

COMMENTS ON JAMES OAKES, "THE COMPROMISING EXPEDIENT"

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Professor Oakes's excellent paper convincingly characterizes the 1787 Constitution as a reactionary abandonment of the anti-slavery ethos of the 1776 Revolution that had appeared to set the new country on a course toward the abolition of slavery. "What," he asks, "accounts for the Constitution's failure to promote the cause already pushed so far by the Revolution?"¹ If we could answer this question, we might not only explain the reactionary falling away from the Revolution, but also shed light on the historically parallel phenomena that Oakes identifies at the end of his paper—the abandonment of the emancipatory impulse from the Civil War and the first Reconstruction "by a sustained political reaction" that lasted far longer than the radicalism of the 1860s² and the shift in our time from the comparatively lesser achievements of the so-called Second Reconstruction of the 1960s, to a reaction that "has gone on now for a quarter of a century and . . . shows no signs of slowing down."³ Indeed, I would say not only that the reactionary process has not slowed down since 1970, but it has recently gathered new speed in the electoral triumph of the Gingrich-Republican "Contract With America"—which some have called the "Contract on America" and which I would call the "Contraction of America."

Professor Oakes is understandably and appropriately cautious in offering any sweeping answer to explain this recurrent cycle of ten years or so of high emancipatory commitment followed by prolonged reactionary abandonment. The most striking characteristic he identifies in the 1787 Constitutional Convention is the delegates' almost universal silence, their failure to even acknowledge their distance from and disavowal of the antislavery ethos of the Revolution. This creates a special problem of historical explanation, Oakes says, because "[i]n the end, there is no satisfactory way for historians to explain silence."⁴

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¹ James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 *CARDOZO L. REV.* 2023 (1996).

² *See id.* at 2054.

³ *See id.*

⁴ *See id.* at 2032.

I am not a historian. I am a lawyer who dabbles in history. My professional calling certainly does not equip me better than Professor Oakes to “explain a silence.” Silence in itself, it seems to me, is one phenomenon that is peculiarly beyond any lawyer’s professional understanding. But since the organizers of this Symposium have asked a lawyer to comment on a historian’s paper, I propose to take advantage of a well-known lawyerly characteristic and offer some loose-tongued speculations about the possible answer to the question that Professor Oakes has posed, but carefully and appropriately did not claim to have definitively resolved.

My own speculations build from the base proposition that Oakes’s paper convincingly lays down: the proposition that the framers of the 1787 Constitution did not reluctantly bow to the deep South slave states’ demands that there would be no Union unless slavery was protected. Instead, the Constitution rested on a more general conviction—a conviction so widely shared among the delegates that it required virtually no discussion—that the institution of slavery must not be disturbed.

Why should these sons of the American Revolution have so firmly and quickly come to this conclusion? I suspect an answer can be found in the very phenomenon that gave impetus to the anti-slavery ethos of the Revolution itself—the close social identification between black slaves and white colonists that had been forged in the mind of the whites during the years immediately leading to the Revolution. One of the most striking characteristics of the pre-Revolutionary rhetoric was the colonists’ repeated references to themselves as “slaves” within the British Empire.⁵ This constant refrain had a hypocritical and even an absurdist quality—a quality that was not lost on contemporary critics. Samuel Johnson famously observed, “how is it that we hear the loudest yelps for liberty among the drivers of Negroes?”⁶ But the white colonists did, I think sincerely, believe that their oppression at the hands of British imperial masters had much in common with the oppression of black slaves in their own colonies.

The imagined parallels were not forgotten by 1787. James Madison, probably the most clear-sighted thinker at the Constitutional Convention, was quite explicit about this in notes that he

⁵ For examples of this accusation from diverse colonial sources, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 102, 107, 111, 119-20, 122, 125-26 (1967).

⁶ SAMUEL JOHNSON, *Taxation No Tyranny*, in SAMUEL JOHNSON’S *POLITICAL WRITINGS* 454 (Donald L. Greene ed., 1977).

wrote in 1791 and 1792. He wrote “[t]he danger of oppression to the minority from unjust combinations of the majority . . . is illustrated by various instances.”⁷ He then proceeded to list eight such instances, including “the conduct of G[reat] B[ritain] towards Ireland, of d[itt]o towards America, . . . by the case of Debtors & Creditors in Rome & Athens [and] By the case of Black slaves in Modern times.”⁸ But unlike the American colonists who widely trumpeted this imagined equivalency in their campaign against British authority, Madison never published this observation; it remained in working notes, buried among his private papers, which were not published until some 150 years after his death.

