

KEEPING OUR REPUBLIC

Ashlee A. Paxton-Turner*

I. INTRODUCTION.....	147
II. WHAT WE TALK ABOUT WHEN WE TALK ABOUT ORIGINALISM.....	152
III. WHAT WE SHOULD BE TALKING ABOUT BUT AREN'T TALKING ABOUT.....	158
A. <i>We Should Be Talking About Union Preservation</i>	158
B. <i>We Aren't Talking About Union Preservation</i>	165
IV. HOW WE KEEP OUR REPUBLIC.....	167
A. <i>The Animating Principles of Union Preservation</i>	169
B. <i>Union Preservation and Longstanding Precedent: Franchise Tax Board of California v. Hyatt</i>	173
C. <i>Union Preservation and the Bill of the Rights: District of Columbia v. Heller</i>	175
V. CONCLUSION.....	177

I. INTRODUCTION

In championing the Constitution at a time when most Americans hardly felt any national allegiance, Alexander Hamilton insisted on “think[ing] continentally.”¹ In other words, if the fledging nation² were going to survive, the loose confederation of states formed under the Articles of Confederation was not the answer.³ For many Americans in 1787, the idea of abandoning

* J.D., Duke University School of Law; B.A., University of Pennsylvania. Many thanks to Professor H. Jefferson Powell and Alexandra L. Foulkes for their encouragement and thoughtful suggestions and edits along the way in developing this Article. Thanks, too, to T.J. Keefe for helpful feedback on early drafts of this Article and to Patrick Bradley for reading and discussing *The Federalist Papers* with me. Thanks also to the editors of the *South Carolina Law Review* for their hard work on this Article.

1. JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789*, at xvi (2015). By using the term “continentally,” Hamilton was emphasizing the collective states, otherwise known as the developing Union. And, of course, we know this by other uses of the term “continental,” such as the Continental Congress and the Continental Army. So, when we think “continentally,” we are thinking about the Union.

2. *See id.* at xvi.

3. *See id.* at xi (“The government . . . created in 1781, called the Articles of Confederation, was not really much of a government at all and was never intended to be.”).

this loose confederation was a hard sell.⁴ But Hamilton, along with James Madison and John Jay,⁵ understood that a new structure of government was needed.⁶ And it is here—with this colonial trio—that our story begins.⁷

To be sure, our colonial trio understood that guiding this historical moment was the overarching goal of union preservation; they repeatedly returned to this goal in *The Federalist Papers*,⁸ significant advocacy used to promote the Constitution's ratification and help make the seismic shift from the Articles of Confederation to the Constitution a reality. In our current and particularly divisive historical moment, when many fear that our ability to respond with confidence to Ben Franklin's famous quip⁹ hangs in the balance, the idea of union preservation has inherent appeal.¹⁰ But union preservation is more than just a comforting sentiment in the twenty-first century. This Article

4. *Id.* at xiii (noting that the transition from the Articles of Confederation to the Constitution was a “seismic shift” and “a dramatic change in direction and in scale, in effect from a confederation of sovereign states to a nation-size republic”).

5. Of course, this is not to say that Hamilton, Madison, and Jay were the only three who understood this point and promoted it. Some historians would add George Washington into the mix as well as Gouverneur Morris, among others. *See, e.g., id.* at xv (arguing that “four men made the transition from confederation to nation happen” and specifically naming George Washington among those four). But, as Hamilton, Madison, and Jay authored *The Federalist Papers*, this Article focuses on them.

6. *See, e.g., id.* at xv (discussing the role that Hamilton, Jay, and Madison played in the transition to the Constitution).

7. Indeed, it has been said that “[t]hrough all our history, to the last, in the hour of darkness and peril and need, [t]he people will waken and listen to hear . . . the midnight message of Paul Revere”; in our current historical moment, we might well listen to hear a different message. HENRY WADSWORTH LONGFELLOW, PAUL REVERE'S RIDE 45 (Houghton Mifflin and Co., 1907). This time, the message is from Hamilton about how our nation endures long after “the British Regulars [have] fired and fled.” *Id.* at 39.

8. *See, e.g.,* THE FEDERALIST NO. 5, at 53 (John Jay) (Clinton Rossiter ed., 1961) (“Let candid men judge, then, whether the division of America into any given number of independent sovereigns would tend to secure us against the hostilities and improper interference of foreign nations.”); THE FEDERALIST NO. 8, *supra*, at 70–71 (Alexander Hamilton) (“If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation.”); THE FEDERALIST NO. 41, *supra*, at 260 (James Madison) (“[N]othing short of a Constitution fully adequate to the national defense and preservation of the Union can save America from as many standing armies as it may be split into States or Confederacies . . .”).

9. The famous anecdote goes that following the Constitutional Convention, as Ben Franklin exited Independence Hall onto the streets of a young Philadelphia, someone asked him what type of government we would have, to which Franklin supposedly quipped: “A republic, if you can keep it.” *See* Adam J. White, *A Republic, If We Can Keep It*, ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/> [<https://perma.cc/T78X-YB76>] (discussing this anecdote).

10. Indeed, at other divisive moments in history, such as the Civil War, the appeal of this point has not been lost on those in power. *See, e.g.,* ELLIS, *supra* note 1, at xii (discussing Lincoln's “compelling reasons for bending the arc of American history in a national direction, since he was then waging a civil war on behalf of a union that he claimed predated the existence of the states”).

argues that it is the very principle we must hold onto when interpreting the Constitution if we want to keep our republic. In other words, we keep our republic by preserving our union rather than preserving that loose confederation of states. Though some may hold the Constitution sacred, it is our republic that is sacred, and without it, there is no Constitution worth interpreting.

Specifically, we must confront a new era of the Supreme Court, where originalism will likely color more and more opinions,¹¹ especially as jurists across the ideological spectrum at least acknowledge what the Framers may have had in mind.¹² There will also be many critics quick to cry foul.¹³ Critics will likely still insist that an originalist interpretation is merely a coded way of attempting to maintain the political status quo or promote conservative positions.¹⁴ Some, too, will argue that originalism is merely a tool wielded to reject the current constitutional status quo¹⁵ in favor of something that at least masquerades as more objective and more legitimate. And maybe so—that is not for this Article to consider. Instead, this Article accepts that originalism is a powerful and popular (and controversial) method of constitutional interpretation. To the extent we have to reckon with originalism, placing union preservation as the lodestar¹⁶ of the originalists' constitutional interpretation

11. See Samuel Issacharoff, *Pragmatic Originalism?*, 4 N.Y.U. J. L. & LIBERTY 517, 517 (2009) (anticipating this trend over a decade ago).

12. See Emily Bazelon, *How Will Trump's Supreme Court Remake America?*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> [<https://perma.cc/EEH4-2X5X>] (“Some liberals have tried to find common ground with conservatives by blurring the boundaries between originalism and an evolving understanding of the Constitution’s open-ended principles.”). Arguably leading this charge is Justice Kagan, who famously said at her confirmation hearing that “we’re all originalists, now,” because, at least to the extent that jurists apply the Framers’ “very specific rules” and “broad principles,” they are consistently “apply[ing] what [the Framers] meant to do.” *Id.*

13. But to the extent we accept this Article’s theory of continental originalism, we might be able to feel confident in saying that the critics are merely crying wolf.

14. See Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> [<https://perma.cc/4B3B-Q9R5>] (noting that one of the “three most common criticisms of originalism” is that “[o]riginalism is just a cover for conservative judges to reach the results they like”); see also Jamelle Bouie, *Which Constitution is Amy Coney Barrett Talking About?*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/opinion/amy-coney-barrett-originalism.html> [<https://perma.cc/9FLZ-DHSK>].

15. Bazelon, *supra* note 12 (“[Thomas] became the justice most determined to use originalism to rip up whole fields of American law, especially to reduce the scope of federal regulation.”).

16. We might also consider it to be our North Star, helping us find our way and escape from the confines of misleading legal interpretation.

can make originalism a little more faithful to the historical moment it holds sacred and thus add greater legitimacy to judicial opinions at a time when we need it most.¹⁷ Doing so will also foster greater faith in the independence of our independent judiciary and promote valuable debate on important issues rather than merely fueling division based on political assumptions.

Particularly in divisive historical moments, we ought to be wary of the fact that originalism can masquerade as an objective lens. It is no secret that the idea of objective truth in history is ever-shifting and complicated,¹⁸ and yet, *The Federalist Papers*—among other historical sources¹⁹—are often presented as evidence of some allegedly objective historical truth that necessitates a certain answer.²⁰ In fact, even Thomas Jefferson, who had a different vision for our republic, noted that *The Federalist Papers* were often considered as evidence of the Constitution’s “genuine meaning” and rarely denied as evidence of such.²¹ This, of course, is part of originalism’s allure.

17. *But see* Jack M. Balkin, *The Roots of the Living Constitution*, 92 B. U. L. REV. 1129, 1132 (2012) (“[F]idelity to ‘original meaning’ requires fidelity to the semantic meanings of the words in the text at the time of adoption, including generally recognized terms of art.”). Continental originalism, however, is about shifting our focus to how a key theme of the relevant historical moment, union preservation, necessarily shapes the meaning of the words.

18. *See* H. Jefferson Powell, *On Not Being “Not an Originalist,”* 7 U. ST. THOMAS L.J. 259, 260 (2010) (“But since authority has a nose of made of wax, it is possible to twist it in any direction.”). There is no reason to think that history is any less malleable than other authorities. Thomas Jefferson identified this same problem with law and constitutional interpretation. *See* Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 THE WRITINGS OF THOMAS JEFFERSON 140, 141 (Paul Leicester Ford ed., 1899). Put differently, “[m]emory is choice.” OCEAN VUONG, ON EARTH WE’RE BRIEFLY GORGEOUS 10 (2019). Inevitably, then, history is likewise a choice. *See* Louis Menand, *The People Who Decide What Becomes History*, NEW YORKER (Apr. 18, 2022), <https://www.newyorker.com/magazine/2022/04/18/the-people-who-decide-what-becomes-history-richard-cohen-making-history#:~:text=Does%20it%20matter%20that%20Gibbon's,be%20regularly%20drained%20of%20fluid%20C> [https://perma.cc/RD3L-TQ5A] (“[H]istory is not a science. . . . ‘By and large, the historian will get the kind of facts he wants.’”). The law is no different. Like the storyteller and the historian, the lawyer gets the facts he wants.

