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Constitutional Myths and Realities

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The following is adapted from a speech delivered on April 29, 2003, at a Hillsdale College National Leadership Seminar in Dearborn, Michigan.

The United States has enjoyed unprecedented liberty, prosperity and stability, in large part because of its Constitution. I would like to discuss a number of myths or misconceptions concerning that inspired document.

Myth or Misconception 1: *Public policies of which we approve are constitutional and public policies of which we disapprove are unconstitutional.*

It might be nice if those policies that we favor were compelled by the Constitution and those policies that we disfavor were barred by the Constitution. But this is not, by and large, what the Constitution does. Rather, the Constitution creates an architecture of government that is designed to limit the abuse of governmental power. The delegates to the Constitutional Convention of 1787 sought to create a government that would be effective in carrying out its essential tasks, such as foreign policy and national defense, while not coming to resemble those European governments with which they were so familiar, where the exercise of governmental power was arbitrary and without limits. Therefore, while the Constitution constrains government, it does not generally seek to replace the representative processes of government.

➤ *INSIDE THIS ISSUE:* William F. Buckley, Jr.

Governments may, and often do, carry out unwise public policies without running afoul of the Constitution. As a Justice of the Michigan Supreme Court, I often uphold policies that have been enacted in the state legislature, or by cities and counties and townships, that I believe are unwise. But lack of wisdom is not the test for what is or is not constitutional, and lack of wisdom is not what allows me—a judge, not the adult supervisor of society—to exercise the enormous power of judicial review and strike down laws that have been enacted by "we the people" through their elected representatives. Redress for unwise public policies must generally come as the product of democratic debate and at the ballot box, not through judicial correction.

Myth or Misconception 2: *The Constitution principally upholds individual rights and liberties through the guarantees of the Bill of Rights.*

It is not to denigrate the importance of the Bill of Rights to suggest that the Founders intended that individual rights and liberties would principally be protected by the architecture of the Constitution—the *structure* of government set forth in its original seven articles. The great animating principles of our Constitution are in evidence everywhere within this architecture. First, there is federalism, in which the powers of government are divided between the national government and the states. To the former belong such powers as those relating to foreign policy and national defense; to the latter such powers as those relating to the criminal justice system and the protection of the family. Second, there is the separation of powers, in which each branch of the national government—the legislative, the executive, and the judicial branch—has distinct responsibilities, yet is subject to the checks and balances of the other branches. Third, there is the principle of limited government of a particular sort in which the national government is constrained to exercise only those powers set forth by the Constitution, for example, issuing currency, administering immigration laws, running the post office and waging war. Together, these principles make it more difficult for government to exercise power and to abuse minority rights, and they limit the impact of governmental abuses of power.

Many of the Founders, including James Madison, believed that a Bill of Rights was unnecessary because the Constitution's architecture itself was sufficient to ensure that national power would not be abused. As Alexander Hamilton remarked in *Federalist* 84, "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." And practically speaking, until 1925, the Bill of Rights was not even thought to apply to the states, only to Congress; yet the individual rights of our citizens remained generally well protected.

Myth or Misconception 3: *The national government and the state governments are regulated similarly by the Constitution.*

As the 10th Amendment makes clear, the starting point for any constitutional analysis is that the national, i.e., the federal, government can do *nothing* under the Constitution unless it is affirmatively authorized by some provision of the Constitution. The states, on the other hand, can do *anything* under the Constitution unless they are prohibited by some provision of the Constitution. Why then, one might ask, throughout the 19th century and well into the 20th century—before the Bill of Rights was thought to apply to the states—did Michigan and other states not generally infringe upon such indispensable freedoms as the freedoms of speech or religion? How were individual rights protected? Well, in two ways principally: First and most obviously, there was simply not majority sentiment on the part of the people of Michigan or other states to encroach upon such freedoms. Second, Michigan and all other states had their *own* Constitutions that protected such freedoms.

Today the Bill of Rights has been construed by the U.S. Supreme Court to apply to the states, creating more uniform and more centralized constitutional policy. It remains true, however, that the impact of the Constitution upon the national and state governments varies substantially.

Myth or Misconception 4: *Federalism is the same thing as state's rights.*

"State's rights" in the constitutional sense refers to all of the rights of sovereignty retained by the states under the Constitution. But in this sense, state's rights refers to only half of what federalism is, the other half consisting of those powers either reserved for the national government or affirmatively prohibited to the states.

