



The Constitution in America Today

*Remarks to the League of Women Voters of Port
Washington & Manhasset (excerpted)*

Delivered by
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November 23, 2014

The speaker does not
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viewpoint of the LWV.

The latest boogeyman is being conjured to once again explain away the failure of elected officials to address the real bipartisan problem of leadership in our nation. The creature, over 225 years old, doesn't breathe fire, stomp aggressively through the town square or climb our tallest buildings clutching helpless damsels in distress. In fact, it is barely even mentioned by our fellow citizens except in rare instances of either praise or malign.

Yet, despite the rarity of its sighting, the U.S. Constitution has once again been blamed as being the culprit for broken government in Washington. This point of view, seemingly growing in popularity, is nothing more than a distraction and a misreading of our history.

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Americans like things in writing. From contracts with employers, deeded property lines, marriage licenses, birth/death certificates and countless other examples, if it is not on paper, we usually don't trust it.

So goes our relationship with government.

Constitutions--both state and national--were written not only as a roadmap for government to work properly but also as a roadblock to prevent its abuse. By providing a political system in accessible language, those elected to positions of power in government would be bound by the rules, procedures and policies spelled out for all to read in the document. It may be common sense to us today but the written constitution--and the protection it provides--is a cornerstone of American legal theory.

Constitutional critics are correct to point out that the supreme law of the land leaves plenty of room for interpretation with its vagueness. What makes a search and seizure by police "*unreasonable?*" What does it mean to be "*Commander-in-Chief?*" When is the Senate in "*recess?*" These and countless other questions have made parts of the Constitution pliable. Yet the flexibility in interpretation has provided durability through each successive generation.

The 4,440-word document written in 1787 is not infallible. Our fidelity to the Constitution, however, should be grounded in the fact that the system works more often than it fails. Should a deficiency be cause for concern, the document provides an amendment remedy for us to decide the parameters of what should be changed and--more often--what should remain the same.

Our founding fathers--and mothers--made it unrealistic and impossible to simply wish away the parts of the document we don't like. So we must do the hard work of applying reason and logic to arguments that might easily engender passion and enthusiasm.

The Declaration of Independence proclaims that "All men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

You might want to ask why we are talking about the Declaration of Independence in a discussion about the US Constitution. If that is the case, you have paid attention in your studies when you were in school. Far too often we teach the two framing documents separately and distinct from one another. And it is easy to understand why: they were written just über a decade apart, one in 1776, the other in 1787. One was conceived in wartime, the other in a time of peace. One was written during a struggle for independence, the other written as we questioned power in the hands of the people and our tenuous future.

Yet they are not distinct. They are a continuation of thought across a generation. Less often quoted is Jefferson's poetic articulation in the same paragraph as this most famous line is the justification for why government is necessary in the first place: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

If government is formed by us to protect our rights, what can we do if that government fails this objective? Jefferson's words provide the guide: "whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government."

The right of revolution to one generation meant putting down the plow to pick up the sword. Yet today the right of revolution, a Declaration theory, is enshrined into the constitution itself not necessarily in armaments but in the participation of the citizenry. We can find it in our amendment process and our elections. In the finite terms of our elected officials. In a bill of rights. And in our process for writing law. ...

Our discussion today should be titled the *constitutions* in America today. There are 51 constitutions, if we expand our discussion, as we should, to include the states own framing documents. We focus so much on the federal government, state governments get ignored. Put another way: We focus so much on Washington, that Albany gets a pass. ...

The right of revolution can also be found in our jury system.

"No Justice, No Peace."



There's been no shortage of demand for these seemingly-compatible principles during the protests--some restrained, others not--that have taken place nationwide since the shooting death of Michael Brown at the hands of a Ferguson, Missouri, police officer on August 9.

"Peace" can be defined as the absence of conflict. Yet, if some are willing to surrender this principle in the absence of its counterpart, as the slogan above suggests, we might want to also consider how to define "justice."

The Founding Fathers felt the concept was so significant that they listed "*establish justice*" as one of the few defining objectives of government in the 52-word Preamble that is the first sentence of the U.S. Constitution. Although it acquaints the reader to the word, the poetic introduction to the supreme law of the land doesn't define it. So we must dig a little deeper.

"The trial of all crimes," the Constitution's Article III guarantees, "shall be by jury." The Fifth Amendment promises "due process," prohibits "any person be subject for the same offense to be twice put in jeopardy" and makes compulsory self-incrimination illegal. Amendment Six incorporates the right to "a speedy and public trial," the right to confront witnesses and provides the "assistance of counsel" for an adequate defense. "Equal protection of the laws," another important concept, was added in 1868 with the ratification of the Fourteenth Amendment.

If we cobble together these and other relevant phrases of the Constitution, we find the concept of justice both at the founding and in succeeding generations has more to do with the process in deciding a case than with a specific desired verdict.

