DOCUMENT RESUME

ED 282 793 SO 017 995

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TITLE The Bicentennial: A Constitutional Restoration.
INSTITUTION Department of Justice, Washington, D.C. Civil Rights Div.
PUB DATE Feb 87
NOTE 21p.; Address given by the Assistant Attorney General, Civil Rights Division, at the Lyndon Baines Johnson Library, University of Texas (Austin, TX, February 19, 1987).
PUB TYPE Speeches/Conference Papers (150) -- Viewpoints (120)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Constitutional Law; Court Litigation; *Court Role; *Federal Courts; *Governmental Structure; *Government Role; Judges
IDENTIFIERS Bicentennial; *Federalism; State Role; Supreme Court; *United States Constitution

ABSTRACT

Judicial activism raises the question whether the people, through their elected representatives, should make decisions about social policy issues or whether these decisions will be made by appointed members of the federal judiciary. Through a series of judicial decisions, many basic social problems have become nationalized. Yet the U.S. Constitution originally intended that the states would tend to such matters as education, criminal justice, and the general welfare, morality, and health of their communities. Good constitutional government requires full allegiance to the structural design of the Constitution, and a due regard for the purposes and principles for which that structural design stands. A jurisprudence of original intention--adhering to the original intent of the framers of the Constitution--would give back to the people the power to decide basic social policy issues and restore democratic self-government. It is a way of constitutional thinking, litigating and judging that seeks to grant people ample latitude to choose answers for themselves. (SM)

Department of Justice

"THE BICENTENNIAL: A CONSTITUTIONAL RESTORATION"

ADDRESS

OF

WILLIAM BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

AT

THE LYNDON BAINES JOHNSON LIBRARY
THE UNIVERSITY OF TEXAS

9:30 A.M. CST
THURSDAY, FEBRUARY 19, 1987
AUSTIN, TEXAS

The Bicentennial: A Constitutional Restoration

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It is a distinct pleasure to be here with you this morning, in this important building which contains so much history of a presidency not so many years ago. Lyndon Baines Johnson guided this country through a good portion of the 1960s, a time during which we struggled mightily as a people, with deeply engrained stereotypical misconceptions about one another based on race. Out of that struggle there began to emerge under President Johnson a growing national awareness that the equal opportunity principle enshrined in our Fourteenth Amendment means little to any of us unless it means the same thing to all of us.

During those years, an appreciation of the human rights and personal dignity of each individual began to push to one side group-oriented evaluations and characterizations that compartmentalized and treated individuals only according to the color of their skin. It is informative to pause now and then -- not only on visits to this remarkable library but wherever we might be -- and reflect on that period of our civil rights history, and the nondiscrimination ideal that was its

centerpiece, as we engage the current debates on civil rights enforcement issues that swirl today.

Similarly, we should more regularly pause to reflect on the history of our founding as a framework for the current deliberations on our Constitution and its continuing viability in today's world. One cannot overstate the importance of this program and the many like it scheduled to take place across this country during this Bicentennial year. The sad fact is -- as a recently published survey revealed all too graphically -- that far too many Americans are wholly uninformed about our Constitution. Barely a majority of the more than 1,000 people surveyed know that the purpose of the document was to create a government structure and define its powers. Over half are unaware that the Bill of Rights is the first 10 amendments to the Constitution. And nearly half believe the Constitution contains the Marxist declaration: "From each according to his ability, to each according to his need."

A few other surprising revelations in the survey were: (1) 60 percent think the President, acting alone, can appoint a justice to the Supreme Court; (2) over 60 percent believe the framers established English as this national language; (3) three-quarters of the respondents believe the Constitution guarantees a right to free public education through high school; and (4) half of those surveyed said the Constitution gives every citizen the right to own a handgun.

While distressing, this degree of misunderstanding pales when compared with the extent to which our Constitution -- the one whose 200th birthday we celebrate this year -- has suffered in the hands of those in official positions who have chosen to read it to suit their own personal visions of an evolving social order, rather than adhering to its original meaning as reflected in the document's language (including all of its amendments) and the debates among its framers that ultimately produced that language. Regretfully, we have in large measure discarded the constitutional legacy that sets apart from all other forms of government the "novel experiment" undertaken by those great patriots of two centuries ago.

The challenge during this Bicentennial year is to recapture that legacy, to rekindle in both the American people and in their elected and appointed officials an understanding and appreciation of our justly celebrated and often imitated Constitution, a document William Gladstone once described as "the most wonderful work ever struck off at a given time by the brain and purpose of man."

