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## FIXING IMPLIED CONSTITUTIONAL POWERS IN THE FOUNDING ERA

**The Second Creation: Fixing the American Constitution in the Founding Era.** By Jonathan Gienapp.<sup>1</sup> Harvard University Press. 2018. Pp. 451. \$35.00 (Cloth).

*John Mikhail*<sup>2</sup>

Jonathan Gienapp's new book, *The Second Creation*, is a marvelous study of the earliest debates over constitutional language, meaning, and interpretation. In virtually every respect, the book is brilliantly conceived, meticulously researched, and masterfully executed. Like any worthwhile scholarly endeavor, it will generate fresh insights and open up new avenues of inquiry, some of which may eventually call into question some of Gienapp's own premises and arguments. In the current academic and political climate, the implicit challenge this exciting monograph poses to originalism also seems likely to provoke a certain amount of healthy controversy.

*The Second Creation* is written for multiple audiences. On the one hand, the book is addressed to historians, political scientists, and other specialists in early American politics, offering them a dramatic new account of the drafting and ratification of the Constitution, along with four early constitutional controversies: removal, amendments, the bank, and the Jay Treaty. As his title implies, however, Gienapp also defends a provocative thesis of import for constitutional lawyers and, in particular, constitutional

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2. Associate Dean for Research and Academic Programs and Agnes N. Williams Research Professor, Georgetown University Law Center. The author wishes to thank Mary Bilder, Brian Bix, William Ewald, Jonathan Gienapp, Maeva Marcus, Victoria Nourse, Farah Peterson, Robert Reinstein, David Schwartz, Lawrence Solum, and William Treanor for their feedback. A previous version of this essay appeared in an online symposium on *The Second Creation*. See John Mikhail, *Fixing the Constitution's Implied Powers*, BALKINIZATION (October 25, 2018), <https://balkin.blogspot.com/2018/10/fixing-constitutions-implicit-powers.html>.

originalists. In a nutshell, that thesis is that constitutional meaning was not fixed when the Constitution was framed and ratified. Nor did it operate as a significant constraint on early practice. The “Fixation Thesis” and “Constraint Principle” endorsed by many contemporary originalists,<sup>3</sup> therefore, are untenable insofar as they endeavor to be faithful to the best historical understanding of the founding era—or so Gienapp seems to suggest. A close encounter with that history reveals that constitutional meaning was uncertain, unstable, and “up for grabs” right from the start. In no small part, this was due to a pervasive uncertainty over what kind of instrument or object the Constitution itself actually *was*.

For example, the Constitution is written, yes; but is it entirely so? Is it a contract, power of attorney, corporate charter, something else?<sup>4</sup> To what extent does it presuppose or incorporate principles of common law or the law of nations? And what is the significance of its most noteworthy omissions? The Articles of Confederation contains a crucial provision reserving to the states all powers not “expressly delegated” to the United States, but the Constitution does not.<sup>5</sup> Does the Constitution nonetheless presume that whatever is not given is reserved? Does it presume that whatever is not *expressly* given is reserved? What about the document’s very first and most striking sentence—the Preamble? Does it fall within the scope of the Constitution?

Finally, what should one make of the fact that some of the state ratifying conventions adopted the Constitution with a “form of ratification” or other interpretive declaration, explaining how the document should be construed? When the South Carolina convention adopted the Constitution, for example, it echoed the Articles of Confederation by declaring that “no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not *expressly* relinquished by

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3. See, e.g., Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

4. On the second and third alternatives, see GARY LAWSON AND GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); see also John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on “A Great Power of Attorney”: Understanding the Fiduciary Constitution by Gary Lawson and Guy Seidman*, 17 GEO. J. L. & PUB. POL’Y 407 (2019).

