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# *ARTICLES*

## OLD TEXTUALISM, NEW JURISTOCRACY

MARCO BASILE*

*This Article traces the emergence of text-centric theories of legal interpretation in the early nineteenth century amid an increasingly writing-based legal culture. While many scholars and judges associate textualism with the Founding period's enactment of written constitutions and innovation in the separation of powers, this Article argues that the first "textualist" turn in legal interpretation crystallized after the Founding and reflected transnational developments. Not until the 1830s through 1850s did certain jurists on both sides of the Atlantic elaborate interpretive theories predicated on understanding a written law as an ordinary linguistic communication, as opposed to being in part declaratory of unwritten principles. This new emphasis on the enacted text reflected the increasingly writing-based legal culture of the early nineteenth century enabled by the industrial revolution in print and communication technologies. Amid this technological change, old textualists believed they were bringing the equivalent of modern steam power to legal interpretation.*

*Indeed, it was their work from the 1830s through 1850s, not the Founding, that Justice Scalia cited as muses for his project to revive a text-centric "science" of legal interpretation. Scalia's new textualism, however, differed from old textualism. New textualism emphasizes the public legibility of the enacted text and how that public*

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*legibility operates to constrain judicial discretion. Old textualism, by contrast, understood law as a largely technical language and instead promoted a vision of legal interpretation that advanced public ends through non-public means. Old textualists ultimately sought to claim interpretation as the expertise of judges and to reassure skeptics that judges could exercise this expertise objectively—laying groundwork for the rise of judicial supremacy that would follow.*



## INTRODUCTION

For many lawyers and judges, the primacy of text for legal interpretation is rooted in their understanding of the Founding. They may ground statutory textualism in Founding-era innovations in the separation of powers, for instance, or identify constitutional textualism with originalism and the Founding-era adoption of a written Constitution.[1] Scholars have taken a wide range of views. As to statutory

[1] *See, e.g.*, NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 116–17 (2019) (identifying originalism with constitutional textualism and defending the approach based on the

interpretation, John Manning has argued that most early American authorities understood the Article III grant of "judicial power" to exclude any equitable power to align statutes with their purposes.[2] By contrast, William Eskridge and Farah Peterson have maintained that equitable interpretation was in fact central to early American statutory interpretation.[3] In turn, as to constitutional interpretation, many originalists identify original constitutional meaning with the original public meaning of the enacted constitutional *text*.[4] Many historians of the late eighteenth century, however, have pressed the view that constitutions were not yet understood in their modern guise as just the documents that could be "entombed in a glass case" of an archive.[5] Rather, on their view, there was more continuity with an early modern understanding of a constitution as a self-enforcing set of practices for organizing government that were only loosely and incompletely translated into text.

This Article enters these conversations by asking a new question: When do we first see legal writers explicitly elaborating text-based theories of legal interpretation that privileged the clear linguistic meaning of the enacted text over other considerations?[6] My argument is that such a development occurred only in the 1830s through 1850s, when a vanguard of writers in the United States and Britain began to publish treatises that portrayed legal interpretation as primarily a text-centric enterprise, and they saw themselves as modernizing reformers,

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founders' deliberate decision to reject the largely unwritten English constitution and "to adopt a written Constitution"); *id.* at 130–31 (defending statutory textualism based on an original understanding of the constitutional separation of powers); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW, at xxviii–xxix, 15, 23–24 (2012) (describing their treatise on statutory and constitutional textualism as a project "to restore" original understandings).

2 John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7, 78 (2001).

3 William N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 991, 997 (2001) [hereinafter Eskridge, *All About Words*]; Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 713 (2018).

4 *See* sources cited *infra* notes 53–60.

5 Daniel J. Hulsebosch, *The Constitution in the Glass Case and Constitutions in Action*, 16 L. & HIST. REV. 397, 401 (1998); *see also* sources cited *infra* note 63 (describing early modern understandings of documentary constitutions as both written and unwritten).

6 The term "interpretation" can refer to just the identification of a legal text's linguistic meaning, excluding any other activity that may be required to determine the text's legal meaning (such as resolving the legal meaning of a vague or ambiguous legal text or otherwise translating the linguistic meaning into doctrine). *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103 & n.19 (2010). Except when discussing a historical actor's use of this narrower sense of the term, I use "interpretation" in its broader and more familiar sense in law to refer to the entire process of determining a legal text's legal meaning.

not merely recorders of existing practices. Their modernizing project was in fact twofold. They advanced textual rules of interpretation, which they drew largely from treaty interpretation under the law of nations (international law's precursor) and civil law in Europe. And they did so as part of a broader project to promote—rather than constrain—judicial power.

Here is a clue (or at least a teaser): In *District of Columbia v. Heller*[7]—on whether the Second Amendment protects an individual right to a gun—a central point of disagreement concerned what to make of the Amendment's prefatory clause announcing the preservation of a militia as its purpose or condition.[8] The dissent opened with several pages arguing that the preamble circumscribed the Amendment's scope.[9] In the majority opinion holding that the Amendment nevertheless encompassed an individual right to bear arms, Justice Scalia skirted the preamble's more limited horizon. He explained, matter-of-factly, that while a prefatory clause can "resolve an ambiguity in the operative clause," it "does not limit or expand the scope of the operative clause."[10] But where did that rule come from? For authority, he cited none of the usual suspects. No Marshall, no Madison, no Hamilton. Rather, he cited Fortunatus Dwarris and Theodore Sedgwick III.[11]

*Who?* As obscure as these names ring today, they were as prominent in their day. Dwarris, a Brit, and Sedgwick, a New Yorker, were part of a self-styled modernizing, liberal, moderately antislavery generation of lawyers eager to bring law into the modern world along with steam power, telegraphs, and railroads. Dwarris's 1830s treatise on interpretation and Sedgwick's 1850s treatise met demand for multiple editions.[12] Within the intervening span, the Prussian émigré Francis Lieber and New Yorker Elisha Fitch Smith issued similar

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7 554 U.S. 570 (2008).

8 U.S. Const. amend. II.

9 554 U.S. at 636, 640–44 (Stevens, J., dissenting).

10 *Id.* at 578 (majority opinion).

11 *Id.*

12 Fortunatus Dwarris, A General Treatise on Statutes (London, Saunders & Benning 1830–1831) [hereinafter Dwarris (1830–31 ed.)]; Fortunatus Dwarris, A General Treatise on Statutes (Phila., John S. Littell 1835) [hereinafter Dwarris (1835 ed.)]; Fortunatus Dwarris, A General Treatise on Statutes (London, William Benning & Co. 2d ed., 1848) [hereinafter Dwarris (1848 ed.)]; Fortunatus Dwarris, A General Treatise of Statutes (Platt Potter ed., Albany, William Gould & Son 1871) [hereinafter Dwarris (1871 ed.)]; Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law (N.Y.C., John S. Voorhies 1857); Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law (John Norton Pomeroy ed., N.Y., Baker, Voorhis & Co. 2d ed. 1874) [hereinafter Sedgwick (1874 ed.)].

works.[13] New York state court judge Platt Potter, upon publishing the second American edition of Dwarris's treatise, deemed it "a standard work of the highest authority" and "the necessary complement to the professional life of the lawyer."[14] And in Europe, Alexis de Tocqueville gushed over Sedgwick's work—"he shows a deep knowledge of precedents, a rare gift of interpretation, and in my opinion, good sense"—advising all those interested in public law to find a copy.[15]

The "new textualism"[16] of Justice Scalia can be understood as a movement to revive the text-centric, "scientific" theories of interpretation articulated by writers such as Dwarris and Sedgwick. In fact, Justice Scalia said so himself. He pointed to Dwarris, Sedgwick, and other nineteenth-century treatises on "the science of statutory interpretation" as models for a more systematic approach to legal interpretation today.[17] And he expressly expanded that project to constitutional interpretation.[18]

But the revival and the revived were not coterminous. To be sure, they shared enough to both be categorized as "textualist." Although textualism eludes any simple definition,[19] the earlier theories of legal interpretation by Dwarris, Sedgwick, and likeminded writers shared modern textualism's understanding of interpretation's core duty: "to adhere strictly to the terms of a clear . . . text."[20] And it was in their period, not coincidentally, that the term "textualism" entered use to describe a related, Protestant approach to biblical interpretation.[21]

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[13] Francis Lieber, Legal and Political Hermeneutics (Bos., Charles C. Little & James Brown 1839) (enlarged edition of articles published in 1837–1838); E. Fitch Smith, Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction (Albany, Gould, Banks & Gould 1848).

[14] Dwarris (1871 ed.), *supra* note 12, at iii.

[15] Alexis de Tocqueville, *Report on a Work by Mr. Th. Sedgwick*, *in* Tocqueville on America After 1840, at 456, 460 (Aurelian Craiutu & Jeremy Jennings eds. & trans., 2009) (1858).

[16] William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990) [hereinafter Eskridge, *The New Textualism*].

[17] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation 3, 15 (1997); *see also* John James Magyar, The Legacy of Anglo-American Textualism 43–59 (Nov. 6, 2018) (Ph.D. dissertation, University of Cambridge) (identifying the roots of Justice Scalia's textualism in nineteenth-century transatlantic treatises, albeit discussing the antebellum origins of this tradition only briefly).

[18] *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 Geo. Wash. L. Rev. 1610, 1611 (2012); Scalia & Garner, *supra* note 1, at 51.

[19] *See* John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 420 (2005) (noting that "textualism does not admit of a simple definition").

[20] John F. Manning, *The New Purposivism*, 2011 S. Ct. Rev. 113, 114.

[21] *See* J. W-S., *Germany, Religious and Political*, Christian Exam'r & Religious Miscellany (Nov. 1847), at 394, 417 (referring to "the dry textualism of worthy country parsons," a term for Protestant clergy); *Notices of New Publications*, Christian Inquirer,

But their textualism was different from the "new textualism" of recent decades. It was "old textualism." Or more precisely, albeit too unwieldly to use, it was "old, old textualism"—older than both a "softer" textualism open to legislative history that immediately preceded the new textualism[22] and the allegedly literalist, turn-of-the-century "Plain Meaning School."[23]

While new textualism emphasizes the public legibility of the enacted text and the ways in which that public legibility constrains judicial discretion, old textualism was—in a roundabout way—about judges constraining legislatures. Old textualists in the United States, such as Sedgwick and Smith, were among the most fervent proponents of judicial review at a time when this power, though widely accepted, was still rarely exercised in practice. It was in promoting judicial review that they found it necessary to articulate how this power was guided by scientific rules, which they found by looking to European publicists writing about treaties and civil law. The first books on textual rules for interpreting statutes and constitutions were, effectively, handbooks for judicial review.

Tocqueville, long a student of judicial power in America,[24] observed all this with awe from France and summarized Sedgwick's project to a tee. While English courts had used flexible interpretation to "evade" laws that struck them as "contrary to the general principles of fairness

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Sep. 17, 1859, at 1 (criticizing the "textualism" of George Stanley Faber, a Protestant theologian). These sources show earlier uses of the term than appears to have been observed before; *cf.* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347 n.3 (2005) ("The earliest usage of 'textualism' reported by the *Oxford English Dictionary* comes from 1863.").

[22] *See* Eskridge, *The New Textualism*, *supra* note 16, at 626 (distinguishing this approach from the "new textualism"); Benjamin C. Mizer, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 252 (2001) (referring to this approach as "'old' textualism"); Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 533 n.176 (2019) (same); Sam Capparelli, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of* Bostock v. Clayton County*?*, 88 U. CHI. L. REV. 1419, 1426 n.23 (2021) (same).

[23] *See* Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1489 (2018) (describing "Old Textualism" from the "latter half of the nineteenth century" as "an ancestor of New Textualism that took a literal view of statutes and text"); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 270–77 (2011) (similar); Maura A. Flood, *"Kennewick Man" or "Ancient One"?—A Matter of Interpretation*, 63 MONT. L. REV. 39, 54, 90 (2002) (similar); Michael C. Mikulic, *The Emergence of Contextually Constrained Purposivism*, 91 NOTRE DAME L. REV. ONLINE 128, 131 (2016) (similar). *But cf.* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1036–37 (2023) (revising the conventional account of a "literalist" approach to statutory interpretation in the late nineteenth and early twentieth centuries).

[24] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 99 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835–1840) ("I have thought it right to devote a separate chapter to the power of the judges. For had I only mentioned it in passing, its great political importance might be lessened in the reader's eye.").

and equity," he wrote, they "never formally refused to apply a law."[25] But Sedgwick's purpose, Tocqueville continued, was to show that American judges "ought to exercise" judicial review and to set forth "the rules that can guide them in the exercise of their power."[26] Or, as the historian Bill Novak once observed in passing, Sedgwick "opened the door for both modern judicial review and a thoroughgoing . . . constitutionalization of American law."[27]

Yet, though some legal historians may be acquainted with Sedgwick and company, no one has studied their theories closely before. The reason may be that their treatises on interpretation span thousands of pages on a topic that, as Judge Cardozo quipped, "no man can make interesting."[28] In accepting Cardozo's challenge and excavating old textualism and its influence on modern judicial review, this Article illuminates core puzzles in the development of American law. Most basically, when were text-centric theories of interpretation elaborated? And how did we get from courts' use of interpretive strategies to conform statutes to judges' views of constitutional permissibility—dubbed judicial review "in the shadows"[29]—to today's form of judicial review? It turns out that the answers are part of the same story. The rise of old textualism goes hand in hand with the rise of modern judicial review. The old textualists were the "opening salvo" to late-nineteenth-century judicial supremacy.[30]

This history thus joins other work situating American textualism not in the Founding but rather within a more gradual interpretive evolution that crystallized later in the nineteenth century.[31] Old textualists were, by their own admission, modernizing reformers. That point does not mean that they lacked supporting precedents or older authority. Far from it. *Heller*, for example, cited a precedent on preambles on which the old textualist treatises had relied for their rule about construing prefatory clauses.[32] Rather, they recognized competing authority, and in the process sought to move the law toward the more textualist pole within that divided authority.

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25 Tocqueville, *supra* note 15, at 459–60.

26 *Id.* at 460.

27 William J. Novak, The People's Welfare 246 (1996).

28 Robert H. Jackson, The Supreme Court in the American System of Government 54 (1955).

29 Keith E. Whittington, Repugnant Laws 117 (2019).

30 Novak, *supra* note 27, at 246. I am not the first historian to observe the connection between more scientific theories of legal interpretation in the nineteenth century and the rise of judicial review. For that connection, I stand on the shoulders of historians from Morton Horwitz to Farah Peterson. *See* sources cited *infra* notes 596–98 and accompanying text. In the treatises I study, though, we see this connection explicitly.

31 *See* sources cited *infra* notes 61–75 and 86–99.

32 District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008).

Old textualism's history also illuminates a different model for text-centric interpretation. In a provocative essay some years ago, the late Frederick Schauer probed the "often ignored" question of whether law should be understood as primarily an ordinary or technical language.[33] To whom does law speak?[34] On one hand is the more intuitive view that law speaks to the public because "the audience, or at least the principal audience, for law [is] the public whose behavior [is] to be guided or controlled."[35] An alternative view, however, is that "law is substantially the internal dialogue of a professional culture with public goals but a nonpublic way of achieving them."[36] As Schauer's query indicates, this issue remains unsettled in our textualist world today.[37] While some observers understand modern textualism as embracing an understanding of law as a specialized language,[38] others have described modern textualism as a form of "judicial populism" committed to claims about "the people" as law's audience and thus tied to skepticism of specialized meaning.[39] Old textualism, by contrast, was predicated more clearly on an understanding of law as a technical language. It

33 *See* Frederick Schauer, *Is Law a Technical Language?*, 52 San Diego L. Rev. 501, 502 (2015).

34 *See id.* at 513; *cf.* Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 Harv. L. Rev. F. 167, 170–71 (2021) (noting that "[w]ho is the relevant audience . . . of the statute" is "crucial" yet "often . . . ignored"); David S. Louk, *The Audiences of Statutes*, 105 Corn. L. Rev. 137, 140 (2019) ("When it comes to the *interpretation* of statutes . . . important considerations of audience often go overlooked . . . ."); Mauro Zamboni, For Whom Should Legislation Be Written? Legislative Audiences, Legal Outputs, and Participatory Democracy 2 (unpublished manuscript) (on file with author) (exploring "for whom should legislation be written, the people it governs, or the experts who make it work?").

35 Schauer, *supra* note 33, at 506.

36 *Id.* at 513.

37 *See id.*; *see also* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2209 (2017) (observing that modern textualists have not clarified to what extent they adopt "the perspective of the 'ordinary lawyer' rather than the ordinary English speaker").

38 *See, e.g.*, Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 Tex. L. Rev. 639, 646–47, 661–70, 688–91 (2024) [hereinafter Grove, *Is Textualism at War?*] (arguing that modern textualism involves "a distinctively legal inquiry"); *accord* Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning,"* 90 Geo. Wash. L. Rev. 1053, 1063 (2022) [hereinafter Grove, *Testing Textualism*]; John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 Wm. & Mary L. Rev. 1321, 1326 (2018) (developing an originalist understanding of the Constitution as written in a "technical language" that "overlays ordinary language").

39 Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 Minn. L. Rev. 283, 309–18 (2021) (examining textualism as a form of "judicial populism" that "presents *legal text* as the authoritative embodiment of the people's will" and grounds interpretation in an understanding of "an imagined unitary people" as law's audience); *id.* at 318–24 (arguing that "[o]riginalism in constitutional interpretation, like [statutory] textualism, exhibits the key traits of political populism by suggesting that the Constitution's text embodies the founding generation's will" and noting that originalism has "moved in an audience-oriented direction, basing interpretation on the way a constitutional provision's original public would have understood it").

was decidedly a textualism of expertise, not populism, and recovering it complicates the common intuition today that an interpretive commitment to the enacted text in a representative democracy is in tension with expertise.

To see the above points, though, some methodological interventions are needed. For one thing, a researcher cannot merely search for key phrases in these treatises. Rather, one must read the treatises within their contexts—especially the debates in which the authors were engaged—and ask what projects the authors had in the world.[40] This Article thus relies not only on the treatises at issue but also a wide range of printed and archival sources to reconstruct the treatises' contexts. In addition, a researcher must read the treatises with an openness to the ways in which American public law used to be less fragmented and parochial.[41] To theorize legal interpretation, old textualists did not confine themselves to what we today would categorize as "constitutional" and "statutory" sources, but instead also turned to the law of nations and civil law. And old textualists and their ideas traveled across borders, making theirs a transatlantic history.

Thus, through a deep contextual reading of early-nineteenth-century treatises on legal interpretation, this history of old textualism intervenes at the intersection of several literatures. It enters and brings together two conversations regarding Founding-era interpretive practices that have previously proceeded separately: one over constitutional interpretation and another over statutory interpretation.[42] By adding to the explanation for the rise of judicial supremacy in the late nineteenth century, it contributes to the new literature on the rise of American juristocracy.[43] And it joins an emerging literature that is moving beyond the much-debated question of whether textualism is desirable or not to instead challenge our presumptions about what textualism even is—and can be—by investigating textualism's history and varieties.[44]

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[40] *See* Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 Hist. & Theory 3, 48–49 (1969) (elaborating a contextualist methodology for intellectual history that asks not simply what a historical text said but rather what the author was doing in writing it, which requires reading the text within its broader linguistic context).

[41] *See* Marco Basile, *The Splintering of American Public Law*, 92 U. Chi. L. Rev. 1529, 1531–32 (2025).

[42] *See infra* Part I.

[43] *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 Yale L.J. 2020 (2022); Helen Hershkoff & Fred Smith, Jr., *Reconstructing* Klein, 90 U. Chi. L. Rev. 2101 (2023); Samuel Moyn & Rephael G. Stern, *To Save Democracy from Juristocracy: J.B. Thayer and Congressional Power After the Civil War*, 38 Const. Comment. 315 (2025); Alexander Zhang, *Legislative Statutory Interpretation*, 99 N.Y.U. L. Rev. 950 (2024).

[44] *See* Jonathan Green, *The Misunderstood History of Interpretation in England*, 56 Ariz. St. L.J. 911 (2024); Grove, *supra* note 23; Kellen R. Funk, *Sect and Superstition: The*

Before proceeding, I should explain my selection of legal writers under discussion. My choice does not reflect a belief that they were unusually brilliant (or even correct) and thus worthy of studious emulation. Rather, I chose them because of the novelty of their genre, their documented influence, and their likely representation of how some—but not all—lawyers were thinking about interpretation at the time. As I will get to later in the Article,[45] they all published in-depth treatises on legal interpretation that, for the first time, treated the interpretation of different types of written law as the same enterprise. This novel genre influenced legal practice, especially judicial supremacy in the nineteenth century[46] and new textualism in the late twentieth century.[47] Finally, their treatises likely tell us something about how other lawyers were beginning to think differently about legal interpretation at the time. As legal historian Robert Gordon has explained, treatises and other materials by the legal system's "high mandarins"—that is, persons of position and influence within law—are "among the richest artifacts of a society's legal consciousness" because they are efforts to rationalize and elaborate acceptable legal ideas at the time.[48]

I am not suggesting, however, that old textualists' ideas were representative of an entire era. They weren't. In fact, part of my argument is that their approach to interpretation was *not* a restatement of consensus views but rather an effort to consolidate interpretive practices around a more text-centric approach entrusted to judges. Less text-centric alternative approaches flourished. And even contemporaries who embraced a text-centric approach did not necessarily pair that approach with judicial empowerment. Indeed, as I will explain below,[49] a different textualism at the time among abolitionists linked a commitment to text with political constitutionalism—underscoring that old textualism's link to juristocracy was a project, not a corollary.

Here is the plan: Part I begins in the Founding period by reviewing varying scholarly accounts of interpretive methods during that era. Parts II through V then turn to old textualism.

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*Protestant Framework of American Codification*, 64 Am. J. Legal Hist. 190 (2024); Magyar, *supra* note 17; John J. Magyar, *Debunking* Millar v. Taylor*: The History of the Prohibition of Legislative History*, 41 Statute L. Rev. 32 (2020); *cf.* Aaron-Andrew P. Bruhl, The General Law and the Local Law of Interpretation (unpublished manuscript) (on file with author) (investigating how early American courts and treatise writers thought about the nature of interpretive methodology and emphasizing methodological variation).

45 *See infra* Part II.

46 *See infra* Section V.B.

47 *See* sources cited *supra* note 17.

48 Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57, 120 (1984).

49 *See infra* Section VI.C.

Part II documents the emergence of old textualism in the 1830s through 1850s. It identifies a new genre of treatise that was devoted exclusively to legal interpretation and that treated interpretation across different types of laws, including both constitutions and statutes.

Part III describes the context for old textualism—namely, the rise of what old textualists called "the government of Written Law." Old textualists' interpretive turn to text reflected in part the proliferation of written laws and increasingly writing-based legal culture engendered by the industrial revolutions in print and communication technologies. But unwritten laws endured, underscoring that old textualism also reflected old textualists' ideological commitments to text, rooted in positivism and Protestantism.

Part IV depicts the new interpretive science that old textualists developed for "the government of Written Law" to bring legal interpretation into the modern world. They approached legal interpretation as an enterprise concerned, at least initially, with discerning the linguistic meaning of the enacted text, as opposed to a political or ethical enterprise to discern the "spirit" or "mind" of the law. By thereby emphasizing the writtenness of a law as its most important feature for theorizing how to interpret that law, they assimilated constitutional and statutory interpretation in novel ways. At the same time, their fixation on the interpretive primacy of text led them to encounter the limits of textual interpretation rooted in the seemingly inevitable ambiguity of linguistic communication—and thus to the need for interpretive flexibility.

Part V turns to how the development of old textualists' interpretive science was part of a broader project to promote judicial guardianship of the laws against legislative excess. Old textualism's greatest influence was on the promoters of judicial supremacy in the late nineteenth century who explicitly invoked them as their predecessors, though that lineage has become obscured.

Part VI takes stock of this history's lessons. First, the history joins other scholarship questioning textualism's Founding-era roots by introducing new evidence of the elaboration of text-centric theories of interpretation by modernizing reformers in the post-Founding period. The history of old textualism thus suggests a more discontinuous tradition of textualism in this country. Second, recognition of a discontinuous tradition of textualism opens a window into different varieties of textualism. The history of old textualism illuminates an understanding of textualism that viewed written law as a largely technical language requiring expert interpretation. It thus crystallizes an alternative understanding of the links between text-centric interpretation and expertise amid uncertainty on this score in our textualist world today.

