The First Amendment and Its Religion Clauses: Where Are We? Where Are We Going?

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I

Last September 17, less than three months ago, was the two-hundredth anniversary of the signing of what then was the proposed Constitution of the United States of America. As we all know, from what has been hammered into our consciousness since last New Year's Day, when the year of the Constitution's bicentennial arrived, the document was the result of hard and compromising — and perhaps inspired — work by those so-called “founding fathers” who assembled that warm summer in Philadelphia. The signing by thirty-nine men from twelve states, with the attestation by the secretary, was not, of course, the consummation of the task. Ratification by at least nine states in convention was yet to be accomplished.

The intervening months were a period of uncertainty, for all were aware that in some of the state conventions there would be significant opposition, heated debate, and doubts about the wisdom of the proposed document and about what it would effectuate for the infant nation. In some states the voting indeed was very close. Massachusetts, New York, and Virginia were large and pivotal, and their joinder was needed. The final vote in Massachusetts was 187 to 168 in favor of ratification; a ten-vote shift out of 355 votes would have defeated it. In New York it was 30 to 27, a narrow escape by two votes. In Virginia it was 89 to 79.

One of the reasons for hesitation, although only one, was the absence of a bill of rights, a statement of the type presented with such vigor and resolve in the Declaration of Independence and in some of our earlier source documents. Virginia, in ratifying, called for one.

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Harry A. Blackmun is an Associate Justice of the Supreme Court of the United States. This essay is adapted from a lecture sponsored by the Constitution Study Group of the National Archives Volunteers presented on June 23, 1987 at the National Archives. It was originally published by the National Archives in the Fall, 1987 issue of the PROLOGUE. The NOVA LAW REVIEW wishes to thank the National Archives and Justice Blackmun for allowing us to reprint this article.
North Carolina, in fact, did not ratify (the twelfth state to do so) until 1789, after the Bill of Rights had been proposed in the new Congress. And Rhode Island came along only when the suggestion was made that it be treated as a foreign nation. But the Constitution was ratified, and finally we had in place our "blueprint" for government. That is what we celebrate in September and throughout 1987.

Although the original Constitution is vital and fundamental, it may reflect the first ten amendments, our Bill of Rights, ratified in December 1791, four years after the Constitution's signing, can be seen as just as important, if not more so. We rightly regard the Bill of Rights now as an integral part of the original. We ought to celebrate all through the next four years. Thus we have no less than three national celebrations in the eighteenth century: 1776, 1787, and 1791.

When Dr. Frank G. Burke, Acting Archivist of the United States, invited me to be here this evening, he advised me of the proposed series of continuing lectures on the evolution and significance of the Constitution. He also told me of the enthusiasm that is being placed on our "preparation for the third century."

Rather than add to what already has been said, and to what will be said, by eminent speakers about the general significance and precise character of our basic document, I thought I would take a somewhat different approach. We must acknowledge, of course, what the three hundred years has meant to us and what it has become in these two hundred years in almost any part of the Constitution and the Bill of Rights under the microscope of specific analysis and controversy. So I presumed to think of my remarks on a single and perhaps narrow, but dramatically important, segment of our constitutional example — an example of what is not the First Amendment, and only a part of that, namely, the two Religion Clauses. What has been achieved in this particular area in the last two centuries? Perhaps more important, what remains to be done and what hope is there for its being done?

The Constitution itself barely mentions religion. There are only two references. The first is in the Oath-of-Office Clause (Art. VI, clause 3), where any religious test as a qualification for public office is concluded. The second is to the "Year of our Lord" in the

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Forty-five simple words. But what do they really mean? Those forty-five words are the seeds of volumes of decisional law. They contain much material that we regard as fundamental to our life as a nation. If numbers are important, this is the First Amendment, not the Second of the Sixteenth, but the First. It guarantees religious rights, freedom of speech, freedom of the press, freedom of assembly, freedom to petition. All this in forty-five simple words.

