

55 MEN: THE STORY OF THE CONSTITUTION BASED ON THE DAY-TO-DAY NOTES OF JAMES MADISON. By F. Rodell.¹ Harrisburg, Pa.: Stackpole. 1986 (1936). Pp. 288. \$12.95.

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There is no substantive justification for reprinting this book, first published in 1936 on the eve of the much ballyhooed sesquicentennial of the Constitutional Convention. Professor Fred Rodell does not tell us anything about the Convention or the men who attended it that is not available in more comprehensive, up-to-date, and judicious accounts.³ Professor Rodell's work has been reprinted, presumably, because of the great national celebration of the Bicentennial of the Convention, whose objective, announced by the Bicentennial Commission Chairman, Warren Burger, is "a history and civics lesson for all of us." Rodell wrote the book in exactly that spirit, dedicating it "To The School Children and Politicians—for the same reason."

In 1936 the book may have filled a need. Farrand's short 1913 narrative—a better and more authoritative work—was not in print, and Hendrix's much longer popular book was not published until 1937. At any rate, though the only serious historians who reviewed Rodell's work panned it, reviewers in the popular press liked it. William Seagle, in *The Nation*, said it had "refreshing charm and deceptive simplicity"; Lewis Gannett described it as "lucid and enlightening"; and Harold Laski applauded "the simple way in which the narrative unfolds itself [which] almost conceals the scholarly art with which it is constructed."

Whether Rodell deserved such praise is another matter. My own view is that the book is better understood as a part of our intellectual history than as an accurate portrayal of the founders.

The history of writing about the Constitutional Convention has been authoritatively sketched by James Hutson.⁴ The story begins

1. Late Professor of Law, Yale University.

2. Professor of History, University of Connecticut.

3. Accounts of the Convention are spinning off the presses this bicentennial year. Standard scholarly works are: M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1987 [1911]); C. WARREN, *THE MAKING OF THE CONSTITUTION* (1929). Popular accounts are: R.B. BERNSTEIN & K.S. RICE, *ARE WE TO BE A NATION?* (1987); C.D. BOWEN, *MIRACLE AT PHILADELPHIA* (1966); C. COLLIER & J.L. COLLIER, *DECISION IN PHILADELPHIA* (1986); W. PETERS, *A MORE PERFECT UNION* (1987); C. VAN DOREN, *THE GREAT REHEARSAL* (1948).

4. Hutson, *The Creation of The Constitution: Scholarship At A Standstill*, 12 *REV. IN AM. HIST.* 467 (1984).

in the early years of the nineteenth century when, because of the "obsessively observed" secrecy of the framers, very little was known about the proceedings. The Convention was customarily given scant attention in general American histories, usually preceded by a description of chaos and despair during the 1780s.

Madison's *Notes* were finally published in 1840 as the Abolitionists began an attack on the Constitution, and the dominant interpretation of the mid-to-late nineteenth century depicted the Constitution as a "bloody compromise" with slavery.⁵ The Court's decision in *Prigg v. Pennsylvania* appeared to substantiate this view, and in due course mainstream historians came to see the Constitution as a bundle of compromises, not just about slavery but also about other subjects.⁶

The conservative activism of the *Lochner* era angered progressives and their academic allies, creating a propitious environment for another interpretation of the writing of the Constitution. This one would have to weaken the public's veneration for the document by showing it to be an antidemocratic counterrevolution against the popular excesses engendered by the ideology of the Declaration of Independence and manifested in popular protests culminating in Shays Rebellion.⁷ Appropriate materials were at hand.

In 1871 Henry B. Dawson, the controversial editor of the *Historical Magazine*, suggested that the so-called Critical Period (1783-1787) was not critical at all, but one of unprecedented prosperity. In his view, the Constitution was an unnecessary innovation "fraudulently," "violently and corruptly" foisted upon the masses by a cabal of aristocrats "without any other than selfish or partisan motives . . ." J. Allen Smith, professor of political science at Washington University, provided a scholarly elaboration of this thesis in his *Spirit of American Government* in 1907.⁸ The stage was set for Charles Beard's *Economic Interpretation*.

Beard's thesis that the Constitution was written and pushed

5. For a full canvass of slavery issues at the Convention see D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820*, at chs. 5, 6 (1971). For the most outstanding examples of "Second Reconstruction" interpretations of the Convention see S. LUND, *CLASS CONFLICT, SLAVERY AND THE CONSTITUTION* (1967).

