SYMPOSIUM

THE FEDERALIST CONSTITUTION

FOREWORD

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Over the past twenty years, constitutional law has taken a decidedly historical turn, both in academia and in the courts. The U.S. Supreme Court's constitutional decisions are increasingly filled with extended historical inquiries, and not just by self-described originalists.[1] Yet much of this historical inquiry is severely distorted. Twenty-first-century lawyers and judges enjoy improved and ever-widening access to a rich array of primary sources from the founding era and the early republic, but the ability of modern interpreters to make sense of these materials is pervasively affected by present biases. Many of these biases stem directly from long-standing received narratives of constitutional meaning. Every generation of constitutional interpreters since 1787 has indulged to some extent in the American penchant for linking present-day intuitions to the minds of the founders.[2] This does not necessarily make us "all originalists now,"[3] but it

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1. *Compare, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 573–636 (Scalia, J.) (examining the original historical understanding of the Second Amendment), *with id.* at 636–80 (Stevens, J., dissenting) (same).

2. *See* Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1703 (2012) ("Attention to original intentions and expectations facilitates judges' guardianship of long-term values, helps to constitute us as a people with temporally extended commitments, and lends the Framers' credibility to the results reached through an otherwise legitimacy-challenged system of judge-made constitutional law."); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 13, 20 (2016) (certain constitutional interpretations are "continuity tenders" that ritually "affirm a connection to one's predecessors").

3. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011) ("We are all originalists now."); *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Solicitor General Elena Kagan) ("[W]e

does tend to make every generation's interpretive narrative—whether from James Madison in 1830,[4] Roger Taney in 1857,[5] Robert Jackson in 1942,[6] or Clarence Thomas in our own day[7]—into an origin myth.

A challenge for historical understanding of the founding is that the dominant origin myth has been shaped so deeply by political developments more than a decade following ratification of the Constitution. The electoral dominance of the Jeffersonian-Republican and Jacksonian-Democratic political parties between 1800 and 1860 rewrote the founding narrative in ways that even today remain to be disentangled. For the century following Chief Justice John Marshall's death in 1835, the Supreme Court would be dominated by Jeffersonian-Jacksonian Justices or by Justices whose constitutional worldview was shaped in no small measure by Jeffersonian-Jacksonian jurisprudence. Even today, it is difficult to avoid reading founding-era evidence through that distorting prism. As a result, ideas like "dual sovereignty" and "limited enumerated powers" that were contested in the founding era and only "settled" by post-1800 constitutional politics are mistaken for the Constitution's consensus "original meaning." The ideologies of once powerful cohorts can become unfamiliar or even lost after the landscape of power shifts. This was largely true of the Federalists.

We come to unbury the Federalists, not to praise them. Not that they are unworthy of praise: many ideas promoted by the founding-era Federalists were sensible, intelligent, or even wise. They also had shortcomings. Our present aim, however, is neither to censure the Federalists nor to argue that they were superior to the Jeffersonians and Jacksonians who followed them. Instead, our intention in gathering a distinguished group of constitutional historians is to make progress in excavating the lost civilization of the Federalists, whose constitutional ideology predominated before 1800 but faded thereafter. This Symposium does not claim to initiate this historical inquiry. But by giving a name to the constellation of ideas and practices we study—"the Federalist Constitution"—we hope to encourage increased interest and coherence in the enterprise of presenting a historically accurate picture of the founding.

The essays that follow do not purport to show that the original meaning of the Constitution cleanly reflected a Federalist agenda. Rather, they

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apply what [the Framers] say, what they meant to do. So in that sense, we are all originalists.").

4. Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 411, 417 (Gaillard Hunt ed., 1910) (emphasizing fundamental continuities between the Articles of Confederation and the Constitution).

5. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422–23 (1857) (inferring the original proslavery intent of the Framers based on later antebellum demands of slave states), *superseded by constiutional amendment*, U.S. CONST. amend. XIV.

6. Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("At the beginning Chief Justice Marshall described the Federal commerce power with a breadth never yet exceeded.").

7. United States v. Lopez, 514 U.S. 549, 590 (1995) (Thomas, J., concurring) ("The Founding Fathers confirmed that most areas of life . . . would remain outside the reach of the Federal Government.").

demonstrate that the Constitutional Convention of 1787, the ratification debates, and the precedents of the early republic together produced a Constitution that combined Federalist with Anti-Federalist elements and left considerable room for further contestation. One simply cannot make sense of the original Constitution without reckoning with the Federalist ideas that originally surrounded it. The present-day significance of this historical inquiry is to highlight problems with thinking that the Constitution's contested provisions had singular "original meanings" and to reinforce the proposition that a political settlement of constitutional meaning reached decades after ratification cannot "fix" *original* meaning retroactively.[8] Indeed, the story that emerges strongly suggests that the range of constitutional meanings available in one generation can be altered by a later one—both as a descriptive and a normative matter.

