THE TWIN PEAKS FABLE OF AMERICAN CONSTITUTIONALISM†

ALISON L. LACROIX*

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* Robert Newton Reid Professor of Law and Associate Member, Department of History, University of Chicago. I thank the organizers of this symposium, which took place at the annual meeting of the Association of American Law Schools in Washington, D.C., on January 6, 2024, for inviting me to participate. I am grateful for the support of the Mayer Brown Faculty Research Fund. Some portions of this essay are adapted from my recent book, ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS (2024).

INTRODUCTION

This symposium was the second event on the topic of the Supreme Court and history in which I had the good fortune to participate following the end of the Supreme Court's momentous 2022 Term. The first such discussion took place in July 2023, before a different type of audience, but raised many of the same questions as this session aired. The venue was the annual meeting of the Society for Historians of the Early American Republic ("SHEAR") in Philadelphia. That conversation, which involved a few of the participants in this symposium, took the form of a roundtable titled "Judging the Early Republic: Today's Supreme Court and the Responsibilities of Historians."

As both a lawyer and a scholar of U.S. legal history who specializes in eighteenth- and nineteenth-century constitutional thought, I relish these opportunities to bridge the two disciplinary fields in which I conduct operations. SHEAR is not primarily a conference of legal historians; its boundaries, although fluid, are defined chronologically: the period of U.S. history between 1776 and 1861.[1] As this SHEAR panel on the Court and history demonstrated, however, in recent years the temporal, the methodological, and the political have become fused—and, in some cases, confused—as a result of the Justices' and other legal actors' apparent embrace of "history."

The motivating question for the SHEAR panel was adjacent to the question at the heart of this symposium, but oriented from the perspective of historians (principally, but not entirely, nonlawyer historians). The question hovering over the conference room in Philadelphia might have been paraphrased as, "Why does the Supreme Court suddenly seem to care about the history of the early American republic?" Then followed two more queries: "What does the Court want from us? And what can we the historians provide to the Court?"

One answer to both of these questions might be: nothing. But another answer, one that is both more hopeful and more accurate, is: to the extent that the Court has adopted originalism as its guiding interpretive method, it seeks content stripped of context. What we the historians can provide to the Court, however, is both content *and* context. There is no way for historians, consistent with our professional duty, to provide context-free content.

I. HISTORIANS' HISTORY V. THE COURT'S HISTORY

In order to answer the question of what historians should be providing to the Court, we must first ask: does the Court's new focus on "history and tradition," as elaborated in *New York State Rifle & Pistol Ass'n v. Bruen*,[2] actually have

[1] *About Us*, SHEAR, https://shear.org/about-us/ [https://perma.cc/NCH4-WPZD] (last visited Jan. 30, 2025) ("SHEAR's mission is to foster the study of the early republican period among professional historians, students, and the general public.").

[2] 597 U.S. 1 (2022).

anything to do with what historians do?[3] In other words: is the "history" called for by "history and tradition" the same as the methodology of history? Or is history as methodology fundamentally different from history as (but one component of) a legal test?[4]

To be sure, historians regularly make valuable contributions to the Court's enterprise, chief among them taking on the effort of producing work product that is cognizable to judges and lawyers in the form of amicus briefs and, on occasion, expert testimony.[5]

Yet in the SHEAR discussion, as with so many conversations between trained historians and lawyers who are consumers of history, it quickly became clear that these two uses of history—as methodology versus as test—are in fact fundamentally incommensurable. They are, of course, the same in terms of diction; they are literally the same word: the Department of History, the history and tradition test. But they are not the same in terms of meaning. At best, they are homonyms—words with the same spelling or pronunciation, but different meanings or origins. Less happily, they are false cognates, ready to lead the inattentive or unwary to assume a relationship, a resemblance, that does not actually exist.

