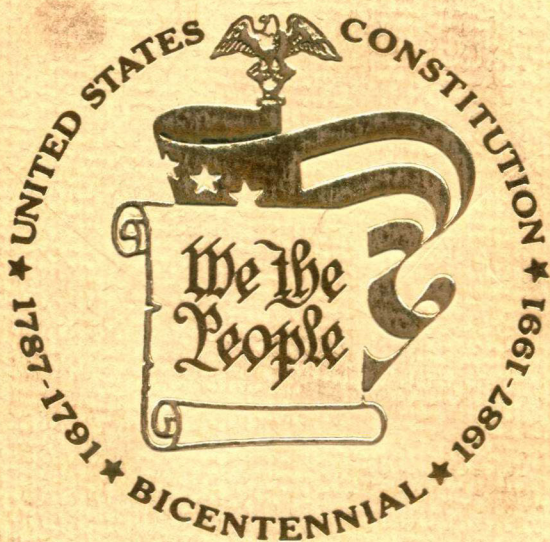


THE CONSTITUTION, THE LAW, AND FREEDOM OF EXPRESSION

1787-1987



Edited by
James Brewer Stewart

Foreword by
The Honorable
Warren E. Burger

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PREFACE

The 1986 Wallace Conference on "The Constitution, Freedom of Expression, and the Liberal Arts" exemplifies Macalester College's commitment to free, uninhibited inquiry and expression, within a legal tradition that protects the rights of the individual and provides for the welfare of the greater society. The flourishing of education in this country, from the natural and social sciences to the humanities and fine arts, is due in large part to the support provided by the Constitution and the way of life it makes possible.

It could not have been more appropriate for the first Wallace Conference to be held during the time the nation was beginning its celebration of the bicentennial of the Constitution, the basic document of governance that has provided freedom and democracy to our nation for almost two centuries. No other form of government has been as successful as ours in protecting basic freedoms and no other receives as much critical attention.

The freedom to praise or criticize all aspects of our lives, including the very document that supports those freedoms, is precious. Those who participated in this conference are excellent examples of the theme and the tradition.

Macalester College, in the tradition of liberal arts colleges, seeks to educate persons who will become good citizens and leaders in American society. We believe that the best way to accomplish this is to bring together a talented group of students to be educated by a faculty of dedicated teacher-scholars with a broadly based program deeply rooted in the arts, humanities, and sciences. In addition, we are convinced that both students and faculty need constant challenges from those seminal minds who are shaping the various disciplines—and our society as a whole. The Wallace Visitors Program, with its emphasis on bringing outstanding scholars to the Macalester campus and giving our students and faculty the opportunity to interact with them, is an example of what we do best.

We were honored that the Bicentennial Commission designated the Wallace Conference as an official bicentennial event. The essays that follow are in accord with the finest traditions of both the college and the nation.

Robert M. Gavin, Jr.
President
Macalester College

FOREWORD

Warren E. Burger

Apart from honoring the memory and work of DeWitt Wallace, the conference in which the following essays originated had two objectives, both involving anniversaries. On the one hand, the Wallace Conference celebrated the one-hundredth anniversary of Macalester College as among America's small but great liberal arts colleges. On the other hand, it saluted the two-hundredth anniversary of history's greatest example of basic organic law, the Constitution of the United States.

At the beginning of our activities, we on the national Commission on the Bicentennial of the United States Constitution took as our mission to give ourselves and the American people a history and civics lesson about that document. We need to know more about how it came to be written and ratified and what it has meant to us. We also must assess and appreciate its continuing and pervasive impact on our own lives and, indeed, on the lives of people all over the world.

Because of the basic integrity of the document itself, the Constitution has stood the test of time. At its inception, it embodied the ideas of the best thinkers of earlier periods and a special, daring genius. Its framing and ratification marked an unparalleled advance in human freedom and the art of government. In our own time, no less than in 1787, the strength to secure freedom involves risks as well as rewards, and, indeed, the risks themselves are what make the rewards possible.

