There Is Something That Our Constitution Just Is

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Evan D. Bernick* & Christopher R. Green**

Abstract

Historian Jonathan Gienapp has launched a collection of widely celebrated attacks on originalism. He charges originalists with culpable neglect of the legal and political context in which the Constitution was framed and claims that the idea of a written Constitution was not prevalent in 1787 or 1788. Indeed, he goes so far as to call it a “myth.”

This Article critiques Gienapp’s arguments, contending that he is perpetuating myths of his own. It is not true that originalists haven’t seriously investigated what sort of thing the Constitution is. It is not true that there was widespread, fundamental disagreement during the Founding Era concerning just what the Constitution was. Finally, it is not true that the idea of a written Constitution emerged only after ratification.

Gienapp does raise important questions about how constitutional theory should address morality, present day customs, and history. We begin to answer them by investigating officeholders’ promises to obey “this Constitution” and then propose a research program dedicated to determining what people today think that the Constitution is and how it binds public officials. We hope that this program will yield insight into contemporary understandings of constitutional obligation, which Gienapp neglects almost entirely.

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INTRODUCTION .................................................................................................................. 249
I. A BRIEF REVIEW OF GIEAPP’S PHILOSOPHICAL AND HISTORICAL ARGUMENTS ................................................................. 252
II. CONSTITUTIONAL SELF-DEFINITION: THE SPATIAL AND TEMPORAL BOUNDARIES OF “THIS CONSTITUTION” ............. 266
   A. Constitutional Indexicals ...................................................................................... 266
   B. Framers Putting the Constitution in Their Pockets: References to a “Copy of the Constitution” and “the Constitution [Itself]” ......................................................................................................................... 271
   C. Paine v. Adams on Whether the British Constitution Exists 274
   D. Tucker, Iredell, Patterson, and Marshall on the Textual Constitution ................................................................. 276
III. THE CONCEPTUAL DISTINCTION OF “LAW” FROM “THE CONSTITUTION”: WHY JURISPRUDENCE DOES NOT SETTLE OUR CONSTITUTIONAL TRUTHMAKE... 277
IV. DISTINGUISHING ONTOLOGY FROM EPISTEMOLOGY: WHY UNCERTAINTY DOES NOT UNDERMINE A DETERMINATE CONSTITUTIONAL ONTOLOGY .................................................................................................................. 282
   A. Why Meanings Are Frequently Unknown .......................................................... 283
   B. Particular Instances of Epistemic–Ontological Slippage in Gienapp’s Arguments ................................................................................................................................. 285
V. DISTINGUISHING THE CONSTITUTION FROM ITS CONTEXT, ANALYTIC FROM SYNTHETIC, AND SENSE FROM REFERENCE .................................................................................................................. 289
VI. THE WAY AHEAD .......................................................................................................... 303
CONCLUSION .......................................................................................................................... 308
INTRODUCTION

Historian Jonathan Gienapp has launched a collection of widely celebrated attacks on originalism. He charges originalists with culpable neglect of the jurisprudential and political context in which the Constitution was framed and claims that the idea that the Constitution was a written text was not prevalent in 1787 or 1788; it only became so later. In so doing, he focuses, as very few others have, on issues of constitutional ontology: what the Constitution is and what renders constitutional claims true or false. In his presentation, originalism is fatally flawed as constitutional theory because it fails to give a proper account of the Constitution’s nature.

This is dense, difficult stuff. It draws upon philosophical literature that has generated no end of debate between specialists and is decidedly unfriendly to the layperson. Gienapp does not discuss modern Supreme Court cases or doctrines, and he does not opine on what the Court should do in cases involving abortion, the administrative state, the rights of criminal defendants, religious liberty, or any number of hot-button issues. Yet, for all that, Gienapp’s arguments have received a great deal of attention from scholars¹ and journalists,² and he has placed articles in mainstream publications.³

We’re happy for Gienapp and consider the attention well deserved. We agree with him about the importance of constitutional ontology. We are enthusiastic about his use of philosophical tools to shed light on a question that every person who promises to follow the Constitution ought to ask themselves: just what is it that I’m bound by? But a close reading of Gienapp’s writings reveals that the philosophers whom he marshals on his

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³ See, e.g., Jonathan Gienapp, Originalism Is the Rage, but Constitution’s Authors Had Something Else in Mind, BOS. GLOBE: IDEAS (Oct. 20, 2018, 9:00 AM), https://www.bostonglobe.com/ideas/2018/10/20/originalism-all-rage-but-constitution-authors-had-something-else-mind/KDd4Xj7laJ5AuzmRvysO/story.html [https://perma.cc/72PL-7U18] (arguing against the idea that the Constitution’s meaning was fixed at ratification).
side endorse approaches to language that either are deeply unappealing guides to constitutional decision-making or cannot settle the ontological debate in Gienapp’s favor. We also disagree with his readings of key historical details and with his conclusions.

Part I summarizes Gienapp’s critique of originalism, paying special attention to its philosophical foundations. In particular, it examines his use of W.V.O. Quine, Robert Brandom, and Wilfrid Sellars, all of whom adopt a holistic view of language. These philosophers can be read as raising doubts about whether any given word or phrase has determinate meaning on which two people can agree. If true, this would defeat the possibility of even such basic features of our constitutional discourse as disagreement about the Second Amendment—there would be nothing to disagree about.

We ultimately conclude that Gienapp is not committed to such radical indeterminacy. Determinacy is actually critical to his case against originalism, as he claims that the Constitution once was not but later became written. But we make a point of highlighting the unattractiveness of radically indeterministic theories of language as a guide to constitutional decision-making.

Part II of this Article responds to Gienapp’s argument that the Constitution was not generally understood to be a written text until after ratification. It explains how the Constitution was understood to be both spatially and temporally situated from the beginning. Spatially, the resolution of the Constitutional Convention submitting the Constitution to Congress describes the Constitution using the phrase “the preceding Constitution.” Temporally, the document to which that resolution was attached


"Underdeterminacy" is used to refer to issues or cases with respect to which the communicative content of a legal text may provide limits on legal content without fully determining that content. "Indeterminacy" is used to refer to issues or cases for which the communicative content provides no limits on legal content. "Determinacy" is used to refer to issues or cases with respect to which the communicative content fully determines all of the issues of cases that might arise in connection with the text.

Id.

uses words like “now” and “the time of the Adoption of this Constitution” to refer to the late 1780s and distinguishes “ourselves,” speaking at the Founding, from “our posterity,” who exist later. Gienapp’s treatment of constitutional indexicals like “this” and “now” is unsatisfying.

Part III considers Gienapp’s argument that originalists have misidentified the Constitution because they misunderstand the Founders’ concept of law. Gienapp interprets Founding Era references to unwritten customs and natural law as rejections of positivism, conflates positivism with textualism, and infers that the Constitution can’t be exclusively textual.

Gienapp’s interpretation of Founding Era jurisprudence is dubious; but more importantly, the inference is invalid. Devotees of a concept of “law” that permits unwritten law or incorporates morality into the criteria of legal validity may, with perfect propriety, also affirm an exclusively written Constitution. The very Founders that Gienapp reads as rejecting positivism and textualism spoke repeatedly of a written, textual Constitution. And they used the phrase “the Constitution itself” to refer to the text, not customs or aspects of the natural law.

Part IV argues, contra Gienapp, that the existence of Founding Era disagreement about the meaning of the Constitution doesn’t prove that the Constitution lacked a stable, fixed nature circa 1788. The spatial and temporal attributes of the phrase “this Constitution” can exist even if not everyone recognizes them or agrees about what they are. And the Founding Era debates Gienapp highlights don’t evince substantial disagreement about those attributes in any event.

Part V argues that Gienapp’s charge that originalists who affirm a written Constitution have ignored jurisprudential and political context and haven’t thought seriously about constitutional ontology is unfounded. Originalists are committed to reading the Constitution’s language according to what that language expressed in its original context. But there is a key difference between reading the Constitution in context and identifying

7. Id. art. II, § 1, cl. 5.
8. Id. pmbl.
9. 2 Annals of Cong. 1192 (1790); 1 Annals of Cong. 803 (1789) (Joseph Gales ed., 1834); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793).
context with content. We argue that Gienapp is mistaken to do the latter and defend the standard originalist picture of contextually enriched language.

Part VI considers normative questions about why, exactly, we should care about constitutional ontology. We argue that if it is true either that the meaning of words is radically underdetermined by the data or, as a practical matter, that meaning is inaccessible, the question of the Constitution’s nature would lack normative significance. This, in turn, would undermine a basic premise of Gienapp’s enterprise: it really does matter what sort of thing the Constitution is.

As we have suggested elsewhere, the pressing need in current constitutional theory is to assess what people today think that promise-making officeholders mean when they use the term “the Constitution.” Experimental jurisprudence that gleans information about what laypeople take the Constitution to be is essential in order for us to make sense of our current culture of constitutional promise-making, which Gienapp neglects almost entirely.

I. A BRIEF REVIEW OF GIEAPP’S PHILOSOPHICAL AND HISTORICAL ARGUMENTS

Gienapp’s attacks on originalism began with two 2015 articles. In Historicism and Holism, he claims that originalists are neglectful of the context in which the Constitution was adopted:

[T]he meaning of the part [must] only be understood by situating it in the context of the whole. The meaning of individual linguistic components—words, phrases, or utterances—can only be understood in terms of their relations within the conceptual vocabulary of which they are a part.

Solum and other originalists fail to grasp this point. Rather than seeing meaning and translation holistically, they conceive of it in thoroughly atomistic terms, believing that effective translation can be conducted at the level of term-for-term

No. 1  There Is Something that Our Constitution Just Is

without engaging in any broader form of substitution.13

In speaking of the “context of the whole,” Gienapp means not just the historical context of a particular utterance but interpreters’ entire “web of beliefs,”14 expressed throughout the entire rest of the language.15 Gienapp enthusiastically embraces philosophers like W.V.O. Quine,16 Donald Davidson,17 Wilfred Sellars,18 Richard Rorty,19 and Robert Brandom.20 Team Quine begins their analysis of language by denying the analytic–synthetic distinction drawn by the likes of Immanuel Kant and his followers like Gottlob Frege, Rudolph Carnap, H.P. Grice, and Peter Strawson.21 These philosophers think that analytic statements are true merely by virtue of the meaning of their constituent terms22—a classic example is “All bachelors are unmarried.”23 Synthetic statements, like “children wear hats,” require reference to extralinguistic reality in order to be evaluated.24

It is worth pausing to unpack just how radically indeterminate Quine’s account of language is on one common reading.25 Quine

13.  Id. at 941.
15.  See W.V. Quine, Two Dogmas of Empiricism, 60 Phil. Rev. 20, 39–40 (1951) (contending that “the totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges” and that “[n]o particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole”).
17.  Id. at 941 n.28, 943 n.36.
18.  Id. at 941 n.28, 951–52.
19.  Id. at 941 n.28, 943 n.36.
20.  Id. at 941 n.28, 952–53.
21.  See id. at 945 n.45 (decrying Solum’s “almost Kantian commitment to the logical priority of philosophical reasoning”). For Kant and others on the analytic–synthetic distinction, see infra notes 22–24 and accompanying text.
24.  See Rey, supra note 22 (explaining that analytic statements like “Pediatricians are doctors” are considered true “by virtue of the meanings of their words alone” while synthetic statements like “Pediatricians are rich” depend upon knowledge of how the world works).
25.  Quine is not easy to parse. We present a radical-indeterminist reading of Quine here, both because it is a common reading of his work and because not much of importance follows if more modest readings of Quine are accurate. See Gary Ebbs, Quine Gets the Last Word, 108 J. Phil. 617, 617 (2011), for one such modest reading that acknowledges but challenges the “entrenched” view that Quine holds sentences to be meaningless except in the context of an entire system of stimulus-responses. Davidson, too,
assumes physicalism—that is, that all of the truths of nature are physical truths. He then claims that the translation of any given utterance is not determined by physical truths because different and incompatible theories of translation have equal power to explain all observational data bearing upon linguistic meaning—by which he means the “stimulus meanings” of sentences. These stimulus meanings encompass (1) the class of situations in which a speaker would assent to sentence $S$ and (2) the class of situations in which the speaker would dissent from $S$.

Quine’s most memorable and illustrative example of his indeterminacy thesis involves the translation of a fictional language into English. A translator and a native speaker meet, a rabbit scurries by, and the native speaker utters, “Gavagai.” After observing this take place several times, the translator treats “Gavagai” as a short sentence: “Lo, a rabbit.” So far, so good; it would seem that “Gavagai” could be translated as “rabbit.” But Quine points out that a second translator who, confronted with the same observational evidence, translates “Gavagai” as “undetached part of a rabbit” (say, “rabbit ear”) would adopt a translation that is equally supported by the observational evidence.

This does not at first appear to be particularly destabilizing. It can be read to take a similar view:

If sentences depend for their meaning on their structure, and we understand the meaning of each item in the structure only as an abstraction from the totality of sentences in which it features, then we can give the meaning of any sentence (or word) only by giving the meaning of every sentence (and word) in the language.

Donald Davidson, *Truth and Meaning*, 17 Synthia 304, 308 (1967). But see Ernie Lepore & Kirk Ludwig, Donald Davidson: Meaning, Truth, Language, and Reality 99 n.90 (2005) (arguing, on the basis of a holistic reading of Davidson’s work, that this must be a “loose expression” or an “exaggeration”).

26. WILLARD VAN ORMAN QUINE, WORD AND OBJECT 1–2 (new ed. 2013) (suggesting that all sensory experiences which lead to language are rooted in the observation of physical objects).

27. Id. at 29.

28. Id. Late in life, Quine did affirm the reality of numbers and other objects of classical mathematics on the ground that these entities are indispensable to our understanding of the physical world. See W.V. Quine, THEORIES AND THINGS 148–50 (1981) (recognizing that “numbers and functions contribute just as genuinely to physical theory as do hypothetical particles”). This would be cold comfort to constitutional decision-makers—the Constitution is full of numbers, but numerical provisions in the Constitution are rarely contested or litigated.


30. Quine, supra note 26, at 25.

31. Id. at 46.
would explain why translating words from one language into another language is difficult without casting doubt upon the everyday phenomenon of intralinguistic communication. Perhaps the solution to the problem would involve just gathering more observational evidence.

Quine contends, however, that his point applies not only to the interpretation of the words of other English speakers but also to a single speaker’s own words across time. He is committed to the view that behavioral data underdetermines the stimulus meanings of sentences that include even “natural kind” terms like “rabbit”—terms that seem to refer to things that exist out there in the natural world, independently of the interests and actions of human beings. As Scott Soames summarizes, Quine holds that observational data will equally support that:

(i) the term ‘rabbit’ as used by us in the past means the same as the term ‘rabbit’ as used by us now, (ii) the term ‘rabbit’ as used by us in the past means the same as the phrase ‘undetached rabbit part’ as used by us now, or (iii) the term ‘rabbit’ as used by us in the past means the same as the phrase ‘temporal stage of a rabbit’ as used by us now.

