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COMMENTARY

WILL THE CONSTITUTION SURVIVE INTO THE TWENTY-FIRST CENTURY? SOME REFLECTIONS ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

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A great amount of hoopla has gone on this year about the wisdom of our Founding Fathers and that magnificent document they struck off in Philadelphia back in 1787. It has taken Thurgood Marshall to remind us that the Constitution was not conceived without sin.¹

Nonetheless, while recognizing that the Constitution is not flawless, most Americans would acknowledge that it has served the majority of us well these two hundred years. It has survived with only minor alterations; America has become a world power and, for a time, became the most prosperous country on this earth; and Americans enjoy a relative amount of personal liberty and freedom.

But what about the future? How will the Constitution hold up when it confronts the Twenty-First Century?

Most discussions on the future of the Constitution focus on structure. Is Federalism obsolete? Does Separation of Powers really work? Yet the pragmatism that characterizes the American constitutional character has always ensured that these questions will work themselves out anew with each generation. But when the focus is on personal rights and liberties, I for one, am more pessimistic about the future.

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1. T. Marshall, Remarks at the San Francisco Patent and Trademark Ass'n (May 6, 1987). Professor Derrick Bell has eloquently pointed out that the Framers achieved freedom for the white race by compromising the freedom of the black race. D. BELL, AND WE ARE NOT SAVED 26-50 (1987).

I.

Our Constitution was drafted to ensure the continuing existence of a peculiar institution—the enslavement of black Americans.² The opinion of the Framers about black Americans was summarized by Chief Justice Taney in the infamous *Dred Scott* opinion in 1857:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit.³

The Civil War and the passage of the thirteenth, fourteenth and fifteenth amendments and several important civil rights acts following the War hoped to put an end to this peculiar institution.⁴ And they did. But the racism which produced the system continued and received official imprimatur by the Supreme Court in a series of late Nineteenth Century decisions.⁵ Slavery was abolished, but Jim Crowism took its place.⁶

*Brown v. Board of Education*⁷ in 1954 and a series of civil rights statutes passed by Congress in the 1960's⁸ spelled doom for Jim Crowism, and for a time it looked like they might do more. But racism has survived—again compliments of the Supreme Court.

Slavery and Jim Crowism were based on direct oppression of the black race. They were so successful that today black inferiority can be assured by “indirect oppression” and “ritual avoidance.”⁹ By affirming that equal protection is violated only by “purposeful” discrimination, the Supreme Court has ensured that the results of past racism will continue.¹⁰

2. See *supra* note 1.

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

4. See, e.g., HYMAN & WIECEK, *EQUAL JUSTICE UNDER LAW* (1982).

5. See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876).

6. The classic work on Jim Crowism is C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

7. 347 U.S. 483 (1954).

8. E.g., *The Civil Rights Act of 1964*, 42 U.S.C. § 2000 ff; *The Voting Rights Act of 1965*, 42 U.S.C. § 1973; and *The Fair Housing Act of 1968*, 42 U.S.C. § 3601 ff.

9. A. PICKERING, *CONFRONTING THE COLOR LINE* 367 (1986). The National Urban League, in its annual reports, documents that large numbers of black Americans are still at the bottom of society. NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* (1986). See also M. EDELMAN, *FAMILIES IN PERIL* (1987); W. WILSON, *THE TRULY DISADVANTAGED* (1987); W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978).

10. In *Washington v. Davis*, 426 U.S. 229, 248 (1976), Justice White frankly acknowledged that

[a] rule that a statute, designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race

Also, by lumping all racial and national origin discrimination together, the Court has diluted the means available to eradicate the continuing legacy left by slavery and Jim Crowism.¹¹ White Americans, including such ethnic groups as the Irish or the Italians, Orientals, Hispanics, or even the American Indians, have not been discriminated against in the same manner as has been the case with black Americans. Yet statutes and judicial opinions appear to be incapable of making the distinction.

The destructiveness of relying on an overbroad and inflexible "equality" standard is evident in the affirmative action cases.¹² Nevertheless, assuming that some affirmative action plans for black Americans will continue to be accepted by the courts, even the most liberal programs are aimed only at helping a small number of blacks enter the middle class.

