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Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century

John P. Figura

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THEORIES OF CONSTITUTIONAL INTERPRETATION IN THE NINETEENTH CENTURY

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ABSTRACT

Resounding in the debate between textualists and purposivists is a subtle yet powerful narrative that figures purposivism as a twentieth-century phenomenon and textualism as a renaissance, a new-and-improved version of the text-focused, plain-meaning interpretation that predominated in the nineteenth century. This account gives textualists the historical high ground—the traditional, conservative choice—and puts purposivists in the position of defending a comparatively recent, radical position.

The accuracy of this account is belied, however, by nineteenth-century judges’ methods of constitutional interpretation, as expounded by treatise writers of the era. Their theories can be categorized in three groups, none of which is more than superficially textualist. First was an approach popularized by Joseph Story in mid-century that I call plain meaning purposivism. Story and his followers embraced the plain meaning rule and a text-focused interpretive framework, but they founded their approach on purposivist notions of the overall meaning of the Constitution. This school was followed after the Civil War by a more direct form of purposivism that I refer to as conventional purposivism. This eclectic group set aside the plain meaning rule and counseled interpreters to more freely use extratextual indicia—both historical and contemporary—of constitutional meaning. Only by the 1880s did theorists begin to experiment with non-purposivist interpretation, but they turned not toward the text but to society. In their view, one should interpret the Constitution not with regard to the words on the page but with a Burkean understanding of the nation’s evolving cultural and economic character.

In constitutional interpretation, then, the nineteenth century was a mostly purposivist age, not a textualist one. It was an era in which purposivism was the textually

1 Associate, Weil, Gotshal & Manges LLP, New York. J.D., cum laude, Order of the Coif, Emory Law School. M.A., English, The Ohio State University. B.A., Augustana College. In September 2010, Mr. Figura will begin a clerkship with the Honorable Jack B. Weinstein, Senior District Judge, Eastern District of New York. The author wishes to thank Victoria Nourse, Visiting Professor at Georgetown University Law Center, for posing the question that launched this project and for her invaluable guidance throughout its execution. Thanks are also due to H. Jefferson Powell, Robert Schapiro, Charles Shanor, Stephen Siegel, and Adam Winkler for their thoughtful comments and words of encouragement.
conservative choice and in which there was little, if any, credence given to the proposition that the Constitution should be read through a textualist lens. In constitutional interpretation, textualism is not a renaissance but a novel departure from a purposivist tradition. An understanding of that tradition is particularly useful today, as we stand poised to discard purposivism and enter an age of textualist consensus.

INTRODUCTION

Historical precedent plays a significant role in the ongoing debate between textualists and purposivists. As the familiar historical account has it, purposivism is a twentieth-century phenomenon, a digression from a more deep-seated American tradition of text-focused interpretation. Seen in this light, purposivism is but a misguided experiment and textualism—especially as employed in originalist constitutional interpretation—a sort of renaissance, a return to the wiser, more sensible baseline of text-based American legal interpretation.2

If this account were true, the nineteenth century would reveal a strong tradition of text-based constitutional interpretation. But a close look at the nineteenth century’s interpretive theories, as put forth in legal treatises of the era, reveals nothing of the sort. Instead, the century was dominated by purpose-based, not text-based, approaches to the Constitution. In this article, I identify three dominant interpretive tendencies, none of which was more than superficially textualist: the plain-meaning purposivism of mid-century, as defined by Joseph Story; the conventional purposivism that arose after the Civil War; and the late-century, anti-originalist school of evolutionary constitutionalism.

This history shows not only that the nineteenth century was a mostly purposivist era but that purposivism was, in the nineteenth century, the textually conservative choice, promising greater fidelity to the text of the Constitution and the understandings of the founding generation than any extant alternative. These lessons are particularly relevant today, as courts and commentators move toward a broad acceptance of textualism and a rejection of purposivism.3

By focusing on constitutional treatises, I have sought to isolate the interpretive rules that nineteenth-century courts followed—or at least aspired to follow. Of course, a treatise is a scholarly work, not a legal one, and any treatise writer approaches his or her task from particular theoretical and ideological perspectives. In the nineteenth century, however, treatise writers generally eschewed abstract theory and were primarily concerned with describing actual

2 Infra text accompanying note 28–36.
3 See infra text accompanying note 36.
practice. For this reason, their work is a useful—if imprecise—mirror for judicial practice. It is also, of course, a much more manageable research universe than would be entailed in a study of one hundred years of case law.

The work of treatise writers in discussing constitutional interpretation is also valuable in discussions of statutory interpretation. Nineteenth-century thinkers often wrote of the two types of interpretation not as separate spheres but as following the same set of rules. To avoid confusion, I have indicated in the text or notes those passages where I have inferred a rule of constitutional interpretation from a rule of general or statutory interpretation.

In Part I, I address the writings of Joseph Story and the other adherents of what I call plain meaning purposivism—the group that is usually discussed as the “plain meaning school.” Because of its use of the plain meaning rule, which states that a court should consult extratextual sources only when the plain meaning of a provision is unclear, this approach is often seen as a precursor to contemporary textualism. But the nationalist Story and his mid-century followers subordinated their seemingly text-based approach to a set of substantive—and only loosely originalist—presumptions about the role of the federal government. Because these presumptions were based on extratextual deductions of constitutional principles, this school took a fundamentally purposivist approach to constitutional interpretation.

Part II addresses a more conventionally purposivist approach that flourished from the late 1860s through the end of the century. Adherents of this approach softened or eliminated the plain meaning rule that had figured so prominently in Joseph Story’s approach; instead, they advised courts to freely consult extratextual materials, both of historical and contemporary origin, even in the face of clear constitutional language. Like purposivists today, these writers were not a united school of thought but an ideologically diverse group united by little more than their orientation to the text.

4 See Lawrence M. Friedman, A History of American Law 244–45 (3d ed. 2005) (stating that nineteenth-century American legal treatise writers eschewed prescriptive, academic approaches, instead attempting to instruct working lawyers on how law was actually practiced). See also Francis R. Aumann, The Changing American Legal System 198 (1940) (stating that the widespread distribution of high-quality treatises by authors such as Story and James Kent helped unify American legal doctrines); John W. Head, Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America, 13 Duke J. Comp. & Int’l L. 1, 72 (2003) (same).

5 E.g. infra notes 118, 122, 169, and 170. But see infra text accompanying notes 93–94 (discussing Henry Sedgwick’s divergent views of statutory and constitutional interpretation).
In Part III, I discuss evolutionary constitutionalism. Melding the theories of Edmund Burke and Herbert Spencer, these theorists wholly abandoned originalism and embraced not the text but the notion of an unwritten, evolving Constitution. In their view, courts should settle constitutional questions not by original intent or the meaning of the text but by the character of the living nation and the needs of its people. This was primarily a conservative, pro-industrial movement, but its evolutionary, non-purposivist model would be adapted to progressive ends after the turn of the century.

I. THE CONTEMPORARY DEBATE: PURPOSIVISM VS. TEXTUALISM

This article looks at nineteenth-century theories of constitutional interpretation primarily through the lenses of textualism and purposivism, two theories that are usually discussed in a statutory context. Purposivists believe judges should interpret ambiguous laws with an eye toward serving the purposes for which they were enacted. In determining purpose, purposivists look to numerous sources: statutory context, legislative history, the mischief that was to be remedied by the provision, and the text itself. Textualism—or “the new textualism,” as Professor William Eskridge called it in 1990—emerged in the 1980s as a reaction against the perceived excess of purposivism. In the view of textualists, purposivism allowed interpreters—particularly the members of the much-maligned Warren Court—to substitute their own policy preference for the meanings of the text, undermining the rule-like nature of law and unconstitutionally expanding the power of unelected and unaccountable judges. Textualists view intent itself as

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6 The fathers of twentieth-century purposivism, Henry Hart and Albert Sacks, stated that a statutory interpreter must “[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—(a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement.” HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (1994, William N. Eskridge, Jr., & Philip P. Frickey, eds.) (internal line breaks omitted).

7 Id. at 1379.

8 William N. Eskridge, Jr., & Philip P. Frickey, Introduction, HART & SACKS, supra note 6, at cv.


inscrutable at best and inherently nonexistent at worst. Even if intent could be ascertained, to treat it as law—in place of the enacted statutory provisions—would violate the Constitution.

Instead of intention, textualists focus on the text itself. They apply what Eskridge has called the “hard” plain meaning rule, which states that there is no need to look beyond the text when the textual meaning is clear. Purposivists, by contrast, apply a “soft” plain meaning rule, which allows interpreters to consult extratextual sources freely and to use them in contradiction of clear statutory language. While purposivists concern themselves with the policy context of ambiguous provisions, textualists limit their inquiry to what John Manning has called semantic context—that is, the generally understood meanings of the words on the page. Therefore, instead of consulting legislative history, they rely on

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11 Easterbroook, *Intent, supra* note 9, at 60 (starting that purposivism requires judges “to figure out the mental pattern of the legislature.”); *id.* at 65 (1988) (“Words appeal to the reasonable man of tort law; private language and subjective intents should be put aside.”); Frank Easterbroook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 551 (1983) (hereinafter *Domains*) (“Few of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them.”).

12 Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 Sup. Ct. Rev. 231 (1990) (“The search for actual legislative intent is “a theoretically optimizing but likely self-defeating search for first-best solutions by multiple decisionmakers with different goals and different perspectives.”); Easterbrook, *Domains, supra* note 11, at 547 (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”).

13 Easterbrook, *Intent, supra* note 9, at 60.


16 Eskridge, *Textualism, supra* note 15, at 626 (citing 143 U.S. 457 (1892)) (stating that Holy Trinity indicates the soft plain meaning rule).


18 Id. at 621, 653 (“Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.”).
dictionaries, other statutes, and common law precedent. The result, in the view of textualists, is less judicial discretion, more predictable results, and more fidelity to the work of democratically accountable representatives.

Both theories apply in constitutional interpretation as well as statutory interpretation. Purposivists believe courts should interpret the Constitution to serve the document’s overarching purposes, structure, and standards. So, instead of limiting their inquiry to the text, they look to abstract principles—say, democracy, liberty, equality, or the protection of private property. Textualists also see their approach as applicable to constitutional questions. They generally shun the notion of determining the intent of the framers and instead look to sources, such as dictionaries or the Federalist papers, that would indicate the public meaning of the words in the Constitution.

The textualist/purposivist divide only partially overlaps with the more prominent debate in constitutional interpretation: that between originalists and nonoriginalists. Originalism has in the last decade proven to be an especially large tent, encompassing everything from attempt to recapture the content of the framers’ opinions to the attempt to honor the framers’ spirit of philosophical inquiry. For the purposes of this discussion, it is important to maintain the distinction between textualist originalism, as typified by the constitutional interpretation of Justice Scalia, and conceptual or abstract originalism, which I would suggest is generally purposivist. I will return to this distinction later in the article as I discuss the interpretive three approaches that predominated in the nineteenth century.