19. Looking at Justice Scalia’s opinion in *District of Columbia v. Heller*, 554 U.S. 570, 579–80 n.6 (2008), for example, other sources considered in interpreting “right of the People” included the N.C. Declaration of Rights § XIV (1776), the Md. Declaration of Rights § XVIII (1776), the Vt. Declaration of Rights, ch. 1, § XI (1777), and the Pa. Declaration of Rights § XII (1776).

20. In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court cited *The Federalist Papers* thirty-five times. *See also* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of Original Meaning of the United States Constitution*, 87 B. U. L. REV. 801, 802 (2007); Issacharoff, *supra* note 11, at 524 (“[T]he Federalist Papers began to be cited as evidence of the intent of the framing generation as early as *Cohens v. Virginia* in 1821[.]”).

21. Specifically, decades after *The Federalist Papers* were penned, Jefferson commented that *The Federalist Papers* are “an authority to which appeal is habitually made by all, and rarely declined or denied by any, as evidence of the general opinion of those who made and of those

Certainly, it would be unfair to suggest that originalism is the only methodology co-opting *The Federalist Papers* when it is convenient. But originalism ignores a fundamental aspect of the history from which it purports to divine its answers each time it insists that *The Federalist Papers* have decisively revealed the original public meaning of the Constitution²² and thus what the constitutional interpretation should look like.²³ If we step back to 1787 (or 1791, when the Bill of Rights was ratified),²⁴ the individuals orchestrating the adoption and ratification of the Constitution were pushing for an enduring form of government, for a structure that would “preserve the Union.”²⁵ Specifically, all three authors make repeated references to the organization of the United States government and its Constitution as a way to prevent the nation from falling prey to European powers and dissolving into

who accepted the constittn [sic] of the US. on questions as to its genuine meaning.” See *Thomas Jefferson: Principles of Government for UVa, Feb. 1825, February 1825*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-5007> [<https://perma.cc/V6UE-KGDX>] [hereinafter *Principles of Government for UVa*].

22. To be sure, there is also a third strand of originalism that focuses on the ratifiers’ understanding. See Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8–9 (2009). But for purposes of this Article, as all three strands suffer from the same defect, the Article primarily refers to original public meaning and, to a lesser extent, original intent for convenience.

23. See Maggs, *supra* note 20, at 839–840.

24. Or even to the Reconstruction era, depending on the question at issue. Although it is beyond the scope of this Article, Reconstruction is a prime example of yet another seismic shift that reveals additional animating principles of union preservation such as inclusion. Amendments Thirteen through Fifteen reveal this animating principle by abolishing slavery, providing for equal protection, and expanding the right to vote. But the moment in time itself also required another form of inclusion—reincorporating the Confederate states into the Union.

25. This theme appears repeatedly throughout *The Federalist Papers*. See, e.g., THE FEDERALIST NO. 8, *supra* note 8, at 70–71 (Alexander Hamilton) (“If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation.”); THE FEDERALIST NO. 41, *supra* note 8, at 260 (James Madison) (“[N]othing short of a Constitution fully adequate to the national defense and preservation of the Union can save America from as many standing armies as it may be split into States or Confederacies”); THE FEDERALIST NO. 64, *supra* note 8, at 392 (John Jay) (discussing the Senate and explaining that “by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved”); THE FEDERALIST NO. 70, *supra* note 8, at 424 (Alexander Hamilton) (noting that “[t]he ingredients which constitute energy in the executive” include “unity”).

independent sovereigns.²⁶ Taken as a whole, *The Federalist Papers* consistently champion union preservation.²⁷

To that end, through a close reading of *The Federalist Papers*—and the historical moment from which they were born—this Article builds a theory of “continental originalism” with union preservation as the originalists’ lodestar. Because if we accept that originalism is not going anywhere anytime soon, and we also accept its basic principles, we must also take seriously the historical point—clearly revealed by *The Federalist Papers*—that baked into the original meaning, original intent, or the ratifiers’ understanding is this idea of securing the nation’s survival and preserving our union. Plainly put, to keep our republic, we must start by “think[ing] continentally.”²⁸

This Article proceeds in three parts. Parts II and III describe two conversations about originalism—the one we’re having and the one we should be having. Specifically, Part II considers what we talk about when we talk about originalism. Part III then turns to *The Federalist Papers* and argues that when we talk about originalism, we should be talking about union preservation. Before concluding, Part IV develops continental originalism as a way to bring union preservation into the originalists’ toolkit and to take the necessary steps to keep our republic, including by navigating the distinction between debate and division.

II. WHAT WE TALK ABOUT WHEN WE TALK ABOUT ORIGINALISM

When we talk about originalism, we are talking about an interpretive method with roots dating back, at the very least, to early constitutional caselaw.²⁹ This lends a certain appeal to originalism over other methods. And

26. Hamilton may have most concisely captured this sentiment, explaining that “[i]f we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation,” “[b]ut if we should be disunited, . . . we should be, in a short course of time, in the predicament of [European powers].” THE FEDERALIST NO. 8, *supra* note 8, at 70–71 (Alexander Hamilton).

27. See THE FEDERALIST NO. 41, *supra* note 8, at 260 (James Madison) (“[N]othing short of a Constitution fully adequate to the national defense and preservation of the Union can save America from as many standing armies as it may be split into States or Confederacies . . .”).

28. See ELLIS, *supra* note 1, at xvi. In other words, we can think of continental originalism as what Hamilton might have said to Franklin on the streets of Philadelphia, walking along Chestnut Street.

29. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B. U. L. REV. 204, 204 (1980) [hereinafter Brest, *The Misconceived Quest*] (“At least since Marbury, . . . originalism in one form or another has been a major theme in the American constitutional tradition.”); see also Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. ONLINE 99, 101 n.6 (discussing the roots of originalism). The term “originalism,” however, did not appear until the 1980s when Brest used it. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090

there is a comfort (perhaps a cold comfort) in knowing that “[a]rguments from original meaning are, well, unoriginal.”³⁰

But there is a discrepancy in how scholars and jurists talk about originalism and how popular political culture talks about it. Typically, what scholars and jurists refer to when they discuss originalism is the now-familiar idea of original public meaning.³¹ In other words, what would the original public meaning at the relevant time have been?³²

At other times, the conversation dwells on original intent—that is, what the drafters’ intent was.³³ If we could step inside James Madison’s head, what exactly did he intend certain phrases to mean? This strand of originalism has become less popular,³⁴ and for good reason. Divining anyone’s intent is a dubious exercise that does not neatly square with originalism’s popular persona—objective history. But original public meaning is not necessarily any more precise or any less dubious.

In either case, we have what boils down to a historical conversation. We begin with the text and then move on to the texts available around the time of ratification and adoption. This is where we often find ourselves talking about *The Federalist Papers* and other historical sources, particularly those that were significant to ensuring that the seismic shift away from the Articles of Confederation to the Constitution occurred.³⁵ Yet, no matter how good the conversationalist, the motivation for and significance of the seismic shift away from the Articles of Confederation and towards the Constitution—to keep this experiment going even at a time when that shift was not universally appealing—is almost invariably omitted from what has otherwise become a robust dialogue.

(1981); Brest, *The Misconceived Quest*, *supra*, at 204; *see also* Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. FAC. PUBL’NS & OTHER WORKS 2 (2011), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub> [<https://perma.cc/E4HN-SUY9>] (discussing the “origins of originalism” and crediting Paul Brest with coining the term).

30. Powell, *supra* note 18, at 263.

31. *See* J. HARVIE WILKINSON, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 37–39 (2012).

32. *See id.*

33. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 945–46 (1985).

34. Solum, *supra* note 29, at 1.

35. Again, even Jefferson was aware of how frequently *The Federalist Papers* were consulted for the Constitution’s “genuine meaning,” and at least as far back as Justice John Marshall’s tenure on the Court, jurists have been raiding or mining *The Federalist Papers* when thorny constitutional questions arise. *See Principles of Government for UVA*, *supra* note 21; *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821) (“The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth.”) (Marshall, C.J.).

We should also be clear that, for all the ink spilled on and airtime given to originalism,³⁶ the conversation has not been limited to academics or the judiciary.³⁷ Somewhat uniquely, originalism has made its way into popular political culture,³⁸ insisting that it is neutral and merely remaining faithful to the views of our Founders.³⁹ But this is hardly a neutral conversation.⁴⁰ As

36. A Westlaw search of law review articles discussing originalism yielded over 9,000 results. But originalism has also been discussed in the media. *See, e.g.*, Ken Levy, *The Problems with Originalism*, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html> [<https://perma.cc/ZH6W-D6MY>]; *Originalism: A Primer on Scalia's Constitutional Philosophy*, NAT'L PUB. RADIO (Feb. 14, 2016), <https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy> [<https://perma.cc/3558-EGYQ>]. And politicians, too, are quick to toss the term around. Indeed, regarding the nomination of Amy Coney Barrett to the Supreme Court, Senate Judiciary Committee Member Mike Lee commented that he thought Barrett would “be a textualist and an originalist,” and Senator Mike Braun commented that Barrett “is a strong Constitutional originalist.” *Support for President Donald J. Trump's Nomination of Judge Amy Coney Barrett to the Supreme Court*, WHITE HOUSE (Sept. 27, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/wtas-support-president-donald-j-trumps-nomination-judge-amy-coney-barrett-supreme-court/> [<https://perma.cc/Z4X6-SA2H>]. Originalism is also discussed and applied in a number of judicial opinions, perhaps most famously in *District of Columbia v. Heller*, 554 U.S. 570, 595–96 (2008).

37. *See* Powell, *supra* note 33, at 936.

38. To the extent that a method of constitutional interpretation can wind its way into popular culture, originalism seems to have done just that. Indeed, “originalism” even has its own hashtag. And it is now a popular concept for both those who want to endorse it and those who want to set it up as the theory to knock down, the villain of constitutional interpretation. *See, e.g.*, Laurence H. Tribe, *The Scalia Myth*, N.Y. REV. (Feb. 27, 2016), <https://www.nybooks.com/daily/2016/02/27/the-scalia-myth/> [<https://perma.cc/R9NJ-5JQ6>] (“[D]epicting Scalia’s interpretive methods as more rigorous than others—in the sense that they better restrict judges by rendering their substantive visions of justice and decency less relevant—is an exercise in self-delusion: even in Scalia’s own opinions, text, context, and history were often far less determinate than he liked to assert.”). *See also* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 9 (Grant Huscroft & Bradley W. Miller eds., 2011) (“For all of its sophistication, originalism is viewed in some quarters as a protest movement rather than a scholarly endeavor. It has been the subject of parody and deprecation, sometimes by those who understand it least, and it has been ignored by many—including some who otherwise extol the benefits of comparative constitutional law scholarship.”).

