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Commencement Address - Justice Stanley Mosk

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California Supreme Court

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Address by JUSTICE STANLEY MOSK
Commencement, Golden Gate University
San Francisco, May 25, 1991

Though you will little note and not long remember what I say here, nevertheless I am honored to be with you on this significant occasion and to wish you graduates well as you start on a new career. I said much the same thing to your predecessors four years ago from this same platform. I told them they were entering the legal market at a happy time, sort of a seller's market. I wish I could say the same thing today, but, as we know all too well, the economic circumstances of the day are not as encouraging.

We could assess the blame for our predicament--deregulation of many service industries, Reagan-Bush laissez faire policies, just a normal trend--but this is not the occasion for a study of economic factors.

Suffice it to say, yours will not be an easy road to success. It will take all the heart, all the talent, all the industry that you can muster. But always remember, success can be won, if you give the task the same dedication that brought you through law school. While it is often said that we have too many lawyers, keep in mind that there is always need for more good lawyers.

I do not mean to paint a dismal portrait for you on this joyous occasion. Things can never get as bleak as when

I began practicing law in the depths of the Great Depression of the '30s. I remember all too well after passing the bar and starting a solo practice, I came home one evening, elated, and proudly reported to my wife that I had a great day: a \$10 case and two small ones.

For this occasion I checked with Kitty Kelly who told me Nancy's astrologer studied the stars and cautioned me not to give a long, dull talk. So I shall give you a short dull talk. I will speak for 20 minutes, you will listen for 20 minutes. I hope you do not finish before I do.

I would like to take as my theme today the immortal words of that eminent philosopher, Art Buchwald, who admonished a graduating class a few years ago: "We are giving you a perfect world; now don't louse it up."

While, of course, nothing is perfect, we do have the closest thing to it in our Bill of Rights. And this year we celebrate the 200th anniversary of the adoption of the Bill of Rights. It should be marked with more than a mere passing nod.

And it is. Many trees are being felled to make the paper, and much ink is spilled, to provide the published articles these days extolling the virtues of our Constitution and its Bill of Rights. There are T-shirts and cereal boxes containing pictures of the Constitution and recently I received a promotional ad for a belt buckle with the

Constitution on it. It may be comforting to know that the Constitution can help keep your pants up.

If we can overlook this trivialization of history, I suggest the inflated interest in our great charter is all to the good. It reminds us of the one overriding reason why we are able to meet here today in peace. We have no fear of government intervention on behalf of those who may believe differently than do we. We have no fear of secret police dispersing this assemblage, or of assaults by the army, or of interference from any source, official or private.

We gather in peace and security because we are protected by--and indeed, part of--a democratic government created by and responsible to a written constitution. That remarkable document is our treasured heritage.

There were innumerable celebrations of our Constitution's bicentennial in 1987.

But we must bear in mind that the constitution did not become effective until ratified by at least nine states. That process was not completed until the middle of 1788, and the final original state did not formally ratify the Constitution until the middle of 1790.

More importantly to most of us is that the first ten amendments to the Constitution, the Bill of Rights, were not proposed until September 25, 1789, and not finally ratified until December 15, 1791. Thus this year we celebrate the

bicentennial of the Bill of Rights. We cannot too often be reminded of the liberty under law that we enjoy.

Our Constitution is a remarkable document, particularly when you realize it was created by a brand new country that had just won its independence in a David and Goliath armed conflict with the greatest world power of that era. Former Chief Justice Warren Burger put it well in a recent speech: "Here we were, a country of . . . people scattered up and down the eastern coast, with wilderness and aborigines to the west, with no great tradition of culture, no long history behind us, no significant industrial system, no public education system, and yet 55 men, with only about 40 or more in regular attendance, drafted a document creating a system of government that had no precedent, no parallel in all human history."

