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FIXING AMERICA'S FOUNDING

Maeve Glass*

THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA. By *Jonathan Gienapp*. Cambridge: Belknap Press. 2018. Pp. 464. \$35.

INTRODUCTION

The forty-fifth presidency of the United States has sent lawyers reaching once more for the Founders' dictionaries and legal treatises.¹ In courtrooms, law schools, and media outlets across the country, the original meanings of the words etched into the U.S. Constitution in 1787 have become the staging ground for debates ranging from the power of a president to trademark his name in China² to the rights of a legal permanent resident facing deportation.³ And yet, in this age when big data promises to solve potential chal-

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1. See, e.g., *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 194 (D.D.C. 2019) (finding that “[t]he President’s definition [of emolument] . . . disregards the ordinary meaning of the term as set forth in the vast majority of Founding-era dictionaries”); Memorandum of Law in Support of Plaintiffs’ Opposition to Motion to Dismiss at 31–32, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-01596-PJM) (same); Memorandum of Law in Support of Defendant’s Motion to Dismiss at 28–32, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-RA) (citing Founding-era dictionaries to interpret the Emoluments Clauses); Brief of Amicus Curiae by Certain Legal Historians on Behalf of Plaintiffs at 3–5, *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d 174 (No. 1:17-cv-00458-RA) (same); see also Fred Barbash, *Trump’s ‘Emoluments’ Battle: How a Scholar’s Search of 200 Years of Dictionaries Helped Win a Historic Ruling*, WASH. POST (July 27, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/07/27/trumps-emoluments-battle-how-a-scholars-journey-through-200-years-of-dictionaries-helped-win-a-historic-ruling/> [<https://perma.cc/CE2F-LDBZ>] (same). For examples of the Court’s prior use of Founding-era dictionaries to interpret the Constitution, see, for example, *NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (citing Founding-era dictionary definitions to interpret the Recess Appointments Clause), and *District of Columbia v. Heller*, 554 U.S. 570, 581–86 (2008) (citing Founding-era dictionaries and Blackstone’s *Commentaries* to interpret the Second Amendment). For examples of recent scholarship examining the scope of presidential power with the aid of eighteenth-century linguistic usage and social practice, see Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019), and Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1263–69 (2019).

2. See Plaintiff’s Amended Complaint at 23–28, *District of Columbia*, 291 F. Supp. 3d 725 (No. 8:17-cv-1596-PJM), ECF No. 90; Second Amended Complaint at 26–27, *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d 174 (No. 1:17-cv-00458-RA), ECF No. 28.

3. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224–25 (2018) (Gorsuch, J., concurring) (citing Lord Coke’s 1797 treatise and Justice Joseph Story’s 1833 *Commentaries on the*

lenges of interpretation⁴ and judges have for the most part agreed that original meaning should at least count for something,⁵ a historian named Jonathan Gienapp⁶ in the Stanford University History Department has returned from the archives with a paradigm-shifting proposition. Not only were the intentions of the drafters of the Constitution diverse, as scholars have long recognized.⁷ Not only were the meanings of their chosen words uncertain, as others have since emphasized.⁸ Instead, the very thing that we might think of as the U.S. Constitution simply did not yet exist in that storied moment when ink met parchment and we the people said aye.

In what may be the first attempt by a historian to pair H.L.A. Hart's concept of law with a philosophical theory of language to examine the formation of the U.S. Constitution,⁹ Gienapp invites readers to set aside familiar notions of a Constitution whose identity as a closed, textual object was settled through the solemn act of ratification. Instead, as he argues in his award-winning monograph *The Second Creation: Fixing the American Constitution in the Founding Era*, the requisite consensus as to what type of object the Constitution was and how it ought to be interpreted emerged only over the course of the 1790s. This crucial second phase of creation unfolded not in the courts or in the streets, but in the halls of Congress. It is there, Gienapp tells us, that a radically indeterminate object transformed in the minds of America's politicians into the fixed written Constitution that pulses

Constitution as part of the historical evidence to determine whether the Due Process Clause of the Fifth Amendment applies to legal permanent residents); see also Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 381 (2017) (citing the "Constitution's historical background and text and early American practice" as evidence that the "founding generation understood the Due Process Clause to apply to U.S. law enforcement against anyone, anywhere").

4. See, e.g., James C. Phillips et al., *Corpus Linguistics and "Officers of the United States"*, 42 HARV. J.L. & PUB. POL'Y 871 (2019) (using 150 million words from 120,000 texts to test the meaning of "officers"); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).

5. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1754 (2015) ("[N]early all of those who characterize themselves as nonoriginalists . . . acknowledge the importance . . . of evidence bearing on the original meaning . . ."); Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1697 (2012) (identifying original understanding as a rhetorical exercise in our constitutional tradition); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) ("Virtually everyone agrees that the . . . intentions of the Framers count for something.").

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7. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (emphasizing the challenges of pursuing subjective intentions of Founders).

8. MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997).

9. See *infra* Part II.

through the courts today: a transformation propelled by a series of political debates and the very human need to ask for and give reasons.

Since this provocative thesis appeared last fall, it has generated a good deal of attention within the legal academy,¹⁰ much of it focused on parsing the book's implications for originalism.¹¹ But as this Review argues, the book's significance extends well beyond the narrow question of whether its claims are sturdy enough to revise dominant modes of constitutional interpretation. Instead, situating the book's profound contributions in historiographical context reveals that *The Second Creation* represents an equally significant methodological departure from prior scholarship, one that in turn invites a broader conversation about the modes and stakes of writing American constitutional history today.

Although one might be hard-pressed to tell from the reception that the book has generated thus far, *The Second Creation* marks a subtle but deliberate shift away from historiographical currents. Since at least the 1960s, a dominant trend in the field of early American history has been the expansion of the archive for the study of the formation of the republic, as social and cultural historians have pushed beyond the temporal and spatial boundaries that once confined the archive of America's founding to the summer of

10. See Stephen B. Presser, *The Tenacity of Transformation Theory, and Why Constitutional History Deserves Better*, 20 FEDERALIST SOC'Y REV. 42 (2019); Alexander V. Marriott, *Marriott on Gienapp, "The Second Creation: Fixing the American Constitution in the Founding Era,"* H-FEDHIST (Apr. 2019), <https://networks.h-net.org/node/5299/reviews/4071957/marriott-gienapp-second-creation-fixing-american-constitution> [<https://perma.cc/3HJZ-M2RX>]; Mike Rappaport, *Parchment Barriers and the Determinateness of Constitutional Text*, LAW & LIBERTY (Jan. 24, 2019), <https://www.lawliberty.org/2019/01/24/parchment-barriers-and-the-determinateness-of-constitutional-text/> [<https://perma.cc/FG3Y-NGQF>]; Ilan Wurman, *Originalism's New Critics, Part I: Fixing Fixity*, CRB (Jan. 16, 2019), <https://www.claremont.org/crb/basicpage/originalisms-new-critics-part-1-fixing-fixity/> [<https://perma.cc/HN5N-VFZS>]; stanfordlawschool, *The 2019 Publius Symposium: A Conversation About Jonathan Gienapp's The Second Creation*, YOUTUBE (May 7, 2019), <https://www.youtube.com/watch?v=98sZaxHddqE> [hereinafter *Publius Symposium*] (featuring commentary on the book by Bernadette Meyler, Saikrishna Prakash, Jack Rakove, and Amalia D. Kessler); *Balkinization Symposium on Jonathan Gienapp, The Second Creation—Collected Posts*, BALKINIZATION (Nov. 1, 2018), <https://balkin.blogspot.com/2018/11/balkinization-symposium-on-jonathan.html> [<https://perma.cc/572D-3JBB>] (containing posts from more than eight different law professors reacting to and discussing Gienapp's book).

11. See John Balkin, *The Second Creation and Originalist Theory*, BALKINIZATION (Oct. 15, 2018), <https://balkin.blogspot.com/2018/10/the-second-creation-and-originalist.html> [<https://perma.cc/Q646-F79N>] (investigating the potential implications for various forms of originalism); William Baude, *Were the Framers Originalists (and Does It Matter)?*, BALKINIZATION (Oct. 24, 2018), <https://balkin.blogspot.com/2018/10/were-framers-originalists-and-does-it.html> [<https://perma.cc/RA27-K366>] (“If the Constitution was not truly created as law until years after its official ratification, then we have the kind of newly discovered mismatch between official story and revealed truth that should provoke a constitutional crisis.”); Bernadette Meyler, *The Second Creation and Its Implications*, BALKINIZATION (Oct. 17, 2018), <https://balkin.blogspot.com/2018/10/the-second-creation-and-its-implications.html> [<https://perma.cc/5YUK-7XFW>] (suggesting that the book could be “reincorporated into a defense of originalism rather than serving as a critique of it”).

