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LEXSEE 40 Vand. L. Rev. 1343

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Vanderbilt Law Review

NOVEMBER, 1987

40 Vand. L. Rev. 1343

LENGTH: 3965 words

ESSAY: Another View: Our Magnificent Constitution.

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SUMMARY:

... It is by now no revelation that the Framers would be aghast at the size and reach of government today; but they would also be enormously proud of how much of their legacy has endured. ... It is one thing to be reminded of the compromise on slavery during the making of the Constitution. It is quite another, however, to encourage the view that there are two constitutions, the one of 1787, the other consisting of the Bill of Rights and the fourteenth amendment; that the old one is so thoroughly defective that it did not survive the Civil War, and that the new one alone is worthy of celebration. ... Indeed, it was only by preserving our underlying constitutional system -- one of divided governmental authority and separated government powers -- that blacks could enjoy the fruits of liberty once that self-contradiction to which I alluded was corrected. ... Many of the Framers were not satisfied to protect individual rights merely by limiting the power of national government; they insisted upon a Bill of Rights to safeguard explicitly those rights they deemed most fundamental. ... In making this deal with the devil -- and departing from the absolute principle of "equality under law" -- the Framers undermined the moral legitimacy of the Constitution. ... James Wilson, for example, emphasized that "the term slave was not admitted in this Constitution." ...

TEXT:

[*1343] Let me start with the observation that I regard myself to be most privileged to be a public servant at a time when we celebrate the 200th anniversary of the Constitution -- a magnificent document that has, in my view, no equal in history and every reason to be feted. It is by now no revelation that the Framers would be aghast at the size and reach of government today; but they would also be enormously proud of how much of their legacy has endured. The vitality of the original Constitution, and its various amendments, is reflected by its ability to withstand spirited debate over its content and meaning, a process that thankfully has been taking place with more and more enthusiasm in town meetings and forums all around the country, involving students, public officials, and citizens of every variety in evaluating how well our Constitution has served us over the past two centuries. I find it remarkable -- and an enormous tribute to the Constitution -- that in every instance about which I have read, these gatherings have been hardpressed to think of ways in which to improve it in any meaningful manner.

That is not to say that the original Constitution of 1787 was flawless. And in our celebration of the document, we must not overlook its flaws and our long and painful struggles to correct them.

If there was any tendency to do so, it was no doubt corrected when Justice Thurgood Marshall spoke in Hawaii on the Constitution's Bicentennial celebration. n1 whatever degree of disagreement one might have with Justice Marshall's comments, he has invigorated the debate on the meaning and vitality of constitutional [*1344] principles in a focused way that can only serve to underscore the importance of the document itself and why it is so deserving of this Bicentennial celebration.

In recounting his remarks, I will rely on Justice Marshall's own words. He began by warning against what he called the "tendency for the celebration to oversimplify" the adoption and meaning of the Constitution of 1787 and to "overlook the many other events that have been instrumental to our achievements as a nation" n2 -- events that, as he explains, included the Civil War and the amendments added to the Constitution in its wake. n3 Thus, he rejected what he described as a complacent belief that the "vision of those who debated and compromised in Philadelphia yielded 'the more perfect Union' it is said we now enjoy." n4 Justice Marshall remarked further that he does not believe -- and I quote -- that "the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention[;]" n5 nor does he find "the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound." n6 The government the Framers of 1787 devised, he declared, "was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today." n7

More specifically, Justice Marshall faulted the original Constitution because, as he put it, the Framers "did not have in mind the majority of America's citizens." n8 The Preamble's "we the People," the Justice said, included only whites. n9 Justice Marshall observes that the Constitution tacitly addressed the slavery issue in two ways: in article I, section 2 by counting "other Persons" as three-fifths of "free Persons" for purposes of congressional representation; and in article I, section 9, by protecting the authority of states to continue importing slaves until 1808. n10 Because the original Constitution was defective in this manner, Justice Marshall holds that "while the Union survived the civil war, the Constitution [*1345] did not." n11 Taking its place, he said, was "a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process and guaranteeing equal protection of the laws." n12 For Justice Marshall, it is this new Constitution that we should celebrate; not the old one, which contains "outdated notions of 'liberty,' 'justice,' and 'equality.'" n13 Thus, Justice Marshall declines to participate in the festivities with "flag-waving fervor," but rather plans to celebrate the Bicentennial of the Constitution as a "living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights." n14

Justice Marshall chose to focus almost exclusively on the most tragic aspects of the American experience, but he is absolutely right to remind us of them. For the Constitution was intended to be the culmination of a great struggle for the natural rights of men -- a philosophy whose cornerstone is the absolute guarantee of equality under the law. When the Framers sought to protect in the Constitution the fundamental rights of man but failed to guarantee explicitly those rights to every individual, they introduced a self-contradiction that preordained struggles and conflicts we continue to confront today.

