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

Mary Sarah Bilder

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Part of the Legal History Commons

Recommended Citation
https://opencommons.uconn.edu/law_review/459
Essay

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

MARY SARAH BILDER

In written celebration of Kent Newmyer’s intellectual and collegial influence, this Essay argues that the written constitution was an emerging genre in 1787-1789. Discussions of the Constitution and constitutional interpretation often rest on a set of assumptions about the Constitution that arose in the years and decades after the Constitutional Convention. The most significant one involves the belief that a fixed written document was drafted in 1787 intended in our modern sense as A Constitution. This fundamental assumption is historically inaccurate. The following reflections of a constitutionalist first lay out the argument for considering the Constitution as an emerging genre and then turn to Kent Newmyer’s important influence. The Essay argues that the constitution as a system or frame of government and the instrument were not quite one and the same. This distinction helps to make sense of ten puzzling aspects of the framing era.
The Emerging Genre of *The Constitution*: Kent Newmyer and the Heroic Age

MARY SARAH BILDER *

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

***

At the outset, let me be honest . . . in the dark hours of the night, I have considered converting to originalism. The appeal is undeniable. I love history and think that history is relevant to constitutional interpretation. I have written about what people of the framing generation thought about words and concepts—and I find fascinating the tracing of etymologies and lexicographies.¹ I am happy puzzling over the details of the Constitutional Convention.² But then I think about the framing generation and the generations that have followed—and what *The Constitution* is. And I can’t do it.

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


Because at core, I am what I call, a constitutionalist, not an originalist.3 Originalism has one foundational assumption about the Constitution. It was (1) a written constitutional text in 1787; (2) with a fixed, knowable meaning. As Lawrence B. Solum explains, “Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors.”4 Whether a semantic originalist,5 an original methods originalist,6 a positivist originalist,7 a public meanings originalist,8


4 Solum, supra note 3, at 1244. Solum delineates the core of originalist constitutional theory: (1) the Fixation Thesis; (2) a reasonable version of the Constraint Principle; (3) “some account of the nature of original meaning”; and (4) “they affirm (or at least do not deny) the plausibility of such other theses as are required to render originalism plausible” (including among these that the text “is not radically indeterminate”; that the “original meaning” is recoverable through originalist methodology; and that constitutional actors can “comply with the Constraint Principle”). Id. at 1270–71.


6 For discussion defining original methods originalism, see, for example, the work of John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 NW. U. L. REV. 751, 752–53 (2009).

7 For a discussion on positivist originalism, see, for example, the work of William Baude and Stephen E. Sachs.
or a framers intent originalist, they share the assumption that the Constitution of 1787-1789 belonged to a genre already known to the framing generation and which carried a set of interpretive rules.

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

There was no abrupt transformation from system of government to Constitution. There was no sudden shift from constitution to Constitution. The first state “constitutions” used the term interchangeably, calling themselves “constitution or frame of government” or “constitution or form of government.” In the 1780s and in the 1790s, constitution still denoted

---

8 The extensive originalist-influenced scholarship that draws its conclusions from writing during the ratification period or from dictionary definitions falls into this category. See, e.g., Solum, Semantic Originalism, supra note 5.

