WERE THE FOUNDERS THEMSELVES ORIGINALISTS?

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The founding generation was broadly originalist in constitutional interpretation. As Judge Pryor has suggested, the Founders believed the meaning of the Constitution was fixed at the time of enactment and was not subject to updating by interpretation. Any updating was to be left to the amendment process. Thus, originalism energizes the amendment process by allowing subsequent generations to be framers of the Constitution.

What is harder to assess is exactly what kind of originalists the Founders were. Ultimately, a review of the history indicates that the Founders were legal contextual textual originalists, rather than living constitutionalists. Calling the Founders "legal contextual textual originalists" seems like quite a mouthful. What it means is that, first, the Founders focused on the text rather than directly on intent.[1] And second, the Founders were contextualists, not word- or even clause-bound textualists. The Founders ascertained the meaning and often made it more precise by consulting the entire document. Third, they permitted the meaning of the text to be made more precise by understanding it as law and that meant consulting the legal and historical background of its terms.[2]

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1. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1409–12 (2019).

2. *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1392–94 (2018).

The Constitution was not created *ex nihilo* but rather was set against a rich background of Anglo-American history and Anglo-American interpretive methods. This background was to the advantage of the officials who had to implement the Constitution and those who lived under it because the Constitution's Anglo-American legal heritage can make meaning more exact than might otherwise be expressed solely within the four corners of a short document.

In this brief time, I will show how various elements of the founding indicate that the Founders were originalists: first, the document itself; second, debates between the Federalists and the Anti-Federalists; and third, the post-enactment practice of the founding generation.

First, a review of the document itself provides valuable insights into the nature of the originalism of the founding generation. The Constitution the Founders created is itself an essential context for its method of interpretation.

Second, the debate between the Anti-Federalists and the Federalists, those supporting the Constitution, demonstrates the Founders' embrace of legal contextual textual originalism in how the Constitution would be interpreted. The Federalists emphasized that the judges would be constrained by strict rules of interpretation so that they could not create a consolidated government. Some of the Anti-Federalists, to be sure, opposed these methods of interpretation in favor of more populist—rather than legal—methods. But that does not mean that the Anti-Federalists expected populism to guide constitutional interpretation. To the contrary, the Anti-Federalists' opposition to originalist methods often stemmed from their recognition that originalism was likely to guide constitutional interpretation—for the Anti-Federalists, a reason to reject the Constitution.[3]

3. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907–12 (1985) (laying out the debate between the pseudonymous Anti-Federalist Brutus and the Federalist Alexander Hamilton over interpretive methods).

Third, the founding generation put originalist interpretation of the Constitution into practice. Obviously, in a short talk, I cannot do justice to the huge variety of constitutional argument and debate in the early republic. However, the debate over the constitutionality of the Bank of the United States illustrates how all the main participants in the founding generation's political debates were originalists and even largely agreed on the methods of interpretation, even as they disagreed on the question of whether chartering a national bank was constitutional.[4] Indeed, the better and more experienced the lawyers were, the more they tended to agree on interpretive principles, if not the result.[5]

First, let us begin with the Constitution, which itself provides some clues about how it is to be interpreted. For instance, as Professors Chris Green and Evan Bernick have argued in some interesting new work, the Oath Clause[6] is an oath to "this Constitution." Some internal references in the Constitution, like "the powers granted herein" and their careful enumeration, suggest that this Constitution is listing things.[7] That is the kind of thing texts do. Moreover, Washington's transmittal letter talks of delivering the Constitution for ratification to the States.[8] And what was the Constitution? It was a text written on parchment.

Another indication of the salience of text is the great care the Framers took in perfecting it. The Committee of Detail and the Committee of Style of the Constitutional Convention made many

4. McGinnis & Rappaport, *supra* note 1, at 1401–18.

5. *Id*. at 1403.

6. U.S. CONST. art. VI, cl. 3. *See* Evan D. Bernick & Christopher R. Green, *What is the Object of the Constitutional Oath?* (August 22, 2019). Available at SSRN: https://ssrn.com/abstract=3441234 or http://dx.doi.org/10.2139/ssrn.3441234 [https://perma.cc/SZS2-XQTQ].

7. *See* Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1651–53 (2009).