Facing up to that challenge is what I would like to address for a few minutes this morning. For we have strayed too far from the Founders' original Constitution and in the process damaged seriously (perhaps fatally) our most basic governmental and institutional relationships. In the year 1987, we have a choice: we can focus on pomp and ceremony and talk in abstract terms of a Constitution that has outlived its practical value; or we can

focus more intensely on what was accomplished in 1787, and why, and ask ourselves candidly whether subsequent judicial and political experiments have served or disserved the original constitutional design for popular government. Not surprisingly, I urge the latter course; for only then might we hope to remedy the constitutional illiteracy that so plagues us.

For most, the obvious starting point is to remember why the Founders thought that popular government was inherently problematic and why their Constitution was deemed by them to be novel an experiment. It was "novel" in their view because they were the first to endeavor to found a new nation, to create a scheme of government out of whole cloth. History and political theory were their guides and the moral principle of human equality was their foundation.

Our forefathers sought to establish this new and novel nation on the then radical proposition that all men are created equal and are endowed by their Creator with certain inalienable rights. At a minimum, that idea of equality demanded in practice that each be treated the same as the others without regard to what James Madison called "frivolous and fanciful distinctions", distinctions such as race, religion, and ethnicity. While their own conduct often fell short of this standard, their ideal was enduring; and what began in 1787 finally was completed by the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments which were intended to allow all to participate fully in the Constitution's scheme of self-government. The Founders

knew that the eyes of the world were upon them; nothing less than the future of human freedom depended upon the outcome of their efforts.

That is why Alexander Hamilton introduced The Federalist with something of a sober caveat. It remains to be seen, he wrote, "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." To hedge their political bets on this most basic question, the Founders -- friends and foes of the new Constitution alike -- dedicated themselves to a proposition that was truly new in the science of politics; they were committed to the idea of a written constitution of clear and common language that would at once create and limit the powers of the government. Their novel experiment was to fashion a government at once limited and energetic, a government with the powers to act but with a structure, as Herbert Storing described it, "designed to make it act wisely and responsibly."

This basic premise was best captured by the man often called the Father of the Constitution, James Madison. In The Federalist, No.51, Madison summed it up simply: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." This was no easy task; power, he knew, was always of an encroaching nature. Thus the solution was not to make good

government depend upon the virtue of those who might come to govern any more than it was to depend primarily upon the civic virtue among the people. Rather the trick was to create a system of government that would be rendered self-regulating by its various "internal contrivances" -- such things as federalism, separation of powers, a bicameral legislature, and both an energetic executive and an independent judiciary.

This was the vision of our founding fathers. They contemplated a nation characterized by limited popular government that rested upon the consent of the governed, the achievement of which depended upon faithful allegiance to a complex system of divided sovereignty and separated powers. To this end, they undertook to shore up their good intentions with a compliment of sturdy institutions. In electing to divide the powers of the new national government among three branches, they foresaw the need to build into the institutional framework safeguards against a usurpation of power by any one branch.

Perhaps the greatest irony of our day is that the Judiciary was seen by our Forefathers as the "least dangerous" branch of all. Yet it is the Judicial Branch that has done the largest disservice to the Constitution, and the bedrock principles on which it stands. The delicate balance struck in the Constitution's first three Articles among legislative, executive, and judicial functions has long since been interpreted virtually out of existence by activist judges who through an overly expansive reading of the Commerce and Supremacy clauses have

nationalized almost every social problem. The core principle of Federalism enshrined in the Tenth Amendment -- that reserves all power to the states not constitutionally assigned to or reserved for the Federal Government -- was recently removed in its entirety by the Supreme Court's pronouncement, in the case of Garcia v. San Antonio Transit Authority, that state sovereignty now exists only at the pleasure of Congress. According to Garcia, the states have no special status that is constitutionally immune to regulation by the national government. To put it most graciously: Garcia has left federalism in tatters.

Nor is this the extent of the judicial mayhem. Our Constitution was read by justices of an earlier era, in the infamous Dred Scott case, to protect the immoral institution of slavery; by others, some years later in Plessy v. Ferguson, to embrace the nearly equally noxious principle of separate but equal; and still other generations of judges saw fit to import into the Constitution their own clearly extraconstitutional predilections such as the doctrine of liberty of contract. More recently, we have seen an untethered judiciary deny the right of the people to define the moral tone of their community by invalidating properly enacted death penalties, by denying the constitutionality of soberly crafted statutes restricting the practice of abortion and by removing nearly every reference to God from our public places.