Accompanying the theoretical argument between textualism and purposivism is an historical narrative that figures textualism as a renaissance, a new-

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19 Manning, What Divides, supra note 17, at 92.
22 Id. at 611–12.
23 Scalia, supra note 10, at 37 (“The [constitutional] problem is distinctive,” Justice Scalia wrote, “not because special principles of interpretation apply but because the usual principles are being applied to an unusual text.”).
24 Id. at 38.
26 See, e.g. Scalia, supra note 10, at 37.
27 See BARBER & FLEMING, supra note 25, at 83–84.
and-improved return to an older, wiser approach to interpretation that proliferated before the twentieth century. In the view of Leonard Levy, what we know today as textualism dates to the Founders.\textsuperscript{28} Judge Frank Easterbrook has called labeled the father of American jurisprudence, John Marshall, “the first great textualist.”\textsuperscript{29} And numerous commentators have linked modern textualism to the nineteenth-century “plain meaning” school, either describing it as a more sophisticated version of that school\textsuperscript{30} or asserting that the two are one and the same.\textsuperscript{31}

By contrast, textualists have popularized a conception of purposivism as relatively young, originating around the time of the (infamous) \textit{United States v. Holy Trinity Church}.\textsuperscript{32} As Justice Scalia figures it, purposivism as we know it today achieved prevalence during the Hart-and-Sacks era of the 1940s and 1950s, when judges began making extensive (and, in the view of textualists, misguided) use of the wealth of newly available legislative history materials.\textsuperscript{33} Justice Scalia called in 1995 for an end to the “brief and failed” experiment with legislative history.\textsuperscript{34} Today, it appears that his wish has been largely fulfilled, as commentators appear ready to announce the death of purposivism. In the words of Jonathan Molot, “textualism

\textsuperscript{28} LEO NARD W. LEVY, ORIGINAL INT ENT AND THE FRAMERS’ CONSTITUTION 2 (1988) (stating that the Framers, who did little to memorialize their proceedings, wished future interpreters to rely not on their intentions but on “the text, construed in the light of conventional rules of interpretation, the ratification debates, and other contemporary expositions.”).


\textsuperscript{30} E.g. Eskridge, supra note 15, at 623 n. 11 (“What is new’ about the new textualism is its intellectual inspiration: public choice theory, strict separation of powers, and ideological conservatism.”).

\textsuperscript{31} Martin H. Redish & Dennis Murashko, \textit{The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation}, 93 MINN. L. REV. 26, 49 n. 99 (2008) (criticizing the “new textualism” label for suggesting that textualism is a recent development).


\textsuperscript{33} Scalia, supra note 10, at 30.

\textsuperscript{34} Id. at 36.
has been so successful in altering the views of even nonadherents”\textsuperscript{35} that it is now safe to say that “we have all become textualists.”\textsuperscript{36}

While no one suggests that our current interpretive choices should be determined by those of nineteenth-century jurists, the narrative has a certain power. If textualism is the de facto baseline of American constitutional and statutory interpretation—and if purposivism has been a mere brief but failed experiment—then embracing textualism and abandoning purposivism seems a careful, conservative option.\textsuperscript{37}

This narrative may be powerful, but it is not accurate, as this article will show. Most nineteenth-century treatise writers who addressed constitutional interpretation—and particularly those whose guidelines resemble today’s textualism—espoused purpose-based interpretation. Their conception of meaning was generally broad; instead of limiting themselves to a narrowly originalist perspective—where they would be bound by what the original drafters of an instrument would have said if faced with a precise contemporary issue—they instructed judges to reason from principle and purpose. In a word, they were purposivists.\textsuperscript{38}

II. JOSEPH STORY AND PLAIN-MEANING PURPOSIVISM

[A] constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words. . . . [W]e should never forget, that it is an instrument of government we are to construe; and . . . that must be the truest exposition, which best harmonizes with its design, its objects, and its general structure.


\textsuperscript{36}\textit{Id}. at 36. \textit{See also} Jonathan R. Siegel, \textit{Textualism and Contextualism in Administrative Law}, 78 B.U. L. REV. 1023, 1057 (1998) (“In a significant sense, we are all textualists now.”).


\textsuperscript{38}See Martin H. Redish & Theodore T. Chung, \textit{Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation}, 68 TUL. L. REV. 803, 813, 815 (1994); (“Intentionalism asks how the enacting legislature would have decided the interpretive question facing the court. . . . [P]urposivism calls on judges to identify the statute’s broader purposes and to resolve the interpretive question in light of those purposes.”).
Commentators have discussed the nineteenth-century plain meaning interpreters as formalists, woodenly applying the law in an effort at detached, scientific objectivity. Eskridge has described this group as a predecessor to contemporary textualism, but with a looser plain meaning rule and without the intellectual motivations of today’s textualists. Some commentators have disputed Eskridge’s distinction and labeled them textualist.

But none of these descriptions properly applies to plain meaning constitutional interpretive theory. Adherents of this method approached the Constitution with neither a search for objective truth nor a desire to uphold the text at all costs. They were guided by policy concerns, particularly their view that the Founders intended to create a potent central government. Because they turned to the text only with this understanding of principles in mind, the plain meaning constitutional interpreters of the nineteenth century were fundamentally purposivist.

A. Origins: Blackstone and Marshall

In his Commentaries on the Laws of England, first published in 1765, Sir Henry Blackstone memorialized the two most durable rules in legal interpretation: the intention rule and the plain meaning rule. But he made clear that it was intention, not a textual focus, that was to control, when he offered the following as an overall maxim: “The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs most natural and probable.” The plain meaning rule appears as the first of a series of more specific guidelines, subordinated to that overriding mission: “Words are

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39 JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 441 (1833).


41 Eskridge, supra note 15, at 623 n. 11.

42 E.g. Redish & Murashko, supra note 31, at 49 n. 99 (criticizing the “new textualism” label for suggesting that textualism is a recent development).

43 1 WILLIAM BLACKSTONE, COMMENTARIES 59 (1765) (emphasis altered from original).
generally to be understood in their usual and most known signification.”

Blackstone followed this with a series of purposivist guidelines. He wrote that a law is “always” to be understood with regard to its “subject matter”—that is, the mischief the law was meant to address. More broadly, readers should interpret dubious words by considering “the reason and spirit” of a law; “when this reason ceases,” he wrote, “the law itself ought likewise to cease with it.”

Blackstone’s treatise was an immense success in the United States and played a major role in the development of early American jurisprudence. Its American readership grew when the scholar St. George Tucker, a Jeffersonian Republican, published a five-volume edition adapted to the laws of the United States and Virginia in 1803. Tucker’s adaptation copied Blackstone’s rules of interpretation verbatim.

It would be decades before the United States saw an authoritative general legal treatise of its own, but we can turn to the opinions of Chief Justice John

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44 Id. at 59. The second rule in the series is a rule on extratextual sources. See id. at 60 (“If words happen to be still dubious, we may establish their meaning from the context.”) id. (stating that context includes other words within the document as well as “other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.”).

45 Id.

46 Id. Blackstone’s fourth rule concerned the absurdity doctrine. Id.

47 FRIEDMAN, supra note 4, at 69.


Marshall for an indication of how Blackstone’s formula was applied in Constitutional interpretation.\footnote{52} Numerous textualists have characterized Marshall as either an early textualist or a precursor to textualism,\footnote{53} but his textual focus was offset by a strong, Blackstonian intentionalism that is at odds with contemporary textualism. He made this clear in \textit{McCulloch v. Maryland}, where in explaining his broad conception of the Necessary and Proper Clause, he reminded his readers, “We must never forget that it is a \textit{constitution} we are expounding.”\footnote{54} That case involved nothing less than the execution of those great powers on which the welfare of a nation essentially depends. \textit{It must have been the intention of those who gave these powers}, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end.\footnote{55}

This intentionalist view calls into question the seemingly textualist dicta in \textit{Sturges v. Crowninshield}. In that decision, Marshall wrote that

although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme, to infer

\footnote{52} Blackstone did not suggest applying formal rules of textual interpretation to a constitution; he designed his rules for statutory interpretation. \textit{See generally BLACKSTONE, supra note 43.}

\footnote{53} \textit{E.g.,} Steven G. Calabresi, \textit{The Tradition of the Written Constitution: Text, Precedent, and Burke}, 57 \textit{ALA. L. REV.} 635 (2006) (stating that Marshall’s opinion in \textit{Marbury v. Madison} pointed the way toward contemporary textualism); John F. Manning, \textit{The Absurdity Doctrine}, 116 \textit{HARV. L. REV.} 2387, 2388 (2003) (stating that the Marshall Court “entrenched the primacy of the text in matters of statutory interpretation”); Manning, \textit{Equity, supra} note 15, at 100-102 (discussing Marshall’s establishment of the faithful agent theory as a hallmark of American statutory interpretation); Easterbrook, \textit{Dead Hand, supra} note 29, at 1122 (applauding Marshall for relying “squarely on constitutional text—not on imputed intent, not on \textit{The Federalist}, not on the debates in the Convention (which had been kept secret), not on the debates of the ratifying conventions . . . and not even on the opinions he had written for the Supreme Court.”).

\footnote{54} \textit{McCulloch v. Maryland}, 17 U.S. 316, 407 (1819) (emphasis in original).

\footnote{55} \textit{McCulloch v. Maryland}, 17 U.S. 316, 415 (1819) (emphasis added). \textit{See also} John Marshall, \textit{A Friend of the Constitution}, ALEXANDRIA GAZETTE, July 2, 1819, \textit{reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOUGH V. MARYLAND} 155, 167 (G. Gunther ed. 1969) (asserting that the common law provides “the most complete evidence that the \textit{intention} is the most sacred rule of interpretation”).
from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.\textsuperscript{56}

In light of \textit{McCulloch}, it would perhaps be wise to read the “spirit” in \textit{Sturges} as a synonym for “intention”—in which case Marshall’s seeming textualism, like Blackstone’s plain meaning rule, was subordinated to a fundamental intentionalism.

C. \textit{Joseph Story’s Plain Meaning Purposivism}

Joseph Story extended Blackstone’s and Marshall’s rules into what might seem a proto-textualist approach to the Constitution. He opened his discussion by calling for “uniform rules of interpretation.”\textsuperscript{57} As with Blackstone, he began with the plain meaning rule: “Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation.”\textsuperscript{58} And in no circumstances could a court defy the “letter of the law.”\textsuperscript{59} In Story’s view, “liberality of exposition is clearly inadmissible, if it extends beyond the just and ordinary sense of the terms.”\textsuperscript{60}

He then offered a critique of extratextual sources that would ring true to any textualist. “[C]ontemporary interpretation,” he wrote, “must be resorted to with much qualification and reserve.”\textsuperscript{61} Relying on state ratification debates presented numerous risks: that some state conventions subscribed to peculiar interpretations in order “to remove local objections, or to win local favor”; that some “[inferred] limitations and objects, which others would have rejected”; that some were “governed by a temporary interest or excitement,” while others favored more deeply held values; and that some interpreted its language “strictly and closely,” while others gave it a “large and liberal” meaning.\textsuperscript{62} He harshly criticized the idea,


\textsuperscript{57} \textit{STORY}, \textit{supra} note 39, at 383. \textit{See also id.} at 145 (The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.

\textsuperscript{58} \textit{Id.} at 384.

\textsuperscript{59} \textit{Id.} at 386.

\textsuperscript{60} \textit{Id.} at 412.

\textsuperscript{61} \textit{Id.} at 388.