Finally, the history of old textualism helps us better understand how it was that judicial review transformed from a power in theory to the widespread practice we recognize today. That transformation reflected a foundational shift in how judges supervised legislation: from an English model of using interpretive strategies to construe statutes to conform with a judge's reading of the constitution to what has become the U.S. model of explicit judicial review to invalidate legislation. This complicated development had many contributing factors, including the ascendant view in the nineteenth century of law as a science. Other scholars have pointed to the connection between the understanding of law as a science and the practice of judicial review before. What we see in the work of the old textualists, however, is an explicit connection between a more scientific approach to legal interpretation centered on text and an effort to empower judges to exercise judicial review. As Tocqueville saw it, old textualism was both projects in one.

## I
## The Founding Era

This first Part sets the stage for the discussion of old textualism to follow. As to both early statutory and early constitutional interpretation, scholars have taken different views of the extent to which the writtenness of a legal instrument was understood to determine a law's meaning. Everyone acknowledges, of course, that statutes and the Constitution took the form of written documents. The disagreement, however, is over what the writtenness of a law meant for how to go about interpreting the law. Sections I.A and I.B address the Constitution and statutes in turn.

### *A. An Unwritten Constitution?*

In an essay fifty years ago, the law professor Thomas Grey asked: "Do we have an unwritten constitution?"[50] Grey was not doubting that there is a written Constitution that is our fundamental law. His question, rather, was whether there are also unwritten sources of law, such as "principles of liberty and justice," that have an equivalent status as fundamental law.[51] Writing between the Warren Court and the Reagan Revolution, Grey captured a shift in the legal zeitgeist, and his query "helped launch the hermeneutics debate that engulfed constitutional theory" ever since.[52]

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[50] Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703, 703 (1975).

[51] *Id.*

[52] Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 606 (2004).

Grey called the view that the constitutional text alone governs constitutional practice "the pure interpretive model" of constitutional adjudication, which he attributed to Justice Hugo Black and Solicitor General Robert Bork, among others.[53] In short time, "interpretivism" became associated with what Paul Brest dubbed—as one of its subcategories—"originalism," or the theory that the original meaning of the Constitution, as amended, binds constitutional practice.[54]

Originalism is a big tent, no doubt, and a theory can come within that tent without embracing the primacy of the constitutional text that underwrote interpretivism.[55] But many "new originalists"[56] tend to emphasize that the Constitution is a written document whose linguistic meaning or communicative content—that is, what it said in context—at the time of enactment binds constitutional practice.[57] According to the dominant paradigm of public-meaning originalism, for instance, what reasonable English users at the time of enactment would have understood the constitutional *text* to say in context is our fundamental law.[58]

To privilege the constitutional text in this way is not necessarily to preclude extratextual considerations from constitutional adjudication. Originalists who believe that the constitutional text is underdetermined might recognize recourse to normative considerations when, so to speak, the text runs out.[59] But that remedial reliance on unwritten

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[53] Grey, *supra* note 50 at 703–06; *see also* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 845–46 & n.12 (1978) (discussing the pure interpretive model).

[54] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 204 & n.1 (1980); *see also* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 1 (2015) (describing the thesis that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified" as a core idea of originalism).

[55] *See* Katie Eyer, *Disentangling Textualism and Originalism*, 13 ConLawNOW 115, 115–16 & n.1 (2022) (arguing that, while originalism and textualism may effectively converge under "public meaning originalism," they are distinct); Stephen E. Sachs, *Originalism Without Text*, 127 Yale L.J. 156, 157 (2017) (maintaining that "originalism doesn't need to be about the meaning of any text").

[56] Whittington, *supra* note 52, at 599.

[57] *See, e.g.*, *id.* at 610 ("The point is to understand as well as possible what was said.").

[58] *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243, 1253–54 (2019) (explaining that "[b]oth Public Meaning Originalism and Original Methods Originalism focus on the original meaning of the constitutional text," while versions of "Original Intentions Originalism" and "Original Law Originalism" can vary in the extent of their focus on text).

[59] *Compare, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 458 (2013) (arguing that, in constitutional adjudication, "the construction zone is ineliminable," a reference to the "domain of constitutional underdeterminacy"), *with, e.g.*, John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 Notre Dame L. Rev. 919, 922 (2021)

norms differs from the type of unwritten Constitution queried by Grey that has both written and unwritten sources of fundamental law in the first instance.

Thus, many originalists would answer "no" to Grey's query about the possibility of a partially unwritten Constitution. They see a rupture between the American tradition of written constitutionalism and the unwritten tradition of English constitutionalism, even if the written U.S. Constitution incorporated terms from the unwritten common law and unwritten law of nations and was enacted against a background of unwritten natural law.[60]

By contrast, many historians would recognize Grey's partially unwritten Constitution—at least as the Constitution of the Founding period. In a departure from earlier historical scholarship,[61] constitutional historians of the late eighteenth century British Atlantic world have come to maintain that constitutions were not yet understood in their modern guise as "glass-enclosed document[s]"[62] but rather were "both . . . unwritten and . . . written."[63] And, according to these historians, when Americans began enacting written documents as constitutions, their legal culture did not turn on a dime.[64]

Rather, on their view, there was more continuity across late-eighteenth-century American innovations in constitution-making.

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(arguing that "[u]nderstanding the Constitution as written in the language of the law" and subject to contemporary legal interpretive rules "greatly reduces the indeterminacies of the Constitution"). On the problem of "when a legal text's clear communicative content runs out," framed as the basic problem distinguishing interpretive theories, see Bill Watson, *What Are We Debating When We Debate Legal Interpretation?*, 105 B.U. L. Rev. 1407 (2025).

60 *See* John O. McGinnis & Mike Rappaport, *The Constitution Neglected*, Law & Liberty (Jan. 16, 2025), https://lawliberty.org/book-review/the-constitution-neglected [https://perma.cc/N99X-NC7H]; John O. McGinnis & Mike Rappaport, *The Finished Constitution*, Law & Liberty (Sep. 28, 2023), https://lawliberty.org/book-review/the-finished-constitution [https://perma.cc/SX94-FZHW].

61 *See* Mary Sarah Bilder, *The Free Constitution: The Real Genius of the Constitution*, 36 Yale J.L. & Humans. 372, 375–76 (2026) (attributing "[t]he fixation on writtenness" in late-eighteenth-century constitution-making to the work of Bernard Bailyn and Gordon Wood in the 1960s).

62 Hulsebosch, *supra* note 5, at 397.

63 Mary Sarah Bilder, The Transatlantic Constitution 2 (2004) (describing how the "transatlantic constitution" under which North American colonists lived in the seventeenth and eighteenth centuries was "both an unwritten and a written constitution"); *accord* Daniel J. Hulsebosch, Constituting Empire 7 (2005) (describing how, in the late eighteenth century, constitutions were thought of "not as documents but rather as relationships among jurisdictions and people mediated through highly charged legal terms"); Jonathan Gienapp, Against Constitutional Originalism 67 (2024) (describing how the founding generation "did not wield a clear distinction between written and unwritten constitutional meaning").

64 *See* Bilder, *supra* note 63, at 186–96; Mary Sarah Bilder, *The Emerging Genre of* The Constitution*: Kent Newmyer and the Heroic Age*, 52 Conn. L. Rev. 1263 (2021); Hulsebosch, *supra* note 5, at 398; Jack N. Rakove, Original Meanings 339–40 (1996).

Americans continued to acknowledge unwritten sources of fundamental law, for instance, such as custom and natural law,[65] which some scholars have recently dubbed "general fundamental law."[66] And even fundamental law that was written was understood in "looser" ways than today.[67] Written words were understood to translate principles whose content was not necessarily fixed by the linguistic meaning of those words.[68] As the recent work of historian Jud Campbell has proposed, rights described in the written Constitution were in part declaratory of underlying, evolving principles.[69]

The historian Mary Sarah Bilder has argued that, to understand Founding-era constitutionalism, it is thus necessary to "disambiguat[e] *instrument* and *constitution.*"[70] An "instrument" was "an old legal word for a written document conveying authority" whereas a "constitution" was "a bounded government based on the people's authority protecting their liberty."[71] What we could call the early state constitutions "were not uniformly titled constitutions," she points out, but rather "the word *constitution* appears in various compound phrases" in those instruments.[72] And the 1787 convention for the federal Constitution at times used "constitution" to refer to the plan or arrangement of government, as opposed to the written instrument.[73]

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65 *See* Jud Campbell, *Originalism and the Nature of Rights*, The Panorama (Nov. 27, 2023), https://thepanorama.shear.org/2023/11/27/originalism-and-the-nature-of-rights [https://perma.cc/789S-GA3D] ("Americans did not think of rights as distinctively textual objects. For the most part, bills of rights merely *declared* the existence of certain rights."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1128, 1167–76 (1987) (arguing that the written Constitution was "never intended to displace the prior tradition of multiple sources of fundamental law"); Farah Peterson, *Constitutionalism in Unexpected Places*, 106 Va. L. Rev. 559, 562 (2020) ("Before, during, and after the ratification of the Federal Constitution of 1787, Americans believed that they were governed under an unwritten constitution, a constitution that confirmed ancient rights and that restricted government action.").

66 Gienapp, *supra* note 63, at 76; Jud Campbell, *Tradition, Originalism, and General Fundamental Law*, 47 Harv. J.L. & Pub. Pol'y 635, 636 (2024).

67 *See* Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. Rev. 1545, 1591 & n.285 (2016).

68 *See id.* at 1590 (explaining that "words represented principles, but . . . the principles were not defined and limited entirely by the words").

69 *See* Campbell, *supra* note 66, at 638; Jud Campbell, *Determining Rights*, 138 Harv. L. Rev. 921 (2025). *But cf.* J. Joel Alicea, Bruen *and the Founding-Era Conception of Rights*, 101 Notre Dame L. Rev. (forthcoming 2026) (manuscript at 15–16) (on file with author) (cautioning that "from the premise that the text is merely declaratory of a preexisting right, it does not follow that the precise wording of the text should play no significant role in understanding the scope of the right").

70 Mary Sarah Bilder, *The Character of the Constitution: Instrument and Constitution*, 37 Yale J.L. & Humans. (forthcoming 2026) (manuscript at 7) (on file with author) (citing Bilder, *supra* note 63, at 1270–76).

71 *Id.* at 7–8.

72 *Id.* at 9.

73 *See id.* at 11–12.

Based on this early modern understanding of constitutions, the historian Jonathan Gienapp has recently and prominently argued that originalism (or at least some of its leading variants) is predicated on an understanding of what the Constitution *is* that is not how people in the Founding era would have understood what the Constitution *was*.[74] Gienapp argues that the constitutional text was embedded within a more capacious understanding of fundamental law that, much like Grey's unwritten constitution, included unwritten sources.[75] Whether Gienapp's criticism undercuts originalism may ultimately depend on whether originalism is defended on originalist grounds or not.

For our purposes, though, the contrast between many originalists' and many historians' views of the original Constitution boils down to whether something many people take for granted today—that the Constitution is solely what its written words say in context—was also an axiom of early constitutional understanding. In short, was the Constitution partially unwritten?

### *B. Statutes with Spirits?*

Perhaps even more counterintuitive today is the possibility of partially unwritten statutes. Yet scholars also take different views over the extent to which, in the Founding era, the meaning of statutes was understood to be textually determined. The principal point of contention is the extent to which courts interpreted statutes equitably according to their "spirit" or "mind" as opposed to feeling constrained by the plain terms of a statute's "letter."

Some scholars, while acknowledging the eclectic methods of the period, have emphasized a Founding-era commitment to statutory text. Most prominently, John Manning has argued that strict textualism was baked into the constitutional separation of powers at the Founding, rendering equitable interpretation merely "a doctrinal artifact."[76] On his account, while English courts recognized a doctrine of equitable interpretation, the practice began to decline following the Glorious Revolution with the rise of parliamentary sovereignty and a corresponding appreciation for the separation of legislative and judicial powers.[77] While "embedded legal traditions" are sticky, such that we still see a commitment to equitable interpretation in, say, Blackstone's *Commentaries*,[78] the U.S. Constitution marked a definitive break from

74 *See* GIENAPP, *supra* note 63, at 65–116.
75 *See id.*
76 Manning, *supra* note 2, at 8.
77 *See id.* at 37.
78 *Id.* at 52.

the practice. Namely, the Article III grant of "judicial power" did not encompass an equitable power to align a statute with its purpose given the stricter separation of judicial and legislative powers and the bicameralism and presentment requirements for statutory lawmaking.[79] While Manning accepts that "early American attitudes" on statutory interpretation were "complex and mixed," he argues that they weighed against equitable interpretation,[80] with text-bound interpretive methods surpassing equitable interpretation in the early nineteenth century as "the Supreme Court assimilated the lessons of the separation of powers."[81]

Other scholars have come to similar conclusions. In an article preceding Manning's work, John Yoo argued that, while "confusion reigned" in early American approaches to statutory interpretation, the Marshall Court resolved a commitment to equitable outcomes with a competing distrust of judicial discretion by adopting a flexible, text-centric approach.[82] More specifically, this approach privileged the enacted text as the expression of legislative intent while preserving flexibility through the use of canons of construction.[83] Thus, while the Marshall Court may not have believed "that the separation of powers requires a strict, textual approach," Yoo concludes, it "rejected the notion that judges should exercise broad equitable powers when construing statutes."[84]

Other scholars, by contrast, have emphasized the centrality of equitable interpretation in the Founding era. Equitable interpretation draws on a long tradition of viewing written statutes as in part declaratory of underlying principles variously described as a statute's "spirit" or "mind."[85]

In a series of articles responding to Manning's historical account of textualism, the legal scholar William Eskridge has argued that although text was important to early American statutory interpretation, it was not the end of the matter.[86] The Founding-era understanding of Article III's grant of "judicial power," on his account, encompassed an

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79 *See id.* at 57.

80 *Id.* at 78.

81 *Id.* at 127.

82 *See* John Choon Yoo, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 Yale L.J. 1607, 1608–09 (1992).

83 *See id.* at 1615–16.

84 *Id.* at 1616.

85 *See* Richard H. Helmholz, *The Myth of Magna Carta Revisited*, 94 N.C. L. Rev. 1475, 1480–93 (2016).

86 *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 Mich. L. Rev. 1509, 1523 (1998) [hereinafter Eskridge, *Textualism, the Unknown Ideal?*]; Eskridge, *All About Words*, *supra* note 3.

"eclectic" and "highly contextual" approach to statutory interpretation that was "open to revising, ameliorating, and bending statutory words" in pursuit of the spirit of the law and according to fundamental values suggested by reason, the common law, the Constitution, and the law of nations.[87] In pushing back on the premise of the Scalia-Manning position that the separation of powers was necessarily understood to mean that the "judicial power" excluded equitable power, Eskridge points out that the separation of powers could also be understood to require "a cooperation of different power centers."[88]

The historian Farah Peterson has taken the idea of cooperation between early American courts and legislatures even farther, arguing that statutory interpretation in early America reflected a "power sharing" arrangement more discontinuous from today's judicial role than either Manning or Eskridge recognize.[89] Given early federal courts' quite limited jurisdiction, which they exercised under intense political pressures, her study of original understandings of "judicial power" focuses on state courts; and not all states had the same strict separation of powers on which Manning's argument is premised, given the prevalence of legislative high courts and mixed-branch councils of revision.[90] In state courts, the late 1790s through early 1820s was "an age of collaboration" in statutory interpretation,[91] Peterson argues, during which state court judges viewed themselves as "equal partners with their legislatures."[92] They "tended . . . to see themselves as responsible for the coherence, justice, and sometimes even the policy behind the statutes they were asked to construe," and they used their equitable powers to narrow or expand statutes accordingly.[93]

Per Peterson, only after the 1820s did "state judges become more legalistic," according to a more scientific understanding of law, which "le[d] to more up/down votes on statutes and less interpretive remolding of statutory text" at a time when state legislatures were under siege for corruption and incompetence.[94] In this way, equitable interpretation by judges as "equal partners" gave way to formal judicial review by judges as "technicians."[95]

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87 Eskridge, *All About Words*, *supra* note 3, at 997–98, 1087.

88 Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 86, at 1529.

89 *See* Peterson, *supra* note 3, at 714–17.

90 *See id.* at 715–16.

91 *Id.* at 748.

92 *Id.* at 713.

93 *Id.* at 757.

94 Farah Peterson, Statutory Interpretation and Judicial Authority, 1776–1860, at 221–23 (Sep. 2015) (Ph.D. dissertation, Princeton University) (ProQuest).

95 *See id.* at 221–46.

Finally, the legal scholar Saikrishna Prakash has recently documented the prevalent role of "spirit" in Founding-era interpretation of statutes as well as other legal instruments by courts and the executive branch.[96] He argues that "spirit" could overcome the letter of the law, as opposed to just resolving textual ambiguities, concluding that "the Founders were not Scalian textualists."[97]

At a high level of generality, Eskridge, Peterson, and Prakash's work on early American statutory interpretation returns to an earlier insight from legal scholar Robert Clinton. In the first few decades after the Founding, on Clinton's telling, an almost unrecognizable, premodern approach to statutory interpretation prevailed, under which "the main reason calling forth the need for interpretation in the law, is ethical or political—not linguistic."[98] That is, "[t]he idea of interpretation as an enterprise primarily devoted to resolving linguistic uncertainties and ambiguities" had not yet developed.[99]

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We are left, in sum, with divergent accounts of legal interpretation in the Founding era. There is no dispute over the importance of text to constitutional and statutory interpretation at the time, but scholars disagree over the extent to which unwritten sources continued to shape both constitutional and statutory meaning. Rather than revisit Founding-era sources, the rest of this Article looks ahead to when, some fifty years after the Founding, a new literature took a heightened interest in text-centric legal interpretation. That is, from here this Article will examine closely the texts that Justice Scalia himself identified as modern textualism's muses. What that analysis will suggest is that the transition to "the overwhelmingly text-based juridical culture that Americans inhabit today"[100] was not a sharp break but rather a longer, more gradual evolution.

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96 Saikrishna Bangalore Prakash, *Spirit*, 173 U. Pa. L. Rev. 937 (2025).

97 *Id.* at 941; *see also* Saikrishna Bangalore Prakash, *The Inconvenience Doctrine*, 78 Stan. L. Rev. 1, 50–52 (2026) (discussing Founding-era authorities who found it permissible to consider the consequences of alternative legal interpretations even if a legal text's meaning was clear).

98 Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. Marshall L. Rev. 935, 948 (2000).

99 *Id.*

100 Denis P. Duffey Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 Chi.-Kent L. Rev. 263, 274 (1998).

## II
## A Turn Toward Text

There was a striking turn to textual interpretive legal theory in the early nineteenth century. During this period, several treatises and pamphlets were published in the United States and Britain on legal interpretation.[101]

Legal writers, of course, had addressed legal interpretation before as parts of broader works. As I will discuss in Part IV,[102] continental publicists, such as Grotius and Vattel, included chapters on treaty interpretation in their works on the law of nations.[103] And, in their own treatises, writers from the common-law tradition also included at least short sections on legal interpretation, which were heavily influenced by, if not "cribbed from," the continental publicists.[104] The most famous example may be Blackstone's discussion of interpretation in his *Commentaries*, though the discussion is merely four pages long.[105]

The literature on legal interpretation that emerged in the early nineteenth century was different from these earlier discussions of interpretation. The new literature was focused solely on the interpretation of legal texts, and it was focused on the interpretation of all types of legal texts rather than treating, say, constitutional and statutory interpretation separately.[106]

Most familiar today—because of revived interest in his distinction between "interpretation" and "construction"[107] (more on this later) and his codification of the laws of war during the Civil War[108]—is the work of Prussian exile Francis Lieber.[109] In the late 1830s, while

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101 *Cf.* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 900 (1985) (observing that "the sixty years following 1800 saw a remarkable outpouring of scholarly discussion of hermeneutical issues in both Great Britain and America").

102 *See infra* Section IV.C.

103 *See* 2 Hugo Grotius, The Rights of War and Peace ch. 16, at 848–83 (Richard Tuck ed., John Morrice trans., Liberty Fund 2005) (1625); Samuel Pufendorf, Of the Law of Nature and Nations bk. 5, ch. 12, at 534–52 (Basil Kennett trans., London, 4th ed. 1729) (1672); Emer de Vattel, The Law of Nations bk. 2, ch. 17, at 407–48 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

104 Andrew Tutt, *Treaty Textualism*, 39 Yale J. Int'l L. 283, 307 (2014).

105 1 William Blackstone, Commentaries *58–62; *see also* 2 Thomas Rutherforth, Institutes of Natural Law ch. 7 (1756) (drawing from his lectures on Grotius).

106 *See infra* Section IV.B.

107 *See* Solum, *supra* note 6; Gregory Klass, *A Short History of the Interpretation-Construction Distinction*, The New Private Law Blog (June 6, 2024), https://scholarship.law.georgetown.edu/facpub/2607 [https://perma.cc/2CD3-X4BQ].

108 *See generally* John Fabian Witt, Lincoln's Code (2012) (chronicling Lieber's role in the codification of the laws of war).

109 The best source on Lieber's life is Frank Freidel, Francis Lieber (1947). Lieber had seemingly been "forgotten" until interest in his work revived in the 1990s. Michael Herz,

teaching at South Carolina College, he wrote an analysis of legal interpretation that he had originally planned to include in a broader political treatise,[110] like publicists of the past had. Yet the topic of interpretation became "too capacious" for him, so he instead published his analysis separately—as both a series of articles and then a book.[111] He then expanded the analysis into its definitive form as *Legal and Political Hermeneutics* in 1839.[112] While hardly a commercial hit,[113] *Hermeneutics* was noticed and appreciated by contemporaries. One reviewer called it "the most comprehensive collection of the rules and principles which govern interpretation and construction, with which we are acquainted."[114] The jurist Simon Greenleaf declared it "the *best* authority on Interpretation and Construction, commending it earnestly to the study of the [Harvard Law] School" that he had recently helped revitalize.[115]

That same decade, in his landmark *Encyclopaedia Americana*, Lieber published an essay on legislation that enumerated "rules of interpretation."[116] The little-known essay was largely yet anonymously authored by Justice Joseph Story,[117] who was an influential if only transitional figure in the early-nineteenth-century turn to textual interpretation. Around the same time that he wrote his essay on the rules of statutory interpretation, he more famously enumerated

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*Rediscovering Francis Lieber: An Afterword and Introduction*, 16 Cardozo L. Rev. 2107, 2107 (1995). There has been no equivalent revival of interest in other old textualists.

110 *See* Francis Lieber, Manual of Political Ethics (Bos., Charles C. Little & James Brown 1838).

111 Freidel, *supra* note 109, at 175 & n.9; *see* Francis Lieber, *On Political Hermeneutics, or on Political Interpretation and Construction, and Also on Precedents*, 18 Am. Jurist & L. Mag. 37 (1837); Francis Lieber, *On Political Hermeneutics—Precedents*, 18 Am. Jurist & L. Mag. 281 (1838). The articles were first published in book form as Francis Lieber, Political Hermeneutics (Bos., Charles C. Little & James Brown 1837).

112 Lieber, Legal and Political Hermeneutics, *supra* note 13.

113 *See* Freidel, *supra* note 109, at 178 n.14.

114 *Lieber's Political Hermeneutics*, 46 N. Am. Rev. 300, 301 (1838).

115 Letter from Simon Greenleaf to Francis Lieber (Oct. 26, 1837), *in* M.H. Hoeflich & Ronald D. Rotunda, *Simon Greenleaf on Desuetude and Judge-Made Law: An Unpublished Letter to Francis Lieber*, 10 Const. Comment. 93, 97, 100–01 (1993); *see also Review*, 5 N.Y. Rev. 508, 509 (1839) (praising Lieber's treatise); M. Russell Thayer, The Life, Character, and Writings of Francis Lieber 25 (Phila., Collins 1873) (stating that "Lieber's distinction between interpretation and construction has been generally adopted by legal writers"); Francis Lieber, Legal and Political Hermeneutics 289 (William G. Hammond ed., St. Louis, F.H. Thomas & Co. 3d ed. 1880) (1839) (claiming that Lieber's "rules of interpretation and construction . . . have been repeatedly copied . . . by other writers, and have been frequently quoted by judges").

116 Joseph Story, *Law, Legislation, Codes*, *in* 7 Encyclopaedia Americana 576, 583–85 (Francis Lieber ed., Phila., Carey & Lea 1831) (writing anonymously).

117 *See* R. Kent Newmyer, Supreme Court Justice Joseph Story 275 (1985).

rules on constitutional interpretation in his *Commentaries on the Constitution*.[118]

A less familiar set of writers than Lieber and Story were even more focused on collating and developing the rules for interpreting written laws. They are best thought of as a set because each writer was influenced by and at times copied the preceding one.

