Maryland Law Review

Volume 47 | Issue 1 Article 6

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Carl T. Rowan

EQUALITY AS A CONSTITUTIONAL CONCEPT

CARL T. ROWAN*

As so many of my critics assert, I may be a little bit stupid. But I am not so dumb that I am not aware that the document whose 200th birthday Americans are celebrating this year has spawned more controversies than perhaps anything in print except the Bible as viewed by Jim Bakker or Jerry Falwell.

I speak to you in the wake of Iran-Contra testimony in which Oliver North and John Poindexter provoked a riveting debate about how much power the Constitution gives the President to conduct foreign policy, even when a chosen course involves deceiving and lying to the Congress, lying to the public, destroying national security documents, and more.

I speak to you at a time when the Nation is about to become consumed in a fierce struggle over the nomination of Robert H. Bork to become a justice of the United States Supreme Court. If you read the Op-Ed page of the Baltimore Sun this morning you would have seen a rather remarkable column by Kathleen Sullivan, who teaches constitutional law at Harvard University.

She wrote:

> Imagine a world in which it was up to your state legislature to decide whether you could have sex or children. Imagine further that a majority of your neighbors could decide which members of your family could live with you in your own home.
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> According to Judge Robert H. Bork, President Reagan's choice for a seat on the Supreme Court, such a world would be perfectly constitutional.
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> What would be missing from that world is privacy, a realm of freedom for intimate sexual and family affairs.
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> Judge Bork says that the right to privacy is nowhere in the Constitution, and, therefore, all those Supreme Court decisions upholding privacy were wrong. He suggests that, as to matters of sex, family and procreation, the Court must stand on the sidelines and let the majority have its way.[1]

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* Syndicated Columnist and Correspondent, Chicago Sun-Times; Radio and TV Commentator. B.S., Oberlin College, 1947; M.A., University of Minnesota, 1948.

1. Sullivan, *A Right to Privacy*, Baltimore Sun, July 22, 1987, at A17, col. 1.

But if you picked up the *Washington Times* on July 14, you would have encountered a far different view of the struggle over Bork. The columnist Joseph Sobran wrote:

> The Democrats calculate that they're in a strong enough position to pack the Court themselves. They control both houses of Congress against a weakened Republican president.
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> Subjugating the Court is only part of a larger design. If the Democrats can bring it off, here is what American politics will look like for the foreseeable future: the House of Representatives will be the Democrats' private property. . . . The Senate, of course, will be somewhat more iffy, but the Democrats control it now.
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> The Supreme Court will be dominated by compliant justices who will continue giving novel pseudo-rights a constitutional status. . . . So, it is possible that by the summer of 1989 the Democrats will have full control of the White House, both houses of Congress and the Supreme Court—the greatest monopoly of power since the Johnson administration. . . . If that happens the party system the Framers feared will have triumphed over the constitutional system they designed. And the Supreme Court, instead of being a check on Federal power, will become a mere tool of the ruling party.[2]

These quotations set the parameters for the upcoming American debate. I will talk about Judge Bork and a few other issues this evening. I will talk about the Constitution as it affects you and me, and may affect our children and our grandchildren.

The first point I want to make is about the title I was given for this address: "Equality as a Constitutional Concept." If we were only talking about what the framers agreed upon in Philadelphia 200 years ago, there would not even be a basis for me to talk on that subject, because equality was not the foremost thing in the minds of those people. They regarded blacks as something far short of human beings, and women might as well not have existed. So I will talk a little bit about that original document of 200 years ago. And I will close by talking about the Constitution in the broader context that we understand it—a Constitution supplemented by amendments.

You will note that Kathleen Sullivan complained that Judge

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2. Sobran, *Portents for the Future*, Washington Times, July 14, 1987, at D2, col. 1.

Bork says, "if it's not in the Constitution, leave it alone."[3] There are other scholars who argue in favor of "strict construction," or "original intent," and they say that if the words are not in the Constitution, then the judges have to sit back and let the state legislatures decide what the controlling law should be.

