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THE LIMITS OF LIEBER

Lawrence Lessig*

Texts are transportable. They move. Because written, they are carried. Because carried, they are read—in different places and at different times. Nothing (save the loss of the original language or the original text) can stop this semiotic peripateticism. If you write it, it will roam.

What accompanies these roaming texts? What gets carried with them? We might think at first—meaning. Texts make meaning; if they carry anything with them, then it must be meaning that they carry. "Vote Republican," uttered in 1800, had a meaning; the same text, "Vote Republican," uttered in 1995, has a meaning. Say it now, just as Jefferson might have said it then, and it will have a meaning, or serve a function, or have an effect in 1995, just as it had a meaning, or served a function, or had an effect in 1800.

The problem, of course, is that the meaning, or function, or effect (pick one) that "Vote Republican" has in 1995 is a different meaning, or function, or effect from what it had in 1800. A text may well carry a meaning, but it does not necessarily carry the same meaning. Whether it carries the same meaning is contingent—happenstance—dependent upon the context of understandings within which the text finds itself. If today, for example, Jason says "I love you," and tomorrow Jason says "I love you," there is no doubt in some sense that Jason has said the same thing. But whether what he has said has the same meaning depends upon something about the two contexts—at a minimum, whether it is the same person to whom these two statements are made.

Whether two texts (one following the other) have the same meaning is a question of fidelity. When, or under what conditions, two texts (one following the other) can have the same meaning is a question of fidelity theory. Both questions theorists of plain meaning obscure.1 In insisting upon the meaning that a text contingently

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1 For a discussion of plain meaning theorists, see William N. Eskridge, Jr., Dynamic Statutory Interpretation 38-41 (1994). Criticisms of plain meaning theories are well known:

The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage... to which lip service has on occasion been given.

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has, plain meaning theorists avoid any inquiry into whether the meaning that a text has is the meaning that it had. Overwhelming us with the force of what should be plain, they herd us away from puzzles that may lie just beyond the plain. They obscure the contextuality of meaning, acting as if meaning were carried in words.²

I want to suggest that this obscurantism of textualism may have a point—or better, that it may reflect a certain interpretive maturity, hard perhaps for many of us to accept, but with a force that we should at least understand. There is what we might call an immature textualism—a textualism that just ignores the context in meaning, as if meaning were carried in the words. But I want to argue that there is also a mature textualism, in constitutional as well as statutory interpretation, and that understanding its source tells us something important about the interpretive context within which we now live. For reasons we may well not be able to escape, textualism, rather than fidelity, may be the best we can claim.³

Lieber's text⁴—itself a roaming text, first published in the early nineteenth century, then the late nineteenth century, and now here—will help make this point in two ways, first by displaying a bit more the contours of this context that this contextuality reveals, and second, by failing to solve what will be for us the most damning feature of our present interpretive context. The second point must remain for the moment obscure—focus now on the first.

Imagine a bright, somewhat young, lawyer picked up Lieber's text, and, without realizing who Lieber was or when he wrote, started reading the book. The idea is not wholly implausible: the work has a trendy title (or at least it does before the comma).

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³ For an introductory discussion of this skepticism, see Lawrence Lessig, Fidelity in Translation, 71 TEX. L. REV. 1165, 1267-68 (1993). However, the views I express in this essay carry that skepticism much further.

⁴ FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837), republished in 16 CARDOZO L. REV. 1883 (1995). [In subsequent citations, the page number as it appears in the republication will be given in brackets following the page citation to the third edition.]
"Lieber" is a sufficiently obscure name, and relatively short books are always a pleasure. What would this lawyer think?

Three features of Lieber's work would strike this lawyer as quite odd. The first is its breadth. Here is a work on constitutional and statutory interpretation that draws for its support upon legal materials outside the American legal tradition. It speaks as if German constitutionalism, English constitutionalism, or Spanish constitutionalism mattered to American constitutional law. Indeed, it speaks of these sources more often than it speaks of American sources, as if the experiences of other nations could possibly teach us something about our own, and as if the experiences of these other nations could actually be more important than our own.

A second oddness is related. This is the text's somewhat quaint formalism. The trendy title notwithstanding, the book presents a system of rules designed to aid constitutional and statutory interpretation. To us, such rules appear almost silly in their simplicity or generality. We could not imagine actually using such a system to help us read constitutional texts, or, more directly, we could not imagine teaching our students such a system as anything other than history. To us, it seems obvious that any such system of rules cannot guide the interpretive process. To us, they function (if they function at all) to justify results reached by other means.

