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Kennedy: Comment on Rowan

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COMMENT

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I agree with Mr. Rowan that Justice Thurgood Marshall's now famous remarks on the bicentennial observance of the United States Constitution[1] provided a necessary critique of the uncritical celebration. Although one might have thought that much of what the Justice noted would be familiar, and even banal, to anyone moderately knowledgeable about American history, the expressions of dismay triggered by his comments suggest that public education about the Nation's past is urgently needed. It should be noted, moreover, that neither Justice Marshall's speech nor the controversy surrounding it have drawn any attention to what blacks in pre-Civil War America thought about the handiwork of the founding fathers.

Justice Marshall and Mr. Rowan suggest by implication that, absent the Civil War Amendments, they would be unwilling to pledge allegiance to the Constitution of the United States. Their words display an unflinching repudiation of the constitutional regime that existed prior to 1865. The logic of that position is easy to understand. After all, the legal systems of most states and the federal government radically negated equality for black people in antebellum America.[2] Most were slaves; even so-called "free" blacks were subject, in both the North and South, to many restrictions. In several states blacks were not allowed to testify in cases in which a white person was a party.[3] Almost all excluded blacks from sitting on juries.[4] Many excluded blacks from the franchise.[5] Some passed laws or enacted constitutional amendments forbidding blacks to enter

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

2. *See generally* D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); A. HIGGONBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); I. BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974); L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961); Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986).

3. L. LITWACK, *supra* note 2, at 93.

4. *Id.* at 94.

5. *Id.* at 75-93.

their territory.[6] And Arkansas, just before the Civil War, passed a law directing its "free" black residents to leave within a year or risk enslavement.[7]

Against this backdrop, consider the following statement made in the opening editorial of the first black newspaper in the United States. Writing in 1827, the editors of *Freedom's Journal* declared that "in our discussion of political subjects we shall ever regard the Constitution of the United States as our political star."[8] Or consider this statement made by a noted black abolitionist in 1851 at the State Convention of Ohio Negroes. Engaged in a debate over the stance blacks ought to adopt toward the federal constitution, William Howard Day declared:

> [C]oming as I do, in the midst of three millions of men in chains, and five hundred thousand only half free, I consider every instrument precious that guarantees to me liberty. I consider the Constitution the foundation of American liberties, and wrapping myself in the flag of the nation, I . . . plant myself upon the Constitution . . . and appeal to the American people for the rights thus guaranteed.[9]

Other voices expressed contrary views. Addressing a meeting of the American Anti-Slavery Society in 1847, Frederick Douglass maintained:

> I have no patriotism. I have no country. . . . The only thing that links me to this land is my family, and the painful consciousness that here there are three millions of my fellow creatures, groaning beneath the iron rod of the worst despotism ever devised. . . . I cannot have any love for this country or for its Constitution. I desire to see it overthrown as speedily as possible, and its Constitution shivered in a thousand fragments.[10]

Other blacks were equally frustrated and discouraged. Some were so convinced that the United States was destined to remain a "white man's country" that they migrated to Canada, England, the

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6. *Id.* at 72-74.

7. I. BERLIN, *supra* note 2, at 372-74.

8. *See* R. DICK, BLACK PROTEST: ISSUES AND TACTICS 44 (1974).

9. *See* 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 318 (H. Aptheker ed. 1951).

10. R. DICK, *supra* note 8, at 59. Later, however, Douglass became the leading spokesman for black abolitionists who construed the Constitution as an antislavery document. For a useful discussion of the evolution of Douglass' thinking on this issue, see W. MARTIN, THE MIND OF FREDERICK DOUGLASS 18-54 (1984).

Carribean, and various countries in Africa.[11]

Most of those who could have left, however, chose not to do so. They remained, urged fellow blacks to stay in the United States, and deliberately pledged allegiance to the Constitution even though the Supreme Court consistently interpreted it in a proslavery fashion.[12] Why did they embrace the Constitution? The principal reason was pragmatic: constitutionalism was and is America's civil religion.[13] Most black abolitionists sought to prevent their enemies from completely mastering the document's influential symbolism. One of their primary means of struggle was an activity that has recently emerged from academic obscurity to become front page news: the practice of constitutional interpretation.

