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"WE DO ORDAIN AND ESTABLISH": THE CONSTITUTION AS LITERARY TEXT

ROBERT A. FERGUSON*

I. INTRODUCTION

The Constitution is many things, but it is first a written text, words arranged for all to read. The text becomes the living Constitution, a metaphor of enduring strength, when past and present unite in the further act of interpretation. It follows that effective interpretation requires a continuity of historical understanding. The language of 1787 must reach the problems of the moment in a way that will satisfy both. At the same time, the actual process of interpretation always begins in the words of the text. The Constitution "lives" in the vitality of its language. Most readers accept these preliminaries as elements of consensus in constitutional interpretation. Arguments begin when specific integrations of past and present create differences about the scope, intent, and construction of constitutional language. They do so, however, precisely because the consensus just noted is less informed than it appears to be.

Constitutional debates ultimately flow from fundamental uncertainties about the vitality of constitutional language. In what manner do the statements of 1787 control the modern nation state? How do original intentions apply to unforeseen consequences? Where are the permissions in clauses that are so deliberately circumspect? Can the Founders be wrong on certain issues? We have learned that such questions do not lend themselves to sharp legalistic distinctions. The answers turn instead on more implicit assumptions about the nature of constitutional language, and these assumptions generally go untested. The purpose of this essay, accordingly, is not to engage in current debates—whatever their

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timeliness or importance—but rather to encourage a re-examination of the underlying assumptions where fears begin.

The nature of constitutional language is a poorly understood subject because so seldom examined on its own terms and in its own context. Arguments about the use of given words have stripped phraseology of its original complexity, the very source of vitality. Readers of the Constitution should remember that writing thrives on a wealth of circumstances well beyond authorial intent. The framers of the Constitution enter Philadelphia as accomplished eighteenth-century men of letters with a large number of specific skills to justify that description. What are those skills and what do they suggest about the presumed capacity of language? What do the framers think they can do in 1787? What is their understanding of the text they strive for, and how does that understanding change in a long summer of debate and documentary exchange? The power of language lies in the particulars of perceived possibilities and in the manipulations and methodologies of style, tone, genre, and substance that expand those possibilities. These elements, properly understood as the Founders' literary skills, represent a neglected source of the living Constitution.

II. THE LITERATURE OF PUBLIC DOCUMENTS

Closer attention to the developing genre of public documents in the Revolutionary era reveals a great deal about the actual craft in such writings. Between 1776 and 1787 the Founders become less convinced about the self evidence of truth. The weakness of the Confederation, growing factionalism, Shays's rebellion, economic depression—the very facts that bring the Founders to Philadelphia in 1787—also make them less certain of agreement and more worried about the textual basis on which agreement might rest. One important consistency, however, remains: the writers of both the Declaration of Independence and the Constitution believe in the text as the basis or foundation of all agreement. Growing uncertainties within this underlying faith create a strange aesthetic of control in the writing of the Constitution. The interpenetration appears most clearly in Benjamin Franklin's famous closures as he signs first the Declaration of Independence and then, eleven years later, the new Constitution of federal union.

Signing the Declaration, Franklin observes, "we must, indeed, all hang together, or most assuredly we shall all hang separately."¹ The Declaration functions as both the artifice behind Franklin's witticism and the artifact of the solemnly sworn policy that he enunciates. The Founders not only hang together, they swear to do so in the Declaration, and their oath guarantees the "facts" they submit to "a candid world."² This oath—"we mutually pledge to *each other* our Lives, our Fortunes, and our sacred Honor"³—is then figuralized or mirrored in the grouped signatures that conclude the document. The world is "candid" because it will accept facts as given and because it will further accept a right of revolution based on them. Facts are submitted, again in the Founders' words, "to prove this."⁴

In 1787, incontestable facts, let alone proofs, are much harder to come by. Placed in the same ceremonial situation at the Constitutional Convention, Franklin achieves a similar certainty in the document being signed but by a far more circuitous route. James Madison describes the event:

Whilst the last members were signing [the Constitution] Doctr. Franklin looking towards the Presidents Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have, said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting Sun.⁵

The world may not have changed for Franklin by 1787, but representations within it surely have. Franklin's assumed text in his anecdote, the artist's painting, is hopelessly ambiguous without a

1. 1 THE WORKS OF BENJAMIN FRANKLIN 408 (J. Sparks ed. 1840).

2. The Declaration of Independence para. 2 (U.S. 1776), reprinted in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 73 (M. Jensen ed. 1976) [hereinafter Jensen].

3. *Id.* at para. 32 (emphasis added), reprinted in 1 Jensen, *supra* note 2, at 75.

4. *Id.* at para. 2, reprinted in 1 Jensen, *supra* note 2, at 73.

5. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648 (M. Farrand rev. ed. 1966) [hereinafter Farrand].

larger context: men can and will differ over whether it depicts a rising or a setting sun just as the delegates themselves have differed in a final argument over whether the new Constitution will mean prosperity and peace for America or anarchy and civil convulsion.