These ostensibly similar but ultimately conflicting invocations of the word "history" can be seen as a metaphor, and a cautionary tale, for the problems that can arise when courts attempt to claim the authority of history without actually following the methods of the discipline. Further problems arise insofar as courts disavow the very notion that they are in fact engaged in a discipline, one with its own set of rigorous methods, rather than a commonsense, anyone-can-do-it,

[3] *Id.* at 17, 39 (stating "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation" and endorsing a "text-and-history standard" that Court derived from previous decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

[4] The *Bruen* Court did not announce that it was adopting a history and tradition *test*, although some commentators have adopted this locution. *See, e.g.*, Recent Case, Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc)*, 137 HARV. L. REV. 1034, 1034 (2024). It is not clear that the *Bruen* standard can be meaningfully employed as a "test." Here I differ from some commentators, who vary in their degrees of approval for the putative test but nonetheless treat *Bruen* as having indeed set forth a test. *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435 (2023); Saul Cornell, *History and Tradition or Fantasy and Fiction: Which Version of the Past Will the Supreme Court Choose in* NYSRPA v. Bruen*?*, 49 HASTINGS CONST. L.Q. 145, 145-46 (2022).

[5] *See, e.g.*, Brief for Amici Curiae American Historical Ass'n & Organization of American Historians in Support of Respondents at 1, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 4341742, at *1.

pull-the-dictionary-off-the-shelf (or what one scholar has called "Ctrl-F"[6]) exercise in simply finding meaning.[7]

Here is where the first of many important contributions of Jonathan Gienapp's splendid new book *Against Constitutional Originalism* must be noted.[8] The book captures and dissects the premises behind, and foundations beneath, different strands of originalist thought. It admirably differentiates among them as appropriate, including when doing so requires Professor Gienapp to engage in further extensive analytical work. In short, *Against Constitutional Originalism* presents the case that its title announces. Its opponent is no mere straw-man version of originalism.

Professor Gienapp sums up the central, powerful argument of his book thus: "The Founders' constitutionalism was not ours."[9] In order to support this claim, Professor Gienapp offers an essential, and overdue, distinction between what he terms "originalist" constitutionalism on one hand, and "Founding-era constitutionalism" on the other.[10] This point is a crucial one, which again returns to the difference between history-as-methodology and history-as-test. The array of constitutional thought in the founding era—what I elsewhere call the "landscape of constitutional possibility"—was far broader than the limited and fixed meanings that originalist scholars claim to find in their selective readings of the past.[11]

To cite just one example, Professor Gienapp offers a nuanced corrective to standard arguments that take the writtenness of the U.S. Constitution as entailing a certain set of foundational commitments, chief among them a belief that the document's enumeration of powers amounts to a bedrock interpretive principle that some scholars have termed "enumerationism."[12] As Professor Gienapp notes, the British Constitution was, famously, unwritten. And yet founding-era

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[6] *See* Jed Shugerman, *The Indecisions of 1789: Appendices on the Misuse of Historical Sources in Unitary Executive Theory*, SHUGERBLOG (Feb. 15, 2023), https://shugerblogcom.wordpress.com/2023/02/15/the-indecisions-of-1789-appendices-on-the-misuse-of-historical-sources-in-unitary-executive-theory/ [https://perma.cc/4WMG-QM4P].

[7] *See, e.g.*, *Bruen*, 597 U.S. at 27 ("[H]istorical analogies here and in *Heller* are relatively simple to draw . . . .").

[8] *See generally* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

[9] *Id.* at 116.

[10] *Id.* at 11-13.

[11] *See* ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS 15 (2024).

[12] *See* David S. Schwartz, McCulloch v. Maryland *and the Incoherence of Enumerationism*, 19 GEO. J.L. & PUB. POL'Y 25, 27 (2021); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 577 (2017) (characterizing enumerationism as "ideology"); *see also* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014).

Americans viewed it as a constitution.[13] Building on his previous book, *The Second Creation*, Professor Gienapp argues that "what kind of thing" the original Constitution was understood to be when it was created in 1787 was not self-evident then, much less so today.[14]

One overarching contribution of *Against Constitutional Originalism* is therefore twofold: what it tells us about the importance of constitutional *context* and what it tells us about constitutional *content*.