What do we mean by "the Federalist Constitution"? Roughly, we mean a vision of the Constitution held between 1787 and 1800 by leading figures in the struggle for constitutional ratification and, thereafter, by leading figures in the Federalist Party—a group that dominated the Constitution's formative years. Needless to say, those individuals did not agree on all points all the time, and we accordingly do not suggest that the Federalist Constitution, as we use the term, was a comprehensive theory or a crisply formulated dogma. Instead, we conceive of the Federalist Constitution as a cluster concept with many features, most or all of which were embraced by many leading Federalists.[9] Those features include but are not limited to:

- an operative preamble, signifying more than mere throat clearing;
- broad legislative power to address all national problems;
- complete and inherent foreign affairs powers;
- exclusive national direction of relations with Indian tribes;
- an implied power to regulate the domestic interstate slave trade and possibly even to abolish slavery throughout the United States;
- other inherent and implied national and corporate powers, together with sweeping legislative authority to carry them into execution;
- prohibition of both criminal and civil ex post facto laws;
- state suability and broad equitable powers of the federal courts;
- federal common law, including a federal common law of crimes; and
- above all, the recognition that the United States was a nation and therefore, that the government of the United States was a genuine national government possessing the inherent powers of national governments, including the powers to provide for the common defense,

8. *See generally* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018).

9. That some of these features were disavowed by some leading Federalists during the ratification debates or opposed by some leading Federalists (or former Federalists) during postratification politics does not mean that those features were not affirmatively embraced by many or most Federalists at the relevant times.

> promote the general welfare, and fulfill all of the other ends for which that government was formed.
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The essays that follow fall roughly into three topical groups. One set deals with the interpretive implications of excavating the Federalist Constitution. Jonathan Gienapp leads off the Symposium with "In Search of Nationhood at the Founding."[10] Gienapp argues that anachronistic analysis of founding-era social contract thinking has unduly emphasized a conflictual relationship between government and liberty and thus missed the ways in which Federalists harnessed social contract theory to justify expansive governmental authority.[11] They did so by identifying the United States as a genuine nation, representing a national compact of individuals, and whose government, accordingly, was equipped with the broad power to act on behalf of this national people. Richard Primus, in "Reframing Article I, Section 8," develops a significant interpretive consequence of that Federalist approach to nationhood.[12] Primus argues that the Constitution's enumeration of congressional powers is best understood as a "means of empowerment, rather than limitation," once we perceive the problems with the conventional narratives of "limited enumerated powers"—particularly that a limiting enumeration was not well matched to the kinds of limits the Framers wanted to impose on a national government.[13]

The next pair of essays shows room for divergence within the broad agreement over the Federalist Constitution framework—in this case, different views of James Madison's contribution to the Federalist Constitution. In "President Madison's Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era," Saul Cornell argues that, contrary to originalists who have claimed Madison as their own, modern originalism, particularly public meaning originalism, is far closer in spirit to the Anti-Federalist and "Old Republican" critics who challenged Madison.[14] Rather than embrace a strongly textualist approach to constitutional interpretation centered on modern originalist ideas of fixation and constraint, Madison sought a more holistic approach to constitutional interpretation, one that acknowledged the centrality of constitutional politics.[15] David S. Schwartz and John Mikhail, in "The Other Madison Problem," question the assumed primacy of Madison's thought in the framing of the Constitution.[16] They argue that Madison was neither the

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10. Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783 (2021).

11. *Id.* at 1789.

12. Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003 (2021).

13. *Id.* at 2005.

14. Saul Cornell, *President Madison's Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 FORDHAM L. REV. 1761 (2021).

15. *Id.* at 1778.

16. David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033 (2021).

"father of the Constitution" nor its leading theorist, as his proposals at the Philadelphia Convention were aimed at controlling state governments rather than on empowering the national government to regulate the people directly.[17]

The second set of essays develops the idea that understanding the founding requires attention to the place of the newly formed United States in the Atlantic and greater North American world, ringed by Native nations and the ongoing colonial incursions of European powers. So viewed, the new Constitution created what some scholars refer to as a "fiscal-military state" and which leading Americans preferred to style the "empire for liberty," with aspirations to expand across the continent at the expense of these other nations. In "The Federalist Constitution as a Project in International Law," David Golove and Daniel Hulsebosch bridge this theme with the first group of essays. They identify three dimensions of the law of nations that the founders used to pursue their constitutional project: the first dimension was the law of nations' strictly international aspects, akin to modern public international law; the second was its rich body of resources, featured in a robust transnational dialogue, that was supposed to guide the design and governance of a "civilized" federal state, akin to modern comparative constitutional law; and the third was its transnational dimension as a body of natural law principles and common usages that helped coordinate cross-border relations among the states and their citizens, as well as between them and foreigners. According to Golove and Hulsebosch, it is impossible to understand the Constitution without an appreciation of these still unfamiliar premises of the founding generation's state-building project.[18] Gregory Ablavsky likewise connects the themes of these first two sets of essays in "Two Federalist Constitutions of Empire."[19] Focusing on the new republic's efforts to mediate between U.S. citizens and Native peoples, Ablavsky explores the tension between the Federalist "constitution of constraint" that used federal power to discipline an unruly, expansionist citizenry and the equally Federalist "constitution of empowerment" that directed national power outward.[20] In the end, he suggests, empowerment prevailed largely because Federalists failed to anticipate how adept the nation's citizens would be at exploiting federal power for their own purposes.[21] Mary Bilder, in "Without Doors: Native Nations and the Convention," brings to light a virtually forgotten narrative of Native nations' presence and diplomatic efforts in Philadelphia in the summer of 1787 to confirm treaty obligations