9 For a discussion on framers’ intent originalism, see, for example, the work of Richard S. Kay.

10 E.g., Mary Sarah Bilder, Colonial Constitutionalism and Constitutional Law, in Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz 28, 29 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009); Bilder, Madison’s Hand, supra note 2; Mary Sarah Bilder, The Constitution to The Constitution, in B.C. L. Sch. Fac. Papers 129, 139 (2018), http://works.bepress.com/mary_bilder/95/; Mary Sarah Bilder, The Ordeal and the Constitution, 91 New Eng. Q. 129, 139 (2018). Modern editing conventions obscured this point. For example, according to the standard source, Max Farrand’s The Records of the Federal Convention, George Read wrote to John Dickinson on May 21, 1787, “I am in possession of a copied draft of a Federal system intended to be proposed.” 3 The Records of the Federal Convention of 1787, at 1, 24–25 (Max Farrand ed., 1911). The emphasis appeared to be Federal. The original letter, however, stated “a copied Draft of a federal System.” Letter from George Read to John Dickinson (May 21, 1787), in Read Family Letters, 1716–1787, Collection 0537 (Hist. Soc’y Pa., 2014). For discussion of growing perception of difference between the American and British Constitutions, see Michael Kamen, A Machine That Would Go of Itself: The Constitution in American Culture 156–57 (1986) (describing three transitions in American constitutionalism: “first, we are different (1790s until the 1860s); second, some variations do exist but we share common constitutional roots dating back to Magna Carta and beyond (1870s until the 1920s); and third, although both systems evolved historically within a discernible Anglo-American framework, their most fundamental attributes make them profoundly dissimilar (1920s and 1930s)”).

11 Bilder, Colonial Constitutionalism and Constitutional Law, supra note 10, at 36.

12 The Constitution, or Frame of Government, for the Commonwealth of Massachusetts (Worcester, Isaiah Thomas ed., 1780); A Constitution, or Frame of Government, Agreed Upon by the Delegates of the People of the State of Massachusetts-Bay (Boston, Benjamin Edes & Sons ed., 1780). Pennsylvania combined the
the embedded system of government even as it was coming also to signal the document. The process of drafting a document, arguing about it, structuring a government according to its boundaries, and eventually judging government actors by it, would begin to foreground the document. Eventually, to many Americans, Constitution would come to mean only the document. But in the 1780s and 1790s that had not yet happened. Over three decades ago, Suzanna Sherry alluded to the gap in suggesting both that the “American invention of the Constitution” as creating fundamental law was “largely complete” by September 1787, and yet that Chief Justice John Marshall transitioned to “the modern textual constitutionalists’ use of the single written source” only late into his tenure.13 Jack Rakove similarly incisively commented, “For since 1789 Americans have always possessed two constitutions, not one: the formal document adopted in 1787–88, with its amendments; and the working constitution, comprising the body of precedents, habits, understandings, and attitudes that shape how the federal system operates at any historical moment.”14 Abandoning the assumption that the Constitution as a genre existed by September 1787 resolves these apparent tensions.

What word describes what the Constitution was in the late 1780s and 1790s if it wasn’t “the Constitution” meant as a written fundamental law document? Once one begins to carefully read sources, it becomes remarkably difficult to figure out whether people in the late 1780s and 1790s were using the word Constitution to refer to the type of written legal genre or to the system of government gestured at by written words.


13 Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1156–72 (1987); see H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 903 (1985) (Sherry saw her article as a companion to Jefferson Powell’s important article arguing that the framers did not expect future interpreters to look to the framers’ intent).

Although contemporary capitalization conventions distinguish two distinct understandings, the late eighteenth century followed different conventions. As I noted previously, “The Federalist Papers originally appeared with ‘constitution’ consistently spelled with a small c.” One can imaginatively replace Constitution with system of government or frame of government and sentences retain their meaning and, in some instances, become more nuanced.

Not infrequently, the framing generation used the word charter as if it was that genre to which the document belonged. Indeed, James Madison, so-called Father of the Constitution, referred to American constitutions as charters in January 1792, never once describing the documents as Constitutions. The cultural practice that supported the Constitution as a written text grew out of corporate charters. Recently John Mikhail and Nikolas Bowie argued for the importance of the corporate charter origins when interpreting the Constitution. As I have argued elsewhere, charter constitutionalism—the constitutional law and politics that arose under written colonial charters—followed a different set of interpretive conventions than the ones urged by modern textualists and originalists.

As a case study, the famous language in the liberties assurance in the Virginia charter demonstrated that “[t]he specific words and the underlying concept were not in complete correspondence.” Jud Campbell’s scholarship demonstrates an analogous Founding Era ambivalence about the conceptual correspondence in his work on early First Amendment controversies. Although the 1787 Constitution arose out of this long practice of charter constitutionalism, it did not perfectly fit within the charter genre by historical standards.