The language moreover, is specific: "Congress shall make no law..." There is no equivocation. This is the imperative, not the permissive. It does not say, "Congress may make some law..." The First Amendment, through the Fourteenth adopted in 1868, has been made applicable by court decision to the states as well as to Congress. So the First Amendment today really says not only that "Congress shall make no law" but also that a state "shall make no law."

Of course, while literally absolute, the words cannot be interpreted as fully absolute, and never have been. Can or they? Or should they? I think that we all accept the fact — and the law — that one may not unnecessarily cry "fire" in a crowded theater. The First Amendment is not that absolute.

In March 1986 Mrs. Blackmun and I were fortunate to have been in the city of Jerusalem for a seminar at the law school at the Hebrew University. Among the moving events for me on that trip was a visit to the Western Wall where, topped with a yarmulke and accompanied by a friend, I placed in the wall a note written in Hebrew by one of my law clerks who had lost her mother just a few months before. It was an emotional moment as we stood there, offered a short prayer, and saw others to the right and to the left of us, singly, in pairs, and in groups, from all over the world, doing much the same and participating in the inherent learning and inspiration and strength of the place. I realized then how massively meaningful it was for those people — and for me. And, in a way, I understood why they returned, for they gathered history in their arms, generation upon generation, and they departed renewed in fortitude and outlook as well as in faith. Why? Because there were the roots. How desperately all of us need roots in our private and collective lives.

May I suggest that the Constitution of the United States plus the
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May it rest that the Constitution of the United States plus the
Bill of Rights constitute our roots for governance and for political freedom; that, despite their defects, we have every right to look to them with a measure of reverence and to celebrate them; and that we had better be about protecting them, every day and constantly.

II

Let me turn, to the two Religion Clauses of the First Amendment. Why are there two? The first states that Congress shall make no law "respecting an establishment of religion." The second says that Congress shall make no law "prohibiting the free exercise thereof." At first glance, it all seems so clear: we shall not have a specific religion formally established by government. (Five states at the time still had established churches — Massachusetts, in fact, until 1833!) Indeed, we shall have the very opposite — each of us shall be free to exercise his own religion if he cares to profess one.

But is it really so clear? Is there not tension between the two clauses in their application? Consider this: almost everywhere throughout our fifty states, property genuinely used for religious purposes, such as an edifice for worship, is exempt from local real estate taxes. The Supreme Court has said that this exemption is constitutional. Surely, this exemption assists in the exercise of the congregation's religion. But can one also say that a property tax exemption places the state in the business of establishing religion? With tax exemption, funds of the congregation are not consumed by taxes; instead, they are available for religious endeavors, even though municipal services — fire and police protection, and the like — are provided the place of worship. The atheist and the one who wants nothing to do with any religion might think that tax exemption equates with establishment. In enhancing free exercise, are we not coming close to establishing?

Another example is the Supreme Court case known as Wisconsin v. Yoder.1 Wisconsin, like most states, has a school-attendance law mandating that a child attend school until age sixteen. Members of the old order Amish in that state declined to send their children to school. The state refused an obvious violation of the Wisconsin statute. Would a First Amendment protection against such legislation be constitutional? Would it be, in other words, a violation of the Free Exercise Clause? At the same time, if the Amish were given a discreet exemption from the school-attendance law, would Wisconsin be in the position of contributing to the "establishment" of Amish doctrine?

I think you will see from these simple examples that there can be tension between the two Religion Clauses. Not only is there present the usual difficulty of proper interpretation, but there is the additional difficulty of reconciling these two profoundly important clauses.

A third example one might think about is the current practice of a school board's providing free textbooks. When I went to school, the county paid for the books. Now, a school district usually supplies books free to elementary school children. But suppose the district decides also to include a copy of the same book to every child attending a parochial school within the district. Is that benefiting the establishment of religion? In 1968, in Board of Education v. Allen,2 the Court, by a divided vote, ruled that it was not. But what of the school board's providing the parochial school and other amenities of school life — a school nurse, a microscope, teachers?

