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# The Enduring Constitution

A Bicentennial Perspective

JETHRO K. LIEBERMAN

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## A Bicentennial Perspective

JETHRO K. LIEBERMAN

**West Publishing Company**  
*Saint Paul      New York      Los Angeles      San Francisco*

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(Photo credits continued following index)

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For my brothers on Elm Street, 1963–1964

**Don, Jon, Toby, Bob, Joe, Angus, John,  
Richard, Thomas, Ron, David, and Phil**

and to the memory of

**Louis Tunick II**  
(1942–1963)



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# Some Thoughts on the Constitution

Though written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people; they fix too for the people the principles of their political creed.

—Thomas Jefferson, letter to Joseph Priestly, July 19, 1802

The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crisis of human affairs.

—John Marshall, *McCulloch v. Maryland*, 1819

A Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.

—John Marshall, *Cohens v. Virginia*, 1821

One country, one constitution, one destiny.

—Daniel Webster, Senate speech, March 15, 1837

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government.

—Justice David Davis, *Ex parte Milligan*, 1866

When the Constitution was first framed I predicted that it would last fifty years. I was mistaken. It will evidently last longer than that. But I was mistaken only in point of time. The crash will come, but not so quick as I thought.

—Aaron Burr, 1835

We are under a Constitution, but the Constitution is what the judges say it is.

—Charles Evans Hughes, Speech, May 3, 1907

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## *Publisher's Foreword*

In a world where it seems increasingly true that “Things fall apart: The centre cannot hold,” the Constitution of the United States endures. No other written constitution has worked as well or as long to guide and protect a government and its citizens. Because, as Thomas Paine wrote in 1791, “The constitution of a country is not the act of its government, but of the people constituting a government,” it is fitting that the people of the United States celebrate the two hundredth anniversary of the document they created.

As Jethro Lieberman states, “The Constitution is what lawyers and judges worry about—until something happens to bring it home.” We hope, though, that this bicentennial will bring home more than a sense of celebration. We hope it will bring home to more Americans the sober reflection and awed respect the Constitution never fails to elicit from those who work daily in service to the law.

It is a special kind of reverence. Not the distant respect accorded to a long-dead master, but the vital kind that leads each generation of Americans to wrestle anew with the spirit and the letter of the law. Over the years, this struggle for understanding has led to the publication of thousands of books on the Consti-

tution. An even greater number of articles have been circulated, and countless suggestions have been made concerning what the document means, or how it might be improved.

Still the arguments go on. Is the Constitution a “living document” to be interpreted in light of present day considerations; or do the “original intentions” of the framers still hold? Mr. Lieberman maintains that the Constitution remains vital not *in spite* of but *because* of the continuing debate: “Let the bicentennial nurture a sophisticated reverence for the most successful charter of freedom the world has ever known—and let the commemoration also fan the flames of disputation that have kept it that way,” he writes.

As a publisher of legal materials, West Publishing Company has, since the Constitution was a mere eighty-nine years old, monitored the debate, recorded the arguments, and facilitated the dialogue. In 1976, to celebrate the nation’s bicentennial and its own centennial, West published *Milestones!*, also written by Mr. Lieberman. In that volume, the author wove a legal history of the United States from eighteen events, as selected from a poll of American lawyers.

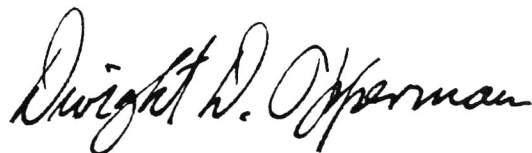
Not surprisingly, those events pivoted around the

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U.S. Supreme Court. From *Marbury v. Madison* to *U.S. v. Richard Nixon*, the legal history of the United States centers on the Constitution and its interpretation.

*The Enduring Constitution* is an expansion of and further testament to that fact. It is meant to honor the document and those who so honorably and nobly uphold it. It is also meant to increase understanding, evoke thought, and illuminate disputes of the future with knowledge of our shared past.

Meanwhile, the debate goes on, as it must if the Constitution is to remain healthy. “Without a vital constitution,” says Mr. Lieberman, “we could not hope to balance order and freedom, progress and conservation, stability and momentum.”

A handwritten signature in black ink, reading "Dwight D. Opperman". The signature is written in a cursive, flowing style with a large initial 'D'.

DWIGHT D. OPPERMAN  
President and Chief Executive Officer

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## *Acknowledgments*

I gratefully acknowledge the research assistance of Ellen M. Berrigan in the preparation of this book. Beyond living in libraries, answering scores of queries, and making dozens of telephone calls to ferret out additional facts, she was largely responsible for the preparation of the minibiographies scattered throughout the text.

