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OUR "SACRED" CONSTITUTION — ANOTHER VIEW OF THE CONSTITUTION AS LITERARY TEXT

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Professor Ferguson reminds us that, unlike the Declaration of Independence, the Constitution posited no self-evident truths. He states that between 1776 and 1787 the framers of the Constitution had learned that truth itself was indeterminate.¹ He compares Franklin's comments on signing the Declaration to his comments on the completion of the Constitution,² and he also cites Madison's acknowledgment in *The Federalist No. 37* of the difficulty with which the delegates at the convention arrived at consensus.³ Professor Ferguson is surely right that Madison, and perhaps Franklin, understood that people's perception of truth was influenced by so many factors that no one could be certain that his or her conclusion was correct beyond a doubt.⁴ Like Jefferson, Madison had arrived at that perception well before 1787. It lay at the heart of their arguments for religious freedom in Virginia. Madison articulated it in his petitions against the religious establishment there,⁵ and Jefferson offered a classic statement of it in his *Notes on the State of Virginia*.⁶

However, it is not at all clear that all or most other framers shared Madison's perspective. The whole concept of the evil of faction that pervaded eighteenth-century American thought was based on the notion that there was a public good that could be identified by virtuous people and that disagreement implied faction—that is, the willingness of a particular group to place its in-

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1. Ferguson, "We Do Ordain and Establish": *The Constitution As Literary Text*, 29 WM. & MARY L. REV. 3, 4 (1987).

2. *Id.* at 5-7.

3. *Id.* at 6-7.

4. *Id.* at 4-5.

5. 2 THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901) (hereinafter MADISON).

6. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 157-61 (W. Peden ed. 1954) (1st ed. 1787).

terests ahead of those of the whole. That notion certainly had not disappeared by 1787. George Washington offered one of the classic statements of it in his Farewell Address of 1797, in language authored largely by another framer, Alexander Hamilton.⁷ The fact is, American opinion about how one arrived at political, religious, and (implicitly) other truths was in flux in the 1780s. It may be that some of the framers were consciously trying to impose order on what they knew was a disorderly reality, but I think one would be hard pressed to demonstrate that this was a dominant perception.⁸

Professor Ferguson states that given their recognition of the indeterminacy of truth, the framers understood that they had to “impose” truth—that the Constitution was a “manipulated and manipulative work, . . . the imposed truth of a conscious and philosophically sophisticated elite.”⁹ It is not clear what Professor Ferguson means by using the terms “manipulate” and “impose” here. Does he simply mean that because truth is not “self-evident,” men must struggle as best they can to discover it by reason and then articulate it through language? If so, well and good. Or does he mean something else—that there is no identifiable truth and that therefore all truth is the artificial creation of investigators who must then convince others of it by the manipulation of language? In terms of the Constitution, does he mean that a sophisticated elite, by manipulation of language, imposed its view of truth on a naive public? The implications of this interpretation of Professor

7. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1797, at 213 (W. Richardson ed. 1896).

8. For discussions of post-revolutionary American political ideas suggesting that Americans believed virtuous people could arrive at correct answers to public questions if not seduced into faction, see G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 53-70, 393-429 *passim* (1969), and R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969). The fact that the Federalists made truth a defense to the charge of seditious libel in the Sedition Act of 1798 but plainly intended it to apply to matters of opinion indicates that many of the framers still believed that truth could be distinguished from error with confidence. Insisting that they wished only to suppress malicious falsehoods, they clearly did not accept Madison's view that “the truth of an opinion is not susceptible of proof.” 6 MADISON, *supra* note 5, at 337. See J. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 81-85 passim* (1951); J. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 122-25, 144-46 passim* (1956).

9. Ferguson, *supra* note 1, at 7-8.

Ferguson's position are serious and ought not to receive unthinking assent. All Professor Ferguson seems to be describing is what for several thousand years western civilization has called rhetoric—the art of persuasion by force of expression. Persuasion, of course, is a legitimate element of political life. If the framers persuaded Americans to ratify the Constitution in part through the compelling craft of their language, few would feel that effort illegitimate. "Manipulation" and "imposition," on the other hand, do not impart the legitimacy of "persuasion." To suggest that the Constitution was "imposed" through "manipulation" undermines the legitimacy of its adoption and certainly of its sanction as an expression of the public will.

Through their craft as writers, Professor Ferguson says, the framers were able to establish a sanction for the system devised by the Constitution, despite the indeterminacy of truth.¹⁰ They were conscious of that craft, he insists—not only that building a government required craft, but that the presentation of it was a matter of craft.¹¹ Note the difference. Professor Ferguson cites Adams as "comparing 'the art of lawgiving' to architecture and painting."¹² Now what was Adams saying here? Was he referring to the language of lawgiving or to the nature of the laws themselves? In the instance of establishing government, was he referring to the manner in which its constitution would be presented, or to the structure of the government it created—the necessity for balance, for making sure conception comported with reality in the same way that an architect must make sure that the conception of a structure will bear the stresses imposed in the real world?

