A PUBLICATION OF HILLSDALE COLLEGE

Imprimis

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April 2010 · Volume 39, Number 4

The Coming Constitutional Debate

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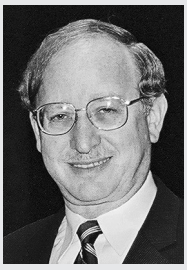
Justice, Michigan Supreme Court



STEPHEN MARKMAN was appointed Justice of the Michigan Supreme Court in 1999, and was re-elected in 2000 and 2004. Previously, he served as United States Attorney in Michigan; as Assistant Attorney General under President Ronald Reagan, where he coordinated the federal judicial selection process; and as Chief Counsel of the Senate Subcommittee on the Constitution. He has published in such journals as the *Stanford Law Review* and the *University of Chicago Law Review*, and has been a distinguished professor of constitutional law at Hillsdale College since 1993.

The following is adapted from a speech delivered in Washington, D.C., on February 25, 2010, at an event sponsored by Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship.

As Assistant Attorney General under President Ronald Reagan, I prepared a report for Attorney General Edwin Meese entitled "The Constitution in the Year 2000: Choices Ahead." This report sought to identify a range of areas in which significant constitutional controversy could be expected over the next 20 years. As critical as I believe those controversies were, they pale in significance before the controversies that will arise over the next several decades. The resolution of these emerging controversies will determine whether the Constitution of 2030 bears any resemblance to the Constitution of 1787—the Framers' Constitution that has guided this nation for most of its first two centuries and has rendered it the freest, most prosperous, and most creative nation in the history of the world.

Proponents of a "21st century constitution" or "living constitution" aim to transform our nation's supreme law beyond recognition—and with a minimum of public attention and debate. Indeed, if there is an overarching theme to what they wish to achieve, it is the diminishment of the democratic and representative processes of American government. It is the replacement of a system of republican government, in which the constitution is largely focused upon the architecture of government in order to minimize the likelihood of abuse of power, with a system of judicial government, in which substantive policy outcomes are increasingly determined by federal judges. Rather than merely

defining broad rules of the game for the legislative and executive branches of government, the new constitution would compel specific outcomes.

Yes, the forms of the Founders' Constitution would remain—a bicameral legislature, periodic elections, state governments—but the important decisions would increasingly be undertaken by courts, especially by federal courts. It will be the California referendum process writ national, a process by which the decisions of millions of voters on matters such as racial quotas, social services funding, and immigration policy have been routinely overturned by single judges acting in the name of the Constitution—not the Framers' Constitution, but a "constitution for our times," a "living constitution," resembling, sadly, the constitutions of failed and despotic nations across the globe.

This radical transformation of American political life will occur, if it succeeds, not through high-profile court decisions resolving grand disputes of war and peace, abortion, capital punishment, or the place of religion in public life, but more likely as the product of decisions resolving forgettable and mundane disputes—the kind mentioned on the back pages of our daily newspapers, if at all. Let me provide a brief summary of six of the more popular theories of the advocates of the 21st century constitution. In particular, it is my hope here to inform ordinary citizens so that they will be better aware of the stakes. For while judges and lawyers may be its custodians, the Constitution is a document that is the heritage and responsibility of every American citizen.

1. PRIVILEGES OR IMMUNITIES CLAUSE

Since shortly after the Civil War, the privileges or immunities clause of the 14th Amendment has been understood as protecting a relatively limited array of rights that are a function of American federal citizenship, such as the right to be heard in courts of justice and the right to diplomatic protection. In defining the protections of the privileges or immunities clause in this manner, the Supreme Court in the *Slaughterhouse Cases* (1873) rejected the argument that the clause also protects rights that are a function of state citizenship, asserting that this would lead to federal courts serving as a "perpetual censor" of state and local governments. This decision has served as a bulwark of American federalism.

Although a considerable amount of federal judicial authority has since been achieved over the states through interpretations of the due process clause of the 14th Amendment, many proponents of a 21st century constitution seek additional federal oversight of state and local laws. Their strategy in this regard is to refashion the privileges or immunities clause as a new and essentially unlimited bill of rights within the 14th Amendment. The practical consequences of this would be to authorize federal judges to impose an ever broader and more stultifying uniformity upon the nation. Whatever modicum of federalism remains extant at the outset

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ISSN 0277-8432

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of this century, considerably less would remain tomorrow.