39. *See* Justice Neil M. Gorsuch, *Why Originalism is the Best Approach to the Constitution*, TIME (Sept. 9, 2019), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> [<https://perma.cc/VY74-RQXS>] (“Originalism teaches only that the Constitution’s original meaning is fixed[.]”).

40. Popular media sources have even gone so far as to say that “[w]e live in a country undergoing a severe case of ancestor worship (a symptom of insecurity and fear of the future), which is exacerbated by an absurdly unworkable and manipulable doctrine called originalism.” *See* Louis Menand, *Drawing Lines*, NEW YORKER, Aug. 22, 2022, at 65–66. And, as part of that problem, “[s]omething that Alexander Hamilton wrote in a newspaper column—*The Federalist Papers* are basically a collection of op-eds—is treated like a passage in the Talmud,” but “[i]f we could unpack it correctly, it would show us the way.” *Id.* Skepticism and sarcasm aside, pulling out a guiding theme from *The Federalist Papers*—union preservation—and

part of this endeavor, supporters of all types, that is, academics, lawyers, politicians, talk show hosts, even regular people, co-opt select historical moments—maybe even supported by snippets from *The Federalist Papers*—as if by doing so the “originalist” view has been constitutionally blessed (and for some, even personally blessed)⁴¹ by some select men from the eighteenth century.⁴²

In any case, both the critics and proponents of originalism are familiar with the idea that originalism is often touted as “the theory that judges should follow the law and not make it.”⁴³ In divisive as well as not-so-divisive times, the appeal of this sound bite is apparent. Of course, our federal judges, making up our independent judiciary, should simply follow the law. This is easier said than done. Returning to the other end of the spectrum, originalism’s political opponents may be quick to argue that originalism is “anti-woman,”⁴⁴ among other “obviously unpalatable”⁴⁵ definitions. There is certainly no shortage of criticisms of originalism and other efforts at divining meaning from dusty texts and equally dusty historical moments.⁴⁶

Often, at least in the present moment, conservative presidents and senators discuss wanting an originalist justice on the Supreme Court.⁴⁷ To the uninitiated, someone who will remain true to the ideals and understandings

understanding why we even have a constitution to interpret in the first place goes a long way to redirecting these sentiments about originalism to renewed energy to wrestling with all sides of thorny constitutional questions.

41. On this point, this Article merely refers to the currently less popular strand of originalism, that is, original intent originalism, which looks to the intent of the Framers when interpreting the Constitution.

42. See *District of Columbia v. Heller*, 554 U.S. 570, 595, 597 (2008) (citing both THE FEDERALIST NOS. 29 and 46 to interpret “well-regulated militia” and “security of a free state” in the context of the Second Amendment). *But see id.* at 653 n.17 (Stevens, J., dissenting) (citing THE FEDERALIST NO. 25 to discuss the Framers’ concerns about “relying on an inadequately trained militia”). *See id.* at 705 (Breyer, J., dissenting) (citing THE FEDERALIST NO. 17, by way of other cases, in observing that “[t]he Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them”). For further information on the ways in which originalism is wielded and the reality that “[T]he Federalist Papers were penned amidst a bitter fight over ratification of the Constitution,” see Ben W. Heinman, Jr., *The Supreme Court: ‘Originalism’s’ Theory and the Federalist Papers’ Reality*, ATLANTIC (Jan. 11, 2011), <https://www.theatlantic.com/politics/archive/2011/01/the-supreme-court-originalisms-theory-and-the-federalist-papers-reality/69158/> [https://perma.cc/SU38-FK8T].

43. *Solum*, *supra* note 29, at 5.

44. *Id.*

45. *Id.*

46. *Id.* at 8–9; Brest, *Misconceived Quest*, *supra* note 29, at 214–22; see also Powell, *supra* note 33, at 945–46.

47. *Support for President Donald J. Trump’s Nomination of Judge Amy Coney Barrett to the Supreme Court*, *supra* note 36.

present when we were building this new republic⁴⁸ seems like the perfect jurist. This is the way it should be. No politics, no esoteric theories, just a return to history. But this sentiment is misleading because neither history nor originalism is objective.⁴⁹

In popular political discourse, originalism has arguably become a code word for conservative ideology.⁵⁰ Indeed, originalism's political champions tend to enter the conversation by focusing on "simplified 'sound bite' versions . . . that conflate the content of originalist theory with the goals it seeks to achieve."⁵¹ Granted, this is a hostile characterization, but there are certainly critics who would find this description accurate.⁵² On the other hand, many proponents of originalism would similarly take issue with it.⁵³ This is just to say⁵⁴—originalists (and their supporters) might want to be mindful of avoiding giving fuel to this type of criticism. Indeed, we might want to be particularly wary of engendering this type of criticism because it frequently leads to vitriol that prevents us from having any meaningful conversation in the first place and obfuscates debate on critical issues by allowing the methodology used (or not used) to dominate any attempts to have a conversation. A shouting match is not a conversation.

What we get from originalism, at least when it is distilled for the masses, is this idea—and it is a nice idea—that interpreting the Constitution only requires a certain fidelity both to the text and to what people long ago thought it meant. Recognizing that this is somewhat reductive, this quaint form of legal interpretation goes hand-in-hand with how history is often presented to school children. All one has to do is turn back some dusty pages, and the answer is there in black and white. This is simply how things were, and this is how they are now—linear progression without a mess. But any good historian will

48. The current political climate is rife with discussion that we are a republic and emphatically *not* a democracy. That debate is beyond the scope of this Article except to the extent that characterizing the nation as a democracy would chip away at our ability to keep our republic.

49. See WILKINSON, *supra* note 31, at 46 (noting that "instead of recognizing [its] flaw, originalism provides cover for significant judicial misadventures").

50. Barnett, *supra* note 14.

51. Solum, *supra* note 29, at 5.

52. See Levy, *supra* note 36 (highlighting that originalist critics frequently link originalism with conservative ideology).

53. See Gorsuch, *supra* note 39, at 7 (noting that some originalist supporters take offense to the perceived connection between originalism and conservative political ideals).

54. Although William Carlos Williams may have used this phrase somewhat apologetically, it's more observational here. See William Carlos Williams, *This Is Just To Say*, POETRY FOUND., <https://www.poetryfoundation.org/poems/56159/this-is-just-to-say> [<https://perma.cc/DHP7-3WT8>]. And unlike the plums, we can keep our republic.

quickly say that history is not linear; history is a mess.⁵⁵ After all, history is cataloguing what humans do, and when have humans conducted their affairs in a purely orderly and logical manner? Law is really no different.⁵⁶ Hamilton himself would join the conversation to remind us that political knowledge cannot be reduced to a math problem.⁵⁷ This notion that we can simply look back in time (understandably) has a lot of appeal in popular and political discourse.⁵⁸ It presents what appears as a tidy solution to thorny legal problems. This presentation is not without its risks, including a failure to achieve the very thrust of originalism in the first place.

Our conversation is then reduced to a question to be answered by another question: What is the Constitution's present-day meaning? What did these words mean when they were first drafted?⁵⁹ It is in answering the second question that our problems really begin and where continental originalism can guide us out of the fray and towards a more productive dialogue by, among other things, encouraging us not to let divisions based on the methodology used to interpret the Constitution overshadow and obfuscate debate on the underlying issues. Simply, for all this talk, there is a glaring omission. The core of the sacred historical moment of ratification is necessarily union preservation, and in our current historical moment, it is time we start talking about it. Until we do, we are neither remaining faithful to the historical moment nor applying what the Framers⁶⁰ and their contemporaries had in mind. For as long as we fail to discuss union preservation when we talk about originalism, we are not answering that second question, and we are simultaneously risking our ability to keep our republic.

55. How could it be anything less? On this point, we might also consider that, although Hamilton may have his own soundtrack these days, Gershwin provides a truly continental soundtrack. *See, e.g.,* George Gershwin, *An American in Paris* (Dec. 13, 1928), <https://www.youtube.com/watch?v=KU1X3WuW-k0> [<https://perma.cc/3CSC-M8XC>] (providing a rhapsody about an *American* in Paris as opposed to an ordinary Virginian in Paris).

56. *See* Powell, *supra* note 18, at 262.

57. *See* THE FEDERALIST NO. 31, *supra* note 8, at 194 (Alexander Hamilton) (“[I]t cannot be pretended that the principles of moral and political knowledge have, in general, the same degree of certainty with those of the mathematics.”).

58. *See* Powell, *supra* note 18, at 269 (“Originalism is, in a very real sense, an enormously attractive proposal.”).

59. *See id.* (“The answer to what appears to be a purely historical question—what did this bit of writing mean when it was first drafted?—thus becomes the answer to the legal question of the Constitution’s present-day meaning.”).

60. The use of “Framers” in this Article is not restricted to the Philadelphia Framers.

III. WHAT WE SHOULD BE TALKING ABOUT BUT AREN'T TALKING ABOUT

A. *We Should Be Talking About Union Preservation*

When we talk about originalism, we are, at present, not talking about union preservation. This is a mistake. When we talk about originalism, we necessarily *must* talk about what it takes to preserve the union to keep our republic.⁶¹ There is no doubt that dissent and debate are vital elements of a well-functioning democracy,⁶² but even that debate should be mindful of its effects on the perpetuation of democracy and the continuation of our republic, lest it devolve into the type of division that obfuscates the real issues and puts our republic in jeopardy. As popular political culture can spearhead and quash the very debates that fuel a healthy democracy,⁶³ union preservation becomes equally vital to the conversation we are having about originalism *outside* of the courts and the academy.

Thus, the conversation we should be having acknowledges that originalism is, by now, a common method of constitutional interpretation, finding its way into judicial opinions regardless of who put a certain judge or justice on the bench.⁶⁴ To the extent that we accept originalism,⁶⁵ we must be as faithful as we can to the historical moment of ratification and adoption if we want to keep our republic. This Article argues that historical context is vital and that, as messy and variable as history can be, there remains an overarching principle that will, quite simply, help us get originalism “right.”

61. Although this Section is framed as what we aren't talking about and what we should be, continental originalism is not merely empty rhetoric. Rather, continental originalism seeks to incorporate an overarching principle of union preservation into constitutional interpretation in order to “refine” originalism to help refocus the conversation with a helpful weight on the scale that also mitigates against the temptation of letting the methodology itself overshadow the discussion of the constitutional issues. See Bouie, *supra* note 14 (discussing the general framework associated with originalism).

