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Aspiring to the Rule of Law: The Ground Rules of Civil Society

Speech by: by Maxwell A. Miller

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The assigned topic for this Transcend Series session, "The Unavoidable Rule of Law," has caused me some heartburn because the "Rule of Law," however one rationally defines that term, is not invariably desirable, and certainly not unavoidable. For instance, no one here would assert, I assume, that the rule of law, whether imposed by any branch of government, is a panacea for all societal ills. Presumably, we would all agree that a joint resolution of the Utah Legislature mandating sufficient rainfall to end the drought, no matter how emotionally comforting, will likely have no effect upon the weather. In Camelot, perhaps, the crown can make it clear, "the climate must be perfect all year," but royal decrees or their equivalent will not work in Utah.

Neither are legal solutions necessarily desirable elixirs for many tribulations facing our society. We can, for instance, pass laws increasing the minimum wage, but we cannot compel customer patronage at businesses that must absorb minimum wage increases as the cost of overhead. There are trade-offs. We can levy higher taxes on corporations doing business in Utah, say for instance, by assessing their property in excess of fair market value, but we cannot preclude corporations from relocating to more economically competitive venues. Again, there are trade-offs. Sometimes ill-informed legislation may unintentionally worsen rather than improve problems. A classic example might be, in certain contexts, the farmer whose cost of production exceeds his sales price. Should we then conclude there is a need for legislative intervention to subsidize an ailing industry? If so, for how long? Are more efficient producers thereby excluded?

Examples of policy decisions that find their way into positive law are legion. Whether legislatures should or should not pass such laws raise unavoidable conundrums whose underpinnings are often unprovable value judgments. Like all statements about how society "ought" to function, the criteria for desirable legislation are difficult to verify because they are subjective. If, for instance, someone asserts the legislature ought or ought not to pass voucher legislation, there is no way to prove either position categorically right or wrong. Such statements are not about what "is," only about what "ought to be." There will inevitably be trade-offs, rather than absolutes. Inquiry into objective facts, therefore, may yield data that supports either position. Take a logical extreme as illustrative. Someone may decide he ought not to steal because stealing is immoral and against the law, while someone else may decide to steal because the risk of being caught is slim and thieves make sizeable, untaxed incomes. Unavoidably, the answer depends upon prudence and wisdom – one's values or beliefs – not simply facts.

Implicitly recognizing this, the foundation of our constitutional framework is that law is legitimate only insofar as the people who devise the law (the legislative branch), and those who enforce the law (the executive branch) are different from those who interpret it (the courts). This sense of legitimacy underlies the many functional checks and balances prescribed in the Constitution and serves as an actual, not merely theoretical, safeguard against tyranny. Such a horizontal division of power may, to some extent, be inefficient since coordinate branches on occasion review, reverse or modify edicts of another. But the framers preferred inefficiency as a check and balance to despotism.[1]

The extent to which the judiciary controls policy decision-making necessarily means that to a lesser extent the people, usually acting through their legislatures, do not. By allowing any judicial review of leg-

islative enactments, we have in effect already consented to some undemocratic aspects of government. Yet to me, traditional consent to judicial review imposes greater obligations upon courts to demonstrate in reasoned opinions that they have valid, neutral principles derived from the Constitution for its constitutional decisions, and from applicable statutes for its statutory interpretations. Otherwise, the courts become an uncontrolled naked power organ inimical to democracy.

A valid theory or principled decision is one scholar Herbert Wechsler describes as resting "on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved. If courts have no such neutral principles for their decision, but merely impose their own value choices, or what is worse, pretend to have a theory but actually follow their own predilections, the courts violate the premise that justifies their power."[2] When that happens, courts foist a fraud upon the public.

Viewing the courts' only legitimate role as primarily interpreters rather than inventors of law sometimes offends popular notions among those who want the judiciary to implement public policy: decisions first, principles later. I recognize that courts develop common law doctrines on such subjects as torts. However, statutory interpretation and constitutional law are qualitatively different matters. There are all too many instances, when we, as a society, have sadly come to think that whatever happens to strike our fancy as a good idea is somehow automatically transformed into a constitutional right. In my view, that is not only intellectually indefensible, but dangerous. The courts have often become battlegrounds and substitutes for legislative deliberation. Within the past thirty years, the courts have begun combating perceived social evils with newly discovered "fundamental rights." As a result, complaints about judicial activism have intensified.