"Justice extorts no reward, no kind of price," Cicero, a Roman Senator in the first century B.C., once wrote. Today, for far too many, justice seems to be only measured by outcome and not by facts.

Prior movements concerned with civil rights protested the inability of discriminated groups to gain access to the process. Those looking to apply the law at their whim had little use for

grand juries, trials, witnesses or equal protection in far too many instances during some of the darkest moments of our history.

Yet even today access to the criminal justice system isn't enough if the process for seeking a fair forum is skewed to favor one segment of the population over another.

To avoid this from happening in Ferguson, particular attention has been paid to the case. Michael Brown has not been forgotten by the system. A grand jury with wide-ranging power has been impaneled. There has been no claim that the 12 members of the community that make up that jury--nine white and three African American citizens--have been engaged in a process designed to do anything but seek an outcome determined by whatever the facts may demonstrate.

Neither those who would protest nor those who would support the grand jury's still-unknown decision have anywhere near the access to information that the jurors are evaluating about the encounter between Brown and Ferguson Police Officer Darrell Wilson that took less than 90 seconds from start to finish, according to recent reports.

Despite the absence of even the hint of wrongdoing on the part of prosecutors or members of the grand jury dealing with the case, headlines coming out of Ferguson in recent days are all but guaranteeing disorder in the wake of a possible non-indictment of the police officer involved in the shooting. "*Ferguson waits uneasily for grand jury decision*," reads the New York Times. "*Ferguson braces for worst ahead of grand jury decision*," proclaimed Time. Town Hall asked the question most of us had already been thinking: "*Are new Ferguson riots inevitable?*"

With increasing frequency, some have been proclaiming that justice will only be served if the decision of the grand jury is the one they want to hear rendered. Although the protections of the accused were designed as an insulation from the masses not an affirmation of their wishes, these calls for fit-to-order style justice raise an important question: Should juries be subject to the influence of public opinion or evaluate the facts before them in the context of the law?

American legal theory assumes the latter but a vocal segment of the American public might be clamoring recently in case after case for the former.

The trial of George Zimmerman following the death of Trayvon Martin produced not only a not guilty verdict in July of 2013 but a chorus of those who proclaimed the absence of justice. This perspective is not racially discriminatory. A disproportionate number of white people--89% in a recent CNN poll--still believe OJ Simpson's acquittal was a miscarriage of justice in spite of the fact that the decision was rendered by a jury following a lengthy trial.

The legitimate rights of protestors--free speech and peaceable assembly--are compatible with the rights of the accused. But in the end, in Ferguson and in other cases yet to be conceived, there will always be those who care little about the facts. The lack of a definition of justice works for them, providing a tool to use not for finding the truth but for promoting their own agendas and moving the goalposts as they see fit.

Perhaps we, the people, would benefit with a restoration of the reality that when we put fate in the hands of our jury system, the juries do not always provide the outcomes we might desire. Recognizing that we have legal system, not a justice system, might be a good start for us to know justice and know peace. Our discussion today should be titled the *constitutions* in America today. There are 51 constitutions, if we expand our discussion, as we should, to include the states own framing documents. We focus so much on the federal government, state governments get ignored. Put another way: We focus so much on Washington, that Albany gets a pass. ...

"The ultimate authority," James Madison wrote in 1788, "resides in the people alone." Perhaps the answer to many of the problems in Washington and Albany can be found in a revival of a group that has been sorely missing in recent politics: the informed electorate. In the vision of the Founders, those who were engaged and educated about the issues affecting their lives remained a necessary ingredient to good government.

The informed citizen, despite overwhelming apathy today, is the remedy for many of the ills in government and the one too many politicians no doubt fear the most. Citizens hungry to hold their representatives accountable by being educated on the issues and knowledgeable about individual voting records and, perhaps most importantly, ready to run should the current officeholder be inadequate to serve the needs of the community.

Today we blame government structure and ignore the glaring deficit in the citizen's individual responsibility beyond casting a ballot on Election Day--in the rare occasion we even do that. When politicians and their endless ambitions come up short it is far easier for us to hold the generic 'system' responsible than to expect more from ourselves.

We the people often lament government and then hypocritically reelect those who serve nothing more than themselves and their party. Instead of just blindly following the designs of a party that cares little about our needs or expectations, the informed voter could and should be the glue that keeps government responsive, effective and accountable.

Some might interpret my talk today to be about politics. I've presented to you a conversation about process not politics. Some might not be used to this because politics is easy and familiar while process is not. In politics there is a good side and a bad side. In that conversation opinion is all that matters. We have talked about politics so often and what do we have to show for it? It is time to talk about process and, yes, the boogeyman.

Then--and only then--will government serve us. Instead of the other way around.