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**Justice, Liberty, Equality:
Toward a Progressive Reading of the Constitution**

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5 July 2020

frederickuu.org

Yesterday was July 4th, our nation's Independence Day. And I would like to invite us to spend a few minutes reflecting on how we have used that hard won independence. As the saying goes, on the other side of liberation, one needs to check, **"Am I now set free or cast adrift?"** It is not only "freedom *from*" that matters: freedom *from* British tyranny, freedom *from* taxation without representation. Freedom *for* also matters: what have and will we use our freedom *for*? Will we create a nation of peace, liberty, and justice merely for some—or for *all*?

As one way of exploring this question, I would like to invite us to spend a few minutes reflecting on our U.S. Constitution: how we have come to understand it, and how we might read it differently and better in order to form a more perfect union. And although there is part of me that would love to spend the next few hours pouring over the nuances of recent Supreme Court rulings, I'll limit myself to a few quick notes about three recent decisions. Each case is in many ways quite good news, even if the fine print is troubling once you read past the headline.

First, let's consider Bostock v. Clayton County. It is stunning that **until three weeks ago, lesbian, gay, bisexual, and transgender citizens of this country could be fired in 25 states for their sexual orientation or gender identity.** That sort of cruel discrimination is now unconstitutional thanks to a 6-3 Supreme Court decision that in many ways is extremely good news.

So by all means, there are many reasons to celebrate! However, it is also important to notice that if you read past the headline into the logic behind how the decision was made, there are some troubling implications longterm. The ruling turned on three words from Title VII in the Civil Rights Act of 1964 that prohibit discrimination “because of...sex.” Get this: Justice Gorsuch, writing for the majority, said: “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.... But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extra-textual considerations suggest another, it’s no contest. **Only the written word is the law, and all persons are entitled to its benefit.**”

This decision is a form of Constitutional interpretation known as textualism—paying attention only to the plain text of the document. And the liberal justices signed on because the end result was what they wanted, even if they would have used a different logic to reach a similar decision. And as you may have begun to guess, where I’m going with this is an invitation to consider that long term, the way we reach Constitutional decisions is at least as important as the decisions that get made.

[Update: On July 8, 2020, less than four weeks after the *Bostock* ruling was released, another Supreme Court decision clarified that LGBTQ+ citizens (and more!) can actually be discriminated against. To amplify Justice Sotomayor’s important dissent, joined by Justice Ginsburg, in *Lady of Guadalupe v. Morrissey-Berru* (a 7-2 decision):

The Court’s conclusion portends grave consequences.... Little if nothing appears left of the statutory exemptions after today’s constitutional broadside. So long as the employer determines that an employee’s “duties” are “vital” to “carrying out the mission of the church,” then today’s laissezfaire analysis appears to allow that employer to make employment decisions because of a person’s skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion. This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court

has lamented a perceived “discrimination against religion.” Yet here it swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court’s conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours. One must hope that a decision deft enough to remold *Hosanna-Tabor* to fit the result reached today reflects the Court’s capacity to cabin the consequences tomorrow.

The Supreme Court giveth and the Supreme Court taketh away. (I urge everyone to read past the headlines about Supreme Court decisions. The details matter. The logic behind the decisions matter.)

Here’s a second recent example that in many ways is also really good news. In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court held that an order to rescind the Deferred Action for Childhood Arrivals (DACA) immigration program was “arbitrary and capricious.” That means that *more* than 600,000 undocumented immigrants who were brought to the U.S. as children are saved from deportation—at least for now. To reach this decision, the Chief Justice joined the four liberal justices for a 5-4 decision. But as one commentator said, if you read past the headline, it is clear that, **“It’s not that Chief Justice Roberts is a closet progressive. He’s not. It’s that the [current] administration is *really bad* at administrative law”** ([The Washington Post](#)). So—good news for now, but further challenges could well be coming to DACA, and likely will since the Chief Justice explicitly laid out ways a decision could be made that he would likely vote in favor of. The current situation leaves the proverbial “Sword of Damocles” hanging over the Dreamers, and what we need is comprehensive immigration reform that allows them to become U.S. citizens, or at least legal permanent residents.