One example among many is *Lawrence v. Texas,*[3] in which the United States Supreme Court held that state legislatures could not criminalize homosexual sodomy. *Lawrence* reversed the Court's decision in *Bowers v. Hardwick*[4] on the same subject that arrived at the opposite result only seventeen years earlier. How is it possible that constitutional rights can change so dramatically is less that two decades? *Lawrence* has precipitated constitutional crises about the future of American marriage. Citing *Lawrence* as a precedent, the Massachusetts Supreme Judicial Court concluded in *Goodridge v. Department of Public Health*[5] that limiting marriage to a man and a woman is "arbitrary and capricious." There is and will be heated disagreement on this subject. More fundamental to my purposes here today, *Lawrence* raises worrisome issues about the stability and structure of our constitutional system. Who should decide the scope and definition of marriage law – the courts or the legislatures? What has become of basic separation of powers? To what extent is the concept of judicial review legitimate?

The difference between originating policy and enforcing it is, largely, a functional question. Courts enforce policy when they compare the Constitution's text with a challenged statute and nullify the latter when it is discrepant with the former. But that is an overly simplistic summation. In 1819, the Court, speaking through Chief Justice John Marshall in *Marbury v. Madison*,[6] suggests that the power of judicial review necessarily extends beyond analysis of the constitutional text. When the text is incomplete or ambiguous, judges must necessarily fill in the blanks.

Whether they are free to fill the void from abstract sources beyond the text or context of the constitution depends upon one's allegiance to the concepts embodied by interpretavism or non-interpretavism schools of though. Non-interpretavism, the school of thought that favors expansive review, encompasses at least three forms of review, all of which retain at least some connection to the constitutional text. But the actual normative content is not derived from the language of the Constitution and need not be harmonized with the framers' intent.

Thomas Gray in *Do We Have An Unwritten Constitution*[7] describes the reasoning of the three most prevalent forms of non-interpretive judicial review. One view is that the Supreme Court justices have a license to read normative content into sweeping phrases like "due process" and "equal protection" so as to prevent legislative infringement on individual rights that the judges currently deem fundamental. *Lawrence* is an apt example. Another view is that judges should apply contemporary social and moral values to specific provisions, even if this restrains legislative initiative, and even though the framers would have read these provisions as implying a different or narrower restraint. An example is *Grutter v. Bollinger*,[8] in which the United States Supreme Court upheld Michigan Law School's affirmative action program, suggesting that its constitutional analysis might be different in twenty five years. A final mode of non-interpretive judicial review allows a court to read into a general provision a body of constitutional law developed under other provisions that would not otherwise apply to the case at hand. Gray cites as an example *Bolling v. Sharpe*[9] in which the Court applied the fourteenth amendment equal protection doctrine, intended by its framers to apply only to the states, to the federal government through the fifth amendment due process clause.

The overriding problem with the open-ended approach of the non-interpretavist is that it fails to provide a rationale for limiting adjudicative authority. In contrast, the interpretavists believe that the text of the Constitution and values which can reasonably be inferred are limits on judicial authority and reaffirm the rule of law.

The interpretavist position finds its roots in our founding documents. In Federalist 78, Hamilton articulates his belief that judges are to implement the Constitution as originally understood by those who ratified it. That, for him, embodies the rule of law and how a republic ought to governed by the will of the people.[10] Justices Scalia and Thomas are modern day disciples of this view.