6. See Farrand, *Compromises Of The Constitution*, 9 AM. HIST. REV. 479 (1904).

7. On the public veneration of the Constitution, see M. KAMMEN, *A MACHINE THAT WILL GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

8. "Democracy — government by the people, or directly responsible to them — was not the object which the framers of the American Constitution had in view, but the very thing which they wished to avoid. . . . Accordingly the efforts of the Constitutional Convention were directed to the task of devising a system of government which was just popular enough not to excite general opposition and which at the same time gave to the people as little as possible of the substance of political power." J.A. SMITH, *SPIRIT OF AMERICAN GOVERNMENT* 29-30.

through ratifying conventions by a group of commercially interested men who owned large amounts of public securities, despite the opposition—albeit unorganized—of the much more numerous yeoman farmers, gained fairly immediate and very wide acceptance.⁹ *An Economic Interpretation of the Constitution* was published in 1913. By 1935 thirty-seven of forty-two new college textbooks, Hutson reports, had incorporated the Beardian thesis.

The mid-1930s, of course, resembled the turn of the century in that a conservative Supreme Court sat athwart the Constitution, blocking reform. For many Americans, an interpretation that stressed class conspiracy rang true. Beard spoke to the generation of the Depression even more forcefully than he did to the old Progressives in their waning days just before World War I.

Fred Rodell was very much of that Depression generation. He taught at Yale Law School from the mid-thirties to 1974 and died in 1980. He was tremendously popular among students, and his seminar on writing was always oversubscribed. He is perhaps best known to lawyers for his controversial *Woe Unto You, Lawyers*, first published in 1939 and reprinted in 1957 and again in 1980. His great enthusiasm was going oxen. After publishing a couple of articles in law reviews, the twenty-nine year old professor then wrote *Goodbye to Law Reviews*¹⁰ in which he brashly denounced the law reviews, and legal scholarship generally and announced he would no longer write for the reviews.

Thereafter, Rodell concentrated on writing for the general public. A bibliography of his writings¹¹ lists ninety-five articles in such journals as the *Saturday Review*, *The Reader's Digest*, *The New Republic*, *Harper's*, *Life*, *Liberty*, and *Esquire*. For this he was denied a chair at Yale, an insult he never tired of griping about to anyone who would listen.

One of the most frequent targets of his public criticism was Harvard Law School, and when a debate between two of that faculty and two Yale professors was held, the Harvards refused to step on the stage with him. Someone else was substituted and Charles A. Wright reports that Rodell, seated in the balcony, "was seen to take an occasional swallow from a flask and to mutter from time to time, 'I should be up there.' 'I feel like Juliet,' he said, 'but I expect there are those who think I am more like Banquo's ghost.'"

9. Attacks on Beard began as soon as he published, tailed off in the 1930s and 1940s, but rose again in the 1950s. See R.E. BROWN, CHARLES BEARD AND THE CONSTITUTION (1956); F. MACDONALD, WE THE PEOPLE (1958).

10. 23 VA. L. REV. 38 (1936). See also Wright, *Goodbye To Fred Rodell*, 89 YALE L.J. 1455 (1980).

11. Wright, *Writings Of Fred Rodell*, 89 YALE L.J. 1462-65 (1980).

And, indeed, here is his work, like Banquo's ghost appearing in MacBeard's throne, shrouded in its mantle of economic conspiracy. In reprint fifty years after publication and seven years after his death, this work is more like Rodell's ghost of himself.

Rodell accepts the Federalist—rather than Beardian—view of conditions in 1787: the economy was in a state of collapse; the central government was literally withering away; relations with foreign nations were all to our disadvantage; and worst of all, the state governments were in some cases in the hands of the debtor class and in others unable to put down riots and revolts fomented by that class.

Rodell's picture of the state legislatures as dominated by small farmers who tied the hands of the men they sent to Philadelphia is both inaccurate according to the scholarship of the past generation and internally inconsistent. Most legislatures were controlled by creditor and anti-paper money factions, and the only one that was wholly dominated by the debtor-paper money forces—Rhode Island—refused to send any delegates to the Convention, a policy that would have been more widely followed if more legislatures had been debtor dominated.¹² In any case, several states attempted to balance their delegations with commercial and agrarian/populist representatives, but the populist agrarians refused to attend. Patrick Henry of Virginia is the outstanding example, but Erastus Wolcott of Connecticut and Richard Henry Lee of Virginia are others.

Rodell is so determined to impose a class interpretation on the Convention that he completely distorts the large state-small state conflict: “[I]t was not any vague idea about state rights and state pride that made [the small state delegates] anxious. It was fear of what a national government, run by the big states, might do to the industries, the business, even the territory of the small ones.” This is a serious misreading of the small state position. True, they were not concerned about “vague ideas” of state rights. But they were very concerned about quite specific issues of local control. Over and over again various delegates insisted that the states should retain their regulatory powers.¹³

Rodell missed the central point of the Convention: to adjust

12. My generalization is based on the fact that most state legislatures did not pass laws demanded by the debtor faction. The best scholarly work on this question seems to dispute my statement, but is very complex and, in my view, not conclusive on this point. See J.T. MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* ch. 12 (1973).

