

**Rights and Responsibilities:
Viewing the Constitution as the Solution Not the Problem***

by
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Closing the season of Bicentennial celebrations of our nation's Constitution, as we shall shortly do, it will perhaps not be taken amiss if we pause to ponder some of the more immediate implications of our national musings.

Many voices have been heard these past four or more years eulogizing the foresight of the Founders, on the one hand, and decrying their narrow-mindedness, on the other. Almost without exception, these voices have been informed by some view of the urgent necessities of American life; today and above all with regard to questions of individual rights and responsibilities. One might think, after all we have heard, that the American people of this era would be peculiarly endowed with insight as to the virtues and prospects of American constitutionalism. I wish to reflect for a brief space on what the evidence has to suggest on that score.

To start at the very surface of the surface, consider a question which many Americans were asked almost exactly one year ago, in the aftermath of the Supreme Court decision in the case, *Johnson vs. Santa Clara County Transportation Agency*:

The U.S. Supreme Court recently ruled that employers may sometimes favor women and members of minorities over better-qualified men and whites in hiring and promoting, to achieve better balance in their work forces. Do you approve or disapprove of this decision?

Here we have a question lying at the heart of issues of constitutional rights and responsibilities—individual rights and responsibilities. The Gallup pollsters reported their results not only in aggregate terms, but in terms of the specific categories of opinion which it has by now become customary to employ in talking about Americans. The results were as follows, for those approving or disapproving the ruling:

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Democrats	37% for	63% against
Republicans	22% for	74% against
Independents	27%for	64% against
Men	26% for	66% against
Women	32% for	59% against
Labor Union Homes	23% for	71% against
Non-Union Homes	30% for	61 % against
Professional& Business	27% for	66% against
Other white collar	29% for	64% against
Skilled Workers	23% for	69% against
Unskilled Workers	35% for	58% against
College Grads	33% for	61% against
College-non grads	23% for	69% against
High School Grads	26% for	66% against
Not High School Grads	38% for	51% against
Income \$25K+	23% for	71% against
Income \$15K—	30% for	64% against
Income Under \$15K	36% for	51% against
Easterners	34% for	55% against
Midwesterners	26% for	70% against
Southerners	32% for	59% against
Westerners	24% for	68% against
Whites	25% for	67% against
Hispanics	46% for	47% against
Blacks	56% for	34%against

As long as this scoreboard is in the recounting, longer still is the tale to tell about the dramatic isolation of American blacks concerning their opinions on the question of affirmative action. And this long tale has much to do with our view of the Constitution in relation to individual rights and responsibilities.

First, I would ask you to grasp the significance of the stark contrast between the opinions of American blacks and the opinions of virtually every other grouping of Americans on this question. Not since the nineteenth century have we witnessed so entrenched and distinct a minority interest in American politics, and one playing a

powerful role in the development of national policies. The powerful and distinct minority which monopolized national attention in the nineteenth century was the slave-holding interest. There we had a minority whose opinions were inconsistent, not only with the broader consensus within the country, but also with the principles of its Constitution. The role played in contemporary politics by the opinions of American blacks is not unlike the role played by the opinions of slaveholders in the politics of the 1850s, and especially the politics which led to the break-up of the Democratic Party and the eventual election of Abraham Lincoln.

My concern is not to discuss affirmative action itself, but rather to discuss the quality of our constitutional understanding and the role it plays in the policies we ultimately adopt to resolve various problems we confront. Affirmative action addresses the problem, first and foremost, of racial discrimination. There are other problems as well; for example, we discuss pervasively today the problem of the so-called “permanent underclass.” In one production devoted to the Bicentennial of the Constitution, the author—a reporter for the Los Angeles Times—writes of the Constitution as an obstacle to justified governmental endeavors to relieve the distress of the unfortunate and oppressed. He quoted a scholar to the effect that, to confer rights on the ex-slaves was not sufficient to empower them to exercise those rights without a “simultaneous grant of resources.” Naturally, what was true in the aftermath of slavery remains implicitly necessary today, insofar as no full-fledged grant of resources was ever made.

