Promises to Keep:
We are the Constitution’s Framers*

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In 1952, when my parents moved out of New York City to the suburb of Spring Valley, N.Y., I was one of two Black kids in my fourth grade class. There were three of us wearing “All the Way with Adlai” buttons amidst a sea of “I like Ikes.” And when Mrs. Rose allowed us to bring our radios in to listen to the Subway Series between the Yankees and the Dodgers, there were five of us cheering our hearts out for the Bums from Brooklyn and against what was then America’s team, the Yanks. Eisenhower and the Yankees won and “Under God” was inserted into the Pledge of Allegiance between “One Nation’ and With Liberty and Justice for All.”

I mouthed but did not vocalize the last two words of the Pledge. I’d seen the sign at the lake resort outside of town that read “No Niggers, Jews or dogs allowed.” I did not know then that in the year of my birth the U.S. Supreme Court had held that I could not be compelled to say the Pledge to the Flag, but I did know that I was not among the “all” to which the Pledge referred.

The following spring my family travelled south to visit relatives. We packed picnic lunches and dinners to avoid the humiliation of being sent to the back door of diners. My parents had grown up in Mississippi and were veterans at coping with Jim Crow. By avoiding the segregated eateries and hosteries of the South, we were laying the evidentiary foundation for the Commerce Clause argument the Supreme Court would rely upon ten years later, but I had no awareness of my part in constitutional history.

That May, Brown v. Board of Education1 was decided. Although I’d heard of the NAACP and even met Thurgood Marshall at a

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church dinner, I think that this was the first time I had heard of the Supreme Court. There was much rejoicing in my house. Nine white men in black robes had lifted the veil of legally sanctioned segregation from our heads. But even at the tender age of ten, I sensed that Brown was not so much a benignly bestowed gift as the fruit of a hard won struggle. Even at this young age, I understood that the struggle had just begun.

While I sensed intuitively that the Constitution only protected those who protected themselves, I also had a naive idealism about the nature of constitutional struggle. I was able to confront my classmates face to face. We played ball and cut class together and fought over whether Mickey Mantle or Willie Mays was the better centerfielder. When as a high school student, I picketed the local Woolworths and asked my white buddies not to patronize them because their stores in the South would not serve Blacks at the lunch counter, they honored my request. I was a friend whose humanity was important to them. They promised only to shoplift and not to buy. When we sponsored a Pete Seeger concert to raise money for SANE, the local chapter of the American Legion picketed the concert. It was a cold day and we served coffee to the picketers, most of them fathers of my classmates, and talked politics face to face. When I refused to participate in a nationwide civil defense drill, the guys on the football team asked why. I told them and they listened and thought. I was more skeptical than most of my friends about the constitutional platitudes we were fed in civics class, but I was a romantic about the possibilities of the struggle.

On May 6 of this year, United States Supreme Court Justice Thurgood Marshall delivered a speech entitled "Celebrating the Constitution. A Dissent." Justice Marshall distanced himself from the flag-waving fervor and celebratory spirit that has been the hallmark of this year's 200th birthday of the U.S. Constitution. He began his speech as follows:

Like many anniversary celebrations, this one takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the Framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself but the tendency
to oversimplify, to overlook the many other events that have been
instrumental to our achievements as a nation. The focus of this cel­
bration invites a complacent belief that the vision of those who
debated and compromised in Philadelphia yielded the "more perfect
Union" it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the
meaning of the Constitution was forever "fixed" at the Philadelphia
Convention. Nor do I find the wisdom, foresight, and sense of jus­
tice exhibited by the Framers particularly profound.3

A Washington Post article reporting Justice Marshall's speech be­
gan by asking, "Is Justice Thurgood Marshall the Grinch of the Con­
stitution's 200th birthday party?"4 My mother called that same day
and said, "Did you read what Thurgood said about the constitutional
bicentennial? Wasn't it wonderful? That man made my week."