62. See Ashlee Paxton-Turner, *Presidential Responses to Protest: Lessons Jefferson Davis Never Learned*, 122 W. VA. L. REV. 171, 186 (2019) (“Democracy works well—perhaps even best—when people can freely protest and compel debate on the issues that they value. After all, . . . the United States [was] formed out of a tradition of dispute.”). *But see* discussion *supra* note 48.

63. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374, 398–99 (2007) (discussing “interpretive disagreement as a normal condition for the development of constitutional law” and tracing the development from *Roe* to *Casey*).

64. See THE CHALLENGE OF ORIGINALISM, *supra* note 38, at 17 (“Whatever the future for originalist theory, engaging with the analytical resources of originalism must be a priority for constitutional scholars of all stripes.”).

65. Even if we choose not to accept originalism, we cannot avoid it entirely. See Issacharoff, *supra* note 11, at 517 (“There has been no more substantial change in constitutional law in the past twenty-five years than the ascendance of ‘originalism’ as a fundamental way of understanding the Constitution.”).

Specifically, the words and actions leading up to the ratification and adoption of the Constitution were motivated by securing the Union's survival.⁶⁶ Subsequent moments in history similarly recognize this overarching principle, most notably the Civil War.⁶⁷ Make no mistake—it is our republic that is sacred, and if we cannot keep it, then we have no constitution worth interpreting.

When it comes to constitutional interpretation, Justice Scalia⁶⁸ popularized his theory that “[t]he Constitution . . . is not living but dead, or . . . enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.”⁶⁹ If we take Justice Scalia at his word, then what the Constitution meant when it was adopted was a compromise at keeping the country together. No doubt, contemporaries at the time of the ratification and adoption of the Constitution did not always agree.⁷⁰ If they did, then the need for *The Federalist Papers* would have been much less acute. But, at the same time, it seems unlikely that the Articles of Confederation would have been successfully abandoned if union preservation were not a pressing concern.⁷¹

This conversation necessarily recognizes that, no matter how plain and clear the language of the Constitution, its language is only as good as how it

66. See ELLIS, *supra* note 1, at xiii–xv (discussing relevant events prior to the ratification and adoption of the Constitution).

67. It is interesting to note that, at least on some level, Lincoln was “bending the arc of American history in a national direction, since he was then waging a civil war on behalf of a union that he claimed predated the existence of the states.” *Id.* at xii. In other words, although this idea of union preservation is very clear from *The Federalist Papers*—and the advocates of the Constitution as we know it—it is not a “natural” movement from the Declaration of Independence to the Constitution. *Id.* at xiii.

68. And, as an aside, whether Justice Scalia meant to recall Hamilton’s “endless train of possible dangers” in THE FEDERALIST NO. 31 when he identified his “parade of horrors,” Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590–93 (1989), both were considering the consequences of the “limits or modifications of the powers of the Union.” See THE FEDERALIST NO. 31, *supra* note 8, at 196 (Alexander Hamilton).

69. Nina Totenberg, *Supreme Court Justice Antonin Scalia Was Known For His Dissents*, NAT’L PUB. RADIO (Feb. 15, 2016), <https://www.npr.org/2016/02/15/466783882/supreme-court-justice-antonin-scalia-was-known-for-his-acerbic-dissidents> [https://perma.cc/JC8M-P5FA] (quoting Justice Scalia).

70. See ELLIS, *supra* note 1, at xiii (highlighting the widespread debate and disagreement among the Framers during the transition “from a confederation of sovereign states to a nation-size republic”).

71. See THE FEDERALIST NO. 40, *supra* note 8, at 249 (James Madison) (“Let them declare whether it was of most importance to the happiness of the people of America that the Articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the Articles of Confederation preserved.”); see also THE FEDERALIST NO. 85, *supra* note 8, at 527 (Alexander Hamilton) (“[A] nation, without a national government, is . . . an awful spectacle.”).

is construed.⁷² And when we talk about an originalist construction, we are consistently confronted with the potential for reductive historical interpretation. This risk should make us particularly wary of originalism's objective allure. Since at least as early as 1791, the problem of reductive historical interpretation has been part of the conversation surrounding constitutional interpretation.⁷³ A faithfulness to the broader historical context, however, can help us avoid this pitfall and preserve the Union.

Historical recollections can be misleading, and the same is generally true of history in its retelling.⁷⁴ This is why we must be especially wary of the objective allure of originalism and why we must make every effort at remaining faithful to the Constitution's broader historical context. This is why union preservation must be part of the conversation and our lodestar.

To that end, opinions that place union preservation as their lodestar are necessarily more principled than those that do not.⁷⁵ When we look back at the text and attempt to understand its original meaning, we need to consider how that historical meaning was intertwined with a fierce effort to keep the Union together. Early court cases show that the distinction between the

72. The Framers, too, understood this point. See EDWARD S. CORWIN, COURT OVER CONSTITUTION 228 (1938) (discussing the importance of how the Constitution is construed); see also Powell, *supra* note 18, at 262 (discussing an anecdote between Gouverneur Morris and friend following the convention in Philadelphia on this point).

73. Letter from Thomas Jefferson to George Washington regarding Opinion on the Constitutionality of the Bill for Establishing a Nat'l Bank (Feb. 15, 1719) (on file with the National Archives), https://founders.archives.gov/documents/Jefferson/01-19-02-0051#normal_view [<https://perma.cc/MZY8-GGCL>]. In making this argument, Jefferson relied on the fact that the Constitutional Convention had rejected granting Congress the power to charter corporations. *Id.* But Hamilton responded by suggesting that Jefferson's point about what went on at the convention was reductive and simply wrong. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank, 23 February 1791*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003> [<https://perma.cc/HG5L-NQ3E>]. Hamilton pointed out that "the precise nature or extent of this proposition . . . [and] the reasons for refusing it [are] not ascertained by any authentic document, or even by *accurate* recollection." *Id.* (emphasis added). And Hamilton was present at the convention, so if anyone could have mustered an accurate recollection, it would have been him. See *Hamilton and the U.S. Constitution*, AMERICAN EXPERIENCE – PBS, <https://www.pbs.org/wgbh/americanexperience/features/duel-hamilton-and-us-constitution/#:~:text=At%20the%20Constitutional%20Convention%2C%20Hamilton,%22best%20in%20the%20world.%22> [<https://perma.cc/TYY8-HDBF>] (discussing Hamilton's role at the Constitutional Convention).

74. See Michael D. Hattem, *Revisionist History is an American Political Tradition*, WASH. POST (Sept. 23, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/09/23/revisionist-history-is-an-american-political-tradition/> [<https://perma.cc/S5TX-JLYQ>] (highlighting the long-standing debate regarding American revisionist history).

75. *But see* JAMES BOYD WHITE, KEEP LAW ALIVE 103 (2019) (discussing "resisting an image of laws as rules and policy" as well as an image of "law as abstract, mechanical, impersonal, essentially bureaucratic in nature").

Articles of Confederation and the Constitution was often in the background, at least on some level. For example, in *Hylton v. United States*,⁷⁶ the Supreme Court considered for the first time whether an act of Congress was constitutional.⁷⁷ Specifically, Justice Iredell, in finding that the carriage tax was not a direct tax and thus was constitutional,⁷⁸ noted that the “leading distinction between the Articles of Confederation and the present Constitution” was that the Constitution was “particularly intended to affect individuals, and not states, except in particular cases specified.”⁷⁹ Part of Justice Iredell’s reasoning was due to the fact that placing power in the states’ hands, as the Articles of Confederation did, created a weak central government, and a weak central government jeopardized the continued existence of the Union.⁸⁰

We arrive at union preservation as our lodestar by returning to the framing and its contemporary sources, namely *The Federalist Papers*, which have wide recognition as more than mere constitutional propaganda.⁸¹ Instead, these eighty-five essays by Hamilton, Madison, and Jay serve as convenient tools to reinforce ideas about precisely what the text of the Constitution means. And jurists are not strangers to cherry-picking from among these essays for the best lines to suit their purposes and interpretations. *The Federalist Papers* themselves remind us that “words express ideas.”⁸²

We tend to forget that the underlying purpose of this advocacy was to ratify the Constitution in an effort to “preserve the Union.”⁸³ The theme of “union preservation” appears countless times across all eighty-five essays.⁸⁴

76. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 172 (1796).

77. See RON CHERNOW, ALEXANDER HAMILTON 501–02 (2004).

78. *Hylton*, 3 U.S. at 181.

79. *Id.* at 181.

80. See ELLIS, *supra* note 1, at xvii (detailing the issues associated with a weak central government stemming from the Articles of Confederation).

81. See Maggs, *supra* note 20, at 802 (“The Federalist Papers long have enjoyed a special reputation as an extremely important source of evidence of the original meaning of the Constitution.”).

82. THE FEDERALIST NO. 37, *supra* note 8, at 229 (James Madison) (“The use of words is to express ideas.”).

83. See, e.g., THE FEDERALIST NO. 8, *supra* note 8, at 70–71 (Alexander Hamilton); THE FEDERALIST NO. 44, *supra* note 8, at 194–96 (James Madison); THE FEDERALIST NO. 44, *supra* note 8, at 284–85 (James Madison).

84. See, e.g., THE FEDERALIST NO. 2, *supra* note 8, at 39 (John Jay) (“A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to preserve and perpetuate it.”); THE FEDERALIST NO. 40, *supra* note 8, at 248 (James Madison); THE FEDERALIST NO. 41, *supra* note 8, at 260 (James Madison); THE FEDERALIST NO. 44, *supra* note 8, at 288 (James Madison) (observing that the question of the power delegated to the federal government “resolves itself into another question . . . whether the Union itself shall be preserved”); THE FEDERALIST NO. 40, *supra* note 8, at 259 (James

More than that, the essays make clear that the future survival of the young nation depended upon a united front.⁸⁵ To that end, “[i]f we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation.”⁸⁶

Looking closely at these essays, we find that our colonial trio touches on the theme of union preservation regarding nearly all topics that are discussed. From the very beginning, Hamilton sets up the “consequences” of the new Constitution as focusing on the Union’s continued existence.⁸⁷ In other words, from the very start, there is no mistaking what undergirds these essays and necessitates the pivot away from the Articles of Confederation; the existence of the Union is at stake.⁸⁸ The essays that follow all implicitly ask and answer *how* the new Constitution can preserve the Union and *why* doing so is vital.⁸⁹

Madison) (noting, *inter alia*, “the consequences of disunion” and that “[e]very man who loves peace, . . . who loves his country, . . . who loves liberty ought to have it ever before his eyes that he many cherish in his heart a due attachment to the Union . . . and be able to set a due value on the means of preserving it”); THE FEDERALIST NOS. 15, 16, 17, 23, 28, 59, 84, *supra* note 8 (Alexander Hamilton); THE FEDERALIST NO. 85, *supra* note 8, at 521 (Alexander Hamilton) (predicting that “the preservation of the Union will impose [restraints] on local factions and insurrections”); THE FEDERALIST NOS. 18, 19, 20, *supra* note 8 (James Madison). Referencing this theme, Hamilton also makes the bold claim that “[i]t belongs to us to vindicate the honor of the human race, and to teach that assuming brother moderation. Union will enable us to do it. Disunion will add another victim to his triumphs.” THE FEDERALIST NO. 11, *supra* note 8, at 91 (Alexander Hamilton). Hamilton then goes on to proclaim, “Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system superior to the control of all transatlantic force or influence and able to dictate the terms of the connection between the old and the new world!” *Id.* Even the phrase “preservation of the Union” or some variation thereof appears throughout the essays. *See, e.g.*, THE FEDERALIST NOS. 1, 8, 12, 15, 23, 28, 59, 84, 85, *supra* note 8 (Alexander Hamilton); THE FEDERALIST NO. 2, *supra* note 8 (John Jay); THE FEDERALIST NOS. 19, 40, 41, 44, *supra* note 8 (James Madison).