In popular use, "state's rights" has had a checkered history. Before the Civil War, it was the rallying cry of southern opponents of pro-

posals to abolish or restrict slavery. By the 20th century, it had become the watchword of many of those who supported segregation in the public schools, as well as those who criticized generally the growing power of the central government.

While I share the view that federal power has come to supplant "state's rights" in far too many areas of governmental responsibility, "state's rights" are truly rights only where an examination of the Constitution reveals both that the national government lacks the authority to act and that there is nothing that prohibits the state governments from acting. There is no "state right," for example, for one state to impose barriers on trade coming from another, or to establish a separate foreign policy. These responsibilities are reserved to the national government by the Constitution.

Myth or Misconception 5: *The Constitution is a document for lawyers and judges.*

The Constitution was written for those in whose name it was cast, "we the people." It is a relatively short document, and it is generally straightforward and clear-cut. With only a few exceptions, there is an absence of legalese or technical terms. While the contemporary constitutional debate has focused overwhelmingly on a few broad phrases of the Constitution such as "due process" and "equal protection," the overwhelming part of this document specifies, for example, that a member of the House of Representatives must be 25 years of age, seven years a citizen, and an inhabitant of the state from which he is chosen; that a bill becomes a law when approved by both Houses and signed by the president, etc. One willing to invest just a bit more time in understanding the Constitution need only peruse *The Federalist Papers* to see what Madison, Hamilton or Jay had to say about its provisions to a *popular* audience in the late-18th century.

One reason I believe that the Constitution, as well as our laws generally, should be interpreted according to the straightforward meaning of their language, is to maintain the law as an institution that belongs to all of the people, and not merely to judges and lawyers. Let me give you an illustration: One creative constitutional scholar has said that the requirement that the president shall be at least 35 years of age really means that a president must have the maturity of a person who was 35 back in 1789 when the Constitution was written. That age today, opines this scholar, might be 30 or 32 or 40 or 42. The problem is that whenever a word or phrase of the Constitution is interpreted in such a "creative" fashion, the Constitution—and the law in general—becomes less accessible and less comprehensible to ordinary citizens, and more the exclusive province of attorneys who are

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The following are remarks by William F. Buckley, Jr., the founder and editor-at-large (ret.) of National Review, ***upon receipt of an honorary degree from Hillsdale College, on May 14, 2005.***

I accept this honor from Hillsdale College, in this distinguished company, with much pride at this confirmed relationship with a college I have courted for decades. When President Arnn advised me that the trustees had voted to confer this degree upon me, I yelped with pleasure, while suppressing my festering impatience at the delay in acknowledging my advances on Hillsdale, as a postulant in the service of liberty and excellence.

When last fall an illness kept me from joining you for the anniversary celebration, I recall that even many miles away, on a sickbed, I felt the special warmth of the occasion. That geniality, so reinforced today, is of course an agent of friendships formed here, among students and friends of Hillsdale College. It is, I think, animated by the sense you have of a great collaboration, the nurturing of a body of students and scholars who cherish freedom and are devoted to the preservation and development of this matrix of informed thought, and of devotion to God and country.

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trained in knowing such things as that "35" does not always mean "35."

One thing, by the way, that is unusual in the constitutional law course that I teach at Hillsdale College is that we actually read the language of the Constitution and discuss its provisions as we do so. What passes for constitutional law study at many colleges and universities is exclusively the study of Supreme Court decisions. While such decisions are obviously important, it is also important to compare what the Supreme Court has said to what the Constitution says. What is also unusual at Hillsdale is that, by the time students take my course, they have been required to study such informing documents as the Declaration of Independence, *The Federalist Papers*, Washington's First Inaugural Address—and, indeed, the Constitution itself.

Myth or Misconception 6: *The role of the judge in interpreting the Constitution is to do justice.*

The role of a judge is to do justice *under law*, a very different concept. Each of us has his or her own innate sense of right and wrong. This is true of every judge I have ever met. But judges are not elected or appointed to impose their personal views of right and wrong upon the legal system. Rather, as Justice Felix Frankfurter once remarked, "The highest example of judicial duty is to subordinate one's personal will and one's private views to the law." The responsible judge must subordinate his personal sense of justice to the public justice of our Constitution and its representative and legal institutions.