The third odd feature of Lieber's work, however, is that which would strike this lawyer as most intriguing, useful, and perhaps as something interestingly new. This third feature, to adopt the language of Lieber's time, is its constructive theorem: that always, no matter the care in drafting, any system of interpretation must acknowledge the gaps in interpretation, that these gaps are inherent in writing and reading, and that a system of interpretation must learn how to deal with the unavoidable insufficiency of the text.
As Lieber shows, as plainly as any contemporary writer has, there is an unavoidably constructive element to any interpretive task, where the reader must add to, or fill in, the text he reads, and any system of interpretation must account for this constructive pact.

Now, to say that these three features of Lieber's text would strike this lawyer as odd is not, of course, to say that these three features of Lieber's text are odd. Indeed, the opposite is the point. That these features seem odd says as much about us as about Lieber. For the oddnesses in him simply reveal the contours of our interpretive context, and, by working back from these oddnesses, we learn something about this context.

Begin with the first feature—the richness of the authority from which Lieber drew. Though not a native, neither was Lieber an alien to American legal culture. While he had no formal training in any nation's law, his use of comparative material suggests (a suggestion confirmed by the reception the book received) that it was relevant and important to look to the experience of others to understand and interpret our Constitution. There was, that is, something to be learned from comparisons, and it was through these comparisons that Lieber sought to teach.

This worldliness apparently is not uncommon in constitutional rhetorics at their birth. It marks a way for a constitution to find itself—a way of identifying what is different about a constitution, but more importantly, a way also of identifying a constitution's strength by locating its lineage, or pedigree. It is a first stage in constructing a constitutional regime—to identify how it connects and differs from other regimes nearby and to draw upon these other regimes to understand the nature, or path, of one's own.

But if this was who we were at our birth, then we have today clearly moved beyond it. And all the worse that we have. Today, the most successful American constitutional law professors can function perfectly well knowing absolutely nothing about the most elementary features of other constitutional regimes, while the sim-

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9 Lieber's use of foreign material is scattered throughout the text. See generally LIEBER, supra note 4. Even more interesting are the extensive references, without embarrassment, by William G. Hammond, the text's editor, to such material. See William G. Hammond, Preface to the Third Edition of LIEBER, supra note 4, at iii-v [at 1887-89].

10 It is, however, the experience of both the German and French constitutional regimes in their postwar life. See JOHN BELL, FRENCH CONSTITUTIONAL LAW (1992); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE (1992).
pleist American lawyer realizes that it is just inappropriate to cite discussions of similar questions within other constitutional regimes. If a lawyer offered the German Constitutional Court's resolution of the problems of delegation as a model for a judge, it is not just that he or she would have made a tactical mistake; it is instead that he or she would have revealed a basic obtuseness about the current constitutional culture—like smoking in an airplane, or burping at the dinner table. For us (now), ever the exceptionalists, other constitutional regimes are always other; they have no place in constitutional argument or constitutional reasoning.

That this is so is, of course, absurd. Certainly, or at least pragmatically, how Germany or France may deal with at least some problems—say, for example, the administrative state—must be more valuable than how James Madison or Alexander Hamilton might have dealt with the same. Madison and Hamilton may have been smart guys, but to us and to this world, they are aliens. They lived, and thought, and wrote about a world wholly other than our own. And yet it is perfectly respectable to be a constitutional law professor who only really knows what Madison and Hamilton would have said about a problem, and nothing about what, for example, Europeans would think about the same problem.

My point is not that we should change: ought implies can, and I am not sure that we can. My point instead is to isolate what about us makes these strange features true. Lieber wrote in a world where cross-national constitutional experience was relevant and salient authority. It is the same world that is inhabited by most young constitutions today, but it is alien to our own. Why?

A clue may be found in the second oddness noted above—that Lieber's style, and the substance of his argument, is oddly formal or mechanical. Lieber gives us a fairly rigorous scheme. Texts have meaning—one and only one true meaning. This is the meaning the author intended, and the interpreter is to find that one

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11 And an absurdity not reciprocated. Other constitutional regimes routinely cite United States Supreme Court decisions. See, e.g., Currie, supra note 10, at 175 n.5 (discussing example of the Lüth case, 7 BVerfGE 198, 208 (1958) (F.R.G.), where the German Constitutional Court quoted Justice Cardozo in English, in Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

12 A practice itself—the citing of old authority—that Lieber would not have liked. See Lieber, supra note 4, at 91-92, 186-88, 226 [at 1954-55, 2021-23, 2047].

13 See, e.g., id. at 74 [at 1943] (“No sentence, or form of words, can have more than one 'true sense,' and this is the only one we have to inquire for.”); see also id. at 9, 11 [at 1898, 1900].
meaning that the author intended.\textsuperscript{14} In this process of finding meaning, the interpreter engages either in acts of interpretation, or, where the text gives out, in acts of construction. With either, the interpreter is guided by a catalog of rules and principles that structure this process of reading to help the interpreter discover the author's intent.