5. See *Articles of Confederation of 1781*, art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

them and vested in the General Government of the Union.”<sup>6</sup> Likewise, when the Virginia convention ratified the Constitution, it did so with the stipulation—prepared by a five-member committee that included James Madison, Edmund Randolph, and John Marshall—that “no right of any denomination can be canceled, abridged, restrained, or modified by the Congress . . . by the President or any Department or Officer of the United States except in those instances in which power is given by the Constitution for those purposes.”<sup>7</sup> As Randolph proposed to the Virginia convention a few days earlier, the purpose of this stipulation was to enable Virginians to consider “every exercise of a power not expressly delegated”<sup>8</sup> by the Constitution to be a violation of that instrument. Should these eighteenth-century counterparts to modern-day “signing statements” be considered part of the Constitution, or at least part of an essential compromise that enabled it to be adopted? Why or why not?

As those who have spent ample time with the documentary record know, all of these problems, and others like them, permeate the earliest debates over the Constitution. Unlike narrower semantic questions (the meaning of “commerce” or “emolument,” for example),<sup>9</sup> none of them can be easily reduced to, or replaced by, empirical questions about the original public meaning of the constitutional text. Rather, these problems take us beyond the text to a challenging interpretive terrain that many conventional forms of originalism or “constitutional textualism”<sup>10</sup> do not comfortably reach. The historical and linguistic inferences one draws on this shaky ground are not only underdetermined, but deeply and pervasively so, in part because the available records are so fragmentary, equivocal, and inconclusive.

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6. *Amendments Proposed by the South Carolina Convention (May 23, 1788)*, reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 15* (1991) (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford, eds., 1991).

7. *The Virginia Form of Ratification, 26 June*, reprinted in *12 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1546* (John P. Kaminski & Gaspare J. Saladino eds., 1993).

8. *12 id.* at 1455-56 (Speech of Edmund Randolph, June 21).

9. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL. U. L. REV. 631 (2019).

10. See Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1306 (observing that at his confirmation hearing, Justice Brett Kavanaugh used the term “constitutional textualism” to summarize his commitment to public-meaning originalism).

Moreover, even when the historical evidence is reasonably clear, it often suggests the founders may have simply disagreed with one another over the particular constitutional provision or principle at issue.

For all of these reasons, I am inclined to agree with the main thrust of *The Second Creation*. Gienapp's key insight seems correct: in fundamental respects, the American Constitution was obscure, unfinished, and uncertain in 1789, and we can learn a great deal about its multiple alternative meanings by paying closer attention to how constitutional debates actually unfolded in the first years after its adoption. Nonetheless, I want to challenge Gienapp's thesis to some extent by examining the part of his narrative with which I am most familiar—the earliest congressional debates over implied powers—and by offering a somewhat different interpretation of these events than he does, which focuses less on issues involving language, meaning, and ontology, and more on the complex interplay of economic interests, regional alignments, and political power. Despite my admiration for *The Second Creation*, at the end of the day I think Gienapp may overstate the importance of the former issues and unduly neglect the latter, even if one accepts the particular methodology and linguistic focus he outlines in the book's Introduction (pp. 15-18). By setting aside the dizzying swirl of semantics for a moment, and looking with a practical eye at how members of Congress actually voted in these controversies, one can identify some remarkably consistent through lines that render the entire sequence of events, and the talking points of politicians, less inchoate and more intelligible. As with so much else that occurred at the time, two unifying themes are land and slavery.

A useful starting point is the constitutional convention itself, which Gienapp discusses in Chapter One of *The Second Creation* (pp. 57-74). As I read the historical record, after the Great Compromise was achieved at the convention on July 16, by means of which the states were assured equal strength in the Senate, while voting power in the House was based on population (modified by the three-fifths clause), the actual drafting of the Constitution was a process disproportionately controlled by, and most congenial to, a core group of nationalist delegates from Pennsylvania and three other "landless" Mid-Atlantic states—Delaware, Maryland, and New Jersey—along with a handful of like-minded delegates from the other states. It is easy to overlook

the fact that over half of the framers who signed the Constitution (20 of 39) represented one of these four Mid-Atlantic states. In fact, just two of these states—Pennsylvania (with eight delegates) and Delaware (with five)—contributed a full third (13/39) of these signatures. Pennsylvania also supplied the two principal authors of the Constitution, James Wilson and Gouverneur Morris, who did the lion’s share of the actual drafting of the document on behalf of the Committees of Detail and of Style, respectively.