Similarly, many of the criticisms of the Constitution in this Bicentennial season stemmed from frustrations over the failures of policies or the inability to adopt pet projects. The best example of this is the familiar passion for “the more streamlined decision making of parliamentary systems, in which prime ministers have extraordinary freedom of action.” Professor James MacGregor Burns has made a career of complaining about the “maddeningly slow and cumbersome” mechanisms of the American constitutional system, and his fervent sponsorship of the parliamentary idea is a further expression of that career interest. But in what way is the American system maddeningly slow? Primarily, in Burns’ view, in delivering the promised goods of individual rights to the disadvantaged.

Little more than a year ago we listened to Supreme Court Justice Thurgood Marshall describe the Constitution as “defective from the start,” and that primarily because, in his view, it was unfriendly to the disadvantaged. Thus, alongside the panegyrics to the wisdom of the Founders in this Bicentennial, we have witnessed as well a consistent refrain describing their failures in regard to what we might generally call today, “the social question.” Indeed, this trend goes so far that it is in fact more accurate to say that critics of the Constitution do not so much attribute failure as malevolence to the Founders.

In this vein, critics end up borrowing, whether knowingly or not, from the concordance of Karl Marx. In the case of Harvard Professor Derrick Bell, the borrowing is certainly knowing. In his book, *And We Are Not Saved*, he describes “a delegate” at the Constitutional Convention, who declared that the “aim of *this* society” is “the protection of property.” That has a nice ring to it, producing the impression of a conscious bourgeois plot to exploit the proletariat. What Professor Bell did not reveal, however, is that “a delegate” is actually Gourveneur Morris of Pennsylvania, one of the staunchest anti-

slavery delegates to the Convention. Further, Morris did not declare the protection of property 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. Nevertheless, before he could get very far in that process, he explicitly recanted the statement, simply because he discovered that the existence of slavery in the United States complicated the analysis. Morris refused to permit his general theory of human nature to lend aid and comfort to the institution of slavery!

Bell's abuse of Morris' record at the Convention may stand for us as a symbol of the abuse to which the Constitution itself has been subjected by those who accuse it of causing various problems of deprivation or conflict. The relationship here is not unlike that which pertains to attacks on the electoral college. Usually, that device is rejected as undemocratic. Upon investigation, however, we learn that democracy, to the critic, means simple majoritarianism, without particular regard for individual rights. When we point out, therefore, that the electoral college serves two very specific and crucial purposes, whether intended or not, and which purposes are highly congenial to a nation dedicated to protecting individual rights, the critics are shown in their true colors, as rather restive under the restraints of republicanism. Because the electoral college sponsors our two-party system (as opposed to multi-parties or no parties), and because it enhances the voice of important minorities in a way that a simple national plebiscite never could (thus making near consensus an element of national politics and a source of stability), we are safer than we might otherwise be. We can enjoy the liberties of American constitutionalism without too much fearing the intense divisions which often paralyze other societies.

Again, the notion of a parliamentary system as preferable to our presidential system is revealed, upon analysis, to be rather an expression of impatience with the role of the American people themselves in the formation of national policies. In a parliamentary system the people retain only a right of remonstrance—after the fact. They can effectively discipline their particular representatives only by disciplining their parties. The vacuum that this creates permits party leaders to exercise the most meaningful discipline, and thus to stifle dissent within the ranks. That is very difficult in an American legislature, where representatives are independently selected from single districts on a winner-take-all basis. Our Constitution does not in fact prohibit the practice of many, and perhaps most of the significant elements of parliamentarism. Indeed, the first attempt to form political parties was based on such a model. Although the Constitution requires a State of the Union message from the President, it does not bind the Congress to pay attention to it. Nor does the Constitution specify that the State of the Union should entail specific legislative or budgetary proposals. Thus, it was a simple matter for the houses of Congress to ordain that their Speakers would be responsible to formulate legislative and budgetary programs. In that step they would become quasi prime ministers. Unfortunately, they would still lack, not only the executive authority, but more importantly, any meaningful tools to enforce party discipline in order to guarantee the approval of their programs. Thus, what the critics object to is the fact that the American voter stands between his representative and the party leadership.

What is the real problem here? Is it not in fact an impatience with the

consequences of taking rights seriously? To deny the responsibilities of citizenship, and the dependence of representatives on voters, would undercut an essential safeguard for the rights of the people. Is such a step justified by the urgent appeals to “do something” about “the social question?”

