

REMARKS

BICENTENNIAL BLUES: TO PRAISE THE CONSTITUTION OR TO BURY IT?*

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I am deeply grateful for your decision to confer an honorary degree upon me today. And I am delighted that you have invited me to address you on the occasion of your commencement. Let me congratulate you on all that you have achieved. You have the special privilege of commencing in the year of the Constitution's Bicentennial—and within several thousand yards of the Constitution itself—a document that travelled by stagecoach, at 11:00 in the morning on September 18, 1787, from Philadelphia to New York. It was spirited to Virginia in a linen sack to save it from the advancing British in August, 1814. For many years, it was stored in an old green cabinet with seven ancient swords in a basement not very far from here. It now rests in the National Archives. It has had a colorful trajectory.

As your careers follow their own trajectories, taking you far from today's celebration, you may find yourselves, from time to time, in a position roughly like that of the pilgrims in one of my favorite cartoons. Two of them stand on a boat—it appears to be the Mayflower. They scan the distant horizon. As they catch a glimpse of land, one says to the other, "Religious freedom is my immediate objective . . . but my long term goal is to go into real estate." You might ponder that throughout your careers.

It is no wonder that a cynic said not too long ago, "America is not merely a city on a hill, it is also a city on the make." My wish for you is that your lives, whether in the law or outside the law, might to

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some degree deny the cynic's prognosis. But I am not here to urge all of you to pursue paths of pure self-sacrifice and unalloyed civic virtue. I have no illusions about the possibility of that, and I would be a hypocrite if I protested too much about pursuits that have at least some worldly dimension. After all, my own Supreme Court arguments have included cases such as *Pennzoil v. Texaco*, as well as civil rights and civil liberties disputes. But it may not be too much to urge you all to dedicate yourselves, at least in some small part, to keeping the Constitution's spirit alive. With that end in view, I am calling my brief remarks this morning, "Bicentennial Blues: To Praise the Constitution Or To Bury It?"

During your law school years, you have encountered at least two radically different visions of what it might mean to praise and to perpetuate the Constitution. One vision is propounded principally by Attorney General Edwin Meese, who proclaims the sanctity of the original Constitution of 1787, its meaning fixed for him by a supposed "jurisprudence of original intent," almost as though Steven Spielberg could transport Alexander Hamilton and James Madison to Ted Koppel's "Nightline" to tell us how they would approach electronic broadcasting or surrogate motherhood. According to this jurisprudence, the more liberal decisions of the Warren era and the Burger era represent illicit lawmaking rather than legitimate interpretation. The 1787 Constitution, according to Mr. Meese, expressed the people's consent to judicial intervention in defense of certain specified rights—and no others. It turns out that the rights Mr. Meese's Constitution empowers courts to protect from the masses (and from politically energized minorities) are largely the rights of the haves against the have-nots. They are largely the rights of the propertied classes—a happy coincidence for the Administration's political allies. In fact, it turns out that some of these apostles of judicial "restraint," at least in the case of recent circuit court nominees, like Professor Bernard Siegan of San Diego, are poised to hold the New Deal, and most social welfare legislation, unconstitutional—in the name of strict construction.

The opposite vision was stated most starkly by Supreme Court Justice Thurgood Marshall, speaking to a group of lawyers meeting in Hawaii earlier this month. Justice Marshall decried the original Constitution as defective. He denounced its framers as more bigoted than visionary. He stressed their willingness to preserve and protect slavery while professing to believe in freedom and equality. Only the Civil War, the Justice observed, ended that obscenity. For Justice Marshall, and I quote him, "The Union survived the Civil War, the Constitution did not."

Now, there is no way *both* Meese and Marshall can be *right*. But there is a way that *both can be wrong*. The “Meesianic” Constitution *was*, in fact, incomplete. It was proclaimed by “We the People,” but “the people” who were the “We” in its Preamble tragically excluded blacks and women, and those who were without wealth or property. To celebrate *that* Constitution, according to *its* original intent, without acknowledging how much it left out—how far it had to evolve—is to ignore what may be the greatest achievement of the Founding Generation. That achievement was the legacy of a living Constitution—not only a Constitution capable of change, but a Constitution containing the tools for its own future development in the amendment provision of article V and in the judicial power of article III. And it contains not only the tools for its future development, but the seeds of its own future growth, in the form of a vision—a still imperfect vision—of a “more perfect Union” than the framers’ own compromises had yet achieved. So Mr. Meese’s Constitution is not the *real* Constitution.