Originalists, of course (those of a textualist persuasion, at least), are committed by virtue of their basic project to the existence of determinate constitutional meanings at particular times (1787, 1791, or 1868) and the possibility of translating those meanings into the language of today. They need not, and do not, deny that the meaning of words changes over time, and leading originalists consider meaning to be constituted, at least in part, by use. They can, and do, acknowledge that use might underdetermine meaning—that constitutional terms might be vague in their application to particular facts or phenomena or ambiguous in the sense of admitting of two or more equally plausible

32. Id. at 48.
33. See generally W.V. QUINE, NATURAL KINDS, IN ONTOLOGICAL RELATIVITY AND OTHER ESSAYS, supra note 29, at 114 (introducing the concept of “natural kind” terms).
35. See Richard H. Fallon, Jr., Judically Manageable Standards and Constitutional Meaning, 119 HARV. L. REV. 1274, 1317 (2006) (defining originalism as “the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning.”).
36. See, e.g., Lawrence B. Solum, The Interpretation—Construction Distinction, 27 CONST. COMMENT. 95, 99 (2010) (stating that the meaning of a communication is determined, inter alia, by the “linguistic practice” that exists at the time the communication is made).
interpretations.\footnote{See id. at 97–98 (explaining the difference between vagueness and ambiguity and noting their presence in legal and constitutional texts).}

Originalists can, however, be expected to recoil at the idea that the referents of even the most prosaic terms in common use, to say nothing of all hotly debated constitutional concepts, are necessarily underdetermined by the available data. Were that true, for any given claim that “the Constitution requires X”—including that “the Constitution requires that a bill be presented to the President before it becomes a law,”\footnote{U.S. CONST. art. I, § 7, cl. 2.}—there is an equally plausible competing claim that “the Constitution does not require X.” This would not merely be a problem for originalists. Non-originalists who would argue that constitutional meaning is determined in whole or in part by the use of its terms in legal or popular discourse \textit{today}\footnote{See, e.g., Richard M. Re, Promising the Constitution, 110 NW. U. L. REV. 299, 304 (2016) (arguing that in order to determine the content of a public official’s oath to uphold the Constitution, “theorists should focus first on the meaning of ‘the Constitution’ at the time of each official’s oath”.)} would have difficulty explaining how that determination is possible given multiple, competing, equally well-supported translations of, say, “commerce.”

Another 2015 article, \textit{Making Constitutional Meaning},\footnote{Jonathan Gienapp, Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism, 35 J. EARLY REPUBLIC 375 (2015).} focuses on the removal debate during 1789 (what the Supreme Court has called the “decision of 1789”\footnote{Myers v. United States, 272 U.S. 52, 141–42 (1926).}) that discussion “set off a process of conceptual making and remaking that would change the Constitution itself.”\footnote{Gienapp, supra note 40, at 399.} Gienapp argues that rather than the constitutional text expressing meaning in virtue of preexisting linguistic legal conventions, the “semantic force” of the Constitution derives only from such later discussions:

By fixing to the document not just new meanings but, most significantly, determinate practices of interpretation (rules that could guide all forms of constitutional interpretation), these politicians played as decisive a role in shaping the Constitution as those who drafted or ratified it. They did not rewrite its words, but they constructed the tacit background against which alone those words could have any semantic force.\footnote{Id. at 370.} Gienapp insists on the impossibility of reading the Constitution’s
provisions related to removal outside of such a post-adoption argumentative context:

Whatever dispositive constitutional interpretations original meanings might provide, the crucial point is that no credible, original understanding of constitutional meaning can be grasped unless the debates in which such meanings were hashed out are reconstructed in some detail.44

While Gienapp’s philosophical views are only mentioned briefly in this article—a short reference to Quentin Skinner and Ludwig Wittgenstein45—this sort of approach has strong affinities with Robert Brandom’s equation of meaning with “inferential role.”46 Only by seeing what role the text of the Constitution played in the logic of later thinkers and politicians can we understand the meaning that text expresses.47 Gienapp goes on in a footnote:

Privileging argumentative context joins a long lineage of thinking in the study of the history of ideas that, at its core, assumes that meaning cannot be extracted from the disputational context in which it is generated. Whether such is to invoke Wittgenstein’s insistence that meaning follows use or Skinner’s contention that to understand an utterance is ultimately to comprehend its illocutionary force, or the impact it would have in a specific discursive context, the point, powerfully, remains the same: Understanding original meanings is only possible by re-creating the disputes in which they earned their shape and impact.48

Note Gienapp’s particular temporally extended interpretations of Wittgenstein and Skinner’s ideas: meaning follows subsequent use, i.e., use of the Constitution after 1789, and understanding that meaning requires an understanding of the illocutionary force of subsequent invocations of the Constitution, not just the force of the linguistic acts of the ratifying conventions adopting it in 1787 and 1788.

44. Id. at 390–91.
45. Id. at 392 n.16.
46. See ROBERT B. BRANDON, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 177 (1994) (“The different circumstances under which various claims are taken or treated as requiring justification . . . is part of what confers on the sentences that express them the different meanings that they have. It is part of the inferential role they play . . . .”). See Lee Farnsworth, Comment, Infentialism, Title VII, and Legal Concepts, 85 U. CHI. L. REV. 1775, 1795–1802 (2018), for a useful summary, with special attention to the implications of Brandomian inferentialism for law.
47. Gienapp, supra note 40, at 379.
48. Id. at 392 n.16.
We do not read Wittgenstein or Skinner as claiming that it is impossible to reconstruct meaning from 1791 because the disputational context in which, say, “the freedom . . . of the press”49 is used in 1798 was quite different. Jules Coleman and Brian Leiter have written of invocations of Wittgenstein’s claim that all linguistic meaning is dependent upon conventional use50 to support claims about the radical indeterminacy of legal language:

All that follows is that there are no facts about meaning that are completely independent of how we are disposed to construe meanings. Meaning is not radically indeterminate; instead, meaning is public—fixed by public behavior, beliefs, and understandings. There is no reason to assume that such conventions cannot fix the meaning of terms determinately.51

Perhaps Gienapp does not dispute this, in which case we have no fundamental quarrel. But if he wants to make a broader claim about the meaning of words and phrases being contingent upon comprehensive agreement about the inferences in which they occur, he must and we do.

Consider a critique leveled against Brandom by Jerry Fodor and Ernie Lepore. If the meaning of a word like “rabbit” depends upon agreement upon all the correct inferences in which the word “rabbit” occurs, it seems as if linguistic communication is impossible—no two people likely agree to this extent.52 Run this sort of inferentialism on contested concepts like the freedom of the press and it might be that even the easiest cases in our constitutional doctrine—say, involving the government’s licensing of political speech—cannot be resolved on the basis of interpreting constitutional language.

We don’t think Gienapp reads Brandom this way. He writes of “recreat[ing] the Founding era’s games and attendant practices from within—based on real moves within them” precisely in order

49. U.S. CONST. amend. I.
52. See Jerry Fodor & Ernie Lepore, Brandom Relegated, 74 PHIL. & PHENOMENOLOGICAL RGH. 677, 684 (2007) (“How can we use the form of words ‘It’s raining’ to communicate to you our belief that it’s raining unless the world [sic] ‘raining’ means the same to all of us?”).
No. 1  There Is Something that Our Constitution Just Is

that “original meaning . . . [can] come into sight.”53 He urges in his criticism of originalists that “[s]ystematically recovering the original meaning of Founding-era utterances requires translating eighteenth-century language holistically,” evidently believing that “original meaning” is something that can be recovered if only we trace carefully “the web of inferential relations that gave individual utterances their specific content.”54 This is not the language of someone who believes that comprehensive inferential agreement is the price of any meaning at all. Gienapp seems instead to be making the more modest claim that originalists just aren’t attentive enough to discursive context.

This modesty is also in evidence in his 2018 book, The Second Creation.55 In it, Gienapp claims that the Constitution’s nature was not fixed when it was proposed in September 1787 or adopted between then and the summer of 1788 but only began to exist at some point in the 1790s.56 He criticizes a textualist conception of the Constitution’s nature:

It might seem obvious that, in 1787, the federal Constitution was a fundamental charter of government, comprising seven articles, written on four sheets of parchment, which collectively structured and distributed powers within a new federal polity. In a certain sense, this basic description is obviously correct. But in another, no less important sense, it is highly misleading, immediately begging all the critical questions.57

His focus is on history itself rather than the philosophical presuppositions of originalism, though a few notes explain how he conducts his entire project through Brandom’s lens:

Brandom has described human beings’ core rational activity as playing the game of “giving and asking for reasons,” and shown how this practice can so readily transform shared authoritative standards. This insight can help us understand constitutionalism in the 1790s. For Americans coping with an uncertain Constitution, the decade following ratification was a contest over which game of giving and asking for constitutional reasons they ought to be playing. Different games imagined the Constitution differently, meaning much more was on the line than merely

54.  Id. at 955.
56.  Id. at 3–4.
57.  Id. at 4–5.
one interpretation or another. The Constitution itself was at stake. If a certain game won out, then a certain conception of the Constitution would as well. This reality explains why post-ratification debates did so much to create the Constitution . . .58

Gienapp’s appropriation from Brandom (who appropriated it from Wittgenstein59) of the concept of a game is telling. All games—from chess to Calvinball60—are rule-based normative systems. A game’s rules might not be laid down by some particular authority and they might change over the course of time—such as by adding a three-point line or imposing penalties for “targeting” a player’s head when tackling—but rules there must be. That is why it is possible for Gienapp to refer to competing games concerning the Constitution’s identity, and one game “w[inning] out.”61 How else could he identify the winning game but by observing that one set of rules—identifying the Constitution as a text—displaced another set of rules—identifying the Constitution as something else?

We are not sure that Brandom is committed to the impossibility of identifying the rules of a language game at any particular point in time. To speak of scorekeepers who can determine whether an inference is correct or not is to accept the existence of norms that constrain meaning at a given time. Brandom’s writings about the law tend to confirm this.

Brandom’s view of legal concepts depends upon a Hegelian model of reciprocal recognition that is rather obscure.62 It is easiest to appreciate its practical uptake by identifying the alternative conceptions of legal concepts that Brandom rejects. The first of these alternatives—which Brandom associates with

58. Id. at 9.
60. See 3 BILL WATTERSON, THE COMPLETE CALVIN AND HOBES 57 (2005) (illustrating Calvinball as the least organized sport where new rules are frequently added).
61. GIENAPP, supra note 55, at 9.
No. 1  

There Is Something that Our Constitution Just Is

Saul Kripke’s influential reading of Wittgenstein—holds that “the actual use of concepts radically underdetermines the norms that articulate their content.”64 This Brandom sees in “[e]xtreme forms of legal realism.”65 These forms hold that legal norms always underdetermine judicial decisions—nonlegal psychological facts that are in no sense norms do the determination. Against extreme realism, Brandom argues that “conceptual norms are not completely indeterminate . . . since a lot of actual applications have been endorsed as correct by potentially precedent-setting judgments.”66

It is true that Brandom goes on to say that any constraining norms are “the product of that activity” and allows for the possibility of future scorers forging different norms in the course of future decisions.67 Still, those norms are not just a heap of judgments—they are rationales articulated by judges that “serve as a reason justifying some future applications and not others.”68 Judges do not find and apply static legal concepts—that, too, is a misconception. But there are rules to the language games that they play.

Originalists and non-originalists both could accept a Constitution the nature and content of which are determined by discursive games that operate in accordance with evolving rules. Originalists do, of course, insist that contemporary decision-makers ought to give effect to the meaning that a provision carried when it became part of the Constitution. But whether that Constitution is the same entity as the Constitution today or whether a given provision carries for most public officials or most people the same meaning today might be contingent upon whether people are following the same conventions that characterized the original games. Non-originalists who prioritize the contemporary meaning of the Constitution tend to deny that people today are playing the original game. However, they cannot make any claims at all about the Constitution or constitutional

63. See generally Saul A. Kripke, Wittgenstein On Rules and Private Language: An Elementary Exposition (1982) (discussing the significance of the rule-following paradox introduced by Wittgenstein for the possibility of private language, i.e., a language based on an individual’s subjective experience of the world and understandable only by that individual).
65. Id. at 38.
66. Id. at 36–37.
67. Id. at 37.
68. Id. at 37–38.
meaning unless there is some different game, governed by different rules, in which people are currently participating.

Suppose, however, that Gienapp did take Brandonian inferentialism to negate the possibility of identifying at any given time what the Constitution or the meaning of some constitutional provision is. If so, we’d think him wrong about Brandon, but it doesn’t matter—his principal claims don’t turn on it.69

Consider an analogy drawn by Jeremy Wanderer.70 A child who knows how to kick a ball, not touch a soccer ball with his hands, and identify and aim for goals on a bounded field is playing soccer.71 A conversation about the activity between the child and an adult who (unlike the child) knows what it means to be offside is a conversation about soccer.72 Is Brandonian inferentialism best understood to hold that “soccer” means something different to the child and the adult because the adult has greater knowledge of the inferences—correct and incorrect—in which “soccer” occurs? This seems wildly counterintuitive and implausible to us.73 But it is not essential to the principal claims quoted above: (1) constitutional meaning is forged through language games involving the giving and receiving of reasons; (2) the rules of language games can change.

In a 2020 article, The Myth of the Constitutional Given,74 Gienapp claims that originalists are dogmatically slumbering under the influence of Wilfrid Sellars’s “Myth of the Given”75:

[T]he decisive originalist work in fact takes place, not at the level of interpretation—where most originalists fastidiously distinguish public meaning from competing interpretive targets—but rather at a prior, more fundamental, level of

69. See Gienapp, supra note 12, at 955 (affirming that the “original meaning” of constitutional provisions can ultimately be determined).
70. JEREMY WANDERER, ROBERT BRANDON 21 (2008).
71. Id.
72. Id.
73. See Farnsworth, supra note 46, at 1806. As Farnsworth explains:

[If] the child knows to kick the ball, not to handle it with her hands, and that the touch lines mark the boundaries of the field, etc., then the child’s activity can genuinely count as playing soccer. Furthermore, this is true even if the child does not subjectively endorse all sorts of inferential consequences of soccer playing: that the ball cannot be passed to a teammate in an offside position, for example.

