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REASSESSING THE HISTORICAL FOUNDATIONS OF ORIGINALISM

Lee Borocz-Johnson*

JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (HARVARD UNIVERSITY PRESS 2018). Pp. 464. HARDCOVER \$35.00.

SHLOMO SLONIM, *FORGING THE AMERICAN NATION, 1787–1791: JAMES MADISON AND THE FEDERALIST REVOLUTION* (PALGRAVE MACMILLAN US 2017). Pp. 273. PAPERBACK \$29.99. EBOOK \$19.99.

The two books under review focus upon the framing, ratification, and coming into effect of the United States Federal Constitution, but in very different ways. James Madison is a central player in both stories, and each book in its own way testifies to the continuing fruitfulness of studying the political and constitutional thought of James Madison, particularly in the wake of historian and legal scholar Mary Sarah Bilder's important recent book *Madison's Hand: Revising the Constitutional Convention*.¹ James Madison has become an important focal point for reevaluations of the American founding era and the framing of the Constitution, and these reevaluations are of interest to legal scholars and political scientists as well as historians.

Shlomo Slonim presents in *Forging the American Nation, 1787–1791: James Madison and the Federalist Revolution* an account of James Madison's role during the founding era in devising and advocating for a model of a strong central government vested with expansive powers and a large degree of supremacy over the states. Slonim's story begins with the confederation period, expounding upon Madison's views of the failure of the Articles of Confederation to establish a sufficiently strong central government, and then runs through the Philadelphia convention, the ratification debates, and the first congress. Slonim's central thesis is that a "federalization process"² took place during the

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1. MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015).

2. SHLOMO SLONIM, *FORGING THE AMERICAN NATION, 1787–1791: JAMES MADISON AND THE FEDERALIST REVOLUTION* xv (2017). It should be noted that Slonim makes a point of indicating that he came upon Bilder's

drafting and ratification of the United States Constitution, a process by which Madison's scheme for a robust, powerful government as laid down in the Virginia Plan was reined in and shored up throughout the Philadelphia Convention, the ratification debates, and the First Congress. At the convention, this "federalization" was the result of politically necessary compromises made with two blocs of states, i.e. slave states and small states, which were both wary of Madison's vision of a very strong, broadly empowered central government with the ability to veto any state legislation.³ Slonim conceives of the slave states and small states as collective interest groups in order to emphasize his contention that states-rights arguments played virtually no part of the federalist system devised at the Philadelphia convention, an important point for his argument at the end of the book about federalism and the original meaning of the Constitution.⁴ Compromises with these two state blocs at the convention were followed by compromises with antifederalists during the ratification debates, which led to the adoption of the Bill of Rights.

Slonim positions the doctrine of implied powers as the driving force in his story. During the Confederation period, Madison tried to argue, to little avail, that the Articles granted implied powers to the Congress,⁵ and in the lead up to the Philadelphia Convention he and his Virginia colleagues had crafted the Virginia Plan precisely so as to grant the central government the wide latitude of implied powers that it effectively lacked under the Articles. Slonim argues that it was the slave states, in particular, who were antagonistic to wide government latitude and who worked to restrain the aspirations of Madison and his colleagues. On Slonim's account it was the compromises over the precise form that the central government would take, and which powers would be vested in it, that created the federal structure of the United States government. Importantly for Slonim, the judiciary was not the key to the federal structure of government devised by the Philadelphia convention. The judiciary was, according to Slonim, a by-product and a partial stand-in for Madison's proposed veto power for the central government over state legislation, an important product of the "federalization process," but not a component of American Federalism.⁶ Slonim's aim is to demonstrate that federalism was built into the Constitution by means of the "federalization" of the legislature.

