Meanings of Mandela
A Commemorative Event

Sanders Theatre
Memorial Hall
Harvard University

March 11, 2014
4 p.m. – 6 p.m.

Nelson Mandela’s Life and Legacy
“I like the dreams of the future…”

Remarks of
Chief Justice Margaret H. Marshall

1010 Memorial Drive
Cambridge, MA 02138

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“I like the dreams of the future, rather than the history of the past.”

President Faust, Mr. Hutchins, Professor Gates, members of the Harvard community. It is hard for me to capture what I feel at this moment, how honored I am to be here.

The death of President Nelson Mandela on December 5, 2013 sparked a tsunami of tributes to this great man. This afternoon’s commemorative event, some four months later, is a welcome moment in our busy lives when we can pause and reflect more deeply on his lasting contributions to our world.

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The tributes to President Mandela have focused, understandably, on his personal qualities. He was, wrote The New York Times “an international emblem of dignity and forbearance.”

1 “The question most often asked about Mr. Mandela” the Times continued, “was how, after whites had systematically humiliated his people, tortured and murdered

See http://www.nytimes.com/interactive/2013/12/05/world/africa/nelson-mandela-obit-coverage.html?_r=0 (last viewed March 11, 2014)
many of his friends, and cast him into prison for 27 years, he could be so evidently free of spite.”

Mandela, said The Times of India, “was widely respected for his role in fighting racism in [his] country, and for forgiving his former white captors after his release from prison. “He lived reconciliation. He was a great unifier,” said F.W. De Klerk, the white South African President who freed Mandela from prison.

I share in those tributes. Perhaps because here, in the United States, where our nation is so deeply divided on so many issues, where words like “unifier”, “forbearance”, and “freedom from spite” are so absent from our political vocabulary, we are drawn to this man and to this image of him.

Today, I commemorate another great attribute of Mandela: his deep, his profound, his lasting commitment to the rule of law.

“I like the dreams of the future, rather than the history of the past.”


I speak to you as a judge, as a woman, as an immigrant from South Africa to the United States. I speak to you as one whose devotion to the rule of law, and to those who nurture and respect it, originates in my own experience of the arbitrary, often brutal abuse of official power in the South Africa of my early life. And almost no one experienced that abuse of official power more keenly, more intensely than Nelson Mandela. “I remember” President Mandela recalled in an NPR interview in 2004, “we adjourned for lunch and a friendly Afrikaner warder asked me the question,

‘Mandela, what do you think is going to happen to you in this case?’ I said to him, ‘Agh, they are going to hang us.’

‘Now,”’ Mandela continued, ‘I was really expecting some word of encouragement from him. And I thought he was going to say, ‘Agh man, that can never happen.’ But he became serious and then he said, ‘I think you are right, they are going to hang you’.”

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4 -Interview on *All Things Considered*, NPR broadcast, April 27, 2004.
Those of you who grew up in the United States or another democracy may take for granted the central importance of the rule of law, and the principal of equal justice. I never can. Apartheid’s laws had one primary aim: to protect and consolidate the power of the powerful, white South Africans. In the United States, my work as a judge has shown me every day what I sensed intuitively when I first arrived here 48 years ago: the genius of a constitutional democracy, with a government of diffused and balanced power, *limited by a fundamental charter of rights* enforced by neutral, independent judges. In South Africa, Mandela led his country to embrace those values: respect and entrench the values of the rule of law, built on a written guarantee of fundamental rights, enforced by independent judges.

As a keen political strategist, he well understood that the white apartheid government would never agree to a form of parliamentary democracy, where the African National Congress would have – at least initially – the overwhelming number of votes in any new parliament. As the key negotiator before and after his release from prison, Mandela embraced a new constitution, with a charter of rights, and an
independent judicial branch, whose duty it would be to uphold and enforce the Constitution.

Second, a new constitutional court, Mandela knew, would play a critical role in South Africa’s future. The Court consists of eleven judges appointed by the President. The first appointments to the Court had to be widely respected. They were. Drawn from across the political spectrum, his appointments came from all races, and included women and men, and a justice who is blind. As the first Chief Justice, Mandela appointed a brilliant lawyer from the Johannesburg bar, Arthur Chaskalson. Chaskalson, who had devoted his professional career to using lacunae in the existing apartheid laws to secure some basic rights for the majority of South Africans, those who were most marginalized and oppressed by apartheid. Chief Justice Chaskalson, who died in 2012, happened to be white. Under his leadership, the new Court quickly emerged as one of the leading constitutional courts in the world, whose opinions are still routinely cited by other courts, internationally.