Franklin, in fact, has taken a central role in these last-minute bickerings, and the substance of his contribution has been to raise the prospect of an unavoidable epistemological uncertainty. "For having lived long," he tells the Convention, "I have experienced many instances of being obliged . . . to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment. . . ."⁶ The point of this comment is to encourage his divided colleagues to settle for an "apparent unanimity" where "real" accord is impossible and to urge them to incorporate that subterfuge into the Constitution itself.⁷ Knowing that the delegates are divided, that they *cannot* hang together, Franklin successfully moves that the Constitution be approved "by the unanimous consent of *the States* present,"⁸ the majority of each delegation being for ratification.⁹

In accepting Franklin's "convenient" motion, the Founders see, articulate, and welcome its "ambiguous form."¹⁰ Unanimity is, of course, a lie. Three leading members of the Convention—Edmund Randolph, Elbridge Gerry, and George Mason—refuse to sign the Constitution on the final day of the Convention, and at least three others—Luther Martin, Robert Yates, and John Lansing, Jr.—withdraw earlier because of their unhappiness with the emerging document. The unanimity injected into the language of the Constitution is instead a useful fiction, a myth of glorious harmony that the Founders wield in the ideological struggle to first elicit and then enforce allegiance in the process of ratification.¹¹ Significantly, the notion of unanimity can be mobilized without

6. *Id.* at 641-42.

7. *Id.* at 643.

8. *Id.* (emphasis in original).

9. *Id.* at 641-47.

10. *Id.* at 643.

11. I use the concept of ideology in its formal critical rather than its pejorative sense. It refers to the structure of values and interests that informs any particular representation of

hypocrisy in this fashion because the text itself has been accepted as an inevitable repository of epistemological ambiguities. Philosophical uncertainty, in Franklin's sense, has become a vital source of political flexibility and literary creativity.

Franklin's strangely useful pessimism might appear idiosyncratic but for the fact that it is shared, even amplified, by a far more important leader of the Convention—by James Madison, Father of the Constitution. At issue is how a writer turns a necessarily ambiguous text into an effective tool of ideological conformity within a divided world. Certainly, the whole problem of consensus is a vexing one in Madison's writings. The most famous *Federalist* paper, No. 10, may indeed argue that disagreement and faction will yield to "the extent and proper structure of the Union,"¹² but *The Federalist* No. 37, also from Madison's pen, reveals paralyzing philosophical uncertainties that call the entire realm of human agreement into question. Here, in one of the darkest thrusts of the American Enlightenment, Madison describes three intruding levels of chaos in human existence: "the obscurity arising from the complexity of objects," "the imperfection of the human faculties," and the failure of language itself—"the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment."¹³

When these elements are compounded in the actual process of human perception—"indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas"—we are left with a world of impenetrable "gloom," one filled with "dark and degraded pictures which display the infirmities and depravities of the human character."¹⁴ This world is so impoverished with its "discordant opinions," "mutual jealousies . . . factions, contentions, and disappointments" that Madison's "man of candor" regards mere agreement with surprise and the presumed unanimity of the Constitutional Convention with "won-

reality and to the inevitable process of hegemony by which that representation elicits or enforces allegiance to a given social order.

12. *THE FEDERALIST* No. 10, at 23 (J. Madison) (R. Fairfield 2d ed. 1981).

13. *THE FEDERALIST* No. 37, at 101 (J. Madison) (R. Fairfield 2d ed. 1981).

14. *Id.* at 102.

der” and “astonishment.”¹⁵ Only “a finger of that Almighty hand” can have supplied such a level of understanding in mere men.¹⁶

The point of *The Federalist No. 37* is that real agreement becomes impossible without imposed manipulation and design—a manipulation and design that we can trace to the pen of Madison as easily as he has traced them to the finger of God. The mythic gloss in Madison’s statement trades on the notion that unanimity in the community of saints comes closest to the will of God, but the substructure of his statement, and particularly the metaphor about a guiding finger, suggests how the actual writing of the Constitution involves an aesthetic of conscious control, how the document itself depends on questions of craft and even guile. The Constitution, to turn one last time to the language of *The Federalist No. 37*, operates as a place where “theoretical propriety” and “extraneous considerations” meet and where a molding hand resolves the difference.¹⁷

How are we to know that the Constitution represents a rising and not a setting sun? What is it about the text itself that leads fallible observers to the same conclusion? The rhetoric of the Founders urges us to answer these questions by thinking of the Constitution as the expression of a shared truth devised by the elected representatives of an enlightened people. We are urged, in other words, to mystify the text in question. Quite another set of answers comes to mind if we think of the text as created text, as a manipulated and manipulative work, as the imposed truth of a conscious and philosophically sophisticated elite, as the concrete product of James Madison, Edmund Randolph, James Wilson, and Gouverneur Morris—the four men who actually wrote succeeding drafts from the Virginia Plan of late May, through the Report of the Committee of the Whole in mid-June, to the copy reported by the Committee of Detail in early August, to the Constitution as submitted by the Committee of Style in mid-September. Within this contextual focus, three forgotten elements can be used to illustrate the original vitality of the Constitution as an ideological work: first, the craft within the writing itself; second, the delegates’

15. *Id.* at 103.

16. *Id.*

17. *Id.* at 102.

clear shift in emphasis in the Convention from a working paper that all are free to modify toward a public document that will not bear subsequent intrusion; third, the visual importance of the Constitution as a painting or icon to be viewed in a certain way.

