THE PAST IS NOT A FOREIGN COUNTRY: HOW A HISTORICAL CRITIQUE OF ORIGINALISM MISSES THAT THE PAST IS PROLOGUE*

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A review of JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

This review is a companion piece to my review of Professor Jonathan Gienapp's first book, published in this journal.[1] Like his first book, which garnered a plethora of plaudits and prizes, this effort appears to be in service of what we might call a "transformation dialectic." Like similar works by Gienapp's generational predecessors Morton Horwitz[2] and Jack Rakove,[3] the central idea proffered seems to be that if we are truly to understand the way our law and the Constitution operate, we must grasp that there is no eternal fixed standard by which proper interpretation can be understood, since times change, and the law and Constitution inevitably evolve or transform to fit the needs of the times. Instead, Gienapp strongly urges, we ought to understand that at the time the United States Constitution was adopted, among the

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Stephen B. Presser, *The Tenacity of Transformation Theory, and Why Constitutional History Deserves Better*, 20 FEDERALIST SOC'Y REV. 42 (2019), https://fedsoc.org/fedsoc-review/the-tenacity-of-transformation-theory-and-why-constitutional-history-deserves-better (reviewing JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018)).

[2] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

[3] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

Founders, there were competing conceptions of the very purpose and meaning of the document,[4] so that it is folly to believe that there is a single "original understanding" which can be discerned and followed in our own time.

Maybe, but maybe not. Gienapp's second book is likely to be received with the same kind of accolades and prizes as his first, because most members of the history fraternity who pass out such encomiums are progressives committed to the living Constitution philosophy which I believe Gienapp embraces. The book does make several valuable points illuminating late 18th century American constitutional history. Still, Gienapp's attack on originalism is not persuasive, and there is nothing in his analysis that should or will dislodge originalism from the currently dominant status it enjoys in the courts if not in the faculty lounges.

In this book, the attack on originalists that was implicit in Gienapp's first book moves to center stage. Gienapp's argument is an open condemnation of contemporary originalists, whom he accuses of inventing a usable past to support their dubious historical arguments. Gienapp says originalists are really "living constitutionalists" since their purported understanding of the founding era is a modern fabrication. The following paragraph is Gienapp's finest blast:

> In defining how the Constitution speaks, [modern originalists] change what it says. In ripping the Constitution from the original context in which it was embedded, they transform its core features. In disaggregating the Constitution from the original constitutional world, they rewrite it. Under the auspices of passively reading the Constitution, they invest it with an identity and substance it did not initially possess. They define its content, redraw its boundaries, alter its character. They, in effect, turn it into something new, something of their own making. Originalists don't simply

[4] Gienapp is on reasonably solid ground in claiming that Hamilton (and other Federalists), Madison, and Jefferson held or at least articulated starkly different conceptions of what the Constitution had wrought. For example, High Federalists such as Fisher Ames believed that the Constitution had created a central government capable of exercising all powers not expressly prohibited to it by the document, while Jefferson's "compact" theory led him to a much more restrictive understanding of central government powers, and Madison held something of an "intermediate" position. *See generally* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 124-37 (2025). Gienapp understands—and there is no denying—that the fact that the framers themselves held such different views about the very document they had framed makes fixing the meaning of that document a challenging enterprise. I don't think this means we have to surrender to "living constitutionalism," as I suspect Gienapp has, and as he believes even originalists have. Some elements of the Constitution—in particular, its elaboration of separation of powers and federalism—are clearer than others, as indicated *infra*.

> find a Constitution in the past, as they emphatically claim. They *make* one in the present.[5]

Gienapp certainly has a way with words. More examples: "When we recover constitutionalism on its own terms, we discover how deeply at odds originalism is with the history it claims to recover and enforce as our fundamental law. We see how un-originalist originalism turns out to be."[6] He accuses originalists, in what he takes to be their naïve belief that the framers were like them, of "playing tricks on the dead."[7] Brilliant and sparkling as much of this book is, it is, to this aged lawyer, not quite convincing.

