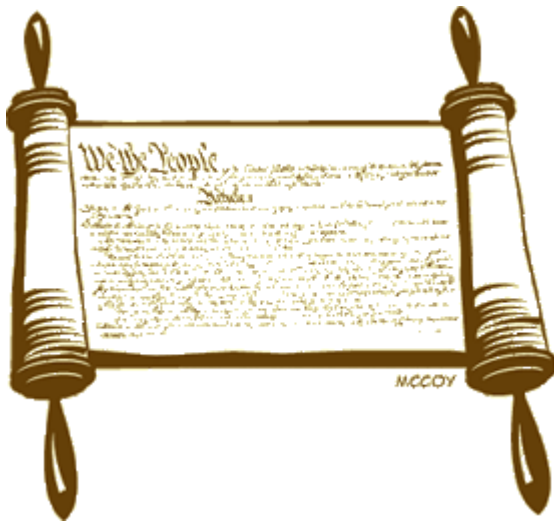


American Midrash



Every July Fourth, Americans celebrate their nation's independence. In Washington, some four hundred thousand people crowd the Mall for a National Symphony Orchestra concert (this year featuring Chuck Berry and Aretha Franklin) followed by fireworks at the Washington Monument. Meanwhile, in Main Streets and backyards across the country, Americans watch parades and barbecue burgers.

But who celebrates Constitution Day? Who even knows that it comes every September 17, and that it commemorates the closing of the Constitutional Convention? There are no fireworks and no hot dogs. No one gets off from work or school. Instead, Constitution Day begins when the president of the United States (or, in a pinch, his wife) recites the Constitution's Preamble ("We the People . . ."), not on national television but on a conference call with school children. And the day's main celebration does not take place in Philadelphia, where the Constitution was written, but at an amusement park in Southern California, in Knott's Berry Farm's replica of Independence Hall (a building that also houses a copy of the Liberty Bell that, its Website oddly boasts, weighs in at "only five pounds less than the original"). All of which is brought to you, not by the National Park Service, which pays for Washington's July Fourth celebration, but by Constitution, Inc., a nonprofit private organization.

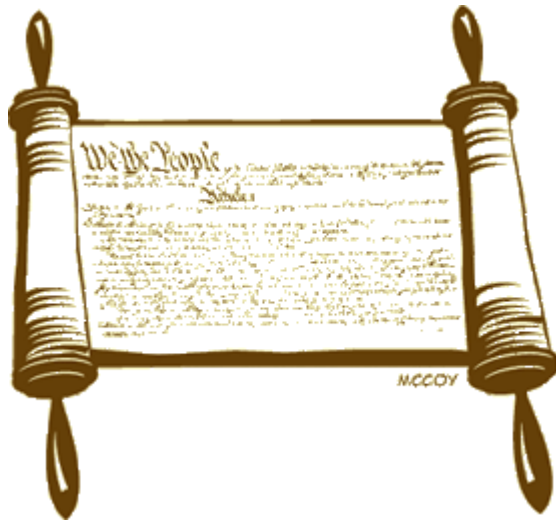
The lowly status of Constitution Day is at least partly a consequence of the status of the Constitution itself. Yes, the Constitution is often publicly praised. But it is more often debated and argued about. As attorney general, John Ashcroft is charged with upholding the Constitution. Yet his six-year term in the Senate included seven different attempts to change it, including one measure that would make it even easier to amend in the future. Both as a statement of principles and a cause for celebration, the Constitution often seems to play second fiddle to the Declaration of Independence. Both documents were debated and accepted in the old Pennsylvania State House, a building since

renamed not Constitution, but Independence Hall. The Declaration has been jubilantly celebrated since 1777 but in 1987 Congress refused to allow even a one-time, one-day holiday for the bicentennial of the Constitution.

Why does America's Constitution Day fail to attract the attention that Constitution Days create in countries like Norway (where it is a major holiday) and Japan (where it is an integral part of perhaps the greatest holiday of the year, Golden Week)? Americans' lack of enthusiasm is partly due to the odd timing of the document itself. The Constitution was drafted some twelve years after the war with Britain started, eleven years after independence was declared, and four years after it was won. It was not even America's first constitution, a distinction held by the ineffectual Articles of Confederation that took almost as much time to ratify as to disintegrate afterwards. As a result, America ended up with two primary documents—and in the popular imagination, the Declaration often seems to overshadow the Constitution.

