Absent Framers
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Friend: 'You have given us a good Constitution.'

Gouverneur Morris: 'That depends on how it is construed.'

Last year was the year of the bicentennial of the US Constitution. Many celebrations were planned and held, not only in Philadelphia, where the framers had met from May to September in 1787, but in many American cities, large and small. The point of these ceremonial events was not only to recall a moment in the nation's past but also to educate the public about the meaning and value of the Constitution. None of these celebrations, however, served the latter purpose so well as two wholly unanticipated events: the Iran-Contra hearings and the Senate Judiciary Committee hearings on President Reagan's nomination of Judge Robert Bork to the Supreme Court. In both cases national telecasts offered Americans a civic education. They now have a far greater understanding of the Constitution than they could possibly have gained from a dozen or more Bicentennial celebrations.

Judge Bork had a definite opinion about Constitutional interpretation and judicial review. He stressed the necessity, as he put it, 'to establish the proposition that the Framers' intentions with respect to Freedoms are the sole legitimate premise from which constitutional analysis may proceed.' In 1982 Bork objected to use of the equal protection clause of the 14th Amendment 'to protect groups that were historically not intended to be protected by that clause', and he criticised the Supreme Court's efforts to extend the application of the clause to women, arguing that the clause was originally intended only to apply to racial discrimination. Apart from its narrow-mindedness, this interpretative ploy is faced with a special set of difficulties. Moves to uncover the authors' original intentions are frequently frustrated, not because of any lack of ingenuity on our part, but because the text contains so little trace of the concrete proposals the authors had in mind in the first place. More to the point, the Framers may have chosen language which in its simplicity and generality leaves the
interpretation of key terms and phrases open because they did not wish their substantive intentions to settle subsequent efforts to interpret the meaning of the text. As Ronald Dworkin has argued, if they had truly wanted us to be guided by what they specifically had in mind by 'justice', 'cruel and unusual', 'right' and 'wrong', they would not have used such general language, but offered more evidence of their own conceptions: not in great detail necessarily, but they would have done more than name the concepts themselves. This feature of the Constitution's language also makes it compelling to regard the Supreme Court as, in Woodrow Wilson's phrase, 'a kind of Constitutional Assembly in continuous session'.

If we think of the Constitution as a work of fiction and of its central concepts, equality, justice, freedom of speech, as the characters, the authors' relation to the text may not have been so different from that of an author like Jane Austen who, in John Bayley's words, 'set her characters going to see what they might do', or Pushkin, who in the midst of composing *Eugene Onegin* wrote to a friend: 'My Tatiana has gone off and got married. I never would have expected it of her.' No doubt the drafters of the 14th Amendment would have been as surprised to learn that the Court, many years later, found separate-but-equal education to be in violation of the equal protection clause as they would have been by some of the recent affirmative action cases: but the wording of the Constitution and of the Amendments strongly implies that the Framers, like Pushkin, would have been open to the unexpected.

A case can be made and is made convincingly by Robert Ferguson, in Sacvan Bercovitch's collection *Reconstructing American Literary History*, that the Framers' absence from the text was evident from the beginning. Those present at the Philadelphia Convention in 1787 were divided over a number of issues: over slavery, and over what power to give the States and the Federal Government and how to balance the powers among them. It is astonishing that the session did not degenerate into a series of nagging arguments and counter-arguments, that the group was able to produce an enduring document – given what we know about the work of most committees, the results of which rarely last so long. Benjamin Franklin urged the Convention 'to face the world as one body in either [their] "real or apparent unanimity",' stressing time and again the need for consensus through 'joint wisdom'. Singularly absent from the text, he, more than anyone, left his imprint on the final document. One way, perhaps a key way, to arrive at agreement is to be silent on certain matters. Franklin understood the virtue of silence. It was the second of his 13 enumerated virtues. Brought before the Privy Council of Parliament as a Colonial agent in 1774, he 'stands motionless and silent, enduring the wrath and invective of the king's ministers for more than an hour without change of expression or reply'. The Constitution shows signs of a similar restraint. Slavery was guaranteed but the text is silent on the matter. In creating a national federal republic, the Framers did not mention the words 'national', 'federal' or 'republic'. The first pseudonym Franklin applied to himself was Silence Do-good, and it might serve as
epitaph for the Constitution itself, which is marked as much by what the Framers left out as by what they put in.