8. Letter from George Washington to the President of Congress (Sept. 17, 1787), *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/04-05-02-0306 [https://perma.cc/4ACL-AF7N] ("We have now the Honor to submit to the Consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable.").

changes to bring clarity to the Constitution. Everyone was watching the nuances, down to its punctuation. For instance, Gouverneur Morris, the most influential member of the Committee of Style, rendered Article I, Section 8, Clause 1 as providing three separate powers: (1) to lay and collect taxes, duties, and imposts; (2) to pay debts of the United States; and (3) to provide for the common defense and general welfare of the United States. Their separation was indicated by a semicolon.[9] But Roger Sherman saw that breaking up the phrases with a semicolon would give greater powers than he thought had been the sense of the Convention, and thus eliminated the last semicolon, making sure that the requirement to provide for the common defense and general welfare provided a limitation on the first two powers and not an expansion.[10] Such careful rearticulation suggests that the text was the essential matter for interpretation—they took a lot of time over it—and that the text was designed both to limit and empower the federal government. When a judge updates the Constitution through interpretation, he destroys the delicate compromise that was forged in that text.

The text itself indicates the relevance of the entire Constitution to interpreting particular clauses, as suggested by the interlocking nature of many provisions, such as the Necessary and Proper Clause, as well as the repetition of words and concepts. Thus, it provides support for contextual textualism. Examples of words that are repeated throughout the text include the words "officer" and "necessary." Intra-textualism flows directly from the way the document is written. In short, as Justice Paterson noted in the 1790s, what differentiated the United States Constitution from previous national

9. *See* William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 21–22 (2021) (comparing the Committee of Style's version to the version in the final Constitution).

10. *See id*. at 23–24. *See also* Albert Gallatin In The House Of Representatives (June 19, 1798), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 379 (Max Farrand ed., 1911) (describing how Sherman, "a member from Connecticut", discovered the construction by Morris, "one of the members who represented the State of Pennsylvania", that would have created a distinct power and the clause was restored to the final version as a limitation).

constitutions like the British constitution that preceded it was its "written exactitude."[11]

But the relevant, perhaps most important, context of the Constitution also comes from the fact that it is a legal document. As philosophers of language remind us, much of what is asserted in a proposition is contextual, and one important part of the general context of the Constitution is its legal context.[12] That comes from the fact that the Constitution was clearly understood as law.[13] As a result, the Constitution's words must be understood against the common law and other aspects of legal background, and they must be interpreted according to the rules of interpretation generally applicable to legal documents, with the caveat that some of the rules need to be changed or modified to apply to the Constitution.

The Constitution itself makes clear it is a legal document. First, the Constitution defines itself as "the supreme Law of the Land" through the Supremacy Clause.[14] Second, the Constitution is full of legal terms. It is extremely difficult to account for the plethora of legal terms without understanding that the Constitution is a legal document to be interpreted, at least when it is relevant, against the background of the law at the time. Mike Rappaport and I have counted the number of these terms.[15] Some terms like "Letters of Marque and Reprisal"[16] are unambiguously legal. No one would understand them in ordinary language. Others have a legal meaning, although perhaps also an ordinary meaning as well: something

11. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795).

12. *See* Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 236–37 (2011) (describing how linguistics distinguishes the meaning of a sentence from its content relative to context, and distinguishes both the meaning and contextual content from what is asserted).

13. *See* John O. McGinnis, *The Constitution's Creation Is Compatible with Reading It as a Legal Document*, L. & LIBERTY (Apr. 3, 2017), https://lawliberty.org/the-constitutions-creation-is-compatible-with-reading-it-as-a-legal-document/ [https://perma.cc/U9JF-B2B8] (discussing the legal context of the constitution).

14. U.S. CONST. art. VI, cl. 2.

15. *See* McGinnis & Rappaport, *supra* note 2, at 1370–71, 1373–75 (counting the terms in the Constitution that have at least some legal meaning).

16. U.S. CONST. art. I, § 8, cl. 11.

like "Privileges and Immunities of Citizens in the several States."[17] Altogether, such terms appear 103 times in the short document of the Constitution.[18] More appear in the Bill of Rights, like the term "due process."[19] The first Congress's decision to write down the people's rights in the language of the law confirms that the founding generation understood the Constitution is written in that language. It is to be interpreted, when relevant, according to the legal conventions of the time. To be sure, that does not mean every word or clause of the Constitution needs a legal context to unpack. Legal rules themselves recognize many contexts in which ordinary meanings predominate.