1787 in Philadelphia. Beginning in the early twenty-first century, historians of the Constitution built upon this expanded archive to situate the project of constitution-making within a transatlantic context, producing articles and monographs that collectively illuminated the centrality of imperial structures of governance and race-based slavery. In doing so, this scholarship invited us to see 1787 not as the grand finale of an exercise in political theory, but as part of a longer historical continuum featuring a Constitution whose roots stretched into the colonial past and whose twisting, arching branches extended far into a future defined by the aspirational search for an America of coequal rights.¹²

With an appreciative nod to this body of literature (pp. 12–13), *The Second Creation* charts a different course. Explicitly bracketing the broader archive of empire and slavery that has guided much of the recent literature (p. 13), *The Second Creation* instead focuses on the microdynamics of congressional debate within the first decade of the Constitution's existence. Enlisting the help of philosopher Robert Brandom's theory of the production of authoritative standards (pp. 9, 343 n.13), Gienapp peers through a high-resolution microscope to examine in exquisite detail the movement of constitutional arguments as they ricocheted around the halls of Congress. Working from this vantage point, Gienapp unearths a previously overlooked trajectory of constitutional development. Whereas recent scholarship has emphasized lines of continuity, Gienapp instead finds evidence of a rapid transformation in constitutional understandings, as the intensity of political debate in Congress closed off possible avenues of constitutional meaning and reified a particular conception of the Constitution as a textual, archival artifact frozen in time and space (p. 11).

Placing *The Second Creation* in historiographical context thus raises a basic, and as yet unresolved, set of methodological questions: Where in the vast debris of the past should historians look for the story of the making of America's Constitution—and what are the prospects for reconciling the multiple creation narratives that now define the field? As this survey suggests, depending on how one defines the relevant units of constitutional time and space, the story of America's creation may look very different. Focus on the political debates in Congress that serve as the primary object of study in *The Second Creation*, for example, and one may well find evidence of a rapid transformation in constitutional understandings among America's politicians. Shift the frame outward to examine the daily practice of law in eighteenth-century America, and one may instead find evidence of constitutional continuities, in a land where entrenched material realities, enduring ideologies, and preexisting legal institutions limited the scope of possibilities as to what the Constitution could become in 1787,¹³ while allowing the laws and atrocities of slavery to flourish for generations to come.

12. See *infra* Part II.

13. See, e.g., 4 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735–1776*, at 1–2, 155 (2018)

By illuminating the acts of archival construction that underpin these constitutional narratives, this Review offers a conceptual framework for synthesizing the seemingly disparate founding stories that now populate the field of American constitutional history. In particular, this historiographical survey invites us to conceptualize constitutional time not as a single linear sequence of events, but as a composite of multiple, coexisting time horizons, each with its own rate of change.¹⁴ As a return to the sources that constitute the archive of *The Second Creation* suggests, even in moments of uncertainty among the Constitution's first interpreters in Congress, it is possible to discern evidentiary traces of an older, more stable world, defined by shared understandings of modes of constitutional interpretation and rules of partnership. From this composite perspective, it may well be that the relatively rapid transformation in constitutional imaginations that *The Second Creation* uncovers between 1787 and 1796 coexisted alongside the glacially slow-moving and brutally stable set of customary rules of governance that others have excavated in an American age of conquest and enslavement.

In the end, then, *The Second Creation* provides not only a novel approach to the study of constitution-making. It also invites us to grapple with the question of whose stories are cut, whose voices are added, and how the picture of the Constitution changes when one adjusts the frame. Perhaps most consequentially, reading *The Second Creation* against the broad sweep of scholarship that preceded it allows us to broaden the terms of the now-familiar debate as to when and to what degree the Constitution became fixed in meaning for purposes of constitutional interpretation. This contextual reading suggests the value of acknowledging the multiplicity of America's constitutional past(s), while taking seriously the normative stakes of what it means to be bound to a historical moment defined not simply by debates about the rules of constitutional interpretation, but also by widespread agreement that the Constitution, however unsettled its ontological nature may have been, sanctioned the laws and daily atrocities of slavery in these united states.

To see these stakes, this Review begins with a brief overview of the field of American constitutional history as it has developed in recent decades, identifying a determined effort to expand the archive of sources beyond the temporal and spatial boundaries of Philadelphia in 1787. The Review then

(summarizing the book's argument that "the structure and practices of preexisting institutions facilitated certain developments and deterred others" and arguing that "[t]hroughout the Revolutionary era and the decades thereafter . . . customary ideas persisted that all law must be consistent with higher law and natural equity"); see also Presser, *supra* note 10, at 43 (observing that had Gienapp looked to the federal courts of the 1790s, he would have found a consistent pattern of interpretation from beginning to end); Wurman, *supra* note 10 (arguing that Gienapp misreads the debates to find ontological questions that were fundamentally about the meaning, not the nature, of the Constitution and adds, "Don't take my word for it—take Madison's"); *Publius Symposium*, *supra* note 10, at 21:13–:25 (featuring Saikrishna Prakash stating, "Mark me as an admiring dissenter," and offering a similar critique).

14. Cf. FERNAND BRAUDEL, ON HISTORY 3–4 (Sarah Matthews trans., 1980) (describing different sequences of historical time).

turns to the making of *The Second Creation*, tracing the book's analytical moves to reveal the novelty of its approach as well as its findings. From there, the Review concludes by returning to the sources and suggesting an analytical framework that can accommodate these different archives of America's Constitution, while opening the door to future paths of inquiry.

I. THE FOUNDING IN AMERICAN CONSTITUTIONAL HISTORY

The story of the contemporary writing of American constitutional history might well begin at Harvard in the early 1960s, when a young graduate student named Gordon S. Wood completed a dissertation that would prove to be of enormous influence.¹⁵ At the time, scholarship on the origins of the Constitution had come to something of a standstill; indeed, the American Historical Association felt no need to list something called “constitutional history” as a field in its annual report.¹⁶ With the publication of *The Creation of the American Republic, 1776–1789*, however, Wood offered readers what many later described as an intellectual awakening¹⁷: the discovery of a new set of documents that suggested the Constitution was not simply the result of political bargains for venal pursuits, but the grand finale of an American Enlightenment, one that had transformed an old model of politics based on the classical idea of virtue and pursuit of the common good into a modern science that embraced social conflict as inevitable.

As with the writing of all history, this account of the creation of America's Constitution rested on an archive of sources that the author constructed based on assumptions about the relevant borders of time and space. “Like

15. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (2d ed. 1998); see, e.g., John Howe, *Gordon S. Wood and the Analysis of Political Culture in the American Revolutionary Era*, 44 WM. & MARY Q. 569, 569 (1987) (“Seldom has a book exerted such powerful and lasting influence on the interpretation of early American history as Gordon S. Wood's *The Creation of the American Republic*.”); Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341, 344 (1989) (“To many readers, Wood's *Creation of the American Republic* seemed to offer the last word on the transformation of political discourse in the Revolutionary era. . . . As a result, historians lost interest in the specific course of events that climaxed in the drafting and ratification of the Constitution.”); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 15 (1992) (attributing the “conceptual transformation” to three books, including *The Creation of the American Republic*).

16. AM. HISTORICAL ASS'N, ANNUAL REPORT 76 (1964) (announcing the defense of Wood's dissertation without reference to a field of constitutional history).

17. See, e.g., Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 971 (2015) (recalling the excitement of working on the history of the American Revolution during the “intellectually vibrant era” in which Bernard Bailyn's *Ideological Origins of the American Revolution* and Gordon Wood's *The Creation of the American Republic, 1776–1787* were published, and recalling, “the works were equally exciting for the way in which they conveyed and depicted the nature of historical change itself”); John Fea, *The Author's Corner with Jonathan Gienapp*, WAY IMPROVEMENT LEADS HOME (Oct. 4, 2018), <https://thewayofimprovement.com/2018/10/04/the-authors-corner-with-jonathan-gienapp/> [<https://perma.cc/F9NK-LRYN>] (quoting Gienapp's account of why he became a historian after reading Wood's *The Creation of the American Republic*).

most other graduate students in the country in the early 1960s," Wood later explained of the temporal units of analysis, "I was trained to think of early American history as the period from the initial settlements in the seventeenth century to the establishment of the Constitution in 1787–1788."¹⁸ Working from this premise, Wood cabined his study of the creation to the eleven-year period leading up to the drafting of the document—although he emphasized that the patterns of change he saw reached deep into the colonial period and continued long afterward.¹⁹ Within this time period, Wood focused his gaze on the bordered space of elite political discourse, reading widely in the "newspapers, pamphlets, and sermons of the Revolutionary era" to discern the complex "creation of American political and constitutional culture."²⁰

Compiled at a time when thousands of documents from the ensuing ratification debates had yet to be published,²¹ this archive for the study of America's Constitution soon began to expand far beyond *The Creation's* temporal and spatial borders.²² As one early reviewer put it in 1969, Wood's focus on elite white men was "an excellent example of a species which has a distinguished ancestry, but which may be nearing at once a culmination and a dead end."²³ Beginning in the late 1960s, a new generation of social historians set out to recover the voices of those who had inhabited the towns, vil-

18. GORDON S. WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 3 (2011).

19. WOOD, *supra* note 15, at xvi–xvii ("Of course this transformation of political thought had its origins deep in the colonial past; and the formation of the federal Constitution hardly marked the end of the advancement of American political ideas."). Note, too, that unlike the resulting book, the dissertation's title did not use years to demarcate the time period, referring only to the "Revolutionary era." See Gordon S. Wood, *The Creation of an American Polity in the Revolutionary Era* (June 1964) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Archives).