\textsuperscript{62} \textit{Id.} at 388–89.
championed by Jefferson, that an interpreter should “recollect the spirit” of the constitutional debates:\textsuperscript{63}

Now, who does not see the utter looseness, and incoherence of this canon. How are we to know, what was thought of particular clauses of the constitution at the time of its adoption? \ldots Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text? \ldots It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the ‘probable meaning’ of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own? [sic] The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men.\textsuperscript{64}

Indeed, all of this would seem to make Story a textualist.\textsuperscript{65} But Story’s seeming textualism is undercut by three key features that mark him as a purposivist. First is a reliance on intention. Like Blackstone, he prefaced his catalog of interpretive guidelines—including the plain meaning rule—with a statement about the preeminence of intention: “The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.”\textsuperscript{66}

And even as Story belittled the use of contemporary interpretation and records from the Constitutional convention and the ratification debates, he welcomed the use of extratextual indicia of meaning generally: “Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject matter, or the reason and spirit of the law.”\textsuperscript{67} Nor did

\textsuperscript{63} Id. at 390 n. 1.

\textsuperscript{64} Id. See also id. at 389 (“Contemporary construction is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause. \ldots It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.”).


\textsuperscript{66} STORY, supra note 39, at 383.

\textsuperscript{67} Id. at 383.
he provide a hard plain meaning rule: “Where the words [of the Constitution] are plain and clear,” he wrote, “and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation.68 The sort of ambiguity that would warrant consultation of other sources need not arise from the text itself but could stem from a disagreement between the text and extratextual sources:

It is only, when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office. There may be obscurity . . . from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived from the whole structure of the instrument, or its avowed object.69

Put this way, the plain meaning rule merely prevents a court from looking beyond the text when it does not clearly say what history or good sense says that it should. This rule would seem to make Story a weak purposivist, not a plain meaning literalist.

This willingness to find ambiguity from extratextual sources points to a second purposivist feature, an element that is subtler but that would have a larger impact on those who combined Story’s approach with a harder plain meaning rule. He adopted a purposivist presumption of the constitutionality of federal exercises of power. This presumption, not the plain meaning rule, lay at the core of Story’s scheme. Story wrote that an interpreter of the Constitution was, “in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts.”70 Story found the Constitution’s nature and objects in its Preamble:

But a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty,

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68 Id. at 384 (emphasis added).

69 Id.

70 Id. at 387. See also id. at 404 (“The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes for which the powers were conferred.”).
necessarily requires, that every interpretation of its powers should have a constant reference to those objects.\(^{71}\)

Story read these statements of principle from a nationalist perspective.\(^{72}\) He was a Republican,\(^{73}\) but of a Jacksonian sort, with an expansive view of federal power.\(^{74}\) In his conception of government, he closely emulated the Federalist Marshall, his ally and mentor.\(^{75}\) He rejected the Jeffersonian view, espoused by Tucker, that federal power should be interpreted strictly, with a presumption of unconstitutionality,\(^{76}\) instead asserting that grants of power to the federal government should be interpreted broadly:

By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted which is most consonant with the apparent objects and intent of the constitution; that, which will give it efficacy and force, as a government, rather than that, which will impair its operations, and reduce it to a state of imbecility.\(^{77}\)

Story continued:

[T]he public functionaries must be left at liberty to exercise the powers, with which the people . . . have entrusted them. They must have a

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\(^{71}\) Id. at 406.

\(^{72}\) See H. Jefferson Powell, Joseph Story’s Commentaries on the Constitution: A Belated Review, 94 YALE L.J. 1285, 1301 (1985) (describing Story’s work as a “massive attempt to prove that the doctrines—nationalism, expansive construction of federal power, and judicial supremacy—for which Story stood and which Jefferson had opposed were in fact the logical conclusions of a truly republican faith.”).

\(^{73}\) Id. at 1290.

\(^{74}\) Id. at 1293.

\(^{75}\) Christopher L. Eisgruber, John Marshall’s Judicial Rhetoric, 1996 SUP. CT. REV. 439, 461 (1996). See also PAUL KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 37 (1992) (placing Marshall and Story on the nationalist side of the states’ rights debate and stating that they saw the Constitution not as an interstate contract but as the “work of the people of the entire nation acting in their unified, sovereign capacity”).

\(^{76}\) Caleb Nelson, Originalism and Interpretive Conventions, 70 U. CHI. L. REV. 519, 576 n. 229 (2003) (quoting TUCKER, supra note 50, at 154) (“the powers of the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn into question.”). See also Powell, supra note 72, at 1300 (stating that Jefferson criticized Story as a “pseudo-Republican”).

\(^{77}\) STORY, supra note 39, at 404 (emphasis in original).
wide discretion, as to the choice of means; and the only limitation upon
that discretion would seem to be, that the means are appropriate to the
end.”  

Story offered no textual support for this presumption, instead relying on a
lengthy—and similarly non-textual—quote from Gibbons v. Ogden and a deduction
on the differences between a constitutional democracy and a constitutional
monarchy. It made sense, Story reasoned, to strictly construe a constitutional grant
of power to a monarch, since such a grant of power was inherently “odious.” Democratic
delcgations of power to a representative government, however, bore no
taint of tyranny and warranted no such restriction.

It is not Story’s nationalism that rendered him a purposivist; all interpreters
subscribe to ideologies of one sort or another. Nor are substantive presumptions
necessarily purposivist; even a textualist will embrace a presumption that arises
from the text of the Constitution or from the founding generation’s understanding of
common law. But Story offered no textual basis for his constitutionality
presumption, and he acknowledged that it deviated from understandings of
governmental power under England’s constitutional monarchy. By reaching this
conclusion from his own deduction and from historical knowledge, not from the
constitutional text or pre-constitutional common law, Story embraced an essentially
purposivist approach.

Nor did Story ground his view in the policy preferences of the Framers or the
founding generation. What mattered to Story was that his view was right, not that
it was original. Story’s use of a novel interpretive presumption further distinguishes
his view from the originalism of Justice Scalia. In Scalia’s view, “A text should not


78 Id. at 417. See also id. at 406 (“No interpretation of the words, in which those powers are
granted, can be a sound one, which narrows down their ordinary import, so as to defeat [the
Framers’] objects. That would be to destroy the spirit, and to cramp the letter.”).

79 Id. at 402–403 (citing Gibbons v. Ogden, 22 U.S. 1, 71 (1824)).

80 Id. at 394.

81 Id. at 396–97.

82 See SCALIA, supra note 12, at 29 (“The rule of lenity is almost as old as the common law
itself, so I suppose that is validated by sheer antiquity.”). But in general, textualists shun
substantive canons of interpretation. Eskridge, supra note 15, at 663. See also SCALIA, supra note
12, at 27 (referring to substantive presumptions as rules that “load the dice for or against a
particular result”); 23 (“A text should not be construed strictly, and it should not be construed
leniently; it should be construed reasonably, to contain all that it fairly means.”).
be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”

The primacy of Story’s purposivist constitutionality presumption relegates the plain meaning rule to a secondary role. Taken out of context, his instruction to follow the “letter of the law” would suggest a text-centered interpretive approach. More telling was his statement that a court should not go beyond “the just and ordinary sense of the terms.” For Story, text was not the start of interpretation but the end—the outer boundary beyond which interpretation could not go. His treatment of the text as merely the outer limit of permissible meaning makes him a purposivist, one ready to make extensive use of extratextual sources, but not to the extent of contradicting plain meaning. Considering Story’s purposivist presumptions and the paucity of constitutional clauses with indisputably clear meanings, however, this outer limit is but a weak restriction on judicial interpretation.

D. Following Story’s Lead: Plain-Meaning Purposivism to 1868

A series of treatise writers in the 1850s and 1860s, most notably Thomas Cooley, adopted Story’s nationalistic, pseudo-textualist approach to the Constitution. They endorsed his purposivist presumption of the constitutionality of federal exercises of power and, to a greater degree than Story, advised restricting the use of extratextual sources.

1. The Surprisingly Aggressive Purposivism of Theodore Sedgwick

In an 1857 treatise, the New York lawyer Theodore Sedgwick adapted Story’s model, but with an outright prohibition on extratextual sources. While Story stated that a court should “generally” not use alternative interpretive techniques when faced with a plain meaning, Sedgwick stated that “[i]t seems to be settled in regard to constitutions as to statutes, that no extrinsic evidence can be received as to their intent or meaning.”

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83 Scalia, supra note 10, at 23.
84 Story, supra note 39, at 386. See also id. at 412
85 Id. at 412.
87 Supra text accompanying note 68.
Sedgwick acknowledged that close adherence to the text came with certain risks, but he asserted that those of “loose and careless” interpretation were still greater. In his view, a judge should not worry if an unwise constitutional provision should compel an unwise result. He quoted with approval a New York judge whose hard-nosed positivism foreshadowed that of Scalia: “‘My rule has been to follow the fundamental law as it [is] written, regardless of consequences. If the law does not work well, the people can amend it.’”

But Sedgwick, an intention-based interpreter, followed Story in adopting a strong presumption of the constitutionality of the federal exercise of power. “[I]n cases of doubt every possible presumption will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in cases of clear and unquestioned violation of the fundamental law.” In empowering judges to determine the meaning of that fundamental law, Sedgwick went beyond Story, outlining a broadly purposivist view that approached dynamic interpretation:

In regard to a statute, the general duty of the judge is that of a subordinate power, to ascertain and to obey the will of a superior; in regard to a constitution, his functions are those of a co-ordinate authority, to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect. No absolute rules of interpretation can be framed.

This means suspending the agency model that Sedgwick applied for statutes. In constitutional matters, “the judicial function is really merged in the legislative”; they “vest a sort of legislative power in the judge”

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89 Id. at 493. But see infra text accompanying note 129–130 (stating that this warning was omitted in a later edition).

90 Id. at 486–87 (quoting with approval People v. Aspinwall, 3 Coms. 547, 568 (N.Y. App. 1850) (Bronson, C.J., dissenting)).

91 Id. at 225 (“When we see what is the sense that agrees with the intention of the instrument, it is not allowable to wrest the words to a contrary meaning.”) (emphasis omitted from original).

92 Id. at 482.

93 Id. at 493

94 Id. at 231
The abolitionist\textsuperscript{95} writers Timothy Farrar and Joel Tiffany echoed Sedgwick’s strong plain meaning rule—if not his aggressive brand of constitutional purposivism—in a pair of treatises published during Reconstruction. Farrar criticized the loose, extratextual approach of the Southern opposition, who endeavored to not only “tone down and fritter away” the meaning of constitutional clauses, but to “construe them out of the Constitution, and get rid of them entirely.”\textsuperscript{96} Both writers endorsed a hard plain meaning rule. In Farrar’s blunt language, the Framers “meant exactly and only what they said... [I]f they meant anything different, it can never be legally proved or known by anybody.”\textsuperscript{97} But like Story and Sedgwick, both writers endorsed a presumption of the constitutionality of federal action, based on their reading of the goals of the founding generation.\textsuperscript{98}

2. \textit{Thomas Cooley: The Progressive Version}

The most notable follower of Story’s nationalist, plain-meaning purposivism was Thomas Cooley. By placing him in this tradition, I am deviating from the views of Professors Paul Kahn and Stephen Siegel, who have argued that Cooley followed the non-originalist, history-focused, evolutionary model of constitutional jurisprudence popularized in the late nineteenth century.\textsuperscript{99} While Cooley may have been more sensitive to history and custom than Story or Sedgwick, he still subscribed to Story’s nationalist pseudo-textualism, unlike his more radical successors. In my view, this paradigm provides a more valuable—and accurate—context for Cooley’s work than his use of history.

