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The Emerging Genre of *The Constitution*: Kent Newmyer and the Heroic Age

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In written celebration of Kent Newmyer's intellectual and collegial influence, this essay argues that the written constitution was an emerging genre in 1787-1789. Discussions of the Constitution and constitutional interpretation often rest on a set of assumptions about the Constitution that arose in the years and decades after the constitutional Convention. The most significant one involves the belief that a fixed written document was drafted in 1787 intended in our modern sense as *A Constitution.* This fundamental assumption is historically inaccurate. The following reflections of a constitutionalist first lay out the argument for considering the Constitution as an emerging genre and then turn to Kent Newmyer's important influence.

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At the outset, let me be honest … in the dark hours of the night, I have considered converting to originalism. The appeal is undeniable. I love history and think that history is relevant to constitutional interpretation. I have written about what people of the framing generation thought about words and concepts—and I find fascinating the tracing of etymologies

* Founders Professor, Boston College Law School. I thank Sharon O'Connor, Saul Cornell, Michael Dorf, Jonathan Gienapp, John Mikhail, and Maeva Marcus for helpful comments. The discussion at Northwestern's Originalism and History: An Interdisciplinary Discussion (October 2019) was helpful and I thank the participants, with special thanks to Jim Pfander and Mike Rappaport for the invitation. This essay reorders comments made at the November 8, 2019 celebration to accommodate the form of the written essay.

and lexicographies.[1] And I am happy puzzling over the details of the constitutional convention.[2] But then I think about the framing generation and the generations that have followed—and what *The Constitution* is. And I can't do it.

Because at core, I am what I call, a constitutionalist, not an originalist.[3] Originalism has one foundational assumption about the Constitution. It was (1) a written constitutional text in 1787; (2) with a fixed, knowable meaning. As Larry Solum explains, "Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors."[4]

[1] See, e.g., Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer,* 28 L. & HIST. REV. 389-1043 (2010); Mary Sarah Bilder, *The Corporate Origins of Judicial Review,* 116 YALE L.J. 502-566 (2006); Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913-1387 (1997); Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MISSOURI L. REV. 743-1065 (1996).

[2] See, e.g., MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015).Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?,* 80 GEO. WASH. L. REV. 1620-889 (2012).

[3] There is not a good term to describe constitutional interpretation that contrasts to originalism. My sense is that the frame continues to be that set by the 1985-1986 debate between Attorney General Edwin Meese and Justice William Brennan. See JACK N. RAKOVE, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990). As opposed to imaging living constitutionalism meaning the opposite of *dead constitutionalism*, the term has become a pejorative, primarily used to suggest untethered interpretive modes. On the history of the term, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. Univ. L. Rev. 1243, 1255-62 (2019); David A. Strauss, The Living Constitution (Sept. 27, 2010), https://www.law.uchicago.edu/news/living-constitution (excerpt of *The Living Constitution*). Although David Strauss has written significantly about living constitutionalism, initially through the lens of common law constitutionalism, reclaiming the concept remains rather doubtful at present. See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); David A. Strauss, *Common Law Constitutional Interpretation,* 63 UNIV. CHI. L. REV. 877-1707 (1996); Bernadette Meyler, *Towards a Common Law Originalism,* 59 STAN. L. REV. VOL. 551 (2006); David Konig, James Madison and Common-Law Constitutionalism, 28 L. & HIST. REV. 507 (2010). For incisive comment on the state of contemporary constitutional scholarship, see Andre LeDuc, *Toward a Reflective Equilibrium: Making out Constitutional Practice safe for Constitutional Theory*, 92 S. CAL. L. REV. 39-65 (2018) (review of Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court*). For recent explanations by non-originalists, see Michael C. Dorf, "Why Not to Be an Originalist," Nov. 14, 2019, http://www.dorfonlaw.org/2019/11/why-not-to-be-originalist.html.

[4] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. UNIV. L. REV. 1243, 1244 (2019). Solum delineates the core of originalist constitutional theory: (1) the Fixation Thesis; (2) a reasonable version of the Constraint Principle; (3) "some account of the nature of original meaning; (4) they "affirm (or at least do not deny) the plausibility of such other theses as are required to render originalism plausible (among these that the text is "not radically indeterminate"; that the "original meaning" is recoverable through originalist methodology; and that constitutional actors can comply with the constraint principle. Id., at 1270-71.