20. WOOD, *supra* note 15, at v.

21. For a brief history of the gradual publication of the thousands of documents related to the ratification debates, see Pauline Maier, Book Review, 68 WM. & MARY Q. 155, 156 (2011) (reviewing 19–23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 2003–2009)). I thank David Waldstreicher for sharing his perspective that this gradual publication of the DHRC, and compilation of sources derived therein, played a direct role in the post-1960s expansion of the archive upon which to write the history of the Constitution.

22. See Gary B. Nash, *Also There at the Creation: Going Beyond Gordon S. Wood*, 44 WM. & MARY Q. 602, 606 (1987) (reviewing the expansion of the archive during the 1970s and 1980s); see also Jack P. Greene, *The Social Origins of the American Revolution: An Evaluation and an Interpretation*, 88 POL. SCI. Q. 1, 5 (1973) (noting that "there has been a wide assortment of specialized studies of various aspects of American social life between 1725 and 1775"). Note that Wood himself was among the first to call for a "new look at the social sources of the Revolution." See Gordon S. Wood, *Rhetoric and Reality in the American Revolution*, 23 WM. & MARY Q. 3, 24 (1966).

23. Jackson Turner Main, Book Review, 26 WM. & MARY Q. 604, 606 (1969).

lages, and backwoods of America.²⁴ Intellectual historians, meanwhile, soon followed suit, seeking to recover the world of ideas beyond the rarified halls of Philadelphia in 1787. Finding inspiration in poststructural literary theories, these scholars sought to deconstruct the reliance on famous texts and attend to discourse out of doors.²⁵ As these alternative voices of “we the people” came into hearing range in the early 1980s, so too did debates emerge as to what, precisely, constituted the content of the particular ideological commitments of those who assembled in Philadelphia.²⁶ By 1987, following a “cultural turn” that brought new prominence to anthropological interpretations of historical cultures, an article in one of the field’s most prominent journals could proclaim, *Also There at the Creation: Going Beyond Gordon S. Wood*, and present a detailed list of the various groups that had been squeezed out from the conventional story.²⁷

As the archive’s spatial borders expanded beyond Philadelphia, the chronology of the Constitution itself began to change. Instead of seeing 1787 as the end of a creative process, those who had been there to witness and participate in the civil rights movement framed 1787 as the beginning of a long period of struggle and contestation. “We will see that the true miracle was not the birth of the Constitution, but its life,” declared Justice Thurgood Marshall in 1987, “a life nurtured through two turbulent centuries of our own making.”²⁸ Emphasizing the patriarchy that had provided the emotional

24. On the rise of social history in the United States in general, see Peter N. Stearns, *Social History and History: A Progress Report*, 19 J. SOC. HIST. 319 (1985). For examples, see JEFFREY J. CROW, *THE BLACK EXPERIENCE IN REVOLUTIONARY NORTH CAROLINA* (1977); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980); STAUGHTON LYND, *CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION* (new ed. 2009); MARY BETH NORTON, *LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750–1800* (1980); JAMES W. ST. G. WALKER, *THE BLACK LOYALISTS: THE SEARCH FOR A PROMISED LAND IN NOVA SCOTIA AND SIERRA LEONE 1783–1870* (1976); *SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION* (Ira Berlin & Ronald Hoffman eds., 1983); Peter H. Wood, “*Taking Care of Business*” in *Revolutionary South Carolina: Republicanism and the Slave Society*, in *THE SOUTHERN EXPERIENCE IN THE AMERICAN REVOLUTION* 268 (Jeffrey J. Crow & Larry E. Tise eds., 1978); and Peter H. Wood, “*Impatient of Oppression*”: *Black Freedom Struggles on the Eve of White Independence*, *SOUTHERN EXPOSURE*, Nov./Dec. 1984, at 10.

25. Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 LAW & HIST. REV. 1, 1, 23 n.61 (1994) (citing Wood for the proposition that “historical scholarship . . . has assumed that America was a single ideological community” and calling for analysis of non-canonical texts); see also Rodgers, *supra* note 15, at 21 (“By the early 1970s . . . intellectual historians were grasping for harder stuff, for conceptualizations that would invest ideas with social power so unmistakable that even the behavioralists in the profession would have to pay attention . . .”).

26. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 163–64 (1992).

27. Nash, *supra* note 22, at 606.

28. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), in *EBONY*, Sept. 1987, at 62, 68.

energy behind the original republican impulse of the Founding, Hendrik Hartog and others seized upon the bicentennial to offer a new framework that redefined the Constitution from a study of political institutions to a system of cultural meanings,²⁹ casting the Constitution as the product of a long, continuous wrestling for justice from darkness toward the dawn.³⁰

By the time a new crop of historians stepped up to bat in the early 2000s to attempt a synthesis of the origins of the Constitution that could compete with *The Creation's* still-prominent hold over the field, the archive of America looked radically different than it had when Wood defended his dissertation. In addition to the robust volume of scholarship produced in the preceding thirty years, historians of the twenty-first century now had at their disposal over twenty volumes of documents from the ratification debates.³¹ Working from this archive, these historians found new and surprising evidentiary patterns upon which to chronicle the creation of the Constitution. Some located the formation of the rules of constitutional union within a broader political economy of slavery. Challenging the longstanding view that the rules of human bondage were peripheral to the Constitution, these histories made it possible to see how ensuing debates over the meanings of liberty, equality, and justice extended long into the nineteenth century.³²

Others productively relocated the Constitution in the context of an Atlantic world of empire, commerce, and nation building that stretched both east across the ocean and west across a continent of indigenous nations.³³ By

29. Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987); Ely Aaronson & Arianne Renan Barzilay, *Rights-Consciousness as an Object of Historical Inquiry: Revisiting the Constitution of Aspiration*, 44 LAW & SOC. INQUIRY 505 (2019) (identifying a shift in periodization as one of the impacts of the Hartogian framework); Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75 (1987); see also Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

30. Vincent Gordon Harding, *Wrestling Toward the Dawn: The Afro-American Freedom Movement and the Changing Constitution*, 74 J. AM. HIST. 718, 719 (1987).

31. See Maier, *supra* note 21, at 156.

32. GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010); DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009); see also Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188 (Richard Beeman et al. eds., 1987); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

33. For a historiographical overview, see Max M. Edling, *Viewpoint, Peace Pact and Nation: An International Interpretation of the Constitution of the United States*, PAST & PRESENT, Aug. 2018, at 267. See also MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 10 (2005); LEONARD J.

expanding the frame, this work recast the storied moment of 1787 as a moment when constitution makers turned to existing governance structures of empire and ideologies of conquest to solve challenges of territorial expansion. Still others, meanwhile, have worked within a familiar landscape of struggling farmers and merchant elites to bring new vigor to Progressive Era debates as to whether the Constitution is best seen as an effort to rein in the power of the people or to protect a flourishing democracy of the middle class.³⁴

While many of these scholars who have pushed outward in time and space from Philadelphia have found ample reason to question the idea of 1787 as the grand finale to a creative process that marked the end of the American Enlightenment, others who have drilled down into the written records of the drafting and ratification process have also found reason to question the idea of 1787 as a moment when meanings were settled. Expanding the definition of what counted as “constitutional political practice” in the early republic, historians of constitutional discourse who followed the textual trail out beyond the halls of Philadelphia found considerable disagreement and evolving understandings of what the Constitution meant.³⁵ As Mary Sarah Bilder argued recently in her prize-winning history of Madison’s notes, “from the moment the Constitution became visible, it was contested. . . . The understandings of the Constitution shifted over the summer of 1787 and continued to transform through” the following decade.³⁶

Reflecting on the scholarship that had made this type of rethinking of constitutional time possible, Wood could survey the terrain and observe that he no longer thought about the temporal boundaries of America’s beginnings in quite the same way.³⁷ And yet, in one of the many ironies of the

SADOSKY, *REVOLUTIONARY NEGOTIATIONS: INDIANS, EMPIRES, AND DIPLOMATS IN THE FOUNDING OF AMERICA* (2009); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019); Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239 (2018); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015).

34. TERRY BOUTON, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* (2007); WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016); cf. GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017).

35. See, e.g., SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). I am grateful to David Waldstreicher for this point and turn of phrase.

36. BILDER, *supra* note 8, at 240.

37. WOOD, *supra* note 18, at 11 (“It certainly had a powerful effect on my understanding of early America,” he later observed, “and I began to think of the Revolution in new ways—not as a political event that could be confined to the period between 1763 and 1787 but one with

writing of American constitutional history, the most recent book to emerge from a history department and capture the attention of members of the legal academy begins by quite deliberately bracketing this scholarship.³⁸ Instead, with a direct footnote to *The Creation* (p. 344 n.17), *The Second Creation* seeks to pick up the conversation where Wood left it fifty years ago, but this time, using a set of new tools to make sense of the creation of the U.S. Constitution.