My mother had voiced a response to Justice Marshall's words
that was echoed the length and breadth of this nation's Black commu­
nity. Many thoughtful whites commended his speech as well, but his
words were much more than a correct or even an insightful analysis to
us. His voice was our voice. His articulation of our perspective, of
what we see and feel daily, was a liberating event. He was Joe Louis
pummeling Max Schmelling, he was Jackie Robinson making us all
Brooklyn Dodger fans, he was Muhammed Ali resisting the draft, and
Martin Luther King preaching a powerful poetic sermon about a
dream that each of us shared. He was for us what Frederick Douglass
had been for our great grandparents when on a Fourth of July he said,

Fellow citizens, pardon me, and allow me to ask, Why am I
called upon to speak here today? Perhaps, you mean to mock me.
For what have I to do with your celebration? What, to the Ameri­
can slave is your Fourth of July? I answer, A day that reveals to
him, more than all other days in the year, the gross injustice and
cruelty to which he is the constant victim. To him, your celebration
is a sham; your boasted liberty, an unholy license; your national
greatness, swelling vanity; your sounds of rejoicing are empty and
heartless; your denunciation of tyrants, brass-fronted impudence;
your shouts of liberty and equality, hollow mockery; your prayers
and hymns, your sermons and thanksgivings, with all your religious
parades and solemnity, are to him, mere bombast, fraud, deception,

3. Id. at 623-24.
impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages.⁵

Justice Marshall's words and those of America's greatest abolitionist share a common theme. It is a theme which brings our nation's ideals and its realities face to face, a theme which confronts us with our contradictions. Marshall indicts the founding fathers for devising a government which was "defective from the start."⁶ He notes that when the framers used the words "We the people" in the Constitution's Preamble:

they did not have in mind the majority of America's citizens . . . .

On a matter so basic as the right to vote, Negro slaves were excluded, although they were counted for representational purposes—each as three-fifths of a person. Women did not gain the right to vote for over a hundred and thirty years.⁷

It is important to note that Justice Marshall does not attribute these defects to negligence or lack of know-how on the part of the Framers. "These omissions were intentional,"⁸ he says. The written record of the Framers' debate on slavery cannot be denied. Nor can the provisions of the document itself; the "three fifths" provisions in Art. I, Sec. 2, the bar on prohibiting the importation of slaves in Art I, Sec. 9, and the "fugitive slave" provision of Art. IV, Sec 2.

Some contemporary commentators have responded to Justice Marshall's indictment by arguing that the Constitution cannot be condemned for being a creature of its times. They characterize the infamous slavery compromises of 1787, as necessary, if unfortunate, decisions influenced by the then prevailing beliefs that slavery was on the decline and would soon die of its own weight; that Africans and their descendants were a different and inferior breed of beings. That the property interests of slave owners were preserved at the cost of freedom for Blacks is seen as a small anachronism in an otherwise brilliant testament to democracy and individual liberty.⁹

But, the slavery compromises were much more than a casual concession to the contemporary mores of the day. The debate over the

⁶. Id. Marshall, supra note 2, at 624.
⁷. Id.
⁸. Id.
⁹. See generally Marshall, supra note 2, at 623.
morality of slavery was already a vigorous one in 1787, and the framers knew full well the moral ramifications of what they did. The constitutional dilemma rested not in a failure to understand the immorality of the enslavement of other human beings or that slavery conflicted with the framers' idealism regarding the worth of the individual, but in the conflict between this aspect of individual liberty and their more pressing pragmatic concern for the protection of vested property and political status based on wealth.

Recall that for the framers, propertied white men all, property was a fundamental extension of the individual, and the social compact was chiefly designed to protect those distributions of wealth that they saw as arising out of the varying talents and efforts of society's members. (Never mind that the largest part of this wealth was produced through the labor of those who they held in bondage.) The framers simply chose to give priority to one facet of individual liberty over another. They chose, quite rationally, to preserve liberty for a very limited segment of the national community - themselves.