For Gienapp, contemporary originalists not only invent history, they are guilty of believing that the Founders treated the Constitution the same way they purportedly currently do—as simply a *legal text* to be understood and interpreted like any other legal document, with a set of rules that could just as well be applied to a will, a contract, a warranty, or a non-disclosure agreement.[8] As Gienapp asserts, "By emphasizing the Constitution's textual character, they make it easier to reduce interpretation to questions of linguistic meaning. By emphasizing the Constitution's legal character, they make it easier to reduce interpretation to questions of legal principle and doctrine."[9] Morton Horwitz claimed in 1977 that, in the period leading up to the Civil War, lawyers, judges, and entrepreneurs, working in tandem, altered American law to move it from a more equitable and democratic foundation to one more fit for manufacturers and bankers.[10] In the same way, Gienapp claims that "[John] Marshall and his colleagues, working in tandem with other lawyers and judges, helped turn a robust, popular, quasi-political process into a

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[5] GIENAPP, *supra* note 4, at 222 (emphasis in original).

[6] *Id.* at 3.

[7] *Id.* at 182. For another splendid but perhaps misaimed bit of invective: "Anyone still invested in establishing that the Founders were originalists, it seems, is ultimately more interested in scoring points in modern political disputes than recovering the past on its own terms." *Id.* at 184. The astute reader of this review will discern that Gienapp may himself be interested in scoring modern political points in favor of the version of popular constitutionalism which he seems to favor. One can't help but wonder if Gienapp is projecting when he declares that James Madison, who like Gienapp was not a lawyer, "still continued to believe that constitutional politics, not judicially controlled textualism, would serve as the final arbiter of the Constitution's meaning." In other words, Gienapp imagines Madison to be a "popular constitutionalist" in the mold of a modern progressive law professor, historian, or political scientist.

[8] For the most powerful argument for treating the Constitution as a document with fixed meaning, which Gienapp does acknowledge in his footnotes, see GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (2010).

[9] GIENAPP, *supra* note 4, at 9.

[10] Horwitz, *supra* note 2.

mandarin-controlled, technical exercise."[11] Only in the first third of the 19th century, in Gienapp's view, did lawyers complete their capture of the Constitution.[12]

That the task of interpreting the Constitution is fundamentally about "legal principle and doctrine" is what the legal academy and the bench and bar have believed for generations. Contemporary originalists, I think it is fair to say, can be forgiven for embracing this view. If there was a capture, however, it probably occurred at the Constitutional Convention itself. After all, what could have been the purpose of reducing our Constitution to writing, and what could have been the purpose of providing for the amendment process of Article V, if it was not to secure a fixed legal meaning of the document?[13]

Gordon Wood—arguably the greatest living American historian, on whom Gienapp frequently relies[14]—in a little book which serves as a *summa* of his thought, observes that the written state and federal constitutions of the founding era were designed to constrain power, particularly the power of unbridled democracy, without which constraint, in Wood's view, the United States could not have survived.[15] Wood describes the views of a man very important to Gienapp, James Madison, to the effect that "democracy was no solution to the problem, democracy was the problem."[16]

Wood's book is all about the use of a written Constitution to constrain both popular and executive power. Wood stresses the importance of *writing* in this endeavor, noting in the second chapter of his book the writings establishing fundamental law in the states. For Wood, the thirteen written constitutions enacted in the states served as templates for the eventual 1787 federal

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[11] GIENAPP, *supra* note 4, at 163.

[12] The culmination of the capture, in this telling, was Joseph Story's *Commentaries on the Constitution* (1833).

[13] Gienapp argues that the amendment process doesn't mean that the Constitution didn't continue to have an evolving meaning as a result of what theorists such as Larry Kramer have called "popular constitutionalism." I'm not so sure about this. For Gienapp's treatment of amendments and ratifications as not securing fixity, see, e.g., GIENAPP, *supra* note 4, at 142-46. On Kramer and other theorists of popular constitutionalism, and how they may well have been guilty of pushing the present into the past in the manner of which Gienapp accuses the originalists, see STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 315-30 (2016). For an example of Gienapp pushing popular constitutionalism into the past, see GIENAPP, *supra* note 4, at 157.