Let us look briefly at the background of the Religion Clauses. It is safe to say, I think, that the historical record is ambiguous. There were at least three distinct and recognized approaches that influenced the framers. The first was the so-called evangelical view, associated with Roger Williams, to the effect, it was said, that "worldly corruptions . . . might consume the churches if sturdy fences against the wilder-ness were not maintained." The stress was on protection of the church. The second was the Jeffersonian view that religion should be separated from the state in order to safeguard secular interests. Indeed, the "wall of separation" phrase was coined by Jefferson in a celebrated letter he wrote to Connecticut Baptists in 1801. The third was the Madisonian view that religious and secular interests alike would be advanced by diffusing and decentralizing power so as to assure competition among sects rather than domination by any one of them. Williams saw separation largely as a means for protecting religious groups from the state. Jefferson saw separation as a means of protecting the state from religion. Madison believed that both religion and government could best achieve their respective high purposes if each was left free from the other and allowed to flourish within its own sphere.

These three views, in some respects, are complementary, but in others they surely conflict. Their histories share certain essential ele-
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ments. First, all three emerged as part of the background of the seventeenth and eighteenth centuries in which they appeared. Second, they fix the ideas of Jefferson and Madison as the direct antecedents of the First Amendment and as particularly relevant to its interpretation. Third, they accept the postulate that a union between religion and the state inevitably leads to civil persecution and strife. It has been said in recent scholarly literature that what emerges are two fundamental characteristics of the First Amendment: volunteerism and separatism. The Free Exercise Clause, at the very least, was designed to guarantee freedom of conscience by prohibiting any degree of compulsion in matters of belief. It was offended by a burden on one's religion. The Establishment Clause can be understood as designed in part to ensure that the advancement of religion comes only from the voluntary efforts of its proponents and not from support by the state. Religious groups are to prosper or perish on the intrinsic merit and attraction of their beliefs and practices.

Separatism reflects Madison's view that both religion and government function best if each remains independent. This means more than institutional separation. It means that the state must not become involved with religious affairs, and that sectarian difficulties must not be allowed unduly to fragment the body politic.

I go no further into history on this occasion. Let us leave that to the historians.

III

Religion, of course, has been one of the primary forces in mankind's struggle with itself. So often we piously speak of the "sanctity of life," and yet history reveals that devastating wars almost constantly are being fought, often in the name of religion. We recall the Christian-Moslem struggle exemplified long ago by the Crusades, which on their way also wiped out scores of Jewish communities in western Europe. The Inquisition. Witchhunting. The original Mormon practice of polygamy. Hindu and Sikh. The seemingly insoluble and prolonged situation in the Middle East. Most of these are examples of intolerance seems to be inevitable when one lives as a member of a minority in a culture and in an area dominated by another religious inclination. It is impossible to cover in detail here the Religion Clause cases over the years. It would be a tedious survey, indeed. There was little First Amendment case law on religion until the adoption of the Fourteenth Amendment in 1868. Since then the cases have been many and varied. One might begin with Reynolds v. United States, decided a century ago, when the court struggled with the question whether the Free Exercise Clause afforded protection to the practice of polygamy in the early Mormon Church. One then might come down to Everson v. Board of Education, where the Court forty years ago, in a 5-4 rather emotional decision, upheld a New Jersey statute authorizing a board of education to use public funds to reimburse parents for the expenses of transporting children not only to public schools but to parochial ones as well. This was not, the Court ruled, a violation of the Establishment Clause. And one might come around to such cases as Marsh v. Chambers, concerning daily prayer for years by a paid Protestant chaplain in Nebraska's unicameral legislature; Lynch v. Donnelly, concerning the Christmas creche on municipal property in Pawtucket, Rhode Island; and four cases argued this term concerning, respectively, the teaching of creationism in Louisiana public schools, the distribution of religious leaflets in public airports, the right to state unemployment compensation when an employee is discharged upon her refusal to work on the Sabbath of the church she newly joined, and the denial to a prisoner of access to an Islamic Friday service.

