THE ORIGINAL FEDERALIST THEORY OF IMPLIED POWERS

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Thank you, Judge McFadden, for your kind introduction. Let me start by thanking the University of Virginia for hosting this event and the organizers for inviting me, and by noting what a privilege it is for me to participate in this debate with Professor Michael McConnell. He is one of the great constitutional scholars of our time, and it's an honor for me to appear on this stage with him.

I'd like to begin my remarks by drawing some distinctions, in order to sharpen our topic. At the outset, I'll simply note these distinctions without much explanation. I'll then draw on them to state a general thesis I'd like to defend today. Finally, I'll say a few words on behalf of the thesis, before turning things over to Michael.

Here are the distinctions I have in mind. The first is the distinction between how the framers designed the Constitution and how they and other Federalists defended it, once Anti-Federalists began attacking it. The second is the distinction between the powers

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vested or delegated by the Constitution, on the one hand, and its enumerated powers, on the other. These three terms are often used interchangeably, but that's a mistake, for the simple reason that powers can be vested or delegated without being enumerated. In our Constitution, enumerated powers are a subset of delegated powers, because some delegated powers are implied. Put differently, there is a critical difference between "delegated" powers and "expressly delegated" powers—a point that was squarely raised, extensively debated, and decisively resolved when the Tenth Amendment was proposed and ratified.[1] Since this is a key theme in the account of federal power I'll defend today, it's important to clarify at the outset.

The third distinction is the difference between powers vested by the Constitution in the Government of the United States and those powers vested in Congress, the President, or other Departments or Officers of the United States. The text of the Necessary and Proper Clause requires us to draw this distinction, which is crucial to understanding how the Constitution was designed and ratified.[2] Nevertheless, a vast amount of scholarship and case law conflates these concepts, causing a great deal of confusion.

Finally, the fourth distinction is more methodological. Simply put, it's the difference between historical studies that honestly and squarely confront the role of slavery in the formation of the Constitution and scholarship that ignores or distorts that issue.

With this background in mind, let me now state my thesis. It doesn't fit easily into a single sentence, but I'll try to give a fairly concise statement of it nonetheless. In a nutshell, the thesis is that

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1. *See, e.g.*, 1 ANNALS OF CONG. 767-68 (1789) (Joseph Gales ed., 1834). *See generally* John Mikhail, *Fixing Implied Constitutional Powers in the Founding Era*, 34 CONST. COMMENT. 507 (2019).

2. *See* U.S. CONST. art. I, § 8, cl. 18 (distinguishing the powers vested by the Constitution in the Government of the United States from the powers vested by the Constitution in Congress or other Departments or Officers of the United States). *See generally* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014).

the framers designed the Constitution to vest implied as well as enumerated powers in the Government of the United States. Those implied powers include, but are not limited to:

1. All the powers to which any nation would be entitled under the law of nations, such as foreign affairs, Indian affairs, immigration, and other incidents of national sovereignty;[3]
2. All the powers that Blackstone and other writers had explained were tacitly possessed by any legal corporation, including the power to own property, make contracts, sue and be sued, operate under a seal, and enact by-laws, along with other corporate powers, such as the power to remove officers for good cause;[4]
3. The power to legislate on all issues that affect the general interests or harmony of the United States, or that lay beyond the competence of the states—in other words, the authorities implicated by Resolution 6 of the Virginia Plan,[5] later modified by the so-called Bedford motion;[6]
4. Finally, the power to fulfill all the purposes for which the Government of the United States was formed, including, but

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3. *See, e.g.*, 1 COLLECTED WORKS OF JAMES WILSON 66 (Kermit L. Hall and Mark David Hall eds., 2007); 2 ANNALS OF CONG. 1955 (Statement of John Vining, Feb. 8, 1791); Pennhallow v. Doane's Admr's, 3 U.S. (3 Dall.) 54 (1795). *See generally* GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919).

4. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *455-473, 303-315 (David Lemmings ed., 2016); 2 COLLECTED WORKS OF JAMES WILSON 1035-37 (Kermit L. Hall and Mark David Hall eds., 2007). *See generally* 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 & Guy Seidman*, 17 GEO. J. L. & PUB. POL'Y 407 (2019).

5. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–21 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. Resolution 6 empowered the National Legislature "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." *Id*.

6. *See* 2 FARRAND'S RECORDS, *supra* note 5, at 26–27. Bedford's motion added to Resolution 6 the power of Congress "to legislate in all cases for the general interests of the Union." *Id*. at 26. It was ultimately adopted by the Convention by a vote of 8-2, with only South Carolina and Georgia dissenting. *Id*. at 27.

not limited to, those ends enumerated in the Preamble and General Welfare Clause.[7]

That's a lot of implied power. Among other things, it suggests that Congress is constitutionally authorized to legislate directly for the common defense and general welfare of the United States. That may seem shocking to some of you, but after many years of studying this issue, I'm reasonably confident that it is historically accurate, at least with respect to the principal framers of the Constitution. While I don't expect to persuade you of this robust account of federal power in the short time we have today, let me at least try to make the thesis more plausible by offering some clarifications and replies to objections.

First, it's natural to object that the Constitution I've just described is not the one defended by Madison and Hamilton in their *Federalist* essays or at their state ratifying conventions.[8] That's correct—but this is where my first distinction comes into play. If one asks how the Constitution was *designed* by the framers, then that question must be distinguished from what happened during the campaign to ratify the Constitution, once critics began attacking it.

In this context, it's worth noting that a common mistake is to assume that James Madison played the leading role in framing the Constitution. The primary author of the Constitution was not Madison, but two anti-slavery Northerners—James Wilson and Gouverneur Morris—who did most of the actual drafting of the

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7. *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States.").

8. *See, e.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton) (explaining why the Necessary and Proper Clause was harmless, and concerns about it were overblown); THE FEDERALIST NO. 44 (James Madison) (same).

Constitution for the Committees of Detail and Style, respectively.[9] Wilson and Morris were two of the strongest nationalists at the federal convention. They also were among the biggest champions of implied national powers in the period *before* the convention. Unlike Madison, they believed that, even under the Articles of Confederation, the United States had the implied power to create a national bank, regulate public finance, govern western territories, provide for the general interests of the United States, and do "all other Acts and Things that Independent States may of right do."[10] For them, the Constitution was less a radical break with the past than an opportunity to place what the national government was already legally competent to do on a sounder footing.

Another likely objection to my thesis is that, on its face, the Preamble is obviously not a grant of power. That's also correct, but it misses the point. The Preamble is not a grant of power itself. Rather, it is a statement of the purposes for which the Constitution was created. But the Necessary and Proper Clause authorizes Congress to make necessary and proper laws to execute all of the powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof. And one of the powers vested by the Constitution in the Government of the United States is the power to fulfill the purposes for which that government was formed.

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9. *See generally* David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033 (2021). *See also, e.g.*, William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008); Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 89 (2021); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015); William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021); David S. Schwartz, *The Committee of Style and the Federalist Constitution*, 70 BUFF. L. REV. 781 (2022).

10. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). *See generally* John Mikhail, *A Tale of Two Sweeping Clauses*, 42 HARV. J. L. & PUB. POL'Y 29 (2019).

That is the original Preamble-based theory of implied powers, as I understand it. It's a simple and sturdy argument, far more intuitive and coherent than many things one finds in the Supreme Court's contorted commerce clause jurisprudence, which is often used to achieve the same ends. In the eighteenth century, this theory was not radical, but mainstream, and it reflected some of the highest ideals of the Enlightenment. Its core premise is that legitimate governments are vested with the power to fulfill their purposes, which include protecting the natural rights and providing for the common defense and general welfare of the governed. This would be true of the Government of the United States even if its ends were not clearly stated in the Constitution. The fact that these ends and the Necessary and Proper Clause are clearly expressed in our fundamental charter simply makes more explicit what would otherwise be true tacitly and as a matter of course.