2. POSITIVE RIGHTS

For the 21st century constitutionalist, perhaps the greatest virtue of redefining the privileges or immunities clause is the prospect of transforming the Constitution from a guarantor of "negative liberties" into a charter of "affirmative government," guaranteeing an array of "positive" rights. As President Obama has observed in a radio interview in criticism of the legacy of the Warren Court of the 1950s and 1960s, "[It] never ventured into the issues of redistribution of wealth and . . . more basic issues of political and economic justice in this society. . . . [T]he Warren Court . . . wasn't that radical. It didn't break free from the essential constraints that were placed by the Founding Fathers in the Constitution . . . that generally the Constitution is a charter of negative liberties, says what the states can't do to you, says what the federal government can't do to you, but it doesn't say what the federal government or the state government must do on your behalf."

President Obama is correct. The Framers' Constitution defines individual rights in terms of what the government *cannot* do to you. For example, the government cannot inflict cruel and unusual punishment, and therefore the individual has a constitutional right not to be subject to such punishment; the government cannot engage in unreasonable searches and seizures, and therefore the individual has a constitutional right not to be subject to such searches and seizures, and so forth. By contrast, the Framers' Constitution does not guarantee rights to material goods such as housing, education, food, clothing, jobs, or health care—rights that place a related obligation upon the state to obtain the resources from other citizens to pay for them.

Proponents of a 21st century constitution have many grievances with the individual rights premises of our Constitution as written—such as the largely procedural focus of the 14th Amendment's due process clause, with its old-fashioned conception of such rights as those to "life, liberty, and property"; the negative cast of the specifically-defined rights in the Bill of Rights; and the limited application of the equal rights clause to things that have been enacted by legislatures (as opposed to things that they *should have been required* to enact). Each of these "limitations" poses significant barriers to what 21st century constitutionalists hope to achieve in reconfiguring America. This explains their interest in employing the privileges or immunities clause, which seems to them open-ended and susceptible to definition by judges at their own discretion.

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As various advocates of a 21st century constitution have urged, a privilege or immunity might be interpreted to allow the invention of a host of new "rights," and thus be construed to guarantee social or economic equality. However pleasing this might sound to some people, there should be no mistake: adopting this interpretation will supplant representative decision-making with the decision-making of unelected, unaccountable, and life-tenured judges. Should the privileges or immunities clause be used in this way, as a charter of positive rights, ours will become an America in which citizens are constitutionally entitled to their neighbors' possessions; in which economic redistribution has become as ingrained a principle as federalism and the separation of powers; in which the great constitutional issues of the day will focus on whether porridge should be subsidized and housing allowances reimbursed at 89 or 94 percent of the last fiscal year level; and in which a succession of new "rights" will be parceled out as people are deemed worthy of them by berobed lawyers in the judiciary.

3. STATE ACTION

A barrier posed by both the due process and the privileges or immunities clauses, and viewed as anachronistic by 21st century constitutionalists, is the requirement

Reviving the Constitution
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of state action as a precondition for the enforcement of rights. In the *Civil Rights Cases* (1883), another post-Civil War precedent, the Supreme Court asserted that these provisions of the 14th Amendment prohibited only the abridgment of individual rights by the *state*. "It is *state action* of a particular character that is prohibited. . . . The wrongful act of an individual is simply a private wrong and if not sanctioned in some way by the state, or not done under state authority, the [individual's] rights remain in full force." However, for advocates of 21st century constitutionalism, if fairness and equity are to be achieved, the Constitution must become more like a general legal code—applicable to both public and private institutions.

Consider, for example, Hillsdale College. Despite being the embodiment of a thoroughly private institution, government officials have sought to justify the imposition of federal rules and regulations upon Hillsdale by characterizing the college as the equivalent of a state entity on the grounds that it received public grants-in-aid. When in response to this rationale, and in order to retain its independence, Hillsdale rejected further grants, the government then sought to justify its rules and regulations on the grounds that Hillsdale was the *indirect* beneficiary of grants-in-aid going to individual students, such as GI Bill benefits. Once again in response to this rationale, Hillsdale asserted its independence by barring its students from receiving public grants, even those earned as in the case of GI benefits, and instead bolstered its own private scholarship resources. We have witnessed a steadily more aggressive effort by governmental regulators to treat private institutions as the equivalent of the state, and thereby to extend public oversight.

However, it would be more convenient simply to nullify the state action requirement altogether. Professor Mark Tushnet of Harvard Law School, for example, would reconsider the *Civil Rights Cases*:

> The state-action doctrine contributes nothing but obfuscation to constitutional analysis. It works as a bogeyman because it appeals to a vague libertarian sense that Americans have about the proper relation between them and their government. It seems to suggest that there is a domain of freedom into which the Constitution doesn't reach. We would be well rid of the doctrine.

If Professor Tushnet succeeds in this mission, Hillsdale's policies concerning such things as tuition, admissions, faculty hiring, curriculum, and discipline will each have to pass the scrutiny, and receive the imprimatur, of judges.