Another indication the Constitution was interpreted against the background of legal rules is that it contained specific clauses that block the application of legal interpretive rules that would otherwise apply. For instance, after stating that the Constitution and other federal laws are the "supreme Law of the Land," the clause provides this phrase: "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[20] Professor Caleb Nelson explained the reason for the appearance of what might seem a curious phrase; it actually had a well understood meaning in the law at the time. It is called a *non obstante* clause.[21] It was to block the application of another legal interpretive rule that would require judges to harmonize state and federal laws, even if the best reading of the state law was that it should be blocked under the Supremacy Clause.[22] The provision showed the Constitution was understood against a set of relevant legal backdrops, again, when those are relevant.

And early observers of the Constitution recognized that it was a document that needed to be interpreted as such. For instance, St.

17. U.S. CONST. art. IV, § 2, cl. 1.
18. McGinnis & Rappaport, *supra* note 2, at 1374.
19. U.S. CONST. amend. V.
20. U.S. CONST. art. VI, cl. 2.
21. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).
22. *Id*.

George Tucker wrote that "science [meaning almost certainly legal science], only, is equal to the task" of making sense of the complexity of our constitutional system of government.[23] And one way the Federalists assured the Anti-Federalists they would not twist the Constitution to create a stronger federal government than was contemplated by the Constitution was to point out that the Constitution would be applied according to textual interpretation done according to legal rules. That was the response of Alexander Hamilton to the Anti-Federalist Brutus. According to *Federalist NO. 78*, judges would just compare the statutes to the Constitution, voiding them only if they conflicted.[24] In doing so, they would be bound down by "strict rules and precedent,"[25] in Hamilton's words. Hamilton relies on the contextual nature of the Constitution, particularly in its legal context, as a protection against updating by judges—the kind of practice favored by living constitutionalists.

Now, let me move to show how the founding generation employed originalism.

The debate over whether the federal government had the power to charter a bank,[26] of course, happened immediately after the Constitution was enacted, and it is one of the best sources for how the founding generation regarded interpretation. This debate engaged a huge spectrum of political opinion. It pitted nationalists—who saw the Bank as essential to sustaining a flourishing Republic[27]—

23. ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA xv (1803).

24. THE FEDERALIST NO. 78, at 466 (1788) (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("If there should happen to be an irreconcilable variance between [the Constitution and a statute]…the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents".).

25. *Id*. at 470.

26. *See* McCulloch v. Maryland, 17 U.S. 316 (1819) (holding that the Constitution gives Congress the power to incorporate a bank).

27. *See* Alexander Hamilton, *Final Version of the Second Report on Further Provision Necessary for Establishing Public Credit (Report on a National Bank, 13 December 1790, in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-07-

against those more interested in preserving state power, which they saw as closer to the people and less liable to corruption than national institutions like the Bank. The nationalists argued that the Bank was necessary and proper to a variety of enumerated powers, such as the taxing power, and was clearly sustained by the text of the Constitution.[28] Those who were in favor of more rights for the States were concerned that Necessary and Proper Clause should be interpreted narrowly and that the nationalists were interpreting it too broadly, were understanding it to mean "conducive."[29] They had a stricter meaning of what necessary meant—but again, a meaning rooted in the text.[30]

They also argued that such a large power should have been expressly enumerated, which is a kind of textual argument about expectations; what kind of powers would be enumerated depend on how large they are.[31] This debate sustained the attention of the most important political and legal thinkers of the time: James Madison,[32]

02-0229-0003 [https://perma.cc/AE6V-SMQM] (arguing the advantages of the Bank to the new nation).

28. *See* Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, [23 February 1791], *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003 [https://perma.cc/MEP6-TKU3] (arguing that Congress has the power to incorporate a Bank in relation to its power of collecting taxes, among other powers).

29. *See id*. (noting that according to grammatical and popular senses of the term "necessary," the word "often means no more than *needful, requisite, incidental, useful*, or *conducive to*") (emphasis in original).

30. *See The Bank Bill,* [2 February] *1791*, *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-13-02-0282 [https://perma.cc/MU3G-T95J] (James Madison speech in Congress on the constitutionality of the Bank, arguing the Bank is not "necessary" to the government but merely convenient).

31. *See id*. (arguing that the enumeration of powers in the Constitution "condemn any exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power").

32. *See id*.

Thomas Jefferson,[33] Alexander Hamilton,[34] and Edmund Randolph.[35]

So, what comes out of that debate for the idea of, "Are the Framers originalists?" First, I think it follows that they were textualists who did not focus directly on intent. Second, in interpreting the text, they said, "We should follow the conventional rules of interpreting a text." Third, those involved in the debate largely incorporated the text according to rules that one would apply to documents analogous to the federal Constitution, like a statute or state constitution.

