Living With Our Constitution

Remarks of U.S. Circuit Judge Frank M. Coffin
at the opening conference of the Maine Commission
on the Bicentennial of the Constitution.
Augusta, Maine
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I cannot think of an occasion which, for me, would be a more stimulating one than to address responsible, knowledgeable, and concerned fellow citizens of Maine at the outset of their efforts to devise a suitable commemoration of our federal Constitution. We celebrate and memorialize so many events and persons great and trivial either so casually or with such excessive sentimentality, that it is a worthy challenge to be in at the beginnings of this exercise in remembrance, appreciation, and deepening sensitivity to the fundamental document that governs us.

For over twenty years, as a United States Circuit Judge, I have spent part of almost every working day living with this Constitution of ours. In deciding whether probationary teachers at public schools were entitled to a hearing before discharge; whether incarcerated juveniles, pre-trial detainees or prisoners were entitled to certain procedural safeguards or to more adequate conditions of custody; whether patients in state mental hospitals could be summarily subjected to the administration of antipsychotic drugs; whether a lawsuit by a group of Congressmen could force the President to call off the Vietnam conflict; whether the Rhode Island legislature could lawfully subsidize its parochial secondary schools; whether New Hampshire could prevent its drivers from masking over the "Live Free or Die" slogan on its license plates; whether Massachusetts could prevent a bistro within 500 feet of a church from getting a liquor license without the church's consent. And hundreds and hundreds of other such cases. Sometimes our court was not unanimous. I have been in the majority and in the dissent. And I have occasionally been reversed by the Supreme Court. But a large part of my meat and drink has been the Constitution.

The onset of the Bicentennial of the Constitution is for me a call to step back from this companion of my days, to look closely at what I've been living with, to ask such questions as -- What, really, is the Constitution? When was it created? In 1787 only -- or over time? Who were "The Founders" -- the 55 mortals gathered at Philadelphia for four months ... or others as well? What about their "original intent?" How do we know it? When is it important that we know it? As to what issues did they have a clearly defined intent -- and as to what issues was their intent fuzzy or nonexistent? And was it their intent that their personal intent, even if ascertainable from correspondence or memoirs, be considered? What answers, what values were bed rock and permanent and what were so tentative and general as to allow room for change? Above all, apart from the few final answers they could give, what is enduring about the process of divining the teachings of this most seminal of national charters? I do not propose to try to answer these questions here. After all, the year ahead ought to be one where all of us should strive to develop insights and perspectives that should help us do a better job of answering -- probably a never-ending task.

In the meantime, perhaps the way to approach these questions is first to step back in time

and catch a glimpse of what happened as the foundation of the temple was being laid at Philadelphia, as the battle for ratification was fought, with the Bill of Rights completing the initial structure. Then we shall have a look, with the benefit of hindsight, at how two centuries of amendment and interpretation have sculpted the friezes on two sides of our Parthenon. What happens thereafter may well owe something to the sensitizing work of citizen undertakings like this throughout the land.

The Foundations

To begin, the Convention itself stemmed from a proposal by five states attending a convention at Annapolis on interstate commercial problems that the states appoint outstanding citizens to a convention at Philadelphia. Congress endorsed the idea but limited the goal to amending the Articles of Confederation. The Articles were essentially a contract between equal and sovereign states. Had our association of states remained a contract, we would have remained a loose and fundamentally impotent collection of separate republics. But deep seated frustration at the weakness of Congress in paying the public debt, in regulating commerce, in securing compliance with treaties, and in maintaining a stable currency, together with intensifying awareness of the lack of respect for the federal authority in the rest of the world, were uppermost in the minds of most participants. So it was that, sparked by the leadership of James Madison, who, through his friend Jefferson in Paris, had acquired, devoured, and pondered over his own five-foot shelf of books on history, economics, and social philosophy, the Convention rapidly found itself discussing the Randolph plan devised by the Virginia delegation that would abolish the contractual concept and substitute that of a charter for a national government deriving its legitimacy from the people of the several states.