Thanks also to Eric T. Freyfogle at the University of Illinois/Urbana-Champaign, William Nelson at New York University, and Stephen B. Presser at Northwestern University for their thoughtful comments on reading the manuscript; to my mother Elizabeth K. Lieberman, for proofreading the galleys and other editorial and cuisinary services; to Clark G. Baxter for all his editorial assistance since the inception of this project in early 1985; and to Bill Stryker and Kristen Weber and the other editors at West, and to Elaine Linden for her sensitive copyediting.

Although they may not realize how much it helped, I record special thanks to Ruth and Sandy Frankel for cajoling me to drop over for many bountiful meals, to Martha and Neal Cooper for all the tea, to Susan and Gerry Uram (he for his unflappable special cour-

ier service, she for her patience with my slamming car doors at 3 A.M.); for their forbearance, to students whose exams and papers last spring were graded late; to the friends who finally got the idea and stopped calling to ask when the manuscript would be finished; and because it will probably be the only opportunity, I record my gratitude to the person or persons who created WordPerfect, thus permitting me to rewrite and edit with remarkable ease many passages in this book twenty times or more (my writing students, please take note, though whether it was useful remains of course for the reader to judge).

For the record, Jessica is off to college and Seth is about to become taller than I am.

As usual, errors that remain are solely my responsibility, and for them I beg the reader's pardon. But after all, not even the Supreme Court always gets it right.

J.K.L.  
Hastings-on-Hudson, N.Y.  
September 17, 1986



## Jethro K. Lieberman



Photograph © 1976 Jill Krementz

Lawyer, journalist, professor of law, and author of numerous articles and 20 books including *Milestones! 200 Years of American Law* (West Publishing, 1976), Jethro K. Lieberman brings to *The Enduring Constitution* impressive credentials in interpreting and popularizing the law.

As Director of the First-Year Writing Program at New York Law School, Jethro Lieberman opens up aspiring minds to the nuances and intricacies of the law by teaching Constitutional Law, Administrative Law, Advanced Writing Skills for Lawyers, and Dispute Resolution. Before joining the New York Law School faculty, he was Visiting Associate Professor at Fordham Law School.

Mr. Lieberman was founding editor of Business Week's Legal Affairs Department and served as that magazine's Legal Affairs Editor from 1973–82. His day-to-day responsibilities included relating and analyzing the changing law for millions of readers. In this responsibility, he followed legislation, court decisions, administrative regulations, and other aspects of law and legal institutions affecting our commercial and personal lives.

He received a B.A. from Yale, and J.D. degree from Harvard, graduating from both with honors. He has taught at Yale and was awarded a Phi Beta Kappa Bicentennial fellowship for a work still in progress.

Previous books include *The Litigious Society* (winner of the 1982 American Bar Association Silver Gavel award), *How the Government Breaks the Law*, *The Tyranny of the Experts*, and *Understanding Our Constitution*.

Prior to becoming a journalist, he spent several years in law practice in a variety of capacities: serving on active duty as a Navy lawyer, practicing antitrust law with a large Washington firm, and working as vice-president and general counsel of a New York publishing house.

He is the father of two children and lives in Hastings-on-Hudson, New York.

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# *Prologue*   **To Celebrate a Constitution**

The Constitution of the United States looms overhead, a giant geodesic dome of practical political philosophy that for two centuries has shielded Americans from the twin disorders of anarchy and tyranny. Like most popular writing on the Constitution, the preceding sentence is both true and florid, and it suggests the dangers that lurk for authors who tackle so noble and overworked a subject as the hallowed charter of our liberties—especially at times of national observance.

On September 17, 1987, the nation celebrates the two-hundredth anniversary of the world's oldest continuing written constitution. That it should have lived so long is testament to both a small band of men who sweated for four months in a hot room in Philadelphia and to the character of Americans at large. But it is also testament to a relationship about which psychologists, sociologists, and anthropologists have, so far as I know, made nothing: The Constitution has shaped us all, as individuals, just as we, collectively, have shaped the Constitution.

The story of the Constitution is the story of a civilization, a culture, a society. It is also the entire history of a nation. And that is what makes writing about it so difficult. The author must take pains to see that he does not merely repeat what so many others for so long have already written, while yet telling the familiar story. He must see to it that he is accurate when nuance is sometimes all. He must shed

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personal opinions (or most of them, anyway) to make the account credible.

Above all, he must condense an abundant chronicle, recorded not merely on paper but also in much of what we see around us. The hurly-burly of the streets and the marketplace, the quotidian headlines of presidents and police chiefs, the currency that too rapidly departs our purses, the machines that surround us and elevate us and change us, the magazines we read and the movies we watch—all have a place in the Constitution that shapes us. The serenity that most of us feel at night (never for an instant supposing that a soldier will come bursting in to drag us off); the unconscious assurance with which we voice our opinions, snarling or smiling as is our style, defending or denouncing our politicians; the unembarrassed trip to church or synagogue (or unembarrassed stay at home)—all, and so much more, have a place in the Constitution that guards us.