What is striking here is the formalism with which Lieber's arguments move, where, by "formalism," I mean simply his confidence that these categories or divisions are in some sense self-interpreting and would guide the user in application.\textsuperscript{15} It is a formalism that we might see in civil law traditions or in France today.\textsuperscript{16} It proceeds as if blind to a world of trouble with each of the terms that it employs, or with an enterprise that proceeds as if these terms are self-defining. And it strikes us as odd because none today would rely upon such stability in meaning, or at least rely upon such stability when speaking of subjects like this.

But it is not as if we don't have our own formalisms. Think for a second about the formalisms in our acceptance of juries, whether in complex patent cases, or in simple contract disputes, or about the formalisms in free speech law,\textsuperscript{17} as it grapples with the extraordinarily difficult questions of hate speech and pornography regulation.\textsuperscript{18} Difficulties notwithstanding, our First Amendment simply churns through these questions of competing values, yielding quite mechanically a formulaic result to deal with these conflicts of pragmatics (juries) and of principle (First Amendment). In the latter case, there is no space to consider the special questions raised by the values of equal citizenship\textsuperscript{19} or the particular harms that

\textsuperscript{14} See id. at 80 [at 1947] ("Good faith in interpretation means . . . that we take the words fairly as they were meant.") (footnote omitted); id. at 90 [at 1954] ("The chief rules in ascertaining the meaning of doubtful words, besides the general one, just given, that we are to take the words in that meaning which we may faithfully believe their utterer attached to them . . .").

\textsuperscript{15} We get a flavor of this in Lieber's catalog of types of interpretation. See, e.g., id. at 60-62 [at 1933-34] (discussing predestined interpretation); id. at 62-64 [at 1934-35] (discussing authentic interpretation).

\textsuperscript{16} See Stone, supra note 10, at 6.


\textsuperscript{19} Amar, supra note 18, at 151-55.
pornography may cause. Instead, these complications are collapsed. For us, here, formalisms flourish. But in Lieber’s time, not.

What distinguishes this world from Lieber’s is not that his was formalistic and ours not. What distinguishes the two worlds are the different domains of formalisms. Every legal system has its formalism; the question is to map these differences and what they reveal.

Formalisms are a reflection of a certain stability, or relative uncontestedness, within a particular space in a legal culture. They tell us something about a legal culture. They reveal what, at a particular time, is relatively stable or taken for granted, and what, at a particular time, stands fundamentally contested. Lieber’s formalisms could not be our own because they reflect a kind of stability within the legal culture that we no longer enjoy. For the same reason, our formalisms would not have been his. And because stabilities are practices, rather than propositions—because they exist when a community treats them as stable and not simply because true, or because a single person asserts that they are stable—we simply could not imagine asserting or declaring the conditions under which his formalisms could flourish. Stabilities, or practices, like social meanings, or norms, require construction, and constructions require collective effort.

Interestingly, however, there is an important link between the particular formalisms that Lieber reveals and my first point about the oddness in his cross-cultural view—for these attitudes often travel together. The willingness to treat foundational categories of thought about interpretation as natural, or given, ties with a willingness to treat categories of law themselves as natural or given. The attitude that it is possible to think of a science of interpretation goes with the attitude that it is generally possible to think of a science of constitutional law. It is thus easy both to be dogmatic about structures of interpretation and open to lessons from other constitutional regimes. Stated another way, if one believes that there is a truth to be found here—in the sense, for example, of a truth about the best structure of a constitutional regime—then it is understandable that one would remain open to other perspectives as a better path to that truth.

21 Indeed, this is a point Lieber himself would make. Lieber understood well that a constitution itself depends upon this array of relative stability background to the text. See LIEBER, supra note 4, at 165-68, 171-74 [at 2008-10, 2011-13].
22 See, e.g., Jamie Kalven, Editor’s Introduction to HARRY KALVEN, JR., A WORTHY TRADITION at xi, xxxi (1988).
Lieber's formalisms have a particular role in his argument, and we should understand their place. Formalisms generally play either a constructive or a critical role in argument. A formalism is constructive when it aims to advance a given formal regime, refining or perfecting its structures. It is critical when it undermines the very structure it was meant to advance. Philosophy's favorite example of this critical role is Wittgenstein's *Tractatus*;^23^ law's best example is Wesley Hohfeld's work on rights.^24^ Both took a formal system of thought, and through an effort to complete it, revealed the very implausibility of its own foundations. Both undermined the very foundations of their formalisms.

