THE PROMISE OF AMERICA[1]

by

W. B. Allen

Chairman, U.S. Commission on Civil Rights

Although we are here to talk about the evolution of the Constitution, I do not really believe that it has evolved. And yet there is not space sufficient to develop that long story of the Constitution's formation and existence. I consider it unfortunate, if I may mildly chide my hosts, that the two days of programs have been so decidedly partial—not in a political sense, but in the sense of not really entertaining fundamental criticism that pursues the truth even at the cost of friendship. I think there are advantages to be gained in taking ourselves sufficiently seriously that we force ourselves to think through our arguments.

A number of the things said in the last two days would probably be subject to such a fundamental challenge. Obviously I can not now respond to all of them, but I feel something like the little Dutch boy called upon to stick his finger in the dike: unfortunately, the dike had already burst before he was summoned. Nevertheless, there are things I do wish to say about the Constitution.

I was mindful as Professor Bell quoted Gouverneur Morris from the Constitutional Convention, when Morris had maintained that "the protection of property is the end of government," that Morris of course recanted that statement just as soon as the question of slavery arose. He recanted because he did not want to extend that consideration to slavery. Professor Bell, accordingly, gives credit to Morris neither in his remarks on this occasion nor in his book, *And We Are Not Saved.*

I cannot say why Dr. Bell thinks it appropriate to create a misleading impression of this Founding Father. For many others, however, I do know that there is a pernicious view of the country as locked in class warfare that leads to the same result. The exponents of this view end up borrowing, whether knowingly or no, from the concordance of Karl Marx. When Dr. Bell quotes Morris as saying that "the aim of *this* society is the protection of property," he produces the impression of a conscious, bourgeois plot to exploit a proletariat. Morris, however, did not declare the protection of property to be the aim of *this* society; he rather asserted the general principle that the protection of property is the aim of *civil society*. From this general principle he meant to deduce the relevant specific applications for the United States. Before he had gotten very far in that process he had to recant, as we have related. He had discovered that the existence of slavery within the United States complicated the analysis, and he refused to permit his general theory of human nature to lend aid and comfort to the institution of slavery!

To employ class analysis, as a stand-in for race, to understand American politics is doubly misguided. First, it hinges on a weak argument—the defense of class analysis—and, second, it serves to obscure the unique and significant role that race has played in United States history. I have, discussed the latter question at length in a recently published essay.[2] The former question—the weakness of class analysis itself—deserves a few pages in this context precisely because of its familiar connection with the question of race.

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1 Remarks delivered before a Roundtable at the Symposium on "Afro-Americans and the Evolution of the Living Constitution," March 15-16, 1988, sponsored by the Smithsonian Institution and the Joint Center for Political Studies.

2 "A New Birth of Freedom: Fulfillment or Derailment," in *Slavery and Its Consequences: The Constitution Equality, and Race*, ed. by Robert A. Goldwin and Art Kaufman (Washington, D. C. American Enterprise Institute, 1988).

Americans came to the language of class analysis, pluralism, and multiculturalism in a context far broader than the relation of American blacks to the constitutional tradition. Earlier in this century the late, distinguished historian, Charles Beard, published works which made the argument that the Federalists, and most notably people like Alexander Hamilton, were defenders of a particular class—loosely, the propertied. Beard, of course, was more subtle than that. He examined the Constitutional Convention's delegate list and divided the delegates according to the kinds of property the individuals held.

The chief division Beard employed was called "realty" and "personalty.' Wealth held in the form of realty is most fundamentally landed wealth, or wealth not readily movable. Personalty is primarily money, securities; that is, wealth that is easily movable and, indeed, which becomes wealth in a certain sense only by being transferred. Beard concluded that the Federalists (who were the nationalists) were mainly folk who held personalty, which is not to say they possessed no other assets but that their wealth was not concentrated in large landholdings (except for western lands, subject to considerable speculation, and which had more to do with note-holding than with land ownership). The Federalists also dominated the Constitutional Convention, and, presumably, they operated in the interests of folk like themselves, commercial interests.