II. BUILDING THE CASE FOR A SECOND CREATION

The Second Creation begins with an act of imagination. Imagine the founding as a game, Gienapp advises his readers in the introduction (p. 8). This is a game, we learn, that takes place not in the halls of Philadelphia in 1787, nor in the ratification debates that followed in 1788, much less in the long struggles that erupted in the streets and courts of America for centuries to come. Instead, we are invited to conceptualize the making of the Constitution as an imaginary game that takes place on an imaginary ball court. The newly ratified Constitution, we are told, is the ball. The goal, we find out, is to score. And yet, while everyone can agree that the Constitution is a ball, no one who is on the court knows what type of ball they are holding. Nor, moreover, do they have any idea of the relevant surroundings or the rules of the particular game. Instead, it is only through the actual practice of playing, we learn, that a “more definitive sense of the rules, the ball, and the court gradually emerged” (p. 8), hardening into the fixed, written Constitution that we of the present have wrongly assumed was preordained from the beginning.

This opening metaphor of an imaginary ball game provides a helpful illustration of the methodological moves that distinguish *The Second Creation* from the preceding decades of historical scholarship. In a field long known for its aversion to theory, Gienapp enlists two distinct theories of law and language to build his case: first to identify the indeterminate Constitution of 1787–1788 and then to identify the fixed Constitution of the 1790s. In doing so, Gienapp delivers what may well be the strongest case yet for a chronology of uncertainty to fixity—one that, as we shall see, may require a more complex model of constitutional time and space.

great social and cultural significance that ran from at least the middle of the eighteenth century to the early decades of the nineteenth.”).

38. See *supra* Introduction. To be sure, other histories of constitutionalism in early America have prompted robust discussions within the legal academy, including law professor Larry Kramer's *The People Themselves*, which was reviewed in every major law review and prompted a two-day symposium. See, e.g., Daniel W. Hamilton, *A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809, 809 (2006). But as a recent article by Logan Sawyer argues, scholarly exchanges between historians of the Constitution's origins and theorists of constitutional interpretation are few and far between. See Logan Everett Sawyer III, *Method and Dialogue in History and Originalism*, 37 LAW & HIST. REV. 847 (2019) (“There is a sharp separation between the scholarly literature of originalists and that of professional historians.”).

A. *Finding the Uncertain Constitution of 1787–1788*

To build his opening case that the players who stepped onto the imaginary court did not have any clear idea what kind of “ball” (constitution) they were holding, Gienapp begins by dedicating the opening two chapters of *The Second Creation* to what we might profitably think of as the pregame show. This is a show that commences with the signing of the Declaration of Independence in 1776, moves briskly through the drafting of state constitutions, surveys the Articles of Confederation, and then lands squarely in the drafting process and ratification debates. While it took Wood nearly six hundred and fifty pages to cover this period, Gienapp covers the same in just over a hundred. And while Wood was focused on mapping how political elites wrestled with and worked through basic problems of representation and governance, Gienapp’s goal is to tee up the main act of the second creation: a state of affairs defined by deep uncertainty as to what kind of object the Constitution was and how it ought to be interpreted.

Underpinning this central claim of the first part of the book is a familiar but as yet underutilized theory of what it takes to create a functioning legal system. As Gienapp makes clear with an appreciative footnote to the famed British legal philosopher H.L.A. Hart (p. 343 n.13), the best way of thinking about the Constitution is not the familiar act of a sovereign entity willing it into being at the moment of ratification. Rather, the best way to think about the Constitution is as a set of primary obligations that required a set of secondary rules in order to become operative and meaningful. In citing this theory of law,³⁹ Gienapp is perhaps one of the first historians to explicitly apply its framework to the construction of the U.S. Constitution.⁴⁰ And yet, while others have used it to probe the rules that lay at the foundation of legal systems from ancient China to Shakespearean England,⁴¹ Gienapp’s interest in this opening act lies not so much in excavating and observing the content of these rules that may have been in force when the Continental Congress first gathered; rather, his primary interest lies in mapping the changing mental habits and constitutional imaginations of those who set out to interpret the Constitution and bring its terms to life.

39. See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012); see also Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist?)*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 235 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

40. Professor Kent Greenawalt was the first to identify a possible rule of recognition in 1987. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987). Since then, scholars have focused on the study of identifying Hart’s rule of recognition in the contemporary U.S. legal system. See, e.g., *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 39; Stephen V. Carey, Comment, *What Is the Rule of Recognition in the United States?*, 157 U. PA. L. REV. 1161 (2009).

41. See RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* (2014) (surveying seventeenth-century England); Norman P. Ho, *Internationalizing and Historicizing Hart’s Theory of Law*, 10 WASH. U. JURIS. REV. 183 (2018); William C. Starr, *Hart’s Rule of Recognition and the E.E.C.*, 28 N. IR. LEGAL Q. 258 (1977).

This study of the shifting mental imagery of the 1770s and early 1780s begins in earnest with what will strike many readers as a familiar staging: a coast defined by thirteen colonies, whose inhabitants all shared the same constitutional imagination inherited from years of governance under the British Empire. For generations, we learn, Americans had embraced the idea that the best means of limiting the power of a king and a distant parliament lay not in rigid compliance with written words on parchment, but in a diffuse and yet commanding framework comprised of fixed principles, some written, some not, and all subject to change and clarification over time (p. 30). Gienapp offers compelling evidence of this particular conception of constitutional fixity that was conducive to constitutional change, describing a world in which a New York lawyer could insist that the rights of mankind were to be found on sunbeams written across the volume of humanity (p. 51), while a lawyer from Virginia could inform a courtroom that a constitution was but a thing that “describes general outlines only” (p. 52).

From this opening scene, Gienapp shows how the threads that composed this stable constitutional imagination began to loosen amidst the ruptures of independence, raising questions about whether, and if so how, they should be wound back together. The first undoing occurred in 1776, when in the process of trying to restart the state governments, Americans encountered a spectacle never before seen: constitutional authors. For those who had long envisioned the British Constitution as the work of an invisible hand of the ages, this novel spectacle of human authorship had a cascade of effects. Procedures of drafting and ratification replaced familiar appeals to custom as the main source of constitutional legitimacy, while these procedures in turn made constitutions more visible and distinct from the old holistic way of thinking of hybrid sources of law (p. 39).

While the appearance of these state constitutional authors began to tug at the coherency of the old way of thinking, the actual work of putting words on paper in Philadelphia left drafters equally uncertain about the document they were producing. As evidence of this uncertainty, Gienapp points to the divergent paths by which two key provisions in the Constitution found their way into the document. Turning to the Necessary and Proper Clause, Gienapp finds that this open-ended provision allowed participants to “deny[] the deeper ontological assumption that the Constitution’s identity was definitively textual,” at a time when no one could conceive why the specific meanings of words might matter (p. 68). And yet, Gienapp tells us, at precisely the same time that this clause betrayed old ways of thinking about unenumerated power, the Convention rejected James Madison’s old-fashioned belief that Congress should have power to strike down any state law it deemed unjust. Instead, the Convention’s decision to adopt a text-based limit on state power in the form of the Supremacy Clause produced a “new set of mental habits,” in which the text of the document—not principles of justice—would be the deciding criteria of legality (p. 64).

If this “daily wordsmithing” (p. 69) in Philadelphia produced an uneasy coexistence of old and new mental habits, the ratification debates that followed worsened the situation still further. In Gienapp’s account, while eve-

ryone involved in the debates may well have simply reverted back to the old way of thinking about the Constitution, a set of “highly contingent reasons” led the Constitution’s opponents to turn their gaze to the constitutional text—in turn prompting the Constitution’s advocates to respond in kind (p. 83). This obsession with the need for precise language, Gienapp argues, began only when Anti-Federalists suddenly discovered that they could no longer count on structural solutions of representation. Reluctantly, they seized upon the imperfect, unfinished nature of the text that Federalists had only recently celebrated as a defining feature of the Constitution and began transforming it into a profound threat to society (pp. 83, 95–96). Federalists soon took the bait, “doubling down on their commitment to an imperfect, unfinished Constitution and disparaging language in the process” while at the same time “insisting that the Constitution was clear and Anti-Federalists had simply misread it” (p. 103).

Surveying these arguments that flourished during the debates, Gienapp concludes that by the time Americans cast their votes in favor of the Constitution, it was unclear what, precisely, they had ratified. Was this a document to be interpreted as an open-ended, imperfect set of principles, as Federalists had initially argued? Or was it instead, as they offered in their rebuttals, a finished document that rested on the precision of words? (pp. 129–30). It is in this confused state of affairs that Gienapp lowers the curtain on this pregame show, leaving us with a Constitution very different than both the triumphant grand finale that Wood had suggested and the moment of structurally encoded inequalities that others have since excavated. Instead, readers are left at the end of Chapter Two with a profoundly uncertain Constitution, one that a new generation of ball players would slowly, inadvertently begin to transform into the fixed Constitution we know today.