"Constitutional context" refers to the concrete surroundings in which arguments take place about structures, such as federalism and separation of powers, and textual provisions, such as the Commerce Clause and the Tenth Amendment. Context is vital to constitutional history, as it is to all forms of history. In the words of the great Cambridge intellectual historian Quentin Skinner, "if we wish to understand a given idea, even within a given culture and at a given time, we cannot simply concentrate . . . on studying the forms of words involved."[15] Instead, "we must study all the various situations, which may change in complex ways, in which the given form of words can logically be used—all the functions the words can serve, all the various things that can be done with them."[16]

Yet it is precisely this context that originalist uses of history eschew. In boring into a narrow set of sources in order to constrain meaning, rather than to unearth the frequently surprising meanings that historical actors attached to words and phrases, originalists flout the very historical method from which they seek to derive authority.[17]

This stripping away of context leads to the impoverishment of content. True, impoverishment can at first appear to be clarifying. For example, if one does not know that members of the founding generation routinely referred to laws regulating foreign commerce as "navigation acts,"[18] and that navigation acts had

[13] *See* GIENAPP, *supra* note 8, at 65-116. As Gienapp writes, to the founding generation, "constitutions consisted of both textual provisions and the preexisting principles of fundamental law. . . . The meaning of the written Constitution . . . rested on an underlying socio-historical account of union and sovereignty that could never be wholly derived from the text itself." *Id.* at 12.

[14] *See id.* at 19, 29, 204; *see also* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 21-23 (2018).

[15] Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 36 (1969).

[16] *Id.* at 37.

[17] *See* Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, PANORAMA (Aug. 3, 2018), http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/ [https://perma.cc/7QCH-6QCG].

[18] *See, e.g.*, Letter from President James Madison to Treasury Secretary Albert Gallatin (Mar. 31, 1817) (on file with the National Historical Publications and Records Commission), https://founders.archives.gov/documents/Madison/04-01-02-0021 (using "navigation act" to refer to British restrictions on U.S. trade with the West Indies); Letter from Vice-Consul F.

for more than a century been commonplace in both local and imperial regulations of commerce,[19] one might easily assume that the Commerce Clause of the Constitution established an entirely new power for which there was no pre-1787 precedent. That assumption would seem to be clear. But it would also be wrong.[20] Its wrongness would be a direct consequence of the impoverishment of meaning that results from ignoring context—in this case, the temporal, political, and legal context of British North America, in which "navigation," "trade," and "commerce" were complementary subjects of regulation falling under the authority of the highest level of government.[21]

Constitutional context includes interpretive context—the lenses that historical actors used to understand what something meant—as well as historical meaning. For another illustration of the necessary interrelationship between constitutional context and constitutional content, consider again Professor Gienapp's example of the British constitution. The fact that British people, in both the metropole and the colonies, understood themselves to have a constitution is a historical fact with which originalism frequently fails to grapple. "Nothing about writing constitutions down ever required treating constitutional content as exclusively written," Professor Gienapp writes.[22] "It is *our* strange conception of written constitutionalism that needs to be explained, not assumed."[23] The meaning of the word "constitution" cannot be explained absent attention to the interpretive context in which the word occurs.

Situating the founding generation within the broader temporal context of what came before (the British Empire) as well as what came after (the United States) is crucial to the second overarching contribution of Professor Gienapp's book. This claim concerns a dynamic perennially beloved of the history department graduate seminar room: the relationship between continuity and change. Professor Gienapp argues for greater attention to the continuity between British and American constitutionalism circa the 1770s and 1780s. Of written constitutionalism, for example, he writes, "there was no sudden change in constitutional thinking, no testimony insisting that constitutions had been one

C. A. Delamotte to President Thomas Jefferson (Jan. 30, 1802) (on file with the National Historical Publications and Records Commission), https://founders.archives.gov/documents/Jefferson/01-36-02-0303 (using "navigation act" to refer to French plans to reinstate trade restrictions on the United States).

[19] *See generally* OLIVER MORTON DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION (1974).

[20] *See, e.g.*, Navigation Act 1660, 12 Car. 2 (Gr. Brit.), https://www.legislation.gov.uk/aep/Cha2/12/18/enacted. On navigation acts and the drafting of the Constitution, see ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010). On the history of the Commerce Clause, see LACROIX, *supra* note 11.