Cooley expounded on the plain meaning rule in his 1868 treatise, \textit{Constitutional Limitations}. Like his predecessors, he wrote that the meaning of the

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\item \textsuperscript{95} Bret Boyce, \textit{Originalism and the Fourteenth Amendment}, 33 \textit{Wake Forest L. Rev.} 909, 964, 966 (1998).
\item \textsuperscript{96} Timothy Farrar, \textit{Manual of the Constitution of the United States of America} 127 (1867). \textit{See also} Boyce, \textit{supra} note 95, at 965 (stating that Tiffany saw the reliance on historical sources in constitutional interpretation as a threat to liberty).
\item \textsuperscript{97} Farrar, \textit{supra} note 96, at 46. \textit{See also} Joel Tiffany, \textit{A Treatise on Government, and Constitutional Law} 66 (1867) (“[O]ne of the first maxims in respect to interpretation is, that it is not allowable where there is no uncertainty as to the meaning of the language used”).
\item \textsuperscript{98} Farrar, \textit{supra} note 96, at 76 (stating that it was the duty of the government to honor the people’s constitutionally expressed desire for a strong national government); Tiffany, \textit{supra} note 97, at 70 (stating that Americans “intended to commit their rights and interests... to the absolute protection of the government” and that its powers were to be interpreted liberally).
\item \textsuperscript{99} Kahn, \textit{supra} note 75, at 73; Stephen A. Siegel, \textit{Historism in Late Nineteenth-Century Constitutional Thought}, 1990 \textit{Wis. L. Rev.} 1431, 1503–1508 (1990) (hereinafter \textit{Historism}).
\end{itemize}
Constitution was communicated by its plain language and that a court could consult extratextual sources only in case of ambiguity. Cooley’s rule on extratextual sources followed the harder Sedgwick/Farrar/Tiffany plain meaning rule, not the soft Story version; he stated that a court was justified in consulting external sources “only” in case of ambiguity. “We are not to import difficulties into a constitution,” Cooley wrote, “by a consideration of extrinsic facts, when none appear upon its face.

Also like his predecessors Cooley held an intention-based view of the Constitution’s meaning: “The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. . . . [I]t is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself.” In embracing an intention-based approach, Cooley flatly rejected the evolutionary model that would develop later in the century. He stated that constitutions were “fixed”—again contradicting the arguments of Kahn and Siegel:

A cardinal rule in dealing with written instruments is that they shall receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.

100 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 58 (1868) (hereinafter LIMITATIONS). See also id. at 57 (quoting with approval Newell v. People, 7 N.Y. 9, 97 (1852) (stating that courts could not contradict the clear meaning of the New York Constitution)).

101 Id. at 65.

102 Id.

103 Id.

104 Id. at 55 (emphasis in original). See also id. at 57 (stating that courts should seek to determine legislators’ intent); Thomas M. Cooley, The Federal Supreme Court—Its Place in the American Constitutional System, CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW 31 (1889) (hereinafter Supreme Court) (stating that “national authority” was “conferred and measured exclusively by the written instrument).

105 COOLEY, LIMITATIONS, supra note 100, at 55.

By contrast, the evolutionary constitutionalists thoroughly rejected the notion of honoring original intention, as I discuss in Part IV.

Like Story, Cooley held a strong faith in government power, but applied to progressive ends, despite the common perception today that he was a conservative. Cooley was troubled by the Gilded Age centralization of wealth and questioned the ability of the private sector to ensure the common welfare. An early defender of the administrative state, he believed that grants of power had to be flexible enough to enable government to respond to changing circumstances.

It is fitting, therefore, that Cooley endorsed Story’s broad, purposivist presumption of federal power. In his view, government exercises of power could be rendered unconstitutional only by express constitutional language, never by mere implication:

But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any constitutional enactment.

In his view, government exercise of police power was rarely unconstitutional, provided it wasn’t “pushed to an extreme that [would] deny just liberty.” He saw the role of judge as less that of a critic or a check on power than that of a broad-

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107 See FRIEDMAN, supra note 4, at 480 (“Cooley himself was much less a cardboard reactionary than has been pictured.”).


109 Paul D. Carrington, The Constitutional Law Scholarship of Thomas McIntyre Cooley, 41 AM. J. LEGAL HIST. 368, 370 (1997) (hereinafter Cooley). See also id. (stating that Cooley’s progressivism would have put him on the dissenting side of the Lochner Court);

110 KAHN, supra note 75, at 75.

111 Siegel, Historism, supra note 99, at 1494.

112 COOLEY, LIMITATIONS, supra note 100, at 172. Cooley primarily addressed state constitutions, but the categorical nature of the rules suggests that they apply to the federal constitution as well. See generally id. at 38–84 (1868). See also id. at 171 (stating that a court could not limit federal exercises of power based on a judge’s assessment of the “spirit” of the federal Constitution).

113 Id. at 227.
minded statesman.\textsuperscript{114} Tellingly, in Cooley’s twenty years as Chief Justice of the Michigan Supreme Court, his court found but a single occasion to overturn a politically popular piece of legislation.\textsuperscript{115}

D. \textit{The Last of the Story Disciples?}

With few exceptions, treatise writers after 1868 abandoned the plain meaning rule.\textsuperscript{116} The Boston jurist\textsuperscript{117} Joel Prentiss Bishop gave a half-hearted, contradictory rendering of Story’s rules in an 1886 treatise, continuing the purposivist focus\textsuperscript{118} but with a weak constitutionality presumption.\textsuperscript{119} He repeated the plain meaning rule,\textsuperscript{120} only to undercut it by stating that words generally have multiple meanings\textsuperscript{121} and that “a court . . . is not required to stultify itself; but it may take into account any pertinent matter whereof it has judicial cognizance.”\textsuperscript{122}

As Stephen Siegel has written, Bishop the judge subscribed to a principles-based jurisprudence,\textsuperscript{123} often failing to articulate or credit the principles on which he

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\textsuperscript{114} Cooley, \textit{Supreme Court}, supra note 104 at 32 (“A mere lawyer might see in the Constitution nothing but an agreement of parties, to be construed by technical rules; it required a statesman to understand its full significance, as an instrument of government instinct with life and with authority.”).

\textsuperscript{115} Carrington, \textit{Cooley}, supra note 109, at 540.


\textsuperscript{117} Stephen A. Siegel, \textit{Joel Bishop’s Orthodoxy}, 13 \textit{LAW & HISTORY REV.} 215, 218 (1995) (hereinafter \textit{Bishop}).

\textsuperscript{118} JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 80–81 (1882) (“The rule that the intent of the makers . . . shall prevail over the latent meanings of words and phrases, but not to the disregard of the true import of what is plain, is applied to constitutions the same as to statutes.”).

\textsuperscript{119} Id. at 80 (“No mere general considerations will authorize a court to nullify a statute as unconstitutional.”).

\textsuperscript{120} Id. at 58 (“Where the legislative meaning is plain, there is, not only no occasion for rules to aid the interpretation, but it is contrary to the rules to employ them.”).

\textsuperscript{121} Id. at 83.

\textsuperscript{122} Id. at 59 (discussing statutory interpretation). \textit{See also id.} (“Constitutions are generally to be interpreted by the same rules as statutes”).

\textsuperscript{123} See Siegel, \textit{Bishop, supra} note 117, at 230.
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was relying. His contradictory rules on interpretation suggest the conflicted view of a jurist reluctant to give put aside the teachings of Joseph Story but who had already been persuaded by the conventional purposivism that would emerge in the late nineteenth century and which I discuss below in Part III.

E. A Not-Quite-So-Plain Meaning School

The plain meaning school has taken a beating in legal commentary. They are apt to be dismissed as natural-law devotees or thick-skulled formalists, unable or unwilling to consider the policy context of the laws they interpret. While this view is no doubt true of many court decisions (but not, I would suggest, Dred Scott, which was an example less of mechanistic formalism than of aggressive judicial activism), it hardly does justice to the Story school’s intellectual inclinations. They interpreted the Constitution based on their understanding of its principles and history, not on natural law assumptions or sterile, formalist paradigms. They were not textualists or originalists of the Scalia variety. Story and his disciples cleaved to the plain meaning rule, but only as a tactic to be used after arriving at a proper—and broadly purposivist—understanding of the Constitution’s principles.

But if Story and his followers are innocent of the charges of wooden formalism or natural-law naïveté, they still deserve criticism for crafting an interpretive approach founded on a double standard. They belittled the value of extratextual sources and discouraged their readers from consulting them, but they failed to acknowledge that their own understandings were based on sources beyond the Constitution’s text. They kept their own purposivist inquiries to themselves, but they passed along the results to their readers in the form of substantive rules mixed in with the procedural ones. In doing so, they invited their readers to play a quasi-textualist game, fixed to ensure that their nationalist team would always win.

III. A More Direct Purposivism: The Retreat of the Plain Meaning Rule

Perhaps the safest rule of construction is to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each clause such operation and force as is consistent with its legitimate meaning, and not nullify or evade them by astute verbal criticism without regard to the aim and objects of the instrument, and the principles upon which it is based.

124 Id. at 231. In this way, Bishop perhaps showed a true fidelity to Story. See infra Part II.E.

125 Molot, supra note 35, at 47.
The latter third of the nineteenth century saw a series of treatise writers whose approach resembled modern-day purposivism. Like Story, these theorists based their interpretations not primarily on the Constitution’s text but on their understanding of the principles and purposes of the Constitution. But they removed Story’s disingenuous plain meaning rule from their interpretive toolboxes and openly embraced a purposivist approach.

Theodore Sedgwick’s changing viewpoint provides the most vivid illustration of the disappearance of the plain meaning rule. Sedgwick, an early adopter of the hard plain meaning rule, stated in his 1857 treatise that it was “settled” that a court could not consult “extrinsic evidence” in constitutional interpretation. By the publication of his 1974 edition, he had reversed course, stating that “[i]t is well settled that aid, in regard to the construction of the Constitution of the United States, may be derived from contemporaneous exposition and legislative exposition[.]” Similarly, his 1857 edition had included a suggestion that the dangers of strict textualism were less severe than those posed by “loose and careless” readings. By 1874, this warning was stricken from Sedgwick’s volume entirely.

