

BOOK TALK: THE CULT OF THE CONSTITUTION

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*Professor Franks delivered the 2020 Constitution Day lecture
at The Center for Constitutional Law based on these remarks.*

When we think of “fundamentalists,” we often think of religious fundamentalists. People who are zealously attached to a particular interpretation of an idea or text—one that just so happens to serve their world view—and who zealously defend this interpretation above and beyond all others, even to the point of engaging in violence against those who dissent. This zealotry is inevitably driven by self-interest masquerading as fidelity. Perhaps the barest distillation of fundamentalism is the invocation of a higher power to justify and perpetuate the domination of one’s own tribe over others.

But fundamentalism is not limited to religious texts. Fundamentalist approaches to legal texts, especially the Constitution, are also common. Similar to how Christian fundamentalists might read isolated passages of the Bible in ways that verify their world view and ignore interpretations or passages that complicate it, constitutional fundamentalists read the Constitution in selective and self-interested ways.¹

Some constitutional fundamentalists are open about their affinity to religious fundamentalism. Conservatives in particular often explicitly adopt a religious fundamentalist approach to the Constitution, treating it as a quasi-divine document and the Founding Fathers like saints or demi-gods. Liberal fundamentalists are harder to identify because they avoid, and even sometimes disparage, religious sentiments towards the Constitution, claiming instead to act in the service of secular values. But as a form of reverence for the past, constitutional fundamentalism is

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1. See MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* xii (2019).

inherently conservative, and given the nature of that past, constitutional fundamentalism always serves the interest of white male supremacy.

It is important to carefully define the term “white male supremacy.”² It is not only the radical and relatively rare view that only white men should have rights. Rather, it is the more subtle and more common view that the rights of white men take *priority* over the rights of all others. In this sense, the concept of white male supremacy mirrors the concept of constitutional supremacy. As stated in Article VI, Clause 2, the Constitution is “the supreme Law of the Land.” This “supremacy clause” acknowledges that other laws may be created and enforced, but none are allowed to conflict with, and all are ultimately subordinate to, the ultimate authority of the Constitution. In a similar fashion, those who adhere to the ideology of white male supremacy may tolerate the expansion of rights to women and nonwhite men, but only to the extent that these rights do not conflict with or undermine the rights of white men.

White male supremacy permeates the creation, interpretation, explication, and execution of the Constitution. Only white, wealthy men were allowed to participate in the drafting of the Constitution itself. The Supreme Court, the body that is tasked with interpreting the Constitution, was composed exclusively of white men until 1967, and did not include a woman until 1981. Congress was exclusively white until 1870, and exclusively male until 1916. Every American president to date except one has been white, and every American president has been male.

While women and nonwhite men today are not formally excluded from political participation the way they were in the past, their representation in government is still not even roughly proportional to their percentage of the population. The U.S. population has been around 50 percent female since 1790, and as of 2020, it was roughly 40 percent nonwhite.³ The 117th Congress, which began its term in January 2021 and is the most diverse Congress to date, is 73 percent male and 77 percent white.⁴ Only two African Americans and five women have served on the Supreme Court in its entire history. This has remained true as the political pendulum has swung in favor of conservatism to liberalism and back again, and has persisted no matter how “progressive” the politics of the left or “compassionate” on the right.

2. *Id.* at 6.

3. Quick Facts, U.S. Census, at <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last accessed Oct. 22, 2021).

4. Membership of the 117th Congress: A Profile, Congressional Research Serv., Aug. 5, 2021, at <https://crsreports.congress.gov/product/pdf/R/R46705>.

Until the late 1800s, most women, regardless of race, were denied the right to own property, to make contracts, and to obtain education or paid employment. Well into the twentieth century, women and nonwhite men's access to housing, universities, and workplaces was denied outright or severely restricted. Their ability to participate in military service, athletics, journalism, and the arts was similarly curtailed, and they faced aggressive harassment when they ultimately did.