[21] *See generally* DICKERSON, *supra* note 19.

[22] GIENAPP, *supra* note 8, at 117.

[23] *Id.* On the English (later British) constitution, see J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY: A REISSUE WITH A RETROSPECT (1987).

sort of thing in 1775 but by 1776 were now something wholly different."[24] Thus far: continuity. But then comes change. Professor Gienapp argues that there was less continuity between the founding moment and today than most originalists admit. "Originalists assume too much when they find themselves and their ideas so readily at the Founding."[25] In other words: there exists more continuity between the all-important *then* and the *before-then*, but less continuity between *then* and *now*.

But what, then, is the key "then"?

II. THE TROUBLE WITH FOUNDINGS

In order to assess continuity between different constitutional contexts, one must have a benchmark—a "measuring moment."[26] For most originalists, the measuring moment is obvious: the founding, meaning the drafting and ratification of the Constitution, and some immediately ensuing number of years—most conventionally, 1787 to 1791, covering the Constitution as originally drafted and the first ten amendments.[27] Until recently, the founding was the sole measuring moment for the standard originalist approach. Many originalists thus either ignored the era of the Civil War and Reconstruction or included it only grudgingly.[28] The past few years have witnessed a shift, with many originalists delving with gusto into Reconstruction.[29] Many historians,

[24] GIENAPP, *supra* note 8, at 110.

[25] *Id.* at 116.

[26] *See* Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1334 (2010) (discussing necessity of a "measuring moment" for both retroactive and prospective conceptions of law).

[27] *See, e.g.*, Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation [https://perma.cc/9U4X-4WAY] (last visited Jan. 30, 2025).

[28] *See* Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1207 (2009) ("Reconstruction has inadequately influenced the direction of constitutional law itself, particularly as compared with the original founding."); Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1967-69 (2017) ("[I]n contrast to [Justice Scalia's] frequent use of *The Federalist* and other evidence from the 1787-1788 ratification debates, he made very limited use of the drafting and ratifying materials of the Fourteenth Amendment."). Notable exceptions include Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

[29] *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT (2021); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 613-17 (2024). For a critical assessment of this turn, see Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241 (2023).

meanwhile, have adopted Eric Foner's influential framing of Reconstruction as a "second founding."[30]

The number of foundings to which originalists—and others—must attend therefore appears to have increased, from one to two. Moreover, definitions vary as to what counts as a founding-level event. For most originalists, whether they adopt the one- or two-founding view, a founding is a founding because it results in the creation of a fundamentally new constitutional order, in terms of both structure and individual rights. On this view, foundings are inextricably linked with text: the first founding was the creation of the Constitution in 1787; the second founding was the transformation of that Constitution through the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments.[31] Another view defines changes to the constitutional order more broadly, recognizing a category of constitutional "moments" in which the text of the Constitution might not change, but Americans nonetheless engage in "higher lawmaking" that fundamentally reshapes the constitutional system.[32] This doubling of American foundings from one to two is in many ways salutary. A view of U.S. constitutional law that derives its meaning entirely from a document drafted in 1787, and that ignores revisions to that document following a war that caused some 620,000 deaths, is incomplete even in originalist terms.[33]

Nevertheless, a view of constitutional law that looks only to foundings is still only a partial understanding. It is a map comprising just two points. The picture that emerges is a constitutional landscape bare but for a pair of mountains: "the Founding Era" and "Reconstruction." Between these two snowcapped peaks lies a formless void—the workaday, the political, but nothing of truly constitutional magnitude. Counting from the drafting of the original Constitution in 1787 to the ratification of the Thirteenth Amendment in 1865, this view consigns to wasteland seventy-eight years—nearly eight decades between foundings.

To be sure, the founding and Reconstruction were epochal moments in our constitutional history. But the turn, among originalists and more broadly, toward a two-founding view of American constitutional law tends to minimize constitutionalism that occurs outside those moments and that manifests itself in modes other than text.[34] There is peril in framing constitutional law in terms of

[30] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[31] *See id.* at 7; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 14, 419 (2005).

[32] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 6-7, 266-94 (1991) (describing "dualist theory" and "higher lawmaking").