Between them, Wilson and Morris were primarily responsible for the precise language of three of the four “dangerous clauses” that Gienapp highlights in Chapter Two (pp. 87-95): the Preamble, the Necessary and Proper Clause, and the jurisdictional grant in Article III extending the judicial power of the United States “to all Cases, in Law and Equity, arising under this Constitution . . . .”<sup>11</sup> The fourth of these clauses, the General Welfare Clause, was added to the Constitution by the Committee on Postponed Parts, chaired by another Mid-Atlantic delegate, David Brearly of New Jersey. Although we lack detailed records of this committee’s treatment of the General Welfare Clause, there are strong reasons to believe it received the support of Brearly and the other Mid-Atlantic delegates, including Morris (Pennsylvania), John Dickinson (Delaware), and Daniel Carroll (Maryland), along with the three New England delegates: Nicholas Gilman (New Hampshire), Rufus King (Massachusetts), and Roger Sherman (Connecticut). By contrast, support for the General Welfare Clause from the four remaining members of this committee—James Madison (Virginia), Hugh Williamson (North Carolina), Pierce Butler (South Carolina), and Abraham Baldwin (Georgia)—seems less certain.

For the Mid-Atlantic states, at least, the “dangerous clauses” were not dangerous at all, but precisely what they had long wanted in a new charter of government.<sup>12</sup> As Merrill Jensen

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11. U.S. CONST., art. III, § 2, cl. 1.

12. The same is true of another formidable clause to which Gienapp devotes less attention: the Supremacy Clause. Although it is easy to overlook this, the genesis of this clause was also principally a Mid-Atlantic affair. The clause was first proposed by William Paterson on June 15 as part of the New Jersey Plan. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 245 (Max Farrand ed., 1911). After the Great Compromise was reached, Maryland’s Luther Martin revived Paterson’s proposal on July 17, which was then adopted unanimously. *See* 2 *id.* at 28-29. Thereafter, Wilson and Morris took the lead in framing the clause and strengthening its language for their respective committees. *See* 2 *id.* at 169, 183, 603.

emphasized over eighty years ago, the critical point to recognize about these Mid-Atlantic states is that their principal land speculators, merchants, and businessmen were situated very differently than their counterparts in Virginia, North Carolina, and other “landed” states in the competition for profitable investments in western lands.<sup>13</sup> As a result, these individuals were a driving force during the formative years of the United States to recognize implied powers in Congress that could be invoked to assert jurisdiction over these territories. Many of the delegates to the constitutional convention from these Mid-Atlantic states, in fact, had direct or indirect ties to these earlier campaigns to extend the scope of congressional authority, as did many of their most prominent constituents.<sup>14</sup> Many of these Mid-Atlantic delegates were also closely affiliated with the Bank of North America, another venture which relied on implied national powers.<sup>15</sup>

In light of this background and the disproportionate control they exerted in Philadelphia, it is not surprising that the Mid-Atlantic states were quite happy with the Constitution, including its nationalism and sweeping implied powers. Three of these four states—Delaware, Pennsylvania, and New Jersey—were among the first states to ratify the Constitution, and two of them—Delaware (30-0) and New Jersey (38-0)—did so unanimously.<sup>16</sup>

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13. See Merrill Jensen, *The Cession of the Old Northwest*, 23 *MISS. VALLEY HIST. REV.* 27 (1936); Merrill Jensen, *The Creation of the National Domain, 1781-1784*, 26 *MISS. VALLEY HIST. REV.* 323 (1939). See also MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781* (1940).