Turning to original public meaning, it's appropriate to want solid evidence that the founders embraced this robust theory of implied powers. Here my reply is that, if one looks, one can find this evidence all over founding-era sources. The core ideas come in different varieties and are not always formulated as crisply as I have stated them here. Partly due to their implications for slavery, they were often invoked guardedly, or with a fair bit of obfuscation. In many contexts, they were ignored or suppressed, to avoid saying the quiet part out loud. But the evidence that these beliefs were widely held is clear and convincing, if one takes time to look for it.

For example, the original Federalist theory of implied powers was a main reason why three framers—Edmund Randolph, George Mason, and Elbridge Gerry—refused to sign the document in Philadelphia.[11] More broadly, this original theory of implied powers is the same theory that Brutus, Federal Farmer, and

11. *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 5, at 563-64, 631 (Randolph); *id.* at 632-33 (Gerry); SUPPLEMENT TO MAX FARRAND'S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249, 251 (James H. Hutson ed., Supp., 1987) (Mason).

other Anti-Federalists warned of during ratification;[12] that Benjamin Franklin relied upon when he called on Congress to abolish slavery;[13] that many members of Congress used to defend the First Bank of the United States;[14] and that John Marshall described in *McCulloch v. Maryland*, *U.S. v. Fisher*, and other landmark cases.[15] Finally, this theory is also the same basic argument that Madison invoked when he proposed his amendments to the Constitution in 1789. To clarify why he wanted to add the Ninth Amendment to the Constitution, Madison pointed to the implied powers implicated by the Necessary and Proper Clause. In light of that clause, he explained, Congress was vested with broad discretionary powers that enabled it "to fulfill every purpose for which the Government was established."[16]

Let me expand on the notion of original public meaning and how it should be understood in this context. As I have indicated,

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12. *See, e.g.*, Brutus, No. 5 (Dec. 13, 1787), in 1 THE DEBATE ON THE CONSTITUTION 499, 500 (Bernard Bailyn ed., 1993) (arguing that the Preamble, read together with the Necessary and Proper Clause, gives Congress power to make laws at discretion); Federal Farmer, No. 4, (Oct. 12, 1787), in 3 THE FOUNDERS' CONSTITUTION 240 (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that "it is almost impossible to have a just conception of [the] powers" implicated by the Necessary and Proper Clause); An Old Whig, No. 2 (Fall, 1787), *id.* at 239 (arguing that the Necessary and Proper Clause vests Congress with sweeping implied powers); Centinel, no. 5 (Fall 1787), *id*. at 239 (arguing that the Necessary and Proper Clause enables Congress to justify "every possible law" as constitutional).

13. *See, e.g.*, 2 ANNALS OF CONG. 1197-98 (Joseph Gales ed., 1834). *See generally* John Mikhail, *McCulloch v. Maryland, Slavery, the Preamble, and the Sweeping Clause*, 36 Const. Comment. 131 (2021).

14. *See, e.g.*, 14 DOCUMENTARY HISTORY OF THE FIRST FED. CONG. 390, 393 (William Charles diGiacomantonio et al. eds., 1995) (Statement of Fisher Ames, Feb. 3, 1791); *id.* at 413 (Statement of John Laurence, Feb. 4, 1791); *id.* at 454 (Statement of Elbridge Gerry, Feb. 7, 1791). *See generally* Joseph M. Lynch, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 83-92 (1999); Richard Primus, *The Essential Characteristic: Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018).

15. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805).

16. *See* CREATING THE BILL OF RIGHTS 82 (Helen E. Veit et al. eds., 1991) (statement of James Madison, June 8, 1789).

some of the best evidence of the original understanding of implied powers are speeches in Congress during debates over the First Bank of the United States. These speeches are not well known because most casebooks pass right by them to focus attention on the "stars" of the bank debate: Madison, Randolph, Jefferson, and Hamilton.[17] Yet one can learn a lot about the original meaning of the Constitution from these debates, arguably more so than from the opinions of the first cabinet. Randolph, Jefferson, and Hamilton were writing for an audience of one, and the contents of their opinions were not publicly known until 1805, when John Marshall summarized them in his biography of George Washington.[18] By contrast, House members who defended the bank did so in public, knowing their statements would be published and circulated in newspapers throughout the nation. By 1791, watching Congress had become a popular social activity in Philadelphia, and the galleries were full of onlookers.[19] If one wants to know how the Constitution was originally construed, then one should focus on these public speeches. When one does, it becomes clear that many of the founders embraced sweeping implied powers, rooted mainly in the Preamble and Necessary and Proper Clause.[20]