The men who created the Constitution certainly knew as much about risks as about rewards when they set about their work. When Hamilton, Madison, and others, with Washington's silent but powerful assent, initially attempted to move forward with the creation of a new central government, they faced thirteen independent sovereigns that called themselves "states" in the fullest sense of the term. State leaders were jealous of their independence; they looked with hostility on any diminution of their sovereignty. The Articles of Confederation contained a provision guaranteeing that "each state retains its sovereignty, freedom

and independence" and the states had done no more than agreed "to enter into a firm league of friendship" with each other. That is the language generally used in multilateral treaties between truly sovereign states for limited and particular purposes. France, Germany, and Italy might approach each other on such terms today to negotiate trade agreements. Little wonder, then, that in 1786, when Madison, Hamilton, and their supporters in Annapolis convened what was ostensibly a gathering on commercial matters but soon moved to a discussion of a new, stronger central government, only five states took enough interest to send representatives. Even the host state, Maryland, was not represented.

And when the same single-minded leaders next tried to secure approval from the Continental Congress for the Constitutional Convention, they encountered opposition from all quarters. The most Hamilton and Madison could secure was a resolution that delegates should be sent to Philadelphia for "the sole and express purpose" of revising the Articles of Confederation, *not* for the purpose of writing a new constitution. Under such constraints only the most venturesome of "risk takers" would have continued to pursue the idea of totally transforming the framework of government for thirteen such fractious states. But of course, that is exactly what they did.

And the risks hardly stopped here. Common people were no less jealous of their local independence than most of the leaders. It would require much persuasion to convince them that their freedom would be more firmly secured, not crushed, by the new central government that Madison, Hamilton, and Washington envisioned. When, for example, some new recruits from New Jersey reported to Washington at Valley Forge, they refused to swear allegiance to the United States, saying "our country is New Jersey." For much the same reason, Washington watched his army dissolve whenever he marched it across a state boundary line. Soldiers would gladly fight for their own states but loyalty to others was limited.

In light of such widespread attitudes, we can surely sympathize with Madison, who wrote, after the delegates finished their work in Philadelphia, "The real wonder is that so many

difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been expected. It is impossible for the man of pious reflection not to perceive [in this circumstance] a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution."¹

Franklin, not much noted for his piety, must have shared Madison's feeling that the problems of drafting a new constitution were so formidable as to require divine intervention. When the delegates convened in Philadelphia, Franklin suggested that every meeting open with a prayer as was done in the Continental Congress.

That the Founding Fathers struggled against great adversity to get their document drafted and ratified is a matter of public record. Patrick Henry, one of Virginia's most powerful politicians, was designated as a delegate to the Philadelphia Convention, but declined, saying, "Me thinks I smell a rat." The "rat," of course, was the stronger central government he feared so greatly. Of more than seventy designated delegates, at least fifteen chose to emulate Henry, and Rhode Island refused even to select delegates. The real work of the Convention fell to about forty-five of those who attended regularly. The greatest risk they ran, of course, was that their work would be rejected, that the states would refuse to agree to so significant a diminution of state power. Such a result was precisely what some members of the Continental Congress aimed for when they first reviewed the proposed Constitution. A resolution was offered criticizing the delegates to Philadelphia for having exceeded their authority.

But to the Founding Fathers, the potential rewards were self-evident and clearly built into the risks. The rewards included the prospect of a truly national government, capable of expanding liberty on a national scale, structured to encourage manufacture, trade, commerce, and orderly growth for the country as a whole. The possibility of defeating parochial attitudes also offered the glowing prospect of creating a truly national and liberating republican government.

John Dickinson captured both the anxiety and the anticipation of the Founders' situation when he wrote, "If the [national] gov-

ernment should be left dependent on the State Legislatures, it would be happy for us if we never meet in this room." So did another delegate, Nicholas Gilman, who wrote to his wife, "[The creation of this Constitution] was done by bargain and compromise. Yet notwithstanding its imperfections, on the adoption of it depends . . . whether we shall become a respectable nation or a people torn to pieces by intestine commotions."²

These two hundred years bear witness to what that delegate had to say about "intestine commotions." The American Civil War and two devastating and debilitating world wars only begin the tragic list that regional and international rivalries have brought about. Yet throughout these travails, the Constitution has endured and our country has grown stronger. That it has done so is, in itself, an enormous tribute to the remarkable leadership of that small group of men who met in Philadelphia.