I am concerned, however, that what Justice Marshall has encouraged is far more than a simple mid-course correction in our celebration of the Constitution.

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It is one thing to be reminded of the compromise on slavery during the making of the Constitution. It is quite another, however, to encourage the view that there are two constitutions, the one of 1787, the other consisting of the Bill of Rights and the fourteenth amendment; that the old one is so thoroughly defective that it did not survive the Civil War, and that the new one alone is worthy of celebration. Certainly, we ought to understand and appreciate the original Constitution in light of its weaknesses as well as its considerable strengths. But in the process, we ought to respectfully decline the invitation to consign it to the dustbin of history. That is a judgment as wrong as any on the other side of the ledger that uncritically praises the document of 1787. We indeed need what Justice Marshall called for -- a "proper [*1346] sense of perspective." n15

Notwithstanding its very serious flaws, the Constitution in its original form constituted the greatest advance for human liberty in the entire history of mankind, then or since. Indeed, it was only by preserving our underlying constitutional system -- one of divided governmental authority and separated government powers -- that blacks could enjoy the fruits of liberty once that self-contradiction to which I alluded was corrected.

Fresh from the experience of subjugation under the British Crown on one hand, and the failure of the Articles of Confederation on the other, the Framers understood that there is an interdependent relationship between fundamental rights and the structure and powers of government. Thus, they crafted a government of limited powers, grounded in natural-law principles and deriving its authority from the consent of the governed. They designed a system to protect individual rights through a balance and separation of governmental powers, which would forever ensure that the new national government would not exceed its enumerated powers. Not the least of these checks against governmental invasions of individual rights was the creation in article III of an independent judiciary as a guardian of constitutional values.

Many of the Framers were not satisfied to protect individual rights merely by limiting the power of national government; they insisted upon a Bill of Rights to safeguard explicitly those rights they deemed most fundamental. Although the Bill of Rights was adopted separately, it would be error to view the original Constitution apart from the first ten amendments, for the Framers agreed from the outset that the rights enumerated in the Bill of Rights were the object of government to protect. Beyond setting forth specific rights essential to a free people, the Framers established in the ninth and tenth amendments a decentralized federal structure to secure more fully the free exercise of individual rights and self-government.

This was the basic structure of government the Framers deemed necessary to vindicate the principles of the American Revolution as set forth in the Declaration of Independence; and that, in my view, is the unique and remarkable achievement we celebrate today. But in celebrating the triumph of the Constitution, I am in full agreement that we must not overlook those parts of the constitutional experiment that were not noble and which, [*1347] fortunately, have long since been corrected. Indeed, the experience of the Framers' compromise on the issue of "equality under law" provides us with important lessons even today.

From our historical vantage point, there is certainly no excuse for the original Constitution's failure to repudiate slavery. In making this deal with the devil -- and departing from the absolute principle of "equality under law" -- the Framers undermined the moral legitimacy of the Constitution.

But we ought to recognize that on this issue the Framers were faced with a Hobson's choice. The Constitution required unanimous ratification by the states, and at least two of the states refused to consent unless the slave trade was protected. James Wilson explained the dilemma: "Under the present Confederation, the states may admit the importation of slaves as long as they

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please; but by this article, after the year 1808, the Congress will have power to prohibit such importation. . . . I consider this as laying the foundation for banishing slavery out of this country." n16 We know now that this hope was far too optimistic; and indeed, it would take the Civil War to rid the Nation of that evil institution.

But even as the Framers were acceding to this compromise, they were sowing the seeds for the expansion of freedom to all individuals when circumstances would permit. James Wilson, for example, emphasized that "the term slave was not admitted in this Constitution." n17 Instead, the term "Person" was used, suggesting that when the slaves became "free persons," they would be entitled to all the rights appertaining to free individuals. n18

Indeed, many abolitionist leaders argued that the Constitution, by its omission of any mention of slavery, did not tolerate slavery. Noting that the Constitution nowhere mentions the word "slave," Frederick Douglass declared that "[i]n that instrument, I hold there is neither warrant, license, nor sanction of the hateful thing." n19 Yet such arguments were tragically unheeded by the United States Supreme Court in the Dred Scott decision, n20 which provided succor to the notion that there are justifications for exceptions to the principle of "equality under law" -- a notion that despite its sordid origins has not been totally erased to this day.

[*1348] Indeed, the Dred Scott decision illustrates that a significant part of the responsibility for our failure to make good on the principle of "equality under law" can and should be assigned less to shortcomings in the original Constitution -- as Justice Marshall would have us believe -- but to those who sat where Justice Marshall now sits, charged with interpreting that document.