[33] *See* James M. McPherson, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION, 163 (4th ed. 2010).

[34] On the problems with an amendment-focused view of constitutional change, see Alison L. LaCroix, *Dispatches from Amendment Valley*, 112 CALIF. L. REV. (forthcoming 2024) (responding to Jill Lepore's Jorde Symposium Lecture titled "The Philosophy of Amendment").

founding moments. If two (at best) founding moments become the only legitimate sources of constitutional meaning, the bar for constitutional change becomes extremely high. The map of our collective constitutional life, in turn, becomes a sizeable gap of what I call "the flyover country of constitutional history" between the twin peaks of 1787 and 1865.[35]

There are at least three problems with this founding-driven, dual-snowcapped-peak view of how and when changes to the Constitution happen: a normative problem; a legal problem; and an empirical, or historical, problem.

The normative problem raised by a founding-focused conception of constitutional meaning is a familiar one that amplifies many fundamental critiques of constitutionalism in general and judicial review in particular. As theorists including James Bradley Thayer, Alexander Bickel, and a host of others have argued in the context of judicial review, a commitment to constitutional text as superior to other forms of law—in particular, legislation—raises concerns about courts as counter-majoritarian, and constitutions as the dead hand of the past attempting to bind future generations.[36] Moreover, amending the Constitution through the Article V amendment process now raises nearly insurmountable challenges.[37] The current Court's focus on text, combined with the near impossibility of amendments to the text, tends toward an overall conservatism, insofar as it sets an extremely high bar for constitutional change. Enshrining the two foundings as the benchmark for truly transformative constitutional change further raises the bar, given the fact that not all amendments rise to the level of "founding." The result is a hierarchy in which real constitutional change occurs only through amendment, and even most amendments will necessarily fall short of the unattainable status of "founding."

The second problem is a legal one, raising the usual array of a lawyer's questions. First, how does one translate a founding—by definition, a unique watershed moment—into a precedent for the everyday process of law and

[35] LACROIX, *supra* note 11, at 10.

[36] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893) (arguing Constitution should not solely be interpreted via "pedantic and academic treatment of the texts of the constitution and the laws" because "combination of a lawyer's rigor with a statesman's breadth of view . . . should be found in dealing with . . . this class of questions in constitutional law"); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1986).

[37] *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 165 (2006). For critical accounts of the role of amendments in modern American constitutional law, see Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686 (2015); Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J. CONST. L. 575 (2015); and David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

politics?[38] In a constitutional system other than our own, the process of translation might frame such a watershed disjunctively, as a regime change—for example, from the First to the Second Republic.[39] Or it might be read more synthetically to harmonize as much as possible with the preceding constitutional order. Second, what are the criteria for a founding-level constitutional event? Especially given that there have been only two to date, how would one know when one was living through a founding moment, as opposed to some less significant moment of change? Third, which institution would be best situated to enact a founding—legislatures, courts, the executive branch, or the people in convention?

The third, and most difficult, problem with a founding-centric view of constitutional law is the empirical—or historical—problem. Fundamentally, an account of the U.S. Constitution that holds that constitutional meaning was created only in these two founding events is a false account of the history. This account is especially inaccurate as applied to the nearly eight decades between the first and second foundings. Here again, the founding-centric view and the amendment-focused view intersect, such that the period between 1787 and 1865 collapses into a hiatus between the "real" constitutional moments of the founding and Reconstruction.[40]

The founding-centric view of the early nineteenth century is afflicted with many empirical, historical errors. To take just one: at a fundamental level, this view of the decades between the founding and the Civil War and Reconstruction fails to explain—or even take notice of—the crucial role of the Supreme Court under the "great chief justice," John Marshall.[41]

Marshall served as Chief Justice of the United States from 1801 to 1835, making him the longest-serving Chief Justice to date.[42] The Marshall Court issued a cascade of foundational decisions that are still at the center of the law-school curriculum, and citations to which continue to pepper Supreme Court briefs: *Marbury v. Madison*,[43] *Martin v. Hunter's Lessee*,[44] *McCulloch v.*

[38] *Cf.* Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681, 1711-16 (2006) (discussing Reconstruction-era Americans' view of "the 1860s as a rupture in constitutional time").