Justice Marshall cites Chief Justice Roger Taney's infamous passage from the Dred Scott case to make his point that the original intent of the Framers was "far too clear for any ameliorating construction."10 "[Negroes] had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . ; and so far inferior, that they had no rights which the white man was bound to respect."11 But as Professor Derrick Bell has noted, Chief Justice Taney may have missed the point. "It was not as he proclaimed . . . that the Constitution's commitment to individual liberty was not intended for Africans, but that the Constitution's injunctions went to those who owned property—a qualification that excluded many whites as well as most Blacks."12

In recent years, I have begun my first constitutional law lecture by recollecting a New Yorker cartoon of several years ago. The cartoon depicts a typical New York Yuppy cocktail party. One guest, a law student explaining his professional goals, said "my short-term interests are in civil liberties but my long-term interests are in real es-

10. Id. at 626.
I relate this cartoon in part as a challenge to my students not to follow suit. But the cartoon also speaks to the constitutional dilemma between this nation's commitment to property and its commitment to humanity.

The Framers chose property and resolved the apparent contradiction between the primacy of property and the broadly stated commitment to humanity by defining Blacks and other people of color as outside the community of human beings. Women were relegated to a similar nonparticipatory status by a different but no less effective ideology that characterized them as less than fully developed humans, as childlike and in need of protection. It should not surprise us that Ed Meese, William Rehnquist and Robert Bork are advocates of original intent or that Thurgood Marshall has called for a different vision of the Constitution, a vision "nurtured through two turbulent centuries of our own making."13

The power of Marshall's vision of the meaning of the Constitution is that it includes us—all of us—that it calls upon each of us to be active participants in making the Constitution; in deciding which constitutional values will be given primacy. Marshall's vision calls upon all of us to be Framers.

Professor Hanna Pitkin has written that there are two uses of the word constitution that do not refer to the Constitution of the United States but that are worth attending to in considering how we may give meaning to that document.

"The first of these uses is constitution in the sense of composition or fundamental make-up, the constituent parts of something and how they are put together, its characteristic frame or nature."14 When we speak of a person's constitution we refer to her physical makeup (we say she has a robust or a delicate constitution) or of her temperament or character. "With respect to a community this use of the word constitution suggests a characteristic way of life, the national character of a people, a product of a particular history and social conditions."15 A constitution is SOMETHING WE ARE, a mode of self-articulation.

"The second use of constitution which deserves our attention is its function as a verbal noun pointing to the action or activity of con-

15. Id.
A constitution is SOMETHING WE DO. A constitution can be seen as activity—as political struggle. As Justice Marshall so aptly pointed out, our founding fathers were men, not gods and we have the same powers that they exercised in framing our Constitution. We have the human capacity for creative action. “We are the species that constitutes itself, that collectively shapes itself, not just genetically through reproduction, as all species do, but culturally, through history.” 17 We take responsibility for what we are by shaping and doing, but not every action we take is a successful extension of our true selves. This effort to express our true selves is the subject of constitutional discourse, a discourse which should not be restricted to lawyers, judges and scholars, but should be engaged in by us all.

In 1787, the vast majority of us were excluded from this constitutional discourse. The continuing legacy of our exclusion is this: for those who are intent on maintaining a status and power gained through wealth and property, the contradiction between the ideals of liberty and equality and the primacy of property requires a rationalization. Some explanation must be devised that hides from us and ourselves the gaping chasm between the ideal and the real. Constitutional doctrine has provided this rationalization in the social Darwinism of economic substantive due process, 18 in the intent requirement’s disregard of culturally ingrained and therefore often unconsciously motivated racism and sexism, 19 or in the state action doctrine’s immunization of private clubs and corporations from constitutional scrutiny. 20

For those of us who have been and continue to be excluded the contradiction between the ideal and the real is enabling. We know that we are part of a struggle about the meaning of the Constitution, a struggle about how we shall be constituted, about who we are and how our values are best articulated and acted out. Professor Jerry Lopez