The craft within the document is one of its most ignored features.¹⁸ The Constitution is, among other things, a miracle of concision, emerging as it does from four months of florid effusion and often bitter debate. It contains just five thousand words of the plainest prose cast in a one-sentence preamble and seven brief articles. Neither verbiage, nor allusion, nor admonition interrupts its prescriptive clarity; there is very little linguistic novelty, almost no philosophic innovation, and minimal elaboration. But these evasions are counterbalanced by a series of more subtle commitments. Brief rather than cryptic, the Constitution confirms a familiar past. Every word belongs to the realm of common understanding in eighteenth-century American experience, and many of them are taken directly from the constitutions of the states and from the Articles of Confederation in a reaffirmation of republican principle. In the 1780s the state constitutions are the essential repositories of an American identity. John Adams calls them the true history of an emerging republicanism.¹⁹ Drafter in his own right of the Massachusetts Constitution of 1780, he presents his personal writings as "a specimen of that kind of reading and reasoning which produced the American constitutions."²⁰

Borrowings from the state constitutions are all the more impressive because so discriminating; controversial terms like "national," "republic," and "federal" are carefully circumvented in the framers' document. Then, too, the many generalities of the Constitution lie within a precise arrangement of tone and structure. The seven articles are clearly deployed in descending order of length, concern, and difficulty. The first three articles—on the legislative, executive, and judicial branches—form the crux of the Constitution. Each moves from description of a branch of government into issues of

18. For a more extended version of the analysis in this paragraph and the next, see R. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 59-64 (1984).

19. 4 *THE WORKS OF JOHN ADAMS* 283-85, 292-94 (C. Adams ed. 1851) [hereinafter C. Adams].

20. *Id.* at 293-94.

qualification and selection for office and then to an enumeration of powers and limits.

Sometime in the rearrangement of twenty-three loose articles into the tightened, final version of seven, the framers decide that the document as such should never be opened to re-interpretation. The Committee of Style presents the Constitution's ultimate amendment clause with its stipulations on how subsequent changes are to become "part thereof,"²¹ a phrase subsequently changed to "Part of this Constitution."²² The word "part" in this case means "extension." One need only compare such language with the relevant clause in the Articles of Confederation, which allows for the possibility of "alteration" within the articles themselves.²³ Amendments to the Constitution are added on to a document that remains intact as a text despite every revision. The whole discussion of constitutional change takes place amidst the framers' final decisions to reject calls for a second convention and for the right of the state ratifying conventions to alter constitutional language.²⁴ Their debate deliberately leaves the people with just two alternatives, "accepting or rejecting [the Constitution] in toto."²⁵ "Conventions," observes a spokesman for the majority, "are serious things, and ought not to be repeated."²⁶

Over and over again in the ensuing fight for ratification, the Founders invoke the necessary uniqueness of the Convention to encircle and seal off the language of their document.²⁷ Meanwhile, the Constitution itself mystifies that language in a literal portrait of the new union. The famous preamble turns the people themselves into the authors of the Constitution by conflating the act of writing with the process of ratification. Contrast, on the one hand, "We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish"²⁸ with, on the other, the

21. 2 Farrand, *supra* note 5, at 602.

22. U.S. CONST. art. V, *reprinted in* 1 Jensen, *supra* note 2, at 316.

23. ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA art. XIII, *reprinted in* 1 Jensen, *supra* note 2, at 93.

24. 2 Farrand, *supra* note 5, at 629-33.

25. *Id.* at 646.

26. *Id.* at 632.

27. C. ROSSITER, 1787: THE GRAND CONVENTION 274-98 (1966).

28. U.S. CONST. preamble, *reprinted in* 1 Jensen, *supra* note 2, at 306.

more literal honesty but thoroughly diminished power of the opening sentence of the Articles of Confederation—"To all to whom these Presents shall come, we the under signed Delegates of the States affixed to our Names send greeting."²⁹

The empowering presence of the people in the Constitution is then joined by the specific articles of government to a conclusion that portrays the union on the very face of the document. The signers of the Constitution appear neither in alphabetical order nor by presumed importance of seniority. They are grouped, instead, by state, with the states themselves appearing in geographical order from north to south, starting with New Hampshire in the north and working in sequence through Georgia in the extreme south. The United States thus appear on the page in familiar map form—the perfect icon in answer to Madison's fears about indistinct objects, imperfect perception, and faulty language.

This iconicity becomes literal in the Constitution makers' image of their work and of themselves as "framing" and "framers." Most famously, Madison, in *The Federalist No. 51*, uses "framing a government" to evoke the necessary controls, internal and external, that distinguish a government of men from one of angels.³⁰ The metaphor, a general one in the discourse of the Founders, conjoins act and object, creation and control, regularity and contrivance, with the overarching notion of order as the ultimate source of many different meanings. In Johnson's *Dictionary of the English Language*, "frame" includes "to form or fabricate by orderly construction and union of various parts," "to make," "to regulate," "to invent," and, from the verb, "a fabrick, any thing constructed of various parts or members," "any thing made so as to inclose or admit something else," "[o]rder; regularity; adjusted series or disposition," "[s]cheme," "contrivance," "projection."³¹ The Constitution, the fabric of union, is all of these things, but most particularly it encloses and, thereby, creates form in the midst of a nameless chaos. Without the weaver's fabric, the frame signifies only a void. Alexander Hamilton, no friend to the original plan,

29. ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA preamble, *reprinted in* 1 Jensen, *supra* note 2, at 86.