A. Early Conventional Constitutional Purposivism

A few treatise writers in the early 1800s deviated from the plain-meaning approach to constitutional interpretation espoused by Story. Joseph Rawle offered no restriction on extratextual sources in his 1825 treatise, stating only that a court should “deduce the meaning from [the Constitution’s] known intention and its entire text, and to give effect, if possible, to every part of it, consistently with the unity, and the harmony of the whole.” Story’s colleague on the Court, Henry Baldwin, forewent a plain meaning rule and reflected a weaker purposivism: “It is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the

127 Supra text accompanying note 88.
129 Supra text accompanying note 89.
130 See SEDGWICK, supra note 128, at 555-56.
131 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 28 (1825).
prohibitory clause, or the grant of power.”¹³² But neither of these treatises appears to have been greeted as a substantial contribution to the interpretive discourse.¹³³

Francis Lieber provided a more intellectually robust post-plain-meaning approach in his treatise, *Legal and Political Hermeneutics*. Lieber, a German émigré to the United States,¹³⁴ offered a Burkean model of jurisprudence,¹³⁵ where a judge would be guided not only by abstract philosophical principles but by culture, history, and the current needs of the country.¹³⁶ “He 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.”¹³⁷ A judge must interpret the Constitution according to “the true spirit, which pervades the whole constitution . . . provided this spirit is in favor of public welfare . . . or the instrument be not irreconcilable with the present time.”¹³⁸

Unlike Story, whom he counted as a friend,¹³⁹ Lieber saw little in the Constitutional text that was plain, asserting instead that it always required judicial interpretation.¹⁴⁰ And when the text conflicted with the spirit of the law, it was the


¹³³ Few subsequent writers referred to Rawle’s treatise. An exception was Joel Parker, who referred to it as a work “of a general and speculative character.” Joel Parker, *Constitutional Law: With Reference to the Present Condition of the United States* 8 (1862). Baldwin’s appears to have been hampered by its scattershot quality, which perhaps resulted from his deteriorating mental condition. Eric M. Maltz, *Majority, Concurrence, and Dissent: Prigg v. Pennsylvania and the Structure of Supreme Court Decisionmaking*, 31 Rutgers L.J. 345, 374 (2000).


¹³⁵ *Id.* at 491.

¹³⁶ Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 Cardozo L. Rev. 2135, 2138 (1995) (hereinafter *Hammond*). See also Francis Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students* 582 (1839) (hereinafter *Ethics*) (stating that the two fundamental assets for an interpreter of the Constitution were good faith and common sense).

¹³⁷ *Id.* at 582.

¹³⁸ *Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics* 186 (1839) (hereinafter *Hermeneutics*).


¹⁴⁰ *Lieber, Hermeneutics*, supra note 138, at vii (“For it seems evident that mathematics alone can wholly dispense with interpretation and construction of some sort.”).
latter that must prevail, in strongly purposivist fashion. In rebutting literalist views of the Constitution, Lieber warned his readers not to “hang burdens of great weight upon slight pegs; for instance, an argument of the highest national importance upon the casual position of a word.” Lieber named this broad, boldly purposivist brand of interpretation “transcendent construction.” He acknowledged that this approach to the Constitution carried the potential for abuse but contended that it was necessary in order to protect the values and welfare of the people being governed.

Lieber also differed from Story by endorsing a strict construction on government power, which he explained in typically colorful language:

[L]et, with a manly nation, everything that is in favor of power, be closely construed; every thing in favor of the security of the citizen and the protection of the individual, comprehensively, for the simple reason, that power is power, and therefore, able to take care of itself as well, as tending, by its nature, to increase, while the citizen wants protection. For the same reason ought we always to be ready to construe comprehensively in favor of the independence of the judiciary.

Lawrence Lessig has concluded from the interest shown by other scholars in Lieber’s work that his agenda was not quite as radical at the time as it may appear now. But this reading overlooks the selective use that mid-century theorists of the time made of Lieber’s work. They amply cited Hermeneutics for its less controversial material, such as a distinction between the definitions of interpretation and

141 LIEBER, ETHICS, supra note 136, at 583.
142 LIEBER, HERMENEUTICS, supra note 138, at 178.
143 Id. at 185.
144 Id.
145 Id. at 186.
146 Id. at 183–84.
147 Id. at 178.
148 Lawrence Lessig, The Limits of Lieber, 16 CARDOZO L. REV. 2249, 2258 (1995) (stating that “[t]he dominance which Lieber’s work quickly gained in interpretive accounts of the time suggests it was not so radical” and lamenting the supposed abandonment of Lieber’s views by subsequent courts).
construction. But they generally ignored or dismissed his more adventurous and academic propositions. For example, Sedgwick, despite ascribing to an aggressive purposivism that vested judges with quasi-legislative powers, described Lieber’s notion of transcendent construction as an idea that “amused the fancy and exhausted the arguments of text writers” but that had little “value for the student of jurisprudence.” Lieber’s vision would eventually find a receptive audience in the last decades of the nineteenth century, but it failed to stimulate any outpouring of conventional purposivism among the Story-dominated treatise writers of the mid-1800s.

B. The Next Wave: The Plain Meaning Rule Rescinded

The late-nineteenth-century wave of conventional purposivism began in 1868, the same year that the Fourteenth Amendment was passed and Cooley’s treatise was published. That year, the California Republican John Norton Pomeroy, hailed as one of the leading writers of legal textbooks in the late 1800s, pointed the way toward a conventionally purposivist approach in his Introduction to the Constitutional Law of the United States for Students.

Much of what Pomeroy wrote agreed with the Story model. He stated that the Constitution had a fixed meaning and that its text provided an outer limit on interpretation. He hailed the wisdom of the Framers, and he stated that

149 Sedgwick, supra note 88, at 288. See also Cooley, Limitations, supra note 100, at 44 (citing a rather conventional explanation by Lieber of judicial review).

150 Supra text accompanying notes 93–94.

151 Sedgwick, supra note 88, at 227.

152 See infra text accompanying notes 211–216.

153 Aumann, supra note 4, at 206 n. 29.


155 Aumann, supra note 4, at 206 n. 29.

156John Norton Pomeroy, An Introduction to the Constitutional Law of the United States for Students 11 (1868) (“The Constitution of the United States is peculiar in that it is all written; that it has nothing of tradition. . . . [T]he past is resorted to only for explanation and interpretation of the written word.”). But see Siegel, Historism, supra note 99, at 1462 (stating that Pomeroy held an evolutionary view of the Constitution).

157 Pomeroy, supra note 156, at 12 (stating that interpretive tools “must be constantly restrained and limited by the letter itself of the written instrument.”).

158 Id. at 102 (praising the “almost divine prescience” of the Founders).
constitutional clauses were to be read broadly\textsuperscript{159} and that exercises of federal power were presumably constitutional.\textsuperscript{160}

But unlike Story, Pomeroy offered no restriction on the use of extratextual indicia of meaning, instead reasoning that they were necessitated by the general nature of the Constitution’s language.\textsuperscript{161} As Stephen Siegel has observed, Pomeroy was notably fond of historical and other non-legal materials\textsuperscript{162}; he advised free use of “[a]ll the aids which the canons of verbal interpretation, or history, or analogies with other forms, or ethics, can contribute.”\textsuperscript{163} By welcoming the use not only of historical and textual material but contemporary ethics, Pomeroy marked himself as originalist in only the most abstract, philosophically oriented sense.

Three years after Pomeroy’s book, John Brown Dillon published a set of guidelines indicating an even more aggressive purposivism, where intent would override even the plain meaning of the text: “Words ought to be construed according to the intent of those who use them, and not otherwise.”\textsuperscript{164} Robert Desty more clearly articulated the strong purposivist position, stating that “[a]dherence to the letter must not be had in opposition to the reason and spirit of the enactment, and to effectuate the object intended, it may be proper to deviate from the usual sense of the words.”\textsuperscript{165} Similarly, John Randolph Tucker stated that a law could be

\textsuperscript{159} Id. at 186 (“[A]s greater interests are involved which affect the state rather than the individual, all narrow and tech. construction should, as far as possible, be avoided; the nature of the writing as an organic law should be allowed its full effect.”).

\textsuperscript{160} Id. at 166. See also David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941, 994, 1019-1021 (2008) (discussing Pomeroy’s expansive view of executive power). But see Spaulding, supra note 154, at 1992 (describing Pomeroy as a “state-rights nationalist”).

\textsuperscript{161} POMEROY, supra note 156, at 13. Pomeroy’s interest in distancing himself from Story is suggested by his citation of Story’s landmark work but three times in his 1868 textbook. Id. at 35, 36, 38.

\textsuperscript{162} Siegel, Historism, supra note 99, at 1475.

\textsuperscript{163} POMEROY, supra note 156, at 10.

\textsuperscript{164} JOHN B. DILLON, NOTES ON HISTORICAL EVIDENCE IN REFERENCE TO ADVERSE THEORIES OF THE ORIGIN AND NATURE OF THE UNITED STATES OF AMERICA 31 (1871).

\textsuperscript{165} DESTY, supra note 126, at 40. See also id. at 39 (stating that one should interpret the Constitution to “subserve the great objects for which it was made”).
constitutional if it followed either the text or the original intent: “No legislation can be proper which is inconsistent with the letter and spirit of the Constitution.”

Other writers, while not clearly identifiable as strongly or weakly purposivist, reflected a conventionally purposivist orientation by advising interpreters to reason based on broad principle and by not including a restriction on extratextual sources. Theophilus Parsons offered two principles upon which interpretation should be based. First, he stated that the Constitution was founded on the principle that “the utmost liberty [be] given to the individual.” But he then asserted a fundamentally majoritarian view: “The very first principle . . . is, that when men come together to accomplish any great purpose, the will of the majority must govern.” Thomas Powell and Albert Putney took a similarly principles-based approach.

Like contemporary purposivism, this was not a consistent school of thought but a collection of ideologically diverse thinkers, united by little more than their endorsement of a common interpretive method. Dillon, reflecting a typical late-nineteenth-century progressivism, looked to the “active moral forces which flow from public virtue, popular education, and Christian principles.” The Virginian Tucker, writing at the end of the century, offered a purposivist defense of the constitutionality presumption—a position at odds with the fervent states’ rights

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166 John Randolph Tucker, 1 The Constitution of the United States: A Critical Discussion of Its Genesis, Development, and Interpretation 372 (1899). See also id. at 365 (“The interpretation must neither strain to diminish the powers of Congress, but by fair reason reach the mind of the Constitution of the United States.”).

167 Theophilus Parsons, The Political, Personal, and Property Rights of a Citizen of the United States: How to Exercise and How to Preserve Them 40 (1876)).

168 Id. at 59.

169 Thomas W. Powell, Analysis of American Law 64 (2d. ed. 1878) (stating that an interpreter’s first two duties were to consider the original mischief that prompted a statute’s enactment and to deduce the intention of the lawmaker). See also id. at 98 (stating that the same rules apply equally to statutes and constitutions).

170 Albert H. Putney, 2 United States Constitutional Law: State Constitutions, Statutory Construction 279 (1908) (stating that the first principle of interpretation was to follow the intention of lawmakers); id. at 302 (advising the use of legislative history without including a plain-meaning restriction). Putney’s rules refer to statutes, but the context and the chapter heading indicate that they apply to constitutions as well. Id. at 275.

171 Powell, supra note 169, at 124.

172 Tucker, supra note 166, at 377-78.
advocacy he had practiced throughout his career. Putney aimed his expansive purposivism at the protections guaranteed by the Bill of Rights.

This diverse flowering of purposivist thought challenges the view, put forth by Thomas Peebles, that the Dred Scott decision prompted a wave of historist, anti-originalist constitutional thought. Conventional purposivism was no doubt a departure from the plain meaning approach, but not a radical one; it merely suspended the plain meaning rule and created a more forthright purposivism than that of Story and his successors. Nor can Dred Scott be safely identified as the primary trigger for interpretive change; that decision was handed down in 1856, but the late-nineteenth century wave of conventional purposivism did not begin until twelve years later. The next wave of interpretation, evolutionary constitutionalism, would not begin in earnest until the 1880s, after the intervening events of the Civil War and Reconstruction. The political backlash that followed Dred Scott was not paralleled by any similar reaction in interpretive theory; if the new purposivism was linked directly to an historical event, it was more likely the war, Reconstruction, or the passage of the Fourteenth Amendment.

