Masthead Logo

McGeorge Law Review

Volume 18 | Issue 2

Article 3

1-1-1987

The Constitution in the Year 2011

Laurence H. Tribe

Essay

The Constitution in the Year 2011

LAURENCE H. TRIBE*

A year after you graduate from law school today, the United States Constitution will be 200 years old. I think it is fitting that the scaffolding around the restored Statue of Liberty will have been removed by then. The symbol of liberty shackled, of freedom in a cage, would have been a sad way to usher in the third century of a Constitution justly celebrated as a structure for liberty, in a nation whose dream Bob Dylan captured in the *Chimes of Freedom*:

> Far between sundown's finish and midnight's broken toll
> We ducked inside the doorway, thunder crashing
> As majestic bells of bolts struck shadows in the sounds
> Seeming to be the chimes of freedom flashing.

Thinking about our Constitution's next century seems almost too large and daunting a mission. A century ago, in 1886, the ink was barely dry on the three constitutional amendments that ended slavery and proclaimed equality. And the Supreme Court's infamous deci-

* Tyler Professor of Constitutional Law, Harvard University. This article is a transcription of a commencement address delivered to graduates of McGeorge School of Law on May 24, 1986.

sion upholding racially segregated public facilities under the "separate but equal" doctrine still lay a decade into the future. The coming century seems fated to be witness to even more radical changes—changes truly testing whether a nation "conceived in liberty" and dedicated to equality and democracy can endure in a world threatened by terrorism and poised at the brink of thermonuclear annihilation. Who can say whether the Constitution of the United States will have a 300th birthday? Who can say what it might resemble if we manage to survive?

So it seems more realistic to focus on a somewhat less remote horizon. A quarter of a century seems long enough to be worth worrying about, but not too long to take in at a single gulp. Hence my topic today: the Constitution in the Year 2011.

That, believe it or not, will be the year that you celebrate your twenty-fifth reunion—the twenty-fifth anniversary of your graduation from McGeorge Law School today. (I still have five years to go before my twenty-fifth law school reunion, but it is already clear to me that twenty-five years pass very quickly—a lot more quickly, I assure you, than any of you who graduate today would dare suppose.) And if I have a wish for you, it is simply this: When you look back over your twenty-five years, I hope you will be proud of the lives that you have led, not just as professionals, but as people.

Those of you in this audience who will be lawyers will have a distinctive relationship to the Constitution over these next twenty-five years. The Constitution is, after all, not just a political charter, an exhortation to government, but the most fundamental of all our *laws*. Ever since John Marshall proclaimed the Constitution to be judicially enforceable in the great case of *Marbury v. Madison* in 1803, the character of the American Constitution as *law* has shaped our entire history as a people living under a government of "laws, not men."

But the Constitution is a special *sort* of law—the only "law" that it makes sense literally to find encased in glass on display in the National Archives in Washington, D.C.; the only law that we virtually *worship* as a nation; the only law that has attained almost the status of *scripture*. Because of its pivotal, even mythological, place in our national consciousness—because so much of what we are and what we aspire to become is represented by the Constitution—its meaning and its evolution are far too important to leave to lawyers alone. The Constitution is law, but it is law of a sort and at a level that must speak to all of us, and it must make sense to all Americans.

So what I have to say this afternoon is not addressed to lawyers alone. I am speaking to everyone when I launch this brief excursion in constitutional time travel.

Some of the best trips into the future begin by going backward. To envision the future, it often helps to revisit the past. So I ask you to go "backward into the future" with me by returning the constitutional clock to where it stood a short quarter of a century ago—in 1961.

A youthful President is being sworn in, on a cold Washington morning, by Chief Justice Earl Warren, formerly the Governor of California. "I, John Fitzgerald Kennedy, do solemnly swear that I will faithfully execute the Office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

Anyone who read a copy of the Constitution that President Kennedy swore to "preserve, protect and defend" on that day in 1961 would have seen a document not very different from the one that President Reagan swore to uphold in January of 1985—the document, indeed, as it stands today, in 1986. Only several amendments have been added since JFK's inauguration:

- the Twenty-Third Amendment, letting the District of Columbia cast votes for President and Vice President;
- the Twenty-Fourth Amendment, eliminating poll taxes in Federal elections;
- the Twenty-Fifth Amendment, changing the details of presidential succession; and
- the Twenty-Sixth Amendment, ratified fully fifteen years ago, giving all 18-year-olds the vote.

The Constitution's framers deliberately made it difficult to amend that document, so the small number of amendments would have come as no surprise to them. Indeed, to read the document as it rests in the National Archives, you would hardly guess that the Constitution of 1961 and the Constitution of 1986 differed very much at all.

But that guess would be wrong—thanks largely to Chief Justice Marshall's 1803 ruling in *Marbury v. Madison*, entrusting the judiciary with the task of interpreting and enforcing the Constitution as a living body of law and not simply as an historical artifact. Thanks largely to that ruling, what the Constitution *is* in 1986 cannot be gleaned from the barely altered text alone: what the Constitution *is* today in 1986, and what it was on that wintery morning in 1961 a quarter of a century ago, can be discerned and compared only by looking beyond the document's words—by understanding their changing interpretation by succeeding generations of judges, nominated by a succession of Presidents, confirmed by a succession of Senates.

Consider, then, what the Constitution, as judicially perceived and enforced, said to this nation just 25 short years ago, in 1961.

It said that women may be excluded from jury service and from other basic positions because of their central role in "home and family life."