14. A partial list of Mid-Atlantic delegates who were affiliated with the two most important land companies, the Indiana and Illinois-Wabash Companies, with claims to these territories, includes Thomas Fitzsimons, Benjamin Franklin, Daniel of St. Thomas Jenifer, Gouverneur Morris, Robert Morris, and James Wilson. See JENSEN, *THE ARTICLES OF CONFEDERATION*, *supra* note 13, at 121-22, 211-12; John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of “Ex Post Facto Law,”* 17 *GEO. J. L. & PUB. POL’Y* 79, 91-93 (2019).

15. The Mid-Atlantic delegates affiliated with the Bank of North America included Richard Bassett, George Clymer, Thomas Fitzsimons, Benjamin Franklin, Jared Ingersoll, Thomas Mifflin, Gouverneur Morris, Robert Morris, George Read, and James Wilson. See LAWRENCE LEWIS, *A HISTORY OF THE BANK OF NORTH AMERICA* 68, 133-147 (1882); John Mikhail, *The Necessary and Proper Clauses*, 102 *GEO. L. J.* 1045, 1078-80 (2014). Another delegate who owned shares in the bank was John Langdon of New Hampshire. See LEWIS, *supra*, at 134, 143.

16. Undoubtedly, there were other factors that also led Delaware and New Jersey to be so enthusiastic for the Constitution, most prominently their equal suffrage in the Senate. For an introduction to ratification in these states, see Gaspare J. Saladino, *Delaware: Independence and the Concept of a Commercial Republic*, in *RATIFYING THE*

Pennsylvania and Maryland contained active and vocal Anti-Federalists, but ratifying conventions in both of these states also adopted the Constitution by decisive margins: two-to-one (46-23) in Pennsylvania and more than five-to-one (63-11) in Maryland. More significantly, all four of these Mid-Atlantic state ratifying conventions adopted the Constitution without proposing amendments. In particular, none of these conventions called for Congress to amend the Constitution by adding a reserved powers clause to the document that would limit the United States to “expressly delegated” powers and reserve all other powers to the states.

Consider now what happened in the First Congress. When the future Tenth Amendment was taken up and debated in 1789, an event Gienapp recounts in Chapter Four (pp. 193-195), these four states voted as a solid block against the proposal to add the word “expressly” to the language of that amendment. The only recorded vote in the House of Representatives on this motion was 17 in favor, 32 against.<sup>17</sup> Representatives from the four Mid-Atlantic states supplied half of these negative votes (16 of 32), as compared with only one vote in favor of the motion. Connecticut—another staunchly Federalist state whose convention ratified the Constitution quickly, decisively, and without amendments—also lined up strongly in favor of preserving the implied national powers vested by the Constitution. Four of the five Connecticut delegates, including Sherman, voted against the motion, and the fifth did not vote. All told, then, delegates from the five most strongly Federalist states at the time, all of which had ratified the Constitution without proposing amendments, voted against this “second bite at the apple” to circumscribe implied powers by an astonishing ratio of 20-to-1. By contrast, the other six delegations then sitting in Congress—New Hampshire, Massachusetts, New York, Virginia, South Carolina, and Georgia—voted in favor of the motion to add “expressly” to the future Tenth Amendment by a 4-3 ratio (16 votes in favor, 12 against). Except for Georgia, conventions in all of these states had voted in favor of amendments specifically designed to curtail implied government powers.

A similar pattern can be gleaned from the controversy over

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CONSTITUTION 29-51 (Michael Allen Gillespie & Michael Lienesch eds., 1989); Sarah M. Shumer, *New Jersey: Property and the Price of Republican Politics*, in *id.*, 71-89.