Earliest among this group was Fortunatus Dwarris, a British lawyer born in the British West Indies, where he later returned in the 1820s to lead an imperial commission into the state of their civil and criminal justice systems.[119] His two-volume *General Treatise on Statutes*—which reviewers described as without precedent[120]—appeared in London in the early 1830s prior to Lieber's *Hermeneutics*.[121] An American edition, trimmed to focus on Dwarris's rules of interpretation, was published in Philadelphia in 1835,[122] and an expanded second edition was released in 1848.[123]

Dwarris's treatise was followed by two American-authored treatises by Elisha Fitch Smith[124] and Theodore Sedgwick III,[125] both lawyers from New York influenced by Dwarris.[126]

Smith was in private practice.[127] Although not as prominent as the other authors discussed here, he was "a lawyer of high reputation"[128] and moved among elite law circles.[129] His treatise, which appeared in 1848, was the first "American work" on the rules for statutory and constitutional interpretation.[130]

Sedgwick's book, which first appeared in 1857, proved more influential. Sedgwick also had a higher profile. He was the scion of a

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118 1 Joseph Story, Commentaries on the Constitution of the United States 383–442 (Bos., Hilliard, Gray & Co. 1833).

119 *See* Fortunatus Dwarris, Substance of the Three Reports of the Commissioner of Inquiry, into the Administration of Civil and Criminal Justice in the West Indies (London, Joseph Butterworth & Son 1827); Lauren A. Benton & Lisa Ford, Rage for Order: The British Empire and the Origins of International Law 70–79 (2016).

120 *See A General Treatise on Statutes*, The Examiner (Lond.), Sep. 2, 1832, at 566.

121 Dwarris (1830–31 ed.), *supra* note 12.

122 Dwarris (1835 ed.), *supra* note 12.

123 Dwarris (1848 ed.), *supra* note 12.

124 Smith, *supra* note 13.

125 Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law (N.Y.C., John S. Voorhies 1857).

126 *See id.* at vi; Smith, *supra* note 13, at xi.

127 Smith, *supra* note 13, at vi.

128 *Commentaries on Statute and Constitutional Law*, Literary World, Dec. 30, 1848, at 966.

129 For example, in 1851, he was among the speakers at the first annual meeting of Harvard Law School alumni. *See* 2 Charles Warren, History of the Harvard Law School 172 (1908).

130 Smith, *supra* note 13, at x; Sedgwick, *supra* note 125, at vi.

Massachusetts legal dynasty that included his grandfather Theodore, a justice on the Massachusetts Supreme Judicial Court, and his uncle Henry, a leading voice in codification reform.[131] The younger Sedgwick spent time in Europe as a diplomat,[132] helped represent *The Amistad* Africans,[133] and accepted President Buchanan's appointment as the U.S. Attorney in Manhattan—more as an honorific, if not sinecure—after he fell ill at the end of his life.[134] His wide range of writings betrayed his reform-minded spirit, including influential pamphlets on reforming state constitutions and lawyers' compensation as well as a treatise on legal remedies that advocated for simplifying the highly technical form of pleading at the time.[135]

While the above authors wrote extensive treatments of interpretation, the heightened interest in the topic was more widespread.[136] The Englishman Herbert Broom's mid-1840s treatise on legal maxims included a chapter on written instruments, for example.[137] And his compatriot George Coode published a discussion on "the language of the written law" around the same time that listed rules from the upstream perspective of a legislative drafter.[138]

Although they aligned with different political camps, the above legal writers tended to align ideologically. They were liberal, laissez-faire, moderately antislavery, and forward-looking.[139] For instance, in

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131 *See* 16 Dictionary of American Biography 551–52 (Dumas Malone ed., 1943).

132 *See id.*

133 *See The Law Office of Robert and Theodore Sedgwick III, Esqs. New York*, folders 13–18, Harvard Law School Library, Historical & Special Collections; Marcus Rediker, The Amistad Rebellion 132, 138, 147 (2012).

134 *See* Letter from Theodore Sedgwick to Alexis de Tocqueville (Feb. 15, 1858), *in* Tocqueville on America After 1840, *supra* note 15, at 284.

135 *See* Theodore Sedgwick, *Constitutional Reform*, 13 U.S. Mag. & Dem. Rev. 563 (1843) (writing anonymously) [hereinafter Sedgwick, *Constitutional Reform*]; Theodore Sedgwick, How Shall the Lawyers Be Paid? (N.Y.C., Alexander S. Gould 1840) (writing anonymously); Theodore Sedgwick, A Treatise on the Measure of Damages 585 (N.Y.C., John S. Voorhies 1847).

136 In addition to the examples above the line, see F. Vaughan Hawkins, *On the Principles of Legal Interpretation, with Reference Especially to the Interpretation of Wills: Read May 21, 1860*, *in* 2 Papers Read Before the Juridical Society, 1858–1863, at 298 (Lond., William Maxwell 1863).

137 Herbert Broom, A Selection of Legal Maxims (Phila., T. & J.W. Johnson 1845). Compared to my protagonists, Broom seemed less reform-minded and more committed to what he described as a "strictly elementary" project of collecting existing maxims into "a Compendium of Legal Principles." Herbert Broom, A Selection of Legal Maxims, at iv (Phila., T. & J.W. Johnson 4th ed. 1854).

138 George Coode, On Legislative Expression: Or, the Language of the Written Law (Lond., William Benning & Co. 1845); George Coode, On Legislative Expression: Or, the Language of the Written Law (Phila., T. & J.W. Johnson 1848).

139 Lieber at one point was a slaveholder, though he expressed an increasingly antislavery position over the course of his life. *See* Freidel, *supra* note 109, at 223–58. Sedgwick aligned

the 1830s, Lieber aligned with the conservative Whigs,[140] who embraced his *Hermeneutics*.[141] By contrast, Sedgwick was a leading Democrat in the Young America, or Locofoco, movement of the 1840s and 1850s—a nationalist, expansionist faction of the Democratic Party associated with literary New Yorkers such as Nathaniel Hawthorne and Herman Melville.[142] Although they divided politically, Whigs like Lieber and Young America Democrats like Sedgwick had much in common ideologically.[143] Most notably, both groups saw themselves as modernizers, in contrast to the agrarian worldview of many Jacksonian Democrats. Their views were similarly anchored in "market growth, technological invention, entrepreneurial opportunity, and other aspects of what contemporaries considered the modern world."[144] And there lies a clue to why this new genre on written law emerged in the first place.

## III
## Rise of Written Law

To understand the explosion of interest in the interpretation of legal texts in the early nineteenth century, one must zoom out to the broader context. Between the late eighteenth and mid-nineteenth centuries, a transition was underway from "the age of revolution"[145]

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with antislavery Democrats and prominently opposed annexation of Texas on the ground that "[i]t is *as* a slave territory, and *because* a slave territory, that her annexation is demanded." Theodore Sedgwick, Thoughts on the Proposed Annexation of Texas to the United States 7 (N.Y.C., S.W. Benedict & Co. 2d ed. 1844). By the end of his life, critics called him "a practical Black Republican if not an Abolitionist." *The Immaculate Daily News, and a Peep at Its Antecedents*, N.Y. Leader (Dec. 26, 1847) (on file with Mass. Hist. Soc'y, Theodore Sedgwick III Papers, 1821–1865, Volume 19). Dwarris supported gradual emancipation within the existing colonial system, and he published a pamphlet defending the "improved" condition and treatment of enslaved persons in the colonies. Fortunatus Dwarris, The West India Question Plainly Stated 11 (Lond., Piccadilly 1828). The pamphlet was celebrated by gradual emancipists, *see The West India Question Plainly Stated*, The Athenæum, June 18, 1828, at 534, yet lambasted by abolitionists, *see Review of Mr. Dwarris's Pamphlet*, 2 Anti-Slavery Monthly Rep. 237 (1828).

140 *See* Freidel, *supra* note 109, at 132; Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 Cardozo L. Rev. 2169, 2179–84 (1995).

141 *See, e.g.*, Letter from Henry Clay to Francis Lieber (Feb. 12, 1838) (on file with Huntington Libr., Francis Lieber Papers, Box 9, Folder 56) (expressing admiration).

142 Yonathan Eyal, The Young America Movement and the Transformation of the Democratic Party, 1828–1861, at 12 (2007); *see also* Edward Widmer, Young America 6–8 (1999) (identifying young writers like Nathaniel Hawthorne, Walt Whitman, and Herman Melville with the Young America movement).

143 Eyal, *supra* note 142, at 2.

144 *Id.*

145 *See* Eric Hobsbawm, The Age of Revolution: Europe, 1789–1848, at xv (First Vintage Books 1996) (1962).

to "the modern world."[146] Industrialization, rationalization, and democratization catalyzed modernity,[147] and those processes accelerated after the Founding period—making the years between 1815 and 1865 host to "the modern world in genesis."[148]

For those writing on text-centric interpretation, the rise of written law was the harbinger of this new, modern world when it came to law. Lieber explained in his preface that his treatise was motivated by the emerging practice of disputing political issues through the construction of text, which he attributed to "the idea of written constitutions."[149] Sedgwick opened his own treatise by describing the modern world's proliferation of "positive enactments"—that is, written laws made by the authorities empowered to do so.[150] In short, modernity ushered in what he dubbed "the government of Written Law."[151]

This Part traces the emergence of "the government of Written Law" in the early-nineteenth-century United States and broader Atlantic world. In part, as Section III.A will describe, the rise reflected actual changes. The industrial revolution in print and communication technologies accelerated the writing and printing of law and legal materials. Written laws of various types proliferated at record rates. More broadly, discussion, debate, and decisions about law were increasingly mediated and disseminated through printed texts, such as judicial opinions in law reports or transcriptions of legislative debates. The result was a more writing-based legal culture. Yet, as Section III.B will explain, the rise of "the government of Written Law" also partly reflected the ideological commitments of those who announced it as modernity's course. As transformative as innovations in print and communication technologies were, the legal culture did not morph overnight from unwritten to written. Rather, unwritten laws and legal traditions endured. Hence, to understand why some legal thinkers at the time nonetheless perceived written law as the government of tomorrow, we must understand how they saw written law itself as a technology that would change the world.

### *A. Writtenness by Technology*

The rise of "the government of Written Law" was in part a very real development. It reflected changes dating to the invention of the

146 *See* C.A. Bayly, The Birth of the Modern World, 1780–1914, at 11 (2004).
147 *See id.* at 9–10 (discussing S.N. Eisenstadt, Modernization (1966)).
148 *Id.* at 121, 125.
149 Lieber, Legal and Political Hermeneutics, *supra* note 13, at vi.
150 Sedgwick, *supra* note 125, at 6.
151 *Id.* at v, 697.

printing press in the fifteenth century.[152] At printing's dawn, judicial cases began to be reported in print, albeit very haphazardly and selectively.[153] After 1590, the printing of lawbooks increased[154] and became the basis for legal instruction.[155] The seventeenth century witnessed "the first 'modern' code" in the Massachusetts Bay colony[156] as well as early written constitutionalism in the form of colonial corporate charters.[157] And by the mid-seventeenth century, pleading through an exchange of papers supplanted oral pleading.[158]

In the early nineteenth century, the industrial revolution in communication and transportation technologies accelerated these changes.[159] It became easier and cheaper to print text with the invention of steam-driven iron presses, mechanized papermaking, and the casting of stereotyped plates.[160] And it became easier and cheaper to spread those texts across space with the advent of "steamboats, canals, turnpikes, and railroads."[161] Consider, for example, that when the Cherokee Nation enacted a written constitution in the 1820s to reinforce its status as a sovereign nation amid encroachments by Georgia, it was a newly established newspaper, the *Cherokee Phoenix*, that printed and distributed copies across the entire United States using a press and type that had traveled by steamboat and wagon from Boston.[162] In such ways, the period spawned an unprecedented proliferation of written laws, as well as a more writing-based legal culture.

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152 *See generally* Elizabeth L. Eisenstein, The Printing Press as an Agent of Change (1979) (recounting the many ways in which print changed the world during the early modern era).

153 *See* John Baker, An Introduction to English Legal History 219–22 (5th ed. 2019); Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter and Identity, 1560–1640*, 10 Yale J.L. & Humans. 229, 278 (1998).

154 *See* Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520–1640*, 146 U. Pa. L. Rev. 323, 348 (1998).

155 *Id.* at 304–05.

156 George L. Haskins, *Codification of the Law in Colonial Massachusetts: A Study in Comparative Law*, 30 Ind. L.J. 1, 3 (1954).

157 *See* Nikolas Bowie, *Why the Constitution Was Written Down*, 71 Stan. L. Rev. 1397, 1401–02, 1481–84 (2019).

158 *See* 6 John Baker, The Oxford History of the Laws of England 335 (2003).

159 *See* Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848, at 1–7 (2007) (describing these revolutions).

160 *See* James Raven, *The Industrial Revolution of the Book*, *in* The Cambridge Companion to the History of the Book 143, 146–48 (Leslie Howsam ed., 2015); Rob Banham, *The Industrialization of the Book, 1800–1970*, *in* 2 A Companion to the History of the Book 453, 454–60 (Simon Eliot & Jonathan Rose eds., 2d ed. 2020).

161 Howe, *supra* note 159, at 2.

162 *See* Alison L. LaCroix, The Interbellum Constitution 271–76 (2024).

### *1. Written Laws*

One's intuitions might be that the shift to written law must have happened by 1789, at which point two written federal constitutions and several written state constitutions had been ratified, but the growth of written laws was more gradual.[163] Law remained substantially unwritten in the Founding period (and even through the nineteenth century), given not only the continued pervasiveness of the common law but also the unwritten law of nations, general law, and the lingering influence of natural law. As the historian Perry Miller quipped of the early republic's oral and diffuse legal order, "[a]t the beginning . . . nobody quite knew what was or was not law in America."[164] By the mid-nineteenth century, however, written law was ascendant.

To begin with, written constitutions proliferated throughout the world. According to historian Linda Colley, while 22 written constitutions were issued from 1776 to 1791, there were 187 new written constitutions between 1792 and 1820,[165] reflecting increased use in a period of increased war.[166] In the United States, the initial state and federal constitutions of the late eighteenth century were followed by 37 new state constitutions between 1800 and 1860.[167] Published compilations of state constitutions furthered their dissemination, with 18 compilations published before the turn of the century, and 58 compilations published in the first half of the nineteenth century.[168] In Europe, after the French adopted their first written constitution in 1791,[169] written constitutions became central to Napoleon's efforts to consolidate his control over a vast empire.[170] In South America, revolutions spurred a wave of constitution-writing and rewriting,[171] such as the Bolivian constitution in 1826.[172]

Even in Britain, which never adopted a single document as a constitution, written constitutionalism surged. With their military spread throughout the world, the British learned of these new written

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163 Written law encompassed any enacted law, such as a constitution, statute, or treaty. *See supra* note 150 and accompanying text.

164 Perry Miller, *The Common Law and Codification in Jacksonian America*, 103 Procs. Am. Phil. Soc'y 463, 463 (1959).

165 Linda Colley, The Gun, the Ship, and the Pen 161 (2021).

166 *See id.* at 5, 7–8.

167 G. Alan Tarr, Understanding State Constitutions 94 (1998).

168 Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 Hastings Const. L.Q. 199, 205 (2000).

169 *See* Michael P. Fitzsimmons, The Forgotten Constitution 1 (2025).

170 *See id.* at 216 (citing Stuart Woolf, Napoleon's Integration of Europe 127 (1991)); Colley, *supra* note 165, at 162–68.

171 *See id.* at 239–40.

172 Linda Colley, *Empires of Writing: Britain, America and Constitutions, 1776–1848*, 32 L. & Hist. Rev. 237, 261 (2014).

constitutions, translated them, and discussed them.[173] At the same time, foreign constitutional reformers came to London with their ideas.[174] In this context, British reformers such as Richard Carlile, Major Cartwright, and Jeremy Bentham advocated for written constitutions.[175] And it is in this moment that there was a revival of interest in the written Magna Carta as a quasi-constitutional document,[176] while it also became common to describe the written Reform Act of 1832 (which reshaped the representative system) as "a new constitution."[177]

During this same period, there was also rapid growth in written statutory law, both in quantity and detail. In 1817, as the legislation scholar William Popkin has pointed out,[178] the jurist David Hoffman faulted the legal profession for being unfamiliar with statutes.[179] Things changed quickly.

Most basically, existing statutes were compiled and printed in more regular and accessible fashion. State statutes were curated by topic and printed as "revised statutes," which effected a paradigm shift in usability from session laws recorded by date.[180] As for federal statutes, there was no official compilation until 1797, and their publication did not become regularized until the debut of the authorized Statutes at Large in 1846.[181]

More radically, efforts to write down all legal rules, including unwritten ones, in codes swept across the Atlantic world. The adoption of the Code Napoléon throughout Europe beginning in 1804 was a crowning achievement for unifying and systematizing law through codes.[182] Even common-law England, as historian George Bancroft reported in 1827, "ha[d] caught the rabies."[183] Most famously, the English philosopher Jeremy Bentham was an ardent advocate of codification, but others in England, such as Henry Brougham in Parliament, were too.[184]

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173 *Id.* at 249.

174 *Id.* at 249–51.

175 *Id.* at 248–49, 251–53.

176 *See* COLLEY, *supra* note 165, at 97–101.

177 Colley, *supra* note 172, at 260–61.

178 WILLIAM D. POPKIN, STATUTES IN COURT 62 (1999).

179 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 283–84 (Balt., Coale & Maxwell 1817).

180 *See* KELLEN R. FUNK, LAW'S MACHINERY 26 (2025).

181 *See* Clarence E. Carter, *Zephaniah Swift and the Folwell Edition of the Laws of the United States*, 39 AM. HIST. REV. 689, 691 & n.8 (1934); Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1008–11 (1938).

182 *See* ALEXANDER GRAB, NAPOLEON AND THE TRANSFORMATION OF EUROPE 49–51 (2003).

183 CHARLES WARREN, HISTORY OF THE AMERICAN BAR 527 (1911) (quoting George Bancroft, *Review of Kent's Commentaries*, 1 AM. Q. REV. (1827)).

184 *See id.* at 526–27 & n.1.

The Code Napoléon and the nineteenth-century lure of codification influenced developments in the Americas. New governments in Latin America innovated upon codes modeled after the Code Napoléon to consolidate their power, culminating in the highly influential Chilean Civil Code by Andrés Bello in the 1850s.[185] In the United States, the decades between 1820 and 1860 have been dubbed "the era of codes" given the political centrality of debates over codification.[186] Although codification met only checkered success in the early-nineteenth-century United States, Louisiana adopted a civil code in 1825, and New York enacted David Dudley Field's code of civil procedure in 1848 that thirty other states eventually adopted.[187]

Other forms of written law beyond constitutions and statutes proliferated as well. Most notably, treaty-making increased nearly sevenfold in the nineteenth century.[188] Like with the rise of written constitutions, increased treaty-making came along with increased warfare and the alliance-building and peace-making that accompany war.[189] Amid this global trend, the United States was a case in point. The fledgling republic actively used treaties to integrate itself politically and commercially within the European state system, especially in the first half of the nineteenth century.[190] Moving from the global to the local, even municipal ordinances experienced a "deluge" in the nineteenth century.[191] As Sedgwick summed up bluntly at mid-century, "written law is making inroads . . . on the continent of Europe, in England, and this country."[192]

### *2. Writing-Based Legal Culture*

Written law not only made inroads in the early nineteenth century, but discussion, debate, and decisions about law were also increasingly

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185 *See* M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the* Code Napoléon, 8 Tul. J. Int'l Comp. L. 83, 83–85 (2000).

186 Warren, *supra* note 183, at 508–39. Influential entries in the literature on this topic also include Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (1981), notably reviewed in Robert W. Gordon, Book Review, 36 Vand. L. Rev. 431 (1983), and Perry Miller, The Life of the Mind in America 239–65 (1965). For a more recent account attuned to the codification movement's "success" in advancing its anti-legislature agenda through procedural codes that bolstered governance by litigation, see Funk, *supra* note 180, at 23–46.

187 *See* Code of Practice, in Civil Cases, for the State of Louisiana (1825); Funk, *supra* note 180, at 19 (describing the adoption of the Field Code in New York and other states).

188 Edward Keene, *The Treaty-Making Revolution of the Nineteenth Century*, 34 Int'l Hist. Rev. 475, 478 (2012).

189 *Id.* at 479.

190 *Id.* at 488.

191 Novak, *supra* note 27, at 15.

192 Sedgwick, *supra* note 125, at v.

mediated and disseminated through printed writing.[193] Oral and diffuse practices increasingly became anchored to texts.

Start with what happened inside courts. "[T]hrough the first third of the nineteenth century," historian Robert Ferguson has explained, "[c]ourtroom litigation dominated the [legal] profession in America."[194] Lawyers were orators, and judges and public spectators would patiently listen to their oral arguments for hours.[195] But in the early nineteenth century, lawyers' advocacy was gradually shifting to a more writing-based practice. In 1821, for instance, the Supreme Court began requiring written briefs.[196] And while "the early American lawyer found vocational definition in general knowledge and learned eloquence," by the 1830s "common sense and clear maxims could not compete with a detailed knowledge of statutory and case law."[197]

Judges' decisions were also increasingly written down and printed in volumes of reports.[198] The New York state judge James Kent recounted that when he first took the bench at the turn of the nineteenth century, "[t]he opinions from the Bench were delivered *ore tenus* [orally]" and "there were no reports or State precedents."[199] He was exaggerating, as some initial experiments in private reporting of state court decisions existed, though they struggled to sell.[200] That struggle only underscores Kent's central point about how different the turn of the nineteenth century was from the following decades: "I never dreamed of volumes of reports and written opinions," he wrote, "[s]uch things were not then thought of."[201]

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193 *Cf.* Colley, *supra* note 172, at 260 (discussing an increasingly "writing-based politics" throughout the Atlantic world).

194 Robert A. Ferguson, Law and Letters in American Culture 69 (1984).

195 *See id.* at 69–70.

196 LaCroix, *supra* note 162, at 62, 446 n.138.

197 Ferguson, *supra* note 194, at 6, 230.

198 *See* Stuart Banner, The Decline of Natural Law 119–28 (2021) (describing the explosion in American case reporting in the early nineteenth century); Funk, *supra* note 180, at 32–34 (discussing how an "industrial revolution in printing swiftly accelerated the pace of reporting" in the early nineteenth century); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1295–98 (1985) (describing the earliest efforts to report American case law at the turn of the nineteenth century); Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, *in* 2 The Cambridge History of Law in America 68, 92–93 (Michael Grossberg & Christopher Tomlins eds., 2008) (observing "[t]he proliferation of American law reports" in the early nineteenth century).

199 William Kent, Memoirs and Letters of James Kent 117 (Bos., Little, Brown & Co. 1898).

200 *See* Duffey, *supra* note 100, at 264–65 & n.8 (noting that early American private reports lacked sufficent sales to succeed).

201 Kent, *supra* note 199, at 116.

In the early nineteenth century, however, states and the federal government began appointing official reporters of judicial decisions.[202] In the late 1840s, advertisements could be found in newspapers for dozens of recently published volumes of state law reports.[203] At the federal level, the 1820s and 1830s marked the origin of accurate, accessible written reports of Supreme Court decisions.[204] Earlier, privately-funded reports were inexact, incomplete, and so delayed that lawyers and the public generally had to rely on word of mouth or newspaper accounts instead.[205] The appointment of the Court's first official reporter, Henry Wheaton, from 1816 to 1827 brought more timely and accurate reports, as did Justice Story's stewardship of improved reporting.[206] Then Wheaton's successor, Richard Peters Jr., produced a condensed edition of the Court's reports that was cheaper and secured many new subscribers.[207] By 1834, when the Justices ruled that no reporter could hold a copyright in their written opinions,[208] the rise of the Court reports was assured.[209] Two years later, considering both state and federal law reports, the jurist David Hoffman counted over 450 volumes.[210]

It is also worth observing, more subtly, that what the reports were reporting increasingly had a less oral basis. There was a shift within the reporting of cases from a vestigial focus on the transcription of oral arguments, which once made up the bulk of a case report, to the Court's opinion itself.[211] When Peters condensed the Supreme Court reports, for instance, his main tactic was to omit accounts of the oral arguments.[212] There was also a gradual shift from reporting an oral announcement of the Court's opinion to reproducing a written opinion supplied by the Court, with some states beginning to require their judges to write down their opinions.[213]

The increasing writtenness of legal culture in the early nineteenth century can be seen outside courts, too.

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202 On state reporters, see Duffey, *supra* note 100, at 265–66, and Joyce, *supra* note 198, at 1342–43. On Supreme Court reporters, see *id.*

203 *See* Funk, *supra* note 180, at 32–33.