Whether a semantic originalist,[5] an original methods originalist,[6] a positivist originalist,[7] a public meanings originalist,[8] or a framers intent originalist,[9] they share the assumption that the Constitution of 1787-1789 belonged to a genre already known to the framing generation and which carried a set of interpretive rules.

But in 1787-1789, the Constitution was an emerging genre. *Constitution* still carried with it the meaning of a system of government. Indeed, in 1787 the Constitution was still as much a "System of government" as it was a document.[10] Or to put it differently, the paper drafted in 1787 described a system of government for a new nation. When I first began to explore this topic over a decade ago, I suggested, "Rather than a dramatic step from charter to Constitution that bifurcates the colonial period from the constitutional one, the adoption of the term "constitution" was perhaps initially a less dramatic step."[11] Although *constitution* was beginning to shift towards signifying the words of the document as discrete and severable from the embedded system of government, it would take decades—if ever—for that transition to be complete.

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[5] See, e.g., the work of Lawrence Solum.

[6] See, e.g., the work of John O. McGinnis and Michael B. Rappaport.

[7] See, e.g., the work of William Baude and Stephen E. Sachs.

[8] The extensive originalist-influenced scholarship that draws its conclusions from writing during the ratification period or from dictionary definitions falls into this category.

[9] See, e.g., the work of Richard S. Kay.

[10] See generally BILDER, MADISON'S HAND, supra note 2; Mary Sarah Bilder, "The Constitution to The Constitution" (2018), http://works.bepress.com/mary_bilder/95/; Mary Sarah Bilder, *The Ordeal and the Constitution*, NEW ENGLAND QUARTERLY March 2018, Vol. 91, No. 1, pp. 129–146; Mary Sarah Bilder, *Colonial Constitutionalism and Constitutional Law*, in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF MORTON J. HORWITZ, eds. Alfred L. Brophy and Daniel W. Hamilton (2009). Modern editing conventions obscured this point. For example, according to the standard source, Max Farrand's *The Records of the Federal Convention*, George Read wrote to John Dickinson in May 21, 1787, "I am in possession of a copied draft of a Federal system intended to be proposed." MAX FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 24-25 (1911). The emphasis appeared to be *Federal*. The original letter, however, stated "a copied Draft of a foederal System." Read to Dickinson, 21 May 1787, Read family letters (Collection 0537), Historical Society of Pennsylvania. For discussion of growing perception of difference between the American and British Constitutions, see MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 156-84 (1986)

[11] Bilder, *Colonial Constitutionalism and Constitutional Law*, supra note 10, at 36; see

There was no abrupt transformation from *system of government* to *Constitution*. There was no sudden shift from *constitution* to *Constitution.* The first state "constitutions" used the term interchangeably, calling themselves "constitution or frame of government" or "constitution or form of government."[12] In the 1780s and in the 1790s, *constitution* still denoted the embedded system of government even as it was coming also to signal the document. The process of drafting a document, arguing about it, structuring a government according to its boundaries, and eventually judging government actors by it, would begin to foreground the document. Eventually, to many Americans, *Constitution* would come to mean only the document. But in the 1780s and 1790s that had not yet happened. Over three decades ago, Suzanne Sherry alluded to the gap in suggesting both that the "American invention of the Constitution" as creating fundamental law was "largely complete" by September 1787 and yet that Chief Justice John Marshall transitioned to "the modern textual constitutionalists' use of the single written source" only late into his tenure.[13] Jack Rakove similarly incisively commented, "For since 1789 Americans have always possessed two constitutions, not one: the formal document adopted in

[12] See, e.g., THE CONSTITUTION, OR FRAME OF GOVERNMENT, FOR THE COMMONWEALTH OF MASSACHUSETTS (Worcester, Isaiah Thomas 1780); THE CONSTITUTION, OR FRAME OF GOVERNMENT, FOR THE COMMONWEALTH OF MASSACHUSETTS (State-Street [Boston], Benjamin Edes & Sons, 1780). Pennsylvania combined the Declaration of Rights with its Constitution, or Frame of Government (1776). Virginia enacted separate Declaration of Rights and The Constitution or Form of Government (1776). Special Collections, Vault, Library of Virginia, Richmond, Virginia, https://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/va_constitution. North Carolina used "the Constitution, or Form of Government." THE CONSTITUTION, OR FORM OF GOVERNMENT, AGREED TO, AND RESOLVED UPON, BY THE REPRESENTATIVES OF THE FREEMEN OF THE STATE OF NORTH-CAROLINA (Philadelphia: F. Bailey, 1779). For the use of similar title for the 1787 document, see THE CONSTITUTION, OR FRAME OF GOVERNMENT, FOR THE UNITED STATES OF AMERICA (Boston: Adams & Nourse, 1787). Into the nineteenth century, some states continued to title the enacted document using these names. On early constitutions, see GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC (1969; rev. ed. 1998); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA, trans. Rita Kimber and Robert Kimber (1980); DAVID J. BODENHAMER, THE REVOLUTIONARY CONSTITUTION (2012).