30. THE FEDERALIST NO. 50, at 160, (J. Madison) (R. Fairfield 2d ed. 1981).

31. A DICTIONARY OF THE ENGLISH LANGUAGE (S. Johnson 1st ed. 1755).

turns these characteristics into the rallying call for ratification when he asks, in the act of signing, "is it possible to deliberate between anarchy and Convulsion on one side, and the chance of good to be expected from the plan on the other[?]"³²

The frame, together with the framers' effort, insists upon what might be thought to be missing: recognizable form. As such, it is both a claim of accomplishment and a rejection of prevalent fears. The belief in boundaries behind the image eases the three central innovations of the Constitution, all of which involve a chilling open-endedness in conventional eighteenth-century political thought. The amorphous and changeable people as the foundation of all authority, the constitutional separation of powers in government, and the sharing of sovereignty between the nation and states do not lend themselves readily to unified form in the early American mind.

Framing is a visual aid for an assumed congruity. The eighty-five *Federalist* papers build around this premise; they argue that the new national fabric is indeed a uniformity woven of apposite parts and not a weak tissue, not a mere contrivance. Inevitably, these arguments require an act of faith to be accepted as proofs in the troubled 1780s. In the ratification process, as Madison quickly points out, *who the framers are* counts for more than *what has been framed*.³³ Of course, knowing and accepting the framers means visual identity. Framing, with all of its literal implications of craftsmanship and method and vision, feeds that identity, and so, in a much smaller way, does a fortuitous parallel in Revolutionary parlance. The transposition of a single letter in terminology lifts the landowning framers into the imagery of a happier and less ambiguous realm—into that proverbial synonym for political sincerity, the nation of farmers.

III. WRITING CONSTITUTIONS

The search for controlling images and other hegemonic devices must be understood carefully. To recapture the conscious manipulation that the Founders bring to the writing of the Constitution is not to question James Madison's famous claim that "there never

32. 2 Farrand, *supra* note 5, at 646.

33. 10 THE PAPERS OF JAMES MADISON 355 (R. Rutland ed. 1977) [hereinafter Rutland].

was an assembly of men, charged with a great and arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them."³⁴ It is, however, to give new depth to John Adams' equally famous claim that the Constitution represents "the greatest single effort of national deliberation that the world has ever seen."³⁵

We need to recover that act of deliberation in its fullest sense. National deliberations rarely develop into intellectually impressive events. This one stands out not just because of the oft-noted genius of its participants but because of their practiced talents as men of letters. Between 1776 and 1784, every state except Rhode Island and Connecticut writes and adopts a new constitution. Seventeen new constitutions in all are written in America during the course of the Revolution, and the very number contains the best key to critical interpretation.

For only in repetition do the possibilities of a genre become apparent. The quantum jump in quality of language and conception between the Articles of Confederation and the Constitution actually occurs step by step in state convention after state convention, and it has as much to do with developing literary skill and the mastery of a new art form as it does with political considerations. Skill appears in the Founders' many shorthand references to state constitutions during debate on the Convention floor; mastery, in their self-confidence amidst every difficulty.

Actual articulations of difficulty illustrate the point perfectly. Madison calls the Constitution "a task more difficult than can be well conceived [sic] by those who were not concerned in the execution of it."³⁶ Franklin compares it to an infinitely complex game of chess in which every move is contested.³⁷ John Adams thinks of thirteen clocks striking simultaneously, "a perfection of mechanism, which no artist had ever before effected."³⁸ In every case, the fact of difficulty gives way to a metaphoric projection of competence and accomplishment. Madison's executor of a task, Frank-

34. 3 Farrand, *supra* note 5, at 551.

35. 6 C. Adams, *supra* note 19, at 220.

36. 10 Rutland, *supra* note 33, at 208.

37. 9 THE WRITINGS OF BENJAMIN FRANKLIN 658-59 (A. Smyth ed. 1907) [hereinafter Smyth].

38. 10 C. Adams, *supra* note 19, at 283.

lin's chess player, and Adams' artist know what to do and how to do it. Thomas Jefferson best captures the self-confidence of 1787 when he writes, "[I]t is a part of the American character to consider nothing as desperate; to surmount every difficulty by resolution and contrivance."³⁹ The combination is illuminating: resolution (an act of will) permits contrivance (the ability to invent order in a crisis).

The Founders take the measure of their own growing ability in the very first speech of the Convention. Edmund Randolph begins his criticism of the Articles of Confederation by exonerating the authors of that document for errors made "in the then infancy of the science, of constitutions, & of confederacies."⁴⁰ Obviously, much has been learned in ten years, since the supposed infancy of 1777. A new sophistication in the science of constitutions, in the knowledge of framing a government, has reduced a series of primal uncertainties. What does it mean to write out a constitution when the ideal model of the British Constitution presumes an unwritten status? To whom does one address such a document amidst raging debates about the locus and feasibility of sovereignty? How and where, precisely, does fundamental law lie upon a page also dedicated to the artificial machinery of modern government?