[14] Gienapp is writing in a distinguished tradition. Wood was a student of Harvard's Bernard Bailyn (on whom Gienapp also relies), and Gienapp's distinguished mentor Jack Rakove was also a Bailyn student.

[15] *See generally* GORDON WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION (2021).

[16] *Id.* at 67.

Constitution. Wood argues that these thirteen forerunners were actually more important than the federal document in furthering the American understanding of "constitutionalism," including "our single executives, our bicameral legislatures, our independent judiciaries, our idea of separation of powers, our bills of rights, and our unique use of constitutional conventions," and, indeed, the theory of popular sovereignty itself. Wood writes:

> In these new republican constitutions, the Revolutionaries' central aim was to prevent power, which they identified with the governors, from encroaching on liberty, which was the possession of the people or their representatives in the lower houses of the legislatures.[17]

Rather than put their faith in the workings of the traditional orders in society (as Britain did), Americans put their faith in written limitations on the power of government, particularly executives.[18] One wonders whether it is possible to overstate the importance to American constitutionalism of writing and the interpretation of written documents. But Gienapp firmly believes it is.

Gienapp's originalists—lawyers, all[19]— think the Founders regarded the Constitution they created as having a fixed meaning that would endure for all time. Gienapp thinks they are wrong about this. Lawyers certainly do pride themselves on drafting documents with fixed meanings, as this is what they are paid to do. Gienapp's first and second books argue passionately for the proposition that the Founders did *not* create a document with a fixed meaning. But one can't help but wonder if the 35 of the 55 delegates to the 1787 Constitutional Convention who were lawyers (not professional historians or political scientists) believed that they were engaged in just such a lawyerly task.[20] In fact, it is difficult *not* to believe that these 35 lawyers were engaged

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[17] *Id.* at 36.

[18] Some of this description of Wood's book is borrowed from my 2022 review of it. Stephen B. Presser, *Defense of the American Vision*, CHRONICLES: A MAGAZINE OF AMERICAN CULTURE (Oct. 2022), https://chroniclesmagazine.org/reviews/defense-of-the-american-vision/. What Wood is describing is the "structural originalism" I refer to *infra*.

[19] There is an interesting bit of professional snobbery in play here. Gienapp bangs the traditional drum that there's something inherently wrong with lawyers' doing history, usually disparaged as "law-office history." Gienapp's version is: "By its inherent structure, then, legal interpretation promotes historical anachronism. Ordinary lawyers' work purposefully distorts the past according to the imperatives and logic of law." GIENAPP, *supra* note 4, at 240. I'm not persuaded by the "purposefully distorts" claim. Good lawyers try to do good history, lest their opponents have the better of the argument.

[20] *See, e.g.*, *10 Famous People Who Were Lawyers*, NAT'L CONST. CTR. (May 1, 2024) https://constitutioncenter.org/blog/law-day-2013-10-famous-people-who-were-lawyers ("Among the

in the very enterprise Gienapp condemns modern originalists for—linguistic and legalistic as it is. Why did the convention have a special Committee on Style[21] if its members were not profoundly concerned with the meaning and choice of words?

A particular target for Gienapp appears to be that famous champion of textualism and originalism, the late Justice Antonin Scalia.[22] He also lambastes the originalist Justice Clarence Thomas,[23] and he lumps in Justices Neil Gorsuch and Amy Coney Barrett for good measure.[24] A brace of Gienapp's fellow constitutional scholars—including leading originalists such as Randy Barnett,[25] Lawrence Solum,[26] John McGinnis, and Michael Rappaport[27]—are limned as similarly misguided.

The error all of these originalists make, according to Gienapp, is their failure to realize that the past is a "foreign country,"[28] and that since the era of the founding, there has been a Kuhnian paradigm shift.[29] In other words, Gienapp suggests that the concerns and beliefs of the late 18th century are so

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Founding Fathers, 35 of the 55 delegates who attended the Constitutional Convention of 1787 were lawyers or had legal training.").

[21] "On 8 Sept. the Convention chose William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King 'to revise the stile of and arrange the articles which had been agreed to by the House.'" *Draft of the Federal Constitution: Report of Committee of Style, 12 September 1787*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/04-05-02-0297.