I think that the mere idea of original intent is an absurdity. Because so many vital areas of American life are new, those men in Philadelphia could not have possibly had an "original intent." What did James Madison or Benjamin Franklin or George Mason think about the laws needed to protect our environment from dioxin or strontium-90?[4] Who at Philadelphia had an "original intent" regarding Connecticut's right to declare that a husband and wife in the privacy of their bedroom could not legally use birth control devices?[5] Even on December 15, 1791, when the Bill of Rights became effective, who had any intent about freedom of the press that would embrace partial government control of the television industry?[6]

Or, consider the second amendment that says clearly, "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed."[7] Remember that in 1791 there was no Pentagon, no Strategic Air Command, and no great central defense apparatus. It was assumed that the state militia would repulse those that might come one by land and two by sea, but nobody had even the wildest notion of somebody coming three by air. There is no way that it was anyone's original intent that Americans today would be packing sixty million handguns, occasionally used by neurotics to shoot people down in shopping centers, on college campuses, in office buildings, and in subways.

There are some things, though, that we do know about "original intent" in Philadelphia. Those men who met there never intended that a black descendant of slaves would be standing in Maryland tonight pontificating on what they did or intended to do.

I am doing a television special on the Constitution, and among the things I have done is interview Justice Thurgood Marshall for about six hours. He told me that someone suggested that the Supreme Court go to Philadelphia this year and sit there as they

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3. *See* Sullivan, *supra* note 1.

4. *See In re* "Agent Orange" Product Liability Litigation, 104 F.R.D. 559 (E.D.N.Y. 1985).

5. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

6. *See Children's Television Report & Policy Statement*, 50 F.C.C.2d 1 (1974).

7. U.S. CONST. amend. II.

might have done two hundred years ago. Marshall said, "If we did that, I'd have to get me some short pants and a tray and serve coffee."

Justice Marshall stirred a storm of protest in May 1987 when he gave a speech in Hawaii and said the following about the Constitution:

> The focus of this celebration 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.
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> 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 justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.
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> For a sense of the evolving nature of the Constitution we need to look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the Framers, "the whole number of free persons." On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths of a person each. Women did not gain the right to vote for over a hundred and thirty years.[8]

Marshall went on to say that these omissions were intentional, as indeed they were. He talked about the fact that in *Dred Scott v. Sandford*,[9] many years after that meeting in Philadelphia, the United States Supreme Court declared that black people had no rights that a white man was bound to respect. Marshall said:

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8. T. Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii 2-3 (May 6, 1987) (available at the *Maryland Law Review*) (footnotes omitted).

9. 60 U.S. (19 How.) 393 (1857).

> [N]early seven decades after the Constitutional Convention, the Supreme Court reaffirmed the prevailing opinion of the Framers regarding the rights of Negroes in America. It took a bloody Civil War before the Thirteenth Amendment could be adopted to abolish slavery, though not the consequences slavery would have for future Americans.[10]

Thus, when someone comes to me talking about "strict construction" and "original intent," I assume immediately that I face a mind-set akin to those of the Taney Court who decided *Dred Scott*, or certainly someone receptive of the notion that women are merely pleasure-giving, baby-producing vassals.

I know what is remarkable about that meeting in Philadelphia two hundred years ago. Of course, the framers figured out a way to make little Rhode Island feel equal to Virginia by giving them the same number of votes in the United States Senate. And, yes, they found a way to produce a bicameral legislature. Sure, they drew up a system of checks and balances. These were marvelous achievements, indeed. But, more to their credit, the founding fathers were forced to leave leeway for some remarkable amendments. George Mason, the great Virginia patriot and friend of George Washington; Edmund Randolph, Virginia's thirty-four-year-old governor; Elbridge Gerry of Massachusetts—these people refused to sign the Constitution because it lacked a bill of rights to protect citizens from the government.[11] What was approved in Philadelphia was no barrier to the oppressions, abuses, and outrages that the Pilgrims and their kin had known and from which they had run. Since then we have gotten a Bill of Rights and more. This essential vitality was underscored by Justice Marshall, who explained: "We have a great Constitution today—I've defended it all over the world and will continue to defend it—but it didn't start out that way. It has become a great Constitution by considering it as a living document, and the legislature passing amendments and this Court issuing judgments. That's what has made it a great Constitution."