---

15 Bilder, Colonial Constitutionalism and Constitutional Law, supra note 10, at 29 (The research for this essay was done before the printed eighteenth century text, and many newspapers, could be searched easily and relatively effectively. With new databases and improved search functions, this conclusion could be explored with more nuance.); The Federalist No. 1 (Alexander Hamilton).


Joseph Story hinted at the definitional dilemma. In Commentaries on the Constitution of the United States, Story defined *constitution* using the word *instrument*: “In our future commentaries upon the constitution, we shall treat it, then, as it is denominated in the instrument itself, as a CONSTITUTION of government, ordained and established by the people of the United States for themselves and their posterity.”

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

*Instrument* is a rather nice word to use. According to the Oxford English Dictionary, the word used in law means: “A formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form, so as to be of legal validity.”

A quick glance can find the word used by favorite Founders in conjunction with the Constitution. In an oft-cited explanation about *The Federalist* in 1818, Madison noted, “The immediate object of them was to vindicate & recommend the new Constitution to the State of N.Y. whose ratification of the instrument, was doubtful as well as important.” Similarly, Gouverneur Morris’s famous explanation about the drafting noted, “That instrument was written by the fingers, which write this letter.”

*Instrument* captures the performative legal function of the document.

Once we see the *instrument* as something apart from the *Constitution*, a number of puzzling aspects of the Convention, ratification, and subsequent history make sense. I managed to come up with ten because I

---

22 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 134 (1833).
25 Letter from Gouveneur Morris to Timothy Pickering (Dec. 22, 1814), reprinted in 3 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 322, 323 (Jared Sparks ed., 1832). In a somewhat bitter letter, Morris goes on to ask,

But, after all, what does it signify, that men should have a written Constitution, containing unequivocal provisions and limitations? . . . Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame if not the guilt of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose.

*Id.* Morris continues to suggest “comparing the plain import of the words, with the general tenor and object of the instrument.”

26 For careful and precise use of *document* in discussing the Constitution, see AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY (2005).
once saw Doris Kearns Goodwin give a ten-item talk. In this space, I will briefly note rather than elaborate them.

1. *The Convention.* During the summer of 1787, the system of government was repeatedly the point. The Convention spent most of its time worrying about principles and structures. The delegates preferred words that were broad, expansive, and with multiple possible meanings, they worried about cavilers (people who would pick a narrow meaning), and they occasionally resolved disputes by picking a word that permitted both sides to think they had won, rather than choosing one side as right and the other wrong. The rights included in the instrument related to the system of government: the two limiting the legislature (bill of attainder and ex post facto); the two from Magna Carta (habeas corpus, jury trial in criminal cases); and the one that made the United States diverge radically from Great Britain—the right to hold office and participate in government without a religious test or a required oath.

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

3. *The Convention’s letter.* At the end of the Convention, they wrote to Congress describing what they were transmitting as “that Constitution which has appeared to us the most adviseable,” not “the

---


28 These points can be found in greater detail in Bilder, *Madison’s Hand*, supra note 2, at 127–30.


30 Bilder, *How Bad?*, supra note 2, at 1648.

31 Id.; Bilder, *The Ordeal and the Constitution*, supra note 10, at 141.

32 Other textual clues include the use of “establish the following Constitution” in the preamble in the August 6 draft and “this Constitution” in the preamble of the final draft. *The Documentary History of the Ratification of the Constitution* 260–61, 306 (Merrill Jensen et al. eds., 1976).
More powers had been needed, and executive and judicial authorities more “fully and effectually vested” in a general government—but it was a bad idea to delegate that to one body of men (i.e., the old Congress). “Hence results the necessity of a different organization.” And the Convention went on to explain that people differed but to reach consensus, people had been “less rigid on points of inferior magnitude” and had entered into “mutual deference and concession.” None of that explanation makes sense about a document that was to be rigidly read; but it all makes sense imagining the instrument as a constitution of a system of government. In fact, the letter accompanied many broadside and newspaper printings of the Constitution. Readers could read the letter and the large-type preamble and skip the detailed instrument.