The Beardian thesis was developed particularly in relation to *The Federalist Papers*. In his analysis, the tenth *Federalist* defended a system designed to restrain the majority, so that people who held movable wealth could protect themselves from the other classes in society. When Beard's book appeared,[3] there had not been for several years any extensive scholarship on *The Federalist Papers*. Beard re-ignited a fascination with those essays and especially with the tenth essay.

Many people followed in his path. As one would expect, however, it was not long before the other side had its hearing, and the counter-Beardian thesis began to emerge. To give a shorthand version of this very lengthy debate, one might find the key question stated already in *The Federalist* number one; namely, whether people's motivations in politics and society can be assumed from the identity of their interests or class. Is it sufficient to attribute to someone a specific end or purpose simply because of his identified material status? From the knowledge that someone holds substantial securities, might one make the leap to the conclusion that his political opinions support the activities of the stock market or of people who, like himself, hold such securities?

In the scholarship the argument has by now backed away from the Beardian model and its assumptions. It has done so for two reasons: first, Beard miscalculated the property-holdings and votes of delegates to the Constitutional Convention. In fact, persons of all kinds of property were on all sides of the debate over the Constitution (and the debate over slavery). Second, it became clear that the Beardian model did not eliminate the need actually to understand and articulate the positions people actually took (witness the discussion of Gouverneur Morris above). Thus, there seemed not to be much promise in the Beardian model. In spite of that, many persons cling stubbornly to it, and we need to ask both why it pleased people initially and why, in some cases, it still does so.

The Beardian model was essentially an attempt to apply to the American experience models of analysis which had prevailed primarily in discussion of European politics—a politics which does focus fundamentally on class and status, continuing to this very day. Now that politics or that mode of analysis was given its decisive form in the works of Karl Marx in the nineteenth century, beginning with his youthful *Economic and Philosophical Manuscripts* and continuing through such mature works as *The Communist Manifesto*. Marxist class-based analysis presupposed distinctions between what came ulti-

3 *An Economic Interpretation of the Constitution* (1913).

mately to be called the proletariat and the bourgeoisie, and a necessary historical confrontation between the two. Insofar as this coming historical confrontation was a scientific fact—and that's the manner in which Marx presented it—then it had to apply to all human beings everywhere. The inspiration for the Beardian analysis was the belief that this scientific fact did indeed take place in America, and that if we did not see it, the problem had to be that something was obscuring it. Patient reflection and research would uncover it.

Against this background and in the same time period in which Beard worked we find the work of the social scientist, Arthur Bentley. Bentley gave us the term "pluralism" as a social descriptor. There is perhaps no more frequently used descriptor of American social and political life today than "pluralistic." One meets it everywhere, on the tongues of bureaucrats, politicians, and professors—practically without exception. It is one of those words that come to be so widely used that no one dares to question what it means. And if one does ask the question—what does it mean?—it betrays an unacceptable ignorance. The fact is, however, that it is a new term, not an old term, and its meaning is ambiguous. It is therefore appropriate to inquire, what facts of American political and social life are described by the term?

When we return to Bentley we discover that he was engaged in the same project that engrossed Beard, though from a slightly different angle. Bentley maintained that, if we were to ground the analysis and description of American political life on terms that explain human political associations universally, then it would be necessary to find terms of description that apply everywhere and not just here. The term, "pluralistic," was a way of dealing with the manner in which the class struggle was disguised in America. It was disguised under groups or factions, which groups or factions were the fundamental facts of representation in the United States.

What is meant by "fundamental facts of representation" is that Americans participate in politics and social life primarily, if not exclusively, through affinity groupings. They do not participate as individuals, according to the theory. This concurs with the Marxian assumption, that the individual has no standing in the social realm. The individual is either the capitalist or the proletarian (the laborer), for Marx, and assumes a different name (such as black) to express the same phenomenon, for pluralism. The laborer's interests are expressed not by the laborer as an individual but as a part of labor, as part of the group. The two broad groupings can be broken down into still more subtle distinctions. Marx, himself, led the way toward Beard's distinction of realty and personalty. Marx spoke primarily of the distinction between rent and property. The technical distinctions are not important here. What is important is that such distinctions became instruments for separating capitalists from laborers. That accomplished, one could then discover the "surplus value" theory of labor, and the capitalist's exploitation of the laborer.

