The Tenacity of Transformation Theory, and Why Constitutional History Deserves Better

By Stephen B. Presser

Federalism & Separation of Powers Practice Group

A Review of:

The Second Creation: Fixing the American Constitution in the Founding Era, by Jonathan Gienapp
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About the Author:

Stephen B. Presser is the Raoul Berger Professor of Legal History Emeritus at Northwestern University's Pritzker School of Law. He is a Visiting Scholar of Conservative Thought and Policy at the University of Colorado, Boulder for 2018-2019.

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Other Views:

• Karen J. Greenberg, *Political Scripture*, The Nation (Feb. 7, 2019), https://www.thenation.com/article/constitution-jonathan-gienapp-the-second-creation-review/.

• Alison L. LaCroix, *The Invention of the Archival Constitution*, Balkinization (Oct. 19, 2018), https://balkin.blogspot.com/2018/10/the-invention-of-archival-constitution.html (part of a symposium on the book).

• Ilan Wurman, *Originalism's New Critics, Part 1: Fixing Fixity*, Claremont Rev. of Books (Jan. 16, 2019), https://www.claremont.org/crb/basicpage/originalisms-new-critics-part-1-fixing-fixity/.

For many years, American progressive scholars have been inclined to view legal and constitutional change as a series of bold "transformations" featuring a switch from one set of values and principles to another. Roscoe Pound (a progressive in his youth, but a conservative at the end of his career) set the template with his *Formative Era of American Law*, in which he described how creative state and federal judges such as Joseph Story and Lemuel Shaw altered the common law of England to fit the needs of the United States.[1] In 1977, Morton Horwitz, in his aptly titled *Transformation of American Law*, took Pound's template and explained that the same judges Pound praised had actually engaged in a pernicious shifting of the legal rules to favor an emerging merchant and entrepreneurial class who had enlisted the newly professional lawyer cohort in their nefarious enterprise.[2]

The intellectual effort to chronicle law as transformation continued with Stanford historian Jack Rakove's celebrated book, *Original Meanings: Politics and Ideas in the Making of the Constitution*, which explained how the early framers saw the Constitution as malleable and argued that they understood the Constitution as a loose template to be adjusted as the needs of the nation changed.[3] A purported alteration in James Madison's thinking about the nature of law and political institutions was a key subject for Rakove. Another book, Mary Sarah Bilder's *Madison's Hand: Revising the Constitutional Convention*, has argued for a similar change in Madison's beliefs by tracing the evolution of his revisions of his *Notes on the Constitutional Convention*.[4]

Jonathan Gienapp, author of *The Second Creation: Fixing the American Constitution in the Founding Era*, is a junior colleague of Rakove's at Stanford. Like Rakove and Bilder, he considers Madison central to his exposition. But rather than make Madison's *Notes on the Constitutional Convention* his subject, Professor Gienapp focuses on the activities of the first Congress, where Madison was a prime mover. Gienapp argues that the first Congress, in essence, engaged in a "second creation" of the Constitution, abandoning one closer to the British "constitution" of broad principles which guaranteed flexibility and change in favor of one fixed in meaning for all time, the interpretation of which relied on an "original understanding" of the document's framers. In other words, Gienapp sees the first Congress as a moment of constitutional *transformation*.

The progressive trope of transformation, which implicates the notion of a "living" or "evolving" Constitution, seems like it

1 Roscoe Pound, The Formative Era of American Law (1938)

2 Morton Horwitz, The Transformation of American Law 1780-1860 (1977).

3 Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996). Rakove's book won the Pulitzer prize in history.

4 Mary Sarah Bilder, Madison's Hand: Revising the Constitutional Convention (2015).

was designed, consciously or unconsciously, to support modern judicial progressives, such as the members of the Warren Court or Justices Anthony Kennedy and Sandra Day O'Connor, who understand their task to be to refashion constitutional principles—particularly the "equal protection" and "due process" provisions of that charter—to fit the "evolving standards of decency"[5] that supposedly characterize American civilization.[6]

Rakove's, Bilder's, and Gienapp's books could be seen as an attack on the jurisprudence of originalists like Justices Antonin Scalia and Clarence Thomas, who embrace the notion that the only sensible and valid strategy of constitutional hermeneutics is to interpret the document according to its plain meaning at the time it was passed or amended. The theory of an evolutionary development of constitutional meaning, based as it is on an idea similar to Darwin's speculation with regard to the evolution of the species, has undeniable intuitive appeal. Nevertheless, evolutionary jurisprudence is in uneasy tension with more basic ideas about ours being a government of laws and not of men, and thus with our hallowed concept of the rule of law itself. If judges become legislators, there is an end to separation of powers, and popular sovereignty also goes by the board. Some scholars are fighting a rearguard action.[7] But Gienapp's new book and the honors bestowed on previous books telling a similar story—Horwitz's and Bilder's books both won the Bancroft Prize, the highest accolade the history fraternity can bestow—show that alternative stories about constitutional and legal development are out of favor.