During the summer of 1787 the various drafts underwent numerous revisions, corrections and emendations. Unanimity required that words be changed, or crossed out; consensus was reached primarily by a process of distillation, reduction and removal. Franklin's consciousness of himself as a writer may indeed best explain why he, in fact, 'made it a rule, as he had already confessed in 1782, 'whenever in my power, to avoid becoming the draughtsman of papers to be reviewed by a public body'. Jefferson did not exhibit the same self-knowledge and when he complained to Franklin during the course of the debate over the Declaration of Independence about the 'degradations' and 'mutilations' of his draft, Franklin was reminded of an incident from which, he said, 'I took my lesson,' and which is, in itself, an allegory of constitution-making:

When I was a journeyman printer, one of my companions, an apprentice Hatter, having served out his time, was about to open shop for himself. His first concern was to have a handsome signboard, with proper inscription. He composed it in these words, *John Thompson, Hatter, makes and sells hats for ready money* with a figure of a hat subjoined; but he thought he would submit it to his friends for their amendments. The first he showed it to thought the word 'Hatter' tautologous, because followed by the words 'makes hats' which show he was a Hatter. It was struck out. The next observed that the word 'makes' might as well be omitted, because his customers would not care who made the hats ... He struck it out. A third said he thought the words 'for ready money' were useless, as it was not the custom of the place to sell on credit ... [The words] were parted with, and the inscription now stood, *John Thompson sells hats.* 'Sells hats!' says his next friend. 'Why nobody will expect you to give them away, what then is the use of that word?' It was stricken out, and 'hats' followed it, the rather as there was one painted on the board. So the inscription was reduced ultimately to 'John Thompson' with the figure of a hat subjoined.

Here the practical business of framing a constitution is neatly and figuratively conveyed. Eager to gain his friends' agreement, the hatter submits his copy for their 'corrections' and 'emendations', only to be left, when all is said and done, with his name and the symbol of a hat. The Constitution is as much sign as text and to it the Framers appended their signatures.

It is one thing, however, to claim that in seeking agreement the Framers used language that was, in the end, open-textured and another that they themselves did not think their intentions should play a significant role in the interpretative process. It is tempting, in fact, to
think that at precisely those points where a text's meaning is open to doubt, we ought to turn to the intent of the author(s).

It is a matter of some significance that the Framers decided on the last day of the Convention (17 September 1787) not to publish any record of their deliberations, deciding instead to entrust all papers to the Convention's President, George Washington. Throughout the summer, too, there was a strict code of secrecy, a 'gag' rule on all those in attendance. No one was to mention a word about the proceedings to anyone outside the Convention. If we expect arguments about Framers' intent to bring the meaning of the Constitution more explicitly to light, the Framers themselves were certainly quite resourceful in making it very difficult, if not impossible, for us to recover their intentions. James Madison, who kept the most extensive notes during the course of the Convention, also refused to publish his journal until after his death – 'or, at least ... till the Constitution should be well settled by practice, and till a knowledge of the controversial part of the proceedings of its framers could be turned to no improper account'. 'As a guide in expounding and applying the provisions of the Constitution,' he continued, 'the debates and incidental decisions of the Convention can have no authoritative character.' Here, from one of the authors of the Constitution, we have direct evidence that the Framers themselves tried to block access to their deliberations, in part, because they did not wish their original intentions to play an 'authoritative' role in subsequent efforts to interpret the meaning of the text. This and the following points have been brilliantly documented by H. Jefferson Powell in 'The Original Understanding of Original Intent' (Harvard Law Review, March 1985).

The Philadelphia Convention had not been authorised to draft a new constitution: rather it was to amend the Articles of Confederation. Against the Anti-Federalist charge that the delegates in Philadelphia had overstepped their bounds and tried to establish a constitution, Madison replied in No 40 of the Federalist that the delegates' powers were 'merely advisory and recommendatory'. The import of the document would have to await its true animus, 'its true makers', the people of the United States represented through the State conventions. As a representative in the first Congress, Madison continued to hold that the delegates to the Convention were 'merely drafters'.

If there are problems with an attempt to recover the intentions of a small group of authors meeting together in the summer of 1787, these problems are now compounded by the practical difficulties of trying to figure out what went through the minds of the representatives who attended the various State conventions. These problems aside, however, it is necessary to note that, having shifted attention away from the understanding of the document shared by those in Philadelphia to the understanding of those who eventually adopted it, Madison did not let the matter rest. He went on to stress that the meaning of the Constitution was determined by an interpretative process that continued long after the
Philadelphia and State conventions had closed their doors.

In one of the earliest discussions in Congress over how to resolve ambiguities of the Constitution, the debate in the House over the resolution calling upon President Washington to hand over the record of Chief Justice John Jay's treaty negotiations with Great Britain, William Vans Murray of Maryland expressed his belief that where there were 'doubts upon some of the plainest passages' of the Constitution it was the duty of a person 'known to have been in the illustrious body that framed the instrument' to 'clear up difficulties' by communicating 'his contemporaneous knowledge'. He wondered why someone who had been present at the Convention did not speak up and share the understanding that was then prevalent with the House. Vans Murray had James Madison in mind in particular. His speech, however, caused Madison to say that his or anyone else's personal impressions of 'the intention of the whole body' were not likely to amount to much and 'were likely in any case to conflict'. But Madison's own views on this matter went beyond his recognition of the problems of historiography or of trying to ascertain the intentions of the Framers as a single body. Some years later he confided to a friend that he was concerned that his awareness of what went on at the Philadelphia and Virginia Conventions might actually be a 'source of "bias" in his constitutional interpretations'.