Let me instead divide the Supreme Court cases into categories. First, the Establishment Clause cases. Everson, the reimbursement-for-transportation case, has been claimed by many to have been a breach in Jefferson's wall of separation. Surely, he would have thought so. But are there not good arguments on each side? After all, why should parochial-school parents, who are subject to the taxes that support the public schools, not have just the same reimbursement — nothing more — as do parents who send their children to public schools?

But the Establishment Clause comes into controversy in other areas. There are the cases that may be said to involve religious expression through the medium of the state: prayer in the public schools, reading of scripture there, banning of the teaching of evolution, the creche at Pawtucket and the one at Scarsdale and the one on Boston Common. In some of these cases, the Court has clearly stated that government has no right to wrap itself in a religious symbol or to require a religious

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practice. In others, the Court has let the religious practice stand. There are also those cases concerning endeavors that seem to discriminate among religions, such as Larson v. Valente. Also, within the Establishment Clause purview are the many cases concerning government assistance of one kind or another. May students be excused during school hours for religious instruction on or off the school premises? May a school board supplement salaries for public-school teachers who go to parochial schools to teach courses offered only in the public schools? May the federal government make grants to denominational institutions so long as the funds are not used for sectarian instruction or to provide a place for such instruction? May a state reimburse nonpublic schools for expenses in connection with the administration, grading, and reporting of results of tests required by the state? May a state issue revenue bonds to benefit a denominational college? May a state provide directly to children enrolled in parochial schools various auxiliary services such as counseling and speech therapy? Does a student religious group have the right to use state university facilities for its meetings? May a state allow an income tax deduction for expenses of tuition, textbooks, and transportation incurred in sending children to parochial schools? The list of Establishment Clause problems seems long, indeed.

What do we find when we turn to the Free Exercise Clause? The cases here seem to separate themselves into three primary categories. The first concerns the alleged right to speak or to be silent. May the distribution of religious literature be taxed or banned in any way? May schoolchildren be required to take the oath of allegiance — “under God” — to the flag? May a holder of a public office be required to declare his belief in God? May New Hampshire insist that its automobile license plates bear the state’s motto, “Live Free or Die?” May a state bar a clergyman from holding public office?

The second category is that concerning personal religious autonomy: Sunday closing laws — the right not to work on one’s Sabbath and, when discharged, to have a recognizable claim for unemployment compensation — the right not to engage in the employer’s work that relates to the manufacture of weapons — the Amish claim not to have a conscientious objector, who performed alternative service, may be denied veteran’s benefits.

The third category has to do with religious discrimination in employment — the duty of an employer to accommodate an employee’s religious beliefs — the right of a denominational employer to hire only its own adherents, however secular in character their work may be.

Here again it is safe to say that the Free Exercise Clause is constantly and intensely at issue.

Then there are the cases concerning denominational autonomy. These usually arise in the context of internal disputes. The majority of a congregation, over opposition, seeks to secede from its denomination. Who then takes over its property? Here the Court has taken the position that the First Amendment does not require a state to defer completely to religious authority so long as it applies “neutral principles of law.” The Court steadfastly has refused, however, to engage itself in doctrinal disputes. Those are not for the judiciary.

When one turns to federal courts other than the Supreme Court, one sees the same type of litigation, but, in addition, cases concerning the public use of religious symbols, a cross, for example, or the appearance of such symbols in municipal seals and on badges worn by law enforcement officers. There is litigation concerning religious practices in prisons — the service of pork and the touching of meat in cleaning dishes — the regulation of beards and hairstyles — the prohibition of the use of Islamic names — group religious activities.

If one looks at litigation in the state courts, one sees a growing tendency on their part to rely on state constitutions rather than on the First Amendment. Some of these are being interpreted to coincide with the federal interpretations, but others are not. There are cases concerning official prohibition of religious dress by teachers. There are the so-called “cult” cases, where fraud and emotional distress and false imprisonment claims are advanced as well as allegations of kidnapping and deprogramming. These are difficult because they concern inquiries that courts seek to avoid, namely, the assessment of the validity of belief and defining the line between religious faith and mind control.