A few sketches of the reality of American life and how we have dealt with the Constitution should further illustrate the point. As you know, there is a clause in the Constitution that says powers not given to the central government are reserved to the states or to the people.[12] Recently, we have heard a lot of talk about states rights. I

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10. T. Marshall, *supra* note 8, at 7.

11. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 649 (M. Farrand ed. 1937).

12. U.S. CONST. amend. X provides: "The powers not delegated to the United States

remember that this was one of the burning phrases of my youth, of my childhood, when I was growing up in Jim Crow Tennessee. This doctrine meant that the state had the right to do almost anything it wanted to do. It could tell me that I had to ride on the back of the bus, and that I had to walk past the school near me and go to a little Jim Crow school miles away.

I also remember a magnificent day in 1948. I was a cub reporter during the Democratic Convention in Philadelphia. The Democrats had produced a platform calling for civil rights of a kind that this country had never known. There was a tremendous battle at the convention. Hubert Humphrey, the mayor of Minneapolis, got up and galvanized that convention with a speech in which he said that it was time for the Democratic Party to reject the doctrine of states rights and reassert the preeminence of human rights. Then Strom Thurmond led the Dixiecrats out of the convention. In the aftermath Democratic Presidential candidate Harry Truman was faced with a terrible political situation.

I was reminded of that situation years later when my editor at the *Minneapolis Tribune* wagered me that I could not get an interview with Mr. Truman on his seventy-fifth birthday. I called several people. In about an hour I got a call from Independence. It was Mr. Truman inviting me to come down to his house to chat with him.

I sat there for the better part of two hours trying to get a word in edgewise, as this marvelous old history buff told tales of the past. Finally, when my chance came, I said, "Mr. President, you have had a marvelous career. You stood up and saved Greece and Turkey from Communism. You pushed through the Marshall Plan so that Western Europe could be rebuilt. You fought for and got a homeland for the Jewish people, the State of Israel. When the Communists tried to take over South Korea, you meant it when you said, 'the buck stops here,' and you sent American boys in to fight. Mr. President, of which of these achievements are you proudest?"

"Hmmmmph," he said, "none of them."

I said, "None of them?"

And he reached back into the bookcase behind him and pulled out a paperbound volume called *To Secure These Rights*.[13] "This is what I'm proudest of," he said.

And, of course, I knew immediately what that document was.

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by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

13. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947).

He said, "After the war, I sat there in the White House reading these stories about black GIs being beaten up and their eyes poked out by cops in North Carolina and Georgia, troubles in Maryland, and I said to myself, 'everybody got something out of that war except the black GIs. They didn't even get the right to ride on the front of the damn bus.' I told my people 'I'm going to do something about this.' And I named a blue-ribboned commission to tell me what to do. And this is their report."

He continued, "You know what they told me? They told me I had to send a message up to Congress, asking for a federal anti-lynching law; that I had to create a Civil Rights Division of the Justice Department; that I ought to ask for statehood for Hawaii and Alaska, and home rule for the District of Columbia; and that I ought to ask Congress to make it a crime for a policeman to violate the basic rights of a citizen."

"My aides looked at this report, and they said, 'Sir, you'd be crazy to send that kind of message to Congress. Old Strom Thurmond and the Dixiecrats have already abandoned you on the right, and Henry Wallace has left you on the left, and you're out there twisting in the wind already. You send that up and Tom Dewey will be the next President of the United States.' "

Truman gave me a little wry chuckle. He said, "But, I sent that message up to Congress. And I still whipped old Dewey's ass."

This is an example of a man walking into the teeth of states rights. And did he get away with it? Everything Harry Truman asked for in that message to Congress has come to fruition with the exception of full home rule for the District of Columbia.

More recently, I was down at Clemson, South Carolina. A gentlemen there expressed the view that, if you cannot find it in the language of the Constitution, you leave it to the state legislatures.

I said, "Wait a minute." I told him of a situation a few years ago, where some people went to Chief Judge Frank M. Johnson, Jr. in the federal district court in Montgomery, Alabama. And they said, "Judge, in the entire history of the state of Alabama, there never has been a Negro highway patrolman." Judge Johnson looked at the situation and found a clear case of discrimination. He found violations of a number of sections of the Constitution, including the equal protection clause of the fourteenth amendment. Accordingly, he ordered the highway patrol of Alabama to set up a system of hiring blacks.