B. *Finding the Fixed Constitution of 1796*

To make the case for how this indeterminate object transformed into the fixed Constitution of 1796, Gienapp enlists the help of philosopher Robert Brandom, a scholar whose theory of the human language has been compared to Copernicus’s discovery of the universe itself.⁴² As Gienapp explains at length elsewhere, Brandom’s theory of inferentialism stands in contrast to the theories of language that have animated much of the previous writing on the Constitution.⁴³ Whereas prior scholarship tended to assume that references to the Constitution were references to a known object, Brandom’s theory begins from the premise that humans produce meanings not by pointing to an external object, but rather through the uniquely human process of ask-

42. P. 9; see Alex Oliver, *Pink Elephants*, LONDON REV. BOOKS, Nov. 2, 2000, at 35, 35 (book review) (describing a blurb on the book jacket that compares Brandom’s theory to that of Copernicus).

43. Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935 (2015).

ing for and giving reasons about that ostensible object.⁴⁴ Using this analytical lens, Gienapp reads the records of congressional debate to reveal how an inchoate Constitution had, by 1796, hardened into the fixed Constitution we know today (pp. 38–39).

The first of these debates occurred in the spring of 1789, when members of the First Congress stumbled upon a basic question: Who in the nation's capital, if anyone, had authority to remove executive officers? The Constitution was silent on the specific matter, offering no obvious answers. While others have read the removal debates simply as an act of constitutional interpretation, by placing this issue in the context of the indeterminacy of 1787, Gienapp explains why such a seemingly straightforward question raised a much broader ontological question about the nature of the document itself. From the outset, he argues, claims about the meaning of constitutional silence required making claims about the type of the document. While politicians who argued that silence constituted a clear and transparent order *not* to act were obliged to assert that theirs was a “finished, linguistic Constitution” (p. 135), those who argued to the contrary that silence constituted an obvious invitation *to act* were obliged to justify their claims by invoking an “unfinished and imperfect Constitution” (p. 136).

Rather than simply rehashing these two arguments, however, Gienapp shows how and why this opening debate led to the creation of a new mental image: an image of the textual Constitution produced not by any sincerely held belief in textualism but rather by the happenstance of debate. According to Gienapp, the peculiar facts of the dispute meant that those arguing in favor of a power to remove had to do more than simply establish that constitutional silence allowed for action. They had to explain and justify why the Constitution lodged the power in a *particular branch* or combination of branches (Chapter Three). This particular contingency, Gienapp argues, had an ironic and unanticipated effect: it subtly undermined the idea of the open-ended Constitution of the pre-1770s (p. 162). Because disputants were obliged to justify which branch had the power to act, disputants in turn had to argue that beneath constitutional silence one could find hidden meanings that could be interpreted through other parts of the constitutional text—or perhaps even the words of the constitutional authors. Here, then, we find the earliest beginnings of what one might think of as original law or original intent: rooted not in any overarching concern for the text but rather borne of the need to justify a particular argument on the Congressional floor.

Gienapp traces a similar pattern when he turns from the opening removal debate that had begun to produce a textual Constitution to the second major source of debates: the addition of the Bill of Rights (pp. 177–90). Here too, Gienapp begins with a seemingly straightforward, mundane question: Where, if anywhere, should amendments to the Constitution be located

44. Jonathan Gienapp, *The Transformation of the American Constitution: Politics and Justification in Revolutionary America* 25 (July 2013) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with the *Michigan Law Review*).

within the physical text? And here too, Gienapp finds that answering this basic question triggered ontological debates that hinged directly on the “fundamental character of the Constitution itself” (p. 188). And once more, as in the case of the removal debate, Gienapp finds that the need to justify particular answers ushered in new modes of thinking. While advocates of interweaving the amendments into the text invoked the longstanding conception of a constitution as a holistic, timeless arrangement of power, those who successfully argued in favor of affixing the amendments as a separate appendix offered a radically different vision: one in which the original text was sacred and separate in time (p. 189). By accepting this second proposal, we learn, Congress in turn produced a literally new way of looking at the Constitution—as a sacred archival text tethered to the founding moment of 1787. Moreover, owing to the whittling down of the amendments to individual rights, the resulting document instructed readers to view the Constitution not as an “elaborate, interlocking, holistic system,” but rather as a set of textual guarantees (p. 196).

While these opening debates thus produced both a mental image of a textual and archival document by the fall of 1789, old habits lingered on. By 1790, when Congress assembled again in New York City to embark on the work of lawmaking, it was still entirely possible for politicians to visualize the sacred, written words of their Constitution not as the definitive guide to interpretation but rather as simply a point of entry into “a necessarily unfinished system” (p. 216). Instead, it would require yet another series of debates to fuse these two modes of thinking and create the fixed, archival Constitution we would recognize today. This process of fusion and legitimating, we learn, emerged as a result of the high-stakes political debates surrounding two of the most controversial federal policies of the 1790s: the formation of a national bank that seemed to favor the wealthy and the president’s restoration of ties with the ousted royal officials of the British Empire.

In the first of these debates, opponents of a national bank fashioned a novel argument to rebut claims that the Necessary and Proper Clause provided Congress with power to establish a bank. Drawing initially on the textual Constitution that had emerged out of the removal debates, these disputants amassed an arsenal of text-based arguments—from the structure of enumerated powers to the eventual Tenth Amendment—to insist that “necessary” meant only what was necessary for constitutionally sanctioned ends (p. 229). Crucially, however, they also linked these textual arguments to archival arguments. Building upon the original intent arguments that had first bobbed to the surface during the removal debates of 1789, opponents now tethered their textual arguments to a historical excavation of the records of the creation of the written Constitution (pp. 243–44). Supporters of the bank, meanwhile, were “willing to play the same game of giving and asking for reasons” (p. 244) and fought back on the same terms: offering up the archives as a solution to the longstanding recognition of the incomplete and imperfect nature of the Constitution. In doing so, they too “were beginning to sanction historical appeals” (p. 236), tying particular words to the broader ends the Constitution was intended to accomplish (p. 219).

Even as this exchange made it possible to see how the archival past could be used to interpret the present, a last and crucial set of questions remained: whether the newly emerging textual, archival Constitution was truly a complete and supreme legal system in need of no external inputs. These questions, Gienapp argues, were answered in 1796, when a novel question presented itself—one that arose not because of constitutional silence or constitutional ambiguity but rather because of what appeared to be constitutional inconsistencies. As Gienapp explains, this last great episode in the creation of the Constitution arose over the question of whether the people's representatives in the House had the right to review a treaty.

This dilemma developed because of what appeared to many to be a contradiction in the Constitution. On the one hand, the Constitution mentioned only the president and the Senate in the process of making treaties, yet it explicitly required the House's approval (p. 262). And once more, this seemingly straightforward question raised a much larger ontological question (p. 277) as both sides "dug beneath the surface, desperate to resolve the Constitution's complexities" (p. 287). In the process, participants who could agree on little else "converged on a particular game of giving and asking for constitutional reasons" (p. 288). In doing so, they made the final step of linking the textual and archival character of the Constitution not simply to the general wisdom of the Founding era, but to concrete creators at specific moments in time, cementing into place the idea that the Constitution could be understood through the "time-locked understandings of original authors" (pp. 289–90).

And so, by the time the congressmen returned home and the last game had ended, the ball that they picked up in 1789 had become a known object on a known court, one upon which any future participant who wished to score points would be required to abide by the rules that had come into being. In place of the old conception of fixity that saw perpetual change and constitutional stability as mutually compatible, a radically new understanding of constitutional fixity had emerged. By imagining the act of creation as one with definitive authors and precise words, the idea of change now became wholly antagonistic to the new conception of fixity. There was a new constitutional imagination born not from any particular commitment to textualism, but from the sheer happenstance of arguments that could take on lives of their own, colliding in space until the historian holding the curtains would lower the lights on the second creation of the Constitution.

III. IN SEARCH OF A SYNTHESIS: OPEN QUESTIONS AND FUTURE RESEARCH

Centuries before Gienapp invited readers to imagine the creation of the Constitution as a decade-long game of ball, a planter from Savannah, Georgia invited Americans to imagine the Constitution as a ship of commerce, waiting to carry its cargo to market in a world that was not really a game at

all.⁴⁵ This metaphor that Congressman James Jackson chose to describe the Constitution was by then a familiar one to the congressman, a man whose thousand-acre rice plantation bordered a river that still bore the name of those who had come across its tributaries first⁴⁶ and who believed that the Black people whom he had purchased to work the fields were better off enslaved.⁴⁷ For decades, merchant ships like the one Jackson conjured up to describe the Constitution had provided the best means of carrying the produce of the plantations to market and the only means of carrying enslaved men and women from Africa's shores to America's ports, before becoming the chosen symbol of the Constitution in celebrations from Boston to Charleston.⁴⁸

Owing to *The Second Creation's* focus on the internal analytical logic of asking for and giving answers in the halls of Congress, the material world from which this metaphorical ship emerged and the rules and legal institutions that kept it afloat remain just beyond the book's scope of inquiry. In this Section, I invite us to consider what it might look like to read the transcribed words of men like Congressman Jackson through the lens of the broader archive that historians of early America have excavated. By returning to the sources of *The Second Creation*, this rereading suggests the possibility for a framework of American constitutional history that can accommodate multiple time horizons. In particular, it suggests that the core of indeterminacy that *The Second Creation* identifies in the founding moment of 1787 may well have coexisted alongside a more stable world of customary rules and material realities that shaped how people like Jackson conceptualized the Constitution. This composite view, in turn, reveals a set of open questions about the nature and sources of constitutional stability in moments of transformation, while also suggesting future lines of research that respond to H.L.A. Hart's call for a study of the primary and secondary rules that rendered legal systems functional. To illustrate these analytical possibilities, this Section begins by returning to the archival records of *The*

45. 1 ANNALS OF CONG. 442 (1834).