For our contemporary purposes, the most important conclusion to be drawn from this interpretive tendency is simply that purposivism as we know it is much older than we might think. It first appeared in the 1820s and 1830s, and its post-Cooley revival had flourished in interpretive theory of the Constitution for over two decades before the Supreme Court decided Holy Trinity.

IV. EVOLUTIONARY CONSTITUTIONALISM

[I]t is the people of the present day who possess the political power, and whose commands give life to what otherwise is a dead letter. No people are ruled by dead men, or by the utterance of dead men. Those utterances are law so far as they are voiced by some living power.

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174 Putney, supra note 170, at 348 (“A liberal and elastic interpretation must therefore be given the United States Bill of Rights; one which will tend to secure substantial rights of liberty and safety to the individual rather than one based on an exact adherence to the technical meaning generally accord to its terms.”).


176 Infra text accompanying note 217.

177 See e.g. text accompanying note 200.
For the present possessors of political power, and not their predecessors, are the lawgivers for the present generation.

—Christopher Tiedeman\textsuperscript{178}

For most of the nineteenth century, interpretive theory was not strongly anti-originalist. They two theories I have discussed were certainly non-textualist, but they arguably represented strains of conceptual originalism. If the story ended there, there could be some truth to Justice Scalia’s 1989 statement that “[i]t is only in relatively recent years . . . that nonoriginalist exegesis has, so to speak, come out of the closet, and put itself forward overtly as an intellectually legitimate device.”\textsuperscript{179}

But Scalia’s assertion ignores the late-nineteenth-century movement that arguably represented the most radical major interpretive theory of our history: evolutionary constitutionalism.\textsuperscript{180} By abolishing the search for intent, this school took a radical step away from both plain-meaning purposivism and conventional purposivism. Like today’s living constitutionalists, the evolutionists viewed constitutional law as dynamic, determined not necessarily by the original intent of the founders but by the changing values and circumstances of the people being governed. But unlike living constitutionalists generally, this school conceived of law as the product of evolutionary progression. Their almost mystical notion of law was founded on the notion that the common law evolved through judicial interpretation to keep pace with the collective will and culture of a living, changing nation.

Because they distanced themselves from—and even scorned—intention-based interpretation, the evolutionists crafted what may be the first anti-purposivist approach to American constitutional interpretation. But because they rejected also any notion of adhering to the text, they must also be though of as fundamentally anti-textualist. This anti-purposivist, anti-textualist approach provided the evolutionists with a powerful tool to address the late nineteenth century’s primary

\textsuperscript{178} CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 161 (1890).


\textsuperscript{180} Rabban, supra note 108, at 556 (stating that the term “evolutionary jurisprudence” is used interchangeable with three different schools of thought: historicism, legal evolution, and the Darwinian theory of law).
legal challenge: defining substantive property rights and the extent of police power\textsuperscript{181} in a climate of large-scale commerce and the regulatory state.\textsuperscript{182}

A. Sources

1. The Evolutionary Principle

Commentators on the evolutionary school have provided a rich historical view of the intellectual roots of the evolutionary constitutionalists. Perhaps the first lesson to be learned is that the notion of evolution was not the brainchild of Darwin, whose *Origin of the Species* was not published until 1859, but of a series of thinkers\textsuperscript{183} who had proposed evolutionary models for both science, society, and government dating back to the eighteenth century.

First was Edmund Burke, who, in the eighteenth century, wrote of the state not as a static structure but a growing organism.\textsuperscript{184} German romantics built a similar concept around the concept of the *volk*, which figured a country’s population as a transcendent, organic entity.\textsuperscript{185} Friederich Karl von Savigny applied this idea to law in the early 1800s.\textsuperscript{186} In his view, law was an evolving extension of the *volkgeist*—the dynamic, creative spirit of a people—and not a mere governmental creation.\textsuperscript{187} This idea became the basis for Savigny’s historical school of jurisprudence, which proposed to interpret law not through abstract analysis but through a sensitive study of a nation’s cultural and historical foundations.\textsuperscript{188}

Herbert Spencer and Henry Sumner Maine connected the evolutionary model to economic concepts. In his landmark *Social Statics*, published in 1851, Spencer portrayed evolution as a zero-sum game in which players allocated finite resources


\textsuperscript{182} Id. at 7-8.

\textsuperscript{183} See JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 145 (1990) (stating that evolution is not a single theory but a family of theories).

\textsuperscript{184} Peebles, supra note 175, at 55, 57–58.

\textsuperscript{185} Id. at 58.


\textsuperscript{187} Id. at 42; Peebles, supra note 175, at 58.

\textsuperscript{188} Elliott, supra note 186, at 40.
according to the laws of natural selection.\textsuperscript{189} The process should, in his view, be allowed to run its natural course,\textsuperscript{190} with a minimum of state interference.\textsuperscript{191} Private property rights were a product of this process, an evolutionary improvement over the backwards communal ownership model of previous epochs.\textsuperscript{192} Henry Sumner Maine held a similar view. In his conception, legal systems inexorably evolved from basic societies, where rights were based on family or tribal status, to advanced systems in which they were defined by contract.\textsuperscript{193}

2. \textit{The Anti-Constitutionalists}

Evolutionary constitutionalism developed in a post-Civil War age in which the Constitution itself was regarded with suspicion, if not outright scorn. Perhaps the best example of the latter is the Unionist lawyer Sidney George Fisher,\textsuperscript{194} whose 1862 polemic, \textit{The Trial of the Constitution}, rebutted the claim that Lincoln’s exercise of executive power violated the Constitution.\textsuperscript{195} Fisher responded to such claims by criticizing the Constitution itself. He saw it as an inherently flawed document,\textsuperscript{196} all but impossible to amend,\textsuperscript{197} whose failings were starkly demonstrated by its failure to protect the country from the disastrous Civil War.”\textsuperscript{198} He criticized what he saw as the reactionary judiciary\textsuperscript{199} whose myopic originalism was responsible for the disastrous \textit{Dred Scott} decision.\textsuperscript{200}

Fisher took aim at the very notion of intent. To Fisher, law resided not in legal instruments but in custom,\textsuperscript{201} which he saw not as instinctive habit but as an

\begin{footnotesize}
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  \item \textsuperscript{189} Herbert Hovenkamp, \textit{Evolutionary Models in Jurisprudence}, 64 TEX. L. REV. 645, 656-57 (1985) (hereinafter \textit{Evolutionary}).
  \item \textsuperscript{190} \textit{Id.} at 671.
  \item \textsuperscript{191} \textit{Id.} at 667.
  \item \textsuperscript{192} \textit{Id.} at 668.
  \item \textsuperscript{193} AUMANN, \textit{supra} note 4, at 198.
  \item \textsuperscript{194} KAHN, \textit{supra} note 75, at 72.
  \item \textsuperscript{195} SIDNEY GEORGE FISHER, \textit{THE TRIAL OF THE CONSTITUTION} 96 (1862).
  \item \textsuperscript{196} \textit{Id.} at 20.
  \item \textsuperscript{197} \textit{Id.} at 30.
  \item \textsuperscript{198} \textit{Id.} at 55. \textit{See also} KAHN, \textit{supra} note 75, at (stating that Fisher viewed the war “as a symbol of the defective character of the founders’ Constitution.”).
  \item \textsuperscript{199} Winkler, \textit{supra} note 106, at 1471.
  \item \textsuperscript{200} KAHN, \textit{supra} note 75, at 72.
  \item \textsuperscript{201} \textit{Id.} at 16.
\end{itemize}
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expression of rational growth. Consequently, he challenged the notion of a Constitution with a fixed meaning. In his view, “[a] fixed, unchangeable Government, for a changeable, advancing people, is impossible.” The Constitution would have to change or be discarded:

But, that it may endure, it must be capable of alteration, when an alteration is needed, otherwise it will be destroyed; for a Constitution that cannot be changed for the people, and by the people, must . . . be swept away by the force opinion, and the march of events.

Fisher’s view was not the fleeting sentiment of a country at war. John Codman Hurd, a former abolitionist, attacked the Constitution and intention-based interpretation in an 1881 monograph, *Theory of Our National Existence*. Hurd embraced the Burkean idea that constitutional questions had to be settled with regard to the will of the sovereign people, not by reference to abstract ideas in the text. By contrast, the Story school ignored sovereignty by revering the Constitution and the intent of the founders. Hurd excoriated what he saw as “Story’s fetish Constitution”:

We can see that the feeling is akin to that in the Guinea negro’s ascription to the toy he has himself made, from sticks, rags, and feathers, of the divinity of uncreated essence, and of power in respect to which he, who patched the pieces together, is a helpless slave. . . .

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202 *Id.* at 72.

203 *Fisher, supra* note 195, at 39. *See also id.* at 2 (“No man or assembly of men is wise as the generations or as time, for time reveals imperfections.”).

204 *Id.* at 96.


206 JOHN CODMAN HURD. *THE THEORY OF OUR NATIONAL EXISTENCE: AS SHOWN BY THE ACTION OF THE GOVERNMENT OF THE UNITED STATES SINCE 1861* xviii (1881) (stating that law depended on “a human agency, a human intellect interpreting the meaning of the words, and a human will and force compelling obedience to that meaning”).

207 *Id.* at ix (criticizing Story and his followers for “seem[ing] to ignore the fact that in every country in the world, there must be somebody in existence whose measure of right everybody else must accept as the rule of action before there can be any public law at all”). *See also id.* at 109 n. 3 (criticizing Story’s interpretation of the phrase, “We the people,” and stating, “The question is not one of *interpretation* of the word *people*, as a *legal* question. It is to identify those who used the pronoun WE, as a *political* question.” (emphasis in original)).

208 *Id.* at 403.
The fact that there must, by the nature of things, by the conditions of all political existence, always be a continuing somebody . . . to make it law for anybody, is sedulously veiled from the conscience of each American. He must believe that the Constitution came,—from Heaven or from hell, it matters not; but came,—and that we all are what we are by it, and without it would be nowhere.