I recall one judicial confirmation hearing a number of years ago when I was working for the Senate Judiciary Committee. The nominee was asked, "If a decision in a particular case was required by law or statute and yet that offended your conscience, what would you do?" The nominee answered, "Senator, I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience." He went on to explain: "I was born and raised in this country, and I believe that I am steeped in its traditions, its mores, its beliefs and its philosophies, and if I felt strongly in a situation like that, I feel that it would be the product of my very being and upbringing. I would follow my conscience." To my mind, for a judge to render decisions according to his or her personal conscience rather than the law is itself unconscionable.

Myth or Misconception 7: *The great debate over the proper judicial role is between judges who are activist and judges who are restrained.*

In the same way that excessively "activist" judges may exceed the boundaries of the judicial power by concocting law out of whole cloth, excessively "restrained" judges may unwarrantedly contract protections and rights conferred by the laws and the Constitution. It is inappropriate for a judge to exercise "restraint" when to do so is to neglect his obligation of judicial review—his obligation to compare the law with the requirements set forth by the Constitution. Nor am I enamored with the term "strict construction" to describe the proper duties of the judge, for it is the role of the judge to interpret the words of the law reasonably—not "strictly" or "loosely," not "broadly" or "narrowly," just reasonably.

I would prefer to characterize the contemporary judicial debate in terms of interpretivism versus non-interpretivism. In doing this, I would borrow the description of the judicial power used by Chief Justice John Marshall, who 200 years ago in *Marbury v. Madison* stated that it is the duty of the judge to say what the law *is*, not what it *ought* to be (which is the province of the legislature). For the interpretivist, the starting point, and usually the ending point, in giving meaning to the law are the plain words of the law. This is true whether we are construing the law of the Constitution, the law of a statute, or indeed the law of contracts and policies and deeds. In each instance, it is the duty of the judge to give faithful meaning to the words of the lawmaker and let the chips fall where they may.

One prominent illustration of the differing approaches of interpretivism and non-interpretivism arises in the context of the constitutionality of capital punishment. Despite the fact that there are at least six references in the Constitution to the possibility of capital punishment—for example, both the 5th and 14th Amendments assert that no person shall be "deprived of *life*, liberty or property without due process of law," from which it can clearly be inferred that a person *can* be deprived of these where there *is* due process—former Justice William Brennan held, in dissent, that capital punishment was unconstitutional on the grounds apparently that, since 1789, there had arisen an "evolving standard of decency marking the progress of a maturing society" on whose behalf he spoke. Purporting to speak for "generations yet unborn," Justice

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Brennan substituted his own opinions on capital punishment for the judgments reached in the Constitution by the Founders. His decision in this regard is the embodiment, but certainly not the only recent example, of non-interpretivism.

Myth or Misconception 8: *The Constitution is a "living" document.*

The debate between interpretivists and non-interpretivists over how to give meaning to the Constitution is often framed in the following terms: Is the Constitution a "living" document, in which judges "update" its provisions according to the "needs" of the times? Or is the Constitution an enduring document, in which its original meanings and principles are permanently maintained, subject only to changes adopted in accordance with its amending clause? I believe that it is better described in the latter sense. It is beyond dispute, of course, that the *principles* of the Constitution must be applied to new circumstances over time—the Fourth Amendment on searches and seizures to electronic wiretaps, the First Amendment on freedom of speech to radio and television and the Internet, the interstate commerce clause to automobiles and planes, etc. However, that is distinct from allowing the words and principles themselves to be altered based upon the preferences of individual judges.

Our Constitution would be an historical artifact—a genuinely *dead* letter—if its original sense became irrelevant, to be replaced by the views of successive waves of judges and justices intent on "updating" it, or replacing what some judges view as the "dead hand of the past" with contemporary moral theory. This is precisely what the Founders sought to avoid when they instituted a "government of laws, not of men."

There is no charter of government in the history of mankind that has more wisely set forth the proper relationship between the governed and their government than the American Constitution. For those of us who are committed to constitutional principles and fostering respect for that document, there is no better homage that we can pay it than to understand clearly its design and to take care in the manner in which we describe it.

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