85. *See* THE FEDERALIST NO. 6, *supra* note 8, at 54 (Alexander Hamilton) (suggesting that we would be “far gone in Utopian speculations” if we thought otherwise).

86. THE FEDERALIST NO. 8, *supra* note 8, at 70–71 (Alexander Hamilton).

87. THE FEDERALIST NO. 1, *supra* note 8, at 33 (Alexander Hamilton).

88. *See* THE FEDERALIST NO. 2, *supra* note 8, at 39 (John Jay) (“A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to *preserve and perpetuate* it.”) (emphasis added). Jay’s point here is, at least in part, to say that though the people have always understood the power of the Union, “politicians [had lately] appear[ed] [to] insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in a division of the States into distinct confederacies or sovereignties.” *Id.* at 37. But, as Jay makes plain, such division comes at a risk of putting the Union’s continued existence in jeopardy. *See id.* at 41 (“They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the convention seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy.”).

89. Indeed, Madison points out that “the immediate object of the federal Constitution is to secure the union of the thirteen primitive States . . . and to add to them such other States as may arise.” THE FEDERALIST NO. 14, *supra* note 8, at 102 (James Madison); *see also* THE

Our colonial trio answers why union preservation is vital by examining the dangers that might flow from a *disunited* nation and emphasizing the “insufficiency of the [then]-present Confederation to the preservation of the Union.”⁹⁰ What we learn is that a “united America” also “preserve[s] the people in a state of peace with other nations.”⁹¹ And keeping the peace with other nations is of rather obvious importance when it comes to preserving the Union and keeping our republic.⁹² Further still, our colonial trio champions

FEDERALIST NO. 23, *supra* note 8, at 152 (Alexander Hamilton) (discussing “[t]he necessity of a Constitution . . . to the preservation of the Union”). Madison makes this even more plain by recalling Congress’s resolution that the convention was to establish “a firm national government” that would be “adequate to the exigencies of government and the preservation of the Union.” THE FEDERALIST NO. 40, *supra* note 8, at 248 (James Madison). Similarly, “the preservation of the Union will impose [restraints] on local factions and insurrections,” all of which goes to keeping our republic. THE FEDERALIST NO. 85, *supra* note 8, at 521 (Alexander Hamilton). Additionally, certain aspects of the structure of the new government’s design—such as the election of the president for four-year terms—similarly animate the goal of union preservation by promoting stability within the branches. *See* THE FEDERALIST NO. 69, *supra* note 8, at 416 (Alexander Hamilton) (“A duration of four years for [the president] is a degree of permanency far less to be dreaded in that office, than a duration of three years for a corresponding office in a single State.”); THE FEDERALIST NO. 70, *supra* note 8, at 424 (Alexander Hamilton) (noting that “[t]he ingredients which constitute energy in the executive” include “unity”); *see also* THE FEDERALIST NO. 72, *supra* note 8, at 436 (Alexander Hamilton) (noting the “intimate connection between the duration of [the president] in office and the stability of the system of administration”); THE FEDERALIST NO. 78, *supra* note 8, at 471 (Alexander Hamilton) (discussing how the courts can promote stability by following “strict rules and precedents” and thus “avoid[ing] . . . arbitrary discretion”).

90. THE FEDERALIST NO. 15, *supra* note 8, at 105 (Alexander Hamilton); *see* THE FEDERALIST NO. 41, *supra* note 8, at 259 (James Madison) (“[T]he consequences of disunion cannot be too highly colored . . . Every man who loves peace, . . . who loves his country, . . . who loves liberty ought to have it ever before his eyes that he many cherish in his heart a due attachment to the Union . . . and be able to set a due value on the means of preserving it.”); *id.* at 260 (“[N]othing short of a Constitution fully adequate to the national defense and the preservation of the Union can save America from as many standing armies as it may be split into States or Confederacies . . .”).

91. THE FEDERALIST NO. 3, *supra* note 8, at 42 (John Jay); *see also id.* at 45 (“[I]t is well known that acknowledgements, explanations, and compensations are often accepted as satisfactory from a strong united nation, which would be rejected as unsatisfactory if offered by a State or confederacy of little consideration or power.”).

92. War—whether abroad or at home between the states—is often a harbinger of division with damaging consequences. And Jay makes no secret of his position that “the safety of the people would be best secured by union against the danger it may be exposed to by just causes of war given to other nations.” THE FEDERALIST NO. 4, *supra* note 8, at 45 (John Jay); *see also* THE FEDERALIST NO. 5, *supra* note 8, at 50 (John Jay) (“[W]eakness and divisions at home would invite dangers from abroad; and that nothing would tend more to secure us from them than union, strength, and good government within ourselves.”). Similarly, a civil war would open the nation up to “external danger,” while war generally might increase the power of the president at the expense of the legislative authority. *See* THE FEDERALIST NO. 8, *supra* note 8, at 67 (Alexander Hamilton); *see also id.* at 70–71 (“If we are wise enough to preserve the Union

union preservation as a way to solidify the nation's "unequaled spirit of enterprise" and thus as a source of national wealth.⁹³ Madison summarizes it most eloquently, emphasizing:

the necessity of the Union as our bulwark against foreign danger, . . . conservator of peace among ourselves, . . . guardian of our commerce and other common interests, . . . the only substitute for those military establishments which have subverted the liberties of the old world, and . . . the proper antidote for the diseases of faction.⁹⁴

If these are benefits of union preservation, Madison later succinctly explains the link between those benefits and the proposed Constitution. Plainly, all of the powers delegated to the federal government are necessary and proper for achieving the purpose and goals of the Union.⁹⁵ And so, the question about the power to be granted "resolves itself into another question" that we should

we may for ages enjoy an advantage similar to that of an insulated situation," but further noting that "if we should be disunited, . . . we should be, in a short course of time, in the predicament of the continental powers of Europe—our liberties would be a prey to the means of defending ourselves against the ambition and jealousy of each other."). But preserving the Union will mitigate some of these concerns. *See id.* at 70 (discussing the advantages of preserving the Union); *see also* THE FEDERALIST NO. 9, *supra* note 8, at 71 (Alexander Hamilton) ("A firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection."); THE FEDERALIST NO. 10, *supra* note 8, at 77 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

93. THE FEDERALIST NO. 11, *supra* note 8, at 88 (Alexander Hamilton); *see also id.* at 90 ("A unity of commercial, as well as political, interests can only result from a unity of government."); THE FEDERALIST NO. 12, *supra* note 8, at 91 (Alexander Hamilton) (explaining how the Union will similarly "promote the interests of revenue"); THE FEDERALIST NO. 36, *supra* note 8, at 222 (Alexander Hamilton) ("Happy it is when the interest which the government has in the preservation of its own power coincides with a proper distribution of the public burdens and tends to guard the least wealthy part of the community from oppression!").

94. THE FEDERALIST NO. 14, *supra* note 8, at 99 (James Madison); *see also* THE FEDERALIST NO. 23, *supra* note 8, at 153 (Alexander Hamilton) ("The principal purposes to be answered by union are these the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries."); THE FEDERALIST NO. 45, *supra* note 8, at 288 (James Madison) (discussing the Union as "essential" to the security of the people and "to the happiness of the people of America"); THE FEDERALIST NO. 23, *supra* note 8, at 157 (Alexander Hamilton) (making plain that absent the proposed Constitution and "an energetic government," we can "never preserve the Union of so large an empire."); THE FEDERALIST NO. 31, *supra* note 8, at 197 (Alexander Hamilton) (arguing that part of preserving the Union also involves "preserv[ing] the constitutional equilibrium between the general and the State governments."); THE FEDERALIST NO. 42, *supra* note 8, at 271 (James Madison) ("Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.").

95. *See* THE FEDERALIST NO. 44, *supra* note 8, at 280–81 (James Madison).

all consider when we seek to interpret the Constitution: “whether the Union itself shall be preserved.”⁹⁶

The broad theme of these essays is “union preservation,”⁹⁷ which makes it seem all the more problematic to pick sentences from among them to construct divisive opinions.⁹⁸ For this reason, when we talk about originalism, we need to talk about union preservation.

B. *We Aren’t Talking About Union Preservation*

There is no shortage of historical support for the concerted effort to ensure the nation’s success at the time the Constitution was adopted and the years immediately following ratification. For example, less than a decade after ratification, the final version of the nation’s treaty with England, the Jay Treaty, was signed, causing great debate between the Federalists and the Republicans.⁹⁹ Republicans thought that Jay had effectively bargained away

96. *Id.* at 288; *see also* THE FEDERALIST NO. 59, *supra* note 8, at 362 (Alexander Hamilton) (discussing the “propriety” of the proposition that “every government ought to contain in itself the means of its own preservation”); THE FEDERALIST NO. 22, *supra* note 8, at 150 (Alexander Hamilton) (calling for a “supreme tribunal” of last resort to balance out the “endless diversities in the opinions in men” to assist in union preservation); THE FEDERALIST NO. 78, *supra* note 8, at 466 (Alexander Hamilton) (“[T]he judiciary is . . . an indispensable ingredient in its constitution, and in a great measure, . . . the citadel of public justice and public security.”); *id.* at 467 (“[T]he courts were designed to be an intermediate body between the people and the legislature in order . . . to keep the latter within the limits assigned to its authority. The interpretation of the laws is the proper and peculiar province of the courts.”). As Hamilton explains, using language John Marshall would echo later, “[l]aws are a dead letter without courts to expound and define their true meaning and operation.” THE FEDERALIST NO. 22, *supra* note 8, at 150 (Alexander Hamilton) (advocating for a supreme tribunal “[t]o produce uniformity,” instead of “in each State a court of final jurisdiction [producing] as many different final determinations on the same point as there are courts”); *see also id.* (“We often see not only different courts but the judges of the same court differing from each other.”). Of course, Hamilton is spot on, and this continues to this day. But what would be helpful is for the courts—and the many judges—to keep this unifying principle of union preservation as their lodestar for constitutional interpretation. Relatedly, another animating principle of union preservation is found in Congress’s power to establish “uniform” rules as well as the general concept of federal supremacy. *See* THE FEDERALIST NO. 32, *supra* note 8, at 199 (Alexander Hamilton); THE FEDERALIST NO. 33, *supra* note 8, at 204 (Alexander Hamilton).