[22] *See, e.g.*, GIENAPP, *supra* note 4, at 7, 202 (attacking Scalia's textualist approach). For Scalia's still very powerful statement of that approach, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[23] GIENAPP, *supra* note 4, at 216, 219 (suggesting Thomas was wrong to read the Constitution's text without a deep dive into context, and arguing that "[b]y defining original meaning in terms of text, Justice Thomas's opinion in *Bruen* quietly molded the past to conform with the assumptions of the present").

[24] *Id.* at 229.

[25] *See, e.g.*, RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2013).

[26] *See, e.g.*, ROBERT B. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011)

[27] *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

[28] Gienapp's Chapter Three, making this point, is entitled "A Foreign Country," and it begins with a 1953 quote from the English novelist L.P. Hartley: "The past is a foreign country: they do things differently there." One might still cogently argue however, that the American past is not a foreign country, but rather the inescapable foundation on which the present rests. The past, after all, is prologue, is it not?

[29] THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION (1962). For Gienapp's reliance on Kuhn, see GIENAPP, *supra* note 4, at 42, 235.

different from ours that it is foolish or presumptuous to think that we can simply replicate for our time what the Founders did with their Constitution. Or, to use one of Gienapp's pithy summations, "*our* Constitution is invariably the product of now."[30] If Gienapp is right, our pretensions to the rule of law are hollow indeed.

Gienapp's argument is, of course, not wholly without merit; there are some obvious differences between our time and that of the framers. Technological, scientific, medical, and other aspects of society are profoundly changed. Even so, the idea that modern lawyers work in a manner that is dramatically different from those in the late 18th century is not one I can easily accept. Gienapp says good legal arguments in 1787, 1800, or 1825 were different from good legal arguments now, citing the great Harvard historian Bernard Bailyn's statement that "[t]he past is a different world."[31] I'm not sure this is wholly true of the legal profession. Any modern lawyer reading Blackstone,[32] or Story,[33] or even Coke (in translation from the Latin)[34] finds much that has not changed, and a reader of *The Federalist*[35] is not reading something in a foreign tongue. The task of the framers—to limit arbitrary power, to check and balance the excesses of the legislative, executive, and judicial branches—is still the task that confronts us, and though it is difficult to accomplish, it is not difficult to grasp.

Gienapp appears to believe, however, that the fact that those in the late 18th century believed that the Constitution did not do away with older sources of fundamental law—the law of nations, the social compact, inalienable rights—and that these sources informed *their* reading of the document shows how different they were from us, as we now allegedly rely only on the text.

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[30] GIENAPP, *supra* note 4, at 16 (emphasis in original). This resonates with Kamala Harris's marvelous suggestion that she wanted a future "unburdened" by the past. For an extensive compilation of former Vice President Harris's repeated expressions of her desire for "what can be unburdened by what has been," see Mark Walker (@RepWalker), X (Jul. 21, 2024, 3:32 PM), https://x.com/RepMarkWalker/status/1815107555137597745?lang=en.

[31] GIENAPP, *supra* note 4, at 59.

[32] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69).

[33] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

[34] SIR EDWARD COKE, SELECTED WRITINGS (Steve Sheppard, ed., 2005) (originally published in the late 16th and early 17th century).

[35] *The Federalist* is, of course, the greatest contemporary explication of the 1787 federal Constitution.

Gienapp is most convincing when he argues that the U.S. Supreme Court's interpretation of the Second Amendment[36] in recent cases[37] to protect an *individual* right to bear arms that cannot be abridged by the states or localities is incorrect because the original understanding of the provision, taking the extra-constitutional elements into consideration, considered it a *collective* right.[38] I think this is a powerful argument, and, as one of Gienapp's mentors, Saul Cornell, has argued, this aspect of the history of the right to bear arms may mean that the Supreme Court nodded in this area.[39]

Other aspects of the history of the late 18th century Gienapp discusses, however, do not necessarily mean that modern originalists—including the current originalist majority of the Supreme Court—get all things wrong. Gienapp is correct that supra-constitutional notions were important in the framing era and continue to be important in interpreting the Constitution.[40] But he fails adequately to reckon with one of the most important supra-constitutional notions of the founding era: the inevitable and necessary religious and moral basis of the newly-created American republic.