[13] Suzanne Sherry, *The Founders' Unwritten Constitution*, 54 UNIV. CHI. L. REV. 1127, 1172 (1987). Sherry saw her article as a companion to Jefferson Powell's important article arguing that the framers did not expect future interpreters to look to the framers' intent. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885-948 (1984).

1787-88, with its amendments; and the working constitution, comprising the body of precedents, habits, understandings, and attitudes that shape how the federal system operates at any historical moment."[14] Abandoning the assumption that *the Constitution* as a genre existed by September 1787 resolves these apparent tensions.

What word describes what the Constitution was in the late 1780s and 1790s if it wasn't the Constitution meant as a written fundamental law document? Once one begins to carefully read sources, it becomes remarkably difficult to figure out whether people in the late 1780s and 1790s were using the word *Constitution* to refer to the type of written legal genre or to the system of government gestured at by written words. Although contemporary capitalization conventions distinguish two distinct understandings, the late eighteenth century followed different conventions. As I noted previously, "*The Federalist Papers* originally appeared with "constitution" consistently spelled with a small *c*."[15] One can imaginatively replace *Constitution* with *system of government* or *frame of government* and sentences retain their meaning and, in some instances, become more nuanced.

Not infrequently, the framing generation used the word *charter* as if it was that genre to which the document belonged. Indeed, James Madison, so-called Father of the Constitution, referred to American constitutions as charters in January 1792, never once describing the

[14] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339-40 (1996). Rakove continues, "The problem of originalism is about the relation between these two constitutions." Id., at 340.

[15] Bilder, *Colonial Constitutionalism and Constitutional Law*, supra note 10, 29; ALEXANDER HAMILTON, THE FEDERALIST: A COLLECTION OF ESSAYS, WRITTEN IN FAVOUR OF THE NEW CONSTITUTION, AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787 (New York, M,DCC,LXXXVIII. [1788]) (Eighteenth Century Collections Online; Gale Document Number: CW3304811543), 2 vols. That research was done before the every printed eighteenth century text and many newspapers could be searched easily and relatively effectively. With new databases and improved search functions, this conclusion could be explored with more nuance.

documents as *Constitutions*.[16] The cultural practice that supported the Constitution as a written text grew out of corporate charters.[17] Recently John Mikhail and Nikolas Bowie argue for the importance of the corporate charter origins in interpreting the Constitution.[18] As I have argued elsewhere, *charter constitutionalism*—the constitutional law and politics that arose under written colonial charters—followed a different set of interpretive conventions than the ones urged by modern textualists and originalists.[19] As a case study, the famous language in the liberties assurance in the Virginia charter demonstrated that "the specific words and the underlying concept were not in complete correspondence."[20] Jud Campbell's scholarship demonstrates an analogous Founding Era ambivalence about the conceptual correspondence in his work on early First Amendment controversies.[21] Although the 1787 Constitution arose out of this long practice of charter constitutionalism, it did not perfectly fit within the charter genre by historical standards.

Joseph Story hinted at the definitional dilemma. In *Commentaries on the Constitution of the United States*, Story defined *constitution* using the word *instrument*:

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[16] [James Madison], "Charters," 18 Jan. 1792, National Gazette; see JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 201 (2018).

[17] See Bilder, *Colonial Constitutionalism and Constitutional Law*, supra note 10*;* Bilder, *The Corporate Origins of Judicial Review*, supra note 1*;* Mary Sarah Bilder, English Settlement and Local Governance, 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815) 63-103 (2008).

[18] John, Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on 'A Great Power of Attorney': Understanding the Fiduciary Constitution' by Gary Lawson and Guy Seidman* (July 21, 2019). 17 GEORGETOWN J. L. & PUB. POLICY 407, 423-29, 440 (forthcoming 2019), available at SSRN: https://ssrn.com/abstract=3423599; Nikolas Bowie, *Why the Constitution was Written Down*, 71 STAN. L. REV. 1397 (2018).