Justice Marshall apparently believes that the original flaws in the Constitution dictated the result in Dred Scott. I am more inclined toward the view of my colleagues at the Department of Justice, Charles J. Cooper and Nelson Lund, who argue that Chief Justice Taney's constitutional interpretation was "loose, disingenuous, and result-oriented." n21 Justice Curtis' dissent sounded a warning over this type of judicial interpretation unattached to constitutional moorings that is as compelling now as it was 125 years ago:

Political reasons have not the requisite certainty to afford rules of interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we no longer have a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. n22

The judiciary's tragic failure to follow the terms of the Constitution did not occur in this one instance only. Indeed, the Civil War amendments and civil rights legislation passed in that era were in the next several decades emptied of meaning by the Supreme Court in decision after decision. In Plessy v. Ferguson, n23 to cite but one example, the Court once again stepped in and, over the lone, brilliant dissent of the elder Justice Harlan, shamefully sacrificed the principle of "equality under law."

I daresay that had the Court fully honored its mandate under the original Constitution in Dred Scott, or under the fourteenth amendment in Plessy v. Ferguson, we could well have escaped much of the racial strife and social divisiveness that Justice Marshall lays at the doorstep of the Constitution itself. Indeed, the tragic legacy of those decisions -- the deadening consequences that so regularly flow from a compromise (no matter how well intended) of the principle of "equality under law" -- provides a sobering lesson for the present Court as it struggles with similar issues involving [*1349]

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race and gender discrimination. These are issues that no less so than in an earlier era leave hanging in the balance the overarching questions of whether the liberating promise of the Constitution, as originally understood and subsequently articulated in explicit terms by ratification of the Civil War amendments, will or will not be fulfilled for all Americans.

Justice Marshall, I would respectfully submit, too casually brushes so weighty a concern to one side in contending that the Constitution did not survive the Civil War. One would think that this assertion would at least invite from some quarter the obvious questions: Did separation of powers survive the Civil War? Did the executive branch and the Congress? Did, indeed, the institution of judicial review?

I must admit to quite a different reading of history, one that has an abiding appreciation of the fact that our Constitution did survive so cataclysmic an upheaval as the Civil War. In all too many instances of internal strife among a people, one form of subjugation is ultimately replaced by another. But the Civil War produced a far different (indeed unique) result: its consequence was to secure more perfectly and extend to all Americans -- through the thirteenth, fourteenth, and fifteenth amendments -- the blessings of liberty as set forth in the Declaration of Independence, blessings of liberty that had already been secured for other Americans in the original Constitution and Bill of Rights. It is revisionist history of the worst sort to suggest that the fourteenth amendment created a blank constitutional slate on which judges could write their own personalized definition of equality or fundamental rights. The Civil War amendments were a logical extension of what had come before: they represented evolutionary, not revolutionary change.

To be sure, the fourteenth amendment does offer support for Justice Marshall's claim that the Constitution is "a living document," n24 but only in the sense that the Constitution itself provides a mechanism -- namely, the amendment process -- to reflect changing social realities. Indeed, this orderly process for constitutional "evolution" is a part of the original Constitution's genius, for it provides a mechanism to correct flaws while safeguarding the essential integrity of our constitutional structure. But the existence of this mechanism -- coupled with the system of checks and balances among the three branches of the federal government and the strong endorsement of federalism principles embodied in the tenth [*1350] amendment -- makes it abundantly clear that the Framers gave no license to judges (members of the Branch regarded, to borrow from Alexander Hamilton, as the "least dangerous" of the three n25) to construe constitutional provisions as they see fit.

There is good reason for this confluence of restraints on judicial activism. The Constitution is not a mass of fungible, abstract principles whose meaning varies with time; rather, it comprises a broad societal consensus on certain fundamental, absolute principles necessary for the protection of individual liberty. The Framers believed that these constitutional values should not be lightly disturbed or set aside. Accordingly, the Constitution was structured so as to require that any change reflect the broadest expression of societal consensus. n26

This does not leave the Supreme Court or lower federal courts unable to apply the Constitution to circumstances never contemplated by the Framers. But the Judges are not free to disengage from our constitutional moorings in furtherance of their own social agendas; they are not free to determine that the constitutional principles themselves are unwise or obsolete.

Indeed, the very premise on which rests the notion that the Constitution as originally framed has no relevance today is fatally flawed. For the fact remains that the core structure upon which the Constitution was based -- a government of limited powers, federalism, separation of powers, protection of fundamental individual rights -- has proven in the past two centuries far superior to any other governmental system in protecting human freedoms. And