204 Joyce, *supra* note 198, at 1329–30, 1364–69.

205 *See id.* at 1294–312.

206 *See id.* at 1312, 1389.

207 *See id.* at 1364–69, 1389.

208 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834).

209 *See* Joyce, *supra* note 198, at 1386.

210 2 David Hoffman, A Course of Legal Study, Addressed to Students and the Profession Generally 657 (Balt., Joseph Neal 2d ed. 1836) (1817).

211 *See* Duffey, *supra* note 100, at 273–75.

212 *See* Joyce, *supra* note 198, at 1365.

213 *See* Erwin C. Surrency, *Law Reports in the United States*, 25 Am. J. Legal Hist. 48, 55–56 (1981) (noting that multiple states enacted such statutes).

Only in the early nineteenth century did the practice of regularly publishing printed accounts of legislative debates begin.[214] The Constitution required only Congress's journals to be published, which were barebone procedural accounts without transcription of debates.[215] Congress did not admit notetakers from the public onto the floor until 1802.[216] Only in 1824 did somewhat regular publication of congressional debates commence with publication of the *Register of Debates* (and retroactive compilation of the *Annals of Congress* from newspaper accounts), followed by the rival *Congressional Globe* beginning in 1833.[217] And it was not until 1850 that the *Globe* gained official access to copies of debates, thereby allowing verbatim reporting.[218] The story in Britain was much the same. Parliament began welcoming notetakers only in 1803, leading to the publication of Cobbett's *Parliamentary Debates*.[219] The *Parliamentary Debates*, now published by the Hansard company, did not obtain "quasi-official" status until the 1830s,[220] and the publication became publicly subsidized only at midcentury.[221]

The printed records and debates of constitutional conventions also proliferated in this period. Written accounts of the 1787 federal constitutional convention, which occurred behind closed doors, did not circulate until decades later. The convention's journal was not published until 1819.[222] Two years later, Edmond Genêt published a notoriously doctored version of Robert Yates's notes from the convention.[223] And only in 1840 were the now-canonical notes of James Madison published posthumously.[224] Publication of records from state constitutional

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214 This development in turn gave rise to a new interpretive problem: what to make of legislative history. *See* Green, *supra* note 44, at 935–43; Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History*, *1890–1950*, 123 Yale L.J. 266, 271–73 (2013).

215 *See* U.S. Const. art. I, § 5, cl. 3; Elizabeth Gregory McPherson, *Reporting the Debates of Congress*, 28 Q.J. Speech 141, 141 (1942). On the clause's history, see Nicholas Handler, *Rediscovering the Journal Clause: The Lost History of Legislative Constitutional Interpretation*, 21 J. Const. L. 1219 (2019).

216 *See* McPherson, *supra* note 215, at 142–43.

217 *See id.* at 143–45.

218 *Id.* at 146–47.

219 Colley, *supra* note 172, at 260.

220 Green, *supra* note 44, at 937.

221 Parrillo, *supra* note 214, at 271–72.

222 Journal, Acts and Proceedings, of the Convention (Bos., Thomas B. Wait 1819).

223 Secret Proceedings and Debates of the Convention (Albany, Websters & Skinners 1821).

224 *See generally* Mary Sarah Bilder, Madison's Hand (2015) (tracing the making, revision, and publication of Madison's Notes).

conventions had a similarly delayed and uneven trajectory, also with an uptick in the early nineteenth century.[225]

Law was also increasingly discussed and taught through writing in the early nineteenth century. A new literature of commentaries and treatises on American law formed, and accelerated beginning in 1830,[226] with some four hundred legal monographs published between 1790 and 1840.[227] This literature included scholarly tomes such as James Kent's *Commentaries on American Law* that are well remembered today,[228] as well as lesser-known civics schoolbooks and catechisms targeted to the broader public.[229] There was also a surge in law magazines beginning around 1830.[230] Finally, newspapers were a central forum for legal debates, and their importance and numbers surged in the 1830s with the emergence of a new party system whose two sides relied heavily on them.[231] It was, tellingly, a newspaper's criticism of President John Quincy Adams's reading of the Constitution that Lieber cited as the inspiration for his treatise on interpretation in the 1830s.[232]

Importantly, there were markets and readers for all these new texts. Amid the development of market capitalism in this period, publishers printed what they thought would sell.[233] And the market of potential readers was growing in the early nineteenth century because of increasing literacy.[234] The broader readership reflected the community schools movement and the Protestant expectation that everyone read

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225 *See* Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 Wis. L. Rev. 1169, 1172–80 (2022).

226 Warren, *supra* note 183, at 544.

227 Konefsky, *supra* note 198, at 93.

228 James Kent, Commentaries on American Law (N.Y., O. Halsted 1826–1830).

229 *See* Michael Kammen, A Machine that Would Go of Itself 77–81 (1986) (describing how a wave of accessible constitutional texts—often aimed at youth and lay readers—circulated widely in the early nineteenth century).

230 *See* Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar*, 12 Am. J. Legal Hist. 306, 308–10 (1968) (charting a sharp increase in the number of new law magazines after 1830); Konefsky, *supra* note 198, at 94 (noting that, while only one legal periodical existed between 1810 and 1820, by 1830 there were five published legal periodicals).

231 *See* Jill Lepore, These Truths 211 (2018); David M. Henkin, City Reading 105 (1998) ("From 1830 to 1840, the number of dailies in the United States rose from 65 to 138, and the average circulation nearly doubled as well, achieving a daily total of approximately 300,000.").

232 *See* Lieber, Legal and Political Hermeneutics, *supra* note 13, at vi.

233 *See* Funk, *supra* note 180, at 7 (observing that publishers produced "dozens of marketable treatises" as legal print culture grew in the early nineteenth century). On how Protestant publishers who were instrumental in the publishing boom, see *infra* notes 257–58, integrated market capitalism with their religious views, see Joseph P. Slaughter, Faith in Markets 159 (2023).

234 *See* Christopher B. Daly, Covering America: A Narrative History of a Nation's Journalism 57–58 (2012) (describing growing early-nineteenth-century literacy).

the Bible for oneself.[235] But they read more than just the Bible in an era of proliferating print culture in which easier-to-produce novels, newspapers, and magazines gave form to a "reading public."[236]

In sum, in the early nineteenth century, written laws proliferated in an increasingly literate culture that increasingly debated and discussed law through writing. There was thus much to support old textualists' perception that they lived under "the government of Written Law."

### *B. Writtenness as Technology*

The perceived rise of "the government of Written Law," however, was also in part an aspiration or prediction. After all, legal culture did not fully jump from an unwritten to a written one with the advancement in print and communication technologies. People, lawyers, and courts continued to rely on extratextual sources, such as custom, general law, natural law, and the unwritten law of nations.[237] Most notably, the common law still dwarfed statutory law because codification efforts met only limited success in the United States.[238] And even if the common law had an increasingly written component insofar as judicial decisions were increasingly reported in printed volumes and systematized in treatises, the common law remained conceptually distinct from written law. As Kellen Funk has explained, "the common law was not precisely determined until a particular case demanded resolution," whereas "'written law[]' prescrib[ed] or reform[ed] the rules even before a case put the precise question in issue."[239]

The perceived rise of "the government of Written Law" was thus in part ideological. Old textualists believed that writtenness itself—the writing down of law—was a technology that would continue to reconfigure legal practices and modernize the world. At the root of this belief were two text-centric ideologies: positivism and Protestantism.

The influence of legal positivism—roughly, the idea that law is made rather than found—was growing in the early nineteenth century, even though its heyday would not come until the late nineteenth and early

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235 *See id.*; LEPORE, *supra* note 231, at 210–11.

236 *See* D. Berton Emerson, *Media and Print Culture*, *in* HANDBOOK OF THE AMERICAN NOVEL OF THE NINETEENTH CENTURY 91, 94–97 (Christine Gerhardt ed., 2018) (explaining how innovations in print technology and the emerging market economy put more novels into the hands of a "hungry reading public" in the 1820s through 1830s).

237 *See* sources cited *supra* notes 63–65.

238 *See, e.g.*, Gordon, *supra* note 186, at 433 (expressing skepticism of the characterization of early American codification efforts as a "movement" and noting that the so-called "Era of Codes" produced few codes).

239 FUNK, *supra* note 180, at 7.

twentieth centuries.[240] That growing influence was related to a similarly gradual turn to scientific positivism in the nineteenth century. More people came to believe that what we know of the world comes from what we can see and touch of it, as opposed to deriving knowledge from the type of intuition or revelation that was a source of much unwritten law.[241] The influence of positivism on law in the nineteenth century was nowhere more apparent than the movement to codify unwritten legal rules.

And old textualists tended to be codifiers, albeit of varying enthusiasm. Lieber professed himself "fully convinced of the great benefit, which a wise code may bestow upon a nation,"[242] and he went on to codify the laws of war during the Civil War.[243] (Lieber was not a full-throttle codifier, however, as he opposed broader codification of the law of nations[244] and expressed skepticism about the possibility[245] and desirability[246] of codifying all law.) Dwarris, while an imperial commissioner in the British West Indies, advocated for new codes, including a Code Noir to govern slavery uniformly across the colonies.[247] Sedgwick, the nephew of a leading common law critic,[248] helped keep the codification effort alive in New York between his uncle's generation and the rise of the Sedgwick family's "protégé" and ultra-codifier David Dudley Field.[249] Sedgwick also spent fifteen months on a diplomatic mission in Europe under the charge of Edward Livingston, the co-author of Louisiana's 1825 code.[250] And he wrote a memoir of William Livingston, one of the earliest American statutory compilers who produced a digest of New York's colonial laws.[251]

Protestantism was also reviving and spreading during the Second Great Awakening of the early nineteenth century.[252] Central to Protestantism was the doctrine that scripture is the only source of

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240 *See* Banner, *supra* note 198, at 1 (dating positive law's ascendancy over natural law in the United States to the late nineteenth and early twentieth centuries).

241 *See* Charles D. Cashdollar, The Transformation of Theology, 1830–1890, at 11 (1989) (describing nineteenth-century scientific positivism).

242 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 44; *accord id.* at 164.

243 *See* Witt, *supra* note 108, at 229–40.

244 *See* Freidel, *supra* note 109, at 403.

245 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 42, 163.

246 *See id.* at 43–44, 164.

247 *See* Dwarris, *supra* note 119, at 431–35; Benton & Ford, *supra* note 119, at 74–75.

248 *See, e.g.*, Henry D. Sedgwick, *The Common Law*, 19 N. Am. Rev. 411 (1824).

249 Widmer, *supra* note 142, at 164.

250 *See* Code of Practice, *supra* note 187.

251 *See* Theodore Sedgwick, Jr., A Memoir of the Life of William Livingston 66 (N.Y., J. & J. Harper 1833); William Livingston & William Smith, Jr., Laws of New-York, from the Year 1691, to 1751, Inclusive (N.Y., James Parker 1752).

252 *See* Howe, *supra* note 159, at 186–95.

religious authority (*sola scriptura*) as well as the doctrine that scripture is its own interpreter (*sacra scriptura sui ipsius interpres*).[253] Accordingly, Protestantism emphasized reading the Bible directly versus the Catholic practice of relying on authoritative glosses.[254] Protestantism was thus a major driver of the increasingly literate and text-based culture, including codification efforts.[255] Evangelists taught people how to read.[256] And Protestant publishers, such as the "Methodist Printer-Publishers" who founded Harper & Brothers,[257] promoted technological advances in printing, even coming to portray God "as a printer, delivering his law to Moses engraved in stone."[258] In short, "a Protestant privileging of the text" combined with nineteenth-century print culture to produce "a new linguistic ideology" that emphasized "the authority of the written (i.e., printed) text."[259]

Old textualists were Protestants attuned to direct reading of the Bible. Lieber was a committed Protestant who had initially planned to pursue theology,[260] and he was also doggedly anti-Catholic.[261] In a book on his mentor, the historian Barthold Niebuhr, Lieber approvingly recalled Niebuhr's praise for St. Francis's direct reading of scripture, which placed him "far in advance of his age."[262] "When dialectics surrounded him everywhere, and the interpretations of the Bible were held far superior to the book itself," Lieber recalled, "he penetrated

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253 Jaap Dekker, Sacra Scriptura Sui Ipsius Interpres*: Reinterpretation in the Book of Isaiah*, *in* Sola Scriptura 195, 195 (Hans Burger, Arnold Huijgen & Eric Peels eds., 2018).

254 *See id.* For a comparison of these interpretive approaches to scripture in the context of their potential relevance to contrasting approaches to constitutional interpretation, see Telia Mary U. Williams, *Sola Scriptura and the Magisterium: Reconciling Two Biblical Analogues of Constitutional Interpretation Through a Judicial Hermeneutic of Storytelling*, 17 U. St. Thomas J.L. & Pub. Pol'y 431, 435–36 (2023); *cf.* Sanford Levinson, Constitutional Faith 29 (1988) (contrasting "the protestant position" that "the constitutional text alone" is the source of doctrine with "the catholic position" that it is "the Constitution plus unwritten tradition").

255 *See* Funk, *supra* note 44, at 192 (describing how "codification was inseparable from a kind of liberal Protestantism that had taken hold in the early national era").

256 *See infra* note 266 and accompanying text.

257 Slaughter, *supra* note 233, at 157–72.

258 David Paul Nord, *Religious Reading and Readers in Antebellum America*, 15 J. Early Republic 241, 247 (1995).

259 Robert A. Yelle, The Language of Disenchantment 9, 37, 74 (2013). Yelle focuses on how this new linguistic ideology shaped British colonial practices in India, including codification projects and reform of nontextual Hindu practices.

260 *See* M. Russell Thayer, The Life, Character, and Writings of Francis Lieber 43 (Phila., Collins 1873); Freidel, *supra* note 109, at 27, 87.

261 *See* Freidel, *supra* note 109, at 407; *see also* Lieber, Legal and Political Hermeneutics, *supra* note 13, at 135 (criticizing Catholic resistance to the Reformation).

262 Francis Lieber, Reminiscences of an Intercourse with Mr. Niebuhr the Historian 144 (Phila., Carey, Lea & Blanchard 1835).

all these mazes, and required the plain Gospel."[263] Sedgwick was also a Protestant. Since a young age, close reading of the Bible was "a part of his daily exercise."[264] He also wrote an unpublished manuscript on "the oppression of French protestants" who resettled in Massachusetts.[265] And one of the few biographical facts that I have found about Elisha Fitch Smith is that he was involved with the American Sunday School Union, a Protestant organization that evangelized through promoting early literacy.[266]

As positivists and Protestants, old textualists believed that written law—and printed text—marked civilizational progress. Their enthusiasm for written law reflected a stadial view of law that resembled scientific positivism's stadial view of human progress through evolutionary stages.[267] Sedgwick declared that "the gradual tendency of civilization" was to supplant "the slow process of custom" with "positive enactments."[268] In an essay collected in a volume edited by Sedgwick, his hero, the political writer William Leggett, celebrated the new political possibilities of widely accessible printed text, particularly penny newspapers, as ushering in "a new era in the history of civilization."[269] "I wonder what civilization is," an awestruck Sedgwick mused in a letter to his parents, "if it is not material—if it is not the printing presses, the architects [sic] tools, the means of communication, and the facilities of receiving & conferring information."[270]

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In short, written law and a writing-based legal culture were ascendant in the early nineteenth century. Although they were far from triumphant, jurists such as Sedgwick *believed* that they heralded a new, modern era of "the government of Written Law."

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263 *Id.*

264 In Memory of Theodore Sedgwick 11 (n.d.) (unpublished manuscript) (on file with Mass. Hist. Soc'y, Theodore Sedgwick III Papers, 1821–1865, Box 15, Folder 16).

265 *See* The Diamond of New Oxford (n.d.) (unpublished manuscript) (Mass. Hist. Soc'y, Theodore Sedgwick III Papers, 1821–1865, Box 15, Folder 8).

266 *See General News*, The Independent (N.Y.), Mar. 3, 1853, at 35; *Notices*, The Independent (N.Y.), Mar. 9, 1854, at 77. The organization's mission was "to teach the alphabet, spelling, and reading, that the ignorant might read the New Testament for themselves." Edwin W. Rice, A History of the American Sunday-School Union 6 (Phila., American Sunday-School Union 1899).

267 *See* Cashdollar, *supra* note 241, at 9–10.

268 Sedgwick, *supra* note 125, at 6.

269 2 William Leggett, *The Newspaper Press*, *in* A Collection of the Political Writings of William Leggett 197, 241 (Theodore Sedgwick, Jr. ed., N.Y., Taylor & Dodd 1840).

270 Letter from Theodore Sedgwick to Mr. and Mrs. Sedgwick (Apr. 29, 1834), *in* In Memory of Theodore Sedgwick, *supra* note 264, at 56.

A consequence of this shift was not only heightened attention to text but also the perceived prospect of more authoritative, precise, and centralized interpretation of law. In the largely oral legal culture of the eighteenth century,[271] legal sources were diffuse, the content of law more uncertain, and interpretive authority more plural.[272] The more that law became (or was perceived to be) concentrated in writings, the more that legal sources were cabined among certain texts, the more precision could be demanded of them,[273] and the more interpretive authority could be centralized around them.[274] It was these prospects that tempted old textualists.

## IV
## Science for Written Law

In the late 1830s, Tocqueville declared that "[a] new political science is needed for a world itself quite new."[275] That is what old textualists set out to do: develop a new science for modern law.[276] "Science advances," Lieber steeled his readers, so "[w]e have . . . to guard ourselves . . . against a too implicit reliance upon old authors, simply because they have been relied upon so long."[277] Dwarris and Smith dedicated their works to the legal profession and to "strengthen[ing] the roots of the science" in which the profession was engaged.[278] Sedgwick agreed that "[o]urs is eminently a practical science"[279] and thereby apolitical.[280] Herbert Broom's preface pleaded that in "more modern times," there

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271 *See* Michael Lobban, The Common Law and English Jurisprudence 1760–1850, at 17 (1991).

272 *See* Daniel J. Hulsebosch, The Lawyers' *Somerset*: Slavery and Legal Pluralism 5 (unpublished manuscript) (on file with author).

273 *See, e.g.*, Lieber, Legal and Political Hermeneutics, *supra* note 13, at 146–47 (observing how writing things down allowed for more interpretive weight to be placed upon precise language).

274 *See* Duffey, Jr., *supra* note 100, at 274 ("In accordance with the legal and political ideology of the early nineteenth century, reports of the period portrayed adjudication as centering upon authoritative written statements rather than discussions among experts."); Hulsebosch, *supra* note 272, at 4–5 (describing shift from "plural and collective" legal authority to increased "legal centralization").

275 Tocqueville, *supra* note 24, at 12.

276 *Cf.* James Farr, *Francis Lieber and the Interpretation of American Political Science*, 52 J. Pol. 1027, 1030–31 (1990) (contextualizing Lieber's *Hermeneutics* within "the formation of a science of politics appropriate for (what Tocqueville called) a world itself quite new").

277 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 103.

278 Dwarris (1848 ed.), *supra* note 12, at xi; *see also* Smith, *supra* note 13, at xi–xii (referring to the book's subject matter as a science and dedicating the book to the legal profession).

279 Sedgwick, *supra* note 125, at 227.

280 *Id.* at vii.

was a need to return to "simple fundamental rules."[281] "[A] knowledge of first principles is at least as essential in Law as in other sciences," he wrote.[282]

Dating to the historian Perry Miller's pioneering work in the 1960s, historians have long observed the trend among antebellum lawyers and judges to portray law as a "science" separate from politics.[283] More text-based approaches to interpretation in this period, as Professor Peterson has pointed out, were a manifestation of this turn to science in law.[284]

This Part excavates the science of old textualism. As Section IV.A sets forth, it viewed legal interpretation as primarily an enterprise to determine the linguistic meaning of an enacted text. Accordingly, as explained in Section IV.B, the science applied to all forms of written law, assimilating constitutional and statutory interpretation in novel ways. Section IV.C dives into their science: Old textualists dissected and classified written laws, and they drew on the dominant textualist traditions of the time from the law of nations and civil law to identify interpretive rules. Due to this interpretive approach, Section IV.D explains, old textualism privileged the clear meaning of the enacted text over other considerations, such as equity. The Part concludes in Section IV.E by considering how the pioneers of this new science understood themselves as modernizing reformers as opposed to merely recorders of existing practices.

### *A. Written Law as Language*

New works on legal interpretation in the early nineteenth century had a recognizably modern feature. They analyzed legal interpretation as an enterprise concerned, at least in the first instance, with discerning the linguistic meaning of the enacted text—that is, the information that the words alone would convey in context[285]—as opposed to a political or

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281 Broom, *supra* note 137, at iii.

282 *Id.*

283 *See* Miller, *supra* note 186, at 156–85; Bloomfield, *supra* note 230, at 314–15; Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 257 (1977); Popkin, *supra* note 178, at 88–96; Jed Handelsman Shugerman, The People's Courts 111–15 (2012); Peterson, *Interpretation as Statecraft*, *supra* note 3, at 772; Gienapp, *supra* note 63, at 162; Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 Wash. & Lee L. Rev. 787, 804 (1999); Konefsky, *supra* note 198, at 92–95.

284 *See* Peterson, Statutory Interpretation and Judicial Authority, *supra* note 94, at 221–46.

285 *See* Mark Greenberg, *The Moral Impact Theory of Law*, 123 Yale L.J. 1288, 1296 n.18 (2014). A text's linguistic meaning is often described as its "communicative content." Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479, 484–86, 488 (2013). On the prevalence of this view today, see, for example, Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 Oxford Studs. Phil. L. 39, 42 (Leslie Green & Brian Leiter eds., 2011) (describing the "Standard Picture" of legal texts to be that "the

ethical enterprise to discern and advance, say, the "spirit" of the law. As Lieber put it, "the same rules which common sense teaches every one to use, in order to understand his neighbor in the most trivial intercourse, are necessary . . . although not sufficient, for the interpretation of documents or texts of the highest importance, constitutions as well as treaties between the greatest nations."[286]

This approach contrasted with more traditional approaches that treated written statutes and constitutions as possibly declaratory of underlying, preexisting principles.[287] In the eighteenth century, for example, Thomas Rutherforth explained that a legislator's decision to commit rules to writing "does not change them from unwritten into written laws" necessarily, as their legal content might still arise from unwritten and evolving custom.[288]

A more linguistic approach to legal interpretation was at the heart of Lieber's *Hermeneutics* in the late 1830s, which announced that "[i]n politics and law we have to deal with plain words and human use of them only."[289] Lieber felt up to that task. Long before he was a whisperer on military law in the Lincoln administration, Lieber was an obsessive, albeit amateur, linguist.[290] In a lecture that struck up a correspondence with Sedgwick,[291] Lieber deemed language the first "practical characteristic[] of man."[292] He studied Native languages, Pennsylvania German, and dialects of the West Indies;[293] had a passion for neologisms and wordplay;[294] and wrote about the origin of language.[295] Around the time that he wrote *Hermeneutics*, he was also busy writing on foreign languages and philology (the historical study of languages) as well as translating the Latin dictionary of the German theologian Johann August Ernesti.[296]

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content of the law is some kind of ordinary linguistic meaning"); Andrei Marmor, The Language of Law 12 (2014) (defending the "'standard' view").

286 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 28.

287 *See* Banner, *supra* note 198, at 11–45 (statutes); *id.* at 71–95 (constitutions).

288 Rutherforth, *supra* note 105, at 290–91; *see also* Campbell, *supra* note 66, at 649–51 (discussing this passage and distinguishing this practice from incorporation of a common law rule as it existed at the time of enactment).

289 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 76.

290 *See* Freidel, *supra* note 109, at 178–83.

291 *See* Letter from Theodore Sedgwick to Francis Lieber (Dec. 17, 1845) (on file with Huntington Libr., Francis Lieber Papers, Box 62, Folder 37).

292 Francis Lieber, A Lecture on the Origin and Development of the First Constituents of Civilisation 6 (Columbia, S.C. I.C. Morgan 1845).

293 *See* Freidel, *supra* note 109, at 178–79, 182–83.

294 *Id.* at 179.

295 *See* Francis Lieber, *On the Vocal Sounds of Laura Bridgeman*, *in* 2 Smithsonian Contributions to Knowledge 61 (Smithsonian Inst. 1851).

296 *See* Francis Lieber, *On the Study of Foreign Languages, Especially of the Classic Tongues*, *in* 1 The Miscellaneous Writings of Francis Lieber 499 (Phila. & London, J.B.