Lest we turn the countryside into a semiotician's guide to the Constitution, the author's burden (and the reader's dilemma) can best be felt in examining the sheer paper commentary. The catalog of the New York Public Library lists 753 books directly under the heading "Constitution, U.S.," and thousands of other volumes touching on it this way or that are doubtless to be found there as well, for the Constitution embraces hundreds of topics on any one of which a lifetime can be spent in study. The public library has no special collection: Butler Library at Columbia University (the King's College that two delegates to the Constitutional Convention, Alexander Hamilton and Gouverneur Morris, attended) shows a similar dedication of shelf space: 564 volumes. And books are by no means the largest measure. Better to see the literary homage we pay in the learned commentary of legal scholars: Every year, the *Index to Legal Periodicals* shows more than 150 articles devoted to general constitutional studies (and again, specific constitutional topics consume much more index space). Better also to see the fealty we owe in the

opinions of courts: Every year federal courts alone devote thousands of pages to constitutional issues. In two hundred years, the glossators have rivaled the work of biblical scholars in all the past two thousand.

Of the writer's many problems, this torrent of commentary is one extreme—sifting through some of it and knowing when not to cull at all is a daunting prospect. No less treacherous a problem is the temptation to wax eloquent in rapid generalities about what is, after all, a subject that was formed in compromise and therefore demands balance.

Which brings us to Sol Bloom.

In 1939, New York Congressman Sol Bloom served as the "director general" of the United States Constitution Sesquicentennial Commission. The commission had a chairman: Franklin D. Roosevelt. It had other distinguished members. But in the volume that commemorates the festivities of the day, a recurring name is Sol Bloom. It appears on the title page, twice on the page that shows commission members, and on the page facing the introduction (a letter from FDR to the director general). Congressman Bloom writes the Introduction and is listed as the author of a 140-page excursus, "The Story of the Constitution." A section titled "Liberty Documents" contains the Magna Carta, the 1628 Petition of Right, the English Habeas Corpus Act of 1679, the English Bill of Rights of 1689, the Declaration of Independence, the Articles of Confederation, the Constitution, Washington's Farewell Address, the Monroe Doctrine—and concludes with, yes, "The Heart and Soul of the Constitution," an address by Sol Bloom. Photographs scattered through the volume depict Sol Bloom: with King George VI, at Washington's Tomb, at various other ceremonies, and even reading, with pince-nez in a stagey pose, the original document, then at the Library of Congress. Several other addresses by the Hon. Sol Bloom punctuate the proceedings, along with a photograph of Mrs. Bloom and daughter in the garden "studying historical material to be used in the Celebration." One almost ex-

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pects to see Sol Bloom painted into Howard Chandler Christy's canvas of the signing of the Constitution, right behind Ben Franklin.

Sol Bloom resides now in a musty volume. The year of the sesquicentennial, 1939, was also the year of the New York World's Fair. But celebrations were tempered by heavy clouds of war. Seventeen days before the main ceremony, Germany invaded Poland. Though we face a corrosive terrorism (itself destructive of constitutional rights), thankfully we face no general war. Also, we have learned a great deal about how to throw a party for the nation. We stand in more danger that far greater impresarios than Sol Bloom will transform what ought to be a solemn occasion dedicated to real understanding of a constitutional culture into one of the largest pseudoevents in our history, even bigger than Bobby Riggs and Billie Jean King's tennis match, say, or the New York City Marathon. (But even these we can attribute to the Constitution: It permits—I did not say requires—an infectious enthusiasm for public events almost wholly devoid of meaning.)

As this is written, a year ahead of ceremonial events, one can begin to feel only a slight rise in temperature, a pale heat of the fever that will sweep the nation through our genius for public relations. Blessed by the Commission on the Bicentennial of the Constitution (headed by retired Chief Justice Warren E. Burger), one group plans to raise \$6 million to sponsor a constitutional "trivial pursuits" among high school students, the winner to receive a four-year college scholarship. The group's advance scouts, promoting a story in the *New York Times*, contend that half the high school students in the country will participate. But if a board game can make even 10 percent of our youth constitutionally literate, we will all have something to celebrate.

Against a \$6-million budget to promote a board game with prizes, what can a single volume on the Constitution (especially among all the dozens that are sure to be published) hope to accomplish? A book

can do only one thing: Lend coherence and integrity to a subject that is merely mysterious if seen as the several answers to random questions. A book can provide perspective that is missing when one looks only to a single word or phrase or clause or looks at text without history or history without philosophy.