As Professor Oakes observed, it is difficult to know what to make of silence. But I would speculate that Madison’s failure to publish his private observations about the equivalences in the oppression of Black slaves, white colonists, and commercial creditors in ancient Rome and Athens was not an oversight. I would speculate that he thought it dangerous to acknowledge these equivalencies publicly. Madison’s silence suggests the danger that he and his fellow delegates perceived in the very empathic identification that just a few years earlier had led their fellow revolutionaries to embrace the antislavery ethos, not just for themselves but on behalf of black slaves in their own country.

The danger arose—to speak sweepingly—from the fact that it is very difficult to confine the impulse toward liberty—the widespread popular conviction that customary social and political oppressions are now suddenly intolerable and must be remedied. There is a powerful, generalized, anarchic impetus in this belief, an impetus that we know was of particular concern to Madison.⁹ But he was not alone in this concern.

We would expect this concern to be most acute among those with the most to lose from any generalized social-economic uprising—such as the elite men who drafted the 1787 Constitution. This charge has, of course, been a standard basis for the unmasking of the Founding Fathers, at least since Charles Beard at the turn of

⁷ JAMES MADISON, *Notes for the National Gazette Essays*, in 14 THE PAPERS OF JAMES MADISON 160 (Robert A. Rutland et al. eds., 1981).

⁸ *Id.*

⁹ For Madison’s retrospective observation about the riskiness of the Revolution itself, see THE FEDERALIST No. 49, at 338 (James Madison) (Jacob E. Cooke ed., 1961). “[There is] danger of disturbing the public tranquillity by interesting too strongly the public passions. . . . Notwithstanding the success which has attended the revisions of our established forms of government, . . . the experiments are of too ticklish a nature to be unnecessarily multiplied.” *Id.* at 340-41.

this century.¹⁰ But I think the perception of danger goes deeper than this. The social and intellectual elite may be most inclined toward, and most adept at, articulating this sense of spreading anarchy. But the middling folks quite readily come to see their own small stakeholdings equally endangered.

For these people—the people who today would call themselves the moral majority—the question becomes, notwithstanding all of their social grievances, are they truly the wretched of the earth, with nothing to lose if existing social arrangements are uprooted? Or can they instead take comfort in the conviction that, as unhappy as they may be with their vulnerability and the manifest injuries inflicted on them by their social superiors, there are others nonetheless more wretched than they? If the great middling mass can take comfort in this comparison, it becomes a short step for them to see that they have a definite stake in ensuring that others remain more wretched than they—and visibly, ostentatiously so. This has been the special fate—the terrible burden—of black people in the long course of American history: to embody the wretched Other for everyone else, sometimes as the objects of empathic identification, sometimes—and more often—as the objects of repelled differentiation.

That is the link that I see not only in the cycle from the emancipatory high point of 1776 to the reaction of 1787 but also, as Oakes has drawn the parallel, from the emancipatory moment of the 1860s to the reaction of the Gilded Age, from the moment of *Brown v. Board of Education*¹¹ and the Civil Rights Acts of the 1960s to the rapid and still escalating Contraction of America. In each instance, the emancipatory moment was characterized by a strong identification by a substantial group of whites with the oppressed status of blacks and a commitment to assuage these shared oppressions—not just the eighteenth century white colonists who saw themselves as the slaves of Great Britain, but the Northern “free soil” advocates of the mid-nineteenth century who saw their status as free laborers threatened by the territorial spread of black slavery,¹² and, in the mid-twentieth century, the extraordinary numbers of different groups who came to see themselves, like blacks, as oppressed “discrete and insular” minorities, such as Jews,

¹⁰ See CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (depicting the economic self-interest of the Founding Fathers as their dominant motive in drafting the Constitution).

¹¹ 347 U.S. 483 (1954).

¹² See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).

women, gays and lesbians, and physically and mentally disabled people.¹³ But from each of these emancipatory high moments, in the short space of a decade or two at the most, the empathic identification came to be perceived as “too close for comfort” for large numbers of previously sympathetic white people, and their sense of shared identity with black people was not just abandoned but forcibly suppressed from awareness.

Professor Oakes’s paper tells a sad story of one of these epochs, of the falling away from the antislavery ethos of our Revolution. If my speculative gloss on his story has any plausibility, it does not diminish the sadness of that story. It makes it sadder still, because my speculation suggests that the very force that initiates the emancipatory impulse, the close sense of identification between oppressed minority and the sympathetic majority, is in the end the very force that undoes the impulse itself. The close identification quickly becomes perceived as dangerous, anarchic, “too close for comfort.” Thus, the cycle of brief emancipatory impulse and sustained negative reaction seems to endlessly repeat itself. There may be some progress in all of this: both slavery and officially imposed race segregation was finally abolished. But nonetheless, as Professor Oakes has shown from the very foundation of our Republic, this impetus does not sustain itself and the story overall is sad and sobering.

¹³ See generally David A.J. Richards, *Abolitionist Feminism, Moral Slavery, and the Constitution*, 18 CARDOZO L. REV. (forthcoming 1996).