When it came to developing his theory of legal interpretation in *Hermeneutics*, Lieber did something radical for his time. He used the methods of hermeneutics—which scholars had previously applied only to the interpretation of the Bible or, at least in Germany, to the philological study of language in historical texts.[297] "Hermeneutics" referred to the "science which establishes the principles and rules of interpretation and construction,"[298] and as sensible as it might now seem to apply such study to law, lawyers at the time were not sure what to make of the move. The lawyer William Kent, son of the famous jurist James Kent, asked Lieber incredulously: "What, in God's name, made you choose '*Hermeneutics*'?"[299]

There were actually two influences on Lieber that explain his choice. The first, familiar to Lieber scholarship, was a group of scholars known as the German historical school, some of whom mentored Lieber before he emigrated.[300] Among this group was Friedrich Schleiermacher, who is best known for developing theological hermeneutics in early nineteenth century Protestant Germany,[301] and whose books filled Lieber's library.[302] Schleiermacher developed a historical approach to reconstructing an author's intended meaning within the context of that author's life and historical moment.[303] That task involved, among other things, meticulously deciphering the rules of the author's language, or what he called "grammatical" interpretation[304]—an idea that would

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Lippincott Co., 1880); Lewis Ramshorn, Dictionary of Latin Synonymes iii (Francis Lieber trans., Bos., Charles C. Little & James Brown 1841).

297 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 64; *see also* James Farr, *The Americanization of Hermeneutics: Francis Lieber's* Legal and Political Hermeneutics, *in* Legal Hermeneutics: History, Theory, and Practice 83, 83 (Gregory Leyh ed., 1992) (noting that Lieber "helped to broaden the reference of hermeneutics to things legal and political").

298 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 64.

299 Freidel, *supra* note 109, at 175 (quoting Letter from William Kent to Francis Lieber (Dec. 19, 1843)).

300 *See id.* at 178.

301 *See* Konstantin Vertsman, *Hermeneutics for Legal Research and Analysis*, 53 St. Mary's L.J. 783, 819 (2022).

302 *See* Catalogue of My Library 185 (n.d.) (on file with Huntington Libr., Francis Lieber Papers, Volume 36) (listing six volumes by Schleiermacher). For more on Schleiermacher's influence on Lieber, see Freidel, *supra* note 109, at 21–22; Wolfgang Holdheim, *A Hermeneutic Thinker*, 16 Cardozo L. Rev. 2153, 2155–57 (1995); Binder, *supra* note 140, at 2173–79.

303 For accessible overviews of Schleiermacher's hermeneutics, see Vertsman, *supra* note 301, at 819–27; Lawrence B. Solum, *Originalism as Transformative Politics*, 63 Tul. L. Rev. 1599, 1607–11 (1989).

304 *See* Vertsman, *supra* note 301, at 793 & n.59, 824–25; Andrew Bowie, *The Philosophical Significance of Schleiermacher's Hermeneutics*, *in* The Cambridge Companion to Friedrich Schleiermacher 73, 74–75 (Jacqueline Mariña ed., 2005) (analogizing Schleiermacher's notion of the "grammatical" to "rules of language . . . programmed into a computer").

deeply influence how Lieber approached legal interpretation. There was also a second, largely overlooked source of Lieber's familiarity with hermeneutics closer at hand in the United States. In the 1820s, the biblical scholar Moses Stuart had issued a heavily annotated translation of the *Elements of Interpretation* by Ernesti, the same theologian whose other work Lieber was translating in the 1830s.[305] Lieber relied on Stuart's commentaries on Ernesti in his *Hermeneutics*.[306] Stuart said he published his work given "the want of a text-book, in our country, on the science of interpretation,"[307] and interest was keen enough for the volume to be in its fourth edition by the early 1840s.[308] Stuart, who also translated Schleiermacher in the 1820s and 1830s, corresponded with Lieber and contributed articles for Lieber's *Encyclopaedia Americana*.[309] Together they have been called "the founding fathers of American hermeneutics."[310]

Lieber earned that title by taking the methods of hermeneutics from Schleiermacher and Ernesti and applying them to law. Lieber's *Hermeneutics* began by sketching a basic model of linguistic communication. "[D]irect communion between the minds of men" must happen through "signs,"[311] he explained, and "[t]he 'true meaning' of any signs is that meaning which those who used them were desirous of expressing."[312] Signs were most commonly—and in law almost exclusively—words.[313] "Interpretation" was thus "the art of finding out the true sense of any form of words: that is, the sense which their author intended to convey."[314] And if "the object of all interpretation" was "to find" the meaning that the author intended to convey, then "the very basis of all interpretation" was: "No sentence, or form of words, can have

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305 J.A. Ernesti, Elements of Interpretation (Moses Stuart trans., Andover, Flagg & Gould 1822). For the only two references I have seen to Stuart's influence on Lieber, see Farr, *supra* note 297, at 88; Mark Donald Walhout, Hermeneutical Patriotism: Interpretation and Culture in Antebellum America 16–18 (Aug. 1985) (Ph.D. dissertation, Northwestern University).

306 *See* Lieber, Legal and Political Hermeneutics, *supra* note 13, at 125 n.1 (citing Moses's commentaries on Ernesti); *cf. id.* at 113–14 (appealing to Ernesti's textualist approach to the Bible).

307 Ernesti, *supra* note 305, at iii.

308 *See* J.A. Ernesti, Elementary Principles of Interpretation (Moses Stuart trans., Andover, Allen, Morrill & Wardwell, 4th ed. 1842).

309 Farr, *supra* note 297, at 88.

310 Walhout, *supra* note 305, at 18.

311 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 13; *see id.* at 14 (defining "signs" as "all marks, intentional or unintentional, by which one individual may understand the mind or the whole disposition of another, as well as those which express a single idea or emotion").

312 *Id.* at 17.

313 *Id.* at 21, 24.

314 *Id.* at 23.

more than one 'true sense,' and this is the only one we have to inquire for."[315] As Lieber later wrote elsewhere, "[t]he law of all hermeneutics" was "to find out by solid interpretation *the truth of the text*, not to try what by ingenuity we can screw into it."[316]

Like Schleiermacher,[317] however, Lieber was keenly attuned to the risk of "misapprehension" in communication given various sources of ambiguity,[318] which resort to the general rules of the author's language could ameliorate. Lieber thus believed that, whether in everyday communication or law, "we are continually obliged to resort to interpretation" in the grammatical sense of Schleiermacher, by which we can use "the same rules which common sense teaches every one to use" to try to figure out what the author intended to convey.[319] Thus, to interpret laws properly, "the ministers of the law must proceed by proper, safe and sound rules."[320]

But when it came to applying the meaning of a text, such as a written law, to a given situation, interpretation aided by general rules could only go so far, given contradictions within (or across similar) texts or unforeseen or unprovided for cases.[321] Application of enacted texts thus often entailed a second, remedial step of "construction."[322] For example, did new technologies such as steam guns fall within the scope of old laws referring to "arms"?[323]

In sum, Lieber theorized the "interpretation" and "construction" of written law in a way that privileged the linguistic meaning of the text (if discernible) and relegated "spirit" to a remedial step.[324] "Ernesti

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315 *Id.* at 86.

316 Letter from Francis Lieber to A.D. White, President, Corn. Univ. (Sep. 19, 1872), *in* The Life and Letters of Francis Lieber 428, 428 (Thomas Sergeant Perry ed., 1882) (emphasis added).

317 *See* Vertsman, *supra* note 301, at 823; Solum, *supra* note 303, at 1609.

318 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 27; *see also id.* at 33–39 (discussing sources of ambiguity). The inevitable ambiguity of human communication is captured by Lieber's famous hypothetical in which a housekeeper directs an employee to "fetch some soupmeat." *Id.* at 28–30. *See generally* William N. Eskridge, Jr., *"Fetch Some Soupmeat*," 16 Cardozo L. Rev. 2209 (1995) (noting the hypothetical's influence and analyzing its alternative interpretations).

319 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 28. On the necessity of interpretation, see *id.* at 21, 39, 45.

320 *Id.* at 53.

321 *Id.* at 55–57; *see also id.* at 121–22 (discussing the limits of interpretation).

322 *Id.* at 56; *see also id.* at 58–59 (describing two modes of construction, following from either "the discovery of the spirit, principles, and rules, that ought to guide us according to the text, with regard to subjects, on which that declaration is silent" or the "principles or rules of superior authority").

323 *Id.* at 138.

324 *See id.* at 113 (explaining that "interpretation precedes construction"). Thus, while the terminology of Lieber's interpretation-construction distinction has been influential, *see*

most solemnly warns against the belief in a perpetual and direct divine assistance in understanding the bible," Lieber wrote, "without an unremitted zealous endeavor to arrive at the sense of the *words*, by the rules of sound interpretation."[325] For Lieber, "[i]t is similar with those who have their own notions of public welfare, and carry them into a constitution, instead of faithfully interpreting the instrument."[326]

### *B. Assimilation of Written Laws*

By developing a theory of how to interpret written laws based on how one might go about interpreting any text, Lieber was suggesting that legal interpretive methods depended on the *writtenness* of law, not the *type* of law at hand, and thus that the science of legal interpretation applied to all written laws indiscriminately. Other antebellum writers on legal interpretation followed suit. That is not to say that they failed to appreciate differences among statutes, constitutions, and other types of written law. Rather, the point is that the interpretation of statutes, constitutions, and other types of written law became understood as something that belonged together—literally between the covers of the same book—for the first time.

Constitutional law and statutory law had previously been written about and studied separately.[327] Their interpretation was not understood as the same enterprise, even if approaches sometimes intersected or analogies were drawn. For example, whether people read the Constitution strictly or not depended largely on whether they understood it to be more like a "treaty" or "compact," as opposed to a true constitution—that is, based on the *type* of law that it was.[328] For example, in his

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sources cited *supra* note 107, he understood the distinction differently than later scholars have. *See* Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 2225, 2231 (1995) (comparing Lieber's understanding of construction, which *supplements* text and is needed in only certain circumstances, with Arthur Corbin's later notion of construction, which *complements* text and will always be necessary at least to declare the text's legal meaning).

325 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 113–14.

326 *Id.* at 114.

327 *See* Basile, *supra* note 41, at Part I; GIENAPP, *supra* note 63, at 166.

328 *See* Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 20 (2024); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 569–78 (2003) (describing early disagreement over the appropriate analogy for the Constitution for purposes of identifying interpretive rules). Farah Peterson has argued that early debates over constitutional interpretation could be thought of as involving disagreements over whether public or private acts "provided the *best analogy*" for a constitution. Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 10 (2020). She invokes public and private acts as examples from competing liberal- and strict-interpretive paradigms, however, while noting that historical actors themselves tended to use the terms "treaty" or "compact," rather than "private act," to draw a contrast with "the general law of

highly influential appendage to the American edition of Blackstone's *Commentaries*, St. George Tucker argued that the Constitution should be construed strictly—citing Vattel on treaty interpretation—because it was a compact among the states.[329] By contrast, in his critique of Tucker, Justice Story argued that if the Constitution were understood as a true constitution framed by the people, then it would be interpreted as liberally as the state constitutions were.[330]

Old textualists, however, applied their science of legal interpretation across different forms of written law because they understood written law as akin to any text for interpretive purposes. Their antebellum works thus assimilated all written law as the *same type of thing* for interpretive purposes,[331] even while appreciating variance in the details.[332] Hence, while the treatises of Lieber, Smith, and Sedgwick are routinely described as the first treatises on "statutory interpretation,"[333] that description mischaracterizes the scope and ambition of their projects.

In *Hermeneutics*, Lieber sought to set forth the "immutable principles and fixed rules for interpreting and construing" all "laws by the Public Power."[334] The principles applied, he declared, to "every sort of interpretation, applied to whatever branch, to whatever text."[335] And his treatise proceeded to apply them to all types of different laws (and contracts),[336] with only some differences in emphasis.[337]

Although Smith and Sedgwick modeled their treatises on Dwarris's—which, as a work on English written law, was focused on statutes—they seamlessly expanded their scope to constitutions and

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the land." *See id.* at 30–31; *cf.* Gienapp, *supra* note 63, at 322 n.71 ("At least initially . . . both legal elites and non-legal elites often refused to think of the Constitution in narrow statutory terms.").

329 St. George Tucker, *View of the Constitution of the United States*, *in* View of the Constitution of the United States with Selected Writings 91–92, 95, 100–04 (Liberty Fund 2012) (1803).

330 Story, *supra* note 118, at 393–401.

331 In addition to the leading examples above the line, see, for example, Broom, *supra* note 137. Broom's treatise began with constitutional law, *see id.* at iv, but also covered other "written instruments," such as statutes and contracts, *see id.* at 237–301.

332 *See, e.g.*, Sedgwick, *supra* note 125, at 587 ("Rules of interpretation vary with the instrument to be expounded.").

333 *E.g.*, Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. Legis. & Pub. Pol'y 333, 338 (2004).

334 Lieber, Legal and Political Hermeneutics, *supra* note 13, at viii.

335 *Id.* at 83; *accord* Paul H. Sanders & John W. Wade, *Legal Writing on Statutory Construction*, 3 Vand. L. Rev. 569, 572 (1950).

336 *See* Lieber, Legal and Political Hermeneutics, *supra* note 13, at 166.

337 *See id.* at 145–91. For example, Lieber asserted that constitutions should be construed more strictly than statutes, which should be interpreted more strictly than contracts. *See id.* at 185.

other forms of written law. That expansion was in keeping with the spirit of Dwarris's treatise, which stated that, because the United States had "a written constitution," its "interpretation or construction . . . requires the exercise of the same legal discretion as the interpretation or construction of a law."[338]

Smith titled his volume *Commentaries on Statute and Constitutional Law*, and he applied the same rules of interpretation to both forms of written law.[339] "In expounding a constitutional provision," he wrote, "the same rules of construction and of interpretation should obtain as are adopted and applied in the construction of a statute."[340]

Sedgwick similarly titled his own work *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law*.[341] He treated statutory and constitutional law together, he explained, because "[t]hey are entirely written law, governed, like all branches of our science, by rules peculiar to themselves."[342] "Treaties, Patents or Grants of Land, and Municipal Ordinances," Sedgwick added, are also "a part of our written law, and are all in some respects governed by considerations and rules of the same kind as those which apply to statutes."[343] His book's purpose, like Smith's and Lieber's, was thus "to state the rules which govern the interpretation and application of written law" tout court.[344]

By suggesting that an increased emphasis on the shared writtenness of constitutions and statutes explains why we begin to see some convergence between constitutional and statutory interpretation in this period, I am departing from the leading explanation: that this convergence was the Marshall Court's doing.[345] True, as originally documented by the political scientist Sylvia Snowiss, the Marshall

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338 DWARRIS (1835 ed.), *supra* note 12, at 14.

339 *See* SMITH, *supra* note 13, at 451–52.

340 *Id.* at 418.

341 SEDGWICK, *supra* note 125.

342 *Id.* at 21; *accord id.* at 24 ("[T]he general rules of interpretation are the same whether applied to statutes or constitutions . . . .").

343 *Id.* at 447; *see also id.* at 447–74 (discussing treaties, land grants, and municipal ordinances).

344 *Id.* at 697; *accord id.* at 25.

345 *See* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 121–75 (1990); GIENAPP, *supra* note 63, at 162–71 (citing Snowiss); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE 199–200 (1996); Powell, *supra* note 101, at 942–44. Powell's argument is that the Marshall Court was in fact *reviving* a constitutional-statutory analogy from the Founding era. *See id.* at 942; *cf. id.* at 887, 923, 948 (asserting that a statutory analogy for the Constitution predominated in the 1790s). To support his claim about the Founding era, however, he relies almost entirely on Alexander Hamilton. *See, e.g.*, *id.* at 889 n.17, 911, 914. He also cites Fortunatus Dwarris, *see id.* at 889 n.17, but Dwarris's treatise was from the 1830s.

Court sometimes applied common-law rules of statutory construction to constitutional text, such as in the Court's Contract Clause cases.[346] But the Court often did not, with Chief Justice Marshall famously cautioning that "we must never forget that it is a *constitution* we are expounding."[347] Moreover, Snowiss's theory uncritically assumes that statutory interpretation was already text-centric, thus overlooking how approaches to statutory interpretation were also in flux. The move that we see in certain antebellum treatises toward assimilating statutory and constitutional law for interpretive purposes has less to do with the Marshall Court and more to do with the growing sense that statutes' and constitutions' shared writtenness was what mattered most for how to interpret them.

### *C. Dissection, Classification, Rules*

Old textualists' ambition was thus to study all written law as a unified field of science. With all written law under their microscope, they set about dissecting written law, classifying its components, and enumerating its rules. "The results," commentators observed of George Coode's book on "the language of the written law," "are reminiscent of that diagramming of sentences which used to be a method of teaching grammar."[348]

Likewise, Lieber told a friend that, with *Hermeneutics*, he aimed to treat interpretation and construction of written law "like a recipe of a cookery book."[349] He classified different modes of interpretation (close versus extensive, limited versus free, predestined, authentic)[350] and construction (close, comprehensive, transcendent, extravagant).[351] His treatise then discussed nine "fundamental principles" of interpretation at length.[352] Because "construction endeavors to arrive at conclusions

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346 *See* Snowiss, *supra* note 345, at 126–61; Hobson, *supra* note 345, at 199–200.

347 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also* Grey, *supra* note 50, at 707–08 (explaining that any Marshall Court case that stressed "the *writtenness* of the Constitution" was "a most atypical" one); LaCroix, *supra* note 162, at 9–10 (arguing that "interbellum constitutional thinkers," including members of the Marshall Court, "understood fidelity to the Constitution to include far more than text alone").

348 Sanders & Wade, *supra* note 335, at 575.

349 Letter from Francis Lieber to Charles Sumner (May 9, 1837), *in* The Life and Letters of Francis Lieber, *supra* note 316, at 115–16. Cookbooks were among the printed texts proliferating in the early-nineteenth-century United States, making more common the experience of cooking as applying a series of written, precise steps. *See* Jan Longone, *Feeding America: The Historic American Cookbook Project*, Michigan State University Libraries (2002), https://d.lib.msu.edu/fa/introduction#1 [https://perma.cc/UBR2-Z97W].

350 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 66–76.

351 *See id.* at 66–82.

352 *Id.* at 83; *see id.* at 83–120. Leiber's "fundamental principles" are summarized at *id.* at 120.

beyond the absolute sense of the text," it was "dangerous" (yet inescapable) and thus also required "safe rules."[353] Lieber enumerated sixteen.[354]

Following their model of Dwarris's treatise, Smith and Sedgwick started with general principles for interpreting written law and then broke written law down into its different subcategories, like a scientific dissection, and enumerated rules for those different subcategories of texts and for their different parts. Smith likened the task to starting with the law of gravity, which "has but one single elementary rule . . . extending through the whole range of matter," and then "apply[ing] it to every complex and variegated combination of material substances."[355]

For example, Smith and Sedgwick, like Dwarris, each dissected a statute into its types (such as public versus private),[356] parts (title, preamble, purview or body, special clauses, provisos, exceptions, schedules, endorsement with date, etc.) with corresponding rules,[357] qualities (such as extraterritorial reach and modes of repeal),[358] and then catalogued rules of interpretation and construction (such as expressio unius and noscitur a sociis).[359]

The rules themselves were drawn largely from publicists' writings on the law of nations and civil codes, not just the Anglo-American tradition.[360] For one rule, to give a typical example, Lieber cited not just Blackstone but also the French civil code, Pufendorf, and Grotius.[361] Dwarris prefaced his discussion of the general rules of interpretation by noting that they could be found in the works of Vattel and the French jurist Domat.[362] Smith claimed that "[a]lmost every rule of

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353 *Id.* at 64; *accord id.* at 80.

354 *See id.* at 124–44. Leiber's "safe rules" are summarized at *id.* at 143–44.

355 SMITH, *supra* note 13, at xi–xii.

356 *See* DWARRIS (1835 ed.), *supra* note 12, at 1–17; SMITH, *supra* note 13, at 594; SEDGWICK, *supra* note 125, at 26–48.

357 *See* DWARRIS (1835 ed.), *supra* note 12, at 17–23, 82–86; SMITH, *supra* note 13, at 594; SEDGWICK, *supra* note 125, at 49–64.

358 *See* DWARRIS (1835 ed.), *supra* note 12, at 23–39; SMITH, *supra* note 13, at 595–99; SEDGWICK, *supra* note 125, at 65–141.

359 *See* DWARRIS (1835 ed.), *supra* note 12, at 39–82; SMITH, *supra* note 13, at 600–738 (discussing expressio unius and noscitur a sociis at 654–58); SEDGWICK, *supra* note 125, at 225–90.

360 While compact theorists also drew on the practices of treaty interpretation under the law of nations, old textualists did so to inform interpretation *without compact theory arguments*. *See infra* notes 366–69 and accompanying text.

361 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 133; *see also id.* at 99–100 (citing Grotius for an ordinary meaning presumption); *id.* at 162 n.1 ("I would . . . refer once more to Vattel's chapter on Interpretation . . . ."); *id.* at 166 (referring his readers, "for a further pursuit of this study," to Pufendorf, the Digest, and Grotius in addition to James Kent).

362 DWARRIS (1848 ed.), *supra* note 12, at 550.

interpretation and construction which has been engrafted into the common law, has been derived from the civilians."[363] His discussion of the general principles of interpretation and construction—"the main and most important question" of his treatise—relied heavily on Grotius, Pufendorf, Vattel, and Domat.[364] Sedgwick's volume included large excerpts from these publicists' works.[365]

Old textualists' reliance on the law of nations may seem counterintuitive given the association today of the law of nations with unwritten law and textualism with domestic law.[366] But, at the time, the law of nations and civil law had the most developed traditions of textual interpretation due to the long-running importance of treaties and codes in these traditions.[367] As Sedgwick put it, "[t]he subject has been so fully discussed by writers of international law."[368] And old textualists were familiar with the law of nations and European civil law. Lieber was trained in Germany, for instance, and Sedgwick, a Francophile, had spent time in France in the 1830s, including with Tocqueville, learning about its legal system.[369]

As their reliance on early modern publicists shows, rules for interpretation had existed almost as long as there had been written law.[370] That was true in the common-law tradition as well. In a 1791 speech addressing the constitutionality of a national bank, to give just one example, James Madison enumerated five interpretive principles.[371]

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363 Smith, *supra* note 13, at 612.

364 *See id.* at 611–738.

365 *See* Sedgwick, *supra* note 125, at 266–90.

366 In more recent times, the direction of textualist influence tends to run from domestic to international. Since the late 1980s, as the new textualism ascended, textualist judges have sought to expand its domain from statutory to treaty interpretation. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 506 (2008) (Roberts, C.J.) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

367 *See* David J. Bederman, Classical Canons 113–41 (2001) (discussing the Grotian tradition of treaty interpretation); Tutt, *supra* note 104, at 292–309 (describing the textual interpretive commitments of early modern publicists).

368 Sedgwick, *supra* note 125, at 448.

369 *See, e.g.*, Letter from Theodore Sedgwick to Mr. and Mrs. Sedgwick (July 25, 1833), *in In Memory of Theodore Sedgwick*, *supra* note 264, at 8, 14 (documenting Sedgwick's stay in France and study of the French legal system).

370 *See* Bederman, *supra* note 367 (tracing the history of interpretive canons back to classical sources); Hans W. Baade, *The* Casus Omissus*: A Pre-History of Statutory Analogy*, 20 Syracuse J. Int'l L. & Com. 45, 83–91 (1994) (tracing "the rules of statutory interpretation reflected in late-nineteenth-century English and American treatises" to a period following the Glorious Revolution); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179, 1183–91 (documenting how maxims of interpretation have endured across centuries); McGinnis & Rappaport, *supra* note 59, at 1383–96 (collecting examples of the use of interpretive rules in early constitutional practice).

371 Address of James Madison (Feb. 2, 1791), *in* Legislative and Documentary History of the Bank of the United States 39, 40 (M. St. Clair Clarke & D.A. Hall eds., D.C.,

What was different in these antebellum treatises, however, was the effort to systematically analyze written laws across forms and at great length, with treatises coming close to or exceeding 1,000 pages.