A book on the Constitution should, in a word, talk about *constitutionalism*, the spirit of law, rights, and orderly procedures that animate a free society and keep it free. It should help the reader see how unhelpful in the realm of society and politics is the old saw "If we can send a man to the moon, then why can't we . . . ?" for the task of keeping order and preserving freedom is far more complex than the engineer's application of physics to rockets. The engineer knows the goal—to go to the moon—whereas we here on earth must search for the goal each day in a never-ending debate with our fellow citizens. Without a vital constitution, we could not hope to balance order and freedom, progress and conservation, stability and momentum. Without a constitution, we could live a life—billions of people have—but it would not be a life of the fullest human potential. That much we owe the Constitution.

There are many ways to approach the constitutional order in America. A treatise would spell out the intricacies. A history would show how we have coped. But this book is not a legal treatise, nor is it (nor could it hope to be) anything approaching a constitutional history. Neither is it a commentary on the government nor a general history of the United States. But it inevitably partakes of all those things: constitutional analysis, institutional history, and narrative of events, political and social. The Constitution is not simply a collection of words on a fading parchment—even those words and that parchment—but a cause and a reflection of real events.

George M. Dallas, who served as James K. Polk's vice president (and as the eponymous inspiration for Dallas, Texas), once observed that "the Constitution in its words is plain and intelligible, and it is meant



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for the homebred, unsophisticated understandings of our fellow citizens.” His bold proclamation is untrue. The Constitution is not intelligible without history, people, stories, litigants, cases, rulings, passion, enemies, philosophy, sociology, and economics. That is not because it is a lawyer’s document, though a lawyer, Gouverneur Morris of Pennsylvania, formulated its final, often elegant, phrasing. Its intellectual father, James Madison, was not a lawyer; the political force for its ultimate ratification—Washington and Franklin, the two most respected men in America—were not lawyers.

No, the need for amplification, for interpretation, stems rather from its very nature. As the great Chief Justice John Marshall put it in 1819: “We must never forget that it is a *constitution* we are expounding.”

A constitution cannot be a rule book, cluttered with definitions and cross-references. If, as Marshall said, it is “to be adapted to the various crises of human affairs,” it must speak in majestic generalities—“due process of law,” “equal protection of the law”—and it must use phrases whose meaning is not necessarily self-evident or self-limiting: “bill of attainder,” “ex post facto,” “judicial power.” For that reason, the Constitution needs interpreters.

It has official ones, of course: the Supreme Court when it sits to construe a provision in the course of hearing an appeal; the president when he considers whether to veto a bill that trenches on constitutional rights or powers; Congress when it considers whether to pass a bill with constitutional implications. It also has as many unofficial interpreters as there are people with passion to think for themselves and debate with their neighbors.

En masse, the public is usually constitutionally inert: The Constitution is what lawyers and judges worry about—until something happens to bring it home. The last time that the great mass of unofficial interpreters talked long and loud about the Constitution was in 1974 when Richard Nixon, the greatest constitutional teacher of his generation, put the instru-

ment to the test and the streets were abuzz with talk of impeachment.

In the end, it is usually the public interpretation that wins out. “The Supreme Court follows the election returns,” says Mr. Dooley, and though few elections are more than Delphic on most issues, sooner or later the Court hears the rumble of the people, especially if a new president gets the chance to appoint his own justices.

Still, it is the fact of interpreting that matters. And because the Constitution will be interpreted—must be interpreted—it is a charter that ultimately has no absolutely fixed meaning. If porous open-endedness is vexatious, that is also the Constitution’s strength and utility.

As we approach the bicentennial, it is fashionable opinion in the highest political circles of Washington that any understanding of the Constitution is wrong if it deviates from that which the framers held. For reasons of logic, philosophy, and probably law, that opinion won’t wash. But it wouldn’t matter if that opinion were right, for the entire course of American history shows that regardless of how passionately the “original intention” view is held, the Constitution is a living document. We adapt it even as we adapt to it, and it will ever be interpreted to fit the times, regardless of what anybody thinks.

That does not mean we can willy-nilly discard its language, flying off on a fancy to fit a sudden fashion. The words of the Constitution are not exactly anybody’s whim. But the reality that it will be interpreted means it is *our* Constitution just as much as it was the framers’ and our forebears’. The Preamble says that “We the People *do* ordain,” not *once did ordain*. Each generation must rally to the Constitution and understand it anew.

This book tries to provide a basis for such an understanding. Because it is not a treatise, it does not pretend to deal with every word and phrase, nor to take the reader by the hand clause by clause. Other books do that. Because it is not a history, it does not