The Constitution in 1961 told states that they may prosecute, as a criminal, anyone who marries outside his or her own race.

The Constitution said that state and federal officials may wiretap and may engage in electronic eavesdropping at will, without getting a warrant, and without having any reasonable basis to suspect any wrongdoing.

The Constitution in 1961 told states that they may put people on trial without juries, even for the most serious crimes.

The Constitution allowed the state to put someone on trial more than once for the same offense.

In 1961, the Constitution warned newspapers and journalists that they could be held liable for careless, or even entirely innocent, errors in their stories about the conduct of our public officials.

In 1961, the Constitution said that illegally seized evidence may be used to obtain convictions, even if the illegality was deliberate.

The Constitution told poor people that they may be tried and jailed without the help of a defense attorney.

It told school children and their parents that state-composed, or state-selected, prayers may be included in the official daily exercises of every public school.

The Constitution in 1961 told women that they could be put in jail for ending any pregnancy, and told all people that they could be jailed for using birth control in the privacy of their homes.

Now this list, however much it may sound like the Soviet Union, is the United States of America as its Constitution was understood in 1961. The list could easily be extended. The Constitution, as of 1961, bore little resemblance to the Constitution to which all of us have grown accustomed. And the constitutional changes in all ten of the examples on my list came about not by amendment, but through an evolving interpretation of just two clauses in that document: the clause requiring states to guarantee all their people the "equal protection of the laws," and the clause telling states that they may not deprive anyone of "life, liberty or property" without "due process of law."

In projecting what the Constitution will be twenty-five years in the future, we cannot afford to ignore at least one significant possibility.

The Constitution in the year 2011, when you celebrate your twenty-fifth reunion, may resemble the Constitution of 1961 more closely than it resembles the Constitution of 1986.

Why is that? There is no way to describe the reasons without sounding opinionated, but that has never stopped me before. The reason is that the Attorney General of the United States and other advisors of the President have attacked all of the Supreme Court decisions that changed the items on my list of ten (that's part of the way I composed the list), claiming that all of them were grotesque and indefensible deviations from the Constitution's true meaning. And the strategy of the Attorney General is to urge the President to nominate federal judges for their lifetime posts only if those nominees share the Meesian view of these matters.

By the time President Reagan leaves office in January 1989, whatever his other accomplishments, he will have named one-half of the nation's 750 life-tenured federal judges. And he *may* have had a chance to remake the Supreme Court itself, since it is already the oldest Court in our history, with a median age of nearly 78.

But the Supreme Court's Justices, as I can report from a recent argument there this Spring, all seem not only alive but vigorous. And in any case, the power of appointment belongs not to the President alone but to the President with the "advice and consent" of the Senate. Sometimes that does induce a degree of moderation in appointments to the highest court in the land. Besides, new Justices may prove surprisingly independent and unpredictable, as Justice Sandra Day O'Connor has, in what I think promises to be a distinguished career as a jurist.

Finally, it may be a lot harder to turn time's arrow around than some of the most radical of the present Administration's advisors suppose. Constitutional progress that strikes a deeply responsive chord in America's sense of justice and tolerance becomes a habit that could prove hard to kick. Having once gazed upon the "chimes of freedom flashing," the nation may find it hard to look away as long as those of us who care resist the darkness—as lawyers, and as citizens.

But it will not be enough simply to hold the line—simply to keep the constitutional landscape from being desolated by craters. New plateaus will have to be constructed, new peaks scaled, new puzzles resolved, if the Constitution's protections for the human spirit are to remain vital and relevant in the face of rapid social and technological change.

Consider just two examples. Whether further developments in computer and communications technology will swell the power of impersonal bureaucracies—or will open up new possibilities for universal education and strongly participatory democracy—may depend heavily on how sensitively we interpret constitutional concepts of free speech, privacy and equality. And whether advances in biomedical technology and genetic recombination will threaten to reduce human beings to manipulable objects—or will instead extend life's options in exhilarating and humane ways—may well depend on how creatively, and how thoughtfully, we interpret ancient constitutional clauses, expressing principles that determine who is empowered to make basic choices about life, about death, and about bodily integrity. Will those choices be made by officials of government, or will they be made by the people most intimately involved?

The precise shape of the constitutional issues that will confront us is impossible now to predict. But what is entirely predictable is that the Constitution of the United States will be called upon, over the next quarter century, to address problems and issues that simply did not exist before new developments posed options not previously available—options for choice where, in the past, "nature" simply took its course. And the time to begin focusing on those constitutional choices is not when they are upon us, but in advance. Hence my decision to make the constitutional future my topic this afternoon.

All of us—all of you—are the custodians of that future. In the cases that you agree to take, in the clients whom you are willing to represent, in the arguments that you choose to advance, in how you urge your Senators to vote on prospective Supreme Court nominees, in whether you allow confirmation elections for state Supreme Court justices to threaten judicial independence and courage—in all of these fundamental choices, each of you will be constructing, slowly but inexorably, your own and your children's constitutional future.

My hope is that this focus upon the future will help you over the years to recall today less as the culmination of three years at law school than as the *commencement* that it really is, more as a beginning than as an end. And what each of you begins as you address the future will take a long time to bear fruit. But that is all the more reason to think about tomorrow today.

There is a story that President Kennedy used to tell in the early 1960's about a French general who once asked his gardener to plant a tree. The gardener objected that the tree was a slow-growing variety

and would not mature for a hundred years. "In that case," the general replied, "there is no time to lose. We must plant it tonight."

Thank you very much.