[19] Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1549-53 (2016).

[20] Bilder, *Charter Constitutionalism*, *supra* note 19, 1552; see Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution,* 97 TEX. L. REV. ONLINE, 115-137 (2019).

[21] Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517 (forthcoming 2019); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246 (2017).

> In our future commentaries upon the constitution, we shall treat it, then, as it is denominated in the instrument itself, as a *CONSTITUTION* of government, ordained and established by the people of the United States for themselves and their posterity.[22]

The *constitution* and the *instrument* were not quite one and the same. The constitution was the constitution of government and that was not precisely the same as the instrument.

Instrument is a rather nice word to use. According to the Oxford English Dictionary, the word used in law means: "A formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form, so as to be of legal validity."[23] A quick glance can find the word used by favorite Founders in conjunction with the Constitution. In an oft-cited explanation about *The Federalist* in 1818, Madison noted, "The immediate object of them was to vindicate & recommend the new Constitution to the State of N.Y. whose ratification of the instrument was doubtful, as well as important."[24] Similarly, Gouverneur Morris's famous explanation about the

[22] JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 382 [section 397] (Boston 1833).

[23] OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("Instrument"; definition 5a), https://www.oed.com/oed2/00118368

[24] "From James Madison to James K. Paulding, 23 July 1818," Founders Online, National Archives, accessed September 29, 2019, https://founders.archives.gov/documents/Madison/04-01-02-0273. [Original source: The Papers of James Madison, Retirement Series, vol. 1, 4 March 1817–31 January 1820, ed. David B. Mattern, J. C. A. Stagg, Mary Parke Johnson, and Anne Mandeville Colony. Charlottesville: University of Virginia Press, 2009, pp. 309–311.]

drafting noted, "That instrument was written by the fingers, which wrote this letter."[25] *Instrument* captures the performative legal function of the document.[26]

Once we see the *instrument* as something apart from *the Constitution*, a number of puzzling aspects of the Convention, ratification, and subsequent history make sense. I managed to come up with ten because I once saw Doris Kearns Goodwin give a 10-item talk.[27] In this space, I will briefly note rather than elaborate them.

1. *The Convention*. During the summer of 1787, the system of government was repeatedly the point. The Convention spent most of its time worrying about principles and structures. The delegates preferred words that were broad, expansive, and with multiple possible meanings; they worried about cavilers (people who would pick a narrow meaning), and they occasionally resolved disputes by picking a word that permitted both sides to think they had won, rather than choosing one side as right and the other wrong.[28] The rights included in the instrument related to the system of government: the two limiting the legislature (bill of attainder and ex post facto); the two from Magna Carta (habeas corpus, jury trial in criminal cases); and

[25] Gouveneur Morris to Timothy Pickering, Dec. 22, 1814, 3 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS, ed. Jared Sparks 322, 323 (1832). In a somewhat bitter letter, Morris goes on to ask, "But, after all, what does it signify, that men should have a written Constitution, containing unequivocal provisions and limitations? … Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame if the not the guilt of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose." Id. Morris suggesting "comparing the plain import of the words, with the general tenor and object of the instrument." Id.

[26] For careful and precise use of *document* in discussing the Constitution, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

[27] See, e.g., Doris Kearns Goodwin, 10 Leadership Lessons from the White House, https://www.edsurge.com/news/2019-03-20-doris-kearns-goodwin-s-10-leadership-lessons-from-the-white-house; Carmen Forman, Doris Kearns Goodwin reveals top 10 presidential traits at Virginia Tech, https://www.roanoke.com/news/education/doris-kearns-goodwin-reveals-top-presidential-traits-at-virginia-tech/article_a0bb7a36-c06a-5cd7-abfb-ece79a694eab.html.