75. WILFRID SELLARS, EMPIRICISM AND THE PHILOSOPHY OF MIND 33 (1997)
constitutional rendering—where originalists fashion a particular image of the Constitution in the mind. Public meaning of what exactly? This, it cannot be stressed enough, is the operative question. And there is nothing immediately helpful about answering, over and over: “the text of the Constitution.” For this is less answer than dogmatic stipulation, one that tends to beg most important questions pertaining to the Constitution’s core features and the character of its content. Enumerationism allows originalists (and often their antagonists) to begin with an object of interpretation that is matter-of-factly passed off as “the Constitution,” now and always, when in fact the object they hold in their minds is the product of considerable constructive work. It allows them to see something as given that is in fact a product of the imagination.76

Here again, Gienapp invites readers to consider his philosophical commitments. Ironically, Sellars never precisely identified the Myth of the Given that he is credited with discrediting.77 But two myths associated with Sellars’s influential essay are relevant here. The first, epistemic myth holds that people have unmediated access to the natural world of sense data.78 Sellars sought to dispel it by arguing that our perceptions are mediated by normative commitments about what we may or ought to accept in our particular circumstances.79 This is true of even seemingly basic observations such as “that tie is green.” Sellars writes: “[I]n characterizing an episode or state as that of knowing, we are not giving an empirical description of that episode or state; we are placing it in the logical space of reasons, of justifying and being able to justify what one says.”80 The capacity to acquire observational concepts (“green”), apply them (“that tie is green”), and be able to justify their application (“I am sure that that tie is green because”) is developed over time through training and with the assistance of competent knowers.81

The second myth is linguistic. Against the view that the

76. Gienapp, supra note 74, at 187–88 (footnotes omitted).
78. See id. at 182 (summarizing the first epistemic myth as holding that “man can conceive things in the world as being of a certain kind with the help of self-verifying states without having any concepts about what it is to be of that kind”).
79. See SELLARS, supra note 75, at 43 (arguing that “the ability to recognize that something looks green . . . presupposes the concept of being green,” which is itself a normatively laden concept).
80. Id. at 76.
81. Id. at 43.
referents of words and phrases either inhere in those words or phrases or are determined by a speaker’s psychological state, Sellars holds that the meaning of a word depends upon the role it plays in inferences.\textsuperscript{82} Inferential roles are themselves determined by social rules governing use.\textsuperscript{85} As Sellars put it in a reply to Hilary Putnam, “language is a social institution, and . . . meaning is to be construed in social terms.”\textsuperscript{84}

How is it, then, that our language can have any relation to the world at all? How can we avoid a linguistic idealism that is completely untethered from reality? Here, Sellars offered a complex picture inspired by the earlier Wittgenstein.\textsuperscript{85} The presentation and evaluation of this account are beyond the scope of this Article.\textsuperscript{86} Like Quine, Sellars is hard to parse.

Fortunately, our beef with Gienapp doesn’t require us to get too into the weeds about the precise content of a myth that Sellars himself did not pinpoint. Nor does it require us to evaluate his solution to the problem of linguistic idealism. Gienapp’s use of Sellars suggests skepticism but not despair about the possibility of acquiring knowledge of particular things and identifying the referents of particular words and phrases, including “the Constitution.” Thus, he does not argue that we cannot answer the question of whether enumerationism is true as a theory of what powers the Constitution allocates to the federal government. Rather, he argues that originalists have been insufficiently reflective and have brought into their evaluation of the evidence a distorting frame without recognizing that they are doing so.\textsuperscript{87}

Finally, in a 2021 article, \textit{Written Constitutionalism, Past and Present}.\textsuperscript{85}

\textsuperscript{82} See Wilfrid Sellars, \textit{Inference and Meaning}, 62 \textit{Mind} 313, 317 (1953) (contending that “material rules of inference are as essential to meaning as formal rules”). See generally Julian Murzi & Florian Steinberger, \textit{Inferentialism, in 1 A COMpanion to the Philosophy of Language} 197 (Bob Hale, Crispin Wright & Alexander Miller eds., 2d ed. 2017), for an overview of inferentialism that includes discussion of Sellars and Brandom.

\textsuperscript{83} See supra notes 45–51 and accompanying text.


\textsuperscript{85} See Wilfrid Sellars, \textit{Naming and Saying}, 29 \textit{Phil. Sci.} 7, 7 (1962) (discussing the “theory of relational statements as pictures” attributed to Wittgenstein); Wilfrid Sellars, \textit{Truth and \textbf{\textit{Correspondence}}}, 59 J. \textit{Phil.}, 29, 39 (1962) (distinguishing said theory from the “correspondence theory of truth”).

\textsuperscript{86} See generally Guido Bonino & Paulo Tripodi, \textit{Sellars and Wittgenstein, Early and Late, in SELLARS and THE HISTORY OF MODERN PHILOSOPHY} 216 (Luca Cornu & Antonio M. Nunziante eds., 2018), for an overview.

\textsuperscript{87} See supra note 13 and accompanying text.
Present, Gienapp makes explicit his belief that we can gain knowledge of what the Constitution is, our linguistically mediated perception notwithstanding. He claims that originalists, especially the ones who embrace positivism about the nature of the law, improperly favor James Iredell’s and Thomas Paine’s conception of the Constitution as a spatially situated text to John Quincy Adams’s understanding of the Constitution’s text as merely evidence of a deeper constitution accepted by the people:

The Constitution as we know it, however, depends on attaching a particular theory of constitutionalism to it: one that the founding generation did not initially share. Prior to 1787, one can find scattered commentary [from Iredell and Paine] anticipating something like our brand of written constitutionalism, but these solitary examples were overwhelmed by contrary opinion. And although attitudes toward writtenness no doubt began to change beginning in the 1790s, older habits lingered for decades to come. It took work to see the Constitution as we do today: to see its content in such positivist, linguistic terms and its boundaries in such sharply textual terms, and to see it as an independent source of law.

Gienapp says that the idea of a Constitution that could be placed in one’s pocket was not prevalent in 1787 or 1788:

It is impossible to overstate how central the writtenness of the Constitution is to originalism. To orthodox originalists, it is the instrument’s defining attribute. The Constitution is not some mysterious omnipresence, amorphous jumble of customs and norms, or guiding spirit that morphs with the times; it is a tangible thing. You can carry the Constitution around in pocket form or see it behind glass at the National Archives. It is a physical document, compactly circumscribed in space. All because it has been reduced to written form.

He does, however, contend that the idea of a written

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89. Id. at 335–36 (arguing that the proper process for “recovering the original Constitution” involves “recreating, from the ground up, [the Founders’] non-positivist understanding of written constitutionalism,” a process which entails the assumption that we can gain knowledge of the Constitution).
90. Id. at 335 (footnotes omitted); see also id. at 343 (relying on John Quincy Adams’s 1791 response to Paine’s Rights of Man (quoting 1 JOHN QUINCY ADAMS, LETTERS OF PUBLICOLA, in WRITINGS OF JOHN QUINCY ADAMS 65, 74 (Worthington Chauncey Ford ed., 1913))); id. at 335 & n.47 (characterizing Paine’s and Iredell’s textualist understandings of the Constitution as “scattered commentary”).
91. Id. at 325 (footnotes omitted).
Constitution with a fixed ontology became prevalent in the 1790s and remains so today:

Prior to the 1790s, fixity and change had been entwined in Anglo-American constitutional imagination . . . . [I]n the aftermath of a decade of debate over how to understand the United States Constitution, they were understood as mutually exclusive antagonists.

. . . No matter how bitterly Americans have disagreed since the 1790s about how they ought to interpret the Constitution or the right way to discover its meaning, more often than not they have imagined the Constitution in much the same ways—as a written, discrete, insert, historically conceived object composed of words, contained on parchment, and enforced by judges. . . . [I]t is a common object born of a common understanding of fixity organizing a common field of vision and argumentation. Beneath disagreement about the Constitution’s meaning, in other words, often lies a shared conception of the Constitution’s constitution. 92

Where does this leave us? The weight of the evidence suggests that Gienapp’s case against originalism relies upon linguistic and ontological foundations that are—if not uncontroversial—modest. The philosophers he invokes claim that people can say true things about the world, reject linguistic indeterminacy, and seek to anchor language to reality. Originalists can get on board with all of that.

Partisans in the debate that Gienapp has generated can assess his case for his understanding of what the Constitution is without taking sides in philosophical battles that have raged for centuries. Is he right that originalists have failed to consider that their conception of the Constitution might be mistaken? Is he right that originalists are mistaken? We think not.

II. CONSTITUTIONAL SELF-DEFINITION: THE SPATIAL AND TEMPORAL BOUNDARIES OF “THIS CONSTITUTION”

A. Constitutional Indexicals

Suppose we agree with Gienapp this much: the meaning of a word is determined in part by discursive use. Insofar as we seek to identify what the Constitution was in 1788, we must take account of the word’s use in the document that was proposed by Congress

92. GIEAPP, supra note 55, at 326.
and ratified by the states. To avoid begging the question, we will refer to it simply as “the 1788 document.”

Elsewhere, one of us has cataloged the ways in which the 1788 document uses indexical language to situate an entity—“this Constitution”—in time and space. Rather than neglecting the contingency of our Constitution’s nature, that article explains it at great length. Spatially, the Constitution is a text, temporally, that text expressed meaning at the time the text was adopted, rather than today or intergenerationally.

Spatially, the 1788 document invites its readers to think of the Constitution as something that can be placed in one’s pocket. So, too, did the Philadelphia Convention: when it sent the document to New York for consideration by the Confederation Congress, it used the language “the preceding Constitution” to refer to the 1788 document. The 1788 document precedes this resolution textually. When Massachusetts wrote its constitution in 1780, it required, “This form of government shall be enrolled on parchment, and deposited in the secretary’s office.” New Hampshire did the same in 1784. To be enrolled on parchment is to be textual. If we are looking for the exact place at which Massachusetts’s or New Hampshire’s constitution renders constitutional claims true or false, we are given very precise directions: go to a particular office and find a particular collection of marks on parchment. Those marks are the place at which the 1788 document expresses its requirements.

To find out when the 1788 document expresses its requirements, we look for temporal language. The document refers to time in several places. Two are extremely important:

93. See Christopher R. Green, “This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607, 1641–67 (2009) (cataloging and describing various indexicals in the Constitution that support a particular version of originalism the author calls “textualist semi-originalism”).
94. U.S. CONST. art. VI, cls. 2–3.
95. See Green, supra note 93, at 1637–41 (discussing “The Contingency of Constitutional Ontology”).
96. See id. at 1642–43 (arguing that the words “this Constitution” support defining the Constitution as a textual document based on evidence from state constitutions using the same language).
97. See id. at 1657 (“[T]he Constitution is a historic textual event, textually expressing meaning at a particular time—the Founding”).
98. Resolution of the Federal Convention, supra note 5, at 1005.
99. Id.
100. MASS. CONST. ch. VI, art. XI.
safeguarding the Northwest Ordinance and the early operation of the system for presidential selection that later on would have a natural-born-citizen requirement. Article II, Section One, Clause Five requires, “No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.” The Constitution is adopted at a particular time, and, of course, exists at that time. And that time is not today, the time at which the presidential-eligibility provision is applied, because otherwise, it would simply mean that any citizen of the United States, full stop, may be president, which obviously isn’t what the provision means. Article I, Section Nine, Clause One requires, “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”

Before 1808, Congress could not prohibit South Carolina or Virginia from importing slaves because they already existed as states at the Founding. But it could prohibit Ohio from doing so, even though it became a state in 1803, because “now existing” refers to the time of the Founding, not the time at which “this Constitution” is applied. As with the temporal reference in Article II, the “now existing” could have been omitted entirely if it were not to be restricted to the Founding. A third prominent temporal indexical appears in the Preamble, which distinguishes “ourselves” (i.e., the “We the People” who “ordain and establish this Constitution”) from “our posterity.” Because an intergenerational constitutional author would already include its posterity, We the People must be confined temporally to the Founding.

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102. See U.S. CONST. art. I, § 9, cl. 1 (preserving the Northwest Ordinance’s prohibition on slavery in the new territories by limiting the restrictions of the clause to “the States now existing”).
103. Id. art. II, § 1, cl. 5 (emphasis added).
104. Id. art. I, § 9, cl. 1.
105. Joint Resolution for Admitting the State of Ohio into the Union, Pub. L. 83-204, 67 Stat. 467 (1953). Although Ohio became a state in 1803, Congress did not fix a final loophole in the Enabling Act’s admission process until 1853, with the date of statehood in that resolution being listed retroactively at 1803. Id.
106. James Wilson explained “now existing” this way to the Pennsylvania Convention. See THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 463 (Merrill Jensen ed., 1976) (Dec. 5, 1787) (“I think the new states which are to be formed will be under the control of Congress in this particular . . . .”)
108. Id.
No. 1 There Is Something that Our Constitution Just Is

Gienapp’s description of the article on constitutional indexicals flattens out the two parts of its argument—the spatial and temporal aspects of the 1788 document’s definition of the Constitution. It would be possible for the document to define the Constitution in one, both, or neither of these ways. It could situate the Constitution temporally but not spatially. Stephen Sachs’s Originalism Without Text imagines such a regime, in which later officers strive to resolve disputes as the Founders would have resolved them but not pursuant to any particular text.109 Or the document could define the Constitution as a text but one understood to be authored over time, i.e., spatially but not temporally. Common law concepts like “privity” or “negligence,” which keep the same text but develop as multiple generations of judges manipulate them,110 are a model for this sort of Constitution. Or the document could define the Constitution as neither historical nor textual.

But as we read the indexical evidence, the document identifies itself as the Constitution. It defines itself as both textual and historical—both spatially and temporally. The separate sections of the article were intended to make these two independent aspects of constitutional self-definition clear. One lengthy section explains the basis for “Textualism,”111 while another separate lengthy section explains the basis for a “Historically Confined, Nonintergenerational Constitutional Author.”112

Gienapp claims, however, that “this linguistic analysis focuses on why the Constitution’s meaning might have been locked at the moment of adoption, not why that meaning is already itself exclusively textual.”113 To the contrary: speaking of the Constitution as putting itself on parchment, and physically enclosing “the preceding Constitution”114 with a resolution, are why we think the Constitution is textual, i.e., an expression of


110. See Allan C. Hutchinson, Work-in-Progress: Evolution and Common Law, 11 TEX. WESLEYAN L. REV. 253, 254 (2005) (“Common law adjudication is viewed as an exercise in principled justification . . . . Judges are considered to judge best when they distil the principled spirit of the past and rely upon it to develop the law in response to future demands.”).

111. Green, supra note 98, at 1648–56.

112. Id. at 1657–66.

113. Gienapp, supra note 88, at 331–32 (citing Green, supra note 98).

114. Resolution of the Federal Convention, supra note 5, at 1005.
meaning. Using words like “now” and “the time of the adoption of this Constitution” are why we think that meaning was locked at the moment of adoption. These two contingent aspects of our Constitution’s self-definition are independent and are supported by independent sorts of evidence.