16. Id. at 168.
17. Id.
has said that "[c]onstitutions result from fighting. They establish so-
cial arrangements that express both in their original detail and in their
ongoing adjustments what fighting continues to be about—not just in
elections [or constitutional conventions] but in day-to-day living." 21

It is not happenstance that those who have been most oppressed
in this country have been the keepers of the dream. It is not fortuitous
that Blacks, browns, women, gays and other stigmatized and
marginalized persons have been in the vanguard of progressive Consti-
tutional change. It is in our interests to close the Constitution's con-
tradictions. We are liberated by the knowledge that we are in a fight
about who we are and how we shall be constituted, and our liberation
has served to liberate all Americans.

During the past several weeks, as I have listened to the Iran-Con-
tra hearings, I have been struck by the presence of a countervailing
force that threatens the vitality of this participatory struggle that is
our Constitution's chief promise. The hearings seemed to me a golden
opportunity for engaging the public in Constitutional debate and yet
they appear to be having quite the opposite effect. The major media
has played into the public's need for bread and circuses. Network cov-
erage of the hearings has replaced the soaps but there is little change in
tone. Tom Brokaw called Ollie North a "Can Do" man without stop-
ing to ask whether we really wanted a government run by Rambo. In
a random survey of 100 people on the street 92 knew who Fawn Hall
was while only 20 knew the name of the Chief Justice of the Supreme
Court.

Network television has done much to take the self out of self-
governance by making government a spectator sport. The adversarial
press is fast disappearing as access to mass communication becomes
largely a function of wealth. The media does not always tell us what
to think, but they have been strikingly successful in telling us what to
think about or by sheer dint of overexposure in eroding our critical
faculties altogether. Professor Neil Postman has noted that in Hux-
ley's Brave New World "Big Brother does not watch us by his choice.
We watch him by ours." 22

Justice Marshall has served us well in reminding us that the handful of propertied white men that met in Philadelphia made us very few promises that we would have them keep. Even the Bill of Rights was a belated concession to more populist state legislatures. If the Constitution has any unfulfilled promises they are those which we and others like us, who have gone before, have made to ourselves. It is we who must fight to give the due process and equal protection clauses a meaning that reflects our values. It is we who must insure that the Constitutionally regulated powers of the executive not be usurped by fascist fanatics who think that the buck should stop with an unelected military officer. It is we who must demand that our senators just say no to Robert Bork and any other candidate who would relegate women, gays and people of color to second class citizenship.

In this year of the Bicentennial of our Constitution we must recapture the naivete and idealism about Constitutional discourse that I experienced as a youth. We must speak to our friends and neighbors face to face. We must remind them and ourselves that we are our Constitution's Framers and that we neglect that solemn responsibility at our own peril.
We the People

in order to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution

ARTICLE I.

Section 1. All powers of the Government of the United States shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the House shall be composed of Members chosen by the People of the several States, which shall have one vote each. A majority of the whole number of Members may constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to deliberate, and to report to such States, and the Senate shall be composed of two Senators from each State, appointed by the legislature thereof; which Senate shall be on equal footing with each other, and no State shall have less than two Senators. The Senators from each State shall have equal voting power. No person shall be a Senator who shall not have reached the age of thirty years, nor been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Senators and Representatives before mentioned, and the Members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Section 3. The Congress shall assemble at least once in every year, and may, by law, adjourn from time to time, not exceeding thirty days.

Section 4. The Congress shall keep a Journal of its Proceedings, and from time to time publish the same, or cause them to be printed; and the Journals of the Senate and House of Representatives shall be published, and all such Proceedings and Bills as are not printed, are to be laid, upon request, before either House.

Section 5. All换子 members of both Houses shall be chosen for the term of two years, and vacancies shall be filled by the Senate.

Section 6. The House of Representatives shall determine, by a majority of a quorum of the Members present, whether a vacancy has happened in the Senate, and shall fill such vacancy; but no such vacancy shall happen during the recess of the Senate, but such Senators may be appointed until the next Meeting of the Senate, which shall be held in December next.