As evidence that Adams was referring to the manner in which the Constitution was presented, rather than to its substance, Professor Ferguson quotes him as saying that in the future, "the fabrication of constitutions will be the occupation or the sport, the tragedy, comedy, or farce, for the entertainment of the world."¹³ He argues that this shows Adams' concern with the aesthetics of constitution-framing, the art of couching the document in language

10. *Id.* at 10-12.

11. *Id.* at 10-12, 22-24.

12. *Id.* at 14 (quoting 10 THE WORKS OF JOHN ADAMS 398 (C. Adams ed. 1851)).

13. *Id.* (quoting 4 THE WORKS OF JOHN ADAMS 397 (C. Adams ed. 1851)).

that would promote acceptance and obedience.¹⁴ But the language does not compel that conclusion. Rather, Adams was saying that American efforts to create governments were so remarkable that they were bound to be chronicled in the future. They might be studied ("the occupation") or they might be "the sport . . . of the world," tragedy or farce, depending on how successfully the revolutionary generation completed the task.

Professor Ferguson states that in *The Federalist No. 37*, Madison articulated the indeterminacy of truth, in effect conceding that agreements on solutions to problems were contrived rather than discovered.¹⁵ Madison therefore turned to craft to win support for the Constitution. He stressed the fact of consensus among the framers to provide a sanction for the Constitution, artfully drawing on a myth of the saints.¹⁶ Professor Ferguson is correct that Madison conceded the indeterminacy of truth in *The Federalist No. 37*. Madison did seem to indicate that the fact of consensus among the framers ought to count for something and that a pious observer—Madison did not say he was such an observer—must perceive the hand of the Almighty in the achievement of consensus on such intractable questions.¹⁷ But I do not think that one can cite *The Federalist No. 37* as demonstrating that the framers turned to a myth of consensus among the saints to sanction the Constitution.¹⁸ Madison's point was not that his readers should defer to the framer-saints, but that they should not adhere to their own views so stubbornly as to dismiss the proposed Constitution simply because it did not correspond in all ways with their own personal ideal. Rather, he urged them to remember that the Constitution had to come as close as possible to the ideals of all those who had framed it and would ratify it. He was reminding his readers that they were part of a community. He was urging open-mindedness, not deference. So considered, *The Federalist No. 37* was of a piece with the central thrust of Madison's and Jefferson's political creed—toleration of opinion in religion and politics. In a sense, Madison invited his readers to imagine themselves in the place of

14. *Id.* at 21-23.

15. *Id.* at 8.

16. *Id.*

17. *Id.* (citing *THE FEDERALIST NO. 37*, at 103 (J. Madison) (R. Fairfield 2d ed. 1981)).

18. *See id.* at 24-25.

the framers; in a sense, he invited them to participate in the framing.

Professor Ferguson argues that the framers worked to sanctify the Constitution, to harness religious imagery to make it an object of veneration.¹⁹ He states that the framers projected the miracle of consensus as the "unanimity of the saints" and thus made the Constitution a sacred text.²⁰ But nowhere do the framers refer to themselves as saints. Professor Ferguson himself authors this metaphor, citing Madison's attribution of consensus to the finger of God.²¹ But Madison's religious metaphor is one of the very few one can find before ratification. The only other allusion to God I know of in the *Federalist* papers is Jay's statement in *The Federalist No. 2* that (a very impersonal) "Providence" had been pleased to create an environment conducive to liberty in America.²² There are very few allusions to God in Elliot's *Debates* in the state ratifying conventions—insignificant compared to the attention to other sources of authority, such as history, theory of government, and British constitutional thought.²³ After ratification, however, when Madison and other nascent Republicans charged Federalists with violating constitutional limitations, they urged Americans to venerate the Constitution—to hold its articulation of the boundaries between power and liberty sacred. Professor Ferguson's quotations of Madison's religious imagery are from 1792, when Madison began organizing opposition to Federalism, criticizing Federalist policy for violating constitutional limitations.²⁴ In doing so he was drawing not on an American religious heritage, however, but on the traditional libertarian rhetoric of the eighteenth-century British world, as common in England as in America.²⁵ The purpose was not to sanctify an artificial imposition of order on a disorderly world, but to establish some sanction for constitutional limitations

19. *Id.* at 22.

20. *Id.* at 21-22.

21. *Id.* at 8 (quoting THE FEDERALIST No. 37, at 103 (J. Madison) (R. Fairfield 2d ed. 1981)).