The many state constitutions that intervene between 1776 and 1787 curb the unfamiliar by placing it within familiar forms. In effect, they bring the Founders to a greater awareness of genre. The delegates at work in Philadelphia in 1787 remain collectively committed to the sequent toil of successive drafts of the Constitution because they share a series of assumptions about the way narrative, form, and style control unruly content. John Adams sees as much in comparing "the art of lawgiving" to architecture and painting.⁴¹ When he also notes that "the fabrication of constitutions will be the occupation or the sport, the tragedy, comedy, or farce, for the entertainment of the world for a century to come,"⁴² we catch a rare glimpse of the aesthetic behind a major literary achievement. Unmistakably, the eighteenth-century American

39. 11 THE PAPERS OF THOMAS JEFFERSON 251 (J. Boyd ed. 1955).

40. 1 Farrand, *supra* note 5, at 18.

41. 10 C. Adams, *supra* note 19, at 398.

42. *Id.* at 397.

writer's originality—entertaining the world—comes in the literature of public documents.

The exact nature and development of the Founders' originality are harder to pinpoint. We can begin by noting that even colonial American constitutionalism differs from its English equivalent in its commitment to the written word. The biblical conjunction of sovereignty and the book of law, the need for an artificially imposed order in the American wilderness, and the politics of Anglo-American relations all encourage a documentation of governmental forms as the reference point of communal identity. Colonial Americans respond to the uncertainty and sheer flimsiness of social forms by inscribing fundamental law more generally, more frequently, more compulsively. By way of contrast, their English counterparts put fundamental law to paper mostly in the form of individual rights and only when faced with an explicit political challenge. Magna Carta and the Bill of Rights of 1689 provide the standard examples. One must think about the difference within a larger continuum: the general act of founding a wholly new society turns an explicit political challenge into an ongoing social norm. In this sense, the artifice of colonial charters, pacts, petitions, ordinances, and constitutions represents a perpetual crisis in definition, a steady search for the words that will complete identity.

As a result, documents like the Mayflower Compact of 1620⁴³ and the Ordinance and Constitution for Virginia of 1621⁴⁴ create social and political structures as much as they assert individual rights. The desire to "covenant and combine ourselves together into a civil Body Politick"⁴⁵ in the first instance, and "to settle such a forme of government"⁴⁶ in the second, requires a psychology of framing. As the Mayflower Compact claims to "enact, constitute, and frame . . . just and equal Laws, Ordinances, Acts, Constitutions, and Officers,"⁴⁷ so the Ordinance and Constitution for

43. 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1841 (F. Thorpe ed. 1909) [hereinafter Thorpe].

44. 4 JAMESTOWN 350TH ANNIVERSARY HISTORICAL BOOKLETS 126-28 (E. Swem ed. 1957) [hereinafter Swem].

45. 3 Thorpe, *supra* note 43, at 1841.

46. 4 Swem, *supra* note 44, at 126.

47. 3 Thorpe, *supra* note 43.

Virginia strives "to make our Entrance, by ordaining & establishing . . . supream Counsells."⁴⁸ Significantly, both documents take the form of a writing upon another writing. As responses in kind to the charters of colonial incorporation from James I, King of England, they engender intertextual tensions, operating at once as glosses on the king's grant and as extensions of it.

IV. THE DEEPEST WORKINGS OF CONSTITUTIONAL LANGUAGE

Taken together, the psychology of framing, the specific language of ordination and establishment, and the textual mediation of power received and power assumed are touchstones in measuring the evolution of a writerly tradition in the literature of public documents. The extent of that evolution becomes clear in any comparison of the concise but magisterial language of the federal Constitution with the prolix, redundant, anxious, and often unreadable prose of earlier official documents through the first state constitutions and the Articles of Confederation.

Compare, for example, the preamble of the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America⁴⁹

with comparable wording, buried in the middle of the Virginia Constitution of 1776:

We therefore, the delegates and representatives of the good people of Virginia, having maturely considered the premises, and viewing with great concern the deplorable conditions to which this once happy country must be reduced, unless some regular, adequate mode of civil polity is speedily adopted, and in compliance with a recommendation of the General Congress, do ordain and declare the future form of government of Virginia to be as followeth.⁵⁰

48. 4 Swem, *supra* note 44, at 126.

49. U.S. CONST. preamble, *reprinted in* 1 Jensen, *supra* note 2, at 306.

50. 7 Thorpe, *supra* note 43, at 3815.

The difference between these passages is a matter of practice. Every writer struggles through lesser works before a masterpiece becomes possible. Just so the Founders prepare themselves in the workshops of congressional and state assemblies. Forty of the fifty-five delegates in Philadelphia already have served in both; half that number have participated directly in the writing of state constitutions and territorial ordinances.⁵¹

By 1787 the Founders have come to understand the deepest workings of constitutional language. The hardest lesson, one that the Committee of Detail articulates, involves simplicity. Edmund Randolph and John Rutledge, for the committee, see the necessity of a scope, style, and tone that will trust to form over detail. As they draft a constitution that will be properly "fundamental," they agree "[t]o use simple and precise language, and general propositions" and "[t]o insert essential principles only, lest the operations of government should be clogged."⁵² This spirit of restraint can dominate the writing process precisely because it claims clarity of form as its goal. Thus, Randolph and Rutledge distinguish sharply between "the construction of a constitution" and the more open-ended enumeration of mere law;⁵³ only the former requires "the shortest scheme that can be adopted."⁵⁴ The accessibility of the Founders' document absolutely depends on this point. The federal Constitution can be twice as clear as its forerunners—the Massachusetts Constitution of 1780, for example—in part because it is less than half as long.