One case some of you may recall is Goldman v. Weinberger. Captain Goldman was an Orthodox Jew and an ordained rabbi. He was in the United States Air Force serving as a clinical psychologist on a military base. A new superior officer arrived and ordered him to discontinue wearing his yarmulke while on duty and in uniform. This was in line with Air Force regulation. Captain Goldman brought suit claiming

practice. In others, the Court has let the religious practice stand. There are also those cases concerning endeavors that seem to discriminate among religions, such as Larson v. Valente.7 Also, within the Establishment Clause purview are the many cases concerning government assistance of one kind or another. May students be excused during school hours for religious instruction on or off the school premises? May a school board supplement salaries for public-school teachers who go to parochial schools to teach courses offered only in the public schools? May the federal government make grants to denominational institutions so long as the funds are not used for sectarian instruction or to provide a place for such instruction? May a state reimburse nonpublic schools for expenses in connection with the administration, grading, and reporting of results of tests required by the state? May a state issue revenue bonds to benefit a denominational college? May a state provide directly to children enrolled in parochial schools various auxiliary services such as counseling and speech therapy? Does a student religious group have the right to use state university facilities for its meetings? May a state allow an income tax deduction for expenses of tuition, textbooks, and transportation incurred in sending children to parochial schools? The list of Establishment Clause problems seems long, indeed.

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7. 456 U.S. 228 (1982).

that the regulation infringed his First Amendment right to express his
religious beliefs. The district court enjoined the enforcement of the reg-
ulation. But the court of appeals reversed.

Our Court, by a 5-4 decision, agreed. It ruled that the First
Amendment did not prohibit the regulation's being applied to Captain
Goldman even though its effect was to restrict the wearing of headdress
dictated by his religious belief. The military, it was said, does not have
to accommodate a practice that detracts from the perceived need of
uniformity of dress. There were three separate opinions for four of us in
dissent.

Our public life is replete with examples of an ambiguous religion.
We pledge allegiance to a nation "under God." We have a National
Prayer Day mandated by federal statute. Our nation's motto is "In
God We Trust." This intersection of the religious with the political is
evident in some of our most treasured public texts. Look at Lincoln's
magnificent second inaugural address and look at Martin Luther King,
Jr.'s, religious words in his "I Have A Dream" speech. There is a host
of practices, texts, and symbols readily classifiable in both political and
religious terms. We accord them some legitimacy. Is this wrong?
Should we do away with practices of this kind? Or can we live with
them, be strengthened by them, and be legally and constitutionally
principled about it? In other words, what does the Constitution say and
demand?

IV

One could go on and on. But let me try to draw conclusions about
this litigious area.

1. We operate in the belief — almost the conviction — that in the
United States there is a wall between religion and the State. Jefferson's
influence is very strong.

2. There are signs in the cases, however, particularly at the Su-
preme Court level, that that wall has been crumbling a little of late —
some would say it has crumbled a lot. Exceptions to complete separa-
tion have appeared and been upheld: legislative prayer, the creche on
public ground, certain aids to parochial schools, tax benefits.

3. Yet, there still is a noticeable urge to keep that wall in existence
and fairly strong. Is this insensitivity toward religion? There are some


who think so.

4. There seems to be an increasing tendency in current political
thought to bring religion into government.

5. What will be the effect of the growing power of the religious
right and its presence in the political-party structure of today? Or has
it reached its crest and is receding?

6. The Religion Clauses are constantly in litigation. There is noth-
ing quiescent about them. We have a long way to go and a lot to settle
before a level of quiet and stability is attained. But I remind you, I
have used the Religion Clause only as examples. May one not say the
same thing about almost all the guarantees embodied in the forty-five
words of the First Amendment?

What a living document we have in the Constitution and the Bill
of Rights! It is protective, controversial, nonperfect, exciting. As Bill
Moyers currently has phrased it, we are constantly in search of its
meaning. It is a source of strength we would not be without. It is
among our primary political roots. Yet it needs constant care, as pre-
cious and valued things usually do.