22. THE FEDERALIST No. 2, at 9 (J. Jay) (J. Cooke ed. 1971).

23. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed. 1836).

24. 6 MADISON, *supra* note 5, at 85.

25. J. Reid, The Concept of Liberty in the Era of the American Revolution (unpublished manuscript).

in an era that did not yet perceive the courts to be the force policing the Constitution's boundaries. Indeed, popular commitment to constitutionalism is the single most important sanction for constitutional limitations, and one can argue that continued efforts to sanctify the Constitution are designed to inculcate that commitment rather than merely to iconize the document.²⁶

Finally, Professor Ferguson argues that in referring to themselves as framers, the authors of the Constitution again worked to convey a sense of order, of boundaries around a finished work, as a frame around a picture.²⁷ Although Professor Ferguson does not himself accept what scholars are now calling originalism—the idea that not only must constitutional law be derived from the text of the document itself, but the text must be interpreted in accordance with contemporary definitions²⁸—his stress on its finished, enclosed, limited nature supports that narrow construction.

I think, however, that Professor Ferguson mistakes the metaphor inherent in the word “frame.” Besides defining frame as “an established order, plan, scheme, system, *esp.* of government,” the *Oxford English Dictionary* defines it as “a structure which serves as an underlying support or skeleton,” or a structure “of which the parts form an outline or skeleton not filled in.”²⁹ That is, frame is used in the sense of a framework. It seems to me that when they referred to themselves as framers, Madison and the others were thinking of the Constitution as a frame of government in this sense. Of course, the difference in the metaphors is significant. A

26. While urging the adoption of the Bill of Rights, Madison pointed out to Jefferson the salutary effect on citizens' attitudes of declaring fundamental liberties in a written Constitution. So declared, he stated, they “acquire by degrees the character of fundamental maxims of free government. . . . [T]hey become incorporated with the national sentiment, [and] counteract the impulses of interest and passion.” 6 MADISON, *supra* note 5, at 273. The importance of the Constitution as a symbol has been recognized by legal scholars, even as they lamented uncritical worship. See especially Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937), and Mason, *The Supreme Court: Temple and Forum*, 48 YALE L.J. 524 (1959). For a more positive assessment, see C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 169-72 (1950).

27. Ferguson, *supra* note 1, at 11-12.

28. See Berger, “*Original Intention*” in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Bork, *Original Intent and the Constitution*, 7 HUMANITIES 22 (1986); Meese, *Toward Jurisprudence of Original Intention*, 2 BENCHMARK 1 (1986); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

29. 4 THE OXFORD ENGLISH DICTIONARY 507 (1961).

picture frame is, as Professor Ferguson points out, enclosing and limiting, setting a boundary to a finished canvas.³⁰ A framework is a skeleton, an outline, a structure that establishes the direction for further articulation, at the same time conveying a sense of incompleteness, an invitation to amplify.

The original strength of the opposition to the Constitution developed precisely because the Antifederalists considered the proposal a finished statement. As such, it was hopelessly flawed in the structure it established—especially so because it lacked a Bill of Rights. It was the stress that the Constitution's proponents placed on its openness to amendment that finally saved the day, securing ratification in the crucial states of Massachusetts, Virginia, and New York.³¹ At the time they made the concession, the Federalists do not seem to have considered the proposed amendments an addition to a closed document. On the contrary, Madison originally proposed to incorporate provisions of the Bill of Rights in the body of the Constitution.³²

The incompleteness of the Constitution is plain from the document itself. Its remarkable conciseness, to which Professor Ferguson has alluded, is largely the result of the framers' decision to describe Congress most completely and then to invite it to develop further the structure of the rest of the government. Thus they authorized Congress to decide how to deal with an inability of both the President and Vice President to serve. They referred to executive departments but left it to Congress to establish them, define their responsibilities, and shape their bureaucracies. They placed judicial power in a Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."³³ They even left it to Congress to decide the composition of the Supreme Court and regulate its jurisdiction. A comparison of the United States Constitution with that of almost any state in the Union indicates how much the framers left undone.

The Constitution is a sketch, not a painting. What is perhaps most remarkable about the men who limned that sketch is that

30. Ferguson, *supra* note 1, at 11.

31. See R. RUTLAND, *THE GREAT RIGHTS OF MANKIND* 105-59 (1977); B. SCHWARTZ, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 126-89 (1955).

32. R. RUTLAND, *supra* note 31, at 167; B. SCHWARTZ, *supra* note 31, at 199, 207-08.

33. U.S. CONST. art. III, § 1.

having done so, they turned the palette over to the people of the United States. They beckoned us to join them, just as Madison invited his readers to participate vicariously in the framing. When it comes to the painting that represents the reconciliation of government and liberty, we are all to be the artists.