17. *Id.* at 2036–37.

18. David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution as a Project of International Law*, 89 FORDHAM L. REV. 1841 (2021).

19. Gregory Ablavsky, *Two Federalist Constitutions of Empire*, 89 FORDHAM L. REV. 1677 (2021).

20. *Id.* at 1678.

21. *Id.* at 1700.

in the new Constitution and bar state claims of authority.[22] Bilder argues that these efforts were largely, if temporarily, successful despite the misleading absence of express language in the Constitution's text and that the framing generation "without doors" also participated in creating the Constitution. [23]

In "Slavery's Constitution: Rethinking the Federal Consensus," Maeve Glass sheds new light on the so-called "federal consensus," in which implied powers under the new Constitution were seemingly required to be interpreted not to extend to slavery. Glass argues that this doctrine was an extension of a preconstitutional doctrine of "noninterference" with mutually profitable commercial relationships between Southern slaveowning planters and merchants and their Northern correspondents and business partners.[24] Yet as James E. Pfander and Elena Joffroy argue in "Equal Footing and the States 'Now Existing': Slavery and State Equality over Time," antislavery Federalists had successfully "secured constitutional provisions that empowered Congress to foreclose much interstate and foreign traffic in enslaved persons to confine slavery to the states 'now existing.'"[25] This original intention would be overruled in subsequent years by the political triumph of the "federal consensus."[26] In an essay on a closely related theme, "The Unwritten Constitution for Admitting States," Roderick M. Hills Jr. argues that the original Federalist constitutional template for admitting new states under Article IV, Section 3 gave Congress broad power to govern new territory as colonies of the original states, in the hope of controlling unruly settlers.[27] Eventually, however, this original understanding was supplanted by a popular sovereignty theory of admitting new states on an "equal footing," offering a demonstration that durable constitutional rules are grounded in "cross-partisan constitutional conventions," rather than text or original meaning.[28]

The third set of essays explores the themes of the Federalist Constitution in Articles II and III. In "Executive Power and the Rule of Law in the Marshall Court: A Rereading of *Little v. Barreme* and *Murray v. Schooner Charming Betsy*," Jane Manners argues that scholars have anachronistically misread the Federalist balance of war power between the executive and Congress.[29] Reexamining two important 1804 Marshall Court precedents,

22. Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707 (2021).

23. *Id.* at 1709–10.

24. Maeve Glass, *Slavery's Constitution: Rethinking the Federal Consensus*, 89 FORDHAM L. REV. 1815 (2021).

25. James E. Pfander & Elena Joffroy, *Equal Footing and the States "Now Existing": Slavery and State Equality over Time*, 89 FORDHAM L. REV. 1975, 1978 (2021).

26. *Id.*

27. Roderick M. Hills Jr., *The Unwritten Constitution for Admitting States*, 89 FORDHAM L. REV. 1877 (2021).

28. *Id.* at 1877.

29. Jane Manners, *Executive Power and the Rule of Law in the Marshall Court: A Rereading of* Little v. Barreme *and* Murray v. Schooner Charming Betsy, 89 FORDHAM L. REV. 1941 (2021).

Manners recovers the forgotten understanding that the president could neither advance the nation closer to war than Congress intended nor give officers a right to act where Congress had not.[30] Thomas H. Lee, in "Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792," argues that new federal judiciary's key mission was to mitigate favoritism for domestic litigants in order to incentivize international trade and investment.[31] This little known purpose, Lee suggests, sheds new light on several disputed elements of federal judicial power.[32] Finally, in "Presidential Removal: The *Marbury* Problem and the Madison Solutions," Jed Handelsman Shugerman unpacks the mistaken assumptions built into the belief that the Article II's Vesting Clause mandates the theory of a unitary executive, recently endorsed by the Supreme Court.[33] Shugerman argues that faulty assumptions about the meaning of the Vesting Clause represent a semantic and constitutional "drift" that is belied by founding-era understandings.[34]

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We hope that readers will find that these essays shed new light on enduring questions about the Constitution and stimulate new and productive lines of inquiry.

30. *Id.* at 1948–49.

31. Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 FORDHAM L. REV. 1895 (2021).

32. *Id.* at 1933–40.

33. Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021).

34. *Id.* at 2111.