In four short months, laboring in secret, the delegates proclaimed their 5,000 word document. They were in the main concerned about structure -- Who would have the suffrage? Would representation be by states or people? How would the powers of government be separated? What checks and balances? How would the scope of federal power be defined? As one reads Madison's Notes of the debates, he is struck, time and time again, by the vast terrain covered, sometimes in a single day, the depth of consideration of some issues and the sparseness of debate on others, the notable absences on some votes, the slender victories on others, the bargains struck, the changes in thinking, even by Madison. And sometimes we blush at the venting of ideas we would be tempted to call unrealistic -- or worse -- if we did not have such veneration for the source. For example, at one point early in the session, Franklin proposed that the President receive no salary, for, he said, he had seen how avarice had moved men and, on the other hand, how the office of High Sheriff in England, an "honorable" but not "profitable" office, was nevertheless well executed. Hamilton seconded the proposal out of courtesy. Madison records: "It was treated with great respect, but rather for the author of it, than from any apparent conviction of its expediency or practicability."[1]

Dominating these debates, overshadowing the sharpness of divisions and the occasionally heated argument, were two all important attitudes, a willingness to compromise and a will to succeed in creating a nation. Franklin, at the very end of the Convention, aged and fragile, had James Wilson read his comments. He first observed how in religious matters people felt themselves possessed of all truth, quoting the essayist Steele in a dedication to the Pope "that the only difference between our Churches in their opinions of the certainty of their doctrines is, the

[1] J. Madison, Notes of Debates in the Federal Convention of 1787, at 55 (1966).

Church of Rome is infallible and the Church of England is never in the wrong."[2] Then he says that, while there are parts he does not at present approve and may never approve, "I consent, Sir, to the Constitution because I expect no better, and because I am not sure, that it is not the best."[3]

And almost on this note the Convention ended. But not quite. Elbridge Gerry of Massachusetts said he feared the Constitution in its existing form would provoke civil war in Massachusetts where people were divided into the most extreme of democrats and the most violent of opponents.[4] And here is where we came in, for of course Maine was then part of Massachusetts.

The drafters at Philadelphia had succeeded in producing a document but the task remained to obtain the support of the people. To us in 1986 this looks foreordained, inevitable. It was not. Lethally effective articles had issued forth from the persuasive, if virulent, pen of one "Brutus," as well as others. Shays' Rebellion in Massachusetts, earlier in the year, had shown the depth of anti-federalist feeling. One of the most significant state ratifying conventions, if not the most significant, was that of Massachusetts. Catherine Drinker Bowen, in Miracle at Philadelphia writes, "[I]f the Constitution had lost in Massachusetts, it would never have been ratified."[5] Of the 364 delegates, Maine had two-sevenths or 104. At the time we greatly desired our statehood and feared that the new Constitution might get in our way.[6]

We sent a colorful group. There was General Thompson of Topsham, both obstinate and flowery; Samuel Nasson of Sanford, a saddler and storekeeper, who, after his town decided not to send a delegate, as Mainer David Sewall wrote, "come down full charged with Gass and Stirred up a 2nd Meeting and procured himself Elected, and I presume will go up charged like a Balloon;" William Widgery of New Gloucester, firmly against the Constitution . . . . He was described by a colleague "as a new light fighting the Devil."[7] Then there was William Cushing.

Sam Adams' recruit to Revolution, the prospering merchant John Hancock, a rather vain and self important man, was made President of the convention to placate Hancock and his followers. However, gout prevented his presence till the end, so Justice William Cushing, Chief Justice of the Massachusetts Supreme Judicial Court, vice president, acted in his stead. He was known to be favorable, having charged grand juries in favor of the Constitution. With Cushing in the chair, the federalists, coming from behind, managed so to conduct themselves as to avoid critical confrontation, to mute disagreement, to isolate opponents, to caucus frequently, and, as one leading scholar put it, to win over the hesitant by "political legerdemain of the first order."[8]

Who was this Cushing?