Justice Story's work on interpretation in the early 1830s, immediately preceding the antebellum treatises at issue, is illustrative insofar as it marked a transitional step between older and newer approaches. Like Lieber, Dwarris, Smith, and Sedgwick, Story took a keen interest in the rules of interpretation. In 1831, he enumerated twenty-one "rules of interpretation" for statutes in an essay in Lieber's *Encyclopaedia Americana*.[372] Two years later he enumerated nearly twenty "rules of interpretation" in his *Commentaries on the Constitution*.[373] Yet, consistent with a more traditional approach, he treated the interpretation of different forms of written law separately—not only by discussing them in separate texts but also by grounding them differently from a jurisprudential standpoint. In his *Commentaries*, he distinguished between the necessarily general nature of a constitution and "the prolixity of a legal code."[374] He derived his rules of constitutional interpretation "from the nature" of a constitution, which he proclaimed made it "wholly unlike" other texts.[375] Moreover, his discussion of interpretation hardly amounted to the type of extensive enumeration of interpretive rules found in the works of the later antebellum writers. His chapter on constitutional interpretation, for instance, was largely a discussion of debates over strict interpretation predicated on compact theory,[376] implied federal powers and the national bank,[377] and exclusive versus concurrent powers.[378] Only at the end of the chapter does a reader find a few pages on the type of textual rules—"belonging to mere verbal criticism," in Story's dismissive words—that would obsess subsequent antebellum writers.[379]

Although these later writers pursued a more extensive, "scientific" approach to interpreting written law, their aspiration should not be confused with rigid formalism. Sedgwick, for instance, cautioned that Lieber had gone too far in classifying different modes of interpretation and construction and "attempt[ing] to frame formal rules for the various

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Gales & Seaton 1832) (stating, for example, that "[a]n interpretation that destroys the very characteristic of the Government, cannot be just").

372 Story, *supra* note 116, at 583–85.

373 Story, *supra* note 118, at 383–442.

374 *Id.* at 419.

375 *Id.* at 393, 404.

376 *See id.* at 392–407.

377 *See id.* at 418–20.

378 *See id.* at 420–33.

379 *Id.* at 436; *see id.* at 436–41.

modes."[380] "Ours is eminently a practical science," he wrote.[381] "What is required in this department of our science is not formal rules, or nice terminology, or ingenious classification," he maintained, but rather "thorough intellectual training" guided by "some general principles that control the matter."[382] Indeed, when Smith analogized between illuminating the science of legal interpretation and analyzing the law of gravity as it applied to every conceivable combination of matter, he was, at bottom, acknowledging the impossibility of the task.[383]

### *D. Skepticism of Spirit*

A consequence of thinking of the interpretation of written law as a linguistic enterprise governed by rules is that if the enacted text had a clear linguistic meaning, then that meaning would normally control, regardless of extratextual considerations. We now call this idea the plain meaning rule.[384] It was a central principle for antebellum writers on legal interpretation, although approaches differed in practice.

Some writers announced the principle while circumscribing its application in practice. In *Hermeneutics*, for example, Lieber stated that an interpreter should follow a law's meaning from its text alone if possible (with qualifications for absurd results)[385]:

> Since our object is to discover the sense of the words before us, we must endeavor to arrive at it as much as possible from the words themselves, and bring to our assistance extraneous principles, rules, or any other aid, in that measure and degree, only as the strictest interpretation becomes difficult or impossible . . . . Words have been used to express the sense, and through the words, if possible, we have to arrive at it.[386]

Yet Lieber was so attentive to the possibilities of ambiguity and misapprehension[387] that he acquiesced to a large role for extra-textual

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380 Sedgwick, *supra* note 125, at 227–28.

381 *Id.* at 227.

382 *Id.* at 228.

383 Smith, *supra* note 13, at xi–xii.

384 *See, e.g.*, Scalia & Garner, *supra* note 1, at 436 (defining the plain meaning rule as "[t]he doctrine that if the text of a statute is unambiguous, it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text—unless this application leads to an absurdity").

385 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 167; *accord id.* at 115.

386 *Id.* at 113; *cf. id.* at 137, 183 (expanding on arguments for the close construction of legal texts).

387 *See, e.g.*, *id.* at 162 ("[I]t is impossible to word laws in such a manner as to absolutely exclude all doubt, or allow us to dispense with construction, even if they were worded with absolute (mathematical) distinctness, for the time, for which they were made . . . .").

construction—especially as laws aged and unforeseen or unprovided for circumstances arose.[388] The plain meaning rule was thus largely one of principle, rather than practice.

Dwarris, Smith, and Sedgwick, by contrast, more zealously advocated for the plain meaning of written laws. This trend was most apparent from their insistence on following the plain meaning of statutes and corresponding criticism of equitable interpretation.

To be sure, consistent with longstanding formulations of the interpretive enterprise, they said the object of statutory interpretation was the legislature's "intention."[389] But, in recognizably modern ways, they reformulated that intention as objective and discernible from text alone. Sedgwick, for instance, wrote that it was "utterly impossible" to identify the legislature's actual intent, so "the only safe rule" was "that the legislative intent must be taken as expressed by the words which the legislature has used."[390]

Accordingly, Dwarris maintained that "[t]he duty of the Judge is to adhere to the legal text, and not to travel out of what that expressly or impliedly contains."[391] He cast doubt on an older, contrary view that a judge ought to construe a statute according to the makers' intention even if "such construction seems contrary to the letter of the statute."[392] When his treatise discussed the details of interpretation and construction, Dwarris focused first on "the language of the act."[393] He insisted on following the plain meaning of the enacted text and criticized "extending statutes by

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388 *See id.* at 121–22 ("Construction is unavoidable. Men who use words, even with the best intent and great care as well as skill, cannot foresee all possible complex cases, and if they could, they would be unable to provide for them . . . ."); *accord id.* at 49, 57–58, 64–65, 134–35, 186 (similar); LIEBER, MANUAL OF POLITICAL ETHICS, *supra* note 110, at 582 (stating that because of the impossibility "for the human mind to devise any written law which can possibly provide for all cases . . . [an interpreter] must fairly interpret according to the spirit of the law and constitution, of constitutional and representative liberty in general, and the genius and history of his people in particular"); Lawrence Lessig, *The Limits of Lieber*, 16 CARDOZO L. REV. 2249, 2262 (1995) (suggesting that Lieber's most instructive insight is that changed circumstances require new readings); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 433 (1989) (observing Lieber's focus on "the problematic character of textual interpretation" and deeming his ultimate "lesson" to be "the necessity of flexible interpretation").

389 DWARRIS (1835 ed.), *supra* note 12, at 39; SEDGWICK, *supra* note 125, at 231.

390 *Id.* at 382–83; *accord id.* at 243 (stating that "the tendency of all our modern decisions is to the effect that the intention of the legislature is to be found in the statute itself"); *see also* DWARRIS (1835 ed.), *supra* note 12, at 48 ("[Judges] are not . . . to *presume* the intentions of the legislature, but to *collect them* from the words of the act of Parliament; and they have nothing to do with the policy of the law.").

391 DWARRIS (1848 ed.), *supra* note 12, at 704.

392 DWARRIS (1835 ed.), *supra* note 12, at 40–41.

393 *Id.* at 47–57.

equity."[394] "[J]udges are not to be encouraged to direct their conduct 'by the crooked cord of discretion,'" he wrote, "'but by the golden metwand of the law;' i.e. not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."[395] When Dwarris's treatise later turned to a statute's "spirit" and "consequences," he was adamant that their consideration was subject to the statute's plain meaning.[396]

Smith's treatise agreed with Dwarris that "[t]he duty of the judge is to adhere to the legal text, as his sole guide."[397] Smith pressed the plain meaning rule[398] and criticized equitable interpretation.[399] As one of his treatise's epigraphs summed up: "So long as there is no ambiguity in the words, there should be no interpretation contrary to the words."[400]

Sedgwick, too, advocated for adhering to the plain meaning of the text. When discussing the "general rules for the construction and interpretation of statutes,"[401] he foregrounded the plain meaning doctrine[402] and favorably discussed plain meaning cases,[403] cases excluding consideration of legislative history,[404] and cases condemning equitable interpretation.[405] While he enumerated the other interpretive aids available to a court, such as exposition by legislatures,[406] he said courts should consult these aids only for "doubtful legislative provisions."[407]

Sedgwick accordingly criticized equitable interpretation that narrowed or broadened the text's plain meaning.[408] Equitable interpretation is "extremely liable to abuse,"[409] he cautioned, and

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394 *Id.* at 48, 52–53; *see also id.* at 59–67 (expressing concerns with the "many" existing authorities for the equitable construction of statutes).

395 *Id.* at 48.

396 *See id.* at 57, 80; *see also* Green, *supra* note 44, at 944–47 (describing Dwarris as the early forerunner of a late-nineteenth-century interpretive turn toward plain meaning among English judges).

397 Smith, *supra* note 13, at 589.

398 *See id.* at 619, 627–28, 688–97, 836–38.

399 *See id.* at 833–38.

400 *See id.* (title page) ("*Quoties in verbis nulla est ambiguitas, iba nulla exposition contra verba expressa fienda est*.") (translated by author).

401 Sedgwick, *supra* note 125, at 225–90.

402 *Id.* at 231–47; *see also id.* at 295, 379 (emphasizing the plain meaning rule).

403 *Id.* at 231, 243–47, 442.

404 *Id.* at 241; *see also id.* at 247 ("[F]or the purpose of ascertaining the intention of the legislature, no extrinsic fact, prior to the passage of the bill, which is not itself a rule of law or an act of legislation, can be inquired into or in any way taken into view."). On Sedgwick's embrace of the exclusionary rule regarding legislative history, see Magyar, *supra* note 44, at 40–41.

405 Sedgwick, *supra* note 125, at 307–11.

406 *See id.* at 247–58 (enumerating aids).

407 *Id.* at 258.

408 *See id.* at 292–95, 305–07.

409 *Id.* at 292; *accord id.* at 244, 295.

"obviously untenable" under the modern separation of powers.[410] "[T]he rules and nomenclature of strict and equitable construction properly apply," he maintained, only in cases of "ambiguity or contradiction"—not "where the language of statutes is clear."[411] "Where the meaning of the statute, as it stands, is clear," he underscored, "[judges] have no power to insert qualifications, engraft exceptions, or make modifications."[412]

Surely by Sedgwick's treatise in the 1850s, then, and beginning with Dwarris and Lieber in the 1830s, this new genre of textualist treatises had consolidated around a position that privileged the plain meaning of enacted text and downgraded equitable interpretation.

Old textualists' commitment to plain meaning extended to constitutional interpretation, albeit with more nuance. "Where the words [in the Constitution] were clear," Smith wrote, "there was generally no necessity to have recourse to other means of interpretation," which "was only warranted where there was some ambiguity in the language."[413] Sedgwick likewise advanced a plain meaning rule for constitutional interpretation.[414] Yet Sedgwick conceded a need for more liberal interpretation of constitutions given that they were harder to amend and written in general terms.[415]

When old textualists said follow the plain meaning of the words, however, they did not necessarily mean follow the ordinary or everyday meaning of those words. The reason is that they tended to view law as a fairly technical language. Their treatises catalogued the technical meanings of seemingly ordinary words at length.[416] For example, Dwarris explained that, in the language of law, "and" can sometimes mean "or."[417] Lieber pointed out that "horse" had different technical meanings in marine insurance, fire insurance, crime, and the military,[418] and that even "sunrise" and "nine o'clock" could bear specialized meanings.[419]

An understanding of law as a substantially technical language was not unusual for their time. In fact, it was during the 1830s through 1850s

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410 *Id.* at 311.
411 *Id.* at 311–12.
412 *Id.* at 380; *accord id.* at 383.
413 SMITH, *supra* note 13, at 451–52.
414 *See* SEDGWICK, *supra* note 125, at 486–87, 593.
415 *See id.* at 492–93; *accord id.* at 230–31.
416 *See* DWARRIS (1835 ed.), *supra* note 12, at 86–94; SMITH, *supra* note 13, at 714–35; SEDGWICK, *supra* note 125, at 435–41.
417 DWARRIS (1835 ed.), *supra* note 12, at 90.
418 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 100.
419 *Id.* at 49–52.

that the first American legal dictionaries were published.[420] These legal dictionaries translated law into ordinary English, and their popularity reflected a widespread view that law could be a very technical subject. John Bouvier issued the most influential dictionary in 1839. In his preface, he wrote that, as a practitioner, he had found himself "in a labyrinth without a guide," and that the goal of his dictionary was to explain the "many technical expressions" found in "the constitution and laws of the United States, and of the several states."[421] Bouvier's legal dictionary was a commercial hit and underwent two more editions in the 1840s and a posthumous edition in 1852.[422]

Old textualists still thought that interpreters should begin with a term's ordinary meaning,[423] but it was a relatively weak presumption. For one thing, their sources for this presumption were the writings of early modern publicists, such as Grotius and Vattel, on treaty interpretation.[424] Early modern publicists began treaty interpretation with a term's ordinary meaning based on a probability of what the contracting parties had intended, rather than any sort of jurisprudential commitment to the public legibility of written law.[425] On that view, especially if one thought that law was full of technicalities, it would not take much to abandon the presumption. As the twentieth-century international lawyer Hersch Lauterpacht put it, Vattel's ordinary meaning presumption was followed by so many qualifications and distinctions in his treatise that his readers were left with a "rich choice of weapons" for defeating the presumption.[426] Indeed, Lieber wrote that one had to consider: "[t]he general character of the text, whether

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420 *See* John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America, Vol. I–II (1839); Alexander M. Burrill, A New Law Dictionary and Glossary (1850–1851). There had been two eighteenth-century English law dictionaries published in the United States. *See* Giles Jacob, The Law-Dictionary (Phila., P. Byrne and N.Y.C., I. Riley 1811) (1729); John Rastell, Les Termes de la Ley (Portland, J. Johnson 1812) (1721). But "nothing was done to Americanize these early legal dictionaries," as was done with more influential imports such as Blackstone's *Commentaries*. George S. Grossman, *Early American Legal Lexicographers*, *in* Language and the Law 63, 63–64 (Marlyn Robinson ed., 2003).

421 Bouvier, *supra* note 420, at v–vii.

422 Grossman, *supra* note 420, at 72; *see also* Book Review, 8 Am. L. Reg. 126–27 (1860) (noting widespread use of Bouvier's dictionary among lawyers and students); *John Bouvier and His Dictionary, 1839–1914*, 3 Am. L. Sch. Rev. 546, 547–48 (1914) (describing high praise and strong demand for Bouvier's legal dictionary in the nineteenth century).

423 *See, e.g.*, Dwarris (1835 ed.), *supra* note 12, at 47.

424 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 99–100 (citing Grotius, *supra* note 103); Smith, *supra* note 13, at 629–30 (citing Pufendorf, *supra* note 103, and Vattel, *supra* note 103); Sedgwick, *supra* note 125, at 266 (quoting Vattel, *supra* note 103).

425 *See, e.g.*, Grotius, *supra* note 103, at 849; Vattel, *supra* note 103, at 412–13.

426 H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int'l L. 48, 48 (1949).

it . . . emanated from a high or low source, . . . was drawn up with care or in haste, with a knowledge of the technical terms or not, the peculiar character of the author, and the especial connexion in which we find a doubtful word."[427] Old textualists only flirted with more jurisprudentially grounded reasons for privileging ordinary meaning, particularly when it came to constitutional interpretation, for which Smith and Sedgwick wrote that the text should be read as the ratifying people would have understood that text.[428]

To sum up these points, old textualists generally were attentive to a distinction between ordinary meaning and plain (as in clear) meaning—that is, between a presumption to begin interpretation with ordinary meaning and an ultimate fidelity to the clear meaning of a text.[429] In Smith's treatise, for instance, he clearly distinguished the plain meaning rule ("[t]he first general maxim of interpretation") from the ordinary meaning presumption ("[t]he next general maxim").[430] Old textualism was skeptical of "spirit," but that was not the same thing as a skepticism of law as a technical language.

### *E. Restatement or Reform?*

This Part has excavated old textualists' scientific study of "the government of Written Law," but what does this excavation illuminate about the disagreement over Founding-era interpretive practices described in Part I? My claim is that old textualists were not restating consensus views from the preceding Founding era but rather seeking to consolidate authority for a more text-centric approach to legal interpretation.

First, old textualists saw themselves as modernizers. They claimed to be the first writers to study the different forms of written law together.[431] And in doing so, they placed themselves at the vanguard of a historical pivot from custom to written law, from the age of revolutions to the modern world.[432] Their slogan, to take a line from Smith, could have been: "Progress . . . is a characteristic of this age."[433] Writers may have a bias toward overstating their novelty, granted, but we do not have to take their word for it alone.

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427 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 101.

428 *See* Smith, *supra* note 13, at 451; Sedgwick, *supra* note 125, at 488.

429 On this distinction and the ways in which it is confounded, see Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 Va. L. Rev. 135 (2024).

430 Smith, *supra* note 13, at 627–30.

431 *See id.* at x; Sedgwick, *supra* note 125, at vi.

432 *See supra* notes 145–48 and accompanying text.

433 E. Fitch Smith, *Review of Waterman's Archbold*, Livingston's Monthly L. Mag., Oct. 1853, at 1, 1.

After all, second, old textualists pointed to competing approaches and authority. Most notably, in their criticism of equitable interpretation, they recognized competing authority. Dwarris, while favorably citing recent cases "manifest[ing] the strongest inclination to adhere more closely, in the construction of statutes, to the words of the act of Parliament,"[434] also cataloged cases betraying "a wide and spirited departure from the words of the statute."[435] "Unfortunately, many cases are extant as authorities," he acknowledged, "which are inconsistent with the juster views of the province and duties of judges, at present entertained."[436] Smith acknowledged that his strict textualism opened him to charges of "ultraism, or bordering upon impracticability."[437] He devoted an entire chapter to "equitable construction,"[438] in which he described authorities supporting the doctrine of the equity of the statute before then arguing that the "modern" trend was to limit the doctrine.[439] For his part, Sedgwick acknowledged competing approaches to statutory interpretation yet claimed judges' "power of construction" had been narrowed over time[440] and that "modern authority" was thus on his side.[441] He disapprovingly surveyed recent equitable interpretation cases at odds with what he took to be the plain meaning of the statutes at issue,"[442] which he said had led him to his treatise's tongue-in-cheek motto: "Great is the mystery of judicial interpretation."[443]

Third, old textualists were influenced by post-Founding developments. Among those influences were the increased proliferation and dissemination of written law, debates over codification, and the hermeneutical turn in Protestant interpretation of the Bible.[444] A common subject in their books, tellingly, was the 1804 Code Napoléon[445] and other European codes that followed the Founding.[446]

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434 Dwarris (1835 ed.), *supra* note 12, at 51.

435 *Id.* at 51–52.

436 *Id.* at 58–59.

437 Smith, *supra* note 13, at vii.

438 *Id.* at 814–38.

439 *Id.* at 833–38.

440 Sedgwick, *supra* note 125, at 203–13.

441 *Id.* at 151; *see also id.* at 212 ("[A]bandoning all pretensions of a right to exercise any control over legislation, to correct its errors or supply its deficiencies, [judges] confined their power of construction to admitted cases of doubt.").

442 *See id.* at 298–305.

443 *Id.* at 305; *accord id.* at 235, 378–79.

444 *See supra* Part III.

445 *See, e.g.*, Dwarris (1848 ed.), *supra* note 12, at 530 n.*, 545, 854; Lieber, Legal and Political Hermeneutics, *supra* note 13, at 41, 126, 133, 162; Sedgwick, *supra* note 125, at 7, 82, 122, 189, 211 n.*; Smith, *supra* note 13, at 589.

446 *See, e.g.*, Lieber, Legal and Political Hermeneutics, *supra* note 13, at 127 n.1 (observing that he "quote[d] frequently from the Prussian code," which was adopted in the 1790s).

Fourth, I would be hard-pressed to argue that their views were immediately and widely read and adopted.[447] Although the works of Dwarris and Sedgwick, especially, would prove influential, they obtained greater readership only later in the nineteenth century.[448] Earlier in the nineteenth century, old textualists were invoking an "age of written law" during what historians have variously called "an age of general law"[449] and "a pre-positivist legislative moment."[450] Their views were competing against less text-centric alternatives, such as the German Savigny's view that "interpretation is an art"[451] or the English Phillimore's view that "as the words are not the law, we must not cleave to them in a servile spirit."[452] For these reasons, old textualists are best understood as modernizing reformers, not authors of restatements.[453]

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In 1833, Story wrote, as to constitutional interpretation, that "[m]uch of the difficulty, which has arisen in all the public discussions on this subject, has had its origin in the want of some uniform rules of interpretation, expressly or tacitly agreed on by the disputants. Very different doctrines on this point have been adopted by different commentators."[454] That was the context for old textualists, and that was the task to which they set themselves: to develop a modern science of legal interpretation.

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447 *See, e.g.*, FREIDEL, *supra* note 109, at 178 n.14 (noting initial low sales of Lieber's treatise).

448 *See infra* Section V.B.

449 Campbell, *supra* note 66, at 649.

450 William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1088 (1994); *cf.* Green, *supra* note 44, at 947–53 (documenting how the plain meaning rule became firmly adopted in England only in the late nineteenth century); LACROIX, *supra* note 162, at 9–10 (arguing that "interbellum constitutional thinkers rarely appeared to feel confined by the actual text").

451 FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW ch. 4 (William Holloway trans., Madras, J. Higgenbotham 1867).

452 JOHN GEORGE PHILLIMORE, PRINCIPLES AND MAXIMS OF JURISPRUDENCE 305–06 (Lond., John W. Parker & Son West Strand 1856).

453 Nor do I believe that the more textualist approach in the antebellum period simply reflected a "lag" in assimilating the lessons from late-eighteenth-century constitutional innovations in the United States. *See* Manning, *supra* note 2, at 52–56. Old textualism was influenced by post-Founding developments and was a transatlantic phenomenon.

454 STORY, *supra* note 118, at 383.

## V
## Democracy Under Written Law

For whom was this science? Trained professionals, especially judges. Old textualism was bound up in a broader project to empower judges. To be sure, thousand-page treatises on textual fidelity in interpretation may, to modern ears, sound like a court-curbing project. But, in context, old textualism was part of the broader legislature-curbing movement of the 1830s through 1850s. All authors under study were concerned about reforming legislatures, and those in the United States urged judicial interpretation and review as the antidotes to legislative excess. They wanted judges to guard the laws, so they needed to educate them how to do so and to assure skeptics that it was safe for judges to fill this role. It was a vision of public ends (rule of law) through nonpublic means (juristocracy). As Sedgwick reminded his U.S. readers, they lived not in a pure democracy, but rather a mixed form of representative democracy.[455]

Section V.A describes how old textualists' works on legal interpretation related to their broader liberal, laissez-faire political projects, as opposed to the populism of the era. Section V.B then documents old textualists' skepticism of legislatures and embrace of judges, including their influence on the late-nineteenth-century cult of judicial constitutionalism that followed.

### *A. Property, Not Populism*

The antebellum period is often, though problematically, remembered as a time of democratization—the so-called "Jacksonian era" in the United States[456]—and thus intuitions might be that old textualism was associated with the populism of the period. After all, today we are familiar with the idea that courts should follow an enacted text's linguistic meaning, at least when clear, so that the people can understand the law and hold judges accountable to the law.[457] Justice

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455 *See* Sedgwick, *supra* note 125, at 164–65, 181.

456 The term "Jacksonian" when used to refer to democratic trends in the period, however, obscures the very antidemocratic side of Jacksonianism. *See generally* Sean Wilentz, The Rise of American Democracy (2005) (detailing the era's simultaneous democratic and exclusionary developments).

457 *See, e.g.*, Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.").

Scalia championed this view[458] and even cited Jacksonians, such as Robert Rantoul, in support.[459]

The goal to make law more accessible to ordinary people by writing it down and construing it in ordinary language was indeed held in this period by radical codifiers, such as Rantoul,[460] who were influenced by the English philosopher Jeremy Bentham.[461] "[A] code of laws addressed to the people, and to the least intelligent portion of the people," Bentham wrote, "would speak a language familiar to everybody: each one might consult it at his need."[462] Otherwise, on the Benthamite view, judges and lawyers would unnecessarily complicate law to the benefit of judges' power and lawyers' income—a conspiracy that Bentham dubbed "Judge & Co."[463]

Yet more moderate and numerous codifiers,[464] and even some of the more outspoken ones,[465] rejected this goal as naïve.[466] Americans widely saw Bentham as a dreamer with his head in the clouds—whom one contemporary law journal referred to as "that crazy philosopher and arch codifier."[467]

Most codifiers were not setting out to rid law of its technical nature. Some technicalities were bad, some were good, and experts were needed to tell the difference.[468] Indeed, moderates, and even radicals,

458 *See, e.g.*, Scalia, *supra* note 17, at 17.

459 *See id.* at 10–11.

460 *See, e.g.*, Robert Rantoul Jr., An Oration Delivered Before the Democrats and Antimasons, of the County of Plymouth: At Scituate, on the Fourth of July, 1836, at 36 (1836) (expressing the view that "[t]he law should be intelligible to all"); William Sampson, An Anniversary Discourse, Delivered Before the Historical Society of New-York, on Saturday, December 6, 1823, at 63 (1824) (arguing for translation of law "into plain and intelligible language" to dispel law's "air of occult magic").