Lieber's formalism is constructive, not critical. His aim was to formalize, perhaps canonize, a system of interpretation by clarifying and ordering what must have been an increasingly disordered collection of interpretive materials. The growing disorder is easy to understand: Lieber writes at a time when the nation has had just two score years interpreting its Constitution. In those forty years, limitations of this, as any, written normative text had become manifest. Gaps had been revealed;^25^ evolutions in meaning had been acknowledged;^26^ changed circumstances had drawn into doubt old conclusions. A written constitution, as America was coming to understand, is not a perfect vessel for carrying fundamental values across time. It was at best an index, which, in its proper context, would reveal the values, or something of the values, that the document meant to signal over time.

Lieber offered his interpretive community both a diagnosis of this increasing disorder and a partial cure. The diagnosis was an explanation of why the failings of a written constitution were in some sense inevitable; the partial cure was a regime of interpretive discipline, and an encouragement to a certain kind of interpretive excess—construction. Consider each of these in turn.

The diagnosis comes in two parts. The first is a proof that every text must be imperfect because incomplete,^27^ and that efforts
to correct this incompleteness—by adding, for example, further clarification\(^2\) or detail—is always self-defeating.\(^2\) The second is an account of the different sources of this imperfection, the most interesting of which we now call changed circumstances. I want to focus on the second argument, and, in particular, on the cure for this isolated source of disease—"construction."

As I have said, "interpretation" in Lieber's scheme is the matching of an author's intent to the facts in the world—a carrying out of instructions as applied to anticipated situations.\(^3\) "Construction" is the carrying over of an author's intent into domains unanticipated or unknown.\(^3\) While interpretation is the normal mode of reading, construction, as Lieber works to prove, is unavoidable over time.\(^3\)\(^1\) This he wants to establish as a matter of truth—it just must be the case, Lieber writes, that the interpreter

\(^{28}\) Most intriguing among the stories Lieber recounts is his account of the 1813 order by Maximilian Joseph prohibiting legal commentary by law professors in Bavaria. \textit{Id.} at 30-32 [at 1912-14].

\(^{29}\) Lieber argues that theorists, such as Jeremy Bentham, made a philosophical mistake in arguing that human language could possibly become perfect or absolutely correct. \textit{Id.} at 35-36 [at 1916-17].

\(^{30}\) \textit{Id.} at 13 [at 1901].

\(^{31}\) \textit{See, e.g., id.} at 44 [at 1921] ("Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.").

\(^{32}\) \textit{See, e.g., id.} at 45 [at 1922] ("And, without construction, written laws, in fact any laws or other texts containing rules of actions, specific or general, would, in many cases, become fearfully destructive to the best and wisest intentions, nay, frequently, produce the very opposite of what it was purposed to effect."); or again:

Construction is unavoidable. Men who use words, even with the best intent and with great care as well as skill, cannot foresee all possible complex cases, and, if they could, would be unable to provide for them, for each complex case would require its own provision and rule; relations change with the progress of time, so that, after a long lapse of time, we must give up either the letter of the law, or its intent, since both, owing to a change in circumstances, do not any longer agree.

\textit{Id.} at 110 [at 1969] (footnote omitted); and again:

The farther removed the time of the origin of any text may be from us, the more we are at times authorized or bound, as the case may be, to resort to extensive construction. For times and the relations of things change, and if the laws, etc., do not change accordingly, to effect which is rarely in the power of the construer, they must be applied according to the altered circumstances, if they shall continue to mean sense or to remain beneficial.

\textit{Id.} at 125-26 [at 1980]; \textit{see also id.} at 22-24 [at 1907-09] (cataloguing reasons for words' "ambiguous signification").
constructs because any text will be carried into contexts unanticipated. If in these contexts the interpreter fails to construct, then he has not been faithful to the intent of the authors. Indeed, by changing the text's meaning, he has expanded his own role beyond its proper bounds.

One can imagine that Lieber's proof had a certain reassuring effect both for its author and his readers, for certainly interpretation of this adolescent constitution was just beginning to show its limits. The nation had already become fundamentally different from the nation at its founding, and as the nation and, hence, the context of the Constitution changed, so, too, would the interpreter have to decide whether the text as written really reached the case at hand. Thus, Lieber offered an account of why readings of the Constitution would necessarily change over time, though remaining faithful to the framers' Constitution—indeed, in order to remain faithful to the framers' Constitution.

33 The examples Lieber uses here are extraordinarily rich. See, e.g., id. at 96 [at 1958] (An 1837 English case in which a pilotage act, passed before steamships existed, was read to include steamships); id. at 131 n.* [at 1984 n.25] (An oath clause that was expressed in pounds sterling, but read to change the value as a function of inflation); id. at 132 [at 1985] (The charter of Harvard University referring to "Christian doctrine" included Unitarianism, even though no Unitarianism existed in New England when the charter was granted); id. at 97 [at 1958-59] (The Spanish use of the word "Christian" as limited to Roman Catholic religion only, even though in the United States, the word reached more broadly).