But the Constitution of Thurgood Marshall is also incomplete. It denies its own roots—and its own still unresolved contradictions—in the process of professing its progressive character. To celebrate the Civil War amendments without acknowledging the basic framework of carefully separated and divided powers into which those amendments *fit* is to overlook the 18th-century institutional structures which alone made it possible for Congress, in the late 19th century and again after the mid-20th, to implement the amendments’ guarantees. To disparage the work of 1787 is to overlook those institutional structures that made it possible for the Supreme Court of the United States, from the 1950’s to the 1970’s, after a century of national blindness, both to see, and to make the country face, what had to be done to redeem the fourteenth amendment’s promise. To downplay the 1787 miracle at Philadelphia is to forget the institutional structures that made it possible for modern presidents like Dwight Eisenhower and John Fitzgerald Kennedy to breathe life into provisions that would otherwise have sounded marvelous but signified nothing—what Justice Jackson once called “a teasing illusion, like a munificent bequest in a pauper’s will.”

Keeping the Constitution’s spirit alive thus means more than either celebrating its creation or lamenting its limitations. It means joining the enterprise of elaborating and extending its reach. That is the enterprise that I want to urge you to join as you leave this hall—and this university.

But you must know that this enterprise has its adversaries. I urge

you to identify those adversaries—and to do battle with them throughout your professional lives.

Those adversaries include many who say that they revere the Constitution but in fact give it a cramped and a narrow reading, a reading deeply inconsistent with its character as a flexible charter, deliberately drafted in broad strokes so that it might adapt without requiring too many abrupt and explicit amendments as society changes.

Those adversaries include many who would deploy the Constitution to remove government once again from the corporate boardroom and give government license to police every private bedroom in the land—as the Supreme Court decision about sodomy last summer authorized—all on the theory that *love* (but not *greed*) is the public's business, and that the framers were more worried about protecting the accumulation of property than about preserving space for human intimacy.

Those adversaries include many who are either ignorant of, or desperately eager to obscure, the Constitution's most basic premise—the premise that the laws bind *all* of government, including Generals and Lieutenant Colonels and, yes, even Presidents who genuinely see themselves, truly and patriotically, as “outside the Beltway,” Presidents who think that Acts of Congress do not apply to the Oval Office when it orchestrates private and foreign efforts to circumvent the law.

Nothing could be more hostile to the spirit of constitutionalism than this sort of shadowy evasion—this effort to find paths, hidden in darkness, that are exempt from the light and the reach of legal and constitutional constraints.

For most of the Constitution's story, throughout our history, is a story of struggle to live by the Constitution's light—to extend its writ, making rights available to groups that had once been excluded, and making responsibilities attach to individuals who had once been exempted.

In this fundamental sense, the *real* framers of our Constitution were not only the propertied, white gentlemen who met in Philadelphia, but the many more—women and men, poor and rich, black, white, brown, and yellow—who marched and bled, who sang and rode buses and sat in and sometimes died, to make freedom ring.

Their song did not take all of its lyrics from the Constitution's literal text. How could it? Even the text itself proclaims its own incomplete, unfinished character. The ninth amendment expressly commands that the failure of the framers to spell out certain rights

in so many words may not be used to justify the authoritarian conclusion that no such rights exist—the conclusion that government may enter every crevice of our private lives, and use every imaginable private device to get around the law, unless it was nailed shut by an explicit clause in the Constitution. Reducing the Constitution to a collection of explicit incantations, the way some would have us do, trivializes it in a way that is false to its most basic purposes.