Indeed, in the guise of interpreting the Constitution, our federal courts have instructed the elected officials of state and local governments that they no longer are free to limit welfare benefits to persons who have resided in the state for a particular length of time or to otherwise treat these payments as anything other than a constitutional "entitlement"; to notify parents that their minor child is seeking an abortion; to refuse to purchase and exhibit x-rated films on state college campuses; to extend remedial education programs and maps to students who choose to attend religious schools (although, for some reason, textbooks may still be provided); or to require that high school graduates be able to read and write, if minority children seem to be disproportionately "disadvantaged" by such educational standards.

They have gone even further. In order to "remedy" constitutional violations, federal courts have abolished any pretense of state sovereignty by dictating such things as the temperature of the dish water in state hospitals, the appropriate wattage of lamps in state prison cells and the specific location of a piano in a public school. Federal judges have even informed the local electorate that the court itself will raise taxes to finance its sweeping remedial schemes if the voters continue their churlish refusal to assume the additional fiscal burden voluntarily.

To put it succinctly, the jurisprudential theories approved by the federal courts generally and the Supreme Court in

particular have, through the years, been largely at odds with the basic principles of our Constitution. All too readily, activist judges have forced their own personal views of "social order" on an unsuspecting society under the rubric of "constitutional law," regularly speaking as though their personal pronouncements were on a par with the Constitution itself.

In this Bicentennial year, sober reflection is needed on how such a state of affairs has come to pass. How is it that a Constitution designed to enshrine in perpetuity a "nation of the people, by the people and for the people," as Lincoln once described it, has been converted into a charter for the federal judiciary to thwart so many efforts to exercise the basic right of self-government?

The answer, I would submit, is found in what must be regarded as a fundamental flaw in such jurisprudential impulses -- a flaw common to Courts as different as the one in 1905 that gave us Lochner v. New York and the one in 1973 that gave us Roe v. Wade: and that is a blatant disregard for the legitimacy of popular government and its guiding principle that liberty is safe only under a nation of laws and not of men. A multitude of rationalizations have been advanced to justify the erosion of this principle, but all share a common attribute: a deep-seated antipathy to any suggestion that the citizenry have both the right and the ability to govern themselves.

Not surprisingly, such judicial pretension is marked by an abiding disdain for a jurisprudence of original intention. The

activist judges of this school refuse to take seriously either the text of the Constitution or the plainly discernible intentions of those who wrote, proposed and ratified that text (including all subsequent amendments). They reject outright the wisdom of both Jefferson, who deemed our written Constitution a "peculiar security," and of Chief Justice John Marshall, who wrote in Marbury v. Madison (1803) that a written constitution is the "greatest improvement" upon political institutions. For them, the security of our rights and the legitimacy of our government rests not nearly so much upon a written Constitution of definite and enumerated powers as upon unelected and life tenured judges who presume "to roam at large in the trackless fields of their own imaginations."

Fortunately, there is no shortage of pointed and well-reasoned criticism of this view of constitutional affairs. And those far better suited than I, from scholars such as Raoul Berger to Attorney General Meese, are sure to carry the great public debate over a jurisprudence of original intention for some time to come. For present purposes, therefore, I have elected to step back from such jurisprudential discourse and focus instead upon what is in many ways the most interesting political question: What would America look like today if a jurisprudence of original intention held sway? What would this theory mean in practice?

The answer to these questions needs to be prefaced by two basic observations. First, the primary complaint against

judicial activism is not at the level of policy choice. It is a problem that goes far deeper than simply whose political ox is being judicially gored. What is at issue is not the right or the wrong, the morality or immorality of certain public policies such as abortion, the death penalty, or school prayer. Rather, the core issue is one of process. At stake is nothing less than the question of how this country should be governed in regard to basic issues of social policy: whether such issues should be decided by the elected representatives of the people, largely on a state-by-state basis, or by appointed members of the federal judiciary who serve for life and are politically accountable to no one.