Turning to our third case, the situation is similar. In *June Medical Services v. Russo*, the Chief Justice again joined the four liberals in a 5-4 decision striking down a Louisiana state law as unconstitutional for placing hospital-admission requirements on abortion clinic doctors that created an undue burden for women choosing abortion. In many ways this decision is great news for reproductive justice, and as with the

previous two decisions, if you read past the headlines, the Chief Justice explicitly laid out ways for how he would likely rule differently if a few changes were made. **That does not bode well longterm.**

And although there is so much more to say about these and other important recent Supreme Court decisions, there is a larger point that I want to be sure we get to. If this sermon leaves you curious to learn more, there's a short, accessible book published two years ago that I highly recommend titled We the People: A Progressive Reading of the Constitution for the Twenty-first Century by Erwin Chemerinsky, Dean of the University of California at Berkeley School of Law. As someone who grew up Southern Baptist and spent a long time learning to interpret the Bible in a progressive (instead of fundamentalist) way, I have similar fascination with learning to interpret the Constitution progressively: to support what our UU Sixth Principle calls “peace, liberty, and justice”—not merely for some—but “for all.”

I particularly appreciate Chemerinsky's emphasis on the Preamble of the Constitution:

We the People of the United States, 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, do ordain and establish this Constitution for the United States of America.

Chemerinsky makes a compelling argument, linked to historical precedent, that the Preamble can provide a touchstone for interpreting the Constitution through a progressive, emancipatory lens.

I will say more about this approach soon. But first I want to say a little more about its opposite: the so-called textualist approach that is currently dominating the Supreme Court. And here as well I can't help spotting parallels to how fundamentalists interpret the Bible. I have spent so many hours arguing with people who would tell me that they didn't *want* women to be second-class citizens and they didn't *want* homosexuality to be a sin—but that's what the Bible says, so “Don't blame me. I'm just doing what the Bible says.”

I would say such interpreters are reading the Bible *selectively, superficially, and problematically*. I can see the appeal in wanting to claim, “I’m just neutrally interpreting the text,” but that is impossible to do. **We human beings are all *always already* interpreting a text—or anything else—from some particular and peculiar point of view that is shaped by our social location.**

If we had time, I could cite case after case of examples of how individual Supreme Court decisions are never simply “neutral interpretations.” And for those of you who would want to dive into the details, Chemerinsky does just that in his book *We the People*. For now, I will give you one representative example of this point: Justices Ruth Bader Ginsburg (1933 -) and Antonin Scalia (1936 – 2016). Before Scalia’s death, they were somewhat of a famous odd couple, longtime friends who often went to the opera together—even though they strenuously disagreed about the Constitution. And here’s the important part:

Justices Scalia and Ginsburg disagree in almost every major case not because one is smarter or understands constitutional law better or avoids decisions based on value choices. Rather, **their disagreements reflect their differing ideologies, life experiences, and worldviews.**

Scalia—and his would-be successors currently serving on the court—would have you believe that they are merely interpreting the Constitution neutrally—and that Ginsburg and other liberals are so-called “judicial activists.” But I urge you not to fall for that seduction any more than you would for a fundamentalist interpretation of the Bible or any other sacred text.

To say more about what I mean, by way of contrast, consider what it looks like to interpret the Constitution in a progressive way using the Preamble as a touchstone. Chemerinsky challenges us to consider that constitutional interpretation should be based on achieving the core values of the Constitution, and that the starting point should be the beginning of the Constitution itself.

The preamble lays out that the clear intent of the people writing the Constitution is to form a government that is democratic, effective, just, and liberatory. I’ll quickly say more about each of those four points in turn:

- **democratic** - the opening three words, “We the people,” mean that this Constitution is not intended to create a monarchy, theocracy, or totalitarian regime.
- **effective** - the words “a more perfect union” means that the United States is intended to work increasingly well to provide “domestic Tranquillity” at home, “common defence” against external threats, and “general Welfare” for all citizens), characterized by
- **justice** (“establish justice”), and
- **liberty** (“secure the Blessings of Liberty to ourselves and our Posterity”)

Those are the reasons—democracy, effective governance, justice, and liberty—why our founders did “ordain and establish this Constitution for the United States of America” (54).