Unless present trends are reversed, the prediction of the Kerner Commission¹³ that we will be a divided nation will certainly be true for the Twenty-First Century, if it is not already true in 1987. The fact that many middle class blacks have broken the color line and are now in positions of visibility and power does not alter the fact, and indeed obscures that fact, that a permanent subclass of poor, uneducated, and unemployable black persons is being formed which will last for generations.¹⁴

Unless the American people are prepared to repair the damage to black Americans caused by the injustices of the past,¹⁵ the Twenty-First Century looks bleak indeed in its prospects for racial justice. Existing constitutional provisions should sufficiently accommodate the type of massive scheme of reparation that is necessary, but a more specific constitutional provision aimed at doing right for black Americans would not be out of order and indeed would be a bright light in what has otherwise been a dismal history.

more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248. See also *Mobile v. Bolden*, 446 U.S. 55 (1980); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

11. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

12. *E.g.*, *Wygant v. Jackson Bd. of Educ.* 106 S. Ct. 1842 (1986); *Bakke*, 438 U.S. 265.

13. REPORT ON THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

14. See M. EDELMON, *FAMILIES IN PERIL* (1987); W. WILSON, *THE TRULY DISADVANTAGED* (1987); W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978); NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* (1986).

15. For a contemporary discussion of the need to make reparation, see BELL, *supra* note 1, at 123-39.

II.

Our Constitution, drafted in 1787, reflects Eighteenth-Century values. To the extent that it and its subsequent amendments concerns itself with the individual, its concern is primarily with checking the power of government as it might encroach upon individual liberties. This approach is enduring, but it is not enough.

Our Constitution concerns itself only minimally with distributive justice, and that is only to ensure that the property of the haves will not be confiscated by the have-nots.¹⁶ The concerns of the Twentieth-Century welfare state—food, clothing, health care, shelter, environment, education and other essentials basic to a minimally adequate standard of living—are not addressed at all.¹⁷ As such, even by the Twentieth-Century standards, much less Twenty-First Century standards, our Constitution is an anachronism.

As our society continues to polarize itself by diminishing the size of the middle class, which has been the foundation of Nineteenth and Twentieth Century America, and by becoming a nation of rich and poor, the problem of distributive justice can no longer be ignored. It is true that the New Deal welfare state was ushered in without constitutional amendment.¹⁸ It is unclear, however, how a progressive nation entering the Twenty-First Century can ignore the fact that its fundamental law does not even address these concerns.

Opponents of constitutionalizing basic human needs and of placing a positive duty on government to address these needs might argue that to do so would further enhance the power of the judiciary, which would presumably oversee the process to insure that constitutional rights are not violated.

India and Nigeria both solved this problem by putting these duties in a separate article entitled Fundamental Objectives and Directive Principles of State Policy.¹⁹ The articles outline various political, economic and social objectives and direct the legislature, the executive, and the judiciary to conform to, observe, and apply these principles. While these constitutions specifically provide that no court can directly enforce these objectives, the directives do provide the courts with standards to measure and interpret other provisions of the constitution and ambiguous statutes.²⁰

16. See U.S. CONST. art. I, § 10, cl. 1 (the Contracts Clause); U.S. CONST. amend. V (the Taking Clause).

17. Cf. UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948).

18. See *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

19. CONST. OF INDIA pt. 4 (1949); NIG. CONST., ch. 2 (1979).

20. *Damisha v. Speaker, Benue State*, [1983] 4 N.C.L.R. 625, 631 (High Ct. Adikpo); *Archbishop Okogie v. Attorney Gen. of Lagos State*, [1981] 2 N.C.L.R. 337, 350 (Fed. Ct. App. Lagos); D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 137

III.

The racial and class polarizations referred to above no doubt pose an additional threat to the civil liberties of all Americans. Should our economy fail to expand to meet expectations and the myth that all men, and now women, can succeed in America if only they work hard enough vanishes, many Americans will feel threatened and cries for law and order will increase. Those in power will no doubt feel pressure to restrict the liberties of all.

The answer is that we have a written Bill of Rights to protect our fundamental freedoms. But even those rights specifically enumerated in the Bill of Rights have never been held to be absolute. They can always be balanced against the legitimate needs of the government.²¹ Non-enumerated rights, like the right to privacy, are even more insecure, and judges and scholars are questioning whether they may exist at all.²²

Procedural protections for those accused of crime have been eroded in the name of law and order. In *Allen v. Illinois*,²³ Justice Rehnquist held for the Court that certain "criminal" protections in the Bill of Rights will not apply despite incarceration if the state treats rather than punishes dangerous persons. Similarly, in *United States v. Salerno*,²⁴ Justice Rehnquist laid the framework to uphold laws requiring the preventive detention without bail of persons on the basis of suspected future dangerousness.