When Gienapp confronts indexical evidence, he understates its significance. For instance, he notes the requirement that the New Hampshire constitution “shall be enrolled on parchment.” He notes, however, that the state constitution was also to be “part of the laws of the land,” and adds this gloss: “Its textual component would be incorporated into the more diffuse body of fundamental law that comprised the ‘laws of the land.’ The new constitutions’ written identity thus posed no necessary complications to what had long been assumed, and thus demanded no immediate reworking of established constitutional habits.”

The “thus” in Gienapp’s gloss here simply does not follow. First, he undersells the scope of the constitutional self-definition. It was not simply the “textual component” of the state constitution that was to be enrolled on parchment—the constitution itself was to be. Nothing about this provision even hints at some sort of textual/customary hybrid constitutional identity that would include the text as a mere component. Such a hybrid could not be enrolled on parchment and stored in a particular office. Further, inclusion in a broader category like “laws of the land” does not mean that the constitution had the same nature as other members of that category. Just because the constitution is one of the laws of the land does not mean that other such laws are equally fundamental.

Erik Encarnacion and Guha Krishnamurthi have recently offered some comments on the argument for constitutional self-definition from constitutional indexicals. Like Gienapp’s discussion of New Hampshire’s explicit textualism, however, their suggestions just do not fit with the details of how the Constitution presents itself. They argue that “this Constitution” could refer to our entire “legal system,” of which the constitutional text is only the “kernel” and which also includes lots of other “institutions,

116. Id. (emphasis added) (quoting N.H. Const. art. 101).
117. See generally Erik Encarnacion & Guha Krishnamurthi, The Oath Doesn’t Require Originalist Judges, 15 HARV. L. & POL’Y REV. 571 (2021) (rejecting the argument that the “ritual” of taking the constitutional oath commits judges to originalism).
No. 1  There Is Something that Our Constitution Just Is  271

laws, and customs together with the principles and goals that animated them.”118 This understanding of “this Constitution” just doesn’t fit the specific indexicals used in the text. The resolution refers to the preceding Constitution, and the Constitution’s text is what precedes the resolution, not other “institutions, laws . . . customs . . . principles and goals.”119 Other customs and principles and goals are not engrossed on parchment and left in particular places.

B. Framers Putting the Constitution in Their Pockets: References to a “Copy of the Constitution” and “the Constitution [I]tself”

Independent of the Constitution’s own self-definition, the Framers regularly distinguished the explicit written Constitution that American states and the federal government would have from the sort of British traditional-customs constitution that they had lived under before the Revolution. Some, like Paine, thought that a traditional-customs constitution was no constitution at all, and others, like John Quincy Adams, pushed back against these sorts of claims.120 But it was commonplace for both Paine and Adams and everyone else to speak textually of the Constitution, and not merely as referring to part of the Constitution. They spoke regularly, as the Convention itself did, of enclosing the Constitution itself with a letter. They were not enclosing a description of traditional customs or of the natural law, but of constitutional text. That’s what the Founders thought the Constitution was.

Initially, this was the way the Founders spoke of state constitutions. John Jay wrote to Richard Morris in 1777, “The enclosed is a Copy of the Constitution of this State, which I am persuaded you will read with Pleasure.”121 Secretary of the Continental Congress Charles Thomson wrote to Thomas Jefferson, then governor of Virginia, in 1779, “I take the liberty of requesting you to transmit to this office a copy of the constitution

118.  Id. at 590 (quoting Farah Peterson, Constitutionalism in Unexpected Places, 106 VA. L. REV. 559, 568 (2020)).
119.  Id.
120.  See infra subpart II(C) (explaining the difference between Paine’s and Adams’s views).
or form of government adopted by your State . . . .” President of the Massachusetts constitutional convention James Bowdoin wrote to Benjamin Franklin in 1780, “I . . . inclose to you a copy of the Constitution of government lately agreed on by our State-Convention to be Submitted to the consideration of the people.” George Washington wrote to his future Secretary of War Henry Knox in 1780, “I have sent you by the Bearer a Copy of the Constitution of Massachusetts . . . .” John Adams wrote to Dutch publisher Jean Luzac in 1780, “I have received a Copy of the Constitution of the Massachusetts [sic] of which I beg your Acceptance.” Washington thanked Charles Pinckney for sending a letter “in closing a copy of the Constitution lately formed for your State.” Madison wrote to Jefferson, “Among the contents of the inclosed letter is a printed copy of the Constitution of Kentucky as finally agreed to.” Washington thanked a correspondent for a letter “inclosing a copy of the Constitution formed for the State of Kentucky.” Washington sent to Congress “[a] Copy of the Constitution formed for the State of Kentucky.”

After the Philadelphia Convention, several Founders sent copies to Jefferson in Paris, constantly using “copy of the Constitution” language. Washington wrote to Jefferson just after the Philadelphia Convention concluded, “Inclosed is a copy of the Constitution . . . .” Benjamin Franklin wrote to Jefferson the


123. Letter from James Bowdoin to Benjamin Franklin (May 1, 1780), in 32 THE PAPERS OF BENJAMIN FRANKLIN 533, 534 (Barbara B. Oberg ed., 1996).

124. Letter from George Washington to Henry Knox (May 2, 1780), in THE PAPERS OF GEORGE WASHINGTON 537, 538 (William M. Ferraro ed., Revolutionary War Ser. No. 25, 2017). Washington asked Knox to return the copy after reading it because it was Washington’s only copy. Id.

125. Letter from John Adams to Jean Luzac (Sept. 1, 1780), in 10 PAPERS OF JOHN ADAMS 119, 119 (Gregg L. Lint & Richard Alan Ryerson eds., 1996).


next month, “I take this Opportunity of sending you another Copy of the propos’d new federal Constitution . . .”[131] John Jay sent to Jefferson “[a] Copy of the Federal Government proposed by the late Convention.”[132] Jefferson wrote to John Adams’s son-in-law William Stephens Smith in November, “I do not know whether it is to yourself or Mr. Adams I am to give my thanks for the copy of the new constitution.”[133] Washington wrote similarly to former governor (and father and great-grandfather of presidents) Benjamin Harrison, “I take the liberty of sending you a copy of the Constitution which the Federal Convention has submitted to the People of these States.”[134] He wrote to William Gordon that he “would have forwarded to you a copy of the Constitution proposed by the late Convention for the United States,” except that it would have been superfluous.[135] The new government likewise spoke of the Constitution textually. The House resolved on July 7, 1789, “[t]hat there be prefixed to the publication of the acts of the present session of Congress a correct copy of the Constitution of Government for the United States.”[136] The Senate agreed.[137]

Finally, when the Framers spoke of “the Constitution itself,” they were consistently referring to the constitutional text. Madison, for instance, preceded the citation of the text of the Constitution by stating, “The language I now use, sir, is the language of the Constitution itself . . . .”[138] James Jackson described the text of Article VI as “the Constitution itself.”[139] In *Chisholm v. Georgia*[140] in 1793, Justice James Wilson preceded his quotation of the text of Article III by saying that his view was “confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself.”[141]

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136. 1 ANNALS OF CONG. 620 (1789) (Joseph Gales ed., 1834).
137. Id. at 49.
138. 2 ANNALS OF CONG. 1192 (1790).
139. 1 ANNALS OF CONG. 803 (1789) (Joseph Gales ed., 1834).
140. 2 U.S. (2 Dall.) 419 (1793).
141. Id. at 466.
This language is simply not the sort that would be used in England. A correspondent who claims to “enclose a copy of the English Constitution” might be referring to enclosing a copy of Bagehot’s famous book with that title, but he certainly would not think of enclosing a copy of all unrepealed acts of Parliament, let alone a copy of the moral or sociological realities that might render the British constitution to be in some sense a higher law. In America, though, enclosing a copy of our state or federal constitution was immediately recognized as a perfectly natural thing for us to do. Our constitutions are textual.

C. Paine v. Adams on Whether the British Constitution Exists

Gienapp refers in his 2021 article to one particularly striking piece of evidence from John Quincy Adams, responding to Paine’s Rights of Man, which itself responded to Burke’s Reflections on the Revolution in France. What might an American explanation of the British constitution in an attempt to understand the French Revolution tell us about the nature of our own Constitution? Here is Gienapp’s argument:

In a world so deeply shaped by the idea of non-positive and general fundamental law (a concept that has since disappeared), the seamless interaction of enacted text with pre-existing, given law made intuitive sense. To see written constitutionalism any differently simply misunderstood the character of fundamental law. As John Quincy Adams wrote in 1791, “the Constitution of a country is not the paper or parchment upon which the compact is written.” Rather, “it is the system of fundamental laws, by which the people have consented to be governed, which is always supposed to be impressed upon the mind of every individual, and of which the written or printed copies are nothing more than the evidence.”

The full context of twenty-four-year-old John Quincy Adams’s argument makes exquisitely clear, though, that there are multiple senses to the term constitution—and some of them were exclusively

142. WALTER BAGEHOT, THE ENGLISH CONSTITUTION (London, Chapman & Hall 1867); see also The Crown: Scientia Potestia Est (Left Bank Pictures, Sony Pictures Television Production UK & Sony Pictures Television Nov. 4, 2016) (imagining Queen Elizabeth consulting her notes on Bagehot to decide what to do about Churchill).

143. See generally THOMAS Paine, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE’S ATTACK ON THE FRENCH REVOLUTION (London, J.S. Jordan 6th ed. 1791) (criticizing Edmund Burke’s Reflections on the Revolution in France (1790)).

144. Gienapp, supra note 88, at 343 (quoting Adams, supra note 90, at 74).
No. 1  There Is Something that Our Constitution Just Is 275

textual. Here is how Adams’s argument begins:

“A Constitution,” says Mr. Paine, “is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none.” Mr. Paine should have gone further, and told us, whether, like a deed, it must be written on paper or parchment; or whether it has a larger latitude, and may be engraved on stone, or carved in wood. From the tenor of his argument, it should seem that he had only the American Constitutions in his mind; for, excepting them, I believe he would not find in all history, a government which will come within his definition; and, of course, there never was a people that had a Constitution previous to the year 1776. But the word, with an idea affixed to it, had been in use, and commonly understood, for centuries before that period; and herefore Mr. Paine must, to suit his purpose, alter its acceptations, and, in the warmth of his zeal for revolutions, endeavour to bring about a revolution in language also.145

Note here that Adams agrees with Paine about the nature of American constitutions: both Adams and Paine think that American constitutions can indeed “be produced in a visible form.” The issue is not whether American constitutions are textual but whether American-style constitutions are the only kind. Adams then notes that the Continental Congress itself had complained in 1774 about violations of “the principles of the English Constitution” and that American states had passed statutes adopting parts of English common law, even though that common law cannot “be produced in a visible form.”146 It is then that Adams says what Gienapp quotes:

No, Sir, the constitution of a country is not the paper or parchment upon which the compact is written, it is the system of fundamental laws by which the people have consented to be governed, which is always supposed to be impressed upon the mind of every individual, and of which the written or printed copies are nothing more than the evidence.147

Adams immediately goes on: “In this sense, Sir, the British nation have a Constitution, which was for many years the

145. John Quincy Adams, Letter III, COLUMBIAN SENTINEL (1791), reprinted in OBSERVATIONS ON Paine’s RIGHTS OF MAN IN A SERIES OF LETTERS 14, 14–15 (Edinburgh, Dickson & Fairbairn 3d ed. 1791) (quoting THOMAS Paine, RIGHTS OF MAN (1791)). The essays are signed merely “Purdiva,” and when first published as a book, they were ascribed to then-Vice President John Adams. Id. at 3.
146. Id. at 15–16.
147. Id. at 16.
admiration of the world; the people of America, with very good reason, have renounced some of its defects and infirmities. But in defence of some of its principles they have fought and conquered. Adams’s “this sense” makes plain that there are different ways to use the word constitution, and his earlier comments make equally plain that Adams agrees with Paine about how to characterize American constitutions. In America, the “fundamental laws by which the people have consented to be governed” are written. Their disagreement is about Britain, not America.

D. Tucker, Iredell, Patterson, and Marshall on the Textual Constitution

Further, when we look at early courts, Paine’s description of the American Constitution as having been reduced to “visible form” was quite mainstream. Justice St. George Tucker quoted Paine in 1793’s Kamper v. Hawkins, Virginia’s Marbury-style first acknowledgment of the power of judicial review. None of the other justices disputed Justice Tucker and Paine’s characterization of the American Constitution. Gienapp himself concedes that future-Justice James Iredell saw the Constitution as textual and objective in his correspondence with Richard Dobbs Spaight, then a delegate at the Convention. Iredell’s argument for judicial review, first presented in 1786 in his essay To the Public, is quite similar to Hamilton’s argument in Federalist No. 78 and Chief Justice Marshall’s argument in Marbury. Iredell said, “It really appears to me, the exercise of the power is unavoidable, the

148. Id.
149. 5 Va. (1 Va. Cas.) 20 (1793).
151. Kamper, 5 Va. (1 Va. Cas.) at 75 (quoting THOMAS PAINE, RIGHTS OF MAN (1791)).
152. See id. at 22–66 (failing to contest Tucker and Paine’s view of the Constitution).
154. Compare James Iredell, To the Public, in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, supra note 153, at 145, 148 (arguing that if a statute conflicts with the Constitution, the fundamental law, then judges have the power to declare that law void), and Letter from James Iredell to Richard Dobbs Spaight, supra note 153, at 172–74 (making that same argument but focusing on the writtenness of the Constitution in doing so), with THE FEDERALIST NO. 78, at 466–69 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the Constitution is the fundamental law, so therefore the judiciary has the power to declare inferior laws in conflict with the Constitution void), and Marbury, 5 U.S. (1 Cranch) at 176–80 (making the same basic argument for judicial review but adding other arguments too, such as the writtenness of the Constitution).
Constitution not being a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wilfully blind themselves. John Mikhail has noted Justice Patterson’s similar comments on written constitutionalism in 1795 in Vanhorn’s Lessee v. Dorrance: “In America . . . every State in the Union has its constitution reduced to written exactitude and precision.” Finally, we would be remiss not to quote Chief Justice Marshall’s use of the writtenness of the Constitution to support judicial review in Marbury itself:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law [i.e., the statute challenged as unconstitutional].

This doctrine would subvert the very foundation of all written constitutions . . . .

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.

Gienapp has not brought forth adequate evidence to convict Justices Tucker, Iredell, Patterson, and Marshall of idiosyncrasy.