These are the underlying principles of Bentley's notion of pluralism, which analyzes the political system on the basis of the relative position of affinity groups in the society. That theory, in turn, became the foundation for what more recently became known as the theory of "elitism." Elitist theory was developed in political science to explain the operation of American political institutions. It starts from a simple proposition: affinity groups may take precedence in society, but *someone* has to speak even for these groups. The *someone* is the *elitist*. The pluralistic-elitist theory allowed us to see where office-holders came from, and where power was centered in the society based on the various groups that these formulations of power and office-holdings expressed. The groups in Bentley's pluralism are only modified and disguised versions of Marx's classes. Thus, as a consequence of these early theoretical efforts in political science, history, and, ultimately, sociology, we come to have a fairly general expectation that all politics is based on adherence to some class interest. Based on such recent notions, scholars frequently return to the prior era, the era of Founding, to judge the accomplishments of the Founding in terms of the affinity groups of the Founders themselves.

The first and most important harmful consequence of this attitude toward the past is its power to blind us to the reality which actually unfolded. When we exert ourselves to conform the past to our present understanding, we deny to ourselves the opportunity to learn from the past. When we dismiss Gouverneur Morris as mere advocate of eighteenth century capitalism, we deny to ourselves all access to those views which persuaded Gouverneur Morris of the evil of slavery. That would perhaps appear to us less a harmful consequence, if we possessed as alternative some certain guide or principle by which we could readily persuade one another of slavery's evil. But the contemporary world, whether of scholarship, the church, or politics, offers no such guide or principle.

Without the arguments from the Founding era, we are at a loss to establish any moral authority for the condemnation of slavery. In that light, the Thirteenth Amendment to the Constitution would mean nothing more to us than a majority vote, given at a certain historical epoch, and able to be rescinded at any time any other majority may wish. I maintain, therefore, that our attitude in interpreting the past ought to be a willingness to approach the Constitution and its architects as if these were individuals standing before us whose arguments, and whose interests, we will take at face value initially—not completely. Then we can investigate them and determine what it is they sought to accomplish and what it imports for us. The precondition of this attitude, by definition, must be that we take ourselves as individuals, capable of making rational arguments as well.

It may not appear that such theoretical or academic concerns have much to do with the topic of this symposium. I hasten to point out, however, that it is reasonings such as these that are responsible for the wrong turn we in America took some years back, when we combined the politics of civil rights with the politics of poverty—when we confused the issue of justice for all with the issue of relief for the poor. That move predisposed us to develop a policy which would treat minorities—blacks in particular—as specific objects of governmental concern and manipulation.

When "simple justice" called not for treating *all* commonly, but rather for commonly distinguishing *some*, then did we step on the slippery slope. We officially divided the country into Americans and aliens, the aliens being the persons who are the specific objects of Americans' caring. For a time we even forgot that there were poor people besides blacks, so much had the terms black and poor become synonyms. By the time we had been reminded by other groups—women, Asians, hispanics, the handicapped, etc.—clambering for Great Society largesse, it was too late. Our policies meant targeted relief for the needy, *not* justified recognition of the worthy! The psychology of charity had come to dominate what ought to have been a psychology of humanity, a psychology of responsible citizenship, with the result that whoever came to be touched by it came thereby to be stigmatized as deficient.

The foregoing discussion elucidates the kind of ambiguities that fundamental criticism would give us the opportunity to work through. If we are serious about our work, we should never undertake such a discussion without planning to challenge ourselves to the utmost. To conduct that kind of challenge, we should be willing to put something at risk. It would require that we imagine that, perhaps, we could even benefit occasionally from being shown to be incorrect. I believe there are reasons today to take that attitude to heart, more perhaps than ever contemplated before, because I think there is real ground to ponder whether the fundamental movement of civil rights in America has not run aground.