Much of Slonim's argument in chapters three through five consists in showing how the familiar compromises over the legislature "federalized" the constitutional vision of Madison and his colleagues, and how they subsequently shored up their vision of a powerful central government in the wake of these compromises. Small states were wary of a strong central government in which the legislature would be constituted in proportion to population, a proposition which they saw as guaranteeing that they would always be dominated by the large states—thus the Connecticut Compromise, creating a senate in which each state would be represented equally. According to Slonim, the contributions of

Madison's Hand after his book went to press, and thus he could not incorporate Bilder's findings into his argument. *Id.* at xx.

3. *Id.* at 2.

4. *Id.* at 41.

5. *Id.* at 17 n.10.

6. *Id.* at 71. Slonim's account is thus counter to ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

the small states to “federalization” are much better known than those of the slave states.⁷ The slave states successfully shored up their own power and influence by means of the Three-Fifths Compromise, which increased their representation in Congress by having three fifths of their enslaved population count for purposes of congressional representation. Further, both slave states and small states pushed for the electoral college as a means of ensuring that their enhanced representation in congress would translate into enhanced power in electing an executive.⁸ Madison and his centralizing colleagues, some of whom professed opposition to slavery and its continuation, were willing to make these compromises because they saw them as the only means of holding the union together, and holding the union together was more important than getting rid of slavery.⁹

For Slonim, the elements of federalization of most direct importance were the rejection of Madison’s proposed congressional veto power over state legislation and the enumeration of the powers of the federal government.¹⁰ The slave states, particularly the two southernmost (Georgia and South Carolina), were pivotal in this rebuke of Madison’s vision of a strong central government. Slonim emphasizes the necessary and proper clause, the supremacy clause, and the judiciary as stand-ins for the veto and as hedges against the restricted latitude of federal government power consequent upon the enumeration of powers in the Constitution.¹¹ For Slonim, these things shored up a strong central government, and even though Madison considered the convention a failure in its immediate aftermath, largely as a result of the rejection of the veto, the antifederalists in the ratification debates nonetheless honed in on the necessary and proper clause as granting the central government precisely the kind of indefinitely wide range of power that Madison had been pushing for, and they began demanding a Bill of Rights for protection against such strong government power.¹² In chapters six through ten, Slonim narrates select episodes from the ratification debates and argues that Madison’s push for the Bill of Rights in the first session of congress was motivated by his fear that a second convention would be called if Congress failed to pass a Bill of Rights.¹³ For Madison, a second convention was a real possibility on account of New York having, upon its ratification of the Constitution circulated a letter raising the possibility to the other states. For Slonim, Madison’s success in pushing through a Bill of Rights saved the Constitution from its detractors by assuaging their fears of broadly empowered government, while also preserving the energetic government, which he had done so much to fight for in the convention.¹⁴ Madison successfully kept the word “expressly” out of the Tenth Amendment, thus ensuring that the powers delegated to the United States by the Constitution were understood to include implied powers, granting the government the wide latitude that Madison had been advocating for since the confederation period.¹⁵

7. SLONIM, *supra* note 2, at 33–39.

8. *Id.* at 34, 38.

9. *Id.* at 39.

10. *Id.* at 33–45.

11. *Id.* at 33–51.

12. SLONIM, *supra* note 2, at 33–51.

13. *Id.* at 105–95.

14. *Id.* at 163.

15. *Id.* at 195–204.

There is much in Slonim's account that is very familiar in terms of the political controversies which precipitated the Philadelphia Convention, the drafting of the Constitution, and the debates over ratification which followed. The chief merit of this study is Slonim's clarity and concision in painting a picture of Madison's project of pushing for an energetic central government from the Confederation period through to the beginning of the first congress as one of the central driving forces of the forging of the American nation (to allude to the book's title). The use of implied powers as the conceptual nexus around which Madison, his compatriots, and their adversaries confronted one another throughout this period is convincing, especially in light of the way Slonim depicts the political stakes of implied powers for the various interests groups involved in drafting the Constitution. Slonim's claims that American Federalism arose at the Philadelphia Convention, not from any particularly strong advocacy for states' rights, but instead from slave states and small states working as coalitional interest groups, may well spark some discussion.¹⁶