In an essay entitled "God's Justice and Ours," Justice Scalia explained:

> If I subscribed to the proposition that I am authorized (indeed, I suppose compelled) to intuit and impose our "maturing" society's "evolving standards of decency," this essay would be a preview of my next vote in a death penalty case. As it is, however, the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted. For me, therefore, the constitutionality of the death penalty is not a difficult, soul–wrenching question. It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse–thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today.[11]

Justice Thomas has similarly opined:

> In important cases, it is my humble opinion that finding the right answer is often the least difficult problem. Having the courage to assert that answer and stand firm in the face of the constant winds of protest and criticism is often much more difficult. Judging is difficult, because the Constitution itself is written in broad, sometimes ambiguous terms. And, unfortunately the Constitution does not come with Cliffs Notes or a glossary. When it comes time to interpret the Constitution's provisions, such as, for instance, the Speech or Press Clauses, reasonable minds often differ on their exact meaning. But that does not mean that there is no correct

> answer, that there are no clear, eternal principles recognized and put into motion by our founding documents. These principles do exist. The law is not a matter of purely personal opinion. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.[12]

If one shares the Scalia and Thomas views on judicial review, as do I, then politics, personal preference and policy necessarily have no role, and ought to have no role, in what I hope would be the judiciary's neutral enforcement of the rule of law. I aspire to that end. Here are several recent illuminating cases in which the rule of law has either been sacrificed to the great detriment of either the litigants and/or society, or followed to everyone's ultimate benefit. All these examples, I should disclose, are cases with which I have had personal involvement, either directly or indirectly.

In one property tax case I handled, a government attorney argued that his jurisdiction's depleted coffers, rather than the constitutional and statutory standard of "fair market value" should be the basis for deciding whether the taxpayer-corporation owed more taxes. Said the attorney, "We're here because of a tremendous impact that affects us in a major way. . . . As the value shrinks, our certified tax rate has to go up, because the budget is constant. . . . The other aspect of it is because there's a significant amount of money that potentially would be given back to [the taxpayer]."

Some of this attorney's direct examination and his closing arguments – suggesting that the tribunal should uphold a higher assessed value and hence higher property taxes because the taxing jurisdiction needs the money – are not only inappropriate, but impliedly condone an illegality. As a matter of basic fairness, the money at issue is no less significant to the taxpayer than it is to taxing jurisdiction. The tribunal has no legitimate authority to base its decisions on policy or political questions, like who, in its view, has greater need of money – the taxpayer or the taxing authority. As a matter of law, the only issue the tribunal had jurisdiction to decide, and can legally or fairly decide, is the property's "fair market value," not whether the decision would have an adverse financial or political impact on the taxing jurisdiction.

Another recently decided case confirms the same principle. In *Skull Valley Band of Goshute Indians and Private Fuel Storage v. Nielson*[13] the Tenth Circuit Court of Appeals recently held that a series of Utah statutes passed between 1998 and 2001, which regulate the storage and transportation of spent nuclear fuel, were preempted under federal law and hence invalid. There has been great unrest, even outrage, about this decision. I am aware of massive publicity against Private Fuel Storage. One website, for instance, claims "The Private Fuel Storage utilities have established histories of pollution, profiteering, safety violations and environmental injustice that warrant skepticism about the PFS proposal."[14] Whether that statement is slanderous, accurate, false, true or partially true is not relevant to me in deciding whether Utah's laws conform to constitutional strictures. Similarly, my personal preference, or some judge's personal preference, that PFS ought to build its waste facility somewhere other than Tooele County, Utah cannot be a legitimate basis for the rule of law in a stable society. Whatever one may think the law ought to be, the law is that the federal government has preempted the field in regulating nuclear waste. The Tenth Circuit concluded:

> In holding the Utah statutes preempted, we do not denigrate the serious concerns of Utah citizens and lawmakers regarding spend nuclear fuel, a matter which presents complex technological, economic, and political challenges to those seek effective solutions. However, in the matter of nuclear safety, Congress has determined that it is the federal government, and not the states, that must address the problem.

I believe the Tenth Circuit reached the correct result in affirming United States District Court Judge Tena Campbell. No other principled conclusion was possible.