Born in Scituate, Massachusetts, in 1733, an apprentice to Massachusetts bar leader Jeremiah Gridley, he came to Maine, was made the first Judge of Probate of Lincoln County, in 1760, began practice in the old town of Pownalboro.[9] He was the only lawyer in an unpopulated vastness extending from Dresden to Canada. So impressive were his attainments that he, at age 39, succeeded his father as superior court judge, at age 44, was named Chief Justice of Massachusetts, and, in 1789, at age 54, was appointed by Washington to the Supreme Court of

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[2] Madison, supra, at 653.
[3] Id. at 654.
[4] Id. at 657-689.
[5] P. 291
[6] Julius Goebel, Jr., Vol. I, the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, at 843 (1971).
[7] Bowen, supra, at 284.
[8] Goebel, supra, at 345.
[9] William Willis, A History of the Law, the Courts, and the Lawyers of Maine 80-81 (1863).

the United States -- a post he held for twenty-one years. This was the man in the chair. I might add that we trace the demise of the judicial wig to the day he left the bench.

On January 14, 1788, the Convention settled down to business. The affair was poorly reported, because so unrestrained and untutored was the discourse that, as one scholar writes, "the printers faced the dilemma of recording the speeches or of abandoning the semblance of reporting a debate. They solved their problem by doctoring the speeches for publication."[10] Nevertheless, the flavor comes through. Professor Goebel makes this significant judgment: "Allowing even for all the deficiencies in reporting, there is no question but that the new Constitution was thoroughly scrutinized. In the process a whole generation of American political figures was immersed in discussions over the ends of government and over the best means of securing these to a degree never before or since then equalled."[11]

The debate was, to say the least, spirited. Widgery raged: "Who, sir, is to pay the debts of the yeomanry and others? All we hear is that the merchant and farmer will flourish, and that the mechanics and tradesmen are to make their fortunes directly . . . . Sir, when oil will quench fire, I will believe this . . . ." He feared that Congress would keep its proceedings secret.[12] Nasson fulminated: "Had I a voice like Jove, I would proclaim it throughout the world -- and had I an arm like Jove I would hurl from the world those villains that would attempt to establish in our country a standing army!"[13] Thompson of Topsham in decrying the absence of a stand on slavery reached the heights -- or the depths: "O! Washington, what a name he has had. How he has immortalized himself! But he holds those in slavery who have as good a right to be free as he has. He is still for self, and in my opinion, his character has sunk fifty percent."[14] On the other hand, another delegate proclaimed that the only general greater than Washington was "Joshua, who was inspired by the Lord of Hosts."[15]

There was also a good deal of lawyer baiting. The Boston American Herald wanted an amendment to exclude lawyers from Congress. A farmer from Worcester County, Amos Singletry, exhorted: "Does not this constitution . . . take away all we have . . .? These lawyers and men of learning . . . expect to get into Congress themselves . . . to be the managers of the Constitution . . . . And then they will swallow up us little fellows, like the great Leviathan, Mr. President; yes, just as the whale swallowed up Jonah."[16] Then another farmer, a young man, came forward, Jonathan Smith from the Berkshires: "Mr. President, I am a plain man, and get my living by the plow. I am not used to speak in public, but I beg your leave to say a few words to my brother plow joggers in this house. I have lived in a part of the country where I have known the worth of good government by the want of it." His reference was of course to Shays' Rebellion of the previous winter. There were interruptions and calls to order. Sam Adams asked the convention to "let him go on in his own way." Smith continued, "Now, Mr. President, when I saw this Constitution, I found that it was a cure for these disorders. I got a copy of it, and read it over and over ... I formed my own opinion and I was pleased with this Constitution." As for lawyers, he added, "I don't think worse of the Constitution because lawyers, and men of learning, and moneyed men, are fond of it . . . . These lawyers, these moneyed men, these men of learning,

