

A Constitution For All Americans

by

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We are free in this country, and thereby hangs a tale which cannot be too often rehearsed. Strange to tell, there are more than a few people, many in high places, who neither know how we came to be free nor seem particularly well disposed toward the preservation of that freedom.

Rose Elizabeth Bird, late of the California Supreme Court, writes in the *Washington Post* of an American Constitution about which citizens ought to be outraged. According to her, the American founding was a travesty, which trampled upon the rights of women. She used the kinds of arguments familiar to all, for she neither invented them nor would know how. She received them from the same stale, academic sources which, for the better part of this century, have dominated American education. They include names like Oliver Wendell Holmes (who thought there was no essential distinction between a human being and a baboon), the historian Charles A. Beard (who thought the Founders took the great pains they did in order to fatten their own nests without anybody noticing—though he never indicated why it should make a difference if anybody had noticed), the historian Carl Becker (who said that it was meaningless to inquire whether the principles of the Declaration of Independence were true or false), and a virtual army of supposed experts on the intentions of the Founders with regard to slavery (who incessantly insist upon the Founders guilt on that question).

Indeed, the wonder is that there are yet Americans anywhere who both believe that freedom is worthwhile and that we yet possess it! So general has been the assault on the principles on which this nation was founded, that it is now rare to find an able exponent of American principles in public office. Did I say rare? I am almost tempted to challenge you to name just one!

We have never faced up to the question: Can this nation endure if it fails to locate and elevate to its highest offices those Americans best qualified to express the purposes of and our relationship to the Constitution and the Declaration? Perhaps it is better that we do not insist on that question, for it is certainly the case that only one defense for our way of life is ultimately compelling: namely, the capacity of mankind for self-government. We can inquire, however, whether the American people will retain the will to demonstrate the truth of that proposition if those upon whom they rely to hold the reins of government are consistently enemies of and unfamiliar with that proposition.

I do not use words like “enemy” and “ignorant” carelessly. The reason is simple: I mean to be taken seriously when I utter them, and for that purpose it is necessary that I use them no more than absolutely necessary. Yet, I would say of Rose Bird that she is both an enemy to and ignorant of the proposition that mankind is capable of self-government, in the sense that that proposition animated the American Founders. Rose

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Bird, however, is no longer the Chief Justice of the California Supreme Court—she is an enemy whose poison has been removed even if she retains her fangs. Were she the only avowed opponent of the founding principles who had held high office in this land, we could take solace in our rescue from her reign of judicial error.

Unfortunately, Rose Bird is not alone. Indeed, there are avowed opponents of the Constitution who stand still higher than she could ever have dreamed. Justice Thurgood Marshall sits on the highest court in the land, the U.S. Supreme Court, which has the responsibility to interpret our Constitution, the supreme law of the land. But Justice Marshall is not well-affected toward the Constitution which he is sworn to uphold; nor is he particularly knowledgeable about the circumstances and arguments which attended its creation.

Justice Marshall has termed the American founding “defective from the start.” Thus, as we set out to celebrate the 200th anniversary of the Constitution’s birth, we are called by him to regard that event as the appearance in the world of a birth defect—a monstrosity. He spoke so on July 6, when he cautioned his audience and the people of the United States not to allow the patriotism of this bicentennial to blind them to massive inadequacies of the Constitution. His list of inadequacies was a traditional one, traditional that is, for relativists and avowed enemies of the Constitution: the Constitution ignored women and Indians; it was a white man’s Constitution, then only for a handful of well-to-do white men. Further, it gave full sanction to slavery, thereby perpetuating in this nation a moral curse which could not be removed but by the violence of civil war, and not altogether then. For it took the fourteenth amendment, in the hands of great humanitarian justices, to create a real regime of rights in America.

Indeed, Justice Marshall made clear, America never existed as a free nation until the Supreme Court undertook to make it so through the fourteenth amendment. Strictly speaking, therefore, we have no Constitution except the fourteenth amendment. We have no separation of powers, no checks and balances, no right of *habeas corpus*, no right of election and to be taxed by representatives of our own election—nothing at all do we have, but what a Supreme Court, standing on the ground of the fourteenth amendment, deigns to give us. We should wonder on what basis anyone could call such an image free government. I will return to that shortly.