Second, the principle most undermined by judicial activism has been that of federalism: the constitutional division of sovereignty between the nation and the states. On the whole the Supreme Court has refrained from juridically molesting Congress. This may well be because Congress has explicit power in the Constitution to exercise some control over the judicial process, from making exceptions to the Supreme Court's appellate jurisdiction, at one level, to how, and when -- even if -- it chooses to create lower federal courts, at another. In any event, it is a fact that historically the Supreme Court has proscribed state power far more frequently than it has national power. Indeed, Justice Oliver Wendell Holmes once went so far as to say that not much would happen if the Court lost its power of judicial review over Congressional actions but that nearly

everything would be lost if it should lose the power of judicial review over state actions.

The problem with this judicial attitude is that under the original design of the Constitution the states mattered. While there were certain things only a national authority could do, other things were considered best left to the states and localities. And they were afforded the sovereignty sufficient to handle most of the activities we think a government ought to do. The reason for this arrangement was a general awareness that greater political access would attend those lower levels of government. It would be there where the people were far more likely to have their opinions and passions and interests expressed and debated. Thus, those lower levels of government would understandably be more responsive to the people; and by the same logic also be more accountable to the people. As James Madison said in The Federalist, No.51, by so dividing sovereignty between two levels -- nation and state -- there would be "a double security . . . to the rights of the people."

In a word, the underlying purpose of the federal structure was to give the people greater political control over their lives. It was originally intended that within the states, the people would be left to tend to such matters as education, criminal justice, and the general welfare, morality, and health of their communities. Regrettably, however, a great deal of this power, of this political control over our lives, has over time been unceremoniously stripped away or seriously compromised at

the hands of an activist judiciary. In this regard, my earlier catalogue of judicial misadventures does not want for company.

In the area of public education, for instance, one finds cases where the federal courts have demanded that schools allow a student to bring his homosexual lover to the junior prom. Other courts have invalidated a state law requiring that only persons who pass basic literacy tests can be awarded a diploma on the grounds that the disproportionate failure rate of black students constituted a "vestige of past segregation". Similarly, teacher competency tests and basic academic requirements for participation in athletics have fallen by the same logic.

School desegregation cases have gone so far as to determine who may or may not be the high school football coach. In Boston a few years ago, a district court judge went so far as to consider invalidating a fare increase on the subway system for that financially strapped city because in his view it might impede his desegregation order.

In the area of religious freedom and separation of church and state under the First Amendment, the judiciary has not only banned prayer and Bible reading in public schools but the posting of the Ten Commandments, as well. Indeed, the courts have gone so far as to invalidate special education programs in parochial schools because the public school teachers who were to participate in the program might be "infected" by virtue of being in a building owned by a religious organization.

The First Amendment has been stretched and distorted in other ways, too. The provision prohibiting Congress from infringing the freedom of speech has been made to prohibit the states and localities from restricting nude dancing or from making certain words impermissible, thus upholding the right in one case of a young man to wear a jacket into a public building sporting an obscene phrase regarding the draft ("F--- the Draft").

The idea of what constitutes obscenity has been so gutted that the states and localities -- our communities, I must emphasize -- find it difficult to say anything is out of bounds. The sale of magazines can neither be banned nor restricted; video stores pandering to the most prurient interests find their trade secure by virtue of these expansive readings of the First Amendment.

In the area of criminal law the states find themselves bound by a virtual manual of police behavior written by judges overly solicitous of the criminal, largely indifferent to the suffering of the victims, and seemingly impervious to the needs of public order. Too often the lawbreaker is back on the street corner before his victim is released from the hospital -- only to strike again. It is just recently that the death penalty has been given a judicial reprieve, of sorts, allowing the states once again to do away with those who have committed the most heinous crimes against society; and even so, judicial resistance to this enlightened development still runs deep.

Beyond these provocative examples are more mundane ones that are every bit as revealing of the poverty of our federal union today. Communities that have tried to pass environmental laws thought worthy by the citizens -- such as noise reduction ordinances near airports -- have found them denied because the Court has held that the field has been preempted by Congress leaving no room at all for local regulations. In similar fashion states have been prohibited from placing limits on the size and weight of trucks that use their highways; from raising speed limits above 55 mph; from freely regulating the drinking age within their own borders; and from ceasing to do business with companies known to be in flagrant violation of federal labor laws.

All told, what was once a sturdy and vibrant republic of states has become in many respects an unyielding national regime where differences are rarely tolerated. What is good for New York must be equally good for Arkansas, whether those in Arkansas think so or not; what is needed in Idaho must also be applied in Massachusetts, whether those in Massachusetts want it or not.