17. See 1 ANNALS OF CONGRESS 768 (Joseph Gales ed., 1834).

the removal power, which Gienapp discusses in Chapter Three (pp. 125-163). The final vote in the House of Representatives on the bill to establish the Department of Foreign Affairs, which indirectly affirmed a doctrine of implied powers, was 29 in favor, 22 against. Almost half of the positive votes for the bill (14/29) were cast by members from the four Mid-Atlantic states, who collectively supported the measure by a 14-2 margin. By contrast, delegates from the seven remaining states voted against the bill by another 4-3 ratio (20 votes against the bill, 15 in favor).<sup>18</sup> Thanks to Pennsylvania Senator William Maclay's Diary, we also have a record of how the Department of Foreign Affairs bill fared in the Senate. Predictably, Pennsylvania, Delaware, New Jersey, and Maryland formed a solid wall of support for the bill and its affirmation of implied powers, voting in favor of the bill, 7-1 (the only dissenting voice being Maclay himself). By contrast, the four Senators from South Carolina and Georgia (Butler, Izard, Few, and Gunn) voted against the bill, as did both Senators from Virginia (Grayson and Lee). Finally, the six New England Senators were divided, 3-3.<sup>19</sup>

Consider finally the contest over the Bank of the United States, which Gienapp vividly describes in Chapter Five (pp. 202-247). Arguably the most important point to comprehend about this famous controversy is that the final vote on the bank bill in the House (39-20) was lopsided and almost entirely sectional. In the eight northern states (which included Delaware at the time), the vote in favor of the bill was 34-1. Once again, Pennsylvania, Delaware, and New Jersey led the way, voting unanimously in favor of the bill; but, in this case, so did the delegations from New Hampshire, Connecticut, Rhode Island, and New York. The lone northern holdout was Jonathan Grout of Massachusetts, a consistent Anti-Federalist, who also voted against the final bill to establish the Department of Foreign Affairs and in favor of adding "expressly" to the future Tenth Amendment. By contrast, 19 of the 20 votes against the bank bill were cast by delegates from the five southern states. Led by Madison, the Virginia delegation

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18. See 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 95 (Linda Grant Depauw, Charlene Bangs Bickford & LaVonne Siegal Hauptman eds., 1977).

19. See THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 109-116 (Kenneth R. Bowling & Helen E. Veit, eds., 1988). As Gienapp notes (127), the resulting 10-10 tie in the Senate was broken in favor of the bill by Vice-President John Adams.

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was unanimously opposed to the bank, as was the Georgia delegation. Four of the South Carolina members and three of the North Carolina members also voted against the bill. Notably, Maryland supplied two of the only five southern votes in favor of the bill, including Joshua Seney, a consistent supporter of implied powers, who also voted in favor of the bill to establish the Department of Foreign Affairs and against adding “expressly” to the future Tenth Amendment.<sup>20</sup>

What lessons should one draw from these observations? I suggest that when one looks closely at the three constitutional controversies Gienapp recounts in Chapters 3–5 of *The Second Creation*, a striking pattern emerges, one that is less variable or fluctuating than one might be led to conclude after reading these chapters and the book as a whole. A large group of delegates, representing primarily, but not exclusively, the four Mid-Atlantic states, formed a relatively stable “implied powers faction” in the First Congress. This faction voted in favor of the final bill to establish the Department of Foreign Affairs, against adding “expressly” to the future Tenth Amendment, and in favor of the bank bill. Twenty-one of the 59 members of the House who were seated in 1789 fall under this general description, two-thirds of whom (14/21) represented Pennsylvania, Delaware, New Jersey, or Maryland. Other core members of this highly nationalist group included such implied powers stalwarts as Fisher Ames, Benjamin Goodhue, and Theodore Sedgwick of Massachusetts; Jonathan Trumbull of Connecticut; and Egbert Benson, John Laurance, and Peter Sylvester of New York.

On the other side of the divide, a second group of delegates, representing primarily, but not exclusively, Virginia and the Deep South, formed what might be called an “enumerated powers faction” in the First Congress. With only a few exceptions, this faction voted in direct opposition to the implied powers group. Fifteen members of this enumerated powers faction, all but two of whom represented states that had adopted the Constitution with proposed amendments limiting implied powers, voted against the bill establishing the Department of Foreign Affairs and in favor of adding “expressly” to the future Tenth Amendment. When it came to the bank, six of the seven northern members of this faction defected, but those who remained were

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20. See generally 2 ANNALS OF CONGRESS, *supra* note 17, at 1960.

joined by an even larger influx of southern delegates, resulting in the sharply divided sectional vote to which I referred.