Two other considerations reinforce the literary ability that the Founders bring to Philadelphia. In 1787, a large majority of Americans embrace the institutional arrangement of a national convention as the appropriate forum for considering national union. Then, too, the delegates who attend the Convention conceive of themselves as eighteenth-century gentlemen of letters. The political legitimacy of the Convention insures the high quality of its participants while reinforcing their self-confidence and mutual awareness. Benjamin Franklin, George Mason, and James Madison all

51. C. ROSSITER, *supra* note 27, at 145-46.

52. 2 Farrand, *supra* note 5, at 137.

53. *Id.*

54. *Id.* at 150.

write that they can hope for much from a Convention made up of "the best contribution of talents the States could make for the occasion."⁵⁵ The special nature of that occasion brings out the best in the best. Virtually every delegate perceives a golden opportunity and works that much harder to preserve it when troubles mount. "It is a miracle that we are now here exercising our tranquil & free deliberations on the subject," Hamilton observes in the difficult days of late June.⁵⁶ "It would be madness to trust to future miracles."⁵⁷

The role of the gentleman of letters suggests a more subtle and generally forgotten influence, one that enabled "the best contribution of talents" to understand and thrive upon itself. Much has been made of the Founders' adept use of committee structures, their secrecy and restraint before publication, their willingness to suggest solutions without insisting on personal investment, and their ability to compromise over language. The argument should be made that these characteristics are what one can hope for in the exemplary writers of the time. The true gentleman of letters privileges reason over emotion, writes for a small group of social peers, circulates drafts among those peers for correction, avoids publication until agreement is reached, and leaves his work unsigned. In other words, the very qualities that critics cite as weaknesses in early American fiction, poetry, and drama become strengths in the literature of public documents. The retreat to committee arrangements for compromise reveals only the most obvious of these strengths.

Surely the most remarkable trait of the Convention has to do with the delegation of sensitive writing tasks within committees to obviously embattled figures like Edmund Randolph, James Wilson, and Gouverneur Morris. These men take strong stands in debate on the floor of the Convention, and yet their colleagues can trust them to express something like the general will in the formal act of writing by assignment. The official selflessness of the man of letters is crucial in this frequent behavior pattern. Not until the 1830s do Americans learn for certain that the aristocratic, thor-

55. 3 Farrand, *supra* note 5, at 21, 32, 37.

56. 1 *Id.* at 467.

57. *Id.*

oughly conservative Gouverneur Morris pens the final draft of the Constitution. News of authorship in 1787 surely would have hurt ratification, but Madison, a sometime opponent, knows that the gentlemanly tradition minimizes the danger of publicity and concludes "[a] better choice could not have been made, as the performance of the task proved."⁵⁸ The spirit of the man of letters channels authorial identity into a social or corporate orientation. Madison captures the essence of that spirit later when he adds, "[The Constitution] was not like the fabled Goddess of Wisdom, the offspring of a single brain. It ought to be regarded as the work of many heads and many hands."⁵⁹

Art manipulates the familiar to create the extraordinary. The Founders' deft use of institutional legitimacies, established literary norms, and other regular resources brings them together in what Edmund Wilson calls "the shock of recognition,"⁶⁰ the moment in which genius takes its own measure in order to move beyond itself. Viewed in this light, the Constitution is the ultimate expression of the literature of public documents because, among other things, it represents the crystallization of a genre. When "the many heads and many hands" of the Convention are finished, constitutionalism has taken on a different meaning. By identifying the nature of this transformation, we come closer to understanding the Founders' ultimate creativity as they "ordain and establish" their document over us.

V. THE CONSTITUTION AS SACRED TEXT

John Adams, from hindsight, describes the formative era as "the age of revolutions and constitutions."⁶¹ The phrase contains a vital expectation: namely, that constitutions cap revolutions. By the middle 1780s, early republican leaders have assumed that constitutional forms define revolutionary accomplishment and, thereby, American culture itself. Benjamin Franklin and George Washing-

58. 3 *Id.* at 499.

59. *Id.* at 533.

60. THE SHOCK OF RECOGNITION: THE DEVELOPMENT OF LITERATURE IN THE UNITED STATES BY THE MEN WHO MADE IT v (E. Wilson ed. 1943) (quoting H. MELVILLE, HAWTHORNE AND HIS MOSSES (1850)). "For genius, all over the world, stands hand in hand, and one shock of recognition runs the whole circle round." *Id.*

61. 10 C. Adams, *supra* note 19, at 149.

ton, the Fathers among the Fathers, say as much. Franklin's *Information to Those Who Would Remove to America*⁶² in 1782 shows how firmly the Founders trust the official word: "Those, who desire to understand the State of Government in America, would do well to read the Constitutions of the several States, and the Articles of Confederation that bind the whole together."⁶³