The creation, interpretation, and application of constitutional privileges have all overwhelmingly served the interests of the Americans who most closely resemble the original "Founding Fathers," and that the core of constitutional power and privilege in this country has never truly shifted away from white men. And so it is that the picture of power in the twenty-first century does not look that different from the eighteenth century: the government, the military, law enforcement, the financial sector, the tech industry, the entertainment industry, and the media are all dominated by white, wealthy men. This is neither a coincidence nor the result of superior effort or talent, but rather the result of a political, economic, and cultural system that has excluded and exploited women and nonwhite men for generations.

But there have been significant moments of challenge and change—moments when women and nonwhite men fought to make "We the people" a reality rather than an empty promise.⁵ The passage of the Reconstruction Amendments, the 19th Amendment, and the civil rights movement were profound steps toward the realization of true equality.

Today, we are in the midst of what may be the most significant challenge yet to constitutional fundamentalism in the service of white male supremacy. Women and nonwhite men are exercising their constitutional rights more visibly than ever before, using them to demand accountability for centuries of institutionalized racism and sexism. The Black Lives Matter and #MeToo movements have transformed the national discourse on equality, identity, and impunity. And the white male monopoly on political power has finally started to fracture: record numbers of women and minorities elected to public office, including the first female, Black, and Asian Vice-President in 2020. All of this is unfolding as women and nonwhite men are achieving prominence in every aspect of society—politics, journalism, entertainment, education.

Like every other historical moment of progress, this moment is being met with violent resistance. The night before they flooded Charlottesville with swastikas, assault rifles, and Confederate flags, white men marched

5. U.S. CONST., Preamble.

through the city with torches, chanting “You will not replace us.”⁶ This was unvarnished constitutional fundamentalism in the service of white male supremacy. The rioters used the First Amendment to dignify their sneering racial resentment and their Nazi slogans, and the Second Amendment as an excuse for military roleplay. Using the Constitution as a prop, they terrorized a peaceful town and killed an innocent woman, paving the way for increasingly bold attacks on their fellow citizens and on democracy itself. From Richmond to Kenosha to the January 6 insurrection, white male supremacists have claimed a constitutional right to use violence to silence dissent, suppress speech, halt legislative action, even overthrow the government—all in order to preserve power for those who look like them.

And yet they are, in fact, being replaced. Like the Confederates whose flag they so sentimentally treasure, they are fighting for a lost cause. The men who wrote the Constitution may have meant to exclude women and nonwhite men from “We the people,” but better men and women have since rewritten it. To be faithful to the Constitution means reading it as a whole, and today that whole includes its most profound passage: the Fourteenth Amendment’s command of equal protection.

Read sincerely, the Fourteenth Amendment is inherently anti-fundamentalist, as it demands the consideration of all rights and all people. Unlike the First or Second Amendment, the Fourteenth Amendment cannot be stripped out of context and fetishized as a super-right elevating the interests of some over others. It is a rule as well as a right, a test that must be universally applied to all laws and all rights.

Equal protection means that white men’s rights to free speech or self-defense cannot be protected more than anyone else’s. Equal protection means that white men’s rights to free speech or self-defense cannot infringe upon those same rights of women or nonwhite men. Equal protection means that we are only free if all of us are free.

Displays of constitutional solidarity may be less common than displays of constitutional fundamentalism, but they are no less powerful for that. One such demonstration took place on June 15, 2020, in the tiny conservative town of Bethel, Ohio. The event was called “Bethel’s Solidarity with Black Lives Demonstration.” Its organizer, a white schoolteacher named Alicia Gee, wrote on social media that she was motivated by the wave of police killings of unarmed Black people across America and inspired by gatherings and vigils in other small conservative towns. “The events of the last few weeks [have] made it perfectly clear to

6. FRANKS, *supra* note 1, at 1.

me it's time for my comfort to be put by the wayside," Gee wrote. "[I]t is time for me to use my body, my voice, and my [privilege] to show my town that it is not 'fine,' that it's not just 'city folks' that have the right to peacefully assemble, and that Black Lives Matter even if there are just a few in our town."⁷