4. POLITICAL QUESTIONS

In areas that were once viewed as inappropriate for judicial involvement, federal courts have begun to assert themselves in an unprecedented and aggressive manner. The limited role of the judiciary, for example, with regard to matters of national defense and foreign policy is not explicitly set forth in the Constitution, but such matters have from time immemorial been understood to be non-justiciable and within the exclusive responsibility of the elected branches of government. As far back as *Marbury v. Madison* (1803), Chief Justice John Marshall recognized that

"Questions in their nature political . . . can never be made in this Court."

Yet just in the last several years, the Supreme Court, in a series of 5-4 decisions, has overruled determinations made by both the legislative and executive branches regarding the treatment of captured enemy combatants. Most notably, the Court ruled in *Boumediene v. Bush* (2008) that foreign nationals captured in combat and held outside the United States by the military as prisoners of war—a war authorized by the Congress under Article I, Section 8, and waged by the President as Commander-in-Chief under Article II, Section 2—possess the constitutional right to challenge their detentions in federal court. Thus, in yet one more realm of public policy—one on which the sovereignty and liberty of a free people are most dependent, national defense—judges have now begun to embark upon a sharply expanded role.

If there is no significant realm left of "political questions," if there are no longer any traditional limitations upon the exercise of the judicial power, then every matter coming before every president, every Congress, every governor, every legislature, and every county commission and city council can, with little difficulty, be summarily recast as a justiciable dispute, or what the Constitution, in Article III, Section 2, describes as a "case" or "controversy." As a result, every policy debate taking place within government, at every level, will become little more than a prelude for judicial resolution.

5. NINTH AMENDMENT

Another looming constitutional battleground concerns the meaning of the Ninth Amendment to the Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Many 21st century constitutionalists understand this amendment to say that there is some unknown array of unenumerated rights that lie fallow in the Constitution, waiting only to be unearthed by far-sighted judges.

Professor Thomas Grey of the Stanford Law School has suggested, for example, that the Ninth Amendment constitutes a "license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein." Rights to abortion, contraception, homosexual behavior, and similar sexual privacy rights have already been imposed by judges detecting such rights in the Ninth Amendment. The problem is that, in the words of Justices Stewart and Black, this understanding of the amendment "turns somersaults with history" and renders the courts a "day-to-day constitutional convention."

The more conventional understanding of the Ninth Amendment has viewed it in the historical context of the Bill of Rights, of which it is a part. By this understanding, it was written to dispel any implication that by the specification of particular rights in the Bill of Rights, the people had implicitly relinquished to the new federal government rights not specified. Like the Tenth Amendment—which serves as a reminder that powers neither given to the federal government nor prohibited to the states in the Constitution are reserved to the states or to the people—the Ninth Amendment was adopted to emphasize that our national government is one of limited powers. Its principal purpose was to prevent an extension of federal power, not to provide an open-ended grant of judicial authority that would have the opposite effect.

6. TRANSNATIONALISM

Professor Harold Koh of the Yale Law School, and now State Department Legal Counsel, is perhaps the leading proponent of what he calls "transnationalism," which he contrasts with the "nationalist philosophy" that has

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characterized American constitutional law for the past 220 years.

Transnationalists believe that international and domestic law are merging into a hybrid body of transnational law, while so-called nationalists persist in preserving a division between domestic and foreign law that respects the sovereignty of the United States. Transnationalists believe that domestic courts have a critical role to play in incorporating international law into domestic law, while so-called nationalists claim that only the political branches are authorized to domesticate international legal norms. Professor Koh predicts that these disagreements will play out in future Supreme Court confirmation hearings, and that these appointments will be "pivotal" in determining by 2020 the direction in which the jurisprudence of the United States proceeds.

In practice, transnationalism would legitimize reliance by American judges upon foreign law in giving meaning to the United States Constitution; it would bind federal and state governments to international treaties and agreements that had never been ratified by the United States Senate much less enacted into law by the Congress; it would render both the domestic and international conduct of the United States increasingly beholden to the review and judgment of international tribunals in Geneva and the Hague; it would expose American soldiers and elected leaders to the sanctions of international law for "war crimes" and "violations of the Earth"; and it would replace the judgments of officials representing the American people, and holding paramount the interests of the United States, with the judgments of multinational panels of bureaucrats and judges finely balancing the interests of the U.S. with those of other nations—including authoritarian and despotic governments—throughout the world.

* * *

It is with the intention of generating debate, and of providing a roadmap to help us better navigate the constitutional forks-in-the-road that will soon be facing our nation, that I offer these thoughts. While there has never been a time in our history in which there was not serious constitutional debate among our people, I would submit that there have been few times in which this debate was more fundamental in defining the American experiment. ■