Horwitz, Rakove, Bilder, and Gienapp are all learned and energetic scholars, and all demonstrate originality, dedication, an appreciation of both the primary sources and the secondary literature. Gienapp also demonstrates some flair with language and a deep and realistic appreciation of the manner in which constitutional theory can be enlisted in the service of particular political ends, or perhaps the manner in which political actors can shade the truth to meet partisan policy needs. His book is a very valuable review of the struggles in the first Congress between the emerging Madisonian-Jeffersonian opponents of the Washington and Adams administrations, and the Hamiltonian Federalist supporters of those administrations.

This is not a new story, however,[8] and Gienapp's overlay, which is an argument that this struggle gave way to a shift in how the Constitution was understood, is not entirely convincing. One element that gives pause is the focus (which Gienapp shares with Rakove and Bilder) on Madison. The Virginian has a reputation as the most important framer at the Constitutional Convention, but this reputation may not really be deserved.[9] Forrest MacDonald concluded that Madison's reputation as "the Father of the Constitution" is a "myth," since Madison's specific proposals for the Constitution were generally defeated.[10] The story that Gienapp tells includes similar setbacks for Congressman Madison, who failed in his efforts to defeat the incorporation of the Bank of the United States and to counter other moves of the Washington Administration.

The notion that one can look to the debates in Congress for authoritative interpretations of the Constitution undergirds Gienapp's book, but it is mistaken. Gienapp is a historian, not a lawyer, and his book has very little on the early federal courts and how they understood the Constitution. While Rakove once appeared to understand that there were great men before Agamemnon[11]—most other American historians appear to believe that the work of the federal courts did not begin in earnest until John Marshall became Chief Justice in the early nineteenth century—Gienapp does not support his argument about a second creation of the Constitution by examining the interpretation of the Constitution in the federal courts in the 1790s. Had he done so, I suspect he might have discerned that the Constitution was not transformed from a malleable to a fixed document. Rather, the implicit fixed-meaning approach—without which *Federalist 78* is incomprehensible—prevailed from the beginning to the end of the decade in the courts.[12] If one wants to understand constitutional hermeneutics, one's inquiry should include all three branches of

5 *See, e.g.*, Matthew C. Matusiak, Michael S. Vaughn, and Rolando V. del Carmen, *The Progression of "Evolving Standards of Decency" in U.S. Supreme Court Decisions*, 39 Crim. Just. Rev. 253 (2014).

6 This notion of using the past to justify radical transformation in the present and future was a principal feature of the notable late seventies' jurisprudence in American law schools, Critical Legal Studies. *See, e.g.*, Debra Livingston, Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 Harv. L. Rev. 1669, 1678 (1982) ("By demonstrating that first principles, not only doctrinal details, are products of historical circumstance and historically specific modes of legal reasoning, the critical legal scholar uses history to disclose that the underlying assumptions of doctrinal fields lack the necessity sometimes claimed for them—to demonstrate that such assumptions represent mere choices of one set of values over another."). On Critical Legal Studies generally, see, e.g., Stephen B. Presser, Law Professors: Three Centuries of Shaping American Law, Chapter 14 (2017).

7 For my efforts, see, e.g., Law Professors, *supra* note 6; Stephen B. Presser, Recapturing the Constitution: Race, Religion, and Abortion Reconsidered (1994); *Recovering Our Republic*, Newsmax, https://www.newsmax.com/insiders/stephenbpresser/id-482/ (accessed Jan. 30, 2018) (a blog where I post occasional columns). For another excellent work of preservation, see John O. McGinnis and Michael B. Rappaport, Originalism and the Good Constitution (2013).

8 For a notable account of the political and judicial struggles in the early republic, see, e.g. Gordon S. Wood, Empire of Liberty: A History of the Early Republic 1789-1815 (2009).