And yet this study is not without its drawbacks. In terms of his source base, Slonim sets aside *The Federalist*, saying that scholars have too heavily relied for their explanations of American Federalism on what is essentially a series of polemical essays written in the context of the ratification debates in New York. He opts instead to explain the origins of Federalism through Max Farrand's classic *Records of the Federal Convention*,¹⁷ which he argues scholars have not examined carefully and systematically enough.¹⁸ It is easy to grant the first point about scholarly overreliance on *The Federalist* in explaining just about any aspect of the founding period, although Slonim does not illustrate this point or position himself relative to other scholars in his introduction. But the familiarity of a great deal of Slonim's account of the Philadelphia Convention makes it unclear exactly what new evidence he turns up from Farrand's records. Slonim could have signposted more in this regard. One area where he does claim to have gathered new insight is his argument for the central role that slave states played in the "federalization" process.¹⁹ His argument is good, but he does not account for David Waldstreicher's *Slavery's Constitution: From Revolution to Ratification*, which covers this precise subject comprehensively.²⁰

Additionally, Slonim's postscript leaves much to be desired in terms of unfolding the implications of his argument for American constitutional history and theory. Slonim expounds a version of originalism which envisions the original meaning of the Constitution as consisting primarily in the very strong powers which Madison and his compatriots fought so hard to preserve within it. For Slonim, the literature of the ratification debates (and therefore *The Federalist* papers) is not a legitimate source base to turn to in order to ascertain the original meaning of the Constitution—this can only be done with the records of the Philadelphia Convention, which produced the document.²¹ On this account, not even Madison after he entered Democratic-Republican opposition to

16. *Id.* at 31–51.

17. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1 (Max Farrand ed., 2d ed. 1966).

18. SLONIM, *supra* note 2, at xvi.

19. *Id.* at 33–39.

20. DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009).

21. SLONIM, *supra* note 2, at 31–51.

the reigning Federalists in the 1790s was a good originalist. Slonim picks out as one of the more important implications of his version of originalism the logical incompatibility of an originalist reading of the Constitution with states' rights theories which depict state and federal sovereignty as coequal and each untouchable by the other.²² Slonim additionally asserts that he has put to rest the ghosts of the Beardian and neo-Beardian theses of the American founding, though he gives no adequate explanation of how he thinks he does so or of what the stakes are in doing so.²³ All of these things in Slonim's postscript should have been developed at greater length, but the book remains useful for its brevity and its facility in presenting with great clarity some of the more important conceptual and doctrinal issues that structured constitutional debate during the founding era.

Jonathan Gienapp's study presents a radically different account of the making of the United States Constitution. For Gienapp, it is a problem that "virtually all accounts of the Constitution's construction privilege the events and debates of 1787 and 1788,"²⁴ as this kind of account "has tended to draw a categorical line between the pre- and post-1788 periods,"²⁵ a line which Gienapp makes it his task to dissolve. Gienapp argues that "when the Constitution was born, it was unclear what kind of thing it was. Accordingly, it was not fully created when it was written or ratified."²⁶ He elaborates that the Constitution "has been defined not simply by its words or its structure, but by a set of core characteristics that—by delineating what kind of object it is and, from there, what kind of contents it possesses and what kind of authority it wields—afford it definitive shape and substance."²⁷ But, and this statement forms the basis of Gienapp's project, "[t]he Constitution was born without many of its defining attributes; these had to be provided through acts of imagination."²⁸ "Constitutional imagination" is a key phrase in Gienapp's argument, much of which takes shape around intricate analysis of how crucial actors imagined the fundamental nature of constitutions generally and the United States Federal Constitution in particular, and the ways that these imaginings shaped peoples' specific sense of how the United States should operate under the authority of the Constitution.²⁹

For Gienapp, the most salient "defining attributes"³⁰ of the Constitution as we imagine it today (and as, so most originalists would probably claim, everyone in the founding generation imagined it) are that the entirety of its prescriptive content is fully contained within its text; the government established by the Constitution must be entirely structured by and work within the prescriptions of this text, and these prescriptions and their meanings are to be ascertained by simply interpreting the text, and looking to some

22. *Id.* at 105–19.