Gienapp is too good a historian not to be aware of the importance of morality and religion to 18th century American law and society. In a footnote, he quotes Noah Webster's 1828 definition of a "constitution," which includes the observation that "The New Testament is the moral constitution of modern society."[41] He quotes Justice Joseph Story's statement that "we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the

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[36] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

[37] District of Columbia v. Heller, 554 U.S. 570 (2008); N.Y. State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

[38] *See* GIENAPP, *supra* note 4, at 50-52. This also explains the import of the language in the Amendment that refers to it as "the right of the people."

[39] *See, e.g.*, Saul Cornell, *"Half Cocked": The Persistence of Anachronism and Presentism in the Academic Debate Over the Second Amendment*, 106 J. CRIM. L. & CRIMINOLOGY 203 (2016).

[40] *See generally* Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer,* 4 L. & HIST. REV. 325-35 (1986); Stephen B. Presser, *Should a Supreme Court Justice Apply Natural Law?: Lessons from the Earliest Federal Judges*, 4 BENCHMARK 103 (1993). In particular, Gienapp is completely correct that founding-era judges, such as Richard Peters and Samuel Chase, believed that the common law in force in early America incorporated the law of nations and the law of nature, as found in the great work of the Civilians such as Vattel, Bynkershoek, Grotius, and Pufendorf. On this point, see generally STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE (1991).

[41] GIENAPP, *supra* note 4, at 290 n.39.

Constitution of the United States."[42] He surely is aware that John Adams famously observed that "Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other."[43]

But Gienapp does not spend much time on the Founders' understanding that for the Constitution actually to work, it would require virtue in the American people, and that the safeguard of that virtue had to be religion and morals. Had he done so, I think he might have found that some contemporary originalists—Justice Scalia in particular—have a better handle on what Adams understood than do the academics and Justices who appear to believe in a "Godless Constitution."[44]

Some originalist scholars, examining the world of the framers, have suggested that we have not adequately appreciated the importance of religion to the founding, and I think their work is very much in the mold of Gienapp's search for extra-constitutional elements that inform the document. Lee Strang's fine work on Thomistic natural law's importance to the Constitution, and the recent extraordinary book by Kody W. Cooper and Justin Buckley Dyer on the contribution of Calvinist Christianity to the founding stand out in this regard.[45] Ironically, though Gienapp believes his book is in the service of the "living constitutionalist" or "popular constitutionalist" varieties of constitutional interpretation, his great contribution to the study of extra-constitutional materials might actually lead in the direction of the social conservative version of originalism.[46]

Ultimately, I think Gienapp's belief that originalism is just living constitutionalism by another name is incorrect. At the core of much contemporary originalism is fidelity to things that have not changed: the restraint of arbitrary power, the separation of powers, and federalism. For many originalists, what really is at issue in constitutional interpretation is what we might call "structural originalism." Originalists ought to be prepared to concede that

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[42] *Id.* at 88.

[43] *From John Adams to Massachusetts Militia, 11 October 1798*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited Mar. 6, 2025).

[44] *See, e.g.*, ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996). For my difficulty with Kramnick and Moore, see Stephen B. Presser, *Some Realism About Atheism*, 1 TEX. REV. L. & POL. 87 (1997).

[45] LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019); KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING (2022).

[46] For my attempt to articulate this version of originalism, see STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994).

this concept won't answer every question of interpretation of the Constitution,[47] and that extra-constitutional legal, philosophical, and political notions can be useful interpretive guides. But originalists are right to maintain that some things about founding-era understandings of the Constitution *can* be known. The framers' Constitution does tell you expressly or by obvious implication that judges shouldn't make law, that arbitrary power should be reduced by checks and balances and federalism, and that the states should be permitted to cultivate virtue in the people by promoting morality and religion.