But the Constitution's endurance also raises a disturbing thought—what if it had not been ratified? What if America had not finally been persuaded by the same logic that prompted Ben Franklin's closing remarks at the end of the Philadelphia Convention? Franklin declared, "I confess there are several parts of this constitution which I do not at present approve, but I am not sure I will ever approve them. For having lived long, I have experienced many instances of being obliged by better information and fuller consideration to change opinions even on very important subjects, which I once thought right, but found to be otherwise. In these sentiments, sir, I agree to this constitution with all its faults, if they are such."³

What if too few Americans had shared Franklin's view and the Constitution had been defeated? We must shudder to think of the consequences if large states like New York and Virginia had held back. Even though nine states had already ratified the Constitution before Virginia approved it by the scant margin of eighty-nine votes to seventy-nine, a rejection at that stage might have led to the kind of "intestine commotion" that would have delayed our nation's unique development as a free people and a prosperous republic.

We can only speculate on these hazards that were avoided, since the happy fact is that the risks did prove to be worth taking

in the time of the Founding Fathers. They remain so in ours. President Grover Cleveland remarked at the one-hundredth anniversary of the Constitution, "If the American people are true to their sacred trust, another centennial day will come, and millions yet unborn will inquire concerning our stewardship and the safety of their Constitution. God grant they may find it unimpaired."⁴ That day is nearly upon us. Let us remember as we ponder the following essays that millions yet unborn will inquire concerning our stewardship of their Constitution, just as we have of those who have gone before us. God grant that they may find it unimpaired.

NOTES

1. James Madison, "The Federalist No. 37," in *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan Univ. Press, 1961), p. 238.

2. Dickinson quoted in Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (Boston: Little, Brown-Atlantic Monthly Press, 1966), p. 185; Nicholas Gilman, letter to Joseph Gilman, 18 Sept. 1787, in *The Records of the Federal Convention of 1787*, ed. Max Farrand, rev. ed. in 4 vols. (New Haven: Yale Univ. Press, 1937), 3:82.

3. Franklin quoted in *Records of the Federal Convention of 1787*, ed. Farrand, 2:641-42.

4. Cleveland quoted in *The One-Hundredth Anniversary of the Constitution of the United States*, ed. H. L. Carson (Philadelphia: J. B. Lippincott, 1889), 2:262.

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INTRODUCTION

James Brewer Stewart

The community that will not protect its most ignorant and unpopular member in the free utterance of his opinions, no matter how false or hateful, is only a gang of slaves.

Wendell Phillips
"The Scholar in the Republic"

This, to Wendell Phillips, the preeminent libertarian, abolitionist, and orator of the Civil War era, was the inevitable cost of curtailing freedom of expression. The victimizers themselves also became victims, and democratic culture was degraded on all levels. Conversely, he believed, the greater the range of public discussion, the healthier the condition of American liberty. In his view, the highest duty of the scholar was simply to enrich the debate, "to entertain no object but truth, to tear a question open and riddle it with light." The contributors of essays to this volume, extraordinarily diverse in their accomplishments and perspectives, illustrate the truth of Phillips's assertions. This is largely because each is (as was Phillips) an activist, as well as a scholar, to whom the practice of free expression is personally and professionally essential.

The nature of the conference in which these contributors participated and in which these essays had their origin gives support to Phillips's opinion. Sponsored by Macalester College in September 1986 and entitled "The Constitution, Freedom of Expression, and the Liberal Arts," the conference was designed specifically to enrich the right of freedom of expression and the general public's understanding of that right by encouraging its freest practice. Those addressing the conference were selected not only for their scholarly eminence, but also for their power to activate public discourse through the powerful expression of their ideas and values. All participants agreed to address the

conference theme in relation to some contemporary topic with which they feel deeply involved.

Three of the contributing essayists are practitioners of the law. Warren E. Burger, recently retired as chief justice from our highest judicial body, has refocused his activism from law *per se* to directing the work of the national Commission on the Bicentennial of the United States Constitution. Antonin Scalia and Norman Dorsen continue to make their distinguished careers synonymous with legal disputation on the highest levels — especially in the Supreme Court of the United States. There Scalia sits as associate justice. There also, Dorsen, president of the American Civil Liberties Union, has often argued cases with national significance, many involving First Amendment rights.

In their essays all three men place high premium on the fundamental importance of law and its historical development as the bedrock of individual freedom in America. Equitable laws and illuminating precedents, they argue, are what we must rely upon most of all to preserve and extend our rights of self-expression. To be sure, these three essays address a widely dissimilar set of subjects. Still, a basic reliance on law and history to secure personal liberties underlies them all.