23. This calls back to his brief debate with Gordon Wood. *See generally* Shlomo Slonim, *Motives at Philadelphia: Gordon Wood's Neo-Beardian Thesis Reexamined*, 16 L. & HIST. REV. 527 (1998); Gordon Wood, "Motives at Philadelphia": A Comment on Slonim, 16 L. & HIST. REV. 553 (1998); Shlomo Slonim, *Rejoinder to Gordon Wood*, 16 L. & HIST. REV. 563 (1998).

24. JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 3 (2018).

25. *Id.*

26. *Id.*

27. *Id.* at 3–4.

28. *Id.* at 3.

29. GIENAPP, *supra* note 24, at 3–4.

30. *Id.* at 4.

relevant archival source base (i.e. the records of the Federal Convention, the ratification debates, etc.) when it is not clear how a part of the text should be interpreted.³¹ In a word, the nature of the Constitution, and with this, the guiding assumptions about how its authority should be understood, its text interpreted, and political action justified on its basis, are “fixed.”³² More specifically, this “fixity” is characterized by Gienapp as “archival”—that is, the Constitution is fundamentally a complete, written text, tied permanently to a given set of archival documents which help clarify and confirm the meaning which it already has, but which it does not need in order to be complete and sufficient unto itself.³³ It is not susceptible of having its meaning altered, transformed, or supplemented, except by means of its own provisions for its amendment.³⁴ Gienapp argues, with notable success, that this constitutional imagining of “fixity” only took shape and came to define the fundamental nature of the Constitution in the wake of the development, by fits and starts, within the United States Federal Government (the early records of the House of Representatives provides Gienapp’s source base) of ways of justifying political positions on the basis of notions of fixity which were at first inchoate.³⁵ It is not at all clear, in 1790, that fixity would come to be the dominant mode of imagining the Constitution.³⁶

Gienapp’s argument is presented in two main stages. The first consists of two lengthy chapters that survey in a panoramic yet concise way the wide range of elements of constitutional imagining at the discursive and practical levels at work in the British Atlantic World in the seventeenth and eighteenth centuries. Gienapp demonstrates that most American colonists, up to, during, and after the break with Britain, imagined constitutions as entities which were simultaneously “fixed yet changing.”³⁷ Constitutions established “dynamic, interlocking systems of power,” but such systems of power were not rigidly constrained in their nature and operation by constitutions, and these systems could transform and develop in ways that would change the constitution itself.³⁸ The lines between constitutions and the systems they established were blurry. The “fixed principles” which could be brought forth to justify such transformations could be derived from multiple sources not contained within the constitution itself (natural law, moral and social philosophy, common law, etc.) but which could legitimately dictate actions not prescribed by the constitution in accordance with purposes for the existence of government that transcended any kind of constitutional structure.³⁹

The North American colonists’ constitutional experiences were uniquely inflected by living under written colonial charters while at the same time they claimed birthright British constitutional liberty.⁴⁰ They lived under layers of imperial and legal authority

31. *Id.* at 1.

32. *Id.* at 4.

33. *Id.* at 10–11.

34. GIENAPP, *supra* note 24, at 144.

35. *Id.* at 11.

36. *Id.* at 8–15.

37. *Id.* at 23, 34.

38. *Id.* at 23.