34 See id. at 53 [at 1928] ("For, although dangerous, we cannot possibly escape it; because times, relations, things change, and cannot be foreseen by human intellect; nor is it given to any man to provide for all cases already existing, or to use language which shall leave no doubt.")

35 The limits to this interpretation led famously to a rhetoric that supported the idea of a common-law constitution. President Harrison, in his March 4, 1841 inaugural address, stated:

I believe with Mr. Madison that repeated recognitions under varied circumstances, in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications in different modes of the concurrence of the general will of the nation, . . . as affording to the President sufficient authority for his considering such disputed points as settled.

Id. at 194-95 n.* [at 2027 n.11] (quoting President Madison).

36 Interpretation and construction of laws, then, become, or may become, necessary:

On account of the character of human language, as has been shown.

On account of their ambiguity, arising either from a want of acquaintance on the part of the legislator, with the subject legislated upon, or from contradictions in the law itself.

Id. at 157 [at 2002].

37 Indeed, Lieber also explained why the need for construction grew over time. Id. at 136 [at 1988] ("The older a law, or any text containing regulations of our actions, though given long ago, the more extensive the construction must be in certain cases.").
We cannot tell from the text itself, of course, how radical such an idea was to the culture of the times. The dominance which Lieber's work quickly gained in interpretive accounts of the time suggests it was not so radical. And, indeed, we can see in other adolescent constitutions of today—the German Constitution, in particular—a relative openness to arguments that suggest why an earlier reading of the Constitution must now change because circumstances have changed. Constitutions in their early years, like bones, are more flexible and open to interpretation (I mean construction) than constitutions as they grow old. Lieber's work speaks to this youth in our own constitutional tradition.

But what we can quite confidently note is that we have lost this flexibility. We live in a moment when flexibility, evolution, or change in interpretation is presumptively suspect—when the method of construction that Lieber offers more likely opens one up to the charge that “You’re just making it up,” than the praise of fidelity. The point is not that we pass without return from one era of flexibility to another of rigidity—as if history moves in stages. The shift is more transitional or temporary—an ebb and flow rather than a march. Today, we are in an ebb of flexibility, where in vast domains of constitutional law, the most one can hope for is a tiny pin-prick of restraint in just those places where the original text and original meanings have not been lost to changed circumstances. There are exceptions—again, the First Amendment—but, again, these are exceptions.

Why have we lost this flexibility? Is it merely that we have lost Lieber's constructivist insight? Could we imagine recovering it anytime soon?

My suggestion is that our rigidity is about more than forgetting what Lieber taught, and that the flexibility Lieber enjoins is something we cannot recreate, or at least, cannot recreate just now. For Lieber's account misses what is, I want to argue, the central feature of modern American constitutional interpretation—what we might call the institutional dimension to the problem of interpretive fidelity. This feature is the focus on the capacity of a court to function as a constraint on democratic action, where capacity reflects not just the features of a court (its skill, administrative support, or spe-

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38 The editor of the 1880 edition, however, provides some indication of its acceptance. See id. at 50 n.* [at 1925 n.9].
40 See, e.g., Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (“This Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”).
cialization), but something about the interpretive context within which it must function as well. This may not have been an important problem in Lieber's own time; but, for reasons tied to the first two oddities noted above, it is the central concern of fidelity theory in constitutional law today. What Lieber teaches is true but so incomplete as an account of the problem of interpretive fidelity today as to be fundamentally misleading.

What I want to do then, in the balance of this essay, is isolate what is missing. Lieber may move us from immature textualism to a mature constructivism. However, when we then add what is missing, we will be moved back to what we might call a mature textualism—back, that is, to a rejection of construction.

What Lieber offers is this: as should be strikingly obvious, our readings of the Constitution must account for the radical change in the Constitution's context. Changed circumstances have fundamentally changed the meaning of the text as originally understood, and any attempt at a faithful reading of that original text must account for this change in context. Fidelity requires a reckoning of this change.

In my efforts to render the same point, I have suggested, following others before, that we think about this problem as a problem in translation. A translator carries a text from one context to another where, because of the difference in context (or language), she must rewrite the text to preserve the original meaning. A changed text, then, is required to accommodate a changed context if the original meaning is to be preserved.

So, too, with readings of fidelity in law. We begin with a text written in an earlier context, and we try to understand that text in that context. This is the first step. To say that we understand the text in that context is just to say that we understand how the text would have been applied in that context to various cases that we

41 See Lessig, supra note 3, at 1251-63 (discussing structural limits on practice of fidelity); see also Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 STAN. L. REV. 395, 426-42 (1995).