If implied powers were so widely embraced, why weren't they discussed during ratification? The answer is that they *were* discussed—by Anti-Federalists, who repeatedly warned that these powers, along with the Supremacy Clause, were dangerous and

17. *See, e.g.*, RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 44-59 (1st ed. 2008); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 30-39 (6th ed. 2015); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 53-73 (2d ed. 2013).

18. *See generally* John Marshall, 4 THE LIFE OF GEORGE WASHINGTON 264-403 (Philadelphia, C.P. Wayne 1805).

19. *See, e.g.*, "Introduction," 14 DOCUMENTARY HISTORY OF THE FIRST FED. CONG. OF THE UNITED STATES OF AMERICA xi-xv (William Charles diGiacomantonio et al. eds., 1995).

20. *See supra* note 14 and accompanying text.

would likely produce a consolidated government.[21] Many commentators have assumed that these Anti-Federalist objections were exaggerations, made to cast the Constitution in an unduly negative light.[22] But the fact is they probably were accurate interpretations of what men like Wilson and Morris set out to achieve with the Constitution. They *wanted* a strong national government with power to provide for the common defense and general welfare in unforeseeable circumstances, and they drafted the Constitution accordingly. The fact that Federalists were unwilling to put the Constitution in jeopardy by spelling this out during ratification should not surprise us, let alone lead us to draw false inferences about how the government they designed was meant to operate.

A more revealing question is how federal powers were conceived *after* ratification, when it was time to put the new machine into motion. At that point, "government by implication" quickly

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21. *See supra* note 12 and accompanying text. *See also, e.g.*, 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1321-22 (John P. Kaminski and Gaspar J. Saladino eds., 1993) (Patrick Henry in the Virginia Ratifying Convention); 22 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2146 (John P. Kaminski et al. eds., 2008) (George Clinton in the New York Ratifying Convention).

22. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 16 (noting that many Anti-Federalist objections to the Constitution "distorted the plain text or rested on predictions so fantastic as to defy common sense and the limits of plausible speculation"); Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 193, n. 13 (Richard Beeman, Stephen Botein. & Edward Carter III, eds., 1987) (suggesting that Patrick Henry "used any argument he could find to oppose the Constitution"); Cecilia Kenyon, "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," in MEN OF LITTLE FAITH: SELECTED WRITINGS OF CECILIA KENYON 39 (Stanley Elkins, Eric McKitrick, & Leo Weinstein, eds., 2002) (discussing the "very black picture indeed of what the national representatives might and probably would do with the unchecked power conferred upon them under the provisions of the new Constitution" and observing that "[t]he 'parade of imaginary horribles' has become an honorable and dependable technique of political debate, but the marvelous inventiveness of the Anti-Federalists has rarely been matched"). *Cf.* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 81 (2001) ("[I]t is at least plausible that the Anti-Federalists shaded or exaggerated their views for reasons of political strategy").

became how the First Congress did business, in the words of one historian.[23] On issue after issue—the oath, removal, assumption, the bank—the United States largely ran on implied powers.[24] Strict construction, states' rights, the enumerated powers doctrine, and similar theories were visible competitors, but this was still the Age of Federalism, when the original Constitution held sway.[25]

Let me conclude these remarks by noting two corollaries of my thesis, one which concerns gaps in the written Constitution, and the second, slavery. Famously, the Constitution seems to be missing certain enumerated powers that one might expect the framers to have noticed and supplied. For example, there is no general foreign affairs power. Nor are there express powers over removal, neutrality, immigration, Indian affairs, federal eminent domain, or recognition of foreign governments, among other subjects. If the federal government is one of only enumerated powers, along with incidental powers to carry into effect the enumerated ones, then omissions like these seem puzzling. What were the framers thinking? The mystery disappears and the Constitution becomes more rational and coherent once one realizes that all of these powers can be understood as among the "other powers" vested by the Constitution in the Government of the United States to which the Necessary and Proper Clause refers. Perhaps the framers knew what they were doing, in other words, when they decided to enumerate some powers, but left others implicit.