What is this but a fetish?209

The work of Fisher and Hurd presaged a revolt against the founding generation. As Paul Kahn has observed, these thinkers saw the Founders “reduced from semidivine fathers to naïve children,” whose Constitution was not a work of genius but a bumbling accident.210

3. The Lieber Revival

The late nineteenth century saw a revival of the work of Francis Lieber and, in 1880, a posthumous reissue of his Hermeneutics.211 Lieber’s more radical ideas about interpretation had generated little traction among mid-century treatise writers,212 but they found a receptive audience among late-century scholars. To these Lieber revivalists, his work was a much-needed antidote to the influence of Christopher Columbus Langdell, whose influence threatened to transform the legal profession into a narrow, technocratic vocation divorced from political, social, or economic concerns213

Lieber’s interpretive framework was well-suited for an evolutionary conception of law. His view that a judge must interpret not only according to the spirit of the law but to “the genius and history of his people”214 went well beyond conventional purposivism. His rule that no law could be constitutional when it contradicted the public welfare215 suggested a jurisprudence that was less abstract and more attuned to public policy. While Lieber was no anti-constitutionalist, he had articulated a notion of non-originalist sovereignty decades before Fisher or Hurd:

209 Id. at 95 (emphasis in original).
210 Kahn, supra note 75, at 67. See also id. (discussing postwar thinkers’ “patricidal attitude”).
211 Carrington, Hammond, supra note 138 at 2143.
212 Supra text accompanying notes 148–152.
213 Carrington, Hammond, supra note 138 at 2149–50.
214 Lieber, Ethics, supra note 136, at 582.
[C]onstitutions do not make liberty; liberty is not decreed in so many words on parchment. That parchment, with its ink upon it, may be eaten by the worms . . . but if they are but the pronouncing and solemn expression of that which lives within the nation, the written words of the living essence, it is far otherwise.\textsuperscript{216}

C. \textit{Social Darwinist Constitutionalism: The Conservatives}

1. \textit{William Gardiner Hammond}

From these philosophical sources—evolution, anti-constitutionalism, and the writings of Francis Lieber—the evolutionary constitutionalists crafted a distinctly conservative constitutional ideology. Among the first was the German-educated Iowa lawyer William Gardiner Hammond, editor of the 1880 edition of Lieber’s \textit{Hermeneutics} and perhaps the leading legal historian of his day.\textsuperscript{217} Hammond supplemented Lieber’s work with a hundred-page appendix articulating the platform of this new school of American legal thought.\textsuperscript{218}

Hammond’s criticism of the plain meaning school anticipated the one Hurd would make a year later. He described Story’s \textit{Commentaries} and Tucker’s edition of Blackstone as typical of American legal treatises that purported to interpret law without inquiring into the rationale behind it.\textsuperscript{219} In his view, the work of Savigny had put to rest the notion that a judge could only consult extratextual sources in case of ambiguity.\textsuperscript{220}

Following Lieber, Hammond called for judges to have the discretion to apply law flexibly to accord with changing human behavior.\textsuperscript{221} This discretion was itself a product of evolution:

\textsuperscript{216} Id. at 179.

\textsuperscript{217} Carrington, \textit{Hammond, supra} note 138 at 2143.

\textsuperscript{218} See generally William Gardiner Hammond, Appendix, \textit{LIEBER, HERMENEUTICS, supra} note 138.

\textsuperscript{219} Id. at 306 (emphasis in original). In my view, Hammond misread Story, whose theory was indeed based on a careful—if not fully disclosed—consideration of the rationale underlying the Constitution. \textit{See supra} text accompanying note 125.

\textsuperscript{220} Id. at 243 (quoting an uncited passage by C.G. Bruns) (“It is a gross mistake to suppose that the words alone compose the law, and that the meaning or spirit—the more ideal elements—can only be appealed to when the words become ambiguous. . . . Savigny has successfully refuted this view”).

\textsuperscript{221} Id. at 284.
Man begins with narrow, strict, technical rules, formal language, arbitrary definitions; and it is only by centuries of labor that he gradually learns to dispense with them, as clumsy tools, to use abstract ideas with some degree of freedom . . . and to form . . . judgments that will comment themselves at once to the reason and conscience of the community.\footnote{Id. at 292.}

To Hammond, a dismissive view of the text was permissible because the real Constitution—the one that mattered—was not even written down:

No truth can be clearer to the student of history and law than that a written constitution of any value always presupposes the existence of an unwritten one. . . . [T]he constitution as an \textit{objective fact} must exist, before the constitution as an \textit{instrument of evidence} can have any value. The worthlessness of written constitutions that have not unwritten ones beneath and behind them, is one of the most frequently recurring lessons of the nineteenth century."\footnote{Id. at 308 (emphasis in original). \textit{See also id. at 309 (“That constitutional government . . . existed in England and America long before the first reduction of the constitution of any state to writing, is too familiar a matter of history to be proved here.”); id. at 319 (stating that judicial precedent was evidence of the unwritten law).}

And what powers did this unwritten Constitution have? In the spirit of Spencer and Maine, Hammond asserted that it protected economic rights—even, he suggested, to the extent of contradicting the Fourteenth Amendment. \textquotedblright[A] change of the written constitution,\textquotedblright he wrote, \textquotedblrightdoes not abrogate rights of property.\textquotedblright\footnote{Id. at 310.}

The conservative school of evolutionary constitutionalism would consistently embrace the views that Hammond articulated: an evolving, unwritten Constitution; disregard for the intent of the Framers; the free use of extratextual sources freely; extensive judicial review; and a fervent protection of economic rights.

2. \textit{Francis Wharton}

As Stephen Siegel has discussed,\footnote{\textit{See generally Stephen A. Siegel, Francis Wharton’s Orthodoxy: God, Historical Jurisprudence, and Classical Legal Thought, 46 AM. J. LEGAL HIST. 422 (2004) (hereinafter \textit{Wharton}).}} Francis Wharton reflected these views in his 1884 \textit{Commentaries on Law}. Wharton took a Christian view of the work of Burke, Savigny, and Spencer;\footnote{KAHN, supra note 75, at 82.} an Episcopal priest,\footnote{Id. at 292.} he believed that the evolution of
society and law was not merely natural but was part of God’s plan. Wharton embraced the view that law was determined not by original intention but the will of the living sovereign, stating that “no laws that conflict with such conscience, or do not respond to such needs, are operative.”

But he was no majoritarian positivist. Following the German model, he did not see law so much as a conscious, considered choice but as “the instinctive utterance of the people,” a set of “emanations rather than efforts,” a product of an unconscious “sense of right,” the “silent and spontaneous evolution of the nation . . . adapting itself to the conditions in which in each epoch it is placed.”

Nor did Wharton trust elected representatives to convey the substance of this evolving law. “[T]he unconscious tendencies of a Christian nation,” he wrote, “are more wise and healthy than the conscious policy of its legislators or rulers, or even of its own component members meeting for popular deliberation.” He viewed the Framers with similar suspicion, praising them only for giving “substantial expression” to the needs of the nation. For Wharton, only judges could properly articulate the needs and character of the people. Invoking a geologic simile, he saw common law jurisprudence as

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227 Rabban, supra note 108, at 569.
228 Siegel, Wharton, supra note 225 at 432.
229 FRANCIS WHARTON, COMMENTARIES ON LAW 56 (1884). See also id. at 85–86 (criticizing Blackstone’s static view of the Constitution).
230 Id. at 433 (describing the words of the Preamble to the Constitution).
231 Id. at iii.
232 Id. at 99.
233 Id. at iii-iv.
234 Id. at 61. See also id. at 93 (“[T]o Mr. Spencer, the law of a nation is the product of custom flowing from and through prior generations, its quality and its course modified by their distinctive characteristics”).
235 WHARTON, supra note 229, at 410 (“The constitution was evolved in a large measure unconsciously from the conditions in which the community was placed; and it by no means follows, because the formal framers of the constitution succeeded in giving substantial expression to the national conscience and needs, that what they said is equally authoritative with what they did and with what caused their action.”).
236 KAHN, supra note 75, at 86. See also Siegel, Wharton, supra note 229 at 431 (describing Wharton’s vision of law as an evolutionary process guided by judicial precedent).
237 See id. at 427 (stating that Wharton was a student of geology).
a glacier which is congealed and yet flows. . . . [I]t forms a solid and consistent structure; it incorporates in its volume whatever rights belong to the community . . . yet still it moves on, and not only moves but expands. . . . It moves in complex sympathy with the conscience and genius of the people from whom it emanates. Spontaneously and instinctively there appears a redress for every wrong, and a retribution for every injury.\textsuperscript{238}

This disregard for the mechanics of representative government provided a solid basis for Wharton to provide a capitalist revision of the Fourteenth Amendment. Wharton, a defender of laissez-faire economics,\textsuperscript{239} asserted that the amendment was not a menace but rather a bulwark against unwelcome regulation of commerce.\textsuperscript{240} This was to be the true, lasting purpose of the amendment, regardless of the racial concerns that underlay its passage\textsuperscript{241}:

\textit{[T]he provisions contained in these amendments, bearing distinctively on the negro race, are comparatively ephemeral in their character, while the clause before us is likely to be permanent, and to permeate the whole business system of the Union. Almost all the adjudications in respect to the amendment have, heretofore, related to negro rights. But these are now finally settled.]}\textsuperscript{242}

3. Christopher Tiedeman

Christopher Tiedeman, author of the tellingly titled \textit{The Unwritten Constitution}, was the best known and most extensively studied of the American evolutionary constitutionalists. While he was by no means the school’s founder,\textsuperscript{243} he arguably introduced Social Darwinism to a larger audience of judges than that of Spencer himself.\textsuperscript{244}

\textsuperscript{238} \textit{Wharton}, supra note 229, at 99.
\textsuperscript{239} \textit{Siegel, Wharton, supra} note 225, at 424.
\textsuperscript{240} \textit{Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379, 396 (1988).}
\textsuperscript{241} \textit{Id.} at 396.
\textsuperscript{242} \textit{Wharton, supra note} 229 at 681.
\textsuperscript{243} \textit{But see} \textit{Kahn, supra} note 75, at 77–78 (crediting Tiedeman as the movement’s leader).
\textsuperscript{244} \textit{David E. Bernstein, Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism, 92 Geo. L.J. 1, 9 n. 21 (2003).}
Like Wharton, Tiedeman perceived the Due Process Clause of the Fifth and Fourteenth Amendments as protecting economic interests from government regulation. But he added yet another layer of *laissez-faire* protection—a presumption of the unconstitutionality of state police power legislation.

Wherever by reasonable construction the constitutional limitation can be made to avoid an unrighteous exercise of police power, that construction will be upheld, notwithstanding the strict letter of the constitution does not prohibit the exercise of such a power. The unwritten law of this country is in the main against the exercise of police power.]²⁴⁶

Tiedeman also surpassed his predecessors in invoking the nation’s supposed racial and cultural heritage: “[T]he English Constitution was not the conscious and voluntary creation of the English people . . . it was an evolution from the simple political principles and formulae of the Teutonic race[.]”²⁴⁷ Those principles and formulae provided the two countries with similar political templates: “The unwritten constitution of the United States, within the broad limitations of the written Constitution, is just as flexible, and yields just as readily to the mutations of public opinion as the unwritten constitution of Great Britain[.]”²⁴⁸

But Tiedeman’s views on constitutional interpretation were fully continuous with those of Hammond and Wharton. In his view, constitutional authority rested in the conscience of the living, sovereign lawgiver,²⁴⁹ but it was the job of judges, not legislators, to make such determinations.²⁵⁰ He warned against revering the founders or treating the Constitution as a “popular idol.”²⁵¹ He encouraged the free

²⁴⁵ CHRISTOPHER G. TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 11 (1886) (quoting with approval Bertholf v. Reilly, 74 N.Y. 509 (1878) (holding that a state liquor regulation violated the due process clause of the New York constitution)) (hailing the due process clause as “‘the main guaranty of private rights against unjust legislation.’”).

²⁴⁶ Id. at 10.

²⁴⁷ TIEDEMAN, UNWRITTEN, supra note 178, at 17.

²⁴⁸ Id. at 43.

²⁴⁹ Id. at 153 (1890) (stating that this notion was consistent with the views of Justice Marshall). See also id. at 151 (stating that a judge “need not concern himself so much with the intention of the framers of the Constitution or a statute” but instead should “find out what the possessors of political power now mean by the written word”).