46. 12 DEBATES IN THE HOUSE OF REPRESENTATIVES 733 (Helen E. Veit et al. eds., 1994) ("I hold one thousand acres of tide rice land, on the Altamaha.").

47. 1 ANNALS OF CONGRESS 352 (1834) ("[H]e believed it was capable of demonstration that [slaves] were better off in their present situation than they would be if they were manumitted. What are they to do if they are discharged? Work for a living? Experience has shown us they will not. Examine what has become of those in Maryland; many of them have been set free in that State. Did they turn themselves to industry and useful pursuits? No, they turn out common pickpockets, petty larceny villains."); see also WILLIAM OMER FOSTER, SR., JAMES JACKSON: DUELIST AND MILITANT STATESMAN, 1757-1806, at 89 (1960).

48. See *Charleston (S.C.) May 29. Grand Procession*, U.S. CHRON. (Providence), June 19, 1788; *Federal Procession and Order of March*, PA. PACKET, May 3, 1788; *From the Charleston (South-Carolina) Gazettes*, BOS. GAZETTE, June 16, 1788; *Grand Procession*, MASS. SPY, July 10, 1788, at 2; *New-York, July 24*, DAILY ADVERTISER (N.Y.), July 26, 1788, at 2; *Philadelphia, July 4: Order of This Day's Grand Procession*, INDEP. GAZETTEER (Phila.), July 4, 1788; *Ratification of the Federal Constitution, by Massachusetts!!*, AM. HERALD (Bos.), Feb. 11, 1788; see also *Observations on the Federal Procession*, MASS. GAZETTE, Aug. 1, 1788.

Second Creation to identify traces of stability, before drawing upon secondary sources to offer a preliminary sketch of the broader world in which these constitutional understandings emerged.

A. *Finding Constitutional Indeterminacy: The Sources*

As a point of departure, return for a moment to the first piece of evidence that Gienapp offers to illustrate the constitutional uncertainty that characterized the First Congress: the quote from Congressman James Jackson comparing the Constitution to a merchant vessel (p. 1). In Gienapp's reading, this quote is best interpreted as proof of the indeterminacy surrounding the nature of the Constitution that defined the founding moment. But when one returns to the *Annals of Congress* in which the quote appears and locates the source in the broader archive of America, an alternative interpretation is possible. Congressman Jackson was not speaking about the uncertainty of what constituted the Constitution. Instead, he was speaking quite confidently about the Constitution as a metaphorical merchant ship. Moreover, the congressman was using this widely recognized metaphor to raise questions not about the Constitution's ontological status, but rather about the inevitable unknown strengths and weaknesses of a new vessel and the ability to succeed in the journey that awaited.⁴⁹

A similar alternative reading is possible when one turns from the opening analogy of the Constitution as a merchant ship to sources describing the nature of the Constitution and its rules of interpretation. For example, in support of the thesis that drafters of the Constitution were of two minds as to what type of document the Constitution should be, Gienapp points readers to the words of Edmund Randolph of Virginia, who "seemed to hover between two distinct brands of constitutional imagination" (p. 66). As evidence, Gienapp cites Randolph's first two guidelines for how to draft a Constitution: (1) "[t]o insert essential principles only" and (2) "[t]o use simple and precise language" (p. 65). For Gienapp, who reads "essential" as the equivalent of "broad," (pp. 66–67), these guidelines "cut in an entirely different direction" (p. 66). But it is possible to reconcile the two statements into a coherent whole: perhaps Randolph simply envisioned using simple and precise language to insert essential principles.

Likewise, although Gienapp detects uncertainty surrounding the rules of interpreting the Constitution in 1787, here too the evidence allows for alternative interpretations. According to Gienapp, this uncertainty is best embodied in the writings of Alexander Hamilton (p. 121). And yet, as in the case of Randolph's two distinct brands of constitutional imagination, there are ways to reconcile the evidence for Hamilton's "divergent thoughts on the subject" (p. 122). Consider, for example, this list that Gienapp presents as evidence of the contradictory ways that Hamilton described the rules of interpretation: (1) "the rules of legal interpretation are rules of *common sense*,"

49. See 1 ANNALS OF CONG. 442 (1834).

(2) a textual provision ought to be interpreted in light of its “natural operation,” and (3) a textual provision could be tested based on whether it was “consistent with reason or common sense” or “unnatural and unreasonable” (p. 121). While Gienapp reads this as a “hodgepodge” of tests that could be used “alternatively” (p. 121), on its face, it is again not immediately clear why these are in tension. All seek to ground interpretation according to that which is based on common sense, reason, and natural operation, in what Hamilton presented as a coherent whole.⁵⁰

It is equally possible to reconcile Hamilton’s views about the applicability of legal maxims to the Constitution. In Gienapp’s reading of the evidence, Hamilton’s writings reflect a desire for stability in a novel situation, rather than any recognized conventions of interpretation (p. 121). As evidence, Gienapp finds an apparent tension in Hamilton’s writings. As Gienapp writes:

Hamilton often spoke confidently of the applicability of certain conventional legal rules, such as when he argued that “a specification of particulars is an exclusion of generals” and “the expression of one thing is the exclusion of another.” . . . Yet, despite these invocations, he also strenuously contended that certain legal maxims “would still be inapplicable to a constitution of government.” (pp. 122–23)

As Gienapp points out, both of the quoted phrases in the passage above are from the same source: Federalist 83. A return to this source, moreover, provides a means of resolving the apparent tension. Hamilton’s goal in this essay was neither to speak confidently of the applicability of the rules nor to reject their applicability. Rather, as Gienapp notes, Hamilton’s stated goal was to demonstrate the correct mode of applying general legal maxims that lacked a clear technical rule to the Constitution. In this case, Hamilton was offering advice about how to apply these general legal maxims (i.e., “A specification of particulars is an exclusion of generals” and “The expression of one thing is the exclusion of another”) to the Constitution.⁵¹ Federalist 83 can thus easily be read today as the work of a lawyer explaining how to apply general maxims to the constitutional structure.

A similar alternative reading is evident when one turns from the drafting and ratification debates to the apparent indeterminacy that haunted the members of the First Congress as they reassembled in 1789 to begin the business of setting up the new government. To make the case that these in-

50. See THE FEDERALIST NO. 83 (Alexander Hamilton) (“This being the case, let me ask if it is consistent with common-sense to suppose that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.”).

51. See *id.*

augural congressmen saw the question of the removal of executive officers not simply as a moment of constitutional interpretation, but as one precipitating a deep ontological question, Gienapp cites Congressman Thomas Scott of South Carolina: "Strange, that *all this* should arise from the executive magistrate's having the power of removal."⁵² The implication here is that when Scott said "all this," he was referring to the ontological debate that Gienapp summarized. But again, a return to the source allows for an alternative reading. Scott, it appears, was not referring to the ontological question as to what type of document the Constitution was. Instead, Scott's phrase "all this" was referring to a specific argument about the removal power that struck him as manifestly absurd.⁵³

While these alternative readings suggest there may have been at least some settled understandings as to what constituted a Constitution and basic principles of interpretation in 1787, they also invite further study of the scope of transformation in the 1790s. Consider, for example, Gienapp's account of how debates surrounding the Bill of Rights prompted a mental transformation among members of the First Congress, giving way to "a distinct brand of written constitutional consciousness" (p. 170). According to Gienapp, the best evidence for this transformation is James Madison (pp. 168–69). But while Gienapp offers a riveting and persuasive account of how the debates made it easier to imagine the Constitution as something bounded in archival time, Madison himself presented his thoughts about the Bill of Rights as consistent across time. Perhaps most notably, in a letter to Thomas Jefferson dated October 17, 1788—before the debates in Congress that supposedly transformed his way of thinking about the Constitution—Madison explained that he had always envisioned "a bill of rights" in the same light.⁵⁴ "My own opinion," he wrote, "has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have favored it because I supposed it might be of use, and if properly executed could not be of disservice"⁵⁵—a po-

52. P. 127 (emphasis added).

53. 1 ANNALS OF CONG. 553 (1834) ("I have listened to the arguments in support of this motion these three days with great attention, and think, when taken together, they consist in this, the raising of a great number of frightful pictures, which, at first sight, appear very terrible; but when they are attentively contemplated, they appear to be the vagaries of a disordered imagination. Let us examine one or two of these frightful pictures, merely as a sample of the whole set, and see what they amount to. The most frightful of all that have been brought into view is, that the Treasurer must be the mere creature of the President, and conform to all his directions, or he arbitrarily removes him from office, and lays his hands violently upon the money chest. . . . Thus despotism rides triumphant, and freedom and happiness are trampled in the dust. *Strange, that all this should arise from the Executive Magistrate having the power of removal.*" (emphasis added)).

54. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 297 (Robert A. Rutland et al. eds., 1977).

55. *Id.*

sition Madison later echoed in the House of Representatives on the first day of debates in June of 1789.⁵⁶

To be sure, it is certainly plausible that Madison was inventing a narrative of continuity—although, according to one historian, Madison was “impressively consistent in the way he spoke about a bill of rights.”⁵⁷ But even assuming he was endeavoring to provide clarity where there was none, the words Madison chose are telling for another reason. Most strikingly, as early as October of 1788, he was able to describe in private correspondence the possibility of a “declaration of . . . rights” that could be “added” to the Constitution as an “addition.” This word choice suggests that even before engaging in the congressional debate of 1789, Madison could conceive of tethering the original Constitution to a particular time and supplementing a declaration of rights.⁵⁸

Taken together, these sources suggest that even in a moment of heated and passionate debate about what the Constitution meant, participants could nevertheless still find places of common ground in how they described the rules of constitutional interpretation and the process of constitutional amendment. Consider, by way of a concluding example, the principles of interpretation that delegates to the Continental Congress drew upon as they debated the scope of the Articles of Confederation. Although the Articles does not feature prominently in *The Second Creation*, a return to the sources reveals that members of the Continental Congress invoked similar criteria to adjudicate whether particular interpretations of the Articles of Confederation were valid.

In debates ranging from the scope of the legislature’s power to apportion Confederation expenses to its power to choose a permanent city of residence, participants regularly adjudicated questions based on whether the action would cause inequality and injustice to the member states that composed the United States assembled in Congress. For example, when delegates from New York wrote home in the spring of 1783 to justify their opposition to a proposed national plan that would determine each state’s relative contributions to the Confederacy, they interpreted the application of Article Eight of the Articles of Confederation by emphasizing principles of injustice and inequality to the states:

Our opposition to the first plan proposed was founded principally on this consideration that it left the interested party judge in his own cause, might

56. 1 ANNALS OF CONG. 436 (1834) (“I will own that I never considered this provision [a bill of rights] so essential to the Federal Constitution as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless.”).

57. ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 63 (1997).

58. Letter from James Madison to Thomas Jefferson, *supra* note 54 (“As far as these [alterations] may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution.”).

have produced great injustice and inequality, and would in all probability have excited great jealousies between the respective states. We dissented from the second plan . . . because it applied the 8th[] article of the confederation in such a manner as would have produced great injustice to the state of New York.⁵⁹

James Madison, meanwhile, invoked a similar logic later that summer, as he wrestled with the novel question of whether Congress could choose a permanent site for a capital of the United States.⁶⁰ Although Article Four of the Articles of Confederation authorized Congress to adjoin to any place, it was silent as to whether Congress could establish a permanent site. Speaking of Congress in the plural, Madison invoked the same principle of state inequality. “May it not also be made a question whether in constitutional strictness the gift of any Sta[te] without the Concurrence of all the rest, can authorize Congs. to exercise any power not delegated by the Confederation!”⁶¹ Indeed, Madison’s interpretation of Article Nine of the Articles of Confederation implied a similar concern with interstate relations: noting that Congress had jurisdiction over ships captured off the Atlantic coast, he reasoned that Virginia had been correct to refer to Congress a dispute arising over a captured vessel off the coast of North Carolina.⁶²

Although absent from *The Second Creation*, these passing references to rules of interpretation that would avoid “producing injustice” to any one member state hint at the possibility of a broader world of settled customs and shared understandings. As one historian has recently concluded, throughout the Revolutionary era and beyond, “customary ideas persisted that all law must be consistent with higher law and natural equity and should be held null, void, and no effect if it was not.”⁶³ Taken together, then, this re-reading of the sources points to possible future paths of inquiry that investigate not simply the sources of constitutional uncertainty in moments of political transformation, but also the sources of constitutional stability in a world that rendered metaphors of ships intelligible to all.

B. *Future Paths of Inquiry*

When, in the early 1960s, H.L.A. Hart proposed analyzing the creation of a legal system, he did so in a way that has seemed to many scholars to re-

59. Letter from Alexander Hamilton & William Floyd to George Clinton (Mar. 5, 1783), in 3 THE PAPERS OF ALEXANDER HAMILTON 280, 280–81 (Harold C. Syrett ed., 1962).

60. Letter from James Madison to Edmund Randolph (July 28, 1783), in 7 THE PAPERS OF JAMES MADISON 256, 257 (William T. Hutchinson & William M.E. Rachal eds., 1971).

61. *Id.*

62. Letter from James Madison to Edmund Randolph (May 1, 178[2]), in 4 THE PAPERS OF JAMES MADISON 195, 195 (William T. Hutchinson & William M.E. Rachal eds., 1965) (reasoning that “[t]he legislative power over captures . . . are clearly vested in Congress by the Confederation,” and concluding that Virginia’s authorities were correct to refer a dispute arising from a captured vessel off of North Carolina to Congress).

63. See NELSON, *supra* note 13, at 155.

quire an empirical study of the relevant obligations and customary norms that existed within a polity at a particular time.⁶⁴ As the preceding analysis suggests, scholars seeking to excavate these customary norms and rules would do well to seek out not only sources of confusion but also sources of settled understandings, understandings that in turn can “offer a convincing explanation for the scope of the thinkable within the rules of the game as it was played.”⁶⁵

Consider for a moment what it would look like to begin the search for the founding rules of America not simply by imagining the ratified Constitution as a ball to be volleyed about in an abstract game, but also by asking *why* the generation of white male Americans who cast their votes in favor of ratification chose to symbolize the document as the merchant ship that opens *The Second Creation*. As historians of America’s ratification have already noted, when the people celebrated the ratification of the Constitution, they did so by hauling up merchant ships from the harbor to be paraded through the streets.⁶⁶ Rather than reading this symbol as a source of ontological uncertainty, we might fruitfully ask what this symbol of the Constitution meant to those who watched as it sailed through the cobbled streets of Boston and Charleston, and what it meant to those who later cited it on the floors of Congress. What hidden meanings and customary rules might it have embodied?⁶⁷

To launch this inquiry, we might productively begin by stepping outside the halls of political debate and mapping the routes that these merchant ships said to represent the Constitution followed. Here, we can draw upon the archive that historians of early America have already compiled. We might begin, for example, by pairing recent scholarship that has illuminated the central importance of transatlantic commerce in the creation of the Constitution⁶⁸ with recent scholarship that has emphasized the centrality of the political economy of slavery.⁶⁹ Working from this existing map of an Atlan-

64. See Greenawalt, *supra* note 40; Ho *supra* note 41; Shapiro, *supra* note 39.

65. Joan C. Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713, 746 (1990).

66. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 212 (2010).

67. For a similar line of inquiry in analyzing the origins of the Constitution in the Holy Roman Empire, see BARBARA STOLLBERG-RILINGER, THE EMPEROR’S OLD CLOTHES: CONSTITUTIONAL HISTORY AND THE SYMBOLIC LANGUAGE OF THE HOLY ROMAN EMPIRE (Thomas Dunlap trans., 2015).

68. See *supra* note 33; see also Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759 (2014).

69. See *supra* note 32; see also GREGORY E. O’MALLEY, FINAL PASSAGES: THE INTERCOLONIAL SLAVE TRADE OF BRITISH AMERICA, 1619–1807 (2014); STEPHANIE E. SMALLWOOD, SALTWATER SLAVERY: A MIDDLE PASSAGE FROM AFRICA TO AMERICAN DIASPORA (2007); Jennifer L. Morgan, *Accounting for “The Most Excruciating Torment”*: Gender, Slavery, and Trans-Atlantic Passages, 6 HIST. PRESENT 184 (2016); Jennifer L. Morgan, Par-

tic commerce deeply intertwined with the institution of human bondage, we might further enlist the quantitative work of economist historians who, in the 1960s, began tracking the movement of such merchant ships in the colonial period and discovered that such ships plied not only the Atlantic waters, but also the ports of America's North Atlantic coast.⁷⁰

What might we gain by following these pathways of the ships that were chosen to symbolize the newly ratified Constitution? Perhaps of most salience, foregrounding the economic spaces of long-distance maritime trade in the Atlantic world of early America can allow us to glimpse the legal customs that rendered such commercial partnerships in an age of slavery possible. As legal historians of the Atlantic and Indian Oceans have uncovered, this was a commercial world constituted by law and defined by a set of customary obligations and expectations of what it meant to engage in long-distance trade.⁷¹ These customary obligations of commercial partnership in turn provided a shared set of principles upon which to build a constitutional union of states. Consider, for example, two of the most prominent principles of inter-jurisdictional partnership within the United States. Perhaps the more familiar of the two, known today among scholars as "the federal consensus," held that no state or national government had any power to interfere with the right of an American state to allow Black people to be held as property.⁷² Derived, at least in part, from older practices of deference to trading partners in foreign jurisdictions,⁷³ this rule of the federal consensus provided one of the cornerstones of constitutional union—a customary obligation that ensured that a ship owned by merchants in Boston or New York could carry the pro-

tus Sequitur Ventrem: *Law, Race, and Reproduction in Colonial Slavery*, SMALL AXE, Mar. 1, 2018, at 1.