It is true, of course, that five and a half centuries earlier the Magna Carta had been wrested from King John at Runnymede. But it must be remembered that King John gave new rights not to all the people, but only to the barons who were the privileged few. And most importantly, the Magna Carta was the bestowal of rights from the monarch to those few people. The Constitution, on the other hand, was the bestowal of rights from the people to a government they were creating. Never before had a government been established with the boundaries of its authority so circumscribed. And

if there were any doubt of the limitation, be it remembered that the Ninth Amendment in the Constitution's Bill of Rights, a provision generally overlooked, declares: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." This is the key: except for the provisions of the Constitution, all other rights are retained by the people.

Undoubtedly the drafters of the Bill of Rights did have some background cases that gave them inspiration. In 1735 a newspaper publisher named Peter Zenger wrote an editorial critical of the royal governor of New York. All he did was suggest that judges were being arbitrarily replaced and that trials by jury were being "taken away when the governor pleases." For this Zenger was charged with the crime of printing a false, malicious and seditious libel.

At the trial, Zenger's counsel argued that truth was a defense. Although the court rejected his contention, defense counsel argued the point to the jury. And the jury acquitted Zenger after ten minutes of deliberation. Thus was born freedom of the press in America.

Another case, decided a century earlier in England, undoubtedly had a profound impact on our constitutional framers. Known as Bushell's Case, it involved charges against William Penn and his associate William Mead for disturbing the peace. All they had done was to preach their

religious doctrine to what was termed an unlawful assembly. The trial judge instructed the jury to find the defendants guilty. The jury refused to do so. Despite threats of fine and imprisonment, and being locked up without food, water or sanitary facilities for four days, the jurors persisted in voting Not Guilty.

The judge thereupon fined the jurors and imprisoned them until the fines were paid. Eight paid the fines and were released, but four, including Bushell, sought a writ of habeas corpus. They prevailed, and thus was born both the freedom of religion and the absolute right of juries to independently weigh the evidence and reach a verdict uninfluenced by a judge or public opinion.

Reflect for a moment on the caliber of men who met at Philadelphia to draft the Constitution. Two were college presidents, three others were professors, four had read law at the Inns of Court. Thirty-three had some background in law. The youthfulness of the delegates was noteworthy, a fact that should be encouraging to you: five were under 30 years of age, Hamilton was 32, Madison, Morris and Randolph were about 35. Oliver Ellsworth and William Paterson, both of whom later became Supreme Court justices were just over 40. Only four delegates were over 60. The debates revealed the classical learning--French, Greek, Roman--of the delegates.

I must confess that as I look back to the origins of our nation and its Constitution, I feel a deep sense of pride--but also a feeling of apprehension for the present and future. Bear in mind that the original 13 states consisted of 2,205,000 people, not much more than the population of many metropolitan areas. Out of that tiny pool of inhabitants there was produced Washington, Jefferson, John and Samuel Adams, Hamilton, Franklin, Tom Paine, Madison, Monroe, John Marshall, John Jay--all cultured, articulate, intellectually brilliant men. They had studied and understood the principles of democracy, and lived with respect for democracy. Now look around us, in this nation more than 100 times larger, more than 250 millions of people, and we search in vain for leadership of that intellectual quality.

As an aside, if you want to play a revealing game at the next dinner party you attend, try this: ask the people at the table that if they were able to anoint a superior man or woman to be the next President of the United States, regardless of party, occupation, age or electibility, whom would they select. You may get a number of superficial responses--like Johnny Carson, Whoopi Goldberg, Joe Montana, Bart Simpson, Dan Quayle, John Sununu--but I doubt that you will readily get a single viable suggestion, not one in the slightest comparable to any of our Founding Fathers.

One is impelled to ask, as Archibald MacLeish did so plaintively: "Where has all the grandeur gone?"

For all its brilliant creativity the original Constitution did not contain any mention of individual rights. The drafters believed that in a country that had fought a bloody rebellion for independence, no authoritative figure would dare restrict personal rights.

But when the Constitution was submitted to the 13 states for their approval, a number of them insisted that a specific bill of rights be added. New Hampshire, New York and Virginia proposed amendments, and North Carolina at first declined to ratify the Constitution until appropriate amendments were voted upon. That is when James Madison adapted his original Virginia declaration on religious tolerance into what became the First Amendment, guaranteeing freedom of religion, speech, press, assemblage and the right to petition the government for a redress of grievances. Thomas Jefferson enthusiastically supported the Madison proposal. In a communication to the Baptist Association, he said: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their

legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."

