

SPEECH AT THE TEXT AND TEACHING SYMPOSIUM

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...It will perhaps not surprise you that the text I have chosen for exploration is the amended Constitution of the United States, which, of course, entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. The encounter with the constitutional text has been, in many senses, my life's work....

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions....

Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation—if there is such a thing as the "na-

ture” of interpretation—commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance....

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time.

For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time....

The Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when the text is not prescribing the form of government it is limiting the powers of that government. The original document, before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities and disabilities of government. When one reflects upon the text’s preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution....

I do not mean to suggest that we have in the last quarter century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.

Indeed, I cannot in good conscience refrain from mention of one grave and crucial respect in which we continue, in my judgment, to fall short of the constitutional vision of human dignity. It is in our continued tolerance of State-administered execution as a form of punishment. I make it a practice not to comment on the constitutional issues that come before the Court, but my position on this issue, of course, has been for some time fixed and immutable. I think I can venture some thoughts on this particular subject without transgressing my usual guideline too severely.

As I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. This is a position of which I imagine you are not unaware. Much discussion of the merits of capital punishment has in recent years focused on the potential arbitrariness that attends its administration, and I have no doubt that such arbitrariness is a grave wrong. But for me, the wrong of capital punishment transcends such procedural issues. As I have said in my opinions, I view the Eighth

Amendment's prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws. Foremost among the moral principles recognized in our cases and inherent in the prohibition is the primary principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for whatever crime and under all circumstances is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, indeed, "cruel and unusual." It is thus inconsistent with the fundamental premise of the Clause that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity....

On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived.

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity....