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[10] Goebel, supra, at 325.
[11] Goebel, supra, at 326.
[12] Bowen, supra, at 284.
[13] Id. at 285.
[14] Id. at 285.
[15] Goebel, supra, at 346.
[16] Bowen, supra, at 286.

are all embarked in the same cause with us, and we must all sink or swim together."[17]

Notwithstanding such solid support, Madison and others were worried. The key to Massachusetts was the absent, vain, gouty Hancock. Key Federalists, concerned about the uncertain outcome, put together a series of propositions which could be put forth as recommendations to Congress, not as conditions. They consisted of some nine amendments, the first of which eventually became our Tenth Amendment, reserving to the states all powers not expressly delegated to Congress. Sam Adams called this a summary of a bill of rights.[18] The idea was that Hancock could, by offering what Sam Adams called the "Conciliatory Proposition", earn kudos and political support for a possible future quest for the Presidency. Thus it was that Hancock was at last carried to the platform, his feet swathed in bandages, and read "his" proposals. The tactic succeeded . . . but just barely. On February 6, 1788, the vote was 187 yeas, 168 nays.[19] A switch of ten votes would have put Massachusetts in the "No" column -- with profound reverberations on the seven states yet to vote. The tactic of the "Conciliatory Proposition" had, however, an even longer life. As Professor Goebel acknowledges, the amendments set the pattern governing similar demands elsewhere for a more clear and detailed cataloguing of individual rights.[20] In short, here began the surge that was to produce, two years later, congressional approval, subject to ratification by the states, of the Bill of Rights.

Our Mainers, except for Cushing whose work was in Boston, went home. One delegate, Barrell, who felt the Constitution had been hurried through, nevertheless had said he would risk the displeasure of his constituents and voted yea.[21] Widgery, who had so strongly opposed, said he had been overruled by a majority of wise and understanding men and now would work at sowing the seeds of union and peace.[22] So also said Samuel Nasson. Ten of the thirteen delegates from Cumberland County had voted yes.[23] But anxiety remained, to be dispelled only over four months later when our neighbor, New Hampshire, became the 9th and last state needed to secure adoption. Our Maine historian, William Willis, records that "Immediately on the news being received in [Portland], a number of respectable gentlemen assembled at a public house and had an entertainment, at which thirteen toasts were drank, each one accompanied by the discharge of cannon."[24]

So endeth a little known chapter of Maine history, one we can be proud of -- first, because our members, over one fourth, were significant in this bellwether state convention, and may well, by the Cumberland County delegates' vote alone, have provided the winning majority; second, because our distinguished fellow citizen, Justice William Cushing, held the strategic position of chairman and so wisely helped guide the Federalist strategy; and, third, but not least, because of the ability and willingness of our most combative delegates to accept the result and labor to make it successful.

The Edifice Today

Those were the feisty, tumultuous, fragile beginnings. Now, with the benefit of hindsight,

[17] Bowen, supra, at 287-88.
[18] Goebel, supra, at 351.
[19] Goebel, supra, at 349-52.
[20] Id. at 353.
[21] Bowen, supra, at 290.
[22] Id. at 291.
[23] William Willis, The History of Portland 602 (1865).
[24] Id. at 602.

we have an edifice consisting not only of the original document and the Bill of Rights arising from the ratification conventions, but the Civil War amendments, and almost two centuries of decisions of the Supreme Court, the lower federal courts, and the state supreme courts. When we stand back to see what this edifice is, we see an impressive temple with six pillars: (1) a government with supreme but not unlimited power vested in the federal government and with residual powers reposing in the states; (2) a government based generally on the principle of majority rule; (3) the majority rule tempered by a commitment to protect the rights of individuals and minorities; (4) the total power of government restrained by diffusing and balancing it among the three branches and between the national government and the governments of the various states; (5) the monitoring of these balances being assigned to an independent, life-tenured judiciary; and (6), above all, the foundation stone of a written Constitution. The first three principles, an effective national government, majority rule, and a commitment to respect individual rights, had some sort of antecedents. But the last three, our specific separation of powers and the intricate machinery of checks and balances, the reliance for monitoring of the system on a judicial system independent of parliamentary approval, and a written constitution, were uniquely the creation of the fifty-five individuals from the twelve states assembled at Philadelphia during those four hot summer months of 1787.