Consider, though, the very language of the fourteenth amendment, which justice Marshall takes to be our entire constitution: “all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

This is the clause Marshall relies upon—along with the authority granted to Congress to “enforce the provisions of this article.” Consider what a host of assumptions are made here, which can have no meaning apart from that imparted to them in the original Constitution—what are states, the United States, what need citizenship mean in either, what are laws and how shall they be made? These are all prior questions, the answers to which must either derive from the original Constitution, or, if justice Marshall

prevails, can be referred to nothing but brute force. That is, if one believes that it is the mere existence of political relations among the Americans, and not the express act of the people who adopted the Constitution, which justifies existing legal and political relations, then one must also believe that it is irrelevant what particular laws and institutions existed. That, I believe, is precisely what justice Marshall believes. He sees the argument for self-government as nothing more than a justification of the rule of some particular ruling class, having no basis whatever in any notion of right or justice, no basis in the “Laws of nature and of Nature’s God.” Once we see that, we can understand why it causes him no difficulty to imagine that a ruling class can consist of a Supreme Court acting on the basis of the fourteenth amendment. His rule is arbitrary, but it is the rule he likes!

Let us return to some of the supposed inadequacies of the Constitution, some of the lies on which this view is based—some of the historical and political lies which are told throughout this land, in the halls of our government and in our media on a daily basis—and what I regard as the only acceptable alternative. Before I do so, however, I wish also to pause to express an idea concerning the political implications of Marshall’s position.

We are often encouraged to believe that any and everything is thinkable and debatable; and that we must at all costs avoid making tests of opinion as the basis for office-holding in America. We would doubtless all accept the wisdom of the Constitution in rejecting religious tests for holding office. Interestingly, when that language was added to the Constitution it provided the finest testimony we can have of the intentions and worth of the Founders. They lived in a land in which religious tests were not only acceptable but also not unheard of.

Jews in Philadelphia—persons who had distinguished themselves in the revolutionary cause—were still subject in 1787 to a requirement that all office holders swear fidelity to the Old and the New Testaments. As the Constitutional Convention sat in the summer of 1787, the Jews of Philadelphia petitioned that the delegates do something to remove the incapacity under which they labored. How great testimony is it, then, to learn that the Constitution’s no religious tests language had already been added to the Constitution in the week before their petition arrived, on a unanimous vote! Worthy indeed! There were no Jews in the convention, and no one who had made it his particular business to see to their interests. This is testimony to the degree to which the Founders were animated by ideas of liberty, and I concur with their ideas about religious tests. I would urge no formal religious tests for service on the Supreme Court, nor for any other office under the Constitution.

I would impose a test of fidelity to the Constitution, however. The Founders did so; where they did not require a religious oath, they did require an oath of fidelity to the Constitution. Does it not make sense? Who would want to place the dearest interests of the society into the hands of its sworn enemies? There is a strict relationship between our society’s prospects of success and dedication to its purposes and principles, by the people themselves and their representatives.

I believe that demonstrated antagonism to the Constitution is grounds for removal from office. Justice Marshall cannot defend and impartially administer a constitution

which he believes to be indefensible. The people of this country cannot justify surrendering the dearest hopes and rights into the hands of such a justice. Justice Marshall should resign. I would not have said so much in the aftermath of the Bakke decision, in which justice Marshall wrote an opinion which no less clearly made his opinions known. There, at least, he subordinated his opinions to his appointed role and made no larger claim for them. He did not make the outright rejection of the Constitution the basis of his argument, preferring instead to cultivate the appearance that he considered it a matter of debate whether the Constitution were compatible with the result which he preferred. That is the minimum concession we can demand, for it acknowledges that there exists a law higher than the Court which ought to be controlling to the Court.

Now, however, in his public speech, justice Marshall has removed the fig leaf of respectability. We, accordingly, cannot hide from ourselves the implications of his attitude: the society justice Marshall would construct for the United States is not at all informed by the purposes and principles of that experiment in liberty which the Founders initiated. Since Justice Marshall is unwilling to continue the experiment—unwilling to make the journey with us—we should resolve to make the journey without Justice Marshall.

Permit me now to investigate more closely the grounds of Justice Marshall's antipathy to the Constitution. I have already declared the grounds to be based on lies. I wish to make them manifest. The first and most obvious lie begins with the Declaration of Independence. All have heard it said that the Declaration excludes women, because it reads, "all men are created equal." It excludes blacks because, it is said, when they wrote "men" they meant "white Angle-Saxon Protestant males." It excludes Indians, etc. The list of reasons goes on and on. But what is the truth, apart from this story we hear? And how should we uncover it?