²⁵⁰ Siegel, Historism, supra note 99, at 1528, 1537.

²⁵¹ TIEDEMAN, UNWRITTEN, supra note 178, at 21. See also id. (“It is the complete harmony of its principles with the political evolution of the nation, which justly challenges our admiration, and
use of extratextual sources\textsuperscript{252} and viewed textual adherence as a relic of “earlier stages of development of a system of jurisprudence,” when the written word is held in “reverential awe.”\textsuperscript{253} He drew heavily on Lieber’s ideas, particularly the idea that a law was unconstitutional when it conflicted with a people’s “prevalent sense of right.”\textsuperscript{254} And, like Wharton, he viewed the Constitution’s primary role as promoting commerce, not preventing oppression. “I do not think,” he wrote, “there can be much doubt that the danger of official tyranny has been successfully dissipated in the American constitutional system.”\textsuperscript{255}

After Tiedeman, treatise writers continued to express this conservative, social Darwinist view of the Constitution through the end of the century. Francis Newton Thorpe discussed the school of thought in starkly economic terms in his 1898 book \textit{A Constitutional History of the American People}. While Tiedeman’s economic conservatism was based on an idealized view of the economic activity of small-scale property owners,\textsuperscript{256} Thorpe unabashedly celebrated the Constitution as a tool to not the political acumen of the convention which promulgated it.”); \textit{id.} at 153 (The fallacy in interpretation of laws is the result of holding on to a rule, after a change of circumstances has confused its meaning or made its application misleading; and its retention, after it has ceased to be true, is due to the general acceptance of the groundless doctrine of the social contract. Under this doctrine, as well as under the doctrine of the divine right of kings, the popular conception of law was . . . that it emanated from some power above and beyond us, from God in the one case, and from our ancestors in the other case.”); Parker, \textit{supra} note 134, at 511 (writing that Tiedeman displayed a “refreshingly cavalier attitude toward the integrity of textual language”).

\textsuperscript{252} TIEDEMAN, UNWRITTEN, \textit{supra} note 178, at 147-48 (1890) (“[E]very fact or circumstance, surrounding the lawgiver, when the law was promulgated, is required by our rules of interpretation to be inquired into; so that the cardinal rule of interpretation of laws may be said to be, that the intention of the lawgiver, when the law was enacted, must prevail.”).

\textsuperscript{253} \textit{id.} at 145.

\textsuperscript{254} \textit{id.} at 149. \textit{See also id.} at 149 n. 1 (discussing Hammond’s explications of Lieber’s interpretive rules).

\textsuperscript{255} \textit{id.} at 161.

\textsuperscript{256} Louise A. Halper, \textit{Christopher G. Tiedeman, ‘Laissez-Faire Constitutionalism’ and the Dilemmas of Small-Scale Property in the Gilded Age}, 51 \textit{Ohio St. L.J.} 1349, 1384 (1990) (stating that Tiedeman’s preferred model of property and enterprise was not the large modern corporation but the small-scale freeholder). \textit{See also James W. Ely, Jr., The Protection of Contractual Rights: A Tale of Two Constitutional Provisions}, 1 \textit{N.Y.U. J. L. \\& Liberty} 370, 398 (2005) (stating that Tiedeman’s “intense dislike of corporate privilege stood at odds with their dedication to open competition in a free market.”).
promote industrial growth. “The industrial process has been co-ordinated with the civil,” he wrote, “and democracy in America is the result.”

But Thorpe was effectively bringing up the rear of his conservative constitutional movement. The weaknesses of Social Darwinism as a legal theory became apparent as soon as it moved from the treatise to the courtroom. Social Darwinist constitutionalism re-legitimated the role of judges, but it gave judges little reason to protect constitutional rights. Its lack of regard for the negative effects of commercial activity revealed the fundamental weakness of the Spencerian idea: the assumption that evolution by natural selection was an inherent good and that government interference was unnatural and dangerous. After 1900, evolutionary constitutional jurisprudence would head in a distinctively progressive direction.

D. Reform Darwinist Constitutionalism: The Progressives

While the focus of this article is the nineteenth century, no treatment of evolutionary constitutional thought can end with the Social Darwinists. A new school, the reform Darwinists, adapted evolutionary logic to progressive ends in the early twentieth century. These thinkers, notably the administrative law scholar Frank Johnson Goodnow and President-to-be Woodrow Wilson—abandoned the

257 FRANCIS NEWTON THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1 (1898). See also id. at 7 (stating that “virtue in a democracy lies close to industry”); id. at 47 (praising American “social efficiency” and the increasingly economic orientation of the law).

258 Siegel, Lochner, supra note 181, at 100.

259 Id. at 76.

260 Hovenkamp, Evolutionary, supra note 189, at 669 (quoting HERBERT SPENCER, SOCIAL STATICS 208 (1851)) (“The most fundamental right for Spencer was the ‘right to be free to ignore the State.’”).

261 Id. at 671.

262 Id. at 671; Peebles, supra note 175, at 65.

263 FRANK JOHNSON GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 6 (1911) (“Constitutions, which are practically unamendable, should be considered rather as statements of general principles whose detailed application should take account of changing conditions, and should be so interpreted by judicial decisions as to be susceptible of a continuous and uninterrupted development.”); Mark Fenster, The Birth of a “Logical System”: Thurman Arnold and the Making of Modern Administrative Law 84 OR. L. REV. 69, 77 (2005) (stating that Goodnow was the first professor to teach a law school course in administrative law).

264 WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 158 (1908) (“The Constitution cannot be regarded as a mere legal document, to be read as a will or a
social Darwinist aversion to interfering with the supposed natural course of evolution. Drawing on the pragmatism of John Dewey, the sociological jurisprudence of Roscoe Pound, and the administrative law work of Ernst Freund, this group hailed the human ability to solve social problems as itself a valuable product of evolution. In their view, it should not be suppressed but should be used to structure and even accelerate evolution of society.

In legal terms, this meant deciding constitutional questions not with regard to the historical values of a race or a nation but according to the principles and needs of the current generation. And it meant a shift from the social Darwinists’ expansive view of judicial power to a narrow, restricted one. Reform Darwinists applied the teachings of James Bradley Thayer, whose deferential, majoritarian approach to judicial review provided the basis for what we know as rational basis review. Thayer opposed courts’ invocation of property rights to render legislation unconstitutional and consistently defended legislative exercise of the police power.

contract would be. it must . . . be a vehicle of life. As the life of the nation changes so must the interpretation of the document which contains it change . . . determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself.”). See also Eric R. Claeys, Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts, 21 CONST. COMMENT 405, 409 (2004) (stating that Goodnow shared with Wilson an interest in an “independent and centralized national bureaucracy”).

265 Hovenkamp, Evolutionary, supra note 189, at 671.

266 Peebles, supra note 175, at 77.

267 Hovenkamp, Evolutionary, supra note 189, at 678 (stating that Pound proposed to base constitutional rights not on metaphysical or natural law propositions but on scientifically verifiable public policy claims).

268 Fenster, supra note 263, at 77 (stating that Freund called for increased governmental reliance on disinterested experts and the creation of a new field of administrative law to enable more effective regulation of economic activity).

269 Hovenkamp, Evolutionary, supra note 189, at 671.

270 Peebles, supra note 175, at 77.

271 Siegel, Lochner, supra note 181, at 102.


273 Davison M. Douglas, Foreword, One Hundred Years of Judicial Review: The Thayer Centennial Symposium, 88 NW. U. L. REV. v, v (1993). See also KAHN, supra note 75, at 85 (describing Thayer’s criticism of judicial review as an accident of history and contrary to the intent of the Framers).
The reform Darwinists proposed using Thayer’s model to give legislatures and agencies the freedom they needed to implement necessary reforms—and to give the new discipline of administrative law the room it needed to grow.275

The appearance of reform Darwinism illustrates the often dialectic nature of interpretive theory. One group develops a theory to pursue ideological ends, only to have that theory appropriated by one who would use it for entirely different objectives. The political content changes, but the theoretical form remains the same. In its deference to administrative and legislative decisions, the progressive school was a return to Story and Cooley. But because it maintained the evolutionary logic and the anti-originalism of its conservative predecessor, it remained essentially anti-purposivist—and anti-textualist.

CONCLUSION

This article has provided a history and taxonomy of the major theories of constitutional interpretation in the nineteenth century. By century’s end, courts could choose any of three broad approaches to the text. They could apply the ageing Story model, following what they saw as the Constitution’s plain meaning when considered from a nationalist, purposivist perspective.276 They could abandon the plain meaning rule and turn to alternative sources to determine a clause’s purpose and meaning, even to the extent of contradicting the text. Or they could dismiss both the text and any evidence of original meaning, looking instead to his conception of the character of the country or the current exigencies of government.

Of course, a judge would probably not have perceived this orderly menu I have described. In practice, judges are eclectics. They rely on a variety of schools of thought, often discovered indirectly and filtered through their own ideological and philosophical conceptions. But an understanding of the broad trends in constitutional interpretation enables a better understanding of interpretation in practice. It explains why a mid-century court might insist it was following the plain


275 See ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS V (1904) (stating that the development of administrative law had to be largely “constructive,” given the newness of the field.); W.G. Hastings, The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State, 39 PROC. AM. PHILO. SOC’Y 359 (1900) (conceding that the police power was a “fiction” defined by custom, not the Constitution).

276 The model may have been generally abandoned in new treatises after 1868, but it continued to appear in updated editions and reprints of the leading works of the school. See e.g. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (7th ed. 1903).
meaning of the Constitution when it presumed the constitutionality of an expansive view of federal power. Or why a late-century court could have ignored the plain meaning rule and made ample use of extratextual sources that indicated a clause’s purpose. Or why the *Lochner* Court reasoned that the Constitution protected the liberty of contract.

The most striking observation to be drawn from this history is that today’s purposivism, far from being a twentieth-century oddity, fits within an intentionalist and purposivist tradition dating at least to Blackstone and continuing through the nineteenth century. The deeply rooted intentionalism of the era prohibits any deep similarity with textualism, which resembles plain meaning purposivism only in its careful, rule-based textual analysis.

A second observation we can make is that, for a judge comparing the three approaches, the two purposivist approaches were the conservative choices, reflecting a far greater respect for both original intent and text than evolutionary constitutionalism. The purposivists were intentionalists and, in at least broad terms, originalists. They looked beyond the text for indicia of intent, but, unlike their evolutionary successors, never suggested dispensing with it. Evolutionary constitutionalism, by contrast, pushed the outer bounds of interpretation and suggested ignoring text and intent altogether.

And then there is the theory that is absent from this history: textualism. If the work of treatise writers is any indication, there was little, if any, currency to the proposition that we are to read the Constitution with an isolating, decontextualized focus on its text. This suggests that—at least with regard to constitutional interpretation—it is textualism and not purposivism that is a twentieth century creation.

This does not mean that, on the merits, textualism is wrong or purposivism right. The historical predominance and relative conservatism of purposivism in the nineteenth century cannot determine our choices today. It does, however, teach us not to think of contemporary textualism as a renaissance. It is not the default choice or even the conservative one but rather a novel and bold departure from a well-established purposivist tradition. This awareness is particularly relevant today as our interpretive community faces the prospect of a new textualist consensus.