I asked this man at Clemson, "Suppose we had argued and held to strict construction? Judge Johnson could not have ruled as he did

and he would have had to leave it to the state legislature. If he had left it to the state legislature, there still would not be a black highway patrolman in the State of Alabama."[14]

So, justice has to mean a great deal more than what you can find written in the Constitution. We have many forces in this society that make the Constitution what it is and something worth celebrating.

One of the most powerful forces is the Presidency of the United States. Exercises of Presidential power can change the mood of the Nation and make the Constitution a living document that is interpreted in ways in which it has not been interpreted previously.

I was the most surprised guy in the world in 1961 when I was at the Rose Bowl game waiting to do the front page story for the *Minneapolis Tribune* and got a call asking me if I would join the Kennedy administration. I had never campaigned for anybody for a day in my life, but I took that job, and I eventually went into the State Department. I discovered that one of the biggest difficulties I faced in those early months was wrestling with the problems of diplomats of color being insulted as they came up Route 40 through Maryland. I got a different impression and understanding of what it meant to have Washington, D.C. as one of the most segregated cities in the Nation. But I saw what a President could do for integration, without finding any language in the Constitution.

I remember going to Washington early to do my homework, because I did not want to be known as the spook who sat by the door, a token appointee. I was reading my briefing papers when my secretary said, "Oh, good news. You just got an invitation to President Kennedy's first state dinner. A white tie and tails affair for President Bourguiba of Tunisia."

I thought about it for about two seconds. Then I said, "Well, I don't own any white tie and tails. My wife is still in Minneapolis. I'll probably be back there myself. Would you send the President my regrets?"

My secretary paused, then said, "Mr. Rowan, I think I ought to tell you that in your job the only way you can say no to an invitation like this is to have two broken legs."

So I called my wife, who ran out and bought herself a fancy new gown. I bought a white tie and tails, which I am still amortizing. We got dressed up and headed for the White House. As we approached

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14. The Supreme Court upheld the promotion system as permissible under the equal protection clause of the fourteenth amendment in United States v. Paradise, 107 S. Ct. 1053 (1987).

the northeast gate, Robert Weaver, a black man who would later become the Secretary of Housing and Urban Development, walked up. He too was all gussied up in his new white tie and tails. He walked over to me and said, "Hey, Carl, goddam this integration is expensive."

So it was, but it was worth it. That night blacks and whites were waltzing and twisting in the East Room of the White House together. From that day forward the social scene in Washington was changed. It almost became *de rigueur* that, if you wanted to be known as a great hostess, you had to have a black couple or two at your dinner party.

Nothing much changes in America unless it is run through the political system. One of the greatest of Presidential powers is the power to nominate people to the Supreme Court, people who will tell you what that Constitution means and does not mean.

I am going to tell you honestly, I have been pretty unhappy and angry in recent weeks. Whatever you think about the nomination of Robert Bork, I do not like it a bit. And I am going to fight it every way I know how. I am angry about that appointment because I know what this President is trying to do. I was angry six-and-a-half years ago when Mr. Reagan took office and announced an agenda that I knew was anathema to America's minorities and its poor. My anger has not subsided over these last six-and-a-half years because I have seen the President persist in espousing policies that meant millions of black children would never have a decent chance in the race we call the pursuit of happiness.

Let me remind you of a few events. Mr. Reagan came in showing hostility to the Voting Rights Act. In fact, he went down to Philadelphia, Mississippi where the three civil rights workers were murdered and chose that as the location to come out in favor of states rights. He was dragged kicking and screaming by Congress into an extension of the Voting Rights Act.

This had a special impact upon me, because as a young reporter I had gone down to Bellzoni, Mississippi to interview a man named Gus Courts who had tried to register to vote. He was cut with a knife and then shot in the side for his troubles. I asked him, "Mr. Courts, why did you go through all this trouble of getting yourself cut up and shot?"

He looked at me, and he said, "Young man, you wouldn't understand. But I just wanted to be able to say that I voted once before I died."

Gus Courts finally did get to vote, because of the Civil Rights

Act of 1964,[15] a civil rights act that a lot of people believe trampled over states rights and violated the Constitution. It pained me that this administration had to be dragged into honoring that particular piece of legislation.