42 Though I doubt it. Part of what motivated the Supreme Court in McCulloch to grant Congress discretion was certainly a sense of its relative institutional capacity. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412-16 (1819). The same motivation applied in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

43 LIEBER, supra note 4, at 45 [at 1922] ("[A] very ancient charter to cases arising out of entirely and radically new relations, which have since sprung up, which cases, nevertheless, clearly belong to that province of human actions for which the charter was intended.").

44 For development of these arguments, see Lessig, supra note 3; Lessig, supra note 41; Lawrence Lessig & Cass Sunstein, The President and the Administration, 94 COLUM. L. REV. 1 (1994).
could imagine arising under the text in that context. We then carry that understanding into the current context—the second step, translating it into this context.

Take a simple example. Congress passes a statute in 1840 that purports to regulate the quantity of lettuce that farmers may raise for home consumption. Is this statute constitutional? Under the commerce clause, as developed by Marshall in *Gibbons v. Ogden,* Congress has the power to regulate interstate commerce. Thus, whether this statute is constitutional depends upon whether lettuce farming is "commerce," and if commerce, whether it is interstate commerce or commerce that affects more than one state. Assume that in 1840 neither is true—that lettuce farming is not thought to be commerce, and that home-grown lettuce, because of the diffuseness of the market, is not and does not affect interstate commerce. Under *Gibbons,* it follows that such regulation is not within the scope of Congress's commerce power. But even so, that would not mean that the regulation was without Congress's power. The Marshall Court would still ask whether regulating lettuce production was "necessary and proper" to regulating interstate commerce—now thought to be, say, the price of lettuce in interstate trade. Thus, the question would shift slightly to whether regulating this intrastate manufacturing would aid in the regulation of interstate lettuce prices.

It is completely conceivable that the answer to this question would still be no: that, in 1840, the market was so diffuse that there was no reasonable connection between the means selected and the ends sought, and that, therefore, this regulation was, in 1840, without the power of Congress.

Call this a *reading* of the Constitution. A reading occurs at a particular time and in a particular context. This reading in 1840 concludes that Congress is without power to regulate the quantity of lettuce that farmers may raise for home consumption.

Now imagine the same statute were passed in 1940. Would it be constitutional? One might think the question answered by the reading just given: in 1840, the Constitution was read (we are assuming) not to grant Congress this power. Therefore, one might think, it should follow that, absent amendment, Congress is still without this power in 1940.

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47 This notion is developed more in Lessig, *supra* note 41.
But so much certainly does not follow. What yielded the conclusion of 1840 was a text and a context. While the text may have remained the same, the context has radically changed. In 1940, cold-car transportation had been perfected; the railroads were well established; it was then possible to ship lettuce interstate in a way not really possible before. These changes in context now made it plausible that the consumption of lettuce at home actually would have an effect on interstate commerce. Thus, in 1940, the statute could well be constitutional even though in 1840 it would not.

It is cases like this that suggest to the heuristic of translation. What the translator does is try to find a reading of Congress's power in 1940 that is equivalent to Congress's power in 1840. But "equivalent" is a wonderfully ambiguous term. It could either mean do the same thing in 1940 that was done in 1840 (i.e., strike the statute down in both cases), or it could mean do the thing that yields the same meaning as the reading in 1840 (i.e., find the reading that allows the regulation of what is interstate commerce, which means, uphold the statute). What the translator fixes on is the second meaning: that with a normative text, readings should preserve the meaning of the text across time. And because meaning is a function of context, across time, readings must change. Because contexts change, changed readings may be readings of fidelity. Because contexts change, the same readings may be readings of infidelity.

This is the insight that Lieber's constructivist thesis teaches, and it is striking that it is an insight we must relearn. Despite the fact that constitutional interpretation at its birth was relatively flexible, open to Lieber-like suggestions that changed circumstances must yield changed readings, constitutional interpretation today, in places, seems plainly to have forgotten this point. Much of the rhetoric of our strongest originalists makes it sound as if fidelity in interpretation is simply doing what the framers did. And much of constitutional interpretation generally proceeds as if this one-step originalism is all that fidelity requires. There is a puzzling persistence to these one-step originalist arguments, and what Lieber gives us is a way to show that whatever the reasons are for this very strong originalism, they are not reasons of fidelity.

49 See, e.g., Lessig, supra note 3, at 1182-84.
50 For an extremely interesting, yet fully one-step originalist argument, see William Van Alstyne, The Second Amendment and the Personal Right to Arms, 1994 DUKE L.J. 1236.
Lieber thus manifests that a practice of fidelity proceeds in two steps: first, identifying (through interpretation) the application of a text in its original context; second (through construction), the carrying over (translating) of that application to the current context. But I want to argue that fidelity notwithstanding, a complete account of constitutional interpretation today must take one more step: that it is not enough to identify what fidelity in the abstract demands—one must also account for institutional constraints on a practice of fidelity. It is this third moment of this practice of interpretation that Lieber does not address, but that is for us most critical.