I suggest that we return to the language that Thomas Jefferson used originally when drafting the Declaration of Independence. Allow him alone to speak for himself, in which he would point out that he used the term "men" three times in the document. "All men are created equal" was only the first; thereafter he wrote that "governments are instituted among men" and founded in the consent of the governed. To the question whether he regarded women as ungoverned, he might respond with an air of incredulity. Surely women too were to be governed. Besides, when Jefferson liberalized the criminal code of Virginia, he included a provision specifically to deal with loose or ungoverned women, so far was he from expecting that to be the norm. Women were surely to be governed, and thus included in the language that "governments are instituted among men."

The third time Jefferson used the term "men" he reproved the King of England for obstructing the elimination of the slave trade in the colonies. There he wrote,

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty ... Determined to keep open a market where MEN should be bought and sold ...

This was the only time he emphasized the word, printing it in bold capitals. Ask him whether, when he did this, emphasizing MEN, he meant "white Angle Saxon Protestant males." Would he not return with the question, "Are you ignorant who the

slaves were among us?” Or, “Do you think me so dense as not to know?” Surely he knew intimately that they were not only black but male and female. Thus, Mr. Jefferson would finally declare that the language of the Declaration is plain; it speaks to all humankind. None are excluded. When the Declaration affirms the proposition that “all men are created equal,” meaning that no human being is by nature the ruler of any other, it means all human beings. Let them that deny this avow the principle by which they would replace it and still preserve to us our love of liberty. They should be forced to declare themselves and to show from where the love of liberty will derive, if not from “the laws of nature and of nature’s God.”

A pedantic objection to this discussion about this point would remind us that the delegates did not accept Jefferson’s language about the slave trade. From that truth they would erroneously conclude that the sense of the language was entirely deleted from the Declaration. We will see that this was not so in the examples to follow, for the Declaration was taken following its adoption precisely in the sense in which it was originally formulated.

Thus would Jefferson respond to such lies, no matter how often written in textbooks, histories, and newspapers. It is unlikely that Justice Marshall employs them because he has not returned to do the reading; more likely, he simply finds them a convenient peg to hang a radical hat on. The radical assault has the intention of reconstructing this society, to which end they require first to reconstruct our understanding of our place in this society. They aim to separate Americans, to line them up in categories, and to obliterate their memory of the great ambition to demonstrate that mankind is capable of self-government. Then only can unfold that radical vision which means the surrender of power and authority into the hands of a very few on the model of justice Marshall’s constitution.

There are other lies besides. A few years after the Declaration of Independence, the Assembly of New Jersey, along with other states, had received from the hands of the Continental Congress a plan for Articles of Confederation, our first Constitution. The people of New Jersey expressed a concern about this plan on account of its provision for calling out the militia of the United States. The plan provided that the different states would be assessed quotas of participation in the militia based on the proportions of white citizens. This made no sense to the New Jersey Assembly, for it entailed that in states which had effectively eliminated slavery, an entire population would be counted, farmers as well as bankers. In a slave state like South Carolina, on the other hand, one would not count a substantial part of the whole population—indeed excluding the greater part of the farmers in calculating the quotas.

By New Jersey’s count that meant that more New Jersey blood must be spilled in war than slave state blood. They cited the Declaration of Independence’s language that “all men are created equal” as authorizing the conclusion that this was unjust. While they made no abolition proposal, and did not pretend to interfere in Virginia’s or North Carolina’s institutions, they did say that abolition seemed to be the reasonable course—unless slave owners were willing to make the sacrifice of sending virtually all of their free males to the militia. Such a move would have preserved a proportionate equality, albeit requiring southern states to make their own decision whether to abandon their homes and fields to the care of their slaves. The decision was their own, as New Jersey

saw it. But New Jersey recognized—as did the Founders in general—that there existed a tension between principles of freedom and principles of slavery. Whoever denies that the Framers recognized that, as justice Marshall has done, lies in the teeth of the facts.

We cannot improve upon the Founding by hiding from ourselves the serious moral questions that were involved in developing the principles of the Constitution and the practical difficulty of dealing with the question of slavery. The example of one further lie will show this more clearly still. This has been most frequently circulated and has most wanted a review. Simply put, for a long time almost everyone in America has misunderstood that language in the Constitution which is referred to as the three-fifths clause.

The general account is that the Framers regarded black people as only three-fifths of human beings. That, in turn, shows them as bigots and their opinion of black people as low indeed. Again, this is a lie. Again, the palpable surface of the documents reveals the truth. Consider what they did in fact mean, then judge how well the Framers confronted their moral dilemmas.