Famously, the Bank was first debated in the cabinet. Secretary of Treasury Hamilton's opinion was the most explicit on the obligation to follow the text under established legal rules. He stated that the " intention is to be sought for in the instrument itself," of course, by which he meant the text, "according to the usual and established rules of construction."[36] Others in the debate also called for following the text under conventional rules. Elbridge Gerry, a Bank proponent like Hamilton, but importantly, for our discussion, an Anti-Federalist unlike Hamilton, argued the rules of Blackstone should be followed.[37] Attorney General Edmund Randolph, an opponent of the Bank, also discussed how conventional statutory rules of interpretation should apply to the text of the Constitution.[38] None of them argued for anti-originalist rules or for judicial updating. Their

33. *See* Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791*, *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-19-02-0051 [https://perma.cc/EV8W-EJPZ].

34. *See supra* notes 29–31.

35. *See* Edmund Randolph, *Enclosure: Opinion on the Constitutionality of the Bank, 12 February 1791*, *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-07-02-0200-0002 [https://perma.cc/L9Q5-LLGZ].

36. *See supra* notes 30–31.

37. 1 ANNALS OF CONG. 1998 (1791). *See also* Charles J. Reid, *America's First Great Constitutional Controversy: Alexander Hamilton's Bank of the United States*, 14 U. ST. THOMAS L.J. 105, 161 (2018) (describing Gerry's proposal for interpretation).

38. Edmund Randolph, Opinion of Edmund Randolph, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 86 (M. St. Clair Clarke & D.A. Hall comp., 1832).

views should be given great weight, because they emanate from very able, practicing lawyers. But even those who did not make a living practicing law used conventional rules. Thomas Jefferson's opinion against the Bank largely turned on the conventional anti-surplusage rule, as he argued that the large power of the Bank would have to have been enumerated.[39]

James Madison set out a series of interpretive rules that would lead to making a constitutional judgment against the Bank.[40] Again, the rules concerned interpretation of the text of the Constitution. There is one way I think in which his proposed rules were not quite like the others embraced. He appeared to think the Constitution should be interpreted like a treaty, but that view did not seem to be widely shared, even by those who agreed with his opinion that the Bank was unconstitutional.[41] Importantly, there appeared to be a consensus against the direct use of the substantive intent of the Philadelphia Convention, against the idea of the originalism of original intent. While Hamilton and Randolph, the two best practicing lawyers among the disputants, disagreed on whether the Bank of the United States was constitutional, they agreed that the intent of the framers was not relevant. Madison mentioned his memory of what happened at the convention in his speech on the Bank, but even he did not include it in his reference to the five relevant legal interpretive rules of the tax for his legal analysis.[42]

Jefferson did argue the Framers had implicitly rejected a Bank based on what they intended at the Convention, but the anti-surplusage rule was more important even to his legal analysis. To be sure, the intent of the Framers was sought indirectly by interpreting the text, but not independently. And I think that is very consistent

39. Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 93 (M. St. Clair Clarke & D.A. Hall comp., 1832).

40. 1 ANNALS OF CONG. 1945–46 (1791).

41. McGinnis & Rappaport, *supra* note 1, at 1398 (discussing Madison's treaty-like approach to interpretation).

42. 1 ANNALS OF CONG. 1945–46 (1791).

with much of the rest of what we see in the founding era. Chief Justice Marshall famously argues that the intent of the Constitution is chiefly collected from its words—it is the text that is paramount.[43] The debate over the Bank also does not support the notion that it was a conventional rule to directly consider the substantive intent of the participants at the state conventions as constitutive of the meaning of the Constitution any more than the Framers' intent.

But it is quite interesting how some of the disputants use that intent. Instead, they suggested the material from the ratifying conventions may have had an interpretive role, but a limited role. Thus, they did not look at them as a matter of intent; they used the state conventions as a form of evidence about the interpretation of a text laid down by others.[44] In other words, the convention was the first interpreter of the text, and they only looked at the formal actions of an entire convention, like the passage of proposed amendments, as to what it thought the Constitution meant, not individual comments of the ratifiers. This too was an application of a conventional legal rule. Contemporary expositions of statutes by officials had long been given weight in Anglo-American law,[45] but note that the rule was applied in a new context. They were giving weight to contemporary expositions, in this case, by the ratifiers of a document that had already been laid down.