IV

What does it take to be a contributing American in 1987? To put
it another way, what does it mean to be a contributing American in
this year of the bicentennial when the nation gives evidence of domestic
turmoil, when in the year before an election it seems to be in the midst
of uproar and political controversy, when there is moral questioning,
when there is soul-searching inquiry, when there are wars in all parts of
the world, when rumors of our involvement in war continually emerge,
when there is wheeling and dealing in the investment markets, when
there seems to be a multilevel morality, when one learns again that feet
can still be made of clay, when apparent loss of national economic and
political prestige comes close to reality rather than being just a bad
dream, and when there is a looming presence of a devastating disease
for which, thus far, we have no antidote?

It may be of small comfort — but at least it is a comfort — to
look at history and to realize that times nearly always have been diffi-
cult nationally. Surely they were in 1776 when our forefathers risked
everything they had to rid themselves of an affinity that had been natu-
ral for decades. Surely that winter at Valley Forge was discouraging
for John Marshall and all the others who were there. Surely the early
years of the nineteenth century, when trouble with Great Britain once
that the regulation infringed his First Amendment right to express his religious beliefs. The district court enjoined the enforcement of the regulation. But the court of appeals reversed.

Our Court, by a 5-4 decision, agreed. It ruled that the First Amendment did not prohibit the regulation's being applied to Captain Goldman even though its effect was to restrict the wearing of headgear dictated by his religious belief. The military, it was said, does not have to accommodate a practice that detracts from the perceived need of uniformity of dress. There were three separate opinions for four of us in dissent.

Our public life is replete with examples of an ambiguous religion. We pledge allegiance to a nation “under God.” We have a National Prayer Day mandated by federal statute. Our nation’s motto is “In God We Trust.” This intersection of the religious with the political is evident in some of our most treasured public texts. Look at Lincoln’s magnificent second inaugural address and look at Martin Luther King, Jr.’s, religious words in his “I Have A Dream” speech. There is a host of practices, texts, and symbols readily classifiable in both political and religious terms. We accord them some legitimacy. Is this wrong? Should we do away with practices of this kind? Or can we live with them, be strengthened by them, and be legally and constitutionally principled about it? In other words, what does the Constitution say and demand?

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IV

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It may be of small comfort — but at least it is a comfort — to look at history and to realize that times nearly always have been difficult nationally. Surely they were in 1776 when our forefathers knew everything they had to rid themselves of an affinity that had been natural for decades. Surely that winter at Valley Forge was discouraging for John Marshall and all the others who were there. Surely the early years of the nineteenth century, when trouble with Great Britain once
again developed, were difficult. And how could national ease have been more destroyed than in those days before, during, and after the War Between the States, the fratricidal conflict that tore this nation apart and weakened it in a cataclysm of blood and disaster and hate? Was the period of the Industrial Revolution easy? Or the days of World War I, the war to make the world “safe for democracy,” or the long years of the Great Depression, or World War II, or Korea, or Vietnam?

When was it ever really easy? But look at what we have: location, with at least a measure of geographical privacy; natural riches; an abundant land; spectacular beauty; an energetic and imaginative people; an enviable position of expected responsibility in the world; a history that, despite its sad spots — and there are many — is generally a laudable one; and at least a professed standard of equality, albeit not yet a sufficiently developed and enforced one. And a Constitution, now two hundred years old.

I ask again — what does it take to be a contributing American today? With diffidence, I offer the following:

1. I think it takes ideals, ideals of the kind that were set forth so ringingly in the Declaration of Independence — “a decent respect to the opinions of mankind” — “all men are created equal” — “they are endowed with certain unalienable rights” — “among these are life, liberty, and the pursuit of happiness” — and the willingness to “pledge to each other our lives, our fortunes, and our sacred honour.”

We see the same stress in ideals repeated in the Constitution’s Preamble, about which we are hearing so much this calendar year. “We the People . . . in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity. . . .”

