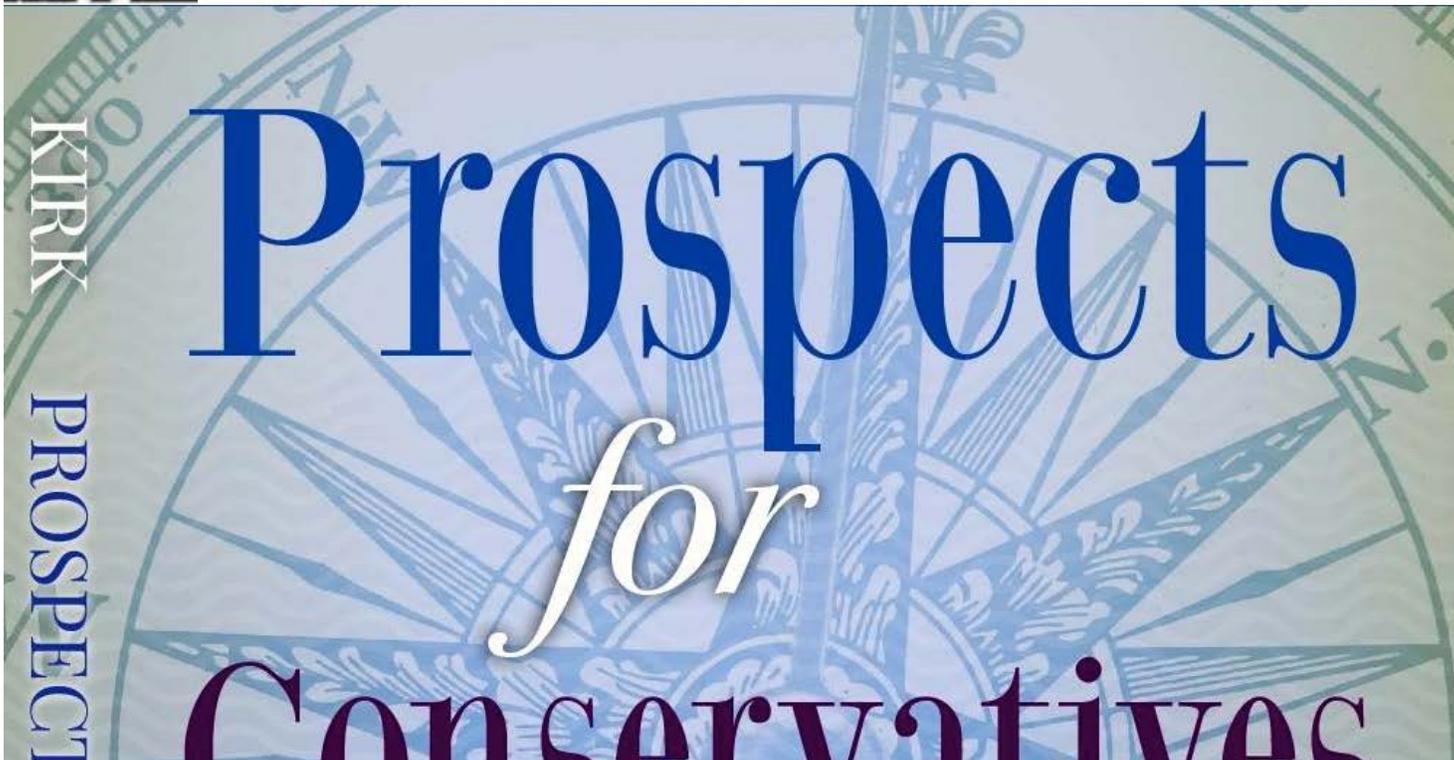


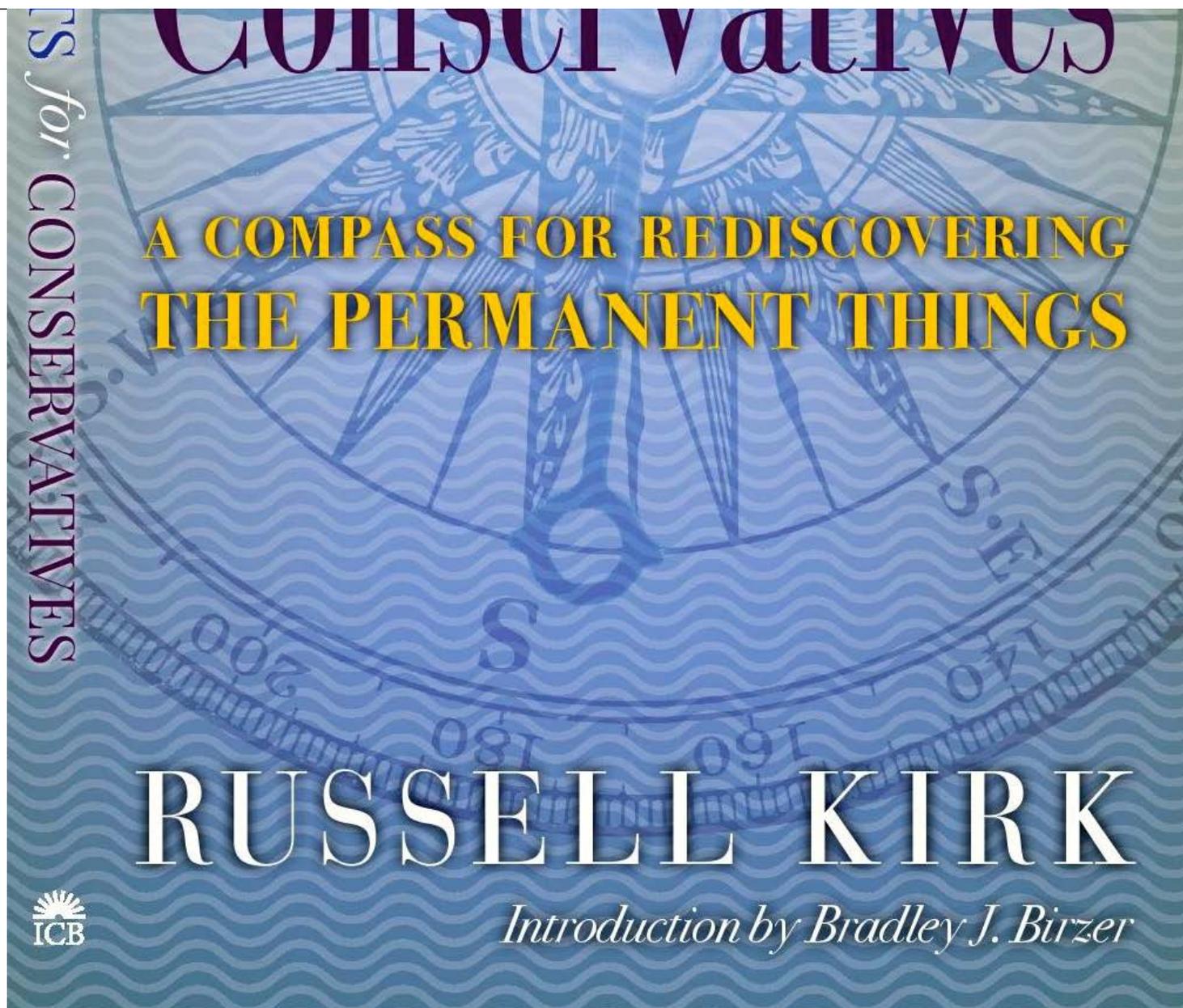
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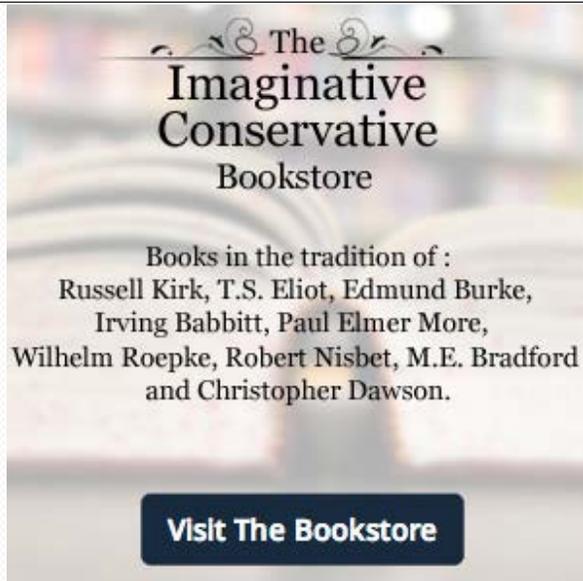


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