III. THE CONCEPTUAL DISTINCTION OF “LAW” FROM “THE CONSTITUTION”: WHY JURISPRUDENCE DOES NOT SETTLE OUR CONSTITUTIONAL TRUTHMAKER

Elsewhere, one of us has looked at length at the argument that one’s views about the nature of the Constitution rise or fall with one’s views about the nature of law. Constitutional ontology is not jurisprudence. Philosophical conceptual analysis of the idea of law need not be tied to what was expressed by the term law in Article VI’s declaration that the Constitution is “supreme Law of

156. 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No, 16,857).
157. Id. at 308, 28 F. Cas. at 1014, quoted in John Mikhail, Does Originalism Have a Natural Law Problem?, 39 LAW & HIST. REV. 361, 366 (2021).
158. Marbury, 5 U.S. (1 Cranch) at 178.
159. See generally Evan D. Bernick, Eliminating Constitutional Law, 67 S.D. L. REV. 1 (2022) (arguing that constitutional theory and practice should not depend on one’s understanding of the nature of the law).
the Land."\textsuperscript{160} Put differently, if on the best theory of law our Constitution is not law, the Constitution would still be "the supreme Law of the Land."

Moreover, conflating jurisprudence with constitutional ontology is a mistake even if we think that the Constitution is necessarily an instance of law. The nature of a species is not determined by the nature of the genus.\textsuperscript{161} A textual Constitution might be law only because of its moral or social-customary pedigree and yet be the Constitution because of its textual self-definition alone. Compare the requirements for Napoleon to be Napoleon—being human, being born at a certain time, and so on—with his requirements to be emperor—being shown deference in various ways.

The Confederate constitution offers an example of a document the nature of which can be assessed independent of why, exactly, we think that it is not the law. The Confederacy was a moral abomination and the South also lost the war. But we need not decide which of those factors undermines the Confederacy's claim to be law in order to make sense of that document's use of indexical language. While the Constitution of the victorious Union used the words "now existing" to confirm congressional power to ban slavery in the territories,\textsuperscript{162} the Confederate constitution used the same indexical for the opposite purpose, requiring that in the territories "the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress and by the Territorial government."\textsuperscript{163} What does "as it now exists" refer to temporally? The time of the Confederacy's attempted founding in 1861,\textsuperscript{164} of course. Understanding the Confederate constitution's self-presentation requires no jurisprudence, and understanding our Constitution's self-presentation requires none either.

Gienapp associates textualism and positivism closely and

\textsuperscript{160} U.S. Const. art. VI, cl. 2.
\textsuperscript{162} See U.S. Const. art. I, § 9, cl. 1 (specifically limiting Congress's power to prohibit the states existing at the time of ratification—but not the territories or those states added later—from importing slaves until 1808).
\textsuperscript{163} Confed. Const. of 1861, art. IV, § 3, cl. 3.
\textsuperscript{164} G. Edward White, Recovering the Legal History of the Confederacy, 68 Wash. & Lee L. Rev. 467, 469 (2011).
No. 1  There Is Something that Our Constitution Just Is  279

casually, to the point of implying that the affirmation of an exclusively textual Constitution is inherently positivist: “Because the Constitution’s content is distinctively textual, it is distinctively positivist (and vice versa). This is how originalists, without much reflection, can see the Constitution on the model of a statute: written law enacted by authorized lawmakers.”165 This association between textualism and positivism is not standard in jurisprudence and invites confusion.

If there is one claim that separates positivism from other theories of law, it is that a norm can be law solely because of agreed-upon conventional practice, irrespective of its moral merits.166 In its leading, Hartian form, what the law is turns on psycho-social facts related to official practice in a given jurisdiction.167

Nothing about this claim entails that law take a textual form. Stephen Sachs’s Originalism Without Text provides a useful illustration of why this is so:

The society of Freedonia has no writing and no written law. Its legal rules are passed down through oral traditions, which provide for councils of elders to do limited judicial work. Freedonia goes through a period of legal tumult, in which influential council decisions are said to have misstated the traditional rules and to have exceeded the councils’ authority. A Great Council is held, in which it’s agreed—in substance, and without resolving on any canonical form of words—that all innovations to date are to be accepted as necessary evils, but that no new innovations are to be allowed, and that the ancestral traditions are otherwise to be preserved inviolate. Generations pass, and again some councils begin to overstep these limits, arguing that the traditions must be altered to accommodate modern circumstances. Other Freedonian elders criticize their fellows for failing to apply the law as approved at the Great

165. Gienapp, supra note 88, at 329.
167. See H. L. A. Hart, The Concept of Law 95, 100–91 (2d ed. 1994) (discussing how the sources of law for each society will vary depending on the complexity of that society). But see William Baade & Stephen E. Sachs, The Official Story of the Law, 45 Oxford J. Legal Stud. 178, 190 (2023) (acknowledging that “Hart is usually read as treating ‘Officials, not citizens,’ as the recognitional community—the group whose attitudes and practices determine the law” but arguing that the “the content of a normal and flourishing legal system rests on more than official beliefs” (quoting Matthew D. Adler, Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?, 100 NW. U. L. REV. 719, 733 (2006))).
Whether originalism is possible in Freedonia or the critics are engaging in originalism is debatable; perhaps originalism requires the interpretation of written texts. Textualism certainly is not possible in this jurisdiction. But by positivist lights, Freedonia clearly has law in the form of oral traditions that inform and guide official practice much as written constitutions and statutes do in other jurisdictions.

A textual constitution, though, like a textual statute, can be understood by either positivists or their natural-law opponents. The fact that a statute or constitution is the law can depend on very different facts from those that make it the particular statute or constitution that it is. A statute or constitution might start out as the law but be repealed (or overthrown in the case of the Confederate constitution) and stay just as textual as it ever was. Those who think that the law includes moral criteria for application might disagree about whether a particular statute or constitution is the law but still agree about what the statute or constitution is.

Gienapp argues that the recognition of unwritten law—in particular, natural law that tracks moral reality—entails a non-textualist understanding of the nature of the Constitution: “Founding-Era Americans did not share modern originalists’ avowed positivism; therefore, they assumed that written constitutional provisions worked in concert with and bled seamlessly into a broader field of non-positive fundamental law derived from several sources.” Again, Gienapp’s apparent assumption that positivism is somehow in tension with unwritten law is unfounded. The assumption that a textual constitution could work “in concert with” non-posited moral reality is unremarkable; we both share such an assumption today, as do other originalists like Jeffrey Pojanowski and Kevin Walsh.
No. 1  There Is Something that Our Constitution Just Is  281

It is also quite a leap to say that a textual Constitution thus “bled seamlessly” into those moral considerations. To the contrary, the boundaries of our textual, visible Constitution mark a very visible seam between the two. Gienapp’s review of the removal debate from 1789 notes that all sides repeatedly referred to the “nature of things.” He construes these arguments as presupposing a nontextual constitutional truthmaker; they are “groping . . . for something else to ground their constitutional interpretations.” He infers that “the Constitution did not stop at the edges of the text”:

In referencing the “nature of things” disputants could [allude] to something natural or something customary, but in both cases something essential beyond their making and control. The Constitution did not stop at the edges of the text, and what was “natural” was fast becoming a powerful standard by which one could justifiably move beyond these edges.

This jump is unjustified. Merely because interpreters appeal to moral reality or to broader customs to bolster their interpretive confidence does not mean that the Constitution itself encompasses these sources. Rather, we might take the justice or goodness of the Constitution (or its fit with tradition and custom) as a rule of thumb to help resolve unclear cases. When judges apply the rule of lenity and decline to impose criminal punishment where a statute does not clearly require them to do so, no one thinks that the rule is part of the statute.

Both Madison during the bank debate and Chief Justice Marshall in United States v. Fisher in 1805 made this sort of use of policy considerations. Madison said, “Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.” Chief Justice Marshall explained at greater length,

That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must

173. Gienapp, supra note 40, at 410.
174. Id. at 412.
175. Id. at 413.
176. See Rule of Lenity, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The judicial doctrine holding that a court, in construing an ambiguous criminal statute . . . should resolve the ambiguity in favor of the more lenient punishment.”).
177. 6 U.S. (2 Cranch) 358 (1805).
178. 2 ANNALS OF CONG. 1896 (1791).
be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.—But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.179

None of Gienapp’s 1789 references to “the nature of things” demand that we take them as expressing a different interpretive posture than Madison and Chief Justice Marshall took. When the Constitution isn’t perfectly clear, we assume it fits with “the nature of things.”

IV. DISTINGUISHING ONTOLOGY FROM EPISTEMOLOGY: WHY UNCERTAINTY DOES NOT UNDERMINE A DETERMINATE CONSTITUTIONAL ONTOLOGY

Throughout his work, Gienapp initially uses terms like “uncertain” or “unclear” and then immediately glosses them with terms like “indeterminate.”180 At the very beginning of The Second Creation, Gienapp summarizes his argument with this very sort of jump: “When the Constitution was born, it was unclear what kind of thing it was. Accordingly, it was not fully created when it was written or ratified.”181 Gienapp explicitly assumes that if an object’s nature is unclear, the object is not yet fully created. But this is not right. Linguistic conventions can exist even if their nature is incompletely known. And the Constitution can have a determinate nature that depends on the implicit linguistic and legal conventions of the time, even if those conventions, and

180. See, e.g., Gienapp, supra note 40, at 376, 392 (describing the Constitution’s text in the removal debate as “uncertain” and “unclear” before later referring to it as “indeterminate”).
181. Gienapp, supra note 55, at 3 (emphasis added).
hence that nature, are only imperfectly known.

A. Why Meanings Are Frequently Unknown

Michael Devitt’s masterful Ignorance of Language develops the theme of the independence of the existence of language from its knowledge at great length. Linguistic conventions can exist without being represented in those who use them. One example that Devitt uses repeatedly is the bee language discovered by Karl von Frisch’s Nobel-Prize-winning work studying honeybee dances, which communicate which direction to find pollen relative to the sun. While we still have very little idea how bees manage to use language this way, it is obvious that they do not do so by representing the structure of language in their minds. A second example is the assessment of linguistic conventions in dead languages. The Granville Sharp rules, for instance, attempt to explain how to interpret two nouns connected by and. They were formulated centuries after the form of Greek to which they applied had ceased to be spoken and were never articulated by those users. Modern scholarship can, however, give us an understanding of the nature of ancient Greek definite articles superior even to its users’ understandings. Linguistic conventions that were unclear or entirely unknown to the users of the language can nonetheless exist, only later to be articulated. A third example is the order of adjectives in English. Mark Forsyth noted in a passage that went viral on Twitter,

[A]djectives in English absolutely have to be in this order: opinion-size-age-shape-colour-origin-material-purpose Noun. So you can have a lovely little old rectangular green French silver whittling knife. But if you mess with that word order in the slightest you’ll sound like a maniac. It’s an odd thing that every English speaker uses that list, but almost none of us could write it out. And as size comes before colour, green great dragons

182. See generally Michael Devitt, IGNORANCE OF LANGUAGE (2006) (“I shall argue, a person could be competent in a language without representing it or knowing anything about it; she could be totally ignorant of it.”).

183. Id. at 20 (citing Karl von Frisch, THE DANCING BEES: AN ACCOUNT OF THE LIFE AND SENSES OF THE HONEY BEE 100–36 (Dora Ilse trans., English ed. 1954)).

184. Id. at 20–21.


186. See Michael J. Jeffreys, The Literary Emergence of Vernacular Greek, Mosaic, Summer 1976, at 171, 175 (noting that Koine Greek, “the language of the New Testament,” was an “ancient” language that died out).
can’t exist.\textsuperscript{187}

The color-origin-material order-of-adjectives rule can, moreover, help disambiguate meaning. A “French silver knife” is one that is made of silver because material usually comes after origin in a list of adjectives, but a “silver French knife” is more likely one that is silver in color because color usually comes before origin. Semantic properties of what particular terms express can, then, be embedded in conventions unknown to ordinary language users.

The fact that it may have taken several years for the Constitution’s textual and historically situated nature to become clear in the early republic does not entail that it did not have that nature from the outset. Unarticulated or incompletely articulated conventions seem to be quite commonplace in language, and it would be surprising if they did not show up in the nature of constitutions too.\textsuperscript{188}


\textsuperscript{188} David Lewis’s comments on non-obvious analyticity—that is, judgments true in virtue of their meaning, but not obviously so—are worth quoting at length:

It is a philosophical problem how there can ever be unobvious analyticity. We need not solve that problem; suffice it to say that it is everybody’s problem, and it is not to be solved by denying the phenomenon. There are perfectly clear examples of it: the epsilon-delta analysis of an instantaneous rate of change, for one. Whenever it is analytic that all A’s are B’s, but not obviously analytic, the Moorean open question—whether all A’s are indeed B’s—is intelligible. And not only is it intelligible in the sense that we can parse and interpret it (that much is true even of the question whether all A’s are A’s) but also in the sense that it makes sense as something to say in a serious discussion, as an expression of genuine doubt. Besides unobvious analyticity, there is equivocal analyticity. Something may be analytic under one disambiguation but not another, or under one precisification but not another. Examples abound. Quine was wrong that analyticity was unintelligible, right to doubt that we have many clearcut cases of it. If differing versions of a concept (or, if you like, different but very similar concepts) are in circulation under the same name, we will get equivocal analyticity. It is analytic under one disambiguation of ‘dog’ that all dogs are male; under one disambiguation of ‘bitch’ that all bitches are canine. It is analytic under some precisifications of ‘mountain’ that no mountain is less than one kilometre high. When analyticity is equivocal, open questions make good conversational sense: they are invitations to proceed under a disambiguation or precisification that makes the answer to the question not be analytic. By asking whether there are mountains less than one kilometre high, you invite your conversational partners to join you in considering the question under a precisification of ‘mountain’ broad enough to make it interesting; yet it was analytic under another precisification that the answer was ‘no.’ So even if all is obvious, open questions show at worst that the alleged analyticity is equivocal.

B. Particular Instances of Epistemic–Ontological Slippage in Gienapp’s Arguments

As noted above, Gienapp’s summary of his entire view of the Constitution explicitly infers the Constitution’s “not fully created” status from the fact that its nature was “unclear.” He characterizes his project in similar terms many times elsewhere. For instance, in his article Written Constitutionalism, Past and Present, Gienapp notes:

[T]he Constitution was not, at first, clearly understood to have possessed many of the defining features that originalists often assume it must have. When the Constitution initially appeared, as Founding-Era Americans struggled to make sense of its essential characteristics, they often imagined it in ways quite different than how it is conceived of today.