2. I think that being a contributing American today means that we need to get back to basics, to look again to the Constitution as our governmental roots, not only as a blueprint for the structure and operation of government, but, with the Bill of Rights, as a precious charter of liberty. Madison pointedly reminded us: “In Europe,” he said, “Charters of power” have been “granted by power.” But in America, Cahn said that even Magna Carta was not enough. It was only a step toward its establishment. The Bill of Rights, the people were entitled to, was “shall not.” This is a command. And, as Cahn stated, the

old pious exhortations “were at last toughened into imperative law.” Those are basics with which we must remain and to which we must tenaciously adhere.

3. To be a contributing American today requires a realization that we are a multiple people, not all alike, not all in the middle of the road, but a nation just as diverse now as we were a hundred years or so ago when the great waves of European immigration struck our shores. We are a nation of blacks and Orientals and Hispanics and Anglo-Saxon, and Catholics and Protestants and Jews and Muslims and Buddhists, and all the other categories that make up this “melting pot” of which we once were so proud. We must have a belief, indeed a conviction, that there is room for all to live under that Constitution and its amendments. What less than this is there for the Religion Clauses to stand for and to assure?

4. To be an American today worthy of the name requires courage, hard work, leadership, integrity, character, even a measure of patriotism, and a belief in the worthwhileness of all these.

5. To be an American today requires that we recognize that the Constitution is not perfect. It never has been. That is an obvious fact. When it was adopted in 1789, it surely was not perfect. We all know — and it is proper that we emphasize it — that there were no less than three glaring and astounding deficiencies right on its face. The first was the complete exclusion of native Americans from Article I, section 2, clause 3, in measuring representation in the House of Representatives. The second was the compromise reached in the same clause with respect to blacks, necessitated by human slavery’s brooding presence. The third was the nonfranchise of women, despite the valiant efforts of Abigail Adams and others as far back as 1787. It took the worst war this country has ever fought, plus the enactment of the Civil War amendments, the Thirteenth, the Fourteenth, and the Fifteenth in the period from 1865 to 1870, to begin to cure the second blight. And it is not cured yet. Finally, it took over 130 years, until the adoption of the Nineteenth Amendment in 1920 to cure the third. And we have ever really cured the situation with respect to native Americans?

The Constitution was not perfect at its inception. It undoubtedly is not perfect today. There is little that is perfect in this world of human kind. We, as individuals, surely are not perfect. We see this in the way we treat our environment, in the way we treat those who are not exactly like us, in the way we treat those who do not behave as we do, in the way we treat each other.

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Symposium

An Introduction to Courts in American Society: A Symposium on the Bicentennial of the Federal Judiciary Act of 1789

Johnny C. Burris

One of the marvels of the Constitution is that it has endured as amended for over two hundred years. The cause of this longevity is not the perfection of the Constitution at its creation. In fact, the Constitution of 1787 suffered from serious flaws and imperfections. It lacked a Bill of Rights, authorized the continuation of slavery, impliedly authorized the exclusion of women from the political process, failed to adequately define the scope of the powers of the President, had no provision for a cabinet or other executive offices besides those of President and Vice President, and did not expressly provide for any courts besides the Supreme Court, to name but a few of the flaws. Some of these flaws were corrected by the amendment process, others were remedied by legislation, and some await adequate remedies. In fact, the Constitution left many fundamental questions on the structure and operation of the new federal government to Congress. ¹ The first Congress did not hesitate to use its powers to fill in the gaps left by the Constitution. Some of these legislative acts have, in retrospect, achieved a practical significance that rivals that of the Constitution. At this date, it is clear the Judiciary Act of 1789² was one of these extraordinary legislative acts which even today in spirit forms the foundation of our current

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¹ Professor of Law, Nova University Center for the Study of Law, L.L.M., Columbia University School of Law, 1984; J.D., Salmon P. Chase College of Law, Northern Kentucky University, 1978; B.G.S., University of Kentucky, 1975.
² An Act to Establish the Judicial Courts of the United States, 1 Stat. ch. 20 (1789) [hereinafter Judiciary Act of 1789].