A final example further heartens me into believing that the rule of law, while perhaps enduring an occasional relapse, has not suffered a total demise. In *Utah Gospel Mission v. Salt Lake City Corp.*[15] (commonly called the "LDS Plaza case"), United States District Court Judge Dale Kimball recently upheld Salt Lake City's sale of a public forum easement to the Mormon Church, which could, therefore, regulate conduct on its own property as it saw fit. Said Judge Kimball:

> After the lengthy process discussed above, the City and the LDS Church entered into the Settlement Agreement pursuant to which the City "relinquished the easement" for $ 5.375 million in land and cash. The right of public access contained in the City's Pedestrian Easement—which was the linchpin of the Tenth Circuit's public forum analysis—is now gone. In accordance with the Tenth Circuit's instructions, the Plaza is now "entirely private" property.
>
> Like any other private property owner, the LDS Church has the right to exclude members of the public from its property and to exercise total control over the activities that occur on its property. Legally, the Plaza is now no different from the adjoining Church-owned Temple Square and Church Administration Block properties, which are entirely private and which are unquestionably subject to Church regulation and control without any First Amendment limitations whatsoever.

The fundamental rule of law Judge Kimball upheld in the "Plaza" case is that the rights of any private property owner embodied in a deed of conveyance from the government mean precisely what they say, and will be honored.

To demand that courts adhere to the rule of law, society must have a clear understanding about what courts were designed to do, or at least an understanding of the difference between a decision based on the Constitution, statutory law and/or neutral and reasonable inferences therefrom, and values derived from personal preferences, politics or externalities that have no legitimate place in a courtroom. If the Constitution and statutes do not specify a value to be preferred and there is not principled way to prefer any one value over another, the legislature, rather than the courts, should make the choice. Otherwise the rule of law becomes a farce, a sham, and an arbitrary edict, not an aspiration.

In his book *Taking Care of the Law*, Griffin Bell, a former federal circuit court judge, and the former United States Attorney General under President Carter, wrote, "A series of Supreme Court decisions refurbishing the Constitution further encouraged citizens to use the courts. Fundamental new rights were perceived in criminal law, in civil liberties – ranging from voting to school to employment – and in the protection of the heretofore seldom-heard-from, such as prisoners and the mentally ill."[16] The primary theme of Judge Bell's book is that there is too much overdependence on our judicial system. For Judge Bell, the appropriate answer to this problem does not lie in choosing up sides between liberal versus conservative judges. Rather, the solution lies at the very soul of our Constitution. Congress and legislatures have primacy over policy making. Courts have primacy over interpretation based upon neutral principles devoid of politics. Only when those roles are respected will the rule of law survive.

[1] The general structure and some of the central concepts of this article were first published in Maxwell A. Miller and Nancie George, *Judicial Activism and the Constitutional Amendment Process*, 9 J. OF SOCIAL, POLITICAL AND ECONOMIC STUDIES, 294 (1984).

[2] Wechsler, *Toward Neutral Principles of Constitutional Law in Principles, Politics and Fundamental Law* 3, 27 (1971).

[3] 539 U.S. 553 (2003).

[4] 478 U.S. 186 (1986).

[5] 798 N.E.2d 941 (Mass. 2003).

[6] 5 U.S. (1 Cranch) 137.

[7] Thomas Gray, *Do We Have An Unwritten Constitution*, 27 Stan. L. Rev. 703 (1975).

[8] 539 U.S. 982 (2003).

[9] 347 U.S. 497 (1954).

[10] THE FEDERALIST NO. 78 (Alexander Hamilton).

[11] Antonin Scalia, God's Justice and Ours, First Things, May 2002 at 17, available at http://www.first-things.com/ftissues/ft0205/articles/scalia.html.

[12] Clarence Thomas, Speech before the American Enterprise Institute for Public Policy Research (Feb. 13, 2004), available at http://www.newsmax.com/archives/articles/2001/2/15/163752.shtml.

[13] 2004 U.S. App. LEXIS 16055

[14] Another Nuclear Ripoff: Unmasking Private Fuel Storage, www.citizen.org

[15] 316 F. Supp.2d 1201 (Utah Dist. Ct. 2004)

[16] G. BELL WITH R. OSTROW, TAKING CARE OF THE LAWC:\Documents and Settings\mmiller\Local Settings\Temporary Internet Files\OLKDF\Transcend Series - August 2004 Keynote - Aspiring to the Rule of Law - by Maxwell A Miller — 8-12-04.doc

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