Washington is even more explicit a year later in his farewell to the army or *Circular To The States*.⁶⁴ At the moment of highest victory and celebration, the country's hero warns that "it is yet to be decided, whether the Revolution must ultimately be considered as a blessing or curse."⁶⁵ Political definition must follow military action. The question remains, Washington asks his countrymen, "if we have a disposition to seize the occasion and make it our own" by giving "such a tone to our Federal Government, as will enable it to answer the ends of its institution."⁶⁶ The choice, an act of clarification, is whether "to establish or ruin . . . national Character forever."⁶⁷ Owning history means writing it down "in the Establishment of our forms of Government."⁶⁸ The same language carries easily to the Convention floor just four years later. Madison and Hamilton announce that they are "digesting a plan which in its operation [will] decide forever the fate of Republican Govt."⁶⁹ Gouverneur Morris thinks of himself not just as "a Representative of America" but as "a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention."⁷⁰

The Founders' rhetoric puts enormous pressure on the plan they actually digest. If ordaining and establishing a republican form of government in America at the end of the eighteenth century possesses cosmic significance, then the artifact of ordination and es-

62. B. FRANKLIN, *Information to Those Who Would Remove to America*, in 8 Smythe, *supra* note 37, at 603.

63. *Id.* at 610-12.

64. G. WASHINGTON, *Circular To The States*, in 26 THE WRITINGS OF GEORGE WASHINGTON 483 (J. Fitzpatrick ed. 1938).

65. *Id.* at 486.

66. *Id.* at 485-86.

67. *Id.* at 486.

68. *Id.* at 485.

69. 1 Farrand, *supra* note 5, at 423-24.

70. *Id.* at 529.

tablishment, the document itself, becomes holy writ. The shift that such logic requires occurs naturally enough during the fight for ratification, but the basic transition is already in place in the Philadelphia Convention. In its simplest form, this transition turns the text of the Constitution into a repository of moral value. Republican virtue resides not in the act of clarification, Washington's formulation, but in the clarified result. The Constitution becomes not a symptom of virtue but virtue itself.

John Adams, writing his *Defence of the Constitutions*⁷¹ in the same year, shows the way by insisting that constitutionalism enables virtue and not vice versa. "The best republics will be virtuous, and have been so," he argues, "but we may hazard a conjecture, that the virtues have been the effect of the well ordered constitution, rather than the cause."⁷² Adams and other early republican intellectuals use their readings in British empirical thought to claim that institutions, rather than the manners and morals of a people, guarantee good government.⁷³ What they add on their own in 1787 and after is the notion that a piece of paper, the text of the Constitution, can be construed as such an institution—indeed, the *central* one. The shift involved in this idea is at once simple and subtle: on the one hand, it legitimates a firmer union; on the other, it creates a lasting tension and potential difficulty. From this moment, the Constitution as process lives in competition with a very different notion of the Constitution as artifact, as enclosed institutional form. All subsequent readers face the problem of defining the flexibility of the former within the rigidities of the latter.

On the Convention floor, the projected unanimity of the saints or miracle of consensus literalizes the Constitution as sacred text and central institution. The language of the actual document is deliberately, even obsessively secular. Nevertheless, the Constitution

71. J. ADAMS, *Defence of the Constitutions of Government of the United States of America*, in 6 C. Adams, *supra* note 19.

72. *Id.* at 219-20.

73. Scholars have traced the Founders' stress on institutions to British empirical philosophy in general and to the work of David Hume in particular. See F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 211 (1985); see generally G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981) (general analysis of the importance of Hume).

as artifact enters at once into the ceremonies of an American civil religion, what Robert N. Bellah has termed "a collection of beliefs, symbols, and rituals with respect to sacred things."⁷⁴ This happens in part because of now-forgotten evangelical strands at work in the period. The powerful religious dimensions embedded in the political culture of early America control initial intellectual access to the Constitution in ways that scholars are only beginning to understand.⁷⁵ More important, for immediate purposes, the Founders quickly make use of those dimensions. Their own remarkable success becomes a providential sign, one that dictates acceptance by a republican citizenry in proof of its virtue. When, a month after the Convention, Madison writes that "it is impossible to consider the degree of concord which ultimately prevailed as less than a miracle,"⁷⁶ he means that events transcend every rational prediction of the secular Enlightenment. Miracles partake of the sacred, and they encourage acceptance over explanation.

As they leave the Convention, the Founders make acceptance of the miracle of consensus a test of personal and communal salvation. Washington's letter delivering the Constitution from the Convention to Congress plays upon the point in form, style, and content. Sent "[b]y unanimous Order of the Convention," this letter addresses a particularity, Sir, from the enlarged perspective of the undifferentiated, first-person plural pronoun: "*Sir*, . . . In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union. . . ."⁷⁷ The litany of pronominal possessives conflates Founder and ordinary citizen, "our deliberations" and "our view" referring to the Founders' decisions but merging with "our Union," the perspective of every true American. Washington then alludes to differences that might be expected but that never materialize because of the presence of this true American perspective. In Washington's words, "the Constitution, which

74. R. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 175 (1970).

75. Botein, *Religious Dimensions of the Early American State*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 315-30 (1987).

76. 10 Rutland, *supra* note 33, at 208.