97. *See* THE FEDERALIST NO. 6, *supra* note 8, at 53 (Alexander Hamilton) (dedicating the essays in the beginning “to an enumeration of the dangers to which we should be exposed, in a state of disunion”). From there, our colonial trio continues to build on this theme to showcase the power and importance of the Union and its continuation and preservation. *See, e.g.*, THE FEDERALIST NO. 7, *supra* note 8, at 61 (Alexander Hamilton) (noting that Congress has “prevail[ed] upon the States to make cessions to the United States for the benefit of the whole . . . under a continuation of the Union” and emphasizing that “[d]ivide et impera must be the motto of every nation that either hates or fears us”).

98. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 595, 597–98 (2008).

99. *See* CHERNOW, *supra* note 77, at 485 (2004) (discussing that the treaty “was not the sort of document calculated to gladden American hearts”).

almost everything in the interests of “peace,” including granting British imports most-favored-nation status without requiring England to do the same for American imports.¹⁰⁰ For the Federalists, the treaty was a victory that promoted peace and prevented a young and ill-prepared nation from entering a war that could destroy it.¹⁰¹ In what quickly became a divisive and polarizing moment,¹⁰² both sides essentially framed their arguments in terms of union preservation. The Federalists pointed to the need for peace and access to foreign markets.¹⁰³ Hamilton specifically emphasized that the United States, as the “embryo of a great empire,” needed a period of peace, lest European powers seize the opportunity “happily [to] stamp out [the] republican experiment . . . discern[ing] that [the nation’s] infancy is the time for clipping [its] wings.”¹⁰⁴ The Republicans, as James Madison put it, argued that the treaty would actually undermine the nation’s neutrality and create “an immediate rupture with France . . . signal[ing] for a civil war at home.”¹⁰⁵ Even Hamilton picked up on this tension, observing that “unless the treaty is ratified, we might expect a foreign war, and if it is ratified, we might expect a civil war.”¹⁰⁶ In other words, the choice was framed as a war abroad or a war at home—neither of which would preserve the union. What is particularly telling about this moment is that the arguments were framed with essentially the same lodestar in mind: How do we keep our republic?¹⁰⁷ This is the question that necessarily is baked into any originalist inquiry. To ignore it is a mistake.

Nevertheless, when judges and justices cite and discuss *The Federalist Papers*, union preservation is frequently not included in the discussion. Take, for example, Justice Thomas’s concurrence in *United States v. Lopez*.¹⁰⁸ There, Justice Thomas, in concluding that “commerce” could not include possessing a gun in school, cited both period dictionaries and *The Federalist* (and *Anti-Federalist*) *Papers* to support his position that “trade” and “commerce” were used interchangeably at the framing.¹⁰⁹ But nowhere in

100. *Id.* at 485–86.

101. *Id.* at 486.

102. *See id.* (noting that the vitriol towards Jay, especially, was so great that, close to Jay’s home in New York, “the walls of a building were defaced with the gigantic words, ‘Damn John Jay. Damn everyone that won’t damn John Jay. Damn everyone that won’t put up lights in the windows and sit up all night damning John Jay.’”).

103. *See id.*

104. *Id.* at 494.

105. *Id.* at 495.

106. *Id.*

107. Recall, again, Ben Franklin’s now-famous quip upon leaving the Constitutional Convention to a curious citizen that the Framers had created a “a republic, if you can keep it.” White, *supra* note 9.

108. *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring).

109. *Id.*; *see also* Maggs, *supra* note 20, at 823–24 (discussing this same example).

Justice Thomas's concurrence does the relationship between "commerce" and union preservation appear. And yet, when discussing "commerce," *The Federalist Papers* go to the great lengths to frame those discussions around exactly that.¹¹⁰

Even sweeping and scathing critiques of originalism¹¹¹ do not discuss how the Constitution was, at bottom, intended to preserve the Union, despite significant opposition at the time to abandoning the concept of a loose confederation of states.¹¹² If the Constitution were merely a governing document like any other, then there would have been no reason to abandon the Articles of Confederation. This is important history that we cannot ignore, and this is precisely where continental originalism can create more historically faithful interpretations that fit into a broader effort at keeping our republic. But talk is cheap, and it is not enough to identify the conversations we are having and the ones we ought to be having. Rather, we must now start thinking continentally.

IV. HOW WE KEEP OUR REPUBLIC

"Think[ing] continentally" is no idle Hamiltonian witticism.¹¹³ Indeed, Hamilton—alongside the rest of our colonial trio—left behind meaningful clues in *The Federalist Papers* to help us do exactly that. A careful sleuthing of those eighty-five essays reveals the theme of union preservation as our chief clue. Even Thomas Jefferson,¹¹⁴ one of Hamilton's biggest rivals, who might

110. See THE FEDERALIST NO. 11, *supra* note 8, at 84, 90 (Alexander Hamilton) (explaining that "[t]he importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion" and that "[a] unity of commercial . . . interests can only result from a unity of government"); see also THE FEDERALIST NO. 12, *supra* note 8, at 91 (Alexander Hamilton) (recalling "[t]he effects of Union upon the commercial prosperity of the States" before turning to how such "commercial prosperity" will "promote the interests of revenue").

111. To be clear, this Article does not suggest that originalism is "bunk." *But see generally* Berman, *supra* note 22 (articulating that very argument). Instead, this Article argues that often we are talking about originalism—and applying originalism—less faithfully than we could be, and this mistake is at the expense of what the Framers cared about most.

112. See ELLIS, *supra* note 1, at xi (discussing that the Articles of Confederation were never intended to be "much of a government at all").

113. *Id.* at xvi. Nor is it exclusively relegated to a dusty historical moment. For example, when we walk along the Mississippi River, we are looking directly at the geography wrapped up in "our continental dream." See JACK KEROUAC, ON THE ROAD 103 (Penguin Books 1997) (1955). And it is the same dream—and the same geography—that "Ben Franklin plodded in the oxcart days when he was a postmaster, the same as it was when George Washington was a wildbuck Indian-fighter." *Id.* at 105.

114. Despite penning the Declaration of Independence in a sliver of a house on Market Street in Philadelphia, it is likely that Jefferson would have been wary of continental thinking,

have been quite skeptical of any continental thinking,¹¹⁵ did just that with the Louisiana Purchase. Although Jefferson was concerned that the Constitution did not authorize the purchase, even admitting the need for a constitutional amendment that would authorize it,¹¹⁶ he went ahead and signed the treaty with France and doubled the size of the United States.¹¹⁷ Jefferson's actions were a very literal application of continental thinking, and a critical one at that, as it made the nation a continental power.¹¹⁸ Expanding the nation's borders was itself a form of union preservation—making the fledging nation a larger point on the map. Despite all this history, and all the care that our trio put into emphasizing union preservation in *The Federalist Papers*, this theme is consistently ignored.¹¹⁹

Ignoring union preservation comes at the expense of undermining the legitimacy of judicial opinions.¹²⁰ A continental originalist approach would

though he need not have been. We can imagine him eyeing Hamilton skeptically, likely with a touch of anger—counting to ten according to his personal rules—and responding to Franklin that we will keep our republic so long as the states are not swallowed by the national government. Depending on the mood of Dr. Franklin, he might have reminded Jefferson that with the union of England and Scotland, it was predicted that as the whale had swallowed Jonah, so would England swallow Scotland. But as it actually happened, there were so many Scottish countrymen brought into the new administration that Jonah swallowed the whale. See Thomas Jefferson, *Anecdotes of Benjamin Franklin*, in 13 THE PAPERS OF THOMAS JEFFERSON, 22 APRIL 1818 TO 31 JANUARY 1819, 462, 462–65 (J. Jefferson Looney ed., 2016).

115. See *id.*

116. Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON 169, 169–71 (Barbara B. Oberg ed., 2014).

117. See John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1999–02 (2009).

118. See Joseph A. Harriss, *How the Louisiana Purchase Changed the World*, SMITHSONIAN MAG. (Apr. 2003), <https://www.smithsonianmag.com/history/how-the-louisiana-purchase-changed-the-world-79715124/> [<https://perma.cc/KLD3-7X4U>]. In fact, some historians argue that “[w]ith the Declaration of Independence and the Constitution, this is one of the three things that created the modern United States.” *Id.*

119. Critics and proponents of originalism equally miss this point. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) (offering “framework originalism” as a constitutional theory and “an associated theory of interpretation and construction, the method of text and principle,” which “requires fidelity to the original meaning of the Constitution” and “the principles that underlie the text”); Berman, *supra* note 22, at 8 (attempting to “dislodg[e] [originalism as] a prominent interpretive theory”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–65 (1989) (outlining originalism and even noting that it is “not without its warts”); see also Jamal Greene, *Selling Originalism*, 97 GEO. L. J. 657, 660 (2009) (“I therefore examine originalism as a constitutional aesthetic, in order to distill those features that make it an attractive part of our overall conception of the role of a constitutional judge.”). But, to Professor Greene’s point, continental originalism becomes an especially attractive “constitutional aesthetic” for our judges and justices because it provides a more secure anchor and a clear lodestar.

120. Not only does ignoring union preservation risk undermining the legitimacy of judicial opinions, but it also risks fracturing our republic. The leaked draft of the Supreme Court’s

avoid this fate. Namely, when we analyze history for clues about what a constitutional provision might mean, we must think, too, about how a given interpretation would have squared with the goal of union preservation, which undergirded the relevant historical moment (generally, 1787 or 1791). This is not a license to impart our *own* views about what it takes to keep our republic. Rather, it is about consistently keeping the aims of the shift from the Articles of Confederation to the Constitution as part of our analysis. The significance of that shift must be baked into the words we interpret today. To start, it is helpful to consider the principles that animate union preservation and then consider some examples of those principles at work and how they promote union preservation.