Those six principles were the structural pillars. They were there from the beginning. The pediments and friezes -- the great substantive messages conveyed by this temple -- have taken time to reveal themselves, two centuries of time. The first was the preservation of hard-earned liberties. Even though the Founding Fathers were concerned with whether we should have one or two houses, and how to balance the powers of states and the powers of the people, the power of the President and that of Congress, and what kinds of courts to establish, they were determined to carry forward the liberties painfully extracted from English kings over a period of six hundred years.

You might say that the Philadelphia Convention, like the Revolution itself, was an extension of the story of Magna Carta, the bargain struck by the Barons with King John at Runnymede in 1215. No matter that this was at first only a contract between nobles and their king; or that the protection of "liberties" referred to the property rights of the most privileged, and that the protection of "free customs" referred to the barons' rights to levy tolls; or that a judgment of one's "peers" meant that of one's upper crust social equals; or that "the law of the land" referred not to fair trials as we know them but to trials by battle or by the ordeal of a red-hot iron. Over the centuries the spirit of Magna Carta came to be the weapon to trim a monarch's power. It asserted the presence of law above the king. But our Founders also knew that England's Constitution is unwritten, and that Magna Carta had been "confirmed" by Parliament no fewer than 32 times -- meaning that it had fallen out of the constitution 31 times.

Therefore, at Philadelphia, when an even greater charter was reduced to writing, there were no fewer than seventeen specific individual rights. Most of the debate was addressed to what should be required to prove treason. Little or no debate sufficed to outlaw bills of attainder, titles of nobility, ex post facto laws and to establish habeas corpus and trial by jury. And, as we have seen, the price of ratification of the Constitution was the adoption of no fewer than thirty specific rights and liberties in the Bill of Rights, the first ten Amendments. Later, in the wake of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments added nine more specific rights, including the protection of due process of law enforceable by individuals against states.

To these liberties, enacted in convention or by amendment, must be added the case law of the courts. What we have seen in the last 35 years amounts to a history of intense judicial

involvement on a case-by-case basis, of finetuning and in most instances of expansion of the rights earlier established. The case law relating to each right in the hallowed catalogue -- the right to counsel, free speech and press, free exercise of religion and the non-establishment thereof and the protections against self-incrimination, double jeopardy, unreasonable search and seizure and cruel and unusual punishment -- fills law school courses, book shelves and treatises. But we have gone beyond these liberties, all of which have some textual source in the Constitution or its Amendments, to constitutionalize some liberties which time, society, and technology have identified as demanding recognition if the essential spirit and intendment of the Constitution is to be relevantly applied to a contemporary world. Thus the old word "search" has been applied to electronic surveillance. We recognize a freedom of association although "association" is not to be found in the First Amendment. So do we forbid unreasonable burdens on the constitutional right to travel, although "travel" is not mentioned in the Constitution. And, most prominently, there has emerged a right of privacy or personal autonomy, still the subject of citizen controversy.

This, then, is the liberty frieze of our Constitutional Parthenon.

A second frieze, slower to be sculpted, is that portraying our dedication to equality of opportunity. Equality as a principal ingredient in our creed was uniquely American. It was not an import. Strange, then, that although given top billing in the Declaration of Independence, it was not mentioned in the original Constitution. Not until the Thirteenth, Fourteenth, and Fifteenth Amendments, following the Civil War, was the concept of equality explicitly made a part of the Constitution.