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23. *See* LYNCH, *supra* note 14, at 51.

24. *See, e.g.*, 1 ANNALS OF CONG. 266-71 (1789) (Joseph Gales ed., 1834) (House debate on whether Congress had the power to require state legislators to take the oath of office); *id*. at 455-591 (House debate on which branch has the authority to remove officers); 2 ANNALS OF CONG. 1205-1364 (Joseph Gales ed., 1834) (House debate on assumption of public debt); *id*. at 1891-1960 (House debate on the Bank of the United States).

25. LYNCH, *supra* note 14, at 50-92. *See also, e.g.*, STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 (1993); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Mikhail, *supra* note 1; Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020); David S. Schwartz, Jonathan Gienapp, John Mikhail, & Richard Primus, *The Federalist Constitution: Forward*, 89 FORDHAM L. REV. 1669 (2021).

Finally, let me say a word about slavery. The conventional wisdom among contemporary historians is that the Constitution was a thoroughly pro-slavery document, which gave slaveholders practically everything they wanted, including protecting slavery from interference by Congress in perpetuity. The term that historians use to describe this doctrine is the "federal consensus."[26] On this view, Congress was incapable of abolishing slavery before the Civil War by ordinary legislation, because the Constitution gave no power to the federal government to interfere with domestic slavery. Regulation of domestic slavery, in other words, was a power reserved to the States by the Tenth Amendment.

In light of the theory of implied powers I've defended here, it's natural to ask if the federal consensus was correct. Is it true that the United States could not end slavery? Or were Anti-Federalists like George Mason and Patrick Henry right when they said that this was nonsense—that whether by means of its taxing authority, its war powers, or even just its implied power to promote the general welfare, Congress could liberate all those who were enslaved?[27] This question, of course, dominated American history

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26. For the origin of this term, which has become common among historians, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 16 (1977). For more recent discussions and elaborations of the federal consensus, see, for example, JAMES OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION (2021); SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING (2018). For an alternative account, which holds that the original Constitution was more neutral with respect to powers over domestic slavery, see DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 15-47 (2001).

27. *See, e.g.*, 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1161 (John P. Kaminski and Gaspar J. Saladino eds., 1990) (Mason); 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1338 (John P. Kaminski and Gaspar J. Saladino eds., 1993) (Mason); *id.* at 1341-42 (Henry); *id.* at 1477, 1504 (Henry). *See generally* Robin L. Einhorn, *Patrick Henry's Case Against the Constitution: The Structural Problem with Slavery*, 22 JOURNAL OF THE EARLY REPUBLIC 549 (2002); Mikhail, *supra* note 13.

for the next seventy-five years, and it can be reframed with reference to later abolitionists. For example, who was correct, William Lloyd Garrison or Frederick Douglass?[28]

I won't try to answer that question here. Let me just conclude these remarks by saying that, in my view, there may be few topics as important as this one. In part this is because slavery is so divisive, its legacies are so profound, and so many of our fellow citizens are justly demanding a reckoning with its role in American history and society. They want to know if America's founding documents can still be admired, and if so, why. My hope is that some of my reflections today might contribute modestly to that endeavor. Thank you.

28. Garrison and his allies famously repudiated the Constitution as a "proslavery compact"—a "covenant with death" and "agreement with Hell." *See, e.g.*, WIECEK, *supra* note 26, at 228. By contrast, Douglass eventually adopted the position that the Constitution was a "glorious liberty document" and that attributing pro-slavery intentions to its framers was "a slander upon their memory." Frederick Douglass, The Meaning of July Fourth for the Negro (speech at Rochester, New York, July 5, 1852), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 181-204, 201-202 (Philip S. Foner ed., 1950).