[28] These points can be found in greater detail in BILDER, MADISON'S HAND, supra note 2.

the one that made the United States diverge radically from Great Britain—the right to hold office and participate in government without a religious test or a required oath. [29]

2. *The final drafting committee*. The Committee on Style was given extensive leeway and completely rearranged the draft into seven articles that permitted an interpretive structure to be superimposed on the system. The formal name for the Committee was "to revise the style of and arrange the articles." Repeatedly, the Secretary referred to it as the Committee of revision."[30] No one fussed and the Convention almost instantly approved the instrument. The Constitution as we come to know it only begins to be visible in this moment.[31]

3. *The Convention's letter.* At the end of the Convention, they wrote to Congress describing what they were transmitting as "that Constitution which has appeared to us the most adviseable," not "the Constitution."[32] More powers had been needed, and executive and judicial authorities "more fully and effectually vested" in a general government—but it was a bad idea to delegate that to one body of men (i.e, the old Congress).[33] "Hence results the necessity of a different organization."[34] And the Convention went on to explain that people differed but to reach consensus, people had been "less rigid on points of inferior magnitude" and had entered

[29] See Bilder, *The Ordeal and the Constitution*, supra note 10, at 141; Mary Sarah Bilder, *The Founding*, in WITH LIBERTY AND JUSTICE FOR ALL? THE CONSTITUTION IN THE CLASSROOM, eds. Robert Cohen, Maeva Marcus, and Steve Steinbach (forthcoming Oxford, 2020-21).

[30] Bilder, *How Bad?*, supra note 2, at 1648; Bilder, *The Ordeal*, supra note 10, at 141.

[31] Other textual clues include the use of "establish the following Constitution" in the preamble in the August 6 draft and "this Constitution" in the preamble of the final draft. 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, ed. John Kaminski, et al. 260, 261, 306 (1976-2013).

[32] 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 31, at 305-306; see Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615-50 (1995); Bilder, *The Ordeal*, supra note 10, at 141-43.

[33] Id.

[34] Id.

into "mutual deference and concession."[35] None of that explanation makes sense about a document that was to be rigidly read; but it all makes sense imagining the instrument as a constitution of a system of government. In fact, the letter accompanied many broadside and newspaper printings of the Constitution. Readers could read the letter and the large-type preamble and skip the detailed instrument.[36]

4. *Congress*. The Convention was intriguingly uninterested in what happened to the precise words of the instrument. It never decided in advance whether Congress could revise the instrument (which Congress decided not to do), nor what to do if states proposed revisions and amendments. Only because the instrument passed without revision through Congress and was subsequently ratified without revisions and amendments, was it possible to begin to think of the instrument drafted in 1787 as particularly special.[37]

5. *Ratification*. As Bernard Bailyn pointed out, attacking the semantic words of the instrument was the strategy of the opponents, the so-called Anti-Federalists; the proponents—the

[35] Id.

[36] See, e.g., [Broadside printing of the Constitution] (Dunlap & Claypoole, ca. Sept. 17-18, 1787, The Gilder Lehrman Institute of American History, GLC00258, available at https://artsandculture.google.com/asset/_/DAEclrGkF842Lw (letter printed on page 4); [UNITED STATES CONSTITUTION], The Pennsylvania Packet, and Daily Advertiser. No. 2960. We, the people of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity ... do ordain and establish this Constitution for the United States of America. [Philadelphia:] Dunlap & Claypoole, Wednesday, 19 September 1787, available at https://constitutioncenter.org/media/files/PA_Packet1.jpg; The Independent Gazetteer published the instrument under the heading "Plan of the New Federal Government." [U.S. CONSTITUTION]. Newspaper. The Independent Gazetteer, or, the Chronicle of Freedom. Philadelphia: Eleazer Oswald, September 19, 1787, 1-3, https://www.sethkaller.com/item/1962-21085.99-Rare-First-Printing-of-the-U.S.-Constitution&from=26. A list of some printings appears in A.R. Hasse, *List of Books and some articles in periodicals in the New York Public Library*, in 8 BULLETIN OF THE NEW YORK PUBLIC LIBRARY 103-104 (1904); Robert Allen Rutland, *The First Great Newspaper Debate: The Constitutional Crisis of 1787-88*, in 97 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY, 43, 47 (1987) (suggesting that "it is probable that every one of the ninety-nine or 100 newspapers" provided the text).

[37] BILDER, MADISON'S HAND, supra note 2, at 155; Bilder, *The Ordeal*, supra note 10, at 143; 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 31, 322-353.