77. 2 Farrand, *supra* note 5, at 666-67.

we now present, is the result of a spirit of amity.”⁷⁸ Those who would disagree with the document must remember that it is constructed out of “mutual deference and concession,” and therefore “is liable to as few exceptions as could reasonably have been expected.”⁷⁹ The acceptable exceptions have been made. A challenge to any part of the final document violates the decorum of amity, forgets “the greatest interest of every true American,” and endangers “prosperity, felicity, safety, perhaps our national existence.”⁸⁰

Washington’s words follow the tactic already traced in the preamble of the Constitution, and they prefigure the Founders’ larger strategy in the ratification debates. Agreement with the document looms as the one acceptable interpretation of it. The people share in the act of writing through the related act of ratification. The Founders contribute to the sacred text of the Constitution by making it scriptural, answerable through assent. With nothing less than national existence at stake, the Constitution as process and the Constitution as artifact become one. How they *apply* as one is perhaps the single most important lesson that the continuity of history can teach in constitutional interpretation. Fortunately, the very ratification process that engenders the Founders’ strategy also creates, in debate, a useful tension between process and artifact. The Constitution lives in the ongoing dialectic of that tension.

Among the Founders, Madison does the most after ratification to keep the sacred text of the Constitution safely within Washington’s spirit of amity—amity, in this case, taking the politicized prefix of unanimity or union. “The citizens of the United States,” writes Madison in 1792, “have peculiar motives to support the energy of their constitutional charters.”⁸¹ The complexity of the American system “requires a more than common reverence for the authority which is to preserve order thro’ the whole.”⁸² In turn, the “great charters” of government are the worthiest objects of reverence because “[a]s metes and bounds of government, they transcend all other land-marks.”⁸³ They are the ultimate sources of

78. *Id.* at 667.

79. *Id.*

80. *Id.*

81. 14 Rutland, *supra* note 33, at 191 (1983).

82. *Id.* at 192.

83. *Id.* at 191.

definition in a culture. As such, texts like the Constitution require more than understanding. The citizen's highest duty is to protect and preserve "the importance of instruments, every word of which decides a question between power and liberty."⁸⁴ Public opinion, Madison concludes, "should guarantee, with a holy zeal, these political scriptures from every attempt to add to or diminish from them."⁸⁵

VI. CONCLUSION

Virtually every aspect of Madison's language of "political scriptures" remains vital in contemporary American ideology. I raise that language not to disagree with it but rather to demonstrate how it must fit within an explicitly text-oriented culture. The amalgamation of political and religious terminology in Madison's discourse is a telling one. From Bible to Constitution to court case, Americans of every century have turned to special writings as the comprehensive and comprehensible units of meaning in thinking about identity and cultural change. Specific, valorized texts have contained the spiritual types, political principles, or legal decisions—sometimes all three—that define reality and allow an appropriate response thereto.

The tensions in a text-oriented approach to America are real and unavoidable. Every attempt to understand the New World has pitted scrutiny of the word against the nature of experience. Resort to a paradigmatic text must also answer conflicting demands, including the search for ideals, the need to substitute language for social forms, and the American compulsion to begin history over again. Traditionally, the greater one's ability to interpret the privileged texts of the culture, the greater one's stature in commenting on the American dream. From the first, the capacity to interpret has enabled the dream. The problem with such an orientation is that it demands a tenacious mastery of the complexities of interpretation as well as the more customary reiteration of ideals.

The Founders' vision of consolidation is literally nothing without their ability to interpret and wield language. James Madison knows as much when, in calling for the "preservation of the [Amer-

84. *Id.*

85. *Id.* at 192.

ican] system [of government] in its purity, its symmetry, and its authenticity," he adds, "this can only be done by a steady attention and sacred regard to the chartered boundaries."⁸⁶ "Steady attention" includes the skill to find authenticity and reconstruct symmetry; "sacred regard" signifies the appreciation of the ideals and the history of continuity that enable vision. Arguably, both are terribly lacking in our own day. A text-oriented culture requires the knowledge of the scholar, the craft of the writer, the sympathy of the accomplished reader, and the tough-mindedness of the political leader to unite in an act of perception and articulation. Only a balanced awareness of the vitality and integrity of language can hope to safeguard the knowledge of chartered boundaries.

An image-oriented culture, increasingly our own, loses these capacities by trivializing them and glossing over the complexity of the combinations. If our regard remains sacred, it often appears superficial, and our attention seems unsteady because less practiced. We have forgotten how to read the Constitution for ourselves in all its generic strength, manipulative brilliance, cunning restraint, and practiced eloquence—the primary qualities that made it possible. Recovery of this lost text should be considered more than an intellectual exercise. When John Adams announces that national virtue comes not from heaven but from the use of reason and the senses in a well-ordered constitution, he understands a well-ordered constitution to be a very difficult thing to comprehend.⁸⁷ Inevitably, preservation requires the same level of understanding. The Founders believe in an absolute connection between personal knowledge and national well-being; the two, together, lead on to virtue. Here, if anywhere, is the positive ideal of the secular Enlightenment, but Adams inserts a characteristic cautionary note that we would do well to remember. If the virtue of this world is easier to assess, history demonstrates that it is also infinitely harder to maintain.⁸⁸

86. 9 THE WRITINGS OF JAMES MADISON 429 (G. Hunt ed. 1910-1911).

87. 4 C. Adams, *supra* note 19, at 291-93; 6 *id.* at 219-20.

88. 6 *id.* at 205-08.