In April, 1783 (not 1787) in the Confederation Congress the three-fifths compromise emerged after six weeks of debate. An eighth article was proposed for the Articles, apportioning expenses for the Confederation on the basis of land values as surveyed. There the discussion opened, only to reveal how difficult it was to assess land values and, in the rude conditions of those times, to produce accurate surveys. Thus, they resorted to numbers instead, speaking of population as a rough approximation of wealth. Taking the numbers of people in the respective states, they hit upon the following language:

expenses shall be supplied by the several states in proportion to the whole number of *white and other free inhabitants, of every age, sex, and condition*, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each state.

What, then, does three-fifths apply to? Slaves, carefully and legally defined. But re-read the opening clause, delimiting “the whole number of white and other free inhabitants.” To whom does that apply? Surely not whites only, nor only males, since “every age, sex, and condition” is further appended. Clearly, they aimed at every free human being, white and non-white. As is generally known, the only significant numbers of free-non-whites in the United States in 1783 were American blacks (another 10,000 of whom were emancipated between 1776 and 1787). There were not in American of 1783, for example, any Asians. Thus, these legislators included American blacks among the free inhabitants; the three-fifths clause following applied not to blacks generically but rather to those in the peculiar legal relation of slavery. Three-fifths of the number of slaves were counted, not in terms of their humanity but with respect to their legal status in the respective states.

The Confederation Congress fully affirmed the humanity of American blacks through the language of “white and other free inhabitants.” When this same language was taken up again in 1787 in the Constitutional Convention, was that recognition of humanity withdrawn? Here is the provision:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to the respective numbers, which shall be determined by adding to the *whole Number of free persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The distance of four years has brought changes. But what are they? On the surface the changes are primarily editorial, introducing economy and exactness of language. As any composition teacher would point out, the first thing to notice is the elimination of redundancy.

Why should it be necessary to say the “whole number of white and other free inhabitants, of every age, sex, and condition,” when the “whole number of free persons” says the same thing? Further, “adding three fifths of all other persons” is less awkward than the inclusion clause of 1783. Finally, the substitution of “Service” for “servitude” continues the liberal impulses of 1776. Thus, 1787’s language includes women and blacks; it does not exclude them.

The foregoing is not an alternative interpretation to that of justice Marshall. Anyone reading these documents and debates must arrive at this reading as the facial meaning. The language is unambiguous. While there is room for interpretation, revisiting the words and activities of the Founding Fathers as they struggled with the ultimate questions, such an interpretation would show the Founders believing to have accomplished as much as was humanly possible to place the question of slavery “on the road to ultimate extinction.” James Wilson declaimed so before the people of Philadelphia when the proposed Constitution had been transmitted for their approval. The Founders in general believed to have come down on the side of good, not evil, however much they may have been forced to compromise. None of this is required for us, however; “we see at the threshold that the entire argument against the Framers falters. It is based on lies. In this Bicentennial season nothing counts for more than recovering the truth about our past.

This is important because we see forces at work to destroy that past. They know that they will prevail in this society only to the degree that they rob it of the instrument by which the people maintain their fidelity to the experiment in liberty. If we no longer have the Founders to draw on, we will no longer draw the strength that will enable us to insist on self-government. America’s founding heritage is its Samson’s hair, and these Delilahs seek to shear it. This Bicentennial is an opportunity to reaffirm the importance of that heritage. To that end, we need again to adopt the high-toned language of moral principle. Again, the priority of self-government must be insisted upon—self-government not as a mere procedure, not as majority rule, but as Washington and the Founders aimed, as a moral principle, affirming the belief not only that all men require to be governed but that all are capable of governing themselves.

Self-government means that every self needs governing; but there is not some distant royal governor (or supreme court) to provide that government. We each provide for self-governing in ourselves and must do so if the experiment is to succeed. Washington was not alone in reminding Americans that the government which had been constructed required for its success what he called “private morality.” By that he meant

not that all values are relative; he meant that each individual must attain a level of decency sufficient to invigorate this form with real political life. Drain that away, like Samson's hair, and this government will fail. This Constitution does not exist merely on parchment. Often it is called a living Constitution, and so it is. It does not live by revolving and changing with the whims of the times, however. We know it as a living Constitution because it lives in us. It is our burden and glory to transmit it unimpaired to the future.