[39] Compare Thurgood Marshall's remark in 1987 that "[w]hile the Union survived the Civil War, the Constitution did not." Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1340 (1987).

[40] LACROIX, *supra* note 11, at 2.

[41] *See generally* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996).

[42] *FAQs – Supreme Court Justices*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_justices.aspx [https://perma.cc/E2ER-548S] (last visited Jan. 30, 2025).

[43] 5 U.S. (1 Cranch) 137 (1803).

[44] 14 U.S. (1 Wheat.) 304 (1816).

Maryland,[45] *Osborn v. Bank of the United States*,[46] and *Worcester v. Georgia*,[47] to name but a few.[48] Moreover, if we situate the Marshall Court in its own time, we see contemporaries debating—indeed, arguing, pamphleting, shouting, dueling, and even warring—over profound questions concerning commerce, slavery, migration, and sovereignty.

Finally, we must consider how the historical actors in the supposed flyover period talked about what they were doing. To take but one example, from a tract written by Abel Upshur, a politically connected Virginian and soon-to-be Secretary of the Navy, then Secretary of State, in 1840: "The Constitution is much better understood at this day than it was at the time of its adoption."[49] Despite his bluster, Upshur was by no means an outlier among legal and political thinkers of the early nineteenth century, many of whom believed that they were engaged in a project of constitutional meaning creation that was equal to that of their founding forbears.[50]

And yet, according to the "twin peaks" story of American constitutionalism, little or no durable constitutional meaning was created—no changes to context or content occurred—in the early nineteenth century. Lacking any change to the text in the form of amendments, the period was a "drought."[51] It could not have been further from something as generative as a founding.

Moreover, this empirical, historical error leads to a further error when this incorrect account of "what happened then" is generalized into an account of "how things must happen in our system." In such cases, a particular but mistaken descriptive account becomes the basis for a normative view. This normative view in turn becomes the basis for a theoretical account—again, mistaken—of when and how constitutional meaning is created. This error recurs throughout originalist constitutional interpretation.

On this view, the Marshall Court's opinions on topics ranging from Congress's powers under Article I, to the constitutionality of the Bank of the

[45] 17 U.S. (4 Wheat.) 316 (1819).

[46] 22 U.S. (9 Wheat.) 738 (1824).

[47] 31 U.S. (6 Pet.) 515 (1832).

[48] Among many works on the significance of the Marshall Court, see GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (Paul A. Freund & Stanley N. Katz eds., 1981); G. EDWARD WHITE WITH GERALD GUNTHER, 3-4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35 (Paul A. Freund & Stanley N. Katz, eds., 1988); and DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (2019).

[49] ABEL PARKER UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT 6 (Philadelphia, John Campbell 1863) (1840).

[50] *See* LACROIX, *supra* note 11, at 9 (noting many legal and political actors of the period "believed themselves to be living in . . . a 'long founding moment'").

[51] LACROIX, *supra* note 34 (manuscript at 108) (citing Jill Lepore's *The Philosophy of Amendment*, 112 CALIF. L. REV. (forthcoming 2024) (draft on file with author)).

United States, to the meaning of a written constitution, to the role of the Court, can all be categorized not as constitutional change but rather as simple implementations of the founding. Because Marshall was operating within a hazily defined zone of proximity to a moment deemed constitutionally salient—the founding—he is treated as simply speaking the Constitution of 1787 into being. Perhaps he was "liquidating" an immanent constitutional meaning.[52] But that is as far as most originalists are willing to go.

As Professor Gienapp astutely points out in his book, both Marshall and his political and legal nemesis Thomas Jefferson are thus sometimes gathered within the originalist curtilage of the founding. Both are capital-F "Founders."[53] A category so capacious, however, fails to be a useful category.