This brings us to the heart of the matter: the Constitution is misunderstood as obstructing meaningful social development. I go further; I say that no meaningful social development has ever occurred under any form of political life of which we have any knowledge, except under the Constitution of the United States. Far from being an obstacle to social progress, our Constitution has been the sponsor of every progress we have known. I say that, too, not merely of the amended Constitution, but of the original Declaration-inspired Constitution. The Constitution’s emphasis on self-government flew in the face of accepted theories about mankind’s capacities. Nevertheless, it has prevailed in the face of the most meaningful test; it has sponsored both the expansion of rights and an unparalleled extension of prosperity.

To the precise extent that Americans have left themselves free to guide themselves—to the extent they have resisted the ancient impulse to turn to the fatedness of law in place of the exertions of individuals—they have prospered. That prosperity has been not material merely but also moral, for greater security for individual rights has always attended heightened individual responsibility for the ultimate decisions which govern one’s fate. That laws and regulations require to inscribe the spheres of collective action and security cannot be doubted. But within those spheres mankind has the most important choices yet to make; namely, how to live well.

As a member of the Commission on Civil Rights this consideration affects me in a most particular manner. I am called upon by statute to assess and report upon the security of the civil rights of Americans. In the era in which we live, habit has inclined most persons to suspect dangers to civil rights from hostile persons and institutions, primarily non-governmental and, if governmental, never at the national level. Yet, a vigilant regard for the rights of citizens can never fail to discern the greatest threat precisely at that point where the ultimate sovereignty is exercised. Nothing is more difficult, however, than to remind those impressed with their capacities to govern others of the priority of self-government in American life. And in no aspect of our life has this difficulty been more manifest than in our attempts to deal with “the social question.” Thus are we quota-ed, repaired, restored, liberated, affirmatively acted upon, educated, and otherwise generally pushed from pillar to post by the ministrations of eager merchants of rights undreamed of.

Alone to convey the paradox of this situation to my fellow commissioners is a difficult task. For some of them, at least, the Constitution is a charter of powers before it is charter of rights. They see rights as the creation of power, rather than power as the offspring of rights. It is not their task to safeguard the founding heritage, but to break new ground in defining rights and the creation of power. And then there are those Commissioners whose grasp of the difference between the two is weak at best. The latter group seem more taken with “their prerogatives” than with the serious work of articulating the grounds of just constitutionalism. Commissioners Destro and Friedman, for example, continue to struggle with the Chairman—and therefore with the Commission itself—in this vein. I find it difficult to imagine that the confusing

discussions of this Bicentennial season, along with generally misguided political sentiments, do not account for this result. People who regard the Constitution as the problem rather than the solution will surely be inclined to devote more time to thinking up ways to get around the Constitution than to ways of revising and fulfilling the aims of the Constitution.

We might hope that this was a passing phenomenon, from which we would recover with an accustomed grace. Consider, however, the evidence with which we began. A large, coherent, and significant minority—seemingly inspired by a view of the Constitution as the problem—stands at loggerheads with the rest of the society on a question of fundamental moral and political importance. You will say that they are not to blame, for their opinions do not vary from the opinions of those opinion-leaders who speak most loudly on these questions. And as I have indicated, even those Commissioners entrusted with the task of clarifying these things fail to do so, for various reasons. I concede the justice of this observation. But I ask in turn, does that exculpation mitigate the potential for crisis in this situation?

The slaveholders of the last century persisted in their errant view to the very point of a bloody, fratricidal war. The fact that our politics is indentured to public opinion—not the opinion of a mere majority—is both our greatest strength and our achilles heel. For, intransigent minorities, when significant, soon or late must entail a crisis in our politics. Their participation in public opinion is real, if contrary. The requirement of fundamental consensus, not on particular issues but on principles, imposes upon our politics the need to mitigate such vast gulfs.

Though I mean nothing less by the historical comparison of American blacks today to slaveholders of yesterday than to convey a sense of the enormous power for good which American blacks hold in their hands, a chorus of shallow resenters will surely take offense at the mere idea of the comparison. Permit me, then, to extenuate the comparison by invoking the significance of the isolation of American blacks, not by historical analogy, but in light of evidence which falls in our hands from our own time.