Then Mr. Reagan attempted to reverse a national policy that had been initiated by Mr. Nixon, and honored by other Presidents. Mr. Reagan wanted to grant tax-exempt status to Bob Jones University and the Jim Crow Goldsboro Christian schools in North Carolina. Fortunately, somebody said, "You can't do that. We're going to the Supreme Court."

Reagan's Justice Department would not argue on behalf of what had been the national policy. The Supreme Court had to ask a distinguished black lawyer, William Coleman, to come in and argue the case. In its decision, the Supreme Court told the administration that it could not give tax-exempt status to schools that retain Jim Crow practices in defiance of public policy.[16]

Then, there was what George Bush had called "voodoo economics." Even as it cut programs for the poor, the administration lavished billions of dollars on the military and pretended there would be a balanced budget by 1984. Finally, I watched Mr. Reagan bring into government the biggest bunch of black quislings that I have ever seen in my life.

I could go on with a litany showing that there was an attempt to roll back the clocks and wipe out the gains that so many white and black people fought for and struggled for and a great many died for. But the truth of it is that the Reagan administration could not roll back all the clocks, because there were brave and thoughtful people in Congress who would not let them. For example, Congress would not let Mr. Reagan destroy the Department of Education. When the administration cut out twenty-two billion dollars over six years for federal support for education, the members of the Congress put it back.

Therefore, you have got an administration that is a little frustrated. It has not carried out its agenda. Now, Mr. Reagan is trying, with one nomination to the Supreme Court, to achieve what he failed to achieve in six-and-a-half years.

I hope to heaven that the American people will not let him do with that one nomination what the Congress and other Americans

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15. Pub. L. No. 88-352, 78 Stat. 241 (codified at scattered sections of 28 and 42 U.S.C. (1982)).

16. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1982).

have refused to let him do previously in his administration. There is going to be a filibuster over the nomination of Judge Bork, as sure as I stand here. To break that filibuster Mr. Reagan's forces will need sixty votes in the Senate. To put it another way: forty-one Senators can assure that there is never a vote on the floor of the Senate over the nomination of Judge Bork.[17]

That is what the Constitution is all about. There are people who say, "You ought not bring that kind of ideology, you ought not bring that kind of social feeling, you ought not bring that kind of racial feeling into a discussion of this man's merits to sit on the Court."

We should not believe for a moment that Mr. Reagan did not think of all those things before he chose Judge Bork. The Senate, with its constitutional responsibility to give advice and to consent, is perfectly right in considering the same things when it decides to confirm or not to confirm.

In closing, while I have been critical of what the framers did or did not do in that session in Philadelphia 200 years ago, I speak of the Constitution with great pride and with a sense of reverence, because I do believe, for personal reasons, that it is a fantastic document. Perhaps I can best explain by way of one last story.

I belong to something in Washington called the Gridiron Club. Every year we give a white tie and tails dinner to which the President and his wife, the Chief Justice, and the Speaker of the House, among others, come to watch us sing and dance and poke fun at those who do the public's business and spend the public's money.

A few years ago one of my guests at that dinner was the Ambassador of Nigeria. He came to my house for lunch the next day, as did my other guests, and when toasting time came, he got up and said, "Mr. Rowan, I sat at that dinner last night in disbelief, listening to the things that you folks said and sang about the President of the United States. You know, we have a new constitution in Nigeria. It is almost a carbon copy of yours. But when I sat there last night, I realized that we got the words, but we didn't get the spirit." I knew what he meant a few weeks later when his government was overthrown and his friends and a lot of my friends in Nigeria were thrown into prison.

I can stand here tonight and tell you that old Carl Rowan is

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17. On October 23, 1987, the Senate rejected President Reagan's nomination of Judge Robert H. Bork by a vote of 58 against the confirmation and 42 in favor. *See Bork's Nomination is Rejected, 58-42*, N.Y. Times, Oct. 24, 1987, at A1, col. 3.

going to be celebrating the Constitution for the simple reason that those amendments to what they did 200 years ago make it possible for me to stand here tonight to say what I have said about the President, oppose his nominee, and know that I can drive home tonight without fear of any jackbooted troops waiting for me.

Thanks to that Constitution. Thank you very much.