39. GIENAPP, *supra* note 24, at 27, 28, 34, 41.

40. *Id.* at 31.

which were never codified in a clear and universally agreed upon coherent way. But even as the Imperial Crisis and the break with Britain occurred as a result of irreconcilable differences over how political power should be distributed within these layers of authority, even as British colonists became revolutionaries and created from scratch their own written constitutions of republican government, the old paradigm of constitutions imagined as simultaneously fixed and changing remained in place well into the 1790s, when the United States Federal Government was already operating.⁴¹ The Constitution imagined as fixed and unchanging, rooted in the essentially text-bound nature of the “archival Constitution,” would not take any kind of fully articulated form until well into the 1790s.⁴²

One of Gienapp’s most compelling arguments for the inconceivability of the “archival Constitution” within the older terms of British constitutionalism has to do with how British colonists and revolutionaries viewed the instability of language and meaning. Gienapp suggests that very few people would have considered it possible to produce a written document whose nature, meaning, and authoritative status could be entirely self-contained and fully measurable according to its own standards.⁴³ This view of the fundamental inability of written language to contain in a coherent and stable way everything about the structure, function, and ultimate ends of a government was what led people like James Wilson to declare it impossible and perhaps even dangerous to try to enumerate all the powers that the Federal Legislature ought to have.⁴⁴ This view also led to the adoption of the necessary and proper clause, a purposely broad and vague formulation meant to hold open a wide range of possibilities for what could eventually be considered constitutional.⁴⁵

The second stage of Gienapp’s argument examines chapter by chapter four major debates in the early House of Representatives—the removal debate,⁴⁶ the debate over adoption of the Bill of Rights,⁴⁷ the Bank Bill controversy,⁴⁸ and the Jay Treaty controversy.⁴⁹ A final chapter details the “Apotheosis of the Fixed Constitution.”⁵⁰ Gienapp contends that arguments within Congress over narrow political issues could and often did quickly balloon into arguments about the fundamental nature of the Constitution and how it restricted and legitimated different kinds of legislative and political action. No summary can do justice to Gienapp’s close and deeply perceptive readings of the records. It is sufficient to say that Gienapp convincingly demonstrates that it was only by the latter half of the 1790s that people were self-consciously imagining the Constitution as fixed but unchanging, arguing that positions were or weren’t justified by a reading of the “archival Constitution.” It is well worth reading Gienapp carefully to see how discursive actions of political justification in the earliest sessions of the House of Representatives

41. *Id.* at 42.

42. *Id.* at 10.

43. *Id.* at 42–49.

44. GIENAPP, *supra* note 24, at 60.

45. *Id.* at 60–68.

46. *Id.* at 125–63.

47. *Id.* at 164–201.

48. *Id.* at 202–47.

49. GIENAPP, *supra* note 24, at 248–86.

50. *Id.* at 287–324.

fundamentally reshaped the way the United States Constitution was imagined.

Gienapp dedicates an epilogue to unfolding some implications of his argument for constitutional theory today. Broadly, his major challenge to originalism is that the strict textualism of the “archival Constitution” were ways of conceiving of the Constitution which took shape almost unintentionally and only by fits and starts throughout the 1790s.⁵¹ Because of this, Gienapp’s book will surely be central to debates about originalism for years to come. Before the book was even published, Gienapp was engaged in debates with originalist scholars, and the implications of his book for originalism have been under discussion by big players in the field since his book appeared.⁵² In light of all of this, I want to deemphasize issues of originalism and gesture at some possibilities revealed by Gienapp’s book for how we think about the United States Constitution, and indeed, constitutionalism on a larger, global scale, in the founding era and beyond. The value of Gienapp’s work can hardly be confined to its place in debates about originalism.