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

---


34 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 32, at 305.

35 Id.

36 Id.


38 Bilder, MADISON’S HAND, supra note 2, at 155; Bilder, The Ordeal and the Constitution, supra note 10, at 143 (explaining how the founders “did not know that the Convention would be
5. Ratification. As Bernard Bailyn pointed out, attacking the semantic words of the instrument was the strategy of the opponents, the so-called Anti-Federalists; the proponents—the Federalists—repeatedly defended it according to structural principles. Pauline Maier noted, “Once criticism of the Constitution mounted, its supporters had to defend sections . . . about which, in truth, they themselves often had reservations, and they had to make sense of the system of government it proposed in ways that went beyond anything said or even understood at the federal Convention.” Although the instrument was ratified without alterations, the ratification debate had altered the understanding of the instrument. Saul Cornell described the arguments of the critics as those of “other founders.” In the aftermath of the instrument’s drafting, a host of incompatible interpretations arose, which were not resolved or abandoned, but rather became part of American constitutionalism. The instrument was ratified without resolution of conflicting interpretations.

6. The First Congress. The First Congress, as Jonathan Gienapp persuasively argues, was characterized by extensive debates over how to interpret the instrument. Madison, in particular, found the interpretive debates fascinating. As he noted, echoing himself in Federalist 37, “the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents.” That is, the idea that the instrument was a constitution only began tentatively as an argument, usually for a particular political end, in followed by public ratification. They thought it plausible—possibly even likely—that Congress would view the Constitution as a report; debate it; revise it—and then decide what to do. . . . They did not know that the Constitution would remain the document that they drafted”); See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 32, at 322–53 (reproducing Melancton Smith’s notes on the debates as “the most complete record of discussion and action in Congress” and providing dates to the originally undated sources by using the printed Journals of Congress).


43 Bildner, Madison’s Hand, supra note 2, at 174. See id. at 172–74 (discussing more on the First Congress debates).
Congress. Gienapp notes that the “fixed Constitution was, thus, not discovered but invented, as a certain form of constitutional imagination acquired coherence and power.”

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

---

45 U.S. CONST. art. III, § 1.
48 See Maeva Marcus, The Effect (or Non-Effect) of Founders on the Supreme Court Bench, 80 GEO. WASH. L. REV. 1794, 1812 (2012) [hereinafter Marcus, The Effect] (“[T]he early Supreme Court Justices . . . understood their role in . . . interpret[ing] federal law uniformly for the new nation” and understood that “various provisions in the Constitution needed to be explained [by] time and experience . . . .”); Maeva Marcus, The Constitution’s Court, 69 WM. & MARY Q. 373, 375–76 (2012) (“At the Virginia ratifying convention, both Patrick Henry and Marshall specifically stated that the judges could declare a statute unconstitutional.”).
49 Marcus, The Effect, supra note 48, at 1794.
constitution, he nonetheless seemed to distinguish between the instrument and the constitution.51

8. Placement of Amendments. The decision to add amendments rather than to interweave them left the 1787 instrument intact. Madison assumed the amendments would revise the instrument; Sherman suggested tacking them on the end (which is what happened). With that decision, “the original Constitution and the Convention that wrote it remained significant.”52 Gienapp points out that “by supplementing rights provisions, observers were encouraged to see the entire Constitution more as a set of textual guarantees than as an elaborate interlocking, holistic system.”53 As the history of the Magna Carta indicates, a repeatedly revised instrument could have nonetheless produced a cultural fixation with the concept of and concepts in the document, but perhaps a less stringent focus on particular words.54

9. Effect of Amendments. And yet, the point of amendments has always been to alter the entire system of government. The amendment process may be analogous to republication in trusts and estates law. A codicil updates the entire instrument by “republication” to the date of the codicil. Indeed, a strong argument for adding the twelve amendments was to help persuade North Carolina and Rhode Island to ratify and come into the union.55 Every state that has entered the Union accepts the supremacy of an instrument that meant something different in that year of admission because of the ways that amendments and judicial and cultural interpretations have republished the document. In 1959, when Hawaii entered, the understanding of the Constitution was different than when Vermont entered in 1791.56 And the “Constitution” to which they pledged