It is fair to say that the people of the United States today are more race conscious than at any other time in the history of the United States. That statement will be more shocking to some than to others, but it ought to be a disappointment to everyone. It ought especially to disappoint us when we reflect that we witness race consciousness today in places where we least expected it. On the American campus of higher education, of all places, and then in those very institutions which only twenty years ago were the very emblems of progressive, indeed, radical thought, we watch the dream of racial harmony gradually disintegrate before our very faces.

When I insist, therefore, that the civil rights movement may have run aground, I do not aim to be confused with individuals who maintain that "the civil rights movement is over, accomplished; the questions have been resolved." Instead, I think it has run aground, not merely short of its goal but set in the wrong direction. We are insufficiently aware of the resources which can aid us and insufficiently aware of the contributions we require to make in order to survive. For example, we have been willing to leave it as a mere matter of taste, of commitment, that discrimination and slavery are unjust. To do that is to refuse to defend out principles, and to fail to give them any chance of success. To pass these principles off as "value judgments," mere arbitrary assertions, means we ourselves do not conceive of them as defensible in the court of reason and of political deliberation. Failing to present that defense, we fail not only ourselves but also humanity.

It is too late for this symposium, but not too late for the United States. In the symposium we did not accept the obligation to defend our principles. That discussion is too long for this space, and should always be a dialogue in any event. We have instead conducted a church meeting. That makes it very difficult to speak of "an unfinished agenda." We lack the references, which would make clear in summary fashion the work that lies ahead of the society. One thing is clear, however: a vision of a society of distinct, competing, and heterogeneous groups will always be inadequate to the articulation of a meaning of citizenship which views the whole society as one. And we need at least that much—that is a new articulation of citizenship, not a recapitulation of the old statements.

Among the things we would be able to see once we found this new language would be the extent to which general confusion colors our discussions of the Constitution and especially civil rights laws. We "enjoy" nearly 150 federal statutes alone, not always mutually compatible and sometimes outright contradictory among themselves. Though Congress assigns title and chapter numbers to these acts, the fact is that the entire edifice has not been reviewed with a comprehensive eye since 1875! No one, no one whatever in the entire country, can say with any confidence that he knows what his civil rights are. We owe the people of the country a clear understanding of what rights there are, at a minimum and even if we cannot guarantee their full enjoyment. We will not be aided in fulfilling this objective by language which envisions an open-ended, fluid process which is always being newly defined, evolving, and never bound to deliver any of its past promises.

We can most clearly understand the danger inherent in an evolutionary view of our Constitution and laws by looking at another aspect of the century long battle to establish a color-blind Constitution. In that struggle, the goal has always been such blessings of liberty as were enjoyed by Englishmen and Americans from time immemorial. In the era of Reconstruction the Congress even spoke, in its statutes, of the "same rights as white men enjoy." The problem, however, is how to define those rights. If we assume them to be constantly evolving, then we can have no fixed standard to aim at. The rights which white men enjoyed yesterday may not be the rights white men enjoy tomorrow. That not insignificant ambiguity has enabled the defenders of an evolutionary Constitution to tease American blacks, and others, with the lure of an equality which remains permanently undefined. We have never been in a position to point to any particular arrangement as fulfilling the promise, but the authority of every prior arrangement is denied by the idea of evolution. Lincoln was enabled to refer back four score and seven years and to a "standard maxim" of a free society precisely because he did not hold to an evolutionary view. The equality of the Declaration of Independence was to him a fixed compass point. Accordingly, it was possible to state what adjustments would repair the injuries of the past. When the compass point is removed, the ability to measure progress is no less removed.

We see this most clearly in the area of American blacks claims for redress for the injuries of slavery and discrimination. Under the traditional practices of Anglo-American jurisprudence, it were a simple matter to envision a tortious jurisprudence that could handle the problem. Under a non-traditional evolu-

tionary standard, however, the courthouse doors have been closed to significant tortious settlements or judgments. Instead, elaborate administrative and bureaucratic procedures have been installed—the latest advances in the technology of assigning blacks their proper places in society. The evidence is still coming in, as scholarship reviews the past hundred years in this respect. But it is not too early to announce already the conclusion.