9 I do not mean to disparage Madison or his contributions. He was a great practitioner of what the framers understood as the "new science of politics," and his contributions to the *Federalist* regarding the separation of powers and federalism deserve their immortal fame.

10 Forrest McDonald, *Novus Ordo Seclorum:* The Intellectual Origins of the Constitution 205 (1985).

11 Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031 (1997).

12 For a discussion of the early federal court cases, see, e.g., Stephen B. Presser, The Original Misunderstanding: The English, The Americans, and the Dialectic of Federalist Jurisprudence (1991). In that book I argued, curiously, that there was a transformation of legal thought in the early republic, but the transformation I proposed was quite different from that set forth by Gienapp. I argued that the early American judges and justices were applying a static and religious view of law, while John Marshall laid the groundwork for a flexible, accommodating, and dynamic view of law. See also Gary L. McDowell, The Language of the Law and the Foundations of American Constitutionalism (2010) (a brilliant exposition—subtler than mine—making the case that the initial conception of the Constitution as fixed

the government, and perhaps even the attitudes of the press, the public, and the academy, though this may be asking too much of any single scholar.

Nevertheless, there is something about Madison that continues to fascinate and inspire provocative scholarship such as this study, and his position in Congress may be the reason for the focus on the legislative branch. Whatever it means for how we should understand the Constitution, it is clear that Madison's beliefs shifted in the 1790s, and that he therefore moved from an alliance with Alexander Hamilton regarding commerce and a strong central government towards a closer embrace of Jefferson's agrarian and states' rights beliefs. This shift, along with his undeniable importance during the framing and ratification of the Constitution, makes Madison a subject of perpetual interest.[13]

In the end, though, the transformation rhetoric is not wholly satisfying. One can argue, as Gary McDowell convincingly did,[14] that the meaning of the Constitution was fixed at the time of its ratification, and that this was the orthodox and original understanding and indeed the very purpose of creating the document. This is not to deny that our constitutional debates have always featured one group or another challenging this original understanding, and arguing for a living Constitution in order to accomplish its own goals, or to transform our politics. Perhaps our constitutional history inevitably involves an ongoing and repetitive series of efforts to replace the original understanding with new constitutional models. In that case, perhaps the appropriate metaphor for American constitutional hermeneutics is a cyclical or repetitive unfolding, rather than a series of transformations.

The distinguished political scientist Garrett Ward Sheldon, in a review of Professor Bilder's book, made an observation which applies just as nicely to Professor Gienapp's notion that the Constitution began as malleable, became temporarily fixed for political purposes, and could therefore morph further in service of other ideologies:

> So, this author's perspective is that the underlying philosophies of the U.S. Constitution in Locke's Natural Rights ideology; Montesquieu's separation of powers; Aristotle and Cicero's views of man's social nature and resultant democracy; the Reformed Christian suspicion of human nature and evil (all prevalent in the Founding period and known by the classically educated Founders), do not provide a stable, solid, permanent foundation for the Constitution and Republic, but we are all subordinate to the vagaries of contemporary political controversies, personalities and interests; relativistic and transitory. And so in this view such mutability of social and government should continue right up to our own time: the Bill of Rights protections of Freedom of Speech, press, religion and Due Process of Law may be modified by future generations, especially if some speech or religion may offend certain groups, or the rights of the accused and judicial procedure are perceived as unfair or irrelevant to certain classes of accusers or aggrieved.[15]

Just so.

because of its written nature can consistently be embraced throughout our history).

13 On Madison's political thought, see especially, Garrett Ward Sheldon, The Political Philosophy of James Madison (2003). It is important to understand that Sheldon brilliantly traces a consistency in Madison's thought, which led Madison, at various times and as circumstances dictated, to be for or against a strong central government. Thus, Sheldon explains, "Madison's political philosophy historically shifted between Lockean liberal and classical republican, federal and states' rights perspectives, with a consistent view to a balanced, moderate government that accurately reflected the Christian view of human nature as egotistical and domineering, realistically establishing a stable and just regime." *Id.* at xiv. In Sheldon's view, unlike Gienapp's, no shifting sense of constitutional meaning is necessary to explain or justify Madison's actions. Rather, the explanation is his consistent religious and political philosophy as applied to different contexts.

14 *See* McDowell, *supra* note 12.

15 Garrett Ward Sheldon, *Review of Mary Sarah Bilder's "Madison's Hand: Revising the Constitutional Convention,"* History News Network, October 9, 2018, https://historynewsnetwork.org/article/170190 (accessed Jan. 31, 2019).