From that communication came the expression we now frequently recite: a wall of separation between church and state. That wall is still threatened on occasion. Earlier this very month our court had to decide whether prayers were appropriate and permissible in public school ceremonies. As the San Francisco Examiner wrote in an editorial, that issue should have been a slam-dunk, but there were still those, including two dissenters on our court, who insisted there is nothing wrong with injecting religion into public school ceremonies.

It must be remembered, finally, that we Americans are doubly blessed. Not only are we protected by a federal constitution, but the 50 states each have their own basic charter, in the form of state constitutions. In many instances the state constitutions provide more guarantees of individual rights than does the United States Constitution.

For example, here in California, Article I, section 1, of the California Constitution provides not only life, liberty, safety and happiness, but a right of privacy. You will not find a right of privacy specified in the federal document.

Article I, section 4, declares that "Free exercise and enjoyment of religion without discrimination or

preference are guaranteed." And section 8 provides full civil rights for all, in assuring "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

The Founding Fathers of the California Constitution in 1849 and 1879 were acutely aware of the need to assure complete religious freedom and independence from governmental scrutiny and control. And they so provided, as a significant supplement to the First Amendment of the United States Constitution.

There has been a renaissance of federalism in the nation today. One hears considerable rhetoric out of Washington about a return to state and local governments. I am not certain the speakers always mean it, for many laws passed by congress these days call for federal preemption. Nevertheless I am convinced there will be more and more reliance on state authority, and particularly on state constitutions. I hope you will bear that in mind in your future court appearances.

A distinguished legal scholar, Professor Dick Howard of the University of Virginia, recently wrote:

"A study of constitutionalism in the United States is incomplete if one considers only the federal Constitution. That document deserves all the attention we can give it. But

those who drafted it understood that an enduring and viable federal system rested as well on the pillars of the state constitutions. It is through those constitutions that the people of the respective states structure governments closer to them than is possible in Washington. Pluralism and a dispersal of power are among the buttresses of our free society."

In short, with a magnificent federal constitution and its Bill of Rights, and with supportive state constitutions, we can look forward with confidence to the future.

Our founders persisted in the cause of freedom. If the creativity and perseverance they demonstrated has been repeated many times in our history, it is due in no small part to the fact that we live in liberty, that we are free--free to pursue whatever heart can hope or mind can imagine, free to think, free to write, free to work. Perhaps most importantly, free to dream.

While today we are learning to live with automation, in a machine dominated society, we must never allow our minds to become automated, to think merely when programmed, to operate only on selected inputs of information. We must always remember that we are free men and women first. We can do what machines can never do--we can think majestically and dream great dreams. Never be afraid to dream. Remember Browning: one's "reach should exceed his grasp, or what's a

heaven for." There can be progress even in failure and splendor in imperfection if the goals toward which we aim are true and lofty.

Thomas Edison was once reproved for trying out unsuccessfully some 1,200 different materials for the filament of his great dream, the incandescent electric light globe. "You have failed 1,200 times," a regimented thinker of that day chided him. "I have not failed," replied Edison, "I have discovered 1,200 materials that won't work."

Today you achieve a change--a change in status. You receive a diploma which carries with it a presumption that you are educated professional men and women. But this is a rebuttable presumption; it was Galileo who declared, "You cannot teach a man anything; you can only help him to find it within himself." From now on you each must rely on yourself as an individual to constructively employ the tools given to you. If you do, you will find within yourself the joys and satisfactions of knowledge, and with them, a feeling of success and attainment.

To conclude: my warmest congratulations on the achievement this day represents to each member of the class. You have earned the opportunities an emerging future will hold. No matter how complex our society becomes, those opportunities and that future can be exciting, productive, inwardly rewarding, if you do three simple things: one, this

being only a commencement, not a termination, you must make continuing self-education your life-long project; two, you should devote at least part of your time and intellectual resources to serving your fellow men and women, and three, you must insist upon retaining the high moral and ethical standards which our profession expects. I am confident you will do so.