In spite of the explosion of civil rights laws, the loud protestations of concern and the elaborate social and political structures established to implement these concerns, American blacks have been systematically excluded from the traditional guarantees of Anglo-American jurisprudence and constitutionalism. In the space of merely a decade, for example, we have seen the area of law called "sexual harassment" carved out and enabled to become an effective tool for litigating civil rights complaints—with significant judgments and settlements; while the older, more solidly established category, "racial harassment," remains vaguely articulated and of ambiguous legal status. It is difficult to resist the conclusion that the difference between the two is closely tied to the problem of race.

In other areas the results are analogous. Very recently, in fact, a family of three youths afflicted with the HIV infection won a $1.1 settlement with a school district on their complaint of unfair treatment resulting from the exclusion of the youths from the school. The complaint was a civil rights complaint, and the family had just cause to complain. It is nevertheless the case that their complaint was almost exactly analogous with the complaints of millions of American blacks for more than one hundred years now. And nowhere in that long history will the records disclose even a single black citizen, on no less just complaints, receiving any judgment or settlement even remotely similar. Indeed, poor Linda Brown, whose 1954 case purportedly created a revolution in our law, not only won no damages but never even got to attend the school involved!

The point of these reflections is not to generate a host of new tort filings. It is rather to demonstrate that we have systematically attempted to vindicate civil rights for a generation now without recourse to the most powerful tool Anglo-American jurisprudence knows, a far more powerful deterrent than affirmative action and its system of paper compliance. In other words, the system we have "evolved" in this respect has above all else worked to deny the just claims of citizenship of countless American blacks. A traditional view of our Constitution and laws would not have made that mistake. The civil rights movement has run aground because, of its rejection of a traditional view of our Constitution. The unfinished agenda is primarily to reestablish the claims of American blacks to be legitimate heirs to the Founding Fathers.

In this regard I would ask you to ponder three images which for me have long expressed the character of the choices we face. The first image derives from the Old Testament, in which Naboth is summoned by King Ahab and requested to sell his vineyard; as you know, Naboth said, "No, no, no, God forbid." Naboth's relationship to his forefathers was such that he could not conceive of surrendering that patrimony—"God forbid." A second tale of vineyards derives from the New Testament. It is the tale of the ungrateful tenants who received a property from the master, only then to refuse him the rent they owed. The master sent the rent collector, but they slew him. Next he sent his son, but they slew him also. The master then said, 'What am I to do? I must go myself," and the ungrateful tenants exclaimed, "God forbid.'

The third tale derives not from the holy text but from Aesop's *Fables*. It is the tale of the father who, on his deathbed, summoned his sons about him and said, "I am going to die now, but I want you to know that there is a treasure buried in the vineyard." The boys saw the father to his death with hill respect, but as soon as that was done they betook themselves to the vineyard with shovel and spade. They did not find trunks filled with jewels or gems. Disheartened, they imagined that their father had deceived

them, promising so much and delivering so little. That fall, however, they discovered to their delight that they enjoyed the most wonderful harvest they had ever seen.

I often think, when I hear people speak about the principles of the Constitution, that they are trying to decide whether they must choose and, if so, which of these three postures they should strike in regard to that legacy. I, for one, have no trouble setting my course.

When we speak of the "evolution" of the Constitution and the status of American blacks in the United States, we must never imagine that, like Topsy, it just happened. There is nothing inevitable in the development of the United States, nor in the realization of the promise of freedom for black men. This rare and difficult achievement of a free society of many races was won and is still being won only at the cost of innumerable cares, labors, and dangers. Americans are in fact building, and always have been, a polity worthy of its original Constitution, of the intention of the Founding Fathers—a polity respectful of the dignity of all human beings, not in the abstract but in the concrete expression of an abiding confidence that there are nowhere men who are not capable of self-government.