As President, Madison signed the Second Bank Bill into law even though as a representative in the First Congress he opposed the Bill to establish a national bank. Although he had voted against the First Bank Bill on constitutional grounds, by the time he was required to sign the Second Bank Bill as President he recognised that 'Congress, the President, the Supreme Court and (most importantly, by failing to use their amending power) the American people had for two decades accepted the existence and made use of the services of the First Bank,' and he viewed this widespread acceptance as 'a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning'. The meaning of the Constitution was to be found in a continuing process of interpretation and not in some specific set of intentions injected into the text at its inception. In fact, Madison was convinced that this was the predominant view held by those who attended the Philadelphia Convention: 'It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter ... and that it might require a regular course of practice to ... settle the meaning of some of them.'

So where might the Constitution's meaning be found? To look to the Framers' intentions may be misplaced, not only because the document itself contains evidence that its authors did not wish their specific intentions to fix the meaning of the text, but because the authors held a theory of interpretation that made their intentions obsolete. The Constitution's meaning is to be found in the history of interpretations rather than in what the Framers originally had in
mind. Those we have designated its 'official' readers, the members of the Supreme Court, are not only called upon to interpret what has come before, to get the gist of what judges in the past have said, but must also rise from the reader's chair to preside as authors of opinions that imaginatively project a coherent sequel while pulling together the strands of past opinion. Judges must read the history of interpretations critically to proceed creatively.

A member of the Court is in a position not so unlike that of Henry James, who was asked in 1908 to contribute a chapter to a collaborative novel by 12 authors. The project was organised by Harper's Bazaar and serialised in the magazine before its publication as a single volume. Each author was assigned his or her own chapter; proofs of all succeeding chapters were sent to all contributors. Authors had to take into account the progress of the novel up to their point of entry into the creative process and give some thought to how it might continue. William Dean Howells wrote the first chapter, felicitously entitled 'The Father', and was followed by Mary Freeman, who wrote, after submitting her chapter: 'I began to realise that I must start some action ... and at the same time not diverge from Mr Howells's character descriptions.' James's contribution came near the middle of the book, and although by the time it had come to be his turn a good half of the novel was already in place and he knew he was not absolutely free to write as he pleased, he was 'interested' and 'amused' by what he saw as his task of taking the chapters his prececssors had written and 'making them mean something, giving them sense, direction and form'. (See Phillip Home's review of the novel's reissue in the London Review, 5 March 1987.) Sitting on the bench of the Supreme Court and having to decide a rather difficult constitutional case is, as Ronald Dworkin has recently noted, 'rather like this strange literary exercise'.

Not so long ago Attorney-General Edwin Meese, speaking at Tulane University, stressed the need to keep the Constitution and Constitutional law distinct. To confuse the two, Meese argued, is to court anarchy. 'The Constitution,' he opined, 'is – to put it simply but, one hopes, not too simplistically – the Constitution ... Constitutional law, on the other hand, is that body of law which has resulted from the Supreme Court's adjudications.' In an 11th hour attempt to salvage the Bork nomination President Reagan in a national television address on 14 October last year said: 'Too many theorists believe that the courts should save the country from the Constitution. Well, I believe it's time to save the Constitution from them.' But the Framers themselves never intended the Constitution to be so transparent or their original intent to be decisive. Indeed, they drafted it in such a way as to frustrate our efforts to get back to their original intent, as Robert Bork would have it, or, as Meese puts it, to the Constitution.

By insisting upon a distinction between the Constitution and Constitutional law, Attorney-General Meese offers an opinion that is impossible to sustain, not because of any failure in our powers of refinement, but because the Constitution is to be found in Constitutional law.
This is not a confusion: it is the nature of the enterprise. To confuse the Constitution with Constitutional law, we would have to be able to identify its meaning apart from the history of interpretations, which include the constructions placed upon it by the people through their State conventions. But this cannot be done, not only because the drafters of the Constitution took steps to block efforts to recover their original intent, but because they expected the meaning of key clauses to be settled only by future 'authoritative decisions' and 'judicial determinations'. During the course of his Tulane speech Meese insisted several times that we 'hold onto the Constitution'. But all we have to hold onto is Constitutional law and the history of our interpretations. If a firm grip on something is what we are after, this answer may not be much of a consolation – after all, the history of our interpretations is constantly shifting.

Upon completion of his chapter, the first one of the collaborative novel ambitiously, although perhaps not too inappropriately, called The Whole Family, William Dean Howells asked the editor to convey to each author that 'it is not expected that he or she shall conform rigidly to my conceptions of the several chapters.' By the time James's turn came around he was speaking of making these conceptions 'mean something', and of 'giving them sense'. Unlike Henry James, the Court in Brown v. Board of Education (1954), where it held school segregation to be unconstitutional, was not able to correspond with the authors of the conceptions with which it had to work, and yet it took the conception of 'equality' and 'made it mean something'. If we are made nervous by having only our interpretations to hold onto, we ought to recognise that this nervousness is something from which the Framers did not intend us to be too easily relieved.

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