But critics will say that the federal courts are always open to check the whims of the majority if they become too oppressive. However, even if one does not completely accept the argument advanced in *Ex Parte McCordle*²⁵ that Congress can restrict the ability of the federal courts to protect individual liberties, the Supreme Court itself has closed the door to many "controversial" cases.

The Court has limited the ancient writ of Habeas Corpus.²⁶ It

(8th ed. 1980).

21. *E.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (religion); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (association); *Dennis v. United States*, 341 U.S. 494 (1951) (speech); *Korematsu v. United States*, 323 U.S. 214 (1944) (race).

22. See *Dronenburg v. Zeck*, 741 F.2d 1388 (D.C. Cir. 1984) (Bork, J.); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The action of the Senate in rejecting the appointment of Judge Bork to the United States Supreme Court may well indicate that Americans will not accept such a crabbed approach to constitutional interpretation.

23. 106 S. Ct. 2988 (1986).

24. 107 S. Ct. 2095 (1987).

25. 74 U.S. 506 (1868). *Cf.* *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 83-84 (1982).

26. *Stone v. Powell*, 428 U.S. 465 (1976) (holding writ is not available if state provided an opportunity to adjudicate a fourth amendment claim in the state courts).

has constitutionalized such devices as standing²⁷ and ripeness²⁸ and has expanded the concepts of sovereign and official immunities so as to bar litigants from the courts.²⁹ Pressure is on to expand the concept of the political question.³⁰ Even when the Constitution or a statute does not bar the federal courts from hearing a claim, the prudential concept of abstention has been used to get rid of especially vexatious cases.³¹

Four years ago, I was teaching law in Nigeria. Following a military coup, I was asked to give a public lecture on the role of courts and individual liberties in a military regime. I ended my speech with a reference to our Declaration of Independence, which provides that all men have certain unalienable rights. I argued that if the courts are not open to protect those rights against governmental abuse, then men have no alternative but to overthrow their government. Everyone listened politely and then I received a question on what I thought might happen in America if the military staged a coup. I was somewhat startled by the question, but I responded that given our history of respect for individual liberties and our respect for law, I did not see such a scenario as being even remotely possible.

On reflection, I have often thought my answer was too flippant. Now we have been told that the "American hero" Ollie North drew up plans for military rule in the United States in the event of a crisis such as "nuclear war, violent and widespread internal dissent or national opposition to a United States military invasion abroad."³² Given the low estimation many people have of politicians and the political process,³³ if people sense a break down in law and order and a threat to their security, however that may be defined, I can now imagine a frustrated and disillusioned American public accepting military rule, at least for a time.

The 1979 Nigerian Constitution expressly outlawed a military takeover³⁴ and restricted the power of the legislature to take juris-

27. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

28. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

29. *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (official immunity); *Penhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (sovereign immunity); *Edelman v. Jordan*, 415 U.S. 651 (1974) (sovereign immunity);

30. See *Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting); *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., dissenting).

31. See *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987).

32. *Chicago Tribune*, July 5, 1987, at 10, col. 4.

33. See THE GALLUP POLL, November 27, 1986. "The bad news is that Americans continue to hold national, state and local officeholders in relatively low esteem [S]enators, congressmen, local officeholders and state officeholders ranked near the bottom of 25 occupations tested." *Id.*

34. NIG. CONST. § 1(2), *suspended by* DECREE NO. 1—CONSTITUTION (SUSPENSION AND MODIFICATION) DECREE (1984).

diction away from the courts to hear constitutional questions.³⁵ The military was able to sweep these provisions aside because the public had lost faith in democracy.³⁶ Our Constitution does not contain the protections enunciated in the Nigerian Constitution largely because such protections are illusory, and more importantly, I suspect, because we have had the will to resist such simple solutions as could be offered by military rulers.

IV.

I now wonder if we have the will at this time to solve our racial dilemma and our social problems and the will to resist tyranny if it means sacrificing our security and comfort. Assuming we have the will, and assuming we do not perish in a nuclear disaster, the big challenge of the Twenty-First Century will be to discover how we can establish a world community under laws which respect and protect individual rights and liberties, as well as provide the basic necessities of life to all persons. Our constitutional experience hopefully will demonstrate that this challenge can be met. If it does not, then all people will be the losers.

35. *Id.* § 4(8).

36. See Seng, *Democracy in Nigeria*, 9 BLACK L.J. (U.C.L.A.) 113 (1985).