I depart from Professor Gienapp's characterization of the Marshall Court as a single unitary force, "legalizing" the Constitution into a certain scientific view that in his view paved the way for originalism.[54] On the contrary: to take but one example, consider *McCulloch v. Maryland* from 1819, in which the Court upheld Congress's power to establish the Second Bank of the United States and rejected Maryland's claim of authority to tax the Bank.[55] The unanimous opinion, authored by Marshall, cites not a single case, and reads more like a treatise on political theory or national destiny than a judicial decision.[56] In addition, if one takes into account the many disagreements, both in the Court's opinions and in the background, among Marshall and his brethren—principally William Johnson, Jr., and also, on occasion, Smith Thompson—the monolithic image of the Marshall Court quickly begins to crumble.[57]

III. FROM MISTAKEN EMPIRICS TO INCOMPLETE THEORY.

Where does all this leave us? Thanks in part to originalism, we have a mistaken empirical and historical story: that nothing about the Constitution changed between the founding of 1787 and the second founding of Reconstruction. Furthermore, for many non-originalists as well as originalists, the importance of the Marshall Court lies in the fact that it fleshed out, or laid down caselaw precedents for, or put into practice, but—crucially—*did not add anything to* the Constitution of 1787. And so all the cases find their way into the

[52] THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961); *see also* William Baude, *Constitutional Liquidation* , 71 STAN. L. REV. 1, 4 (2019).

[53] *See* GIENAPP, *supra* note 8, at 33, 136-42.

[54] *See id.* at 162 ("[T]he Marshall Court legalized the Constitution.").

[55] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

[56] *See* Sanford Levinson, *The Confusing Language of* McCulloch v. Maryland*: Did Marshall Really Know What He Was Doing (or Meant)?*, 72 ARK. L. REV. 7, 9 (2019).

[57] *See* LACROIX, *supra* note 11, at 355. *See generally* Mark R. Killenbeck, *No Bed of Roses: William Johnson, Thomas Jefferson and the Supreme Court, 1822-23*, 37 J. SUP. CT. HIST. 95 (2012).

casebooks, tamed and contained, under vague headings such as "The Antebellum Years" or "The Commerce Power Before the New Deal."[58]

But if these cases were so important, how can we say that nothing changed between the two foundings? Are the Marshall Court cases in fact accurately categorized under the heading "Restatement of the (1787) Constitution"? For it is this characterization of the cases as merely implementary that underpins the originalist shift to the normative. Viewing the post-founding period as simply, descriptively about the working out of the text leads to the normative conclusion that when one talks about "the Constitution," one means the text and only the text—and potentially also something called "tradition," as long as it is "deeply rooted."[59] But this tradition is to be defined by courts, with the depth of any roots measured largely by non-historians. The text is fixed, change occurs through amendments (more text), and truly transformational change occurs at foundings (and there are at best two of these). Thus do the mistakes accumulate.

A historian might offer two objections to this state of affairs. First, as I have discussed above, the empirics on which the interpretive claim are based fail to satisfy the criteria of the historical method. Second, a historian might well shudder from an archival aversion to throwing out so much evidence of constitutional meaning.

IV. WHAT, THEN, CAN HISTORIANS PROVIDE TO THE COURT?

Historians must first understand that judges and lawyers believe that history provides authority. This aspect of the story presents a victory for the craft of history and should be recognized as such.

Historians can provide the Court, just as they provide their wider audience, with good analysis that identifies and analyzes context and content. In this endeavor, historians must proceed with caution, always aware that the questions that the Court is interested in asking are often different from the ones that historians are interested in answering.

Finally, historians can and must present robust challenges to originalism's—or any other method's—unearned claims to *be* history. Professor Gienapp's book elegantly carries out both assignments. Historians' mission here is to

[58] RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 26 (7th ed. 2015); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 83 (16th ed. 2007).

[59] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("[T]he Due Process Clause of the Fourteenth Amendment. . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

challenge and correct the faulty descriptive accounts that underpin the normative claims. The Republic ought to expect that every historian will do her duty.[60]

[60] *Cf.* WILLIAM JAMES, 3 THE NAVAL HISTORY OF GREAT BRITAIN 289 (London, Baldwin, Cradock & Joy 1823) (quoting Vice-Admiral Lord Viscount Horatio Nelson's famous signal at the Battle of Trafalgar in 1805).