---

51 Marbury v. Madison, 5 U.S. 137, 179 (1803) (“Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?”). See also MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 195 (2004) (counting references).
52 BILDER, MADISON’S HAND, supra note 2, at 175 (citation omitted).
56 During questions following a keynote speech by the late Justice Antonin Scalia, entitled, “The Methodology of Originalism” at George Washington University Law School in 2012, moderated by John Manning, I asked about this interpretive dilemma. I referred to it as the problem of a moving wall of ratification. My memory is that Justice Scalia responded that he believed the states came into the union knowing that they were agreeing to a Constitution that was interpreted as it had been interpreted
supremacy reflected an evolving history of constitutional interpretive practices.

10. The Preamble. We the people: I believe that the Preamble creates a consent theory on which the instrument and the Constitution as a system of government are founded.57 “We the People of the United States” is not we the people who signed in 1787—nor we the people who ratified it between 1787 and 1790. In old charters, the first words provided the authority of the king. In the words of the 1662 Connecticut charter: “Charles the Second, By the grace of God, King of England, Scotland, France and Ireland, defender of the Faith, &c.; To all to whom[] the[se] presents shall come, Greeting. “58 Ordain and establish was followed by a long series of words in colonial charters that embraced laws, statutes, ordinances, and other aspects of the system of government.

We know that the Constitution distributed power in ways to disenfranchise, enslave, and deny rights and privileges to people who were not white men—to African Americans, to people of color, to women. And, that the practices of the United States government recognized members of Native Nations as part of the people only at a point when that recognition brought with it few rights and power. And that the last centuries have been characterized by the appropriation of the Constitution by white men under the claim that a white male democracy was somehow the people’s democracy.

And yet, at the same time, the last centuries have also been the story of the people insisting that the system of government embodied in the Constitution be made more perfect for the people. In the instrument, We the People of the United States—undefined by time, by race, by gender, by citizenship—are the authority. And what do the “we” do—they “ordain and establish this Constitution.”59 In every generation, the people, on reading the instrument, become once again the “we” who ordain and establish this constitution for ourselves and our posterity. The Constitution as an instrument and system of government tilts in favor of the purposes of the preamble and its mandate to interpret for ourselves and our posterity.

***

57 See Mikhail, supra note 18, at 429 (arguing that the Preamble vests the government “with the implied power to fulfill every purpose for which that government was established”). For other interpretive theories focusing on the Preamble, see Liav Orgad, The Preamble in Constitutional Interpretation, 8 INT’L J. CONST. L. 714, 715 (2010) (discussing the theory of preambles and their functions); John W. Welch & James A. Heilpern, Recovering Our Forgotten Preamble, 91 S. CAL. L. REV. 1021, 1022 (2018) (arguing that the Preamble does more than set forth the Constitution’s general aspirations and epitomizes the purposes behind the adoption of the Constitution).


59 U.S. CONST. pmbl.
In my gradual shift towards recognition of the emerging genre of the written Constitution, I have relied on Kent Newmyer as a constant influence. I can’t recall when I didn’t know Kent—so I suspect that I came to know him through my dear friend Kitty Preyer; who introduced whom is lost in the mists of time. We both had the pleasure of collaborating with Maeva Marcus on the collection of Kitty’s essays, *Blackstone in America*, published after her death.60

When I met Kent, I was in awe of him because of his magnificent book, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*.61 In telling the story of Justice Story, Kent had not shied away from Story’s complexities—most importantly, Story’s tragic inability to think about cases like *Prigg v. Pennsylvania* (1842),62 in a way that saw African Americans as full and equal citizens.63 Kent showed how Story imagined his role as a statesman in a vision of the United States—the Old Republic—that was vanishing even as Story sought to fix it through constitutional interpretation.64 The title’s juxtaposition of *Supreme Court Justice* with *Statesman* underscored Kent’s point: constitutional law was irrevocably embedded in, not insulated from, American politics.65