Jesse Jackson's campaign for the presidency makes new evidence available to us—and I do not mean the usual pious platitudes (such as the idea of “proving” that a black person can mount a serious campaign), nor the painful confirmation that our public life is conducted with virtually no regard for standards of excellence (as in the forced lie, the great national eye wink, that Jackson's strident strummings constitute eloquent and articulate political deliberation). I mean the evidence of the political isolation of American blacks. Jackson's appeal has succeeded in isolating blacks, not merely within American politics but within the Democratic Party, a thing which even Jim Crow failed to achieve before this time. This fact bears the closest scrutiny, for it is important beyond measure.

It is a cliché to notice that blacks constitute a bloc vote as between the Republican and Democratic parties. But so long as the Democratic party was heterogeneous, and the votes of blacks within the party could be viewed as reflecting the same diversity of views and sentiments that characterized the balance of the party, blacks were seen as politically coherent but not politically isolated. This was all the more true because they were found in the *majority* party, and could therefore be identified with a national consensus—the

mainstream of American opinion.

What was not so readily visible before, namely, that it was not so much uniformity of political sentiment but rather uniformity of racial sentiment which accounted for this phenomenon, now has been nakedly exposed by Jackson's campaign. For the politics of the left were as well and variously represented in this year's campaign as we might ever hope to see. If the opinions of American blacks were rather left than black, their votes in Democratic primaries and caucuses would have been distributed more widely among the field of candidates, in search of the best exponent of their political ideas. You know what has in fact occurred: black voters have voted almost exclusively for Jackson, proving thereby that it is far less his opinions than his race which accounts for their votes, and serving thereby to identify a vast bloc of votes within the party which is not only isolated but, for all practical purposes, up for grabs.

This result could offer enormous promise for the future, were it sensitively understood by political schemers. Or, it could produce the kind of result which occurred in 1860, when Democrat slaveholders refused to vote for Stephen A. Douglas, split the Democratic Party, and assured the election of Abraham Lincoln. It seems the historical analogy, just will not go away. Today, however, we have this advantage, that we are able to see the direction of events *before* they are set finally in their course.

That is why I speak of American blacks holding in their hands an enormous power for good. They can shape their opinions—change their opinions—in such a way as to secure a firm consensus on constitutional principles. The evidence of Gallup's affirmative action poll shows the need for growth in this direction. The opportunity created by Jackson's campaign demonstrates the path whereby non-black Americans might accelerate this process of change through ordinary political developments. I have serious doubts, though, whether the paternalistic thinking of people like Chairman Fahrenkopf, who run campaigns and develop candidates in the Republican Party, can ever learn the necessary lessons. The fact nevertheless remains that America is in a position to mitigate the harm that could conceivably result from the isolation of American blacks within the political system.

No, it is not the task of the significant minority alone to accomplish this mitigation. Indeed, I suspect that the opinions of American blacks, for example, gives evidence less of a settled view of the Constitution than of the dynamics of contemporary political life. For that view expressed in the poll, though not reflected in most other groupings of the society, is nevertheless a direct reflection of the paternalistic pattern which has characterized America's dealings with its minorities. Right here in Milwaukee, for example, you struggle with the question of how to operate your schools in such a manner as to assure a quality education. In the face of demands that persons directly involved in and subject to those schools be left to govern themselves in that regard, we discover a powerful resistance. That resistance surely reflects the interests of administrators and other holders of entrenched power, for whom to surrender it is not an option. Nevertheless, I am persuaded that the far greater source of opposition to such devolution is the broad view that it is necessary to keep these folk under the careful supervision of expert and benevolent persons and institutions.

Much of the discussion of the so-called "permanent under class" runs in the same

direction. Peter Hamill recently wrote in *Esquire* that the black underclass is the unique responsibility of American middle class blacks. What can possibly be the foundation of so outrageous a claim, but a paternalistic and, indeed (though I hate to abuse the overused term) racist, view of American blacks in general. Thus, even people who do not believe in the principle of affirmative action, as a constitutional goal, find themselves nevertheless supporting policies directly expressive of its principles. It never occurred to Hamill, and never occurs to virtually anyone—least of all most of my fellow Commissioners—that perhaps the best thing to do for those folk is to follow the lead of the famous Northwest Ordinance: leave them alone! Carve out a sphere of governance in which they may order and police their own lives. Not only their futures, but the vindication of American principles of self-governance depend on it.

Still, we will not see it happen, for we still do not see that the Constitution and its principles *are* the solution, not the problem.