461 *See, e.g.*, Warren, *supra* note 183, at 508; Cook, *supra* note 186, at 5; Miller, *supra* note 186, at 243; George M. Hezel, *The Influence of Bentham's Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States*, 22 Buff. L. Rev. 253, 255 (1972).

462 Jeremy Bentham, *A General View of a Complete Code of Laws*, *in* 3 The Works of Jeremy Bentham 155, 209 (John Bowring ed., 1843).

463 Jeremy Bentham, *Rationale of Judicial Evidence*, *in* 7 The Works of Jeremy Bentham, *supra* note 462, at 1, 232.

464 *See* Gordon, *supra* note 186, at 434 (noting that moderates predominated over radicals among codifiers).

465 *See* Sedgwick, *supra* note 248, at 432 (accepting that law, even when codified, "must ever remain, to a very great and inconvenient extent, complicated and uncertain").

466 *See* Cook, *supra* note 186, at 69–95 (documenting widespread skepticism of Bentham's codification ambitions); Funk, *supra* note 180, at 40 (explaining that most codifiers agreed that it was utopian to think that codification would eliminate the need for trained or expert interpreters of law).

467 Samuel M. Hopkins, *Hopkins's Reports*, 2 U.S. L.J. 282, 292–93 (1826).

468 *See* Gordon, *supra* note 186, at 455–56.

believed only legal experts could codify.[469] Thus, the historian Perry Miller concluded that codification was ultimately more about scientific rationality than accessibility.[470] In contrast to the rhetoric of "every man his own lawyer,"[471] codification was very much rooted in notions of expertise.[472]

Among and alongside those moderate codifiers were the old textualists. Lieber, for example, complained that it was a long-recurring illusion that law could be applied "by plain men of common sense, and unsophisticated minds" without "technicalities."[473] Thus, while Lieber professed that in principle it was "necessary . . . for every citizen to know how to interpret correctly and faithfully,"[474] he had no patience for the idea that law could be made plain to them. Bentham lacked "a perfectly correct idea of human language," he explained, insofar as the philosopher "imagined that the same degree of clearness of speech, which we find in mathematics, might be obtained in all branches."[475]

The animating concern of old textualism was not a populist concern for the accessibility of law, but rather a concern for protecting the laws of property and liberty. Despite their different political allegiances, old textualists tended to be classically liberal in their politics and laissez-faire in their economics. Their projects on interpretation were tied to these broader political projects because they believed that trained, expert interpretation was the best way to guard the laws of property and liberty. Lieber had originally intended what would become *Hermeneutics* to be part of his treatise on liberal political theory, *Political Ethics*.[476] And not long after Lieber finished *Hermeneutics*, he wrote a defense of private property in response to radical proposals at the time to, for example, abolish hereditary property.[477] Before writing his own treatise on legal interpretation, Sedgwick was best known for editing

469 *See id.* at 434; Cook, *supra* note 186, at 79–80.

470 *See* Miller, *supra* note 186, at 239–49.

471 *See* John M'Dougal, The Farmer's Assistant, or Every Man His Own Lawyer (3d ed. 1815); Giles Jacob, Every Man His Own Lawyer: Or, A Summary of the Laws of England, in a New and Instructive Method (1736).

472 *See* Funk, *supra* note 180, at 44 (explaining that codification increased the demand for lawyerly expertise, which "dispel[s] the myth that American codification necessarily went hand-in-hand with a politics of distributive democracy in the Age of Jackson").

473 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 50; *see also id.* at 49–52 (explicating the point).

474 *Id.* at 77.

475 *Id.* at 47; *accord id.* at 163.

476 *See* Lieber, Manual of Political Ethics, *supra* note 110; *supra* notes 110–11 and accompanying text.

477 Francis Lieber, Essays on Property and Labour (N.Y., Harper & Bros. 1847); *see* Freidel, *supra* note 109, at 191–96.

a two-volume collection of the political writings of William Leggett,[478] a laissez-faire liberal and "prophet" of the Young America Democrats in New York.[479] "[T]he principal guarantees of our liberty and rights," Sedgwick declared, were "compensation for private property taken for public uses, sanctity of contracts, and law of the land."[480]

### *B. Juristocracy, Not "Mob Law"*

It was judges to whom old textualists turned to guard property and civil liberty by entrusting them with interpretation. In the "tug of war" between legislative power and judicial power at the center of American legal history,[481] old textualists were with the judges. To be sure, they took a keen interest in articulating a text-based, rule-grounded approach to interpretation that constrained judicial discretion. But, in doing so, the goal was to assure the profession and the public that judicial interpretation could be undertaken objectively and to educate judges how to do so.

One clue is to whom they dedicated their works and whom they cast as their predecessors. Lieber dedicated *Hermeneutics* to James Kent,[482] and Smith opened his own treatise by describing himself as a successor to Joseph Story[483]—both conservative proponents of judicial power.

A second tell is their works' deep skepticism of legislatures. Lieber, for instance, despised what he called "mob law," such as when mobs—which he defined broadly as "the abject class[es] of a population"—"overawe the legislature . . . and destroy property for their own supposed interest and necessary support."[484] He shuddered at the idea of legislatures with "the power of interpretation," which he deemed "contrary to [the English and American] constitutional spirit."[485]

Dwarris took the view that interpretive questions "must be left to the decision of the judges," in contrast to what he described as the "ancient" practice of bringing "cases of the first impression, and all matters presenting any serious doubt or difficulty . . . 'into Parliament, to be resolved and decided there.'"[486] His treatise on legal interpretation

478 *See* LEGGETT, *supra* note 269.
479 *See* MILLER, *supra* note 186, at 262.
480 SEDGWICK, *supra* note 125, at 675.
481 LARRY D. KRAMER, THE PEOPLE THEMSELVES 207 (2004).
482 *See* LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at iv.
483 *See* SMITH, *supra* note 13, at v.
484 2 LIEBER, MANUAL OF POLITICAL ETHICS, *supra* note 110, at 317–18.
485 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 48.
486 2 DWARRIS (1830–31 ed.), *supra* note 12, at 781–82.

began with a preliminary discussion of "the method of making laws."[487] Reviewers on both sides of the Atlantic cheered on what they read as an effort to improve legislation. An English reviewer decried "our barbarous forms of legislation" and commended Dwarris as a guide to "the difficulties of efficient legislative workmanship."[488] An American reviewer saw in his treatise guidance on how to restrain the excesses of the private legislation of American legislatures.[489]

Smith's treatise began by complaining more openly about this problem. "An excess of legislation," he wrote, "is one of the greatest evils which has engrafted itself upon our political institutions. It has indeed become as a mildew, and blighting curse upon the body politic, and the jurisprudence of the present age."[490] To that end, Smith included nearly 350 pages on the limits of legislative power.[491] As contemporaries summarized his treatise, it took up "[t]he great subject of legislative power, as restricted by written constitutions."[492] "The author is . . . conscientiously opposed to 'the progress of the political pestilence of excessive and unconstitutional legislation,'" another reviewer wrote.[493]

Sedgwick similarly devoted hundreds of pages to constitutional limits on legislatures.[494] Even his chapter on "the boundaries of legislative and judicial power"[495] was more about the limited scope of legislative power than judicial restraint. Sedgwick was far more concerned about the various ways in which legislatures failed to stay within the boundaries of legislation[496]—including "trench[ing] on the functions of the legal tribunals"—rather than the judiciary usurping legislative prerogatives.[497]

Sedgwick was fixated on the risk that state legislatures posed to private property in particular. "[O]ur system chiefly aims to guard

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487 Dwarris (1848 ed.), *supra* note 12, at xii.

488 *A General Treatise on Statutes*, *supra* note 120.

489 *Dwarris on Statutes*, 6 Am. Jurist & L. Mag. 219, 220 (1831).

490 Smith, *supra* note 13, at vi.

491 *See id.* at 236–309 (discussing how, though the issue was unsettled, the "weight of authority" supported the view that "legislative power" is inherently limited and cannot violate natural justice, and that courts may declare laws void that violate natural justice); *id.* at 310–416 (examining federal constitutional limits on Congress and state legislatures); *id.* at 417–576 (analyzing state constitutional limits on state legislatures).

492 *Smith's Commentaries on Statute and Constitutional Law*, N.Y. Legal Observer, Sep. 1849, at 292.

493 *Notices of New Books*, 1 Monthly L. Rep. 377, 377 (1848).

494 *See* Sedgwick, *supra* note 125, at 475–580 (discussing state constitutional law limits); *id.* at 582–697 (discussing federal constitutional law limits).

495 *Id.* at 142; *see id.* at 142–221.

496 *See id.* at 164–77.

497 *Id.* at 166; *see also id.* at 166–70 (describing three types of statutes that usurp judicial power).

the citizen against the legislature," he wrote, "to protect him against the power of a majority taking the shape of unjust law," which is "most likely to take the shape of attacks upon rights of property."[498] His chapters on constitutional law focused on provisions designed to protect private property from legislatures—namely, takings clauses and the federal Contract Clause (the "two limitations of paramount importance"[499]) in addition to vested property rights and the protection from the deprivation of property without due process of law.[500]

The antidote to legislative excess, in old textualists' view, was a strong, independent judiciary. Old textualists embraced a judiciary entrusted with the power to interpret the laws and the power of judicial review.[501] Sedgwick called these powers the "two certain and unquestioned checks on legislative power, the application of both of which is placed in the hands of the judiciary."[502]

In *Hermeneutics*, Lieber called for construing judicial independence "comprehensively."[503] He deemed *Marbury v. Madison*,[504] for its role in confirming the power of judicial review, "an opinion which is of the utmost importance in the constitutional history of mankind."[505] Lieber elaborated on the importance of judicial review in a later work, calling it "a very jewel of Anglican liberty, one of the best fruits of our political civilization."[506] Only after the Civil War would a more radicalized Lieber reevaluate his antebellum enthusiasm for judicial review in response to the Supreme Court's aggressive policing of congressional

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498 *Id.* at 673.

499 *Id.* at 494. Sedgwick observed, however, that these protections had been "seriously diminished" through judicial construction. *Id.* at 671 (discussing the federal clauses).

500 *See id.* at 494–534 (state takings clauses); *id.* at 612 (suggesting that the earlier analysis of state takings clauses applies to the federal clause); *id.* at 534–42 (state due process clauses); *id.* at 610–12 (federal Due Process Clause); *id.* at 616–70 (federal Contract Clause); *id.* at 671–97 (vested rights).

501 Despite their enthusiasm for judicial review, at least Smith and Sedgwick endorsed what today we would consider a relatively deferential version of the doctrine. For a court to invalidate a statute, in their view, the statute's unconstitutionality must be "clear" and thus beyond reasonable doubt—a standard later popularized by James Thayer. *See id.* at 212, 482, 592–93; SMITH, *supra* note 13, at 575–76; Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. 289, 320–23 (2024).

502 SEDGWICK, *supra* note 125, at 147.

503 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 188–89; *accord id.* at 48; *id.* at 178–79; Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135, 2138 (1994) (describing *Hermeneutics* as "an effort to calm the waters roiled by Jacksonian assaults on the elite status and power of judges").

504 5 U.S. (1 Cranch) 137 (1803).

505 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 169. Lieber classified judicial review as a mode of construction. *See id.* at 60.

506 1 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 180 (Phila., Lippincott, Grambo & Co. 1853); *see also id.* at 178–80 (discussing judicial review).

Reconstruction.[507] "When, years ago, I warmly wrote in praise of the principle that the Supreme C[ourt] could settle . . . the doubtful constitutionality of a law," he confessed to the radical Republican Charles Sumner, "I did not contemplate a great rebellion—a territorial mutiny, lying beyond the scope of the constitution, being decided upon by written law and letter-lawyers."[508]

Even though he was writing on the English legal system, Dwarris revealed an affinity for judicial review. In his treatise on legal interpretation, he wrote that a court should treat a statute that contravened natural law as "void," and he celebrated Lord Coke's decision in *Bonham's Case*[509] "that where an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void."[510] Dwarris also approvingly described the American practice of judicial review, which he attributed to the fact of "a written constitution."[511]

After his hundreds of pages on the constitutional limits of legislative power, Smith declared that "[t]he judicial department is the proper power in the government to determine whether a statute be, or be not constitutional."[512] Following the reasoning of Chief Justice Marshall in *Marbury v. Madison* and James Kent in his *Commentaries*,[513] Smith derived the American doctrine from the fact that "[e]very state in the Union has its constitution reduced to written exactitude and precision."[514] Thus, on his view, "[t]he interpretation or construction of the constitution, is as much a judicial act . . . as the interpretation or construction of a law."[515] He praised "a far sighted and an independent judiciary" for recognizing this truth.[516]

Sedgwick envisioned his treatise on interpretation as a tome on the judiciary's guardianship of the laws. "This treatise is . . . devoted mainly to a consideration of constitutional and statute law," he explained, "*and of the control exercised by the judiciary over it*."[517] For Sedgwick, the judiciary's policing of the boundaries of legislation through

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507 *See* Freidel, *supra* note 109, at 393.

508 *Id.* (alteration in original) (quoting Letter from Francis Lieber to Charles Sumner (Dec. 25, 1866)).

509 (1610) 77 Eng. Rep. 638; 8 Co. Rep. 107 a.

510 Dwarris (1835 ed.), *supra* note 12, at 11–12.

511 *Id.* at 14.

512 Smith, *supra* note 13, at 574; *see id.* at 569–76 (discussing judicial review).

513 *Id.* at 572–74 (first quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803); and then quoting 1 Kent, *supra* note 228).

514 *Id.* at 571.

515 *Id.* at 574.

516 *Id.* at 571.

517 Sedgwick, *supra* note 125, at 23 (emphasis added).

judicial review was a matter of maintaining "the scientific character" of jurisprudence.[518] He praised judicial review as "one of the surest preservatives of our liberties" against "despotic" "popular majorities and the popular bodies representing those majorities."[519]

Old textualists' embrace of judges as the antidote to legislative excess was not unique for their time. The decades before the Civil War, Jed Shugerman has shown, saw an uptick of judicial review in state courts in response to corrupt and incompetent state legislatures.[520] Previously, while judicial review was largely accepted in theory, the power was rarely exercised in practice.[521] Things started to change in state courts following fiscal panics in the late 1830s and resulting economic crisis in the early 1840s that were blamed on state legislatures for incompetence, corruption, and overspending.[522] State constitutional conventions in the 1840s pursued an "antilegislature agenda," including "new substantive and procedural limits on legislative power."[523] (Sedgwick, notably, was among the reformers clamoring for state constitutional change in the face of "the headlong extravagance of . . . legislation."[524]) Thus, by the 1840s and 1850s, "the trend of weakening judges . . . was over,"[525] and elected state judges started striking down more legislation in the 1840s and 1850s based on vested property rights and substantive due process.[526]

The embrace of judicial review in this period reflected the Jacksonian era's growing understanding—among Jacksonians and Whigs alike—of law as a scientific enterprise.[527] As historian Maxwell Bloomfield has argued, lawyers in the Jacksonian era "level[ed]" the law not by democratizing legal practice but rather by portraying themselves as "hardworking technician[s] whose services were as necessary to society as those of any other skilled craftsman."[528] And Farah Peterson has shown that this jurisprudence of law as "a science requiring specialized expertise" facilitated judicial review in state courts during

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518 *Id.* at 218.

519 *Id.* at 213–21; *accord id.* at 686.

520 *See* SHUGERMAN, *supra* note 283, at 123–43.

521 *Id.* at 31.

522 *Id.* at 84–85, 101.

523 *Id.* at 105.

524 Sedgwick, *Constitutional Reform*, *supra* note 135, at 569.

525 SHUGERMAN, *supra* note 283, at 111.

526 *Id.* at 123–43.

527 *See* sources cited *supra* note 283.

528 Bloomfield, *supra* note 230, at 306, 317; *cf.* MILLER, *supra* note 186, at 184 (discussing antebellum lawyers' self-understanding as "technicians").

this period.[529] The more that legal interpretation was understood as a technical craft divorced from politics, she explains, the more acceptable it was for judges, understood as "technicians," to claim that task from other institutions,[530] such as legislatures.[531]

In the antebellum treatises on legal interpretation, old textualists sought to educate judges in this craft and to reassure their profession and the public about entrusting this craft to judges. Their treatises sought to show how judicial interpretation of written laws could be governed by objective principles—what Lieber called "safe and general rules"—just like any other science.[532] "It is plain that the matter is of great moment," Sedgwick wrote at the outset of his treatise.[533] It was "require[d]" that "the power of the judiciary . . . be extended over the subject" of legal interpretation, he explained, while at the same it was necessary to show how that power could be "very carefully exercised and confined within strict limits."[534]

Vindication of this project would come later during the fraught consolidation of judicial supremacy after the Civil War. State courts had only begun to exercise judicial review more energetically on the eve of the war.[535] And it was only after the war that federal courts started to assert themselves as the final arbiters of constitutional meaning in the contexts of reigning in congressional Reconstruction and promoting economic nationalism against local regulations.[536] While the Supreme Court

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529 Peterson, *Interpretation as Statecraft*, *supra* note 3, at 771; *see also* Peterson, Statutory Interpretation and Judicial Authority, *supra* note 94, at 221–35 (elaborating this claim).

530 *See* Peterson, *Interpretation as Statecraft*, *supra* note 3, at 771 ("Judicial review . . . was more acceptable to the new political culture because it represented a claim to a specialized expertise that legislatures did not share."); Peterson, Statutory Interpretation and Judicial Authority, *supra* note 94, at 234–35 (explaining that lawyers and judges "most strenuously asserted" their newly conceived role as "technician[s]" in "cases where their opinions were most likely to chafe against popular power").

531 *See* Zhang, *supra* note 43 (documenting a tradition in early U.S. history of "expository" legislation that declared what prior legislation meant); Aaron-Andrew P. Bruhl, The Forgotten History of Legislative Interpretive Directives (unpublished manuscript) (on file with author) (documenting a tradition in early U.S. history of legislatively enacted "directives" to courts regarding how to interpret their statutes generally).

532 Lieber, Legal and Political Hermeneutics, *supra* note 13, at 177; *cf.* Herz, *supra* note 109, at 2125 ("Lieber begins with a modern premise—the inescapability of interpretation—but seeks to downplay the more radical implications of the premise, constructing a hermeneutics that will calm concerns that the failure of texts to speak directly might result in meaning depending on the interpreter rather than the text.").

533 Sedgwick, *supra* note 125, at 23.

534 *Id.*; *accord* 2 Dwarris (1830–31 ed.), *supra* note 12, at 788 ("Where so much is left to the discretion of the judges, it is desirable to know, whether any rules are prescribed for their government, and the guidance of that extensive discretion."); Smith, *supra* note 13, at 589–91.

535 *See supra* notes 520–26 and accompanying text.

536 *See* Basile, *supra* note 41, at 1562–70.

had expressly struck down only two federal statutes and only about one state statute every two years before the war,[537] the Court struck down more than eighty-five statutes within the first two decades after the war.[538]

None of this was without controversy, and it was in this context that proponents of more aggressive judicial protection of property rights turned to the antebellum treatises as their guides for judicial interpretation. In 1871, the New York state judge Platt Potter issued a new American edition of Dwarris's treatise, *A General Treatise on Statutes*.[539] Potter substantially expanded Dwarris's treatment of statutory interpretation to address constitutional interpretation and the "constitutional limitations upon the . . . legislative power."[540] He added more than 100 pages on constitutional protections of private property from legislative powers to take, tax, and regulate,[541] which he preceded with a rigorous defense of judicial review as a check on legislatures.[542] "Those who controvert the principle that the constitution is to be considered, in court, as a paramount law," he warned, risked "subvert[ing] the very foundation of all written constitutions."[543]

Three years later, John Pomeroy issued a new, annotated edition of Sedgwick's treatise on legal interpretation.[544] Pomeroy's notes on Sedgwick's discussion of constitutional provisions were actually, he acknowledged, "independent essays," in which Pomeroy showed a keen interest in "the right of eminent domain," "vested rights," and "statutes impairing the obligation of contracts," among other topics.[545] Pomeroy was at the center of the postwar sparring over judicial supremacy. In one of the first postwar treatises on constitutional law, he had argued that the Constitution demanded "some single umpire" and that "[t]he very nature of the whole Constitution as a written grant of certain limited

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537 SHUGERMAN, *supra* note 283, at 31, 55.

538 *See Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, CONST. ANNOTATED, https://constitution.congress.gov/resources/unconstitutional-laws [https://perma.cc/2C2U-JT57] (last visited Jan. 15, 2026).

539 *See* DWARRIS (1871 ed.), *supra* note 12.

540 *See id.* (title page).

541 *See id.* at 371–492.

542 *See id.* at 362–69.

543 *Id.* at 365. Potter's vigorous defense of an independent judiciary extended to a highly unusual and personal episode of interbranch conflict when the New York state legislature sought to hold Judge Potter in contempt. *See* Aaron-Andrew P. Bruhl, *Judge Platt Potter: Politics and Principle in Interbranch Conflict*, L. & HIST. REV.: THE DOCKET (Dec. 19, 2025), https://lawandhistoryreview.org/article/aaron-andrew-bruhl-judge-platt-potter-politics-and-principle-in-interbranch-conflict [https://perma.cc/H5E9-MS3Y].

544 *See* SEDGWICK (1874 ed.), *supra* note 12.

545 *Id.* at vi.

powers, as well as definite provisions of that instrument, show that this umpire can only be the Judiciary."[546]

Most notable of all, though, was old textualism's influence on Michigan state judge Thomas Cooley. Cooley's 1868 treatise on state constitutional law, *Constitutional Limitations*,[547] was reissued four times within a decade[548] and has been described as "the most important book" of its time.[549] Cooley called the power of judicial review "plain" and "so generally—we may now say universally—conceded," that the subject did not warrant "quoting from the very numerous authorities upon the subject."[550] He also elaborated a theory of substantive due process of law as a constitutional principle for the protection of property.[551] His treatise was thus "unabashedly designed to facilitate constitutional challenge to the legislature's will."[552] "Armed with the *Constitutional Limitations* and the first section of the Fourteenth Amendment," as one historian has described it, "counsel for the railroads and other growing industries went forth to do battle with any popular legislature which might seek to hamper full exploitation of the frontier opened for capitalism by the Civil War."[553]

What has not been appreciated before is the extent to which Cooley saw his project as a continuation of the antebellum work of the old textualists. The very first paragraph of *Constitutional Limitations* invokes "[t]he valuable treatises of Mr. Smith and Mr. Sedgwick" and declares that this new treatise was "supplementary to their labors."[554] Before his analysis of legislatures' powers and the limits on those powers, he included a lengthy chapter on legal interpretation modeled after—and frequently citing—the works of Lieber, Dwarris, Smith, and Sedgwick.[555] He distinguished between "interpretation" and "construction" based

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546 John Norton Pomeroy, An Introduction to the Constitutional Law of the United States 91 (N.Y.C., Hurd & Houghton 1868).

547 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (Bos., Little, Brown & Co. 1868).

548 Benjamin R. Twiss, Lawyers and the Constitution 18 (1962).

549 Lawrence M. Friedman, A History of American Law 480 (3d ed. 2005); *accord* Daniel T. Rodgers, Contested Truths 151 (1987) ("Men quoted [*Constitutional Limitations*] with alacrity in the constitutional debates of the late nineteenth century [and] bestowed on Cooley a stature unmatched by any other law writer of his generation . . . .").

550 Cooley, *supra* note 547, at 45–46.

551 *Id.* at 351–413.

552 Rodgers, *supra* note 549, at 151.

553 Twiss, *supra* note 548, at 20. For revisionist readings of Cooley, see Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865–1885*, 10 Am. J. Legal Hist. 97 (1966); Joseph Postell, *The Misunderstood Thomas Cooley: Regulation and Natural Rights from the Founding to the ICC*, 18 Geo. J.L. & Pub. Pol'y 75 (2020).

554 Cooley, *supra* note 547, at iii.

555 *See id.* at 38–84.

on Lieber's treatise (and Bouvier's legal dictionary).[556] And he insisted that, "[i]n the case of all written laws," the plain meaning of the text must be followed if there is one, and interpretation should begin with a presumption of ordinary meaning while being attentive to the many technical senses that words bear in the law.[557] In sparking the postwar project of Cooley and likeminded soldiers of judicial supremacy, old textualists thus "opened the door for both modern judicial review and a thoroughgoing postbellum constitutionalization of American law."[558]

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Portraying legal interpretation as a text-centric, rule-grounded enterprise might strike readers today as a democracy-enhancing enterprise. Yet while old textualism was indeed intended to serve public ends, it was not in the way that modern readers might initially suppose. The goal was not to make laws more accessible, but rather to entrust their protection with expert judges.