He then infers from this disagreement and uncertainty that the reality did not yet exist at all but had to be constructed later: “Many of the attributes that we would consider definitive of the Constitution emerged only later through searching debate and significant transformations in legal and constitutional understanding.” It is possible, though, that some early observers “imagined” the Constitution incorrectly. If so, we should not assume that the Constitution’s nature “emerged only later.” Its nature may have become clearer later, despite already existing.

In his article Myth of the Constitutional Given, Gienapp summarizes his book as showing that “when the Constitution first appeared there was deep disagreement over its constitutive identity” and that therefore “many of its features that are now treated as essential were only contingently added later as certain habits of mind took hold.” Later, he jumps from “initial uncertainty” about the nature of the Preamble to “latent possibilities”: “[I]f we grasp the novelty of the Constitution born of this discontinuity [with earlier concepts of constitutionalism, sovereignty, and representation], we can appreciate the initial uncertainty that surrounded it; if we see this uncertainty, we can appreciate . . . the latent possibilities contained in the Preamble . . . .” This jump is, we think, a mistake: the lack of

189. Gienapp, supra note 55, at 3.
190. Gienapp, supra note 88, at 322.
191. Id.
192. Gienapp, supra note 74, at 185 n.7.
193. Id. at 196.
perfect certainty over the nature of the Preamble does not mean that the Preamble did not have a particular nature and thus that either side could have equally legitimately claimed to be merely unfolding its “latent possibilities.” Some apparent latent possibilities are mirages, inconsistent with the Constitution’s actual nature. A few sentences later, Gienapp again summarizes what he hopes to have shown in his book: “The Constitution was born engulfed in uncertainty. When it first appeared, the only thing clear about its essential identity was that nothing was clear. [Here he cites his entire book, The Second Creation.] Persistent attempts to analogize it to known forms of law repeatedly broke down.” The lesson Gienapp quickly draws from such uncertainty about interpretive guidelines was that they did not exist at all: “All told, rules for interpreting the new Constitution did not readily exist; they needed to be invented.”

In the article Historicism and Holism, Gienapp explicitly advocates abandoning any more sophisticated understandings of linguistics or language for what the Framers themselves knew about their language. “[R]ecovering eighteenth-century communicative content requires putting aside our working linguistic knowledge—how we trace logical connections between meanings, how we enrich ambiguous utterances, and how we relate meaning to context—and replacing it with Founding-era linguistic knowledge.” Again, we think this a mistake: Granville Sharp was not limited to the rules explicitly known and articulated by speakers of Ancient Greek, and Karl von Frisch was not limited to the rules explicitly known and articulated by honeybees. Neither should we refuse to use modern computer databases and linguistic theory to the extent that they help us reliably reconstruct what particular terms expressed in their eighteenth-century context. While a lot is of course lost by not being ourselves participants in the relevant conversation, there is also no reason in principle why we cannot, by using modern techniques, sometimes understand historically expressed meaning better than the participants themselves.

Finally, in Making Constitutional Meaning, Gienapp refers to two particularly striking pieces of the 1789 debate that, on inspection,
No. 1  *There Is Something that Our Constitution Just Is*  287

are far more concerned with epistemic issues of doubt and uncertainty than of continued constitutional authorship. Gienapp deploys Egbert Benson and Abraham Baldwin to show that the Constitution was importantly incomplete, in need of supplementation from officials later in time. But the full context of their remarks only suggests that the Constitution was unclear: an epistemic defect, not an ontological one. Benson said, 

If we declare in the bill that the officer shall be removable by the President, it has the appearance of conferring the power upon him. Now, I think this improper; because it would be admitting the House to be possessed of an authority which would destroy those checks and balances which are cautiously introduced into the Constitution, to prevent an amalgamation of the legislative and executive powers. For this reason, I shall take the liberty of submitting an alteration, or change in the manner of expression, so that the law may be nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power to the President. Can the gentleman be serious who tells us, that this is a case to be proposed as an amendment to the Constitution? Does he suppose, whenever a doubt arises in this House, (and it will be a doubt, if an individual doubts, [sic]) with respect to the meaning of any part of the Constitution, we must take that mode? Or does he really suppose that we are never to take any part of the Constitution by construction? This I conceive to be altogether inadmissible; for it is not in the compass of human wisdom to frame a system of Government so minutely, but that a construction will, in some cases, be necessary. This is such a case; and we ought most assuredly to declare our sentiments on the occasion.

Gienapp quotes some of the material near the end of this quotation to argue that Benson wanted Congress to “offer the kinds of constructions that would put flesh on the Constitution’s bones.” But Benson’s point was precisely that he did not want Congress to be seen as itself conveying powers to the President; he wanted Congress only to express its view about what the Constitution had already done. Benson wanted a statute that would explicitly be “nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power

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198. 1 *ANNALS OF CONG.* 505 (1789) (Joseph Gales ed., 1834).
to the President.” Construction was needed for epistemic reasons—the existence of doubts in some individuals—not because of any ontological gap in what the Constitution included that Congress could fill. To offer “a construction” was, for Benson, only to “declare our sentiments on the occasion,” not to put flesh on a skeletal Constitution.

Genapp’s next example, Abraham Baldwin, is likewise speaking of epistemically motivated activity when he talks about being a “fellow laborer” with the Senate, not suggesting that a later Congress can finish the work left undone by the Constitution’s initial authors. Here is Baldwin’s full argument:

It is said, that the power is already given by the Constitution, and therefore it is unnecessary to retain the clause in the bill. Others again contend that we are giving the power by construction to the President, which we ought not to do. The gentleman from Connecticut (Mr. Sherman) tells us, we should leave it to the President to discover what is his duty on this subject. At first there appeared great plausibility in this observation, and I was inclined to favor that opinion; but on further reflection, it appears to me as bad a sentiment as any that has been suggested. The great division of this committee proves that it is a question not so easily resolved as others which have heretofore engaged our attention. Now, if we, who are a disinterested branch, find so much difficulty in determining the point, how much more will the President and Senate, who are parties concerned, be perplexed in the decision? Gentlemen may say that the Senate would choose to have it left to the parties themselves. Then why should we interfere? But I am persuaded, when the Senate perceive we are disinterested parties, they will respect our decision. I feel a most profound respect for that honorable body, and I never wish to see them disturbed in the exercise of any part of their power; but I do conceive they will receive with pleasure our opinion on this question; and therefore I am inclined to give it. We are fellow-laborers together, endeavoring to raise on the same foundation a noble structure, which will shelter us from the chilling blasts of anarchy, and the all-subduing storms of despotism. Hence, I flatter myself they will receive this assistance kindly at our hands; but, if they are otherwise inclined, they have the power to counteract what we may do. But I would by no means retreat at this time from a decision; I would let the bill go forward with our full determination; the Senate will receive it with candor. Gentlemen say it properly belongs to the Judiciary to decide this question. Be it so. It is their province to decide upon our laws; and if they find them to be unconstitutional, they will not
No. 1  There Is Something that Our Constitution Just Is  289

hesitate to declare it so; and it seems to be a very difficult point to bring before them in any other way. Let gentlemen consider themselves in the tribunal of justice, called upon to decide this question on a mandamus. What a situation! almost too great for human nature to bear, they would feel great relief in having had the question decided by the representatives of the people. Hence, I conclude, they also will receive our opinion kindly. 200

Gienapp then latches onto the “fellow-laborers” picture, which in context clearly refers to the House’s relationship with the Senate, and explains it as a partnership over time between the initial and subsequent authors of the Constitution:

The image of fellow laborers was revealing, vividly suggesting that politicians were not just applying the Constitution to emergent problems, but assuming the task of continued authorship. Here can be glimpsed, as strikingly as anywhere, the constructionist assumptions underlying early stages of the debate. Where the document was silent, many contended that Congress not only logically, but necessarily took the reins. 201

Baldwin’s language does not fit the idea of continued constitutional authorship but of offering an opinion; he speaks only of sending to the Senate “our opinion on this question” and hopes only that judges “also will receive our opinion kindly,” not that the Constitution will be itself changed by the episode.

V. DISTINGUISHING THE CONSTITUTION FROM ITS CONTEXT, ANALYTIC FROM SYNTHETIC, AND SENSE FROM REFERENCE

Textual originalists are not committed to everything the Founders believed, of course; they are only committed to the meaning that the Founders expressed by means of the Constitution’s text in context. Distinguishing between the Founders’ judgments about constitutional meaning and their judgments about everything else requires what philosophers of language since Kant have called the analytic–synthetic distinction. Again, analytic judgments are judgments that turn only on the meaning expressed by words, while synthetic judgments depend on other things as well. 202 Originalists who are devoted to original meaning are committed to the Founders’ analytic judgments

200. 1 ANNALS OF CONG. 560 (1789) (Joseph Gales ed., 1834).
201. Gienapp, supra note 40, at 402.
(their judgments about what the words in the Constitution expressed in context) but not their synthetic judgments (other extralinguistic, fact-dependent judgments about the set of things to which the Constitution’s linguistic categories apply).  

A more familiar version of the same distinction involves disputes: are they merely about the meanings of words or instead a “real” dispute about the reality to which words refer? David Chalmers has recently noted that a distinction between verbal disputes and other sorts is an enduring feature of argumentative discourse and that such a distinction can be used to ground the analytic–synthetic distinction. Philosophers sometimes downplay the importance of the resolution of verbal disputes and call only nonverbal disputes “real” disputes, but for those who think themselves oath-bound to the meaning of the Constitution, the situation is exactly the opposite: what the Founders thought about the constitutional requirements expressed by their words is far more important than what they thought about political morality as such.

The distinction between analytic and synthetic truths is closely related to Frege’s distinction between sense and reference (or Carnap’s distinction between intension and extension, or Mill’s distinction between connotation and denotation). The sense conveyed by a term is grasped by anyone who knows the relevant analytic truths about meaning, but knowing the reference—the set of things that the term picks out at any particular point in

203. See Christopher R. Green, Originalism and the Sense–Reference Distinction, 50 St. Louis U. L.J. 555, 560 (2006) (arguing that the meaning or sense of the Constitution is fixed at the Founding but that the extralinguistic reality or reference of the Constitution can change).


205. See, e.g., William James, Pragmatism 45–44 (Longmans, Green & Co. reprt. 1908) (claiming that the dispute about whether “the man go[es] round the squirrel or not” disappears when one realizes that the dispute is merely about what one “practically mean[es] by ‘going round’ the squirrel” (emphasis omitted)).


207. See Rudolf Carnap, Meaning and Necessity: A Study in Semantics and Modal Logic 1, 7–8 (1947) (explicating his concepts of intension and extension and noting how they are similar to Kant’s analytic–synthetic distinction).

time—requires knowledge of synthetic facts too.209 Fans of original meaning are committed to the sense expressed by the constitutional text in its original context but not its original reference.210

We might put the same distinction more prosaically, as the Supreme Court itself has done, in terms of meaning and application. Unchanging meaning does not undermine the possibility of changing applications. As the Court put it in 1926,

[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise . . . [A] degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles . . . .211

It said more compactly in 2018: “While every statute’s meaning is fixed at the time of enactment, new applications may arise in light of changes in the world.”212

Both the analytic–synthetic and sense–reference distinctions have proven to be quite controversial, and as noted above, Gienapp is quite explicit in casting his lot with their critics, such as Quine and others like Donald Davidson, Richard Rorty, and Brandom,213 rather than their defenders like H.P. Grice and Peter Strawson,214 David Chalmers,215 Cory Juhl and Eric Loomis,216 and Gillian Russell.217 Quine’s 1952 *Two Dogmas of Empiricism*

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209. See Frege, * supra* note 206, at 210–14 (stating that a term’s sense “is grasped by everybody who is sufficiently familiar with the language . . . but this serves to illuminate only a single aspect of the referent, supposing it to exist” and that “[c]omprehensive knowledge of the referent would require us to be able to say immediately whether every given sense belongs to it”).


213. See Gienapp, * supra* note 12, at 955 (declaring that “Quine famously upended” the analytic–synthetic distinction and approvingly citing Davidson’s, Rorty’s, and Brandom’s critiques of the distinction).


216. See generally CORY JUHL & ERIC LOOMIS, ANALYTICITY (2010) (discussing the history and significance of analyticity and defending their positive account of analyticity). See id. at 1–28, for an easy-to-read account of the idea of analyticity from Hume to Kant to Bolzano to Frege to Carnap.

217. See generally GILLIAN RUSSELL, TRUTH IN VIRTUE OF MEANING: A DEFENCE OF THE
(attacking the analytic–synthetic distinction as one of the dogmas)\textsuperscript{218} and his 1960 \textit{Word and Object} (touting the inherent “indeterminacy of translation”)\textsuperscript{219} were two big landmarks for later philosophical debates. A 2009 survey of philosophers found that about 65\% accept the analytic–synthetic distinction while 27\% reject it.\textsuperscript{220} On a Quinean analysis of language, we cannot distinguish the Founders’ analytic beliefs about what the Constitution’s terms expressed in their original context from the Founders’ synthetic beliefs about everything else. Translating the meaning expressed according to the Founders’ linguistic conventions into today’s world is never fully determinate.\textsuperscript{221}

If Quine and his followers are right, then Gienapp is of course right to interpret the Founders of the eighteenth century through an analytic–synthetic blurring lens; this is simply the way language actually works. Just as we understand eighteenth-century explosions using the chemistry of today, we have to understand eighteenth-century linguistic phenomena in light of what we now know about language.\textsuperscript{222} However, a Quinean interpretation of the Founding will have a necessarily anachronistic cast to it, given that the Founders themselves, in line with the best philosophy of language of the time, actually believed in the equivalents of these distinctions. Understanding Madison by blurring his analytic and synthetic judgments is very much \textit{not} understanding him on his
No. 1  *There Is Something that Our Constitution Just Is*  

own terms because, as we will see immediately below, Madison was part of an intellectual milieu that carefully distinguished these two sorts of judgments.

Further, a reliance—either explicit or implicit—on radical linguistic indeterminacy means that Gienapp’s history actually plays no essential role in his argument against an original-meaning-focused constitutional ontology. As we have seen, if radical linguistic indeterminacy is true, it is impossible to restate any bit of meaning precisely. So, it is folly to look for precise restatements of a constitutional provision’s original meaning. Defining our constitutional truthmaker in terms of textually expressed original meaning, as distinguished from the Founders’ other views, requires us to distinguish sense from reference and analytic judgments from synthetic. Accordingly, if Quine is right, we can undermine a meaning-focused constitutional ontology directly. We don’t have to dig into the 1790s to find this out; Gienapp’s philosophical positions can do all the work without any need for Gienapp’s history.