Black abolitionists, inspired in large part by ideas pioneered by white allies,[14] became heroic readers who transformed the Constitution into a platform more hospitable to their needs, a platform far more decent than that created by the antebellum Supreme Court. A brief mention of two of the ways in which they sought to make the Constitution their own will illustrate the essential nature of their enterprise and the ironic ways in which it resonates with issues relevant to the controversies of our own moment.

First, a principal tenet of black abolitionists who sought to use the Constitution against slavery was that the document should be strictly construed. Just as strict constructionism is now the rallying cry of the conservative movement, so too was strict constructionism the rallying cry of at least some abolitionist radicals. They insisted upon a literal reading because the bare language of the founders' Constitution made no mention either of slavery or of the color line. The document states that "We the People"—not "We the white male people"—but simply "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[15]

Second, black antislavery constitutionalists, refusing to consider the original intent of the framers, construed in innovative ways vari-

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11. *See generally* S. MILLER, THE SEARCH FOR A BLACK NATIONALITY: BLACK IMMIGRATION AND COLORIZATION, 1787-1863 (1975).

12. *See generally* D. FEHRENBACHER, *supra* note 2.

13. *See generally* Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123.

14. *See generally* W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

15. U.S. CONST. preamble.

ous clauses conventionally described as proslavery. As traditionally understood, article I, section 2 of the Constitution[16] represented a compromise under which the slave states were able to count their slaves as part of the population for purposes of political representation.[17] Interpreting the infamous three-fifths clause in a fashion Walt Whitman would have appreciated,[18] antislavery constitutionalists maintained that the clause was abolitionist in nature because it comprised

> a downright disability laid upon the slaveholding states, one which deprives those states of two fifths of their natural basis of representation. A black man in a free state is worth just two fifths more than a black man in a slave state. . . . Therefore instead of encouraging slavery, [this clause of the Constitution] encouraged freedom.[19]

Similarly, article I, section 8, clause 15 of the Constitution has been viewed as proslavery in intent.[20] It provides that Congress shall have power to call forth the militia to suppress insurrections, including, of course, slave uprisings. Antislavery constitutionalists suggested, however, that this language could be read to endow Congress with the power to eradicate the evil that gave rise to slave insurrections: slavery itself.

Some may see these novel interpretations as strategems entitled to nothing more than recognition for their cleverness. I suggest, however, that holders of that view consider the long line of instances in which heroic, counter-intuitive interpretations have served the Nation well. After all, the antislavery reading of the three-fifths clause was no more improbable than the unprecedentedly expansive reading that the Supreme Court began to give to the

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16. The section specifically states that representation in the House of Representatives shall be based on the number of free persons in a state and "three fifths of all other Persons."

17. *See, e.g.*, S. LYND, *The Abolitionist Critique of the United States Constitution*, in CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 153 (1967); D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 201 (1971) (the three-fifths clause "acknowledged slavery and rewarded slaveholders").

18. *See* W. WHITMAN, *Democratic Vistas*, in WALT WHITMAN: POETRY AND PROSE 992 (Library of Am. ed. 1982) ("[T]he process of reading is not a half-sleep, but, in highest sense, an exercise, a gymnast's struggle.").

19. F. Douglass, Speech at Glasgow, Scotland (March 26, 1860), *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS (P. Foner ed. 1950).

20. *See* S. LYND, *supra* note 17. *But see* D. ROBINSON, *supra* note 17, at 218 (suggesting that framers' concern was not with slave uprisings but rather with uprisings by dissident whites).

interstate commerce clause during the New Deal era.[21] What makes the abolitionist interpretation seem so unorthodox is that it failed to obtain authoritative validation through conventional legal channels. Thus, it failed to socialize succeeding generations into accepting it.

The antebellum blacks who pledged allegiance to the founders' Constitution perceived the essential point that words do not speak for themselves. They realized the importance of interpretation. They revelled in the plasticity of language. They refused to be intimidated by those who insisted that constitutional provisions can have only one possible interpretation. They understood that the Constitution is as decent or indecent, as progressive or reactionary as "We the People" make it.

21. *Compare* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (no congressional authority under commerce clause to regulate intrastate poultry slaughtering) *with* Wickard v. Filburn, 317 U.S. 111 (1942) (congressional authority under commerce clause to regulate wheat grown by farmer to feed own family).