Later, Kent would write an intellectual biography of Chief Justice John Marshall and finally, my personal favorite, his account of the Burr treason trial.66 He has been the consummate practitioner of the belief that the historian’s goal is to understand how people—the biographical subjects—constructed their world and why that construction made sense to them; how they justified the inevitable contradictions; and, sadly, how they persuaded themselves to look away and ignore certain questions or injustices present around them. Without fail, Kent wrote in a confident yet humble voice. Sentences were precise and clear. Paragraphs and sections carefully constructed. Difficulties of analysis were explicitly confronted and then explained.

As a kind and generous reader, Kent has a unique capacity for helping an author understand what they are trying to communicate. In late 2013, I was struggling with the manuscript for *Madison’s Hand*.67 In October, I

---

60 KATHRYN PREYER ET AL., BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER (2009).
62 41 U.S. 539 (1842).
63 NEWMYER, supra note 61, at 307, 358, 365–68.
64 Id. at 156.
65 See id. at 388 (discussing how Justice Story’s legal system trended consistently toward the integration of constitutional law with other areas of the law).
67 BILDER, MADISON’S HAND, supra note 2.
emailed Kent a copy of, what I then called, “this awful manuscript.” A month later, he mailed back comments, suggesting structurally moving the detailed material about manuscripts to appendices—thereby saving the reader wading through a discussion of folios and watermarks. And, importantly, Kent helped me clearly articulate the point of the book. After reading his comments, I wrote a new paragraph reflecting what he told me I was saying. There, in 2013, in that exchange with Kent, was the point of my book:

Madison . . . could not even clearly see the Constitution as a coherent textual document. His Notes, in the form they existed in the summer of 1787, revealed this indeterminacy. They reflect the ways in which the politics and process of drafting the document postponed comprehension. Madison’s Notes were one man’s view of the writing of a constitution—one in which we only can glimpse aspects of our understanding of the Constitution.

And Kent responded to a revised introduction: “You have found your groove for sure! Keep on rollin’.” But I found my groove only because Kent helped light the way. Having lived so long with Marshall, Jefferson, Burr, and Story as they struggled to understand this emerging genre of a written constitution, Kent recognized that Madison could not see the Constitution as a coherent textual document.

Ever the consummate historian, Kent appreciated the perilous connection between scholarly accounts of the founding era and contemporary constitutional interpretative claims. He titled his Marshall biography: *the Heroic Age*. There was an obvious duality in the title. On the one hand, maybe he meant that the Age of Marshall was the Age of Heroes—a time in the past when justices were truly great, and, admittedly, there is a tad of that poignancy in the book. But the *Heroic Age* was also the recognition of the creation of myth, for the *Heroic Age* was the name that Hesiod gave to the period in which the great heroes of Homer lived—from the Argonauts to the Trojan war. And in this sense, Kent was cautioning us about the temptation to tell the story of the Framing generation as a *Heroic Age*, where we replaced unsettled answers with misleading clarity, and we turned ordinary men into demi-gods.

---

68 E-mail from Mary Bilder to R. Kent Newmyer (Oct. 10, 2013, 1:26 PM EST) (on file with author).
69 E-mail from Mary Bilder to R. Kent Newmyer (Nov. 12, 2013, 4:52 PM EST) (on file with author).
70 E-mail from R. Kent Newmyer to Mary Bilder (Nov. 18, 2013, 10:55 AM EST) (on file with author).
71 NEWMYER, supra note 66.
In these words, Kent praised our mutual dear friend Kitty Preyer: “[W]hat she willingly lets stand as the truth of history—is that for twenty years the matter was unresolved and open for debate. Only time, experience, and a changed political environment settled the issue.”72 Kent’s insight has always been this truth of history—certainly the *Heroic Age* of the framing—that matters were unsettled, unresolved, and open for debate. Nowhere is this insight as relevant as in coming to understand the unresolved and debatable genre of the Constitution itself.

---

72 Preyer et al., supra note 60, at 117.