Federalists—repeatedly defended it according to structural principles.[38] Pauline Maier noted, "Once criticism of the Constitution mounted, its supporters had to defend sections … about which, in truth, they themselves often had reservations, and they had to make sense of the system of government it proposed in ways that went beyond anything said or even understood at the federal Convention."[39] Although the instrument was ratified without alterations, the ratification debate had altered the understanding of the instrument. Saul Cornell described the arguments of the critics as those of "other founders."[40] In the aftermath of the instrument's drafting, a host of incompatible interpretations arose, which were not resolved or abandoned, but rather became part of American constitutionalism. The instrument is ratified without resolution of conflicting interpretations.

6. *The First Congress*. The First Congress, as Jonathan Gienapp persuasively argues, was characterized by extensive debates over how to interpret the instrument.[41] Madison, in particular, found the interpretive debates fascinating. As he noted echoing himself in Federalist 37, "the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[42] That is, the idea that the instrument was a constitution only begins tentatively as an argument, usually for a particular

[38] Bernard Bailyn, *The* Federalist *Papers*, in BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 100-125 (2003). Bailyn made this point in his lectures on the Constitution in the early 1990s. BERNARD BAILYN, THE DEBATE ON THE CONSTITUTION (1993).

[39] Pauline Maier, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 69 (2010).

[40] SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828 (1999); Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENTARY 383 989 (2014).

[41] See GIENAPP, THE SECOND CREATION, supra note 16. For other writing focusing on the interpretive debates in the First Congress, see Kent Greenfield, *Original Penumbras: Constitutional Interpretation in the First Year of Congress,* 26 CONN. L. Rev. 79-144 (1993); David P. Currie, *The Constitution in Congress: The First Congress, 1789-1791*, University of Chicago Law Occasional Paper, No. 32 (1994). Contemporary interest in executive power gave rise over the last decade in extensive interest in the 1789 Congress by scholars such as Saikrishna Prakash.

[42] BILDER, MADISON'S HAND, supra note 2, at 174; see id., 172-74 on First Congress debates.

political end, in Congress. Gienapp notes that the "fixed Constitution was, thus, not discovered but invented, as a certain form of constitutional imagination acquired coherence and power."[43]

7. *The Supreme Court*. The instrument did not clarify the nature of judicial interpretation; indeed, it only said "one Supreme Court."[44] The original Court and judiciary was under-theorized.[45] The Court came into existence with six Justices and no practice of written opinions.[46] As Maeva Marcus described, the early Court did not interpret the instrument's words as strictly binding; rather, it was interpreted as part of a system of government.[47] They had "remarkably similar views of the purposes" but differences over times on "specific points of constitutional interpretation."[48] And, the logical inconsistency of Supreme Court judicial review and departmentalism remained for the future.[49] Even in 1803, when Chief Justice John Marshall

[43] GIENAPP, THE SECOND CREATION, supra note 16, 324.

[44] Article III.

[45] Maeva Marcus and Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, ed. Maeva Marcus 13-39 (1992). For recent work on various influences on Article III's interpretation, see James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis*, 66 Duke L.J. 1493 (2017); Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 Buff. L. Rev. 477 (2015); James E. Pfander and Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613 (2011).

[46] Mary Sarah Bilder, "Speaking In Writing": Why Did American Judges Publish Written Opinions?" (unpublished job talk, 1993-1994) (on file with author); Charles C. Turner, Lori Beth Way, Nancy Maveety, *Beginning to Write Separately: The Origins and Development of Concurring Judicial Opinions,* 35 J. SUP. CT. HIST. 93-109 (2010); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291-1391 (1985).

[47] Maeva Marcus, *The Effect (or Non-Effect) of Founders on the Supreme Court Bench*, 80 Geo. Wash. L. Rev. 1794 (2012); Maeva Marcus, *The Constitution's Court*, 69 WILLIAM AND MARY Q. 373 (2012).

[48] Marcus, *The Effect*, supra note 47, 1795.

[49] On judicial review and departmentalism, see William M. Treanor, *Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005); William Michael Treanor, *Original Understanding and the Whether, Why, and How of Judicial Review*, 116 YALE L.J. (The Pocket Part) 218-222 (2007), and the scholarship of Keith Whittington.

five times insisted on the importance of the *written* constitution, he nonetheless seems to distinguish between the instrument and the constitution.[50]