A. *The Animating Principles of Union Preservation*

By placing union preservation as our lodestar, continental originalism can strengthen the legitimacy of judicial opinions (and in turn restore faith in the independence of our judiciary). Continental originalism can also lead a vital conversation by, in fact, encouraging a conversation in the first place rather than merely fueling division. Specifically, we can use continental originalism to refocus the conversation on the issues themselves rather than letting the methodology at issue dominate the conversation. Indeed, one of the fundamental animating principles of union preservation involves attention to counterarguments, which *The Federalist Papers* go to great lengths to emphasize the importance of when considering difficult questions.¹²¹ Although most people would readily acknowledge that counterarguments cannot be ignored, we sometimes lose sight of them. Thinking continentally requires that we bring those counterarguments to the surface. By weighing both sides of a dispute, we maintain fidelity to our tradition of dispute,¹²² and we promote healthy debate on important issues rather than inviting schisms based on impulse, politics, and proclivities.

Additionally, when we think continentally, we must consider the balance between federal supremacy and respect for our longstanding principles of federalism and comity.¹²³ In fact, the Supreme Court had the opportunity to explain how union preservation can resolve tensions when trying to strike this balance, though it declined to do so. Specifically, in *U.S. Term Limits, Inc. v.*

decision in *Dobbs v. Jackson Women's Health* is a key example. Abortion has always divided the nation, but, as discussed below, a continental originalist approach to overruling *Roe v. Wade* would have likely looked a little different.

121. See, e.g., THE FEDERALIST NO. 31, *supra* note 8, at 195 (Alexander Hamilton) (noting that it is useful “to analyze the arguments” posited by the “antagonists of the proposed Constitution”).

122. See Paxton-Turner, *supra* note 62.

123. Our federal courts’ original jurisdiction is necessarily also part of this balancing act.

Thornton, in arguing that Arkansas could impose additional qualifications on those running for Congress, Arkansas's Attorney General directly raised the point that "Article I, section 4 . . . was sold on the basis that Congress needed the authority or power to preserve . . . the Union."¹²⁴ If a state failed to act in setting the time, place, and manner of elections, then Congress could intervene and do so.¹²⁵ Presumably, we preserve our union and so keep our republic by ensuring that congressional elections occur. And yet, the Supreme Court did not press this point.

It is true that Justice Stevens came close to addressing it in his majority opinion by observing that the Union's continued existence cannot be left to the mercy of state legislatures,¹²⁶ which rejected Arkansas's argument after looking to history and citing *The Federalist Papers* extensively as evidence of what the Framers envisioned, that is, a *national* government.¹²⁷ Further, Justice Stevens even recognized that the states cannot "craft their own qualifications for Congress" because to do so would "erode the structure envisioned by the Framers . . . to form a 'more perfect Union.'"¹²⁸ But if there were any doubt about how Justice Stevens read the historical record and the relevance of *The Federalist Papers*, that doubt can be removed when union preservation enters into the conversation. Namely, a viable *national* legislature is vital to union preservation, so the Tenth Amendment cannot be read to subvert that goal by allowing the states to pick and choose their own qualifications for members of Congress. Let's be clear, then; we keep our republic by creating a strong union, but our union is only as strong as the states' commitment to being part of that union.

The list continues. For example, when we think about commerce and the power to tax, we must be mindful of how those powers unite or divide the states. For example, in *The Federalist No. 32*, in discussing the central government's power of taxation, Hamilton explains that the Union must have an "exclusive power to levy duties on imports and exports" because otherwise, if the states could prescribe their own distinct rules, then "there could not be a uniform rule."¹²⁹ And a lack of a uniform rule could be dangerous.¹³⁰ As Hamilton goes on to explain in *The Federalist No. 33*, "the danger which most

124. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 809–11 (1995); Transcript of Oral Argument at 15, *Term Limits*, 514 U.S. 779 (1995) (Nos. 93-1456 & 93-1828).

125. See Transcript of Oral Argument, *supra* note 124, at 15.

126. See *Term Limits*, 514 U.S. at 809 (suggesting that the continued "existence of the Union" should not be left to the "mercy" of the state legislatures).

127. See *id.* at 842 (explaining that "[n]othing in the Constitution or *The Federalist Papers*, however, supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives").

128. *Id.* at 838.

129. THE FEDERALIST NO. 32, *supra* note 8, at 199 (Alexander Hamilton).

130. See *id.*

threatens our political welfare is that the State governments will finally sap the foundations of the Union.”¹³¹ The solution, there, is concurrent jurisdiction—leaving open to the states the power of taxation except through the duties on exports and imports.¹³² Again, thinking continentally requires us to acknowledge and balance a strong union with respect for the states that make it up and are willing to be part of a union rather than a loose confederation. At bottom, union preservation is not just a high ideal; it is the thrust of many of our common constitutional concepts. In articulating those concepts in *The Federalist Papers*, our colonial trio outlined the principles that animate (or at least ought to, if approached correctly) union preservation. It is time we started embracing them as such.

All of this is not to say that every originalist-as-we-know-it opinion is wrong or would come out the other way under this framework. But union preservation would add greater legitimacy to the originalist framework—and to judicial opinions generally—and it would refocus attention on critical constitutional issues rather than allowing the methodology to overshadow the conversation and fuel further tensions.

Recently, first with the leak of the majority opinion and then with the final opinion in *Dobbs v. Jackson Women’s Health*, the need to refocus the conversation and navigate the pitfalls of unhealthy division resurfaced. There, the historically divisive issue of abortion only further divided the nation and cast doubt on the independence of our judiciary.¹³³ We know from *The Federalist Papers* the importance of an independent judiciary.¹³⁴ But even if we could put aside the ramifications of the leak itself, an opinion overruling longstanding precedent in an area as controversial as abortion likely could have benefitted from continental originalism. For example, *stare decisis* is itself a tool of union preservation, so an opinion that finds itself no longer bound to precedent must explain how overruling that precedent will promote union preservation. The draft opinion arguably attempts this by hinting at returning the right to regulate abortion to the states.¹³⁵ Whether the ultimate outcome of the decision is right or wrong is not for this Article to consider.

131. THE FEDERALIST NO. 33, *supra* note 8, at 203 (Alexander Hamilton).

132. *Id.* at 204; *see also* THE FEDERALIST NO. 34, *supra* note 8, at 211 (Alexander Hamilton) (“It is evident that [the concurrent jurisdiction] has at least the merit of reconciling an indefinite constitutional power of taxation in the federal government with an adequate and independent power in the States to provide for their own necessities.”).

133. Kari Hong, *The Supreme Court’s Draft Abortion Decision Overturning Roe v. Wade: How Originalism’s Rejection of Family Formation Rights Undermines the Court’s Legitimacy and Destabilizes a Functioning Federal Government*, 83 MONT. L. REV. ONLINE 48, 48 (2022).

134. *See* THE FEDERALIST NO. 78, *supra* note 8, at 466 (Alexander Hamilton) (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”).

135. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (“It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

Instead, continental originalism would have asked how, under these circumstances, leaving an issue up to the states promotes union preservation in ways that following existing precedent does not. Against the backdrop of union preservation, the majority opinion could have added substance to this idea of returning the issue to the states and our democratic processes—an idea that, as articulated, can be read as another type of code word or slogan, fueling division and adding to the turmoil of the current moment. Indeed, both sides could have made much use of union preservation. The majority might have explained how effectively federalizing the right has strained the Supreme Court and the Union in such a way that the Court struggles to be the union-preserving mechanism it needs to be.¹³⁶ The dissent, too, could have made use of union preservation as a weight on the scale. Specifically, the goal of union preservation could have bolstered the dissent’s argument that overturning a fifty-year-old precedent along with the practical consequences that will flow from the inevitable patchwork of state laws around abortion will put more pressure on the Union than the debates about *Roe* ever did,¹³⁷ particularly when they were *actual* debates.

Instead, the American public is left to guess and conclude that the justification for the majority’s decision (and even the justification for the dissent) is primarily political. Assumptions about politics and individual proclivities motivating a decision to overturn longstanding precedent are especially risky for a republic in turmoil. Rather, can we situate abortion and bodily autonomy against the Constitution’s goals of union preservation?¹³⁸

Critics may respond that selecting union preservation as the ultimate theme and goal of *The Federalist Papers* misrepresents them as much as an ordinary originalist interpretation does. And union preservation is, of course, a subjective enterprise. But its subjectivity is obvious and its purpose consistent with (and vital to) the survival of our republic. To be sure, continental originalism is not about making originalism any less subjective. Instead, it is about trying to remain a little more faithful to the relevant historical moments underpinning the Constitution’s adoption and the themes that predominated such moments.¹³⁹

136. *Cf. id.* at 2234, 2259 (focusing on “whether the Constitution, properly understood, confers a right to obtain an abortion” and then explaining that “supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those [policy] arguments and decide how abortion may be regulated in the States”).

137. *Cf. id.* at 2319–20 (commenting that “[t]he Court reverses course today for one reason and one reason only: because the composition of this Court has changed”) (Breyer, J., dissenting).

138. *Roe* and *Casey* would have also done well to engage this question. Importantly, the Fourteenth Amendment (along with the other Reconstruction-era amendments) necessarily works toward union preservation and restoring the Union after we came dangerously close to losing it.

139. *But see* Balkin, *supra* note 17, at 1132.

We are at a pivotal historical moment. When we ask the courts to interpret the Constitution, to explain the scope of our rights, and to define the scope of the political branches' authority, we are also implicitly asking the courts to tell us if we—as a country—are on the right track. Have the decisions, actions, and words that brought us to this juncture—and thus before the courts—affirmed or violated our Constitution? Are we keeping our republic, as Franklin would remind us is our responsibility, or are we chipping away at it? If we are going to look to history, we have to look to the end goal of that history and the reason we are interpreting the Constitution in the first place—preserving our union. This is the theme that *The Federalist Papers* exhaustively examine in trying to garner support for the Constitution. To that end, the importance of union preservation as our lodestar in constitutional interpretation should become apparent. In these divisive moments, we are often asking the courts to weigh in, and those judicial decisions—if framed thoughtfully—have the power to help us keep our republic. Opinions that cherry-pick from history to answer a legal question without acknowledging the historical context in which the applicable constitutional provision was crafted wield history itself as a divisive tool and undermine the legitimacy of constitutional interpretation. To demonstrate the power of acknowledging that historical context, two examples applying continental originalism follow.