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5 At that time (the early 1990’s) few democracies had followed the governance structure adopted by the United States in the late eighteenth century – England was still a parliamentary democracy, and Canada had adopted a charter of rights enforceable by its Supreme Court only in the 1980’s.
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Third, and perhaps most important of all, I vividly recall the moment I knew that constitutional democracy had taken hold in South Africa. In September 1995, before the first free elections, the new Constitutional Court ruled that Mandela's party had violated the new Constitution by establishing election boundaries without enabling parliamentary legislation. This was a stunning defeat for the African National Congress, coming as it did just weeks before that first election. (Recall the pictures of long, snaking lines as millions of people waited patiently to exercise their vote, the majority for the first time). The following day the Associated Press began its story about the court judgment as follows:

"The Constitutional Court handed Nelson Mandela his first major defeat as President on Friday, but instead of reacting angrily, Mandela

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6 In the crush of early business, parliament had delegated to the cabinet the role of promulgating regulations for the first election. The Constitutional Court held this was an unconstitutional delegation of authority of power, and set aside the regulations. Mandela immediately recalled parliament – this is weeks before that first critical election - and parliament passed the constitutionally required legislation. Recollection by Judge Richard Goldstone, March 10, 2014.
called the ruling ‘a victory for South Africa, confirming Mandela said, ‘that our new democracy is taking firm root and that nobody is above the law. This is something of which we should be proud and which the whole of our country must welcome.’”

A new political leader handed a stinging defeat by a constitutional court stands on the steps of Parliament announcing his respect for enforcement of the rule of law, and inviting his country to stand proud. It was a rare moment of constitutional, political leadership in any country.

Mandela continued his open and vocal support for the Constitutional Court. The first major decision of the new Court was to declare the imposition of the death penalty unconstitutional. The ruling was controversial, because the subject of the death penalty had been closely examined in the lengthy constitutional negotiations: in the end the new Constitution had NOT prohibited the death penalty. The following day, F. W. de Klerk, now vice president in South Africa’s coalition transition Government, attacked the Court’s decision. “[T]he overwhelming majority of South Africans support the death penalty” he
said. He was surely correct on that point. His party which had governed the country for decades, would “campaign”, he said, “to reinstate capital punishment”\textsuperscript{7}. The question of amending the constitution to allow for the death penalty should, he said, be put to a referendum vote.

Rather than attacking the Court, or his Deputy, Mandela responded that should be not one, but two referenda questions: first, whether the death penalty should be abolished, and second whether the constitutional provision protecting ownership of land, almost all white-owned, should also be be abolished. The idea of overturning an unpopular, constitutional decision by popular vote was dead.

\textbf{“I like the dreams of the future, rather than the history of the past.”}

Nelson Mandela spoke at the inauguration of the South African Constitutional Court on February 14, 1995. “People come and people go. Customs, fashions, and preferences change. Yet the web of fundamental rights and justice which a nation proclaims, must not be broken. It is the task of this court to ensure that the values of freedom

and equality which underlie our….constitution…are nurtured and protected so that they may endure.”

The Court accepted its role. “There is often a divide between law and justice in the sense that the law prescribes certain actions and the outcome of that is not always just, as far as the individual caught up in the case is concerned”, said Chief Justice Chaskalson in an interview in 2004. “…[The] great challenge today is to try and bring law and justice closer together…that is one of the requirements of our Constitution. If you look at the fundamental values of our Constitution, they entrench dignity, equality, freedom and democracy. So the law should be in line with that.”

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8 See http://www.anc.org.za/show.php?id=3516  (last viewed March 11, 2014)

“I like the dreams of the future, rather than the history of the past.”

Thomas Jefferson wrote these words to John Adams on August 1, 1816. Adams replied: “Your taste is judicious in liking better the dreams of the future rather than the history of the past. Upon this principle I prophesy that you and I shall soon meet and be better friends than ever.”

“I have walked [the] long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb. I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back on the distance I

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\(^{10}\) Thomas Jefferson to John Adams, Monticello, 1 August 1816. To which John Adams replied: “Your taste is judicious in liking better the dreams of the future than the history of the past. Upon this principle I prophesy that you and I shall soon meet and be better friends than ever.” Adams to Jefferson, Quincy, 9 August 1816. See http://www.monticello.org/site/jefferson/dreams-future-quotation, last viewed March 9, 2014

\(^{11}\) Adams to Jefferson, Quincy, 9 August 1816. See http://www.monticello.org/site/jefferson/dreams-future-quotation, last viewed March 9, 2014
have come. But I can rest only for a moment, for with freedom comes responsibilities, and I dare not linger, for my long walk is not yet ended.”¹²

Hamba Kahle, Madiba