Why, then, should we think that the Founders would have distinguished analytic from synthetic judgments and sense from reference? The analytic–synthetic terminology was first used by Kant during the time of the Founding itself, in the 1781 *Critique of Pure Reason* and its 1787 second edition and in his 1783 *Prolegomena to Any Future Metaphysics*. Kant himself was not particularly well-known to the American Founders, but Kant

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223. *See* Soames, *supra* note 34, at 326 (explaining how under Quine’s radical indeterminacy, interpretation—even of one’s own words—is underdetermined “by the observational data for [it]”).


226. John Adams wrote to his sons about him while President: “I have heard of a mysterious Phenomenon in Germany by the Name of Kant. Pray give me a little Idea of his History and Philosophy,” Adams wrote to his son Thomas Boylston Adams. Letter from John Adams to Thomas Boylston Adams (Oct. 25, 1797), reprinted in 12 ADAMS FAMILY CORRESPONDENCE 270, 271 (Sara Martin, C. James Taylor, Neal E. Millikan, Amanda A. Mathews, Hobson Woodward, Sara B. Sikes, Gregg L. Lint & Sara Georgini eds., 2015). After reading a translation of Kant into French, John Quincy Adams wrote to his mother of Kant’s “theoretic madness,” adding, “For my own part, after reading the little Treatise, I find more reason than ever to adhere to my opinion as to the objects of the philosopher—atheism and revolution.” Letter from John Quincy Adams to Abigail Adams (June 11, 1798), reprinted in 13 ADAMS FAMILY CORRESPONDENCE 108, 110 (Sara Martin, Hobson Woodward, Christopher F. Minty, Amanda M. Norton, Neal E. Millikan, Emily Ross, Sara
explicitly built on Locke, who was quite well-known indeed to the Founders, in articulating his distinction. "Locke saw the distinction between analytic and synthetic judgments in his essay concerning human understanding," Kant wrote in a note in the 1760s. 227

Distinguishing analytic judgments about the meaning of words from synthetic judgments about extralinguistic reality emphatically does not mean thinking that words’ meanings are always clear. All of the leading seventeenth- and eighteenth-century philosophical discussions of language noted that human languages, unlike those of mathematics, were imperfectly precise. Arnauld and Nicole’s 1662 Logic, or the Art of Thinking,228 Locke’s 1689 Essay Concerning Human Understanding,229 and Isaac Watts’s 1724 Logic, or the Right Use of Reason, in the Inquiry After Truth230 all catalog the nature of semantic imprecision in great detail. Arnauld and Nicole devote two chapters to the obscurity of language.231 Watts exclaimed, "So uncertain a thing is human language, whose foundation and support is custom!"232 He devoted one section to a detailed catalogue of different kinds of equivocal words233 and another to their origins.234

The point of the analytic–synthetic distinction is not to deny the lack of clarity to human thought but to distinguish two different ways it can be unclear. Arnauld, Nicole, Locke, Watts, and later Madison all distinguished sharply between the imprecision of our language on the one hand and our imperfect knowledge of the facts of the world on the other. They noted, as David Chalmers does

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227. See Brian A. Chance, Locke, Kant, and Synthetic A Priori Cognition, 7 Kant Yearbook 47, 49–50 (2015) (quoting "A note Kant made in the 1760s to his copy of Baumgarten’s Metaphysica").


231. Arnauld & Nicole, supra note 228, at 58–63.

232. Watts, supra note 230, at 51.

233. Id. at 52–57.

234. Id. at 57–60.
No. 1  There Is Something that Our Constitution Just Is  295
today,285 that some disputes that initially look like disputes about the sorts of facts investigated by special sciences instead turn out merely to be verbal disputes.286 If language could be made completely clear, then we would not have verbal disputes, but we would of course still be subject to disputes over the nature of extralinguistic reality.

Gienapp himself sets out Locke's comments on the unclarity of language: "[T]he very nature of Words, makes it almost unavoidable, for many of them to be doubtful and uncertain in their significations."287 Gienapp then adds this gloss: "Perhaps, [Locke] implied, linguistic meaning was perpetually indeterminate."288 Even with the "perhaps" and the "implied," this does not seem right: for meanings sometimes to be "doubtful and uncertain" is not to be "perpetually indeterminate." In light of other distinctions Locke drew with exceptional clarity,289 it is wrong to read him as a proto-Quinean. Far better to read him as Kant did: as a proto-Kantian.290

Let us survey in their own words how the top seventeenth- and eighteenth-century philosophers of language thought about the distinction between words and things, between sense and reference, between analytic and synthetic judgments, and between verbal and real disputes.291

285. See Chalmers, supra note 204, at 515 ("[A] dispute between two parties is verbal when the two parties agree on the relevant facts about a domain of concern and just disagree about the language used to describe that domain.").

286. See, e.g., James Madison, Notes on a Brief System of Logic (1766–1772), reprinted in 1 THE PAPERS OF JAMES MADISON 32, 40 (William T. Hutchinson & William M.E. Rachal eds., 1962) ("[T]he ambiguity of Words is the cause of the greatest controversies and perplexities: different People very often affixing very different Ideas to the same Words, and squabbling not about a disagreement of Sentiments but of Words.").

287. LOCKE, supra note 229, at 305–06, quoted in Gienapp, supra note 55, at 45.


289. See, e.g., LOCKE, supra note 229, at 368–69 (distinguishing between the truth about words and the truth about objects).

290. See Chance, supra note 227, at 49–50 (discussing Kant's likely belief that Locke anticipated both the analytic–synthetic distinction and the notion of synthetic a priori cognition).

291. Many of these classic early statements of the analytic–synthetic distinction ran together three sorts of notions that most philosophers today distinguish: (a) semantic notions of meaning and synonymy in which we are chiefly interested; (b) modal notions of necessity and noncontingency, i.e., truth in all possible worlds; and (c) epistemic notions of apriority and lack of dependence on experience. See Jason S. Baehr, A Priori and A Posteriori, INTERNET ENCYCLOPEDIA OF PHIL., https://iep.utm.edu/apriori/ [https://perma.cc/V7AE-V83S] (noting that although those three categories are similar and have been run together, they should be distinguished). Kant and others' idea of mathematical synthetic a priori, for instance, separated notions (a) and (c). See, e.g., Kant,
Arnauld and Nicole in 1662 noted that verbal disputes could be alleviated by using words with clearly stipulated definitions, but not so with disputes over the things to which those words apply:

[N]ominal definitions are arbitrary, and real definitions are not. Since each sound is indifferent in itself and by its nature able to signify all sorts of ideas, I am permitted for my own particular use, provided I warn others, to determine a sound to signify precisely one certain thing, without mingling it with anything else. But it is entirely otherwise with real definitions. For whether ideas contain what people want them to contain does not depend at all on our wills.

[N]ominal definitions cannot be contested. For you cannot deny that people have given a sound the meaning they said they gave it, nor that the sound has this meaning only in their use of it, once they have warned us about it. But we often have the right to contest real definitions, since they can be false.242

They anticipated the sense–reference distinction and its kin by distinguishing a term’s “comprehension” from its “extension”:

Now in these universal ideas there are two things which it is most important to distinguish clearly, the comprehension and the extension.

I call the comprehension of an idea the attributes that it contains in itself, and that cannot be removed without destroying the idea. For example, the comprehension of the idea of a triangle contains extension, shape, three lines, three angles, and the equality of these three angles to two right angles, etc.

I call the extension of an idea the subjects to which this idea applies. These are also called the inferiors of a general term, which is superior with respect to them. For example, the idea of a triangle in general extends to all the different species of

supra note 225, at 18–19 (distinguishing the source of cognition (a priori or a posteriori) from the type of cognition (analytic or synthetic) to determine that mathematical propositions are synthetic a priori judgments). Kripke has offered counterexamples to both ways we might confute (b) and (c): both a posteriori necessities like “water is H2O” and a priori contingencies like “[the standard meter stick] is one meter long.” SAUL A. KRIPKE, NAMING AND NECESSITY 56, 128–29 (12th prtg. 2001). We will not delve into these notions in detail, other than to make clear that our central concern—the meaning expressed by the constitutional text and the extent to which truths about it can be distinguished from others—involves neither epistemology nor possible worlds. Judgments based on constitutional meanings need not be either necessary or epistemically a priori; they only need to be distinguishable from other sorts of judgments about how the Constitution operates.

242. ARNAULD & NICOLE, supra note 228, at 61.
triangles.

Although the general idea extends indistinctly to all the subjects to which it applies, that is, to all its inferiors, and the common noun signifies all of them, there is nevertheless this difference between the attributes it includes and the subjects to which it extends: none of its attributes can be removed without destroying the idea, as we have already said, whereas we can restrict its extension by applying it only to some of the subjects to which it conforms without thereby destroying it.245

Locke in 1689 distinguished “[v]erbal, . . . trifling” knowledge from “[r]eal” knowledge:

Truth of Words . . . is the affirming or denying of Words one of another, as the Ideas they stand for agree or disagree: And this . . . is twofold. Either purely Verbal, and trifling, . . . or Real and instructive; which is the Object of real Knowledge.

. . . . . . Truth, as well as Knowledge, may well come under the distinction of Verbal and Real; that being only verbal Truth, wherein Terms are joined according to the agreement or disagreement of the Ideas they stand for, without regarding whether our Ideas are such, as really have, or are capable of having an Existence in Nature. But then it is they contain real Truth, when these signs are joined, as our Ideas agree; and when our Ideas are such, as we know are capable of having an Existence in Nature: which in Substances we cannot know, but by knowing that such have existed.244

Leibniz, a frequent correspondent with Arnauld,245 distinguished truths of “reasoning” from those of “fact” in 1714:

There are also two kinds of truths, those of reasoning and those of fact. Truths of reasoning are necessary and their opposite is impossible: truths of fact are contingent and their opposite is possible. When a truth is necessary, its reason can be found by analysis, resolving it into more simple ideas and truths, until we come to those which are primary.246

Watts in 1724 sharply distinguished two sorts of imprecision in our thought—inadequately defined words and inadequately defined objects of study.

243. Id. at 39–40 (emphasis added).
244. Locke, supra note 229, at 368–69.
245. See generally THE LEIBNIZ–ARNAULD CORRESPONDENCE (Stephen Voss ed. & trans., 2016) (compiling Leibniz and Arnauld’s letters to each other).
As the definition of names free us from that confusion which words introduce, so the definition of things will in some measure guard us against that confusion which mingled ideas have introduced. For, as a definition of the name explains what any word means, so a definition of the thing explains what is the nature of that thing.\textsuperscript{247}

Watts parroted Arnauld and Nicole on comprehension and extension in 1724:

In universal ideas it is proper to consider their \textit{comprehension} and their \textit{extension}. [Footnote:] NOTE—The word extension here is taken in a mere logical sense, and not in a physical and mathematical sense.


The \textit{extension} of an universal idea regards all the particular kinds and single beings that are contained under it. So a \textit{body} in its \textit{extension} includes \textit{sun}, \textit{moon}, \textit{star}, \textit{wood}, \textit{iron}, \textit{plant}, \textit{animal}, &c. which are several \textit{species}, or \textit{individuals}, under the general name of \textit{body}. So a \textit{bowl}, in its \textit{extension}, includes a \textit{wooden} bowl, a \textit{brass} bowl, a \textit{white} and \textit{black} bowl, a \textit{heavy} bowl, &c. and all kinds of bowls, together with all the particular individual bowls in the world.\textsuperscript{248}

David Hume proposed his famous “fork” in 1748:

All the objects of human reason or enquiry may naturally be divided into two kinds, to wit, \textit{Relations of Ideas}, and \textit{Matters of Fact}. Of the first kind are the sciences of Geometry, Algebra, and Arithmetic; and in short, every affirmation, which is either intuitively or demonstratively certain. \textit{That the square of the hypotenuse is equal to the square of the two sides}, is a proposition, which expresses a relation between these figures. \textit{That three times five is equal to the half of thirty}, expresses a relation between these numbers. Propositions of this kind are discoverable by the mere operation of thought, without dependence on what is anywhere contained in the universe. Though there never were a circle or triangle in nature, the truths, demonstrated by \textit{Euclid}, would for ever retain their certainty and evidence.

Matters of fact, which are the second objects of human reason, are not ascertained in the same manner; nor is our evidence of their truth, however great, of a like nature with the foregoing. The contrary of every matter of fact is still possible;

\textsuperscript{247} Watts, supra note 250, at 83.
\textsuperscript{248} Id. at 34–35.
No. 1  There Is Something that Our Constitution Just Is

because it can never imply a contradiction, and is conceived by
the mind with the same facility and distinctness, as if ever so
conformable to reality. That the sun will not rise to-morrow is no less
intelligible a proposition, and implies no more contradiction,
than the affirmation, that it will rise. We should in vain, therefore,
attempt to demonstrate its falsehood. Were it demonstratively
false, it would imply a contradiction, and could never be
distinctly conceived by the mind.249

Hume returned to this distinction in his famous conclusion to the
Enquiry:

If we take in our hand any volume; of divinity or school
metaphysics, for instance; let us ask, Does it contain any abstract
reasoning concerning quantity or number? No. Does it contain
any experimental reasoning concerning matter of fact and
existence? No. Commit it then to the flames: For it can contain
nothing but sophistry and illusion.250

As a student at Princeton in the 1760s or early 1770s, James
Madison took some notes that generally follow the form of Watts’s
treatise, though with some Lockean themes as well. He too (or the
instructor whom he parroted) distinguished two sorts of
disagreements—those of “sentiments” and those of “words”:

[T]he ambiguity of Words is the cause of the greatest
controversies and perplexities: different People very often
affixing very different Ideas to the same Words, and squabbling
not about a disagreement of Sentiments but of Words.
Therefore to avoid being impos’d upon or confuted by
arguments of this fallacious kind, there is a necessity often to
make nice distinctions, that is, to show nicely the ambiguity of
Words and their various meanings: that you may discern in what
Sense the Proposition is true, & in what it is false.251

The top philosophers of the 1780s, in the immediate context of

249. DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 25 (Peter
250. Id. at 120.
251. Madison, supra note 256, at 40. The editors William T. Hutchinson and William
M.E. Rachal give an extensive explanation of why they think these notes were based mostly
on Watts, but with some Locke as well, and why the notes were probably composed during
Madison’s junior or senior years at Princeton, i.e., in 1770 or 1771. William T. Hutchinson
& William M.E. Rachal, Introduction to James Madison, Notes on a Brief System of Logick
(1766–1772), reprinted in THE PAPERS OF JAMES MADISON, supra note 256, at 32, 33. At this
point in the notes, they suggest passages from both Watts’s Logic and Locke’s Essay
Concerning Human Understanding that match Madison’s notes. William T. Hutchinson &
William M.E. Rachal, Editors Notes to James Madison, Notes on a Brief System of Logick
(1766–1772), supra, at 32, 41 nn.3–5, 42 n.13.
the Founding, followed this tradition. Thomas Reid described the persistence of verbal disputes and their distinction from “real” ones in 1785:

If all the general words of a language had a precise meaning, and were perfectly understood, as mathematical terms are, all verbal disputes would be at an end, and men would never seem to differ in opinion, but when they differ in reality; but this is far from being the case. The meaning of most general words is not learned like that of mathematical terms, by an accurate definition, but by the experience we happen to have, by hearing them used in conversation. From such experience we collect their meaning by a kind of induction; and as this induction is for the most part lame and imperfect, it happens that different persons join different conceptions to the same general word; and though we intend to give them the meaning which use, the arbiter of language, has put upon them, this is difficult to find, and apt to be mistaken, even by the candid and attentive. Hence, in innumerable disputes, men do not really differ in their judgments, but in the way of expressing them. 252

The same year William Paley disparaged those authors who dwell on “verbal and elementary distinctions” with “no other object than the settling of terms and phrases,” rather than also discussing the substance of their subject matters. 253

253 WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY xxxvi–xxxviii (Liberty Fund, Inc. 2002) (1785). While we will not burden the main text with the development of this idea into the nineteenth century, John Stuart Mill captured the distinction well in his System of Logic:

An essential proposition . . . is one which is purely verbal; which asserts of a thing under a particular name only what is asserted of it in the fact of calling it by that name; and which therefore either gives no information, or gives it respecting the name, not the thing. Non-essential, or accidental propositions, on the contrary, may be called Real Propositions, in opposition to Verbal. They predicate of a thing some fact not involved in the significiation of the name by which the proposition speaks of it; some attribute not connoted by that name. Such are all propositions concerning things individually designated, and all general or particular propositions in which the predicate connotes any attribute not connoted by the subject. All these, if true, add to our knowledge: they convey information, not already involved in the names employed. When I am told that all, or even that some objects, which have certain qualities, or which stand in certain relations, have also certain other qualities, or stand in certain other relations, I learn from this proposition a new fact; a fact not included in my knowledge of the meaning of the words, nor even of the existence of Things answering to the significiation of those words. It is this class of propositions only which are in themselves instructive, or from which any instructive propositions can be inferred. [Footnote] This distinction corresponds to that which is
No. 1  There Is Something that Our Constitution Just Is  301

This philosophical background helps us better read the distinctions that Madison makes in his famous ode to linguistic uncertainty in Federalist No. 37. Let us look carefully at the full flow of Madison’s arguments. Madison’s chief task is to excuse the Convention for not being more precise in distinguishing federal and state authority,254 and he carefully explains three different problems in drawing sharp distinctions: “indistinctness” in the objects of our senses, “imperfection” in our senses themselves, and “inadequateness” in our language.255 Earlier philosophers from Arnauld and Nicole to Locke to Watts—as duly recorded by young Madison when at Princeton—had given similar (though much longer) catalogs of sources of imprecision in human judgments. Indeed, Madison explicitly hopes to build on “all the efforts of the most acute and metaphysical philosophers.”256 Here is the argument of Federalist No. 37:

Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments. Every man will be sensible of this difficulty in proportion as he has been accustomed to contemplate and discriminate objects extensive and complicated in their nature. The faculties of the mind itself have never yet been distinguished and defined with satisfactory precision by all the efforts of the most acute and metaphysical philosophers. Sense, perception, judgment, desire, volition, memory, imagination are found to be separated by such delicate shades and minute gradations that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy. The boundaries between the great kingdom of nature, and, still more, between the various provinces and lesser portions into which they are subdivided afford another illustration of the same important truth. The most sagacious and laborious naturalists have never yet succeeded in tracing with certainty the line which separates the district of vegetable life from the neighboring region of unorganized matter, or which marks the termination of the former and the commencement of the animal empire. A still greater obscurity lies in the distinctive characters by which the

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drawn by Kant and other metaphysicians between what they term analytic and synthetic judgments; the former being those which can be evolved from the meaning of the terms used.

Mill, supra note 208, at 74.

255.  Id. at 229.
256.  Id. at 227.
objects in each of these great departments of nature have been arranged and assorted.

When we pass from the works of nature, in which all the delineations are perfectly accurate and appear to be otherwise only from the imperfection of the eye which surveys them, to the institutions of man, in which the obscurity arises as well from the object itself as from the organ by which it is contemplated, we must perceive the necessity of moderating still further our expectations and hopes from the efforts of human sagacity. Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reins in these subjects, and which puzzle the greatest adepts in political science.

The experience of ages, with the continued and combined labors of the most enlightened legislators and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, and the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed. All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition
No. 1 There Is Something that Our Constitution Just Is

of them may be rendered inaccurate by the inaccuracy of the
terms in which it is delivered. And this unavoidable inaccuracy
must be greater or less, according to the complexity and novelty
of the objects defined. When the Almighty himself condescends
to address mankind in their own language, his meaning,
luminous as it must be, is rendered dim and doubtful by the
cloudy medium through which it is communicated.

Here, then, are three sources of vague and incorrect
definitions: indistinctness of the object, imperfection of the
organ of conception, inadequateness of the vehicle of ideas. Any
one of these must produce a certain degree of obscurity. The
convention, in delineating the boundary between the federal
and State jurisdictions, must have experienced the full effect of
them all.257

Notice particularly Madison’s repetition of a clear three-fold
source of obscurity: objects, human faculties, and language. Like
Arnauld and Nicole, Locke, Watts, young Madison, and later
philosophers, the Madison of Federalist No. 37 plainly thinks that
linguistic obscurity and the obscurity of objects are separate
domains. Verbal disputes are distinct from disputes about external
extralinguistic reality. Even if we agree about extralinguistic
reality, we might disagree about the meanings expressed by our
words; even if we agree about the meanings expressed by our
words, we might disagree about extralinguistic reality. Gienapp is
right that Federalist No. 37 “[e]ffectively paraphras[es]” book III of
John Locke’s Essay Concerning Human Understanding,”258 but in so
doing, Madison distinguishes the very aspects of human thought
that Gienapp would blur.

VI. THE WAY AHEAD

We have attempted to show that the Constitution’s own
conception of itself as both textualist and historically fixed can be
rendered coherent if we adopt a widespread tradition in the
philosophy of language, both at the time of the Founding and
today. But it is of course possible for widespread traditions to be
wrong. How should those who don’t know which side to take in
abstruse and ongoing philosophical debates think about the task
of constitutional adjudication?

The Constitution matters to constitutional decision-making

257. Id. at 227–29.
258. GENAPP, supra note 55, at 111.
only if the Constitution is in fact a thing. More specifically, only if the Constitution’s language can express meaning in a determinate way, so that some translations are right and others are wrong, would the Constitution’s identity or content be any sort of guide to action. On Gienapp’s premises, there is no normative warrant for going back to the lost world before the conceptual revolution of the 1790s. Attempting to enforce fealty to an underdetermined or radically indeterminate Constitution would be pointless.

If there is a right answer to questions of meaning and translation, and if the population today generally thinks that the words the Constitution point back to an object with the same nature that it had at the Founding, then it makes sense to go back to that object and make decisions today under the authority of that late-eighteenth-century entity. But if that’s not so, then there isn’t any determinate late-eighteenth-century entity that could have that authority. Indeed, there isn’t a determinate early-twenty-first-century entity that could have it. A Quinean constitutional ontology can’t support any normative weight; attempting to follow a Constitution that isn’t anything in particular would be a prescription for chaos.

Further, only a Constitution that is a thing can make sense of one important official practice: Officeholders today promise to others that they will adhere to something when they do their jobs.\textsuperscript{(259)} They also regularly justify their conduct as officeholders on the basis of oaths to the Constitution and on the basis of their understanding of the Constitution.\textsuperscript{(260)} If the Constitution’s ontology isn’t fixed, this conduct rests upon an illusion.

Finally, we should not lightly encourage official departure from an understanding of what the Constitution is and means that is widely held by those who live under it. Perhaps a determinate, written Constitution is not in fact a thing; still, whether Americans who are told what to do by officials that draw their authority from this non-thing would accept rule by nothing-in-particular is an open question.\textsuperscript{(261)} We would do well to look before we leap—

\textsuperscript{259} See U.S. Const. art VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

\textsuperscript{260} See Bernick & Green, supra note 11, at 3-4 (listing several examples of judges and legislators who explained their actions in light of the constitutional oath).

\textsuperscript{261} We don’t mean to imply that references to “the Constitution” or “this
specifically, into popular perceptions of what the Constitution is. Our project here is continuous in spirit with recent work in experimental jurisprudence (XJur). XJurs gather evidence regarding ordinary people’s conceptions about the nature of law and the meaning of legal concepts like “consent,” “causation,” and “reasonableness.” It is Quinian in that it seeks to develop epistemically robust understanding of the object of its inquiry by adopting scientific methods that have proven their cash value in other contexts. But the ultimate object of our inquiry will not be the Constitution itself; rather, it will be what ordinary people believe the Constitution to be. We will infer nothing about the correspondence of these beliefs to reality.

Framing our project in this way allows us to escape an objection that has been raised against XJur: that those who look for the nature of law in the heads of ordinary folk are looking in the wrong place. We agree with Felipe Jiménez that because the “legal system is a governance structure characterized by an artificial, highly technical, and relatively arcane form of practical reasoning,” there are compelling reasons to regard the law as being determined by facts concerning the psychology and practices of elite legal officials. Indeed, one of those reasons is close to our area of concern: We cannot understand popular

Constitution” could not convey determinate meaning if they referred to an unwritten body of law. We argue only that, as a contingent matter, those references did pick out textually expressed content.


263. See W.V. QUINE, Epistemology Naturalized, in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS, supra note 29, at 72–73 (1969) (discussing two epistemological ideas which are informed by logic and mathematics).

alienation from the legal system and frustration with its outputs unless we acknowledge a gap between legal reasoning and elite official practice and everyday reasoning by ordinary people.265

To say that Americans have strong beliefs about the Constitution’s content hardly needs demonstration.266 Giennapp’s focus on constitutional ontology invites the question of what Americans take the Constitution to be. If, as we have argued, public officials incur a (defeasible) moral obligation in virtue of their promises to follow the Constitution, the question of what the addressees of their promise take the Constitution to be becomes pivotal. If there’s a bridgeable ontological gap here between what officials understand themselves to be promising and what people understand officials to be promising, officials should bridge it—such is the cost of keeping their promise to the public.

We take the following propositions to be central to our ontology of the Constitution that public officials promise to follow:

1. We have the oldest operating written national Constitution.267
2. The Constitution that officials promise to follow today was ratified in 1788.268
3. When Supreme Court Justices interpret the Constitution and reach different conclusions, they are interpreting the same Constitution.
4. The Constitution can change but only through procedures set forth in the Constitution itself.269
5. You can carry a complete copy of the Constitution in your pocket.
6. The Supreme Court, Congress, the President, and the public

265. See id. at *17–18 (describing the separation between legal and ordinary meanings as “a process of legal alienation” and noting that “knowledge about the disparities between folk conceptions and legal conceptions is valuable” to efforts to reconnect the two).


269. See U.S. CONST. art. V (creating only two ways to amend the Constitution).
can all make mistakes about what the Constitution means.
7. When the Supreme Court overrules a prior constitutional
decision, the Constitution does not change.
8. The Civil War brought important changes to the Constitution,
but the Constitution survived.

These propositions might seem too abstract to be tested empirically. But XJurists have gleaned valuable insight into folk intuitions about comparably abstract questions concerning the nature of law. For instance, Raff Donelson and Ivar Hannikainen conducted a series of experiments to test whether ordinary people endorsed Lon Fuller’s eight conditions of the inner morality of law.270 Fuller considered these conditions to be necessary to legality and criticized H.L.A. Hart’s positivism because it admitted the possibility of laws that did not satisfy them.271 Donelson and Hannikainen investigated (1) whether people saw these conditions as necessary to law and (2) whether people believed that law which they acknowledged to be law actually satisfied them.272

The results? Some individual principles were endorsed as necessary to law, but others were not.273 Further, even people who endorsed certain principles as necessary to law acknowledged that many laws did not actually conform to them.274 The authors conclude that their findings “cast[] doubt upon the notion that we have a stable and univocal concept of law.”275

Perhaps ordinary people do not have a stable and univocal concept of the Constitution either. Perhaps even radical indeterminacy would not be so destabilizing. We shall see. Our bet is, however, that people’s conception of the Constitution more closely resembles the orthodox picture that Gienapp attacks than the unfixity he finds at the Founding. If so, embracing indeterminacy would present a political problem that Gienapp does not engage at all.

270. Raff Donelson & Ivar R. Hannikainen, Fuller and the Folk: The Inner Morality of Law Revisited, in 5 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 6, 7 (Tania Lombrozo, Joshua Knobe & Shaun Nichols eds., 2020).
273. Id. at 16–17.
274. Id. at 18.
275. Id. at 24.
CONCLUSION

Gienapp’s criticism of originalism is elegant and sharp. He lands a number of blows, particularly in taking originalists to task for taking the writtenness of the Constitution for granted. It is true that originalists have been too quick to assume that the idea of a Constitution sprang fully formed from the Philadelphia Convention.

But as he has not minced words, neither have we: Although he charges originalists with embracing a myth of writtenness, Gienapp is perpetuating myths of his own. It is not true that originalists haven’t seriously investigated what sort of thing the Constitution is. It is not true that there was widespread, fundamental disagreement during the Founding Era concerning just what the Constitution was. Finally, it is not true that the idea of a written Constitution emerged only after ratification. And even if it did, we would be reluctant to reorient constitutional decision-making around primordial constitutional chaos. That chaos resolved itself into stable consensus that the Constitution was a particular written thing within a decade, and—on Gienapp’s own account—it remains unbroken. Gienapp offers no compelling normative argument for breaking it.

We do not imagine that we have clinched the case for our own account of constitutional ontology in this reply to a critic. And even if the propositions set forth above are, as we predict, consistent not only with the talk of public officials but also with the intuitions of ordinary people, that doesn’t get us to originalism. We can think of several non-originalisms that might accept them and disagree concerning practical details large and small.

But as Quine recognized, there is value to clearing the universe of conceptual clutter. Gienapp’s myth of an unfixed Constitution is, in the final analysis, clutter. It obscures rather than aids our efforts to understand what the Constitution is and to determine what constitutional decision-makers today ought to do. It should be dispelled.

276. See Willard Van Orman Quine, On What There Is, in FROM A LOGICAL POINT OF VIEW 1, 4 (Harper & Row 2d ed., rev. 1965) (1963) ("These elements are well-nigh incorrigible. By a Fregean therapy of individual concepts, some effort might be made at rehabilitation; but I feel we’d do better simply to clear Wyman’s slum and be done with it.")