B. Union Preservation and Longstanding Precedent: Franchise Tax Board of California v. Hyatt

Writing in dissent in *Franchise Tax Board of California v. Hyatt*, Justice Breyer emphasized that, when the Court overturns longstanding precedent, it “can only cause one to wonder which cases the Court will overrule next.”¹⁴⁰ Justice Breyer is not wrong. But continental originalism can allay these doubts because, when union preservation is our lodestar, we can have confidence in the constitutional interpretation that follows.

For example, it is clear that the majority opinion in *Hyatt* does not contemplate union preservation in holding that the Constitution does not “permit[] a State to be sued by a private party without its consent in the courts of a different State” and overruling its precedent to the contrary.¹⁴¹ Rather, in writing for the majority, Justice Thomas articulated that *Nevada v. Hall* was “contrary to our constitutional design and the understanding of sovereign

140. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

141. *Id.* at 1490. Specifically, *Hyatt* overruled *Nevada v. Hall*, which held that that private suits against a State in the courts of another State are permitted under the Constitution. *See Nevada v. Hall*, 440 U.S. 410, 420–21 (1979).

immunity shared by the States that ratified the Constitution.”¹⁴² Justice Thomas then argued that “*Hall*’s determination that the Constitution does not contemplate sovereign immunity for each State in a sister State’s courts misreads the historical record and misapprehends the ‘implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter,’” thereby failing “‘to give each provision within that document the full effect intended by the Framers.’”¹⁴³ And in discussing exactly why *Hall* misreads the historical record, Justice Thomas looks to—among other sources—*The Federalist Papers*, though this should come as no surprise.¹⁴⁴

In drawing from *The Federalist Papers* (and other historical sources), Justice Thomas points to the states’ “inviolable sovereignty” at the time of the founding.¹⁴⁵ Further, as Hamilton pointed out in *The Federalist No. 81*, “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . . and [that fact], as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.”¹⁴⁶ Hamilton did say as much. Hamilton, however, also went to great lengths to explain the balance between the federal government and the states, which was established to ensure that “the danger which most threatens our political welfare . . . that the State governments will finally sap the foundations of the Union” would be avoided.¹⁴⁷ Justice Thomas’s argument, then, would be bolstered—especially because it overturns precedent—by contextualizing this reading of the Constitution as not permitting a private party to sue a state without its consent in another state’s court against the backdrop of union preservation. In other words, we must consider how consenting to suit in federal court but not in a sister state’s court would have fit within the ultimate goal of ratification and adoption of the Constitution, union preservation.

To do so, we might still start in the same place in which Justice Thomas started, but we would situate this analysis against a larger historical context. By understanding union preservation as the chief aim of the shift to the Constitution, vital reasons for which a state could not be sued in a sister state’s court without its consent are readily apparent. First and foremost, we have to keep in mind that, without this type of sovereignty, the states might have refused to ratify the Constitution; it is no secret that many citizens of the young

142. *Hyatt*, 139 S. Ct. at 1492.

143. *Id.* (quoting *Hall*, 440 U.S. at 433 (Rehnquist, J., dissenting)).

144. *See id.* at 1493.

145. *Id.*

146. *Id.*

147. THE FEDERALIST NO. 33, *supra* note 8, at 303 (Alexander Hamilton) (discussing this issue in the context of taxation).

republic favored the idea of a compact of states.¹⁴⁸ And to allow a private party to hail a state into a sister state's court without consent would have confused and diminished the level of sovereignty enjoyed by the states. In other words, especially at a time when the federal courts were not the expansive body that they are now,¹⁴⁹ states would have been subject to the mercy of each other's courts. And this, too, could have wreaked havoc on our early efforts to keep our republic, especially given the biases about and strong identities of different states. It, then, becomes readily apparent that sovereign immunity is a principle that works towards union preservation, so a faithful reading of the Constitution necessarily contextualizes sovereign immunity as such. It may well be that Justice Thomas is correct. But, to get there, placing union preservation as our lodestar would add the legitimacy and context that we desperately need in this divisive moment when "originalism," "textualism," and "history" are often seen as tools to reject the constitutional status quo rather than as legitimate interpretive tools.

C. *Union Preservation and the Bill of the Rights: District of Columbia v. Heller*

We can also consider *District of Columbia v. Heller* and examine how being mindful of union preservation would have added more nuance and legitimacy to both Justice Scalia's opinion and Justice Stevens's opinion. From the start, the question in *Heller* about an individual's right to keep and bear arms was framed by *both* sides in ways that looked at the right in question without discussing how the exercise of the right fit into the broader scheme of ensuring the nation's survival in 1791.¹⁵⁰ Specifically, the petitioners argued that the Second Amendment "protects only the right to possess and carry a firearm in connection with militia service."¹⁵¹ Conversely, the respondents argued that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for

148. It is also worth noting that even *The Federalist Papers*, which drive towards union preservation, refer to the United States plurally rather than as a singular entity. See, e.g., THE FEDERALIST NO. 12, *supra* note 8, at 95 (Alexander Hamilton) (writing that "[t]he United States lie at a great distance from Europe" as opposed to what would be common today, that the United States *lies* at a great distance from Europe) (emphasis added).

149. Indeed, until 1875, what we now know as federal question jurisdiction was not a basis for original jurisdiction in the lower federal courts. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331); see also Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L. J. 597, 601–07 (1987) (providing a brief history of federal question jurisdiction).

150. *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (discussing the differing ways in which each side frames the issue).

151. *Id.*

traditionally lawful purposes, such as self-defense within the home.”¹⁵² And each of these views of the Second Amendment is where Justice Scalia and Justice Stevens, respectively, started their analysis.¹⁵³

Both Justice Scalia and Justice Stevens attempted to situate their analyses in the context of history, focusing on what the words of the Second Amendment would have meant “[a]t the time of the founding.”¹⁵⁴ No doubt, looking to “founding-era sources”¹⁵⁵ can be helpful; indeed, those sources helped shape both Justices’ opinions. But to look at those sources with an eye only to the original meaning of the words without considering the backdrop of why the Second Amendment—or any of the first ten amendments—was included effectively ignores history. We know that union preservation was central to the Framers’ vision.¹⁵⁶ At least some of the Framers believed that a bill of rights was dangerous to the overall purpose of union preservation.¹⁵⁷ Specifically, in *The Federalist No. 84*, Hamilton argues that such a bill of rights is “not only unnecessary in the proposed Constitution, but [also] would even be dangerous.”¹⁵⁸ As Hamilton posits, “[W]hy declare that things shall not be done which there is no power to do?”¹⁵⁹ In other words, a bill of rights might open the door to “a colorable pretext to claim more [powers] than were granted.”¹⁶⁰ Instead, Hamilton would have us remember that the Constitution was meant to be a “bill of rights of the Union,”¹⁶¹ with a focus on ensuring public security and maintaining a lasting structure of government.¹⁶²

Of course, Hamilton’s view did not prevail, and the compromise was to include such a bill of rights.¹⁶³ So these rights found within the first ten amendments are themselves the product of a compromise brokered to ensure the Constitution’s ratification and adoption and thus the nation’s survival.¹⁶⁴ Returning to *Heller*, we must read the Second Amendment as the product of this compromise. Therefore, the Second Amendment necessarily is not solely about who can “bear arms.” It must also be read within the context of the

152. *Id.*

153. *See id.*

154. *Id.* at 584.

155. *Id.*

156. *See* U.S. CONST. pmbl. (indicating an effort by the Framers to “form a more perfect union,” which implicitly requires preservation).

157. THE FEDERALIST NO. 84, *supra* note 8, at 513 (Alexander Hamilton) (arguing against a bill of rights as being unnecessary to secure individual rights).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 515.

162. *Id.*

163. ELLIS, *supra* note 1, at xv.

164. *Id.* (explaining that the Bill of Rights was drafted partially “as an insurance policy to ensure state compliance with the constitutional settlement”).

broader package of rights to be spelled out if the Constitution *as a whole* were to be adopted. Put differently, the Second Amendment exists as part of a compromise to ensure that the seismic shift away from the Articles of Confederation became a reality. Accordingly, a reading of the Second Amendment that polarizes the nation does not quite square with the historical context—and the original intent and public meaning—of the ratification and adoption of the Bill of Rights. In other words, we must tread carefully when we interpret what was meant for compromise and unity in such a way that it becomes a touchstone of controversy.

What's critical here is to consider the issue in *Heller*, under either frame, with the additional layer of how the inclusion of the right to keep and bear arms would further the ends of the Framers' compromise. On the one hand, militia participation might have seemed a natural part of union preservation, especially given the limited nature of any national military at the time, and would have fit in with the overall package of rights included in the Bill of Rights as a way to keep the young nation secure. On the other hand, the individual right might equally have fit in with the overall package of rights as but one of many tools for the People to keep the federal government in check. And although a thorough analysis of this specific question is outside the scope of this Article, those are the questions that judges and justices ought to consider to the extent they consider history and apply an originalist interpretation. Doing so will go a long way to refocusing the conversation on the issues at hand and encouraging the type of debate that is vital to our republic's survival and the law's evolution rather than inciting the type of division and vitriol that puts our republic at risk.

V. CONCLUSION

In this especially divisive time, continental originalism—understanding originalism as centering around union preservation—is more important than ever. To the extent that we look to the judiciary as a backstop against the political abuses of Congress and the executive branch, its opinions must be legitimate and not rooted in the fallacy of objective history. Indeed, we must look to the judiciary to set the tone for union preservation if we want to keep our republic, if we want the sun on George Washington's chair to be rising

rather than setting.¹⁶⁵ To do so, Hamilton would tell us—and Franklin—to start “thinking continentally.”¹⁶⁶

165. Another now-famous historical anecdote from the convention involves Ben Franklin looking at the chair George Washington sat in for nearly three months. Carved into the chair’s back was a sun, and Franklin allegedly said that he had “often . . . looked at that behind the President without being able to tell whether it was rising or setting. But now at length I . . . know that it is a rising and not a setting [s]un.” James Madison, *Notes on the Debates in the Federal Convention: Tuesday September 17, 1787*, YALE L. SCH.: THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_917.asp [<https://perma.cc/3E55-SZ3L>].

166. Sources cannot confirm whether Hamilton ever had this conversation with Franklin. But, as it was said once before, “when the legend becomes fact, print the legend.” *THE MAN WHO SHOT LIBERTY VALANCE* (Paramount Pictures 1962).