Predictably, violent constitutional fundamentalists attempted to suppress this challenge to white male supremacy. A Bethel resident named Lonnie Meade took to Facebook Live to announce the day and time of the demonstration, stating, "I'm gonna tell you right now, I hope that everybody that feels like me, I hope we outnumber those people a thousand to one, and not let that shit happen here in our little town of Bethel."⁸ Meade continued, "You're not going to bring hate to our town We don't have hate in it right now. You're gonna *bring* hate."⁹

On June 15, the group of 80 or so Bethel residents who showed up for the demonstration found themselves surrounded by roughly 700 counter-demonstrators who came to "protect" the town—members of motorcycle gangs, "Back the Blue" groups, and self-styled defenders of the Second Amendment. Some carried rifles, others baseball bats and clubs. Video footage shows the counter-demonstrators screaming racial slurs, grabbing pro-Black Lives Matter signs from peaceful demonstrators and tearing them up, and a biker punching a demonstrator in the head from behind. The footage also shows police officers standing by as the violence unfolded. Bethel mayor Jay Noble imposed a 9pm curfew, citing "the threat of continued and escalating violence."¹⁰

Bethel Police Chief Steve Teague, while condemning the violence, suggested that the counter-protestors were exercising constitutionally protected rights. "That's what we allow around here, unfortunately," he stated. "You know, it's their right to do it." In an echo of Virginia's Governor McAuliffe, Teague also said his department, which has six officers, were overwhelmed by the large number of counter-protesters who arrived: "I'll be quite honest with you, we were outnumbered many

7. Hannah Knowles, *A Tiny Ohio Town's Black Lives Matter Event was Overrun by Armed Counterprotesters*, WASH. POST, June 16, 2020, at <https://www.washingtonpost.com/nation/2020/06/16/bethel-ohio-black-lives-counterprotest/>.

8. Anna Helene Petersen, *What Happened in Bethel, Ohio?* BUZZFEED, July 5, 2020, at <https://www.buzzfeednews.com/article/annehelenpetersen/bethel-ohio-black-lives-matter-protest>.

9. *Id.*

10. Adrian Horton, *Hundreds of Armed Counter-protesters Confront Black Lives Matter Rally in Ohio*, THE GUARDIAN, June 18, 2020, at <https://www.theguardian.com/us-news/2020/jun/18/hundreds-armed-counter-protesters-confront-black-lives-matter-event-bethel-ohio>.

times with people having more weapons than the officers do.”¹¹ One Bethel councilman, Bryan Coogan, was less ambivalent about the actions of the counter-protestors, thanking the “Second Amendment followers” for “preventing the chaos that could have prevailed.”¹²

These are the hallmarks of the cult of the Constitution: self-righteous, resentful, violent actions disguised as defenses of the Constitution and individual rights. But these attempts at terroristic intimidation fail in the face of constitutional solidarity. In interviews following the Bethel conflict, Gee stated that while she and other supporters of Black Lives Matter in Bethel were threatened and that her personal information was posted online, she “would do it all over again.”¹³ The demonstration “was just the first step. Clearly, we illuminated a division that we have. But I don’t think it’s irreparable. I think that we can fix it. We are definitely energized and ready to move and grow from that.”

For far too long, the Constitution has been a white man’s Constitution. It is long past time to reject the selective appropriation of the Constitution to advance white male supremacy. This project of reckoning requires judgment of people as well as texts. We must openly and accurately credit those who struggle to make “We the people” *mean what it says*, while condemning those who use it to promote “us over them.” As Justice Thurgood Marshall observed in his speech, *Reflections on the Bicentennial of the United States Constitution*, “‘We the people’ no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality,’ and who strived to better them.”¹⁴ To honor the Constitution is to honor those who improved it—and join them.

11. Cliff Pinckard, *Clash of Protesters Puts National Spotlight on Small Southern Ohio town of Bethel*, CLEVELAND.COM, June 17, 2020, at <https://www.cleveland.com/nation/2020/06/clash-of-protesters-puts-national-spotlight-on-small-southern-ohio-town-of-bethel.html>

12. *Id.*

13. Petersen, *supra* note 8.

14. Stuart Taylor, Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES, May 7, 1987.