Why did 19 of 20 votes against the bank come from below the Mason-Dixon Line? Why did Madison's proposed amendments include a new preamble and four new references to private property rights? And why did representatives from South Carolina and Georgia, whose conventions had adopted the Constitution by overwhelming margins, and whose political leadership was generally "Federalist" at the time, almost invariably support efforts to curtail or eliminate implied powers in the First Congress, whether the topic was removal, amendments, or the bank? The likely answer to all these questions—and others like them—involves slavery, a topic to which Gienapp devotes surprisingly little attention in *The Second Creation*. Although William Loughton Smith often takes center stage in Gienapp's narrative, for example, there is only a passing reference to the revealing August 1789 letter Smith sent to Edward Rutledge, explaining that his position on removal and amendments grew out of his concerns over slavery.<sup>21</sup> Nor, more importantly, does Gienapp focus attention on the explosive 1790 antislavery petitions, which also generated interesting debates over the scope of implied federal powers, in which the two congressional factions I have identified again played leading roles.<sup>22</sup>

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21. Eight days before another South Carolina delegate, Thomas Tudor Tucker, moved to add "expressly" to the future Tenth Amendment, Smith informed Rutledge that his concerns about federal interference with slavery lay at the root of his attitude to removal and amendments:

I shall support the Amendmts. proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it any powers not *expressly* given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people—& the powers not delegated by the Constn. nor prohibited by it to the States, are reserved to the States respectively; if these amendts. are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them. Otherwise, they may even within the 20 years by a strained construction of some power embarrass us very much. I had this in contemplation not a little, in my opposition to the Legislature's giving judicial constructions on the Constitution.

William L. Smith to Edward Rutledge (August 10, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 6, at 273 (emphasis original).

22. For instructive accounts of the 1790 antislavery petitions and their fate in Congress, see, for example, JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 81-119 (2000); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY REPUBLIC* 191-203 (2010); Howard A. Ohline, *Slavery, Economics, and Congressional*

This seems to me to be the book's biggest shortcoming, or at least a missed opportunity. In light of the enormously high stakes, implicating approximately 30 percent of all Southern wealth,<sup>23</sup> the effort to fix or "liquidate" implied powers over domestic slavery and thereby establish a "federal consensus" on that subject was arguably the main event—and one of Madison's primary objectives—all along.<sup>24</sup> The story Gienapp tells in *The Second Creation* is already so rich, stimulating, and well-crafted that it seems unfair to criticize him for not adding yet another chapter to the mix, or for not combining his focus on language with a more interest-based perspective, such as the one I have sketched here. Every scholar has to make choices, after all, and carefully working through Madison's complicated rhetoric and actual beliefs about slavery, let alone those of other important founders, in light of the various economic and ideological interests at stake seems like a daunting task.

This "missing" chapter on slavery—and others, too, involving assumption, the neutrality controversy, state suability, and more—is nevertheless an important reminder that Gienapp's exciting project of "Reimagining the Creation of the American Constitution" (p. 1) is a collective, generative, and ongoing process in which many scholars can profitably engage. We are in Gienapp's debt for helping to revitalize this topic, showing us how it can be pursued with great skill and sensitivity, and pointing the way forward. This outstanding book has undoubtedly changed the landscape, and everyone interested in the ideological origins of American constitutional law would benefit from engaging with it.

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*Politics, 1790*, 46 J. SOUTHERN HIST. 335 (1980).

23. See VAN CLEVE, *supra* note 22, at 203.

24. For the origin of the term "federal consensus," which is now standard in the literature on antislavery constitutionalism, see WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 15-16 (1977). For more recent interpretive accounts of this concept, see, e.g., JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865*, at 2-8 (2013); SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING* 162-63 (2018).