But Americans' partiality for the Declaration has other roots. The Declaration contains inspirational phrases such as "all men are created equal" and "Life, Liberty, and the pursuit of Happiness." The Constitution offers little more memorable than its most quoted three words: "We the People." The document that describes our government does not sing. Perhaps this is not surprising; after all, the Constitution was written by a meeting and polished by a Committee on Style. The Declaration, on the other hand, had the advantage of being drafted by a single author, Thomas Jefferson, and being originally edited by both John Adams and Benjamin Franklin.

But the Constitution's lack of stylistic flair cannot be attributed solely to writing staffs. The Declaration is a statement of principles and grievances. Since independence had actually been declared two days before, it served primarily as a propaganda piece. The Constitution needed to be accepted formally by the American people, and it needed to serve as a guide to practice. This collective and practical nature may be the key reason why Americans find it difficult to hold celebrations for the Constitution. The Declaration is advertising copy that seeks to close a sale. The Constitution is the owner's manual that frustrates us and keeps us up late the night before Christmas.



In a different metaphor, that of the Hebrew Scriptures, the Constitution is the law (the Torah), and the Declaration the prophets. Prophetic language at its best (and the Declaration is surely that) recalls our moral commitments, our sense of rightness. Abraham Lincoln knew this. At a time of flagging zeal during the Civil War, his Gettysburg Address proclaimed that the nation was “dedicated to the proposition that all men are created equal.” David Walker, the son of a slave who helped inspire the abolitionist movement, put it more bluntly: “See your Declaration, Americans!!! Do you understand your own language?”

If the Declaration inspires us with lofty ideals, the Constitution vexes us with questions of interpretation. This disagreement, which began days after the release of the document by the secret convention that wrote it, is heightened by the distance that now exists between the Constitution’s statements and specific circumstances. Whatever James Madison meant by the right to “keep and bear Arms” in the Second Amendment, he wasn’t thinking of guns that fire four hundred bullets per minute; an extraordinary Revolutionary-era soldier would have needed at least that time to fire three or four. Similarly, the Bill of Rights’ prohibition on illegal searches did not envision the use of an Agema Thermovision 210 thermal imager to see if a person was using heat lamps to grow marijuana in his house.

These problems have led to two primary schools of constitutional interpretation. One suggests that the problems of AK-47s and heat imaging can be resolved by simply looking more carefully at the Constitution. The words and intentions of the Founders provide all the necessary guidance. This idea has been called “originalism,” or, in Supreme Court Justice Antonin Scalia’s term, “textualism.” The other primary tradition of constitutional interpretation suggests that its words are less the end than the beginning of a discussion. Sometimes writers speak of a “living Constitution” or of traditions of interpretation.

Both schools of thought create further difficulties. Whose intentions or original meanings should prevail—those of Madison, of the Convention, or of the

ratifiers? But, on the other hand, how can we call anything wrong if the conversation is everything? Jewish tradition again provides a helpful parallel, that of the Midrash. Midrashim (to use the plural) are interpretations, commentaries, and discussions. They respond to the difficulties of applying the written law of Moses in a setting where most Jews lived away from the Temple—and then when the Temple itself no longer existed. In attempting to create living connections between life and the law, the Midrash embraces the key insights of both schools of constitutional interpretation. Commentary, reinterpretation, and sometimes commentary upon commentary are the heart of Midrash. A Midrash recognizes that all possible questions have not been answered, that there are seeming inconsistencies in the texts, and that truths contained there might be understood even more deeply than the original author realized. But each Midrash also begins with the original text, warning against the danger of moving too far from it.

Seeing discussions about the Constitution as American Midrash helps us see the possibilities as well as the difficulties of celebrating the Constitution. In a society where the document can be contested in a courtroom rather than simply admired from afar, Americans may perhaps be too close, too deeply involved in using the Constitution to be able to celebrate it easily. A recent poll in Russia, where Constitution Day is a national holiday, showed that over half the respondents admitted that they didn't know any specifics of their constitution. Of those who did, only a third thought the document was a good one (Many Americans, by contrast, do not know much about what is in the Constitution, but virtually all approve of it). Americans' deep and abiding discussions and disagreements about the Constitution may not easily inspire the sort of celebrations that attract television cameras or the Park Service, but our continuing debates about the document should be cause for celebration anyway.

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