I would like to raise one of these possibilities by way of a minor criticism. In his introduction, Gienapp sets to the side considerations of “[w]hat the Constitution’s architects and advocates were hoping to accomplish” in terms of protecting particular interests or promoting political programs.⁵³ This includes “the manifold ways in which the Constitution was used to protect the institution of slavery.”⁵⁴ However, I would suggest that slavery, far more than just one of the myriad political interests at work in the dynamics of the founding era, formed a crucial part of the constitutional imaginings of many in the founding generation.⁵⁵ Specifically, discussions in this period about race and whether slavery had negatively affected the capacities of the enslaved to be citizens of the United States subject to constitutionally established government should affect our view of constitutional imagination in this period by revealing it as being embedded within enlightenment discourses of stadial theory, barbarism, and civilization.⁵⁶ Inasmuch as Gienapp fixes his gaze so intently on the dubious grounding of originalist theories, he misses a wide range of things about constitutional imaginings in the founding era that were just as crucial as the elements of fixity and change. I do not mean to criticize anything about Gienapp’s argument, but rather to take issue with the lines which he draws in terms

51. *Id.* at 325–34.

52. Gienapp’s post of March 20th, 2017 to *Process: A Blog for American History*, which detailed his criticisms of originalism and some of the themes of *The Second Creation* against the background of the then-recent nomination of Neil Gorsuch to the Supreme Court, prompted a response from Randy Barnett in the Washington Post. See Jonathan Gienapp, *Constitutional Originalism and History*, *PROCESS* (Mar. 20, 2017), <https://www.processhistory.org/originalism-history/>; Randy Barnett, *Challenging the Priesthood of Professional Historians*, *WASH. POST* (Mar. 28, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/>; see also Jack Balkin, *Symposium on Jonathan Gienapp, The Second Creation*, *BALKINIZATION* (Oct. 15, 2018), <https://balkin.blogspot.com/2018/10/symposium-on-jonathan-gienapp-second.html>.

53. GIENAPP, *supra* note 24, at 12.

54. *Id.* at 12–13.

55. See also MATTHEW CROW, THOMAS JEFFERSON, LEGAL HISTORY, AND THE ART OF RECOLLECTION (2017). This is an important recent work which makes precisely this case with reference to the constitutional thought of Thomas Jefferson.

56. See generally MARK SOMOS, AMERICAN STATES OF NATURE: THE ORIGINS OF INDEPENDENCE, 1761–1775 (2019). This is a very recent work at the time of the composition of this review which thinks through the development of American constitutional discourse against the background of enlightenment social theory and stadial theories of history.

of what gets to count as elements of constitutional imagining as opposed to merely political concerns of the actors involved in his story. This line of thinking could very easily extend into more broad considerations of how citizenship functioned within founding era constitutional imagining, who was qualified for citizenship and who was not, on the basis of what the role and purposes of government were taken to be. These issues have certainly been covered before, but Gienapp makes it possible to reexamine them in new and productive ways.

Further, Gienapp's focus on the transformation of Anglo-American constitutionalism in the later eighteenth century from the older paradigms he details in his first chapters to the new paradigm of written, textual constitutionalism sits alongside new and forthcoming work by prominent historian Linda Colley, who is presently engaged in asking questions about the hard turn on a global scale to written constitutionalism in the later eighteenth and nineteenth centuries.⁵⁷ That is to say, Gienapp's study makes for a very important examination of a process which was occurring in many other places throughout the world in contexts of revolution and imperial expansion (including American imperial expansion extending well into the nineteenth century). Examining how this "revolution of written constitutionalism" was worked out in other parts of the world could add historical depth to the important work of comparative constitutional scholars like James Melton, Tom Ginsburg, and Zachary Elkins.⁵⁸

As it stands, however, there is not much to fault in Gienapp's work, even if there is much to criticize about his framing of issues and choices of focus for making his points. *The Second Creation* is certain to generate conversations among legal scholars, historians, and political scientists, conversations which will hopefully move in productively interdisciplinary directions.

57. See Linda Colley, *Empires of Writing: Britain, America and Constitutions, 1776–1848*, 32 L. & HIST. REV. 237 (2014); Linda Colley, *Writing Constitutions and Writing World History*, in THE PROSPECT OF GLOBAL HISTORY 160 (James Belich et al. eds., 2016).

58. See generally ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).