The most important lesson to take away from the Bank debate among opponents and advocates is how originalist they were. When they debated the meaning of a text, they debated as if the meaning were already fixed and something to be clarified through resort to conventional rules of interpretation. They were thus acting self-consciously as interpreters of a written legal text.

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43. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202–03 (1819).

44. McGinnis & Rappaport, *supra* note 1, at 1412–17.

45. Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1043 (1991) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416 (1821)) (noting that contemporaneous exposition was a "consideration[] to which Courts have always allowed great weight in the exposition of laws").

The famous opinion in *McCulloch v. Maryland* upholding the Bank is very familiar to many of you.[46] The decision follows a contextual textualism, which considers the meaning of clauses and the context of the whole document, looking at words and connecting to other words. It begins by expressing and relying on the arguments of the cabinet members and the members of Congress in favor of the Bank.[47] But it is important to rebut one argument from the opinion that has been used to justify living constitutionalism. The argument comes from the opinion's language that the Constitution is "intended to endure" and "to be adapted to the various *crises* of human affairs."[48] And, according to many, that language suggests that the Constitution is a living document.[49]

I want to end by giving what I think is a full repudiation of that argument because I think it is the single most common argument that the Founders were living constitutionalists. Consider a fuller context of Chief Justice Marshall's discussion. In *McCulloch*, Chief Justice Marshall wrote:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change,

46. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

47. *Id*. at 401–02.

48. *Id*. at 415.

49. *See, e.g.*, Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1256–57 (1984) (interpreting Chief Justice Marshall's words as supporting a "generally accepted" theory of living constitutionalism); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710 (1975) (arguing that Chief Justice Marshall's words support living constitutionalism).

> entirely, the character of the instrument, and give it properties of a legal code.[50]

While Chief Justice Marshall certainly recognized the problems of allowing future decisionmakers to respond to new circumstances, his argument was not that the Constitution should be adapted to mean whatever those future decisionmakers believed it should mean. Instead, Marshall argued that the problem of anticipating future circumstances required the Congress to be given broad authority so it could choose among the means. Moreover, even if one were to interpret the language as allowing Congress to adapt the Constitution to future circumstances, it does so only in a relatively narrow way. Congress might have the power to adapt the means to future circumstances, but it clearly does not have the power to change the ends. While Congress can select new means to regulate commerce among the States, for instance, it cannot change the meaning of the term "regulate Commerce . . . among the several States."[51]

Also, the view that *McCulloch* endorsed living constitutionalism was not adopted by courts for centuries. During the 19th century, the quote was never cited to support the view that the meaning of the Constitution would change over time.

Interpreting Chief Justice Marshall's *McCulloch* opinion as embracing a broad but originally defined meaning of Congress's powers also has the advantage of rendering the opinion consistent with his other opinions. For example, Chief Justice Marshall's discussion of both constitutional and statutory interpretation in *Sturges v. Crowninshield*[52] reads like textual originalism. There, Marshall said that the meaning of the text should be rejected only if it reached absurd results.[53] And that absurdity must "be so monstrous, that all

50. *McCulloch*, 17 U.S. (4 Wheat) at 415.
51. U.S. CONST. art. I, § 8, cl. 3.
52. 17 U.S. (4 Wheat.) 122 (1819).
53. *Id*. at 202–03.

mankind would, without hesitation, unite in rejecting the application."[54] And even this absurdity rule is just another example of a legal rule that is applied at the time. So it is incongruous to think of *McCulloch* as voicing a different view than the contextual textualism that he practices in the *Sturges* opinion.

Moreover, the originalist interpretation that those in the early era practiced was so powerful that it continued to dominate constitutional law for decades, even if on occasion, it was misapplied.[55] It began to fray later in the nineteenth century.[56] In the progressive era, an alternate vision of the living Constitution came to the fore. But today, the Supreme Court appears to be moving back towards an expressly originalist interpretation of the Constitution.[57] In doing so, the Court is reviving the interpretive practices of the founding generation and applying them anew. The Roberts Court thus does not represent a radical break with the past, but a return to the origins of our constitutional order.

54. *Id*. at 203.

55.*See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 205 (1997).

56. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 13–14 (1998) (describing how originalism frayed after the Civil War as temporal distance from the Founding widened).

57. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., No. 21–418, slip op. 24 (U.S. 2022) (holding that the "original meaning and history" control in Establishment Clause cases); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20–843, slip op. 17 (U.S. 2022) (requiring gun regulations to be "consistent with the Second Amendment's text and historical understanding").