The Founders thought the written Constitution could help them face the problems of their day. Originalists think the same written Constitution can help us address similar problems today. An understanding of history doesn't give you license to make up the law as you go along, but it does reinforce a belief that some things don't change, that there are what Russell Kirk called "permanent things,"[48] and that there are timeless truths that we can seek as did the framers.

Perhaps the most important contemporary monograph for serious and sincere originalists who believe in a fixed or a "dead" rather than a living Constitution[49] is *The Federalist.* In that work, three men (two of whom were at the Constitutional Convention, and two of whom were lawyers) provided what is still regarded as the most reliable interpretation of the United States Constitution. In unambiguous language, Madison, Hamilton, and Jay made clear that they believed they were working with a new science of politics. That new science prescribed the abandonment of hereditary monarchy and aristocracy in favor of a system where arbitrary power would be restrained by having the legislative, executive, and judicial branches check and balance each other. It also employed a system of dual state and federal sovereignty as another mechanism constraining arbitrary power.

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[47] Gienapp, relying on Jack Balkin, correctly makes the point that the Constitution doesn't automatically tell us everything we need to know about interpreting it. GIENAPP, *supra* note 4, at 254. But I do think there are occasions—cases involving separation of powers and federalism, for example—when the Constitution tells us all we need to know about what it means.

[48] *See, e.g.*, RUSSELL KIRK, ENEMIES OF THE PERMANENT THINGS: OBSERVATIONS OF ABNORMITY IN LITERATURE AND POLITICS (1969).

[49] Justice Scalia, arguing against the living constitutionalism of the Warren Court and other nonoriginalists in favor of fixed constitutional meaning, proudly pronounced that the Constitution was "dead, dead, dead." *See, e.g.*, Katie Glueck, *Scalia: The Constitution is 'dead'*, POLITICO (Jan. 29, 2013), https://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853.

These men were not writing in "another country," and their beliefs are not mysterious to us. Gienapp would have us accept that interpreting the Constitution at the time of the founding was an "intersubjective" project.[50] This might be true for some aspects of the document, but we can arrive at an objective understanding of the meaning of many provisions. In particular, Hamilton's *Federalist* 78 makes clear his understanding that when the legislative and judicial tasks are not distinct, tyranny is the result.[51] Students of constitutional history know that from the mid-1950s through the first two decades of the 21st century, our federal courts—especially the Supreme Court, and especially in the areas of race, religion, and abortion—were in the business of legislation.[52] Originalist criticism of the legislative judicial decisions that characterized that era is not misconceived, nor is it a betrayal of history. Gienapp argues that "Rather than understanding the founding generation on their own terms, we force them into conversation with us, on our terms."[53] But if Edmund Burke is right that our efforts in law, politics, and society are undertaken in concert with those who came before us, those with us, and those who will come after us[54]—and he is—then such a conversation is inevitable, and Gienapp is missing something if he seeks to opt out of it.

Gienapp's preferred strategy for interpreting the Constitution—popular constitutionalism and an evolving living Constitution—is one with great appeal to contemporary progressive Stanford historians and Yale law professors. But it slights the deep structure of the Constitution which originalists such as Scalia, Thomas, Gorsuch, and Barrett understand. The Society that sponsors this journal was founded on the belief that our courts, for decades, had failed to follow the constitutional scheme of separation of powers and

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[50] *See, e.g.*, GIENAPP, *supra* note 4, at 215.

[51] "For I agree," Hamilton wrote, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." He cited for support of this statement "The celebrated Montesquieu." For the authors of *The Federalist*, Montesquieu, with his insight about the importance of the separation of powers for restraining arbitrary governmental action, was the avatar of the modern science of politics in which they believed.

[52] Dozens of tomes make this point. Mine was RECAPTURING THE CONSTITUTION, *supra* note 46. *See also* LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 13.

[53] GIENAPP, *supra* note 4, at 238.

[54] In Burke's famous phrasing describing the social contract, society "is a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are dead and those who are to be born." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 96 (Oxford World's Classics ed. 2009) (1790).

federalism. Professor Gienapp's provocative book does not alter that insight, the wisdom of that founding, or the merits of the originalist approach thus encouraged.