There is a striking parallel between that kind of trivialization and some of what the would-be celebrants of the Bicentennial seem to have in mind. It is hard to be sure, but I suspect that the framers would have been appalled by the idea that the way to honor the Constitution they left us would be to carve it up into little pieces while forgetting its overarching purposes or to hand out 50 million tiny copies of the Constitution's text, like so many holy cards, as the Bicentennial Commission proposed not long ago. Constitutional literacy will not be achieved by sticking the text of the Bill of Rights onto every fast-food placemat, or by stuffing miniature copies of the document inside cereal boxes. Just imagine: "Equal Protection Clause Diet Cola," or "Necessary and Proper Clause Measuring Spoons!" The Saturday morning cartoons already feature Bugs Bunny and Elmer Fudd holding forth on bits and pieces of the Constitution. Squeezing more such pabulum between commercials for cornflakes and Go-Bots would not add much light to the subject. And yet a lot more light is needed.

Not long ago, the Hearst Corporation published a survey of the American public's knowledge of the Constitution. The findings were not very encouraging. Consider a few of the highlights:

45% of the people surveyed believe that the U.S. Constitution embodies the Marxist maxim, "From each according to his ability, to each according to his need."

49% of the American people believe that the President may suspend the Constitution whenever he declares a national emergency.

51% believe the Constitution does not permit a citizen to preach revolution—that, in a nation born of revolution.

Those are alarming numbers in a country whose Constitution depends on a fully informed citizenry. A century ago, James Russell Lowell warned that too many people had come to see the Constitution as a giant "machine that would go of itself." Twenty years later, Woodrow Wilson recognized that the Constitution is not a machine at all but, in his words, a "living thing." What he did not add was that it is a very peculiar living thing. It has no body, no mind, no moving parts or organs or spirit, apart from the minds and

bodies and spirits of the people themselves—people whose constant vigilance is the lifeblood of constitutional survival.

To keep the Constitution's promise, it is crucial that the people insist on compliance. If the people elect and retain leaders whose fidelity to the Constitution is a matter of convenient rhetoric—a fickle, sometime thing—leaders who praise the Constitution but scuttle it when it displeases them or when they believe they can get away with it—then it is the people, and not the Constitution, that must be held to account for what has gone awry.

When Presidents, or their aides, assume that they are above the law, then it is a cop-out to ask only: “What did the President know and when did he know it?” or even, “What did the President forget and when did he forget it?” All of us, Republicans and Democrats alike, must also ask: what have the people—*all* of us—forgotten about the requirements of genuine executive leadership and accountability in a constitutional democracy? We talk glibly about how the President must be held responsible for the actions of his subordinates. But we tend to forget that the President is *our* subordinate. We select him; he works for us; if we choose Presidents who are terrific at making us feel good, and at helping us to avoid facing hard realities, the ultimate responsibility for evading the Constitution is not theirs, but ours. “We have met the enemy,” Pogo once said, “and they is us.”

That is the most fundamental reason that we must not be content to *celebrate* the Constitution, or even to *cerebrate* it and study its meaning on this Bicentennial: we must decide to live it. To do no *more* than praise it is, in the end, to bury it.

I think back again to that Mayflower cartoon with which I opened these remarks. Why do we venerate that great ship? I think it is less because of the vessel it *was* than because of the *voyage it began*. And for those who would parade around the Constitution while turning back the clock of constitutional progress, the Constitution is like her naval namesake, the U.S.S. Constitution, now safely berthed in Boston Harbor, which I flew over yesterday—a curiosity for tourists, an obsolete and empty vessel good only for veneration.

But the Constitution of the United States is much more than that. It is a repository of memory and a call to progress. And, what is most important, the two are deeply linked. Justice Brennan was right when he reminded the narrow majority, in last month's decision about racial discrimination in the administration of the death penalty, that we ignore the evils of our own history at our peril:

“[F]or,” Justice Brennan said, “we remain imprisoned by the past as long as we deny its influence on the present.”

I would add only this: we remain imprisoned by the past as long as we worship or revere it while ignoring its deepest lessons for our future. At a gathering of some 2,000 historians in Philadelphia last month, the focus was on the Constitution—but less on its origins than on the long line of dissenters and rebels who helped shape its development. Pete Seeger sang to the historians about working-class women and men. Son Thomas, from the Mississippi Delta, sang the blues—the music first of black dissent, then of power within despair, then of universal, undying hope.

What shall we say to those who come to praise the Constitution but would truly bury its redemptive message? Perhaps we should tell them to listen close. Maybe they, too, will hear the Bicentennial Blues.