13. For example, even such a high nationalist as Charles Pickney said on June 25, “No position appears to me more true than this: that the General Government cannot effectually exist without reserving to the States the possession of their local rights.” Roger Sherman wrote during the ratification debate, “as the different states have different local interests and customs which can best be regulated by their own laws, it should not be expedient to admit the federal government to interfere with them, any farther than may be necessary for the

relations between the states and the national government. As Henry Steele Commager pointed out, Rodell "has managed to write a book about the Convention and the Constitution without once considering, in any intelligent fashion, the question of Federalism . . . [He] has succeeded in missing the most obvious fact about the Federal Constitution, namely that it is a *Federal* Constitution. . . ." ¹⁴ To the extent that Rodell does deal with federalism, he is ill informed, illogical, and confused. He is at great pains throughout his book to demonstrate that the framers were nationalists and that the Constitution was "the framework of national supremacy." "Congress," he wrote, "had been given every power the delegates thought would ever be needed to keep complete control in the central government." And the supremacy clause "should put the states back in their proper places. This should teach them to keep their fingers out of national affairs."

The framers would have rejected such summaries of their work. They thought they had left most governmental power with the states. Madison, after all, left the Convention in a mood of dejection. The Constitution, he informed Thomas Jefferson, will "neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts against state governments."

Rodell's slipshod history is exemplified by his treatment of the full faith and credit clause: "The committee also took a few more shots at what little was left of state independence. Each state was ordered to give 'full faith and credit' to the laws and court decisions of every other state." No responsible historian would write a history of the Constitutional Convention without first familiarizing himself with the old constitution the new one was to replace. The full faith and credit clause found in section 1 of article IV of the Constitution is virtually word-for-word that found in article IV of the Articles of Confederation.

Rodell's one-dimensional view of the framers as "businessmen and manufacturers" (a blatantly unhistorical turn of phrase. Who among the framers or at the ratifying conventions were "manufacturers"?), makes it impossible for him to deal with any issue other than the framers' alleged anti-democratic animus. But democracy was not their concern. "Almost everything that affected what we think of as democracy," wrote Commager in 1936, that is, "suf-

good of the whole." P.L. FORD, *A Citizen Of New Haven II*, in *ESSAYS ON THE CONSTITUTION* 238 (1892).

14. Commager, *Book Review*, 46 *YALE L.J.* 358 (1936). The same issue of *The Yale Law Journal* prints back-to-back reviews of Rodell by Laski and Commager, the former favorable and the latter a blistering put-down. 46 *YALE L.J.* 360 (1936).

frage, representation, social legislation, education, and so forth, was under the control of the States and was left there." And, as Com-mager added, this "initial and grotesque misconception of the purpose of the Convention and the meaning of the Constitution permeates and vitiates the whole of Mr. Rodell's book."

It is legitimate to fault Rodell for failing to see federalism as a central problem of the Convention. Historians had written much on the subject. We cannot fault him, however, for failing to perceive the importance of what many historians of the last generation have seen as equally important: the issue of slavery. During the past two decades the historiography of the Constitutional Convention has been influenced by the great national concern with the race problem, and those writing about the framing of the Constitution see slavery as influencing much of the structure of the document. Not only the 3/5 compromise—a carryover from the Articles—but also the twenty-year prohibition on ending the importation of slaves and the fugitive clause all show the necessity to compromise in the face of demands of delegates from Georgia and the Carolinas. The fugitive slave clause added protections for slaveholders that were not found in the Articles and was the single most pro-slave action on the national level until *Dred Scott*.

Historians in the 1930s—when Rodell was writing—were in the grip of what has been termed "the national consensus" on racism that evolved after the failure of Reconstruction and the rise of Anglo-American imperialism in the 1890s. Rodell, even if he had had any historiographic sophistication, would not have noted the racist core of the Constitution. But by today's lights his slighting of that subject marks the book as archaic.

Rodell's concluding chapter, *What Would They Think Today?*, deals mostly with the Supreme Court as it was behaving in the 1930s. He speaks, thus, to his moment, writing in the shadow of *Schechter* and *Butler*. He faults the Court for relying on the fourteenth amendment instead of the commerce clause in striking down New Deal legislation, and he attacks the Justices for their states' rights stand, since "defending the rights of the states, at the time they wrote the Constitution, was the last thing the founding fathers intended." His principal point, however, is that much has changed since 1787 and "nobody can know what the founding fathers would think today." This conclusion, though based on little historical knowledge and less historiographic sophistication, remains pertinent today.