8. *Placement of Amendments*. The decision to add amendments rather than to interweave them left the 1787 instrument intact. Madison assumed the amendments would revise the instrument; Sherman suggested tacking them on the end (which is what happened). With that decision, "the original Constitution and the Convention that wrote it remained significant."[51] Gienapp points out that "by supplementing rights provisions, observers were encouraged to see the entire Constitution more as a set of textual guarantees than as an elaborate interlocking, holistic system."[52] As the history of the Magna Carta indicates, a repeatedly revised instrument could have nonetheless produced a cultural fixation with the concept of and concepts in the document, but perhaps a less stringent focus on particular words.[53]

9. *Effect of Amendments*. And yet, the point of amendments has always been to alter the entire system of government. The amendment process may be analogous to republication in trusts and estates law. A codicil updates the entire instrument by "republication" to the date of the codicil. Indeed, a strong argument for adding the twelve amendments was to help persuade North Carolina and Rhode Island to ratify and come into the union. Every state that has entered the Union accepts the supremacy of an instrument that meant something different in that year of

[50] Marbury v. Madison, 5 U.S. 137, 138 (1803) ("Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?"); see MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 195 (2004) (counting references).

[51] BILDER, MADISON'S HAND, supra note 2, at 175.

[52] GIENAPP, THE SECOND CREATION, supra note 16, at 196. Gienapp devotes a chapter to the debate, see id., at 164-201.

[53] See generally Charles Donahue, *The Whole of the Constitutional History of England is a Commentary on this Charter*, 94 N.C. L. REV. 1521, 1540–43 (2016); R. H. Helmholz, The *Myth of the Magna Carta Revisited*, 94 N.C. L. REV. 1475, 1492–93 (2016).

admission because of the ways that amendments and court and cultural interpretations have republished the document. In 1959, when Hawaii entered, the understanding of the Constitution was different than when Vermont had 1791.[54] And the "Constitution" which they pledged supremacy reflected an evolving history of constitutional interpretive practices.

10. *The Preamble*. *We the people*: I believe that the Preamble creates a consent theory on which the instrument and the constitution as a system of government are founded.[55] "We the People of the United States" is not we the people who signed in 1787—nor we the people who ratified it in 1789. In old charters, the first words provided the authority of the king. In the words of the 1662 Connecticut charter: CHARLES the Second, by the Grace of GOD, KING of England, Scotland, France, and Ireland, Defender of the Faith, &c. To all to whom these Presents shall come, Greeting. *Ordain and establish* was followed by a a long series of words in colonial charters that embraced laws, statutes, ordinances, and other aspects of the system of government.

We know that the constitution distributed power in ways to disenfranchise, enslave, and deny rights and privileges to people who were not white men—to African Americans, to people of color, to women. And, that the practices of the United States government, recognized members of tribal nations as part of the *people* only at a point when that recognition brought with it no rights and power. And that the last centuries have been characterized by the appropriation

[54] During questions following a keynote speech by the late Justice Antonin Scalia, entitled, "The Methodology of Originalism" at George Washington University Law School in 2012, moderated by John Manning, I asked about this interpretive dilemma. I referred to it as the problem of a moving wall of ratification. My memory is that Justice Scalia responded that he believed the states came into the union knowing that they were agreeing to Constitution that was interpreted as it had been interpreted in 1787-1789. Jamie L. Freedman, "A Supreme Visit," GW Law School (Winter 2012), 48-49 https://www2.gwu.edu/~magazine/archive/2012_law_winter/feature2.html

[55] See Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter*, supra note 18. For other interpretive theories focusing on the preamble, see Liav Orgad, *The preamble in constitutional interpretation,* 8 I-CON 714 (2010); John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. Cal. L. Rev. 1021 (2018).

of the Constitution by white men under the claim that a white male democracy was somehow the *people's* democracy.

And yet, at the same time, the last centuries have also been the story of *the people* insisting that the system of government embodied in the Constitution be made more perfect *for the people.* In the instrument, *We the People of the United States*—undefined by time, by race, by gender, by citizenship—are the authority. And what do the "we" do—they "ordain and establish this Constitution." In every generation, the people who, on reading the instrument, become once again the "we" – who ordain and establish this constitution for ourselves and our posterity. The Constitution as an instrument and system of government tilts in favor of the purposes of the preamble and its mandate to interpret for *ourselves and our posterity*.