70. ARTHUR L. JENSEN, *THE MARITIME COMMERCE OF COLONIAL PHILADELPHIA* (1963); William I. Davisson, *The Philadelphia Trade*, 3 WESTERN ECON. J. 310 (1965); William I. Davisson & Lawrence J. Bradley, *New York Maritime Trade: Ship Voyage Patterns, 1715–1765*, 55 N.Y. HIST. SOC'Y Q. 309, 309 (1971); David C. Klingaman, *The Coastwise Trade of Colonial Massachusetts*, 108 ESSEX INST. HIST. COLLECTIONS 217 (1972); David C. Klingaman, *The Development of the Coastwise Trade of Virginia in the Late Colonial Period*, 77 VA. MAG. HIST. & BIOGRAPHY 26 (1969); James F. Shepherd & Samuel H. Williamson, *The Coastal Trade of the British North American Colonies, 1768–1772*, 32 J. ECON. HIST. 783 (1972).

71. Outside the British colonial context, legal historians of the early modern world have also led the way in focusing on the circuits of law internal to merchant communities, including, but not limited to, FAHAD AHMAD BISHARA, *A SEA OF DEBT: LAW AND ECONOMIC LIFE IN THE WESTERN INDIAN OCEAN, 1780–1950* (2017); LEGAL PLURALISM AND EMPIRES, 1500–1850 (Lauren Benton & Richard J. Ross eds., 2013); and Natasha Wheatley, *Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State*, 35 LAW & HIST. REV. 753 (2017).

72. WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 16 (1977).

73. See Maeve Glass, *Union: The Commercial Origins of the Federal Consensus* (unpublished conference paper, Law and Society Association Annual Meeting, June 2015) (on file with the *Michigan Law Review*).

duce of the plantations that were nestled along the riverbanks outside of Savannah.⁷⁴

This rule of noninterference with the local laws of slavery coexisted with a second principle of partnership: the promise that those who embarked on a joint venture did so as autonomous equals, each with discretion to make decisions that would advance the interests and mutual advantage of the whole. This principle of commercial partnerships that allowed for autonomous decisionmaking was vital in a world defined by long-distance maritime trade, where instructions could arrive weeks after they had been written. As one commission agent put it, a correspondent “cannot at that distance give his orders with such precision as they could wish, they must leave a great deal to my Prudence.”⁷⁵

Studying these customs that kept the merchant ships of the eighteenth century in motion between jurisdictions can provide an additional resource for helping translate the rules that rendered constitutional union intelligible along the Atlantic coast. Situating the Constitution within the broader political economy and commercial legal culture of early America may, for example, help to explain why a lawyer like Edmund Randolph could insist that a document should consist of essential principles, written in clear language. Doing so might also help to further explain why a former merchant like Alexander Hamilton could compose a coherent Federalist 83 outlining how to apply the rules of common sense to the Constitution, or what men might have had in mind when they insisted that theirs was a partnership for mutual advantage, to be governed by deference to the discretionary judgments of the constituent parts, in which no one would interfere with the institution of slavery in the states where it existed.

To be sure, this cursory glance raises more questions than it answers. But as a sketch, it illustrates the possibilities for a future model of inquiry that pairs *The Second Creation's* close study of rapidly changing constitutional debate in the halls of power with an equally close study of the relatively stable material realities, legal rules, and structural institutions that historians of early America have brought to light. Doing so, in turn, reminds us once more of the stakes of how one chooses to construct an archive. Narrow the archive to questions asked and answered in the halls of political debate, and we might well find a moment of open-ended possibility in 1787, in which no one could make sense of what kind of thing the Constitution was. Broaden the archive into the brutal certainties of early America, however, and we might instead find an agreement predicated on much older customary rules of partnership that could keep the merchant ships in motion and allow a system of slavery to flourish.

Far from merely a question of author's prerogative, then, this brief survey suggests that the decision of where to begin and end the story of the

74. *Id.*

75. Letter from William Lux to William Molleson (Feb. 9, 1767) (on file with the *Michigan Law Review*).

creation of America's Constitution will determine not only how fixed the rules appear to us now, but also which rules, and which version of America, we choose to remember when we look to singular moments in the past for answers to questions of constitutional law today. To date, much of the conversation between historians and lawyers has focused on the question of how to interpret the Constitution as a text. In contrast, historians have yet to meaningfully weigh in on how the historical record may call for alternative constitutional methodologies that move beyond preoccupation with deference to the text of the written document.⁷⁶ Perhaps, then, a more expansive archive holds with it the promise of a more expansive conversation between history and law: one that synthesizes, rather than atomizes, the fruits of historical scholarship and provides an empirical footing for a mode of constitutional interpretation that reflects the complexities of America's constitutional pasts and the long struggle of wrestling toward the dawn.⁷⁷

CONCLUSION

When historians of early America assembled in the second-floor conference room of a Marriott hotel this past July to reflect on the Founding era, those who addressed the opening meeting described a world that bore little resemblance to the popular images on the covers of recent releases one might find in an airport bookstore. This was not a founding moment defined by "Our Founding Fathers" busily composing a Constitution that marked the grand finale of a creative effort to launch a new, modern science of politics. This was instead a founding moment whose temporal and spatial boundaries had long since moved far beyond the storied summer of 1787 in Philadelphia, stretching deep into the past and crashing far into an emancipatory moment in the distant future.⁷⁸ In speeches that bore the imprint of decades of scholarship, panelists described a post-revolutionary America de-

76. See generally Sawyer, *supra* note 38. For discussions of the limits of originalism and the need for alternative constitutional methodologies, see Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809, 819 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1686 (2016); cf. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 88–89 (Apr. 3, 2019) (unpublished manuscript) (on file with the *Michigan Law Review*) (noting that "[t]he objection from constitutional evil is rarely articulated" and arguing that "originalists ought to articulate the case that the Constitution is reasonably just"). On the problem and promises of constitutional redemption, see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017); and Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041 (2005).

77. Harding, *supra* note 30.

78. Annette Gordon-Reed, History & Law Professor, Harvard Law Sch., Address at Society for the Historians of the Early American Republic Annual Meeting: President's Plenary (July 18, 2019), <https://www.c-span.org/video/?462646-1/life-declaration-independence>.

fined by the trauma of civil war,⁷⁹ the aspirations of indigenous lawyers for constitutional rebuilding,⁸⁰ and an institution of slavery that was as vital and yet as invisible to the Constitution as electricity to a building,⁸¹ at a time when those who saw the promise of freedom quietly corrected the record from “our Fathers” to “our Enemies.”⁸²

The expansive archive that underpinned these spoken portraits of America’s founding has yet to become the empirical basis for the practice of constitutional law in the United States. Instead, much of the dialogue between history and law has focused on ascertaining the degree and timing of constitutional fixity in the late 1700s. And yet, as this Review has suggested, the scholarship generated by extensive archival digs into the records of early America offers far more than a linear timeline of when and how meaning became settled. Instead, this survey of the field suggests the possibility of an American past defined by multiple constitutional time horizons, each proceeding at its own rate of change and propelled by different confluences of causal factors. By venturing beyond the silos of any one archival site of inquiry to view this intricate landscape of constitutional creation as a whole, it may well be that we can begin to generate a new synthesis: one that encompasses both the spaces of constitutional indeterminacy that greeted a new cohort of lawmakers and the brutally certain customary rules of power that limited the horizons of constitutional possibilities.

79. Rebecca Brannon, History Professor, James Madison Univ., Speech at Society for the Historians of the Early American Republic Annual Meeting: Life After the Declaration of Independence (July 18, 2019), <https://www.c-span.org/video/?462646-1/life-declaration-independence>.

80. Kathleen DuVal, History Professor, Univ. of N.C., Speech at Society for the Historians of the Early American Republic Annual Meeting: Life After the Declaration of Independence (July 18, 2019), <https://www.c-span.org/video/?462646-1/life-declaration-independence>.

81. David Waldstreicher, History Professor, CUNY Graduate Ctr., Speech at Society for the Historians of the Early American Republic Annual Meeting: Life After the Declaration of Independence (July 18, 2019), <https://www.c-span.org/video/?462646-1/life-declaration-independence>.

82. Kay Wright Lewis, History Professor, Howard Univ., Speech at Society for the Historians of the Early American Republic Annual Meeting: Life After the Declaration of Independence (July 18, 2019), <https://www.c-span.org/video/?462646-1/life-declaration-independence>.