To be sure, there are certain areas of concern where such symmetry displays a strength, not a weakness, in our constitutional understanding. Some problems are national in scope and demand a national solution. Civil rights enforcement, to name but one example, came upon this country with a rush in 1964 with enactment of a series of federal antidiscrimination laws. These measures were appropriately passed by Congress in

aid of the Fourteenth Amendment based on a dismal history of inactivity by the several states spawned by earlier Supreme Court decisions in 1883 and 1896 that had severely limited the scope of the Fourteenth Amendment. A national response was needed to address a national discrimination problem, and uniformity of standards promised to be the most effective protection. But it is also important to note that these national laws are the result of legislative deliberations and presidential programs -- not judicial decree. And even in this area of national concern, it is interesting to observe, progressive state and local civil rights laws not inconsistent with federal statues also abound.

The central point is that good government -- that is, good constitutional government -- at a minimum requires full allegiance to the structural design of the Constitution, and a due regard for the purposes and principles for which that structural design stands. In losing sight of this cardinal rule, our courts have effectively "trashed" the Founders' idea of popular government, of a nation wherein people still have a hand in defining the moral, legal, and political content of their lives.

Were it otherwise, as the Constitution demands, some communities would be allowed to have prayer in schools if that was their choice, while elsewhere others could freely follow the different dictates of their community conscience. Similarly, some states could exercise their prerogative to prohibit abortions, while other states would be free to have abortion

policies as liberal as that posited in Roe v. Wade. Under a popular form of government, racial discrimination would find no safe haven among the fifty states, but neither would the neighborhood school system in this country be threatened with extinction because some federal judges, largely oblivious to educational consequences, think it opportune to bus school children miles from and back to their homes in early morning and late evening hours in order to achieve some arbitrarily imposed racial blend in the public schools.

A jurisprudence of original intention would see no harm in communities restricting the sale and distribution of pornographic literature, or the "entertainment" of nude dancing or live sex shows. Indeed, it would celebrate the power of the people to decide these sorts of policies for themselves, collectively, in deliberative representative bodies where the true sense of the community could be registered and felt.

This is not a jurisprudence with a strict social agenda; it is, rather, a jurisprudence aimed at restoring democratic self-government. It is a way of constitutional thinking and litigating and judging that seeks not to impose so-called right answers on the people, but instead grants the people ample latitude to choose for themselves. That, after all, is what popular government -- a truly democratic form of government -- is all about.

At this distance of two hundred years we must ask the question of just how successful the Founders' experiment in

popular government has turned out to be. For the gulf that separates our generation from theirs is more than a simple gulf of years; it is made even wider by social and technological advances that some suggest render our Constitution more an anachronism than a vital charter of fundamental law. But this is, in my opinion, a woefully erroneous point of view. For the vitality of the Constitution today is as great -- perhaps even greater -- than it has ever been. The reason for this is attributable to the Founders' political genius. The Constitution they bequeathed to us was a Constitution designed not in light of the peculiar circumstances of the late eighteenth century but in light of what they understood to be the permanent attributes of mankind.

Yet, to acknowledge that the Constitution remains today a vital source of fundamental law is not to say that American politics has evolved according to the principles intrinsic to the Constitution itself. Indeed, as already indicated, it is my thesis that in too many ways the Constitution has been all but ignored or too facilely contravened through the years. While I lay primary blame on the federal judiciary, ultimate responsibility necessarily must lie with us, the people. The Bicentennial, I would suggest, is a most opportune occasion to take stock of our sorry state of constitutional affairs and collectively set about to restore the basic principle of our Constitution to our politics.

A significant step is being taken in just that direction with the appointment by President Reagan in recent years of a number of superbly qualified Federal judges. Unlike a lot of activist jurists named by the prior administration, men and women who have ascended the federal bench in the past six years have been selected not on the basis of some ideological "litmus test" or allegiance to a partisan agenda, but because they understand and appreciate the written Constitution. They regard it, quite properly, as a viable, lasting blueprint of an interlocking system of governments, whose strength derives from a close adherence to the Framers' original intention to devise a popular but limited government that rests upon the consent of the governed.

By unequivocally endorsing that basic tenet in this 200th year celebration of that most magnificent of political charters, we, the people, can unquestionably form a more perfect union.

Thank you.

*U.S. GOVERNMENT PRINTING OFFICE:1987-181-487:60053