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In my gradual shift towards recognition of the emerging genre of the written constitution, Kent Newmyer has been a constant influence. I can't recall when I didn't know Kent–so I suspect that I came to know him through my dear friend Kitty Preyer. But who introduced whom is lost is the mists of time. We both had the pleasure of collaborating, with Maeva Marcus, on the collection of Kitty's essays, *Blackstone in America*, published after her death.[56]

When I met Kent, I was in awe of him because of his magnificent book, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*.[1] In telling the story of Story, Kent had not shied away Story's complexities—most importantly, Story's tragic inability to think about cases like *Prigg v. Pennsylvania* (1842) in a way that saw African Americans as full and equal citizens.

[56] KATHRYN PREYER, MARY SARAH BILDER, MAEVA MARCUS, AND R. KENT NEWMYER, BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER (2009).

[1] R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

Kent showed how Story imagined his role as a statesman in a vision of the United States—the Old Republic—that was vanishing even as Story sought to fix it through constitutional interpretation. The title's juxtaposition of *Supreme Court Justice* with *Statesman* underscored Kent's point: constitutional law was irrevocably embedded in, not insulated from, American politics.

Later, Kent would write an intellectual biography of Chief Justice John Marshall and finally my personal favorite, his account of the Burr treason trial.[2] He has been the consummate practitioner of the belief that the historian's goal is to understand how people—the biographical subjects—constructed their world and why that construction made sense to them; how they justified the inevitable contradictions; and, sadly, how they persuaded themselves to look away and ignore certain questions or injustices present around them. Without fail, Kent wrote in a confident yet humble voice. Sentences were precise and clear. Paragraphs and sections carefully constructed. Difficulties of analysis were explicitly confronted and then explained.

As a kind and generous reader, Kent has a unique capacity for helping an author understand what they are hope to communicate. In late 2013, I was struggling with the manuscript for *Madison's Hand*.[3] In October, I emailed Kent a copy of, what I then called, "this awful manuscript."[4] A month later, he mailed back comments, suggesting structurally moving the detailed material about manuscripts to appendices—thereby saving the reader wading through a discussion of folios and watermarks. And, importantly, Kent helped me clearly articulate the point of the book. After reading his comments, I wrote a new paragraph reflecting

[2] R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001); R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION (2012).

[3] BILDER, MADISON'S HAND, supra note 2.

[4] Email to R. Kent Newmyer from author, Oct. 13, 2013.

what he told me I was saying. There, in 2013, in that exchange with Kent, was the point of my book:– "Madison … could not ever clearly see the Constitution as a coherent textual document. His Notes, in the form they existed in the summer of 1787, revealed this indeterminacy. They reflect the ways in which the politics and process of drafting the document postponed comprehension. Madison's Notes were one man's view of the writing of a constitution—one in which we only can glimpse aspects of our understanding of the Constitution."[5] And Kent responded to a revised introduction: "You have found your groove for sure! Keep on rollin'." But I found my groove only because Kent helped light the way.[6] Having lived so long with Marshall, Jefferson, Burr, and Story as they struggled to understand this emerging genre of a written constitution, Kent recognized that Madison could not see the Constitution as a coherent textual document.

Ever the consummate historian, Kent appreciated the perilous connection between scholarly accounts of the founding era and contemporary constitutional interpretative claims. He titled his Marshall biography: *the Heroic Age*.[7] There was an obvious duality in the title. On the one hand, maybe he meant that the Age of Marshall was the Age of Heroes—a time in the past when justices were truly great, and, admittedly, there is a tad of that poignancy in the book. But the Heroic Age was also the recognition of the creation of myth, for the Heroic Age was the name that Hesiod gave to the period in which the great heroes of Homer lived –from the Argonauts to the Trojan war. And in this sense, Kent was cautioning us about the temptation to

[5] Email to R. Kent Newmyer from author, Nov. 12, 2013.

[6] Email from R. Kent Newmyer to author, Nov. 18, 2013.

[7] NEWMYER, JOHN MARSHALL, supra note 2.

tell the story of the Framing generation as a Heroic Age, where we replaced unsettled answers with misleading clarity, and we turned ordinary men into demi-gods.

In these words, Kent praised our mutual dear friend Kitty Preyer: "what she willingly lets stand as the truth of history –[is] that for twenty years the matter was unresolved and open for debate. Only time, experience, and a changed political environment settled the issue."[8] Kent's insight has always been this truth of history—certainly the Heroic Age of the framing—that matters were unsettled, unresolved, and open for debate. Nowhere is this insight as relevant as in coming to understand the unresolved and open-for-debate genre of the Constitution itself.

[8] BLACKSTONE IN AMERICA, supra note 56, at 117.