## VI
## LESSONS

The Article has traveled from the technological revolutions that spawned a more writing-based legal culture in the antebellum era to the rise of judicial supremacy in the postbellum period. This final Part takes stock of this history and considers its implications.

### *A. Interpretive Discontinuities*

To begin with, the history of old textualism points toward a more discontinuous tradition of American textualism taking form after the Founding, as opposed to a more continuous American textualist tradition dating to Founding-era innovations and developments.

First, the history suggests that a shift toward more textualist sensibilities in legal interpretation was a gradual development that crystallized after the Founding. Interpretive theories that understood the writtenness of a law as its defining feature for interpretive purposes were elaborated beginning only in the 1830s through 1850s, assimilating

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[556] *Id.* at 38 n.1; *see also* Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 63–64 (2020) (discussing Cooley's reliance on Lieber for the interpretation-construction distinction).

[557] COOLEY, *supra* note 547, at 55; *see also id.* at 55–60, 65 (stating that, especially as to constitutions, words in written laws generally bear their ordinary meaning, unless used in a technical sense).

[558] NOVAK, *supra* note 27.

constitutional and statutory interpretation in novel ways. And these theories were promoted by writers who saw themselves as modernizing reformers, not recorders of existing practices.

That said, the excavation of this antebellum textualist turn also means that textualism was not an entirely twentieth-century innovation that lacks a deeper tradition in this country. Often, twentieth-century textualism is contrasted with a "before" period represented by the Supreme Court's 1892 decision in *Holy Trinity Church v. United States*, which ruled "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[559] But *Holy Trinity* can have a distorting effect, obscuring a longer, more complicated history of textualism in this country.

Indeed, second, the history of old textualism suggests that textualism has swelled and receded and swelled again in cyclical fashion, as opposed to tracking any sort of linear evolution by which interpretive paradigms definitively succeeded each other over time. This point is in keeping with legal historian Richard Ross's broader insight that legal systems have not "move[d] along a single axis through a series of stages, from oral tradition to writing, print, and electronics."[560] Rather, the relationship between new communication technologies and legal culture has been more complicated.

Here, for instance, technological innovation catalyzed old textualism, but new technologies did not *require* textualism. After all, unwritten law endured in the nineteenth century despite the acceleration of written law engendered by the industrial revolution in print and communication technologies. In proclaiming that they lived under a "government of Written Law," old textualists were infusing a partial reality with an ideological aspiration or projection. Moreover, their efforts to craft a text-centric interpretive method for the government of Written Law was driven in part by their politics, including their project to empower judges. Finally, old textualists' awareness of their method's limits puts into stark relief how old textualism already contained within itself the resources to articulate less text-centric interpretive approaches in response. What emerges from this story is thus less a linear evolution of interpretive approaches and more a cyclical one.

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[559] 143 U.S. 457, 459 (1892); *see* Richard M. Re, *The New Holy Trinity*, 18 Green Bag 2d 407, 407 (2015) (describing the "familiar story" in which *Holy Trinity* represents the purposivist paradigm that dominated until "Scalia came to town").

[560] Ross, *supra* note 153, at 320; *accord id.* at 233 (seeking to "complicate[] the commonly assumed forward movement of legal communications from anterior to later stages"); *cf.* Cornelia Vismann, Files 3–4 (2008) (cautioning against overstating the significance of "the transition from an oral to a written culture of law").

Today we may be witnessing another iteration of this cyclical phenomenon. In his recent Scalia Lecture, provocatively titled *Beyond Textualism?*, William Baude contemplated the possibility that "textualism has sort of played itself out."[561] Baude defended the positivist and formalist reasons for the modern "textualist revolution."[562] But he suggested that the implementation of textualism in practice has ultimately revealed the seemingly inescapable need to draw on unwritten law to "supplement" the enacted text, such as immunity doctrines and canons of construction.[563] Thus, new textualism might ultimately meet the same fate as old textualism as American lawyers continue to cycle through interpretive paradigms.

### *B. Different Textualisms*

An upshot of charting the discontinuous history of American textualism is the opportunity to probe how iterations have differed. Attention to the differences among textualisms can reveal diverse ways of thinking about text-centric interpretation, including about what a core interpretive commitment to text necessarily entails and does not.

Indeed, what Scalia revived appears different from old textualism. Modern textualism is rooted in a commitment to the public legibility of enacted text. It rejects as "incompatible with democratic government," per Scalia's famous formulation, "the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read."[564] In a democracy, the rule of law has a "special claim to preference," Scalia explained, and the rule of law demands fair and predictable application of the popularly elected Congress's duly enacted laws.[565] In his view, interpreting enacted texts according to their publicly legible meaning promotes the fair and predictable application of these texts by constraining judicial discretion.[566] In turn, modern textualism's commitment to the public legibility of enacted texts is often expressed

561 William Baude, *Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1331 (2023).

562 *Id.* at 1334; *see id.* at 1334–36.

563 *Id.* at 1341; *see id.* at 1336–43.

564 Scalia, *supra* note 17, at 17; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) (asserting that "[s]tatutes are not exercises in private language" but rather "public documents").

565 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

566 *See id.* at 1179–80. To be sure, as to constitutional interpretation, new originalists have largely dropped "a primary commitment to judicial restraint." Whittington, *supra* note 52, at 608. But "judicial *restraint*" ("deference to legislative majorities") is different than "judicial *constraint*" (narrow discretion of judges), the latter of which constitutional textualists (and statutory textualists) tend to claim as a virtue of their theory. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011).

as a commitment to the "ordinary meaning" of enacted texts,[567] and the invocation of ordinary meaning has accordingly skyrocketed with modern textualism's ascendancy.[568]

These commitments arguably reflect modern textualism's development in the late twentieth century amid the response to the New Deal administrative state and its reliance on the technical expertise of government administrators. Indeed, in *Loper Bright Enterprises v. Raimondo*,[569] it was the Supreme Court's faith in the promise of modern textualism that facilitated the overruling of *Chevron*'s doctrine of judicial deference to expert agencies' reading of ambiguous statutes. "The answer for judges eliding statutory terms is not deference to agencies that may seek to do the same," Justice Gorsuch wrote in his concurrence, "but a demand that all return to a more faithful adherence to the written law. That was, of course, [a] project Justice Scalia championed. And as we like to say, 'we're all textualists now.'"[570]

Old textualism, by contrast, more openly embraced expertise. Old textualists accepted the largely technical nature of law and seemingly inescapable reliance on specialized vocabulary and rules. And they were comfortable with the idea of judges as technical experts. So, for example, while they promoted a presumption of ordinary meaning in statutory interpretation, they drew this presumption from treaty interpretation under the law of nations, which justified ordinary meaning based on the probable intentions of the drafters, not a rule-of-law theory of fair notice and judicial constraint. Indeed, old textualists were more focused on constraining incompetent and corrupt legislatures than courts.

In practice, old and modern textualism may be closer on this score—or may be becoming closer—depending on how one understands

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567 *See, e.g.*, Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case W. Rsrv. L. Rev. 855, 856 (2020) ("Textualism . . . insists that judges must construe statutory language consistent with its 'ordinary meaning.'"); Scalia & Garner, *supra* note 1, at 69–77 ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation."); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. . . . If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); District of Columbia v. Heller, 554 U.S. 570, 576 (2008) ("In interpreting [constitutional] text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))).

568 *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 Colum. L. Rev. 213, 217 (2022) (finding from a sample of six million cases that "[o]ver the past fifty years, citation to 'ordinary meaning' has tripled").

569 144 S. Ct. 2244 (2024).

570 *Id.* at 2291 n.6 (Gorsuch, J., concurring).

modern textualism's evolving commitment to ordinary meaning.[571] While some observers see that commitment as a form of "judicial populism" divorced from relevant expertise,[572] others point to ways in which the modern textualist commitment to ordinary meaning may in fact embody a commitment to specialized meaning. For one thing, while many scholars describe ordinary meaning as "an *empirical* notion" insofar as it is "closely connected to facts about how ordinary people understand language,"[573] ordinary meaning is also at least in part a legal concept insofar as it depends on legal questions about how to define it.[574] Moreover, once we probe *for whom* the meaning must be "ordinary" and what sources may be consulted to determine ordinary meaning from that perspective, the concept may look increasingly specialized. Is the relevant perspective, for instance, that of an "ordinary English speaker" or an "ordinary lawyer" or some other idealized audience?[575] Modern textualists' reliance on, say, terms of art and common-law definitions from precedents may suggest the ordinary lawyer perspective more closely tracks modern textualism.[576] Finally, even if ordinary meaning refers to the perspective of ordinary English speakers, they might still expect laws to be written in more specialized language and thus defer to expert intermediaries on how to read them.[577] In short, it appears

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571 I have elsewhere explored this commitment to ordinary meaning in greater depth. *See* Basile, *supra* note 429. As I explained there, I understand modern textualism's commitment to ordinary meaning to be distinct from modern textualism's commitment to the plain (as in clear) meaning of the enacted text, although these commitments can be conflated in practice. Notably, on my understanding of modern textualism, the constitutionally prescribed statutory lawmaking process requires courts to apply the meaning of an enacted text that is *plain* (as in clear) to a reasonable English user, but not necessarily the *ordinary* (as in everyday) meaning. *See id.* at 171–78.

572 *See supra* note 39 and accompanying text.

573 Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 Brook. L. Rev. 461, 461 & n.2 (2021).

574 Grove, *Testing Textualism*, *supra* note 38, at 1063 ("To determine the ordinary meaning of a term or phrase in a federal statute, the Court must conduct a legal analysis. Accordingly, there is a strong basis for treating 'ordinary meaning' as primarily a legal concept.").

575 Barrett, *supra* note 37, at 2209 (noting "the textualist's occasional use of the perspective of the 'ordinary lawyer' rather than the ordinary English speaker"); *see also* Krishnakumar, *supra* note 34, at 170–71 (explaining that "the key question" in borderline cases of ordinary meaning is: "*Who is the relevant audience or 'ordinary reader' of the statute?*"); Louk, *supra* note 34, at 168–73, 219–20 (examining the significance of audience for claims about "ordinary meaning"); *cf.* Zamboni, *supra* note 34, at 2–14 (surveying different possible idealized audiences of a legal text).

576 *See* Grove, *Is Textualism at War?*, *supra* note 38, at 646–47, 661–70, 688–91 (arguing that modern textualism's interpretive inquiry seeks the distinctly legal meaning of enacted texts); Grove, *Testing Textualism*, *supra* note 38, at 1063 (same).

577 *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Pa. L. Rev. 365, 414–18 (2023) (finding from empirical studies that the public tends "to defer to legal authorities" as to the meaning of legal terms); Barrett, *supra* note 37,

at least unsettled to what extent modern textualism is committed to a "populist" or "expert" notion of ordinary meaning. As Justice Barrett has observed, modern textualists have not yet clarified to what extent they adopt "the perspective of the 'ordinary lawyer' rather than the ordinary English speaker" nor to what extent the perspective of the "ordinary English speaker" ultimately points to the perspective of lawyers as their intermediaries.[578]

Old textualism's greater clarity on this score at least crystallizes one of the alternatives. The history of old textualism illuminates that an interpretive commitment to text necessarily entails neither a strong commitment to ordinary English speaker meaning nor a skepticism of expertise. Old textualists shared an interpretive commitment to the enacted text as the authoritative legal communication in a representative democracy, yet they did not insist on reading the enacted text in a manner that would be publicly legible.[579]

Old textualism was also more openly flexible than the austere form that modern textualism can sometimes take.[580] After all, old textualists acknowledged that their aspiration to have a "government of Written Law" that governed only by what written laws said ran up against the realities of the limits of human language. In this way, the possibility of interpretive precision that attracted them to treat interpretation scientifically also brought with it a heightened problem of indeterminacy.[581] Lieber envisioned a very large role for extratextual construction because "it is impossible to word laws in such a manner as to absolutely exclude all doubt, or to allow us to dispense with construction, even if they were worded with absolute (mathematical) distinctness, for the time, for which they were made."[582] Changed circumstances and unforeseen cases stressed the limits of enacted text. "Whether we rejoice in it or not, the world moves on," he wrote, and "[g]reat evil

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at 2209–10 (suggesting that when a court "read[s] a statute as a lawyer would," the court is simply "employing the perspective of the intermediaries on whom ordinary people rely").

578 *See* Barrett, *supra* note 37, at 2209–10.

579 *Cf.* Zamboni, *supra* note 34, at 2 ("Even theories grounded in popular sovereignty may presuppose that authoritative legal communication takes place in the language of the law rather than in ordinary discourse. Democratic legitimacy, on this view, depends less on immediate comprehensibility for the general audience than on the existence of institutional mechanisms that mediate between legal meaning and public understanding.").

580 On the range of flexibility among different approaches to textualism, see Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (distinguishing between "formalistic textualism" and "flexible textualism").

581 *See* ROGER BERKOWITZ, THE GIFT OF SCIENCE, at xv (2005) ("Only once law becomes a product of science—only once law is transformed into an entity that is willed, posited, and in need of scientific justification—does the indeterminacy of law come to be such a forbidding problem.").

582 LIEBER, LEGAL AND POLITICAL HERMENEUTICS, *supra* note 13, at 162.

has arisen at various epochs from insisting on established laws in times of great crisis; as if the human mind could be permanently fettered by laws of by-gone generations."[583] Sedgwick similarly emphasized the practicality of their science that depended, in the ultimate hour, not on "formal rules" but rather "thorough intellectual training" guided by "general principles."[584]

### *C. Judicial Review Out of the Shadows*

Finally, the history of old textualism brings into sharp relief an institutional tradeoff in how judges exert authority over legislation. The control of legislation is an abiding problem for judges. As Tocqueville described in his review of Sedgwick, there have been two models for judicial supervision of legislation: (1) explicit judicial review to invalidate legislation and (2) using interpretive strategies to construe statutes to conform with a judge's understanding of a constitution.[585] Sedgwick called these two strategies the "two certain and unquestioned checks on legislative power, the application of both of which is placed in the hands of the judiciary."[586]

Before the late nineteenth century, courts primarily exercised control over legislation through the latter strategy—what scholars today call judicial review "in the shadows."[587] That is, judges tended to exercise authority over the constitutionality of statutes not by expressly striking down unconstitutional statutes but rather by construing them to accord with their understanding of constitutional requirements. The early Supreme Court, for example, construed the statute granting federal court jurisdiction over civil cases "where an alien is a party"[588] to mean "'where . . . an alien is one party,' but a citizen is the other," because the constitutional grant of jurisdiction extends only "to suits *between citizens and foreigners*."[589] Beginning in the mid-nineteenth century, however, courts increasingly engaged in the more explicit practice of judicial review that we recognize today.

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583 *Id.* at 134–35.

584 SEDGWICK, *supra* note 125, at 227–29.

585 *See* Tocqueville, *supra* note 15, at 457, 459–60.

586 SEDGWICK, *supra* note 125, at 147.

587 WHITTINGTON, *supra* note 29, at 117; *cf.* Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17, 30 & n.59 (2000) (describing practices that were functionally akin to judicial review); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 106–13 (2000) (same).

588 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

589 Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800); *accord* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Jackson v. Twentyman, 27 U.S. (2 Pet.) 136, 136 (1829).

Several factors contributed to such a complicated development. In state courts, fiscal and economic crises in the late 1830s and early 1840s were blamed on state legislatures' incompetence and corruption, leading to calls for increased judicial oversight of legislation as well as constitutional reforms, such as the election of judges, that facilitated such oversight.[590] In federal courts, for the first sustained time beginning in the 1860s, the Supreme Court and elected branches had become misaligned on the scope of federal powers.[591] That is, the Marshall Court had a capacious view, and the Taney Court had a narrower view at a time when Jacksonians held elected office and did not push the limits of federal power; but Congress's ambitious war and Reconstruction efforts faced a Court consisting of Jacksonian holdovers and moderates appointed by Lincoln and Grant to maintain a delicate war coalition.[592] In addition, Congress made federal courts more powerful by greatly expanding their jurisdiction to implement and entrench Reconstruction amid faltering political strategies,[593] only for northern, white public support to turn against Reconstruction by the early 1870s amid financial crisis and the specter of European-style class conflict.[594] Finally, business and railroad interests, stimulated by the industrial demands of the war, formed a powerful constituency that turned to the courts to promote economic nationalism.[595]

Changing approaches to legal interpretation, too, played a role in bringing judicial review out of the shadows. As other historians have observed, the ascendant view in the nineteenth century that

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590 *See* SHUGERMAN, *supra* note 283, at 123–43 (describing how, following fiscal and economic crises in the late 1830s and early 1840s, the first generation of elected judges established a more widespread practice of judicial review in state courts).

591 *See* Graber, *The Jacksonian Origins of Chase Court Activism*, *supra* note 587, at 19–20 ("The Republican ascendancy in 1860 marked the first time in American history that . . . the dominant majority in the elected branches of national government passed laws most Justices regarded as unconstitutional.").

592 *See id.* at 18–20 ("The Chase Court Justices most likely to declare federal laws unconstitutional were the Jacksonian holdovers from the Taney Court and Justice Stephen Field, the only Lincoln appointee who was a lifelong Democrat.").

593 *See* ERIC FONER, RECONSTRUCTION 529 (1989) (noting that "Congress had placed so much of the burden for enforcing blacks' civil and political rights on the federal judiciary").

594 *See* HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION 122–55 (2001) (tracing Northern moderates' abandonment of Reconstruction due to free labor ideology).

595 *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 137–66 (2009) (recounting how the Supreme Court consolidated its authority in the late nineteenth century by "rendering decisions that met the needs of those political constituencies most able to sustain federal judicial power," such as corporations); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1159–72 (2011) (arguing that business interests formed a powerful constituency facilitating the Supreme Court's assertions of "horizontal" judicial supremacy in the Gilded Age).

law was a science separable from politics facilitated judicial review.[596] Farah Peterson has argued that the more legal interpretation took on the pretense of a technical science, the easier it was to justify tasking expert judges with interpretation and thus to claim interpretation away from other institutions, such as legislatures.[597] Thus, the view of law as a science, Peterson explains, made judicial review more palatable.[598]

To take up this scientific task, however, judges had to learn the science, and skeptics of judicial power had to be reassured that interpretation could in fact be conducted like a science. That was the project of old textualism. Thus, by the treatises of Smith and Sedgwick, we can see within the pages of a single book a scientific analysis of interpretation alongside a call for courts to assume the power of judicial review. These handbooks for judicial review were then reprinted, reissued, and circulated, influencing the leading judicial supremacists of the late nineteenth century such as Thomas Cooley. In this way, old textualism helped bring judicial review out of the shadows.

This link between old textualism and new juristocracy, I underscore, was contingent. A more text-based approach to legal interpretation and a commitment to a stronger judiciary did not have to go together. Indeed, in this same period, abolitionists increasingly made textualist arguments about the Constitution yet tended to pair that textualism with political, rather than judicial, constitutionalism.

Abolitionists such as Lysander Spooner and Frederick Douglass, after changing his position, broke from the Garrisonian view that the Constitution was a "covenant with death" by arguing that the Constitution, on the face of its text, was antislavery. Their antislavery textualism contrasted with proslavery approaches to constitutional interpretation that emphasized the authority of the historical spirit of the Founding.[599] In *The Unconstitutionality of Slavery*, Spooner argued that the Constitution did not condone slavery because the proslavery reading depended on arguments about the framers' intentions, rather than "the words alone."[600] Frederick Douglass

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596 *See, e.g.*, Horwitz, *supra* note 283, at 258–59; Harold M. Hyman & William M. Wiecek, Equal Justice Under Law 348 (1982).

597 Peterson, *Interpretation as Statecraft*, *supra* note 3, at 771; Peterson, Statutory Interpretation and Judicial Authority, *supra* note 94, at 234–35.

598 Peterson, *Interpretation as Statecraft*, *supra* note 3, at 771.

599 *See generally* Simon J. Gilhooley, The Antebellum Origins of the Modern Constitution (2020) (analyzing the proslavery shift toward appeals to the Founding spirit).

600 1 Lysander Spooner, The Unconstitutionality of Slavery 68 (Bos., Bela Marsh 1845) (emphasis omitted); *cf.* 2 Lysander Spooner, The Unconstitutionality of Slavery

called this antislavery interpretation the "plain reading" of the Constitution.[601]

Many abolitionists paired this textualism with political, not judicial, constitutionalism. That is, Douglass's antislavery strategy was not to rely solely on courts to undo their proslavery precedents but rather to elect "abolition statesmen" who could dismantle the institution of human enslavement through political processes.[602] And while Spooner initially had faith in judges to read the Constitution's plain text as an antislavery document, by the 1850s he abandoned that faith for the view that only the people themselves could be entrusted with ultimate responsibility for interpreting and enforcing their antislavery Constitution.[603] By contrast, old textualists were almost entirely silent about slavery in their treatises on legal interpretation, suggesting that their moderate antislavery views[604] were subordinated to, or at least set apart from, their efforts to advance the rule of law through its interpretation by judges.[605]

There were thus multiple textualisms in this period: one tied to antislavery that lost its faith in judges, the other tied to judges as the guardians of the rule of law that barely said a word about slavery. My point, then, is not to suggest that textualism and judicial constitutionalism necessarily run together.

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155–205 & 155 n.* (Bos., Bela Marsh 1847) (enumerating rules of interpretation that Spooner argued should be applied to the Constitution in the same way as to other legal instruments).

601 Frederick Douglass, The Meaning of July Fourth for the Negro, Speech at Rochester, New York (July 5, 1852), *in* 2 The Life and Writings of Frederick Douglass 181, 202 (Philip S. Foner ed., 1950) [hereinafter 2 Douglass]; *accord* Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?, Speech at Glasgow, Scotland (Mar. 26, 1860) [hereinafter Douglass, Pro-Slavery or Anti-Slavery?], *in* 2 Douglass, *supra*, at 467, 469; Frederick Douglass, *Is the United States Constitution for or Against Slavery?*, Frederick Douglass' Paper, July 24, 1851, *reprinted in* 5 The Life and Writings of Frederick Douglass 191, 196 (Philip S. Foner ed., 1975); *cf.* Frederick Douglass, *Change of Opinion Announced*, The Liberator, May 23, 1851, *reprinted in* 2 Douglass, *supra*, at 155 (describing his change of view). On Douglass's textualism, see Anthony Lister Ives, *Frederick Douglass's Reform Textualism: An Alternative Jurisprudence Consistent with the Fundamental Purpose of Law*, 80 J. Pol. 88 (2018); Bradley Rebeiro, *Frederick Douglass and the Original Originalists*, 48 BYU L. Rev. 909 (2023).

602 Douglass, Pro-Slavery or Anti-Slavery?, *supra* note 601, at 478.

603 *See* Helen J. Knowles, *Seeing the Light: Lysander Spooner's Increasingly Popular Constitutionalism*, 31 L. & Hist. Rev. 531, 544–47 (2013).

604 For their positions on slavery, see *supra* note 139.

605 In one of the few passages touching on slavery in these treatises, Sedgwick moderated his confidence in judicial power when it came to this fraught topic. *See* Sedgwick, *supra* note 125, at 179–80 (suggesting that certain general constitutional pronouncements "must be regarded rather as guides for the political conscience of the legislature, than as texts of judicial duty," given that "[a]ll men are born 'free and independent;' but we keep Africans in slavery, Indians in subjection, minors in absolute tutelage till twenty-one, and married women in a state of quasi-dependence all their lives").

Rather, old textualism shows how text-centric interpretation and judicial supremacy can and have run together because old textualists promoted them together as a unified project. In their work, we thus see the explicit institutional tradeoff from spirit-based judicial review in the shadows to text-based judicial review out of the shadows. And, even though textualism has waxed and waned in U.S. legal culture since then, we still live with that basic tradeoff. The United States has settled around a model of text-based interpretation plus judicial review, in contrast to what could be called the English alternative of spirit-based interpretation without judicial review. For Tocqueville and other contemporaries of old textualists, that tradeoff was the clear and most extraordinary upshot of their work.

## Conclusion

This Article has described a shift among certain jurists in the early nineteenth century toward a focus on the writtenness of laws in their thinking about how to interpret those laws. In developing a new science for what they called "the government of Written Law," they sought to modernize legal interpretation in ways that might strike actual modern lawyers as a mix of familiar and strange. Their ideas were neither fully representative of their age nor fully prophetic of our own. In excavating those ideas, the Article has sought to show that the first turn toward text in American legal interpretation crystallized after the eighteenth-century Founding while also offering a different model of textualism than the twentieth-century "new textualism" that would seek to revive it. Old textualism was its own thing of the early nineteenth century. But we still live with its legacies—as a muse for later textualisms and as a bridge to our new juristocracy.