Warren Burger, as we have seen, meditates intensely on the daring of the Founding Fathers, who, he suggests, fashioned a Constitution that has not only endured, but that has also established a tradition that gives Americans of every generation the opportunity to enjoy a fuller measure of freedom than did its predecessors. "An unparalleled advance in human freedom and the art of government" in its own day, the Constitution was born, Burger emphasizes, through the efforts of "risk takers." The Founding Fathers, he reminds us, worked against powerful forces of parochialism, risking not only the failure of their own efforts but also the political fragmentation of the new nation in order to insure our "unique development as a free people and a prosperous republic." Today, Burger concludes, Americans must become cognizant of this tradition by studying the Constitution and its history. By these means, American citizens can remain able to take intelligent risks of their own on behalf of freedom of expression in a threatening, rapidly changing world. In the ab-

sence of such historical consciousness, Burger feels, freedom of expression faces bleak prospects.

Antonin Scalia locates the sources of free expression in precise legal reasoning, as well as in important historical developments. He emphasizes that "the law displays enormous evolution over the past fifty years" in First Amendment cases, especially since the era of World War I. Then, restrictions on free expression abounded on the state level because such matters were not considered to be legitimate concerns of the federal courts. Today, however, the Fourteenth Amendment has been interpreted to extend the guarantees of the First Amendment to the state level. Protections of freedom of expression of all sorts have expanded greatly, thanks in part to the impact of new technologies in expanding opportunities for articulating such expression. But, Scalia emphasizes, this proliferation of freedom has also forced courts to make essential distinctions between various *types* of expression, some of which have been accorded greater legal protection than others. As "speech" of all sorts has become freer, Scalia demonstrates, guarantees of protection for various categories of "speech" have necessarily become less equal. With impressive precision, he explains the sources of this seeming paradox, showing how jurists have developed such distinctions and why such distinctions are essential for the maintenance of "freedom of expression" in its wider sense.

At first reading, Norman Dorsen's views on freedom of expression seem greatly at odds with both Burger's and Scalia's. Unlike the former, Dorsen sees no evident historical progression towards a freer and stronger nation. Instead, he warns, some of the gravest threats to our liberty stem from the augmenting power of government. Unlike the latter, Dorsen wishes to draw no precise distinction between various forms of expression, some of which enjoy greater protection than others. Instead, he fears for the future of freedom of expression in its entirety, warning of a host of new dangers: new surveillance technologies, new expressions of religious intolerance, new assertions of nationalistic ideology, new forms of discrimination, and new efforts to censor artistic expression.

Yet to preserve American liberty, Dorsen, like Scalia and Bur-

ger, emphasizes the profound value of the American law and the historical traditions supporting it. In calling for "a new enlightenment," a reassertion of the eighteenth-century libertarian values that first introduced into Western culture a high regard for the sanctity of individual opinion, he, like Burger, evokes the Founding Fathers. In demanding the application of enlightened legal reasoning to insure the maximum feasible protection of all expression, he parallels Scalia's methods. In this respect, these three essays offer fascinatingly diverse, yet clearly related, legal perspectives on freedom of expression, its prospects, and its place in American law.

The remaining contributors to this collection regard freedom of expression in ways that depart markedly from their legal colleagues. Mary Beth Norton's prize-winning feminist scholarship has helped revolutionize our understanding of America's past and of women's roles in shaping our history. Through his award-winning writings, Robert Jay Lifton, psychiatrist and social psychologist, has fundamentally challenged conventional wisdom on the meanings of nuclear weapons and modern totalitarianism. Harry B. Gray's brilliant discoveries in inorganic chemistry have led us closer to scientific answers to the staggering problems of hunger, pollution, and shrinking sources of energy. John Edgar Wideman has employed rich literary gifts to powerfully evoke the experiences of Afro-Americans and to explicate the significance these experiences have for all of us. But for all their diversity, these essayists all stress that powerful social forces, often beyond the law, define the limits of free expression.

They also agree that freedom of expression depends more on the transformation of our personal and collective consciousness of these forces than it does on legal guarantees. Mary Beth Norton, for example, reminds us vividly that for much of the nation's history, unwritten gender biases, not formal codes, have played a determining role in restricting women's rights of free expression. Conversely, evolving feminist consciousness and activism, not litigation alone, have most often supported those who have struggled to claim that right. The eighteenth-century Enlightenment, she observes, held out little promise for women. While Locke, Rousseau, and the Founding Fathers expanded male free-