To see the point, return to the commerce clause example just given. In Lieber's scheme, just what kind of problem does the 1940 statute raise? Lieber discusses the Commerce Clause just once in *Hermeneutics*, and there refers to its interpretive problems as problems of construction. But in his example, the objects of regulation have changed, and it is that change that has rendered the problem a problem in construction rather than interpretation. Again, if the statute purported to regulate automobiles, then this hypothetical would raise for Lieber a problem of construction since, when the commerce clause was written, there were no automobiles.

My example, however, does not change the objects of regulation. Lettuce is lettuce is lettuce. So in Lieber's scheme, it remains a problem of interpretation, not construction. And as a problem in interpretation, its resolution seems fairly straightforward: following the translator, the interpreter applies the statute in this new context to find that the Constitution does indeed so empower Congress.

There were many judges and justices during our middle-republic (circa 1870-1917) who did not see the problem so simply. They understood that if one followed the interpretive method of Marshall, as the economy and nation became more economically and socially integrated, the extent of Congress's power would increase. But it would increase, they thought, only at the expense of other constitutional values—in particular, the values of federalism. Read in isolation, the changing economy did justify greater Congressional power; but read in the context of the Constitution's division of power, greater Congressional power simply meant an erosion of any exclusive state legislative jurisdiction. Following

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52 For a fuller exposition of some of these points, see Lessig, *supra* note 41, at 465-66.
Marshall's method yielded a local fidelity (to the scope of federal power), but at the cost of a global infidelity (to the balance of state and federal power more generally).

This imbalance led these justices to search for a way to restore an original balance. A straightforward interpretation (in Lieber's sense) of Congressional power yielded this global infidelity. They sought a method that could correct this unintended skewing of the Constitution's balance of powers.

Their method was construction. Not a clause by clause construction—in the sense Lieber describes—but a more holistic construction—one that found implied limits to the otherwise plain scope of the power clauses—so as to maintain the balance between federal and state power that the changing integration of society was rendering askew. Their technique was formalism, erecting formal and categorical tests for the limits in Congress's power. Sharp lines were drawn between "manufacturing" and "commerce," between direct and indirect effects, between intended and unintended effects—lines drawn to cut back on an ever-increasing scope of federal power.

It is plain that these tests were inconsistent with the interpretation of the power clauses rendered by Marshall. Indeed, it is plain that they were not tests derived from an interpretation of the power clauses at all. Instead, these limitations were derived from a sense of the overall balance of the Constitution, constructions drawn from a holistic reading of the document, and not from any narrow understanding of its parts. They were implied conditions, thought by these middle-republic justices to be necessary to maintain fidelity to the framers' design.

The problem that these middle-republic justices faced is, I suggest, a defining problem of modern American constitutional law. It is also a problem that Lieber's method does not directly help us resolve. The problem comes from the relationship between the meaning of individual clauses of the Constitution and the meaning of the Constitution read as a whole. If holism holds, then clauses in the Constitution are not only intended to have a particular relation to the objects they regulate, but as well a particular relation to other clauses in the Constitution. The Commerce Clause, for example, was intended (or so these middle-republic justices believed) not just to empower Congress relative to certain objects of commerce, but also to separate the domain of federal regulation from

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that of state regulation. It was to function, in this sense, like a fence—not just to define a space within which federal power could roam, but also to define a limit on federal power so as to preserve a complementary space within which state power could roam. This second purpose of the Commerce Clause, however (and again, as understood by these middle-republic justices), was nowhere in the text of the clause itself; it was instead implied from the structure of the constitutional design as a whole. And the problem with purposes implied by structure, rather than commands placed in text, is that they do not express themselves in ways that Lieber’s method, or any other ordinary interpretive method, is likely to comprehend.

Lieber’s method gives us a way to make small leaps beyond the constitutional text in the name of fidelity to an original intent. Interpretation is to carry us until the text runs out and then construction is to guide us beyond the text, to assure that similar objects are covered when changing circumstances require. But Lieber’s method gives us no way to think about this more holistic, or structural, fidelity. More fundamentally, his clause-bound method inhibits this more structural fidelity. It inhibits it because there is a presumptive validity to the results of this first step—a satisfaction if the method of interpretation has yielded a solid result, one that does not remain open to the possibility that a solid interpretation of a particular clause may be a solidly unfaithful reading of the Constitution as a whole.