Perhaps this lag in explicit identification is explained by the conditions of the times. When we became independent, we had a continent in front of us, holding out limitless opportunities to those with the wit, will, and daring, with no hint of scarcity. All one could ask was the liberty to try for the brass ring. So long as one was not shackled, -- and no one was thinking about the blacks who were -- the race was to the swift and the rewards sufficient. There was no need to think about equality; liberty was enough. William Dean Howells put it: "Inequality is as dear to Americans as liberty itself."

In any event, equality, though at first taken for granted, soon joined the American pantheon of values. As Professor Huntington writes, "The eighteenth-century value of liberty was quickly joined by the Nineteenth-century value of equality."[25] Indeed, so much momentum has the slow starter achieved that Professor Commager prophesied, "It is highly probable that to the next generation the Equal Protection Clause will be, in constitutional and political interpretation, what the Due Process Clause was in the past.[26]

Now we are at the threshold of a new era, with a new Chief Justice, a new Justice, and perhaps more changes to follow. With each change in the "critical mass" of the Supreme Court, new choices present themselves. And, as Frost wrote "Two roads diverged in a wood, and I -- / I took the one less traveled by, / And that has made all the difference."[27] What road will -- many years from now -- be seen to have been taken?

One road is a kind of turning back to more familiar paths -- a sort of whistle blowing on due process procedural rights, softening of Miranda requirements, an abandonment of the exclusionary rule sanction for Fourth Amendment violations, a fuzzing up of church - state

[25] Huntington, American Politics; The Promise of Disharmony 17 (1981).

[26] Commager, "Equal Protection as an Instrument of Revolution" in Constitutional Government in America 467 (1980).

[27] R. Frost, "The Road Not Taken," in The Poetry of Robert Frost 105 (1975).

boundaries, a possible recanting of the personal autonomy doctrines of Roe v. Wade, a brake on court-ordered desegregation.

Another road is to break new ground, and to push the idea of equality beyond the simple removal of artificially imposed discrimination to the positive stance of providing realistically equal opportunity -- principally, in this high tech, not post-industrial but new industrial world, in education. Thirteen years ago the Supreme Court, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), allowed states to discriminate between rich and poor school districts in payments for educational expenses. Education, it held, was a fundamental interest, but not all that fundamental. Yet, the day may come when the Court may conclude that education, vocational training, job instruction and retraining is just as central to the vitality of our ordered society as unhindered access to the polls and the courts.

Our choices, however, are not as limited as those in Frost's poem. There is a third road that winds across both -- one that occasionally turns back only to take surprising turns forward. This at least has been the pragmatic record of our recent past. Moreover there loom new problems for constitutional analysis as a result of science and technology. A lively garden of legislative and judicial activity is that of the life sciences -- where new medical knowledge is sought to be applied to the termination, the sustaining, the dramatic altering, and even the creation of human life. As to such problems, I doubt that the "original intent" of the Founders will be of much help.

As our story has revealed, the origin of the Constitution lay, first of all, with those outstanding human beings gathered at Philadelphia, but, no less vital, with that larger number of humbler delegates to the ratifying conventions. Then is when the Constitution came closest to the people. Then is when the people saved the Constitution.

This project during the Constitution's Bicentennial Year is another rare opportunity to bring the Constitution close to the people, to let them relive its origins, reflect on what called it into being an how and why it has evolved. To the extent that citizens understand what is needed to make a trial fair, a search reasonable, an arrest legal, a law regulating our conduct supportable, their understanding will bulwark our Constitution. Further, a more enriched sense of history on the part of all of us is the best guarantee against repeating the errors of the past. If, therefore, this enterprise is well done, it cannot fail to strengthen and enhance the quality of justice on which in the long run we depend for our life, liberty, and the pursuit of happiness.

May your labors prosper fully as much as those of our forbears in those ratification months of 1788.