If there is one key word missing, it is arguably **equality**. Since this is July 4th weekend, let us remember that the Declaration of Independence proclaims “all men are created equal,” but the Constitution did not. Indeed, let us be honest that the original Constitution is deeply sexist and racist: giving no rights to women, and explicitly institutionalizing and protecting slavery. Article I, section 2 of the Constitution counts enslaved human beings as “three fifths of all other Persons.” And Article I, section 9 prohibits Congress from any restrictions on importing enslaved human beings for at least twenty years (18).

It was not until after the Civil War that *we the people* voted to change our Constitution with the Fourteenth Amendment to include a core value of equality through the language “equal protection” under the law (59). That was the First Reconstruction. The Civil Rights Movement brought a Second Reconstruction. And The Rev. Dr. William Barber and others in the revitalized Poor People’s Campaign are calling for a Third Reconstruction to live more fully into the dream of a more perfect union with peace, liberty, and justice—not merely for some—but for *all*.

I said earlier that if this sermon leaves you curious to learn more, I encourage you to check out Erwin Chemerinsky’s short, accessible book [We the People: A Progressive Reading of the Constitution for the Twenty-first Century](#). And if that leaves you wanting still more, another excellent recent book that I read while researching this

sermon is titled Supreme Inequality: The Supreme Court's 50-Year Battle for a More Unjust America by Adam Cohen.

There have been periods in our nation's history when the Supreme Court has hewn more closely to a progressive interpretation of the Constitution, but that has been much less frequently the case during the past few decades.

Since I don't have time to get into the details of Cohen's book, I will limit myself to one major quote. His tour through the last five decades of constitutional law highlights all the ways that the Supreme Court has often chosen to interpret the Constitution in recent decades in ways that "sided with the rich and powerful against the poor and weak, in virtually every area of the law" (xv). And it is important to underscore that in so many of those cases *choices* were being made. Often one or two votes in a different direction could've changed a majority opinion from supporting the powerful and rich to supporting the marginalized and oppressed.

Cohen writes that, in retrospect, our country could've chosen a different path over the past five decades:

- All families could have been lifted above the **poverty** line.
- All children could have attended **schools** that were adequately funded and racially integrated.
- **Elections** could have been decided by the most persuasive arguments to the electorate, not by special-interest money, and a government that puts the public's interest ahead of the billionaire's.
- **Workplaces** could have had less discrimination and more unions.
- **Prisons** could have had fewer inmates.

The Court, in other words, could have helped to create a society with more equality, inclusion, and opportunity for all. (318)

Such an America still might be.

The fate of our nation, of course, does not rest solely with the Supreme Court, although they have a significant role. Ultimately, it lies with *we the people*, and I am encouraged by the Movement for Black Lives, our own #UUtheVote movement, and many other such actions in which we the people are seeking to build the world we dream about.

In that spirit of coming together as “we the people, I want to move toward my conclusion by inviting you to hear a powerful poem, “The Low Road,” by Marge Piercy. It speaks to the widening concentric circles of compassion that comprise “we the people” at our best. This is a hard poem; it speaks to the many hard and cruel realities of our present moment. But stick with it. I think you will appreciate where it ends up:

What can they do
to you? Whatever they want.
They can set you up, they can
bust you, they can break
your fingers, they can
burn your brain with electricity,
blur you with drugs till you
can't walk, can't remember, they can
take your child, wall up
your lover. They can do anything
you can't stop them
from doing. How can you stop
them? Alone, you can fight,
you can refuse, you can
take what revenge you can
but they roll over you.

But two people fighting
back to back can cut through
a mob, a snake-dancing file
can break a cordon, an army
can meet an army.

Two people can keep each other
sane, can give support, conviction,
love, massage, hope, sex.

Three people are a delegation,

a committee, a wedge. With four
you can play bridge and start
an organization. With six
you can rent a whole house,
eat pie for dinner with no
seconds, and hold a fund raising party.
A dozen make a demonstration.
A hundred fill a hall.
A thousand have solidarity and your own newsletter;
ten thousand, power and your own paper;
a hundred thousand, your own media;
ten million, your own country.

It goes on one at a time,
it starts when you care
to act, it starts when you do
it again and they said no,
it starts when you say *We*
and know who you mean, and each
day you mean one more.

As I have said at the start of each Sunday Service during this pandemic, during this time of physical distancing, social connection and social solidarity are more important than ever. And I am grateful to be on this journey with all of you.