One could imagine correcting this problem in Lieber’s methodology. One could imagine, that is, a recursive method that tested the first step results of interpretation against a more holistic reading of the text, and modified these first results if they conflicted with these structural values. But to suggest this solution is to point to what is a more fundamental problem with any constructive enterprise in American constitutionalism today. This is the constraint for which I said Lieber’s method has no way to account—what I called above the institutional constraints on any practice of fidelity, and what we might call the *Erie* effect.

54 The Tenth Amendment might be the textual support needed, but, of course, its language is not unambiguous.

55 See Lieber, supra note 4, at 129 [at 1983] (“The result of our considerations then will be, that we ought to adhere to close construction, as long as we can; but we must not forget that the ‘letter killeth,’ and an enlarged construction becomes necessary when the relations of things enlarge or change.”).

56 Lieber may have had less of a need to consider these institutional constraints because he, at times, made construction appear to be, as the “declaration theory” of the common law would later call it, merely a reflection of preexisting norms in society. Constructions then are copies, rather than works of original art. See id. at 110-11 [at 1969].
We can understand these constraints as follows: Divide constitutional interpretation into that part that points to text and that part that does not. Interpretation of the first kind says, for example, the plaintiff loses because the Constitution says X. Interpretation of the second kind says, for example again, plaintiff loses because of Y, where Y is any argument except one that points to the Constitution’s text. Examples of X-like arguments depend upon the text (seemingly) plainly supporting the argument advanced. Examples of Y-like range from the obvious to the obscure: for example, where the Court points to principles of immunity implied in our constitutional structure, or cases where the Court points to principles of liberty limiting the scope of government’s power.

Obviously, given everything said so far, interpretation that points to the text of the Constitution is not necessarily more faithful than interpretation that does not. Fidelity does not track text alone. As contexts change, text can be rendered unfaithful to the framers’ design. Likewise, interpretation that ignores the text and points somewhere else is not always less faithful than interpretation that does not. Again, as contexts change, and as texts are rendered unfaithful, fidelity might require readings that are contrary to text. My point in dividing interpretation into these two kinds is not to suggest that one is, in the abstract, more faithful to an author’s intent than the other. It is, instead, to comment on an institutional feature that distinguishes the two.

One kind of interpretation is institutionally easier to make, or assert, than the other—or more precisely, one is institutionally easier for American courts to assert just now. All things being equal, it is easier for a court to point to a text to justify a particular conclusion than it is for a court to point to something else to justify the same conclusion, especially where the conclusion so justified is contrary to the text. This is the fate of our present legal culture—that arguments relying on text have a normative push far far greater

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57 The *Erie* effect refers to a changed reading brought about by a change in an interpretive context that weakens or undermines the institutional support grounding an earlier interpretation. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), is such a case, resting, as the doctrine of federal common-law making came to be understood, upon the notion that the common law is found, not made. When that notion changed (as *Erie* essentially held), then this forced a reallocation of institutional responsibility (from federal courts to state courts). The old view depended upon this earlier understanding of the common law; when this understanding changed, so, too, did institutional allocations have to change. See Lessig, *supra* note 41, at 426-38.
than equally valid (from the perspective of fidelity) arguments based on something else, even though textual arguments are no more inherently tied to fidelity than nontextual arguments. This difference, and the gap it creates, is critical to modern American constitutional theory. Any interpretive theory, I suggest, must account for this institutional constraint if it is to be an interpretive theory within our constitutional tradition.

There is then a matrix of possible interpretive positions. An argument could be text-based, or non-text-based; and it could be an argument of fidelity, or not an argument of fidelity. The possibilities look like this:

<table>
<thead>
<tr>
<th></th>
<th>Text</th>
<th>Non-Text</th>
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<tbody>
<tr>
<td>Fidelity</td>
<td>[1]</td>
<td>[2]</td>
</tr>
<tr>
<td>Non-Fidelity</td>
<td>[3]</td>
<td>[4]</td>
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In the framing context, with a well-crafted text, arguments based on text will likely also be arguments of fidelity (box [1]). Likewise, in the framing context, against the background of a well-crafted text, arguments based outside the text are likely arguments of infidelity (box [4]). But over time, as contexts change, both for the reasons that Lieber suggests and for others, this simple linkage between text and fidelity will come apart. As contexts change, it will become necessary, if fidelity is to be maintained, to move from a box [1] reading to a box [2] reading. To make arguments of fidelity, that is, it will become necessary to rely upon non-text-based arguments.

Whether a legal culture can support arguments of the type in box [2], however, is not a given. It all depends. In the American legal culture, as we have become more and more removed from our origins and as what fidelity means has become more and more contested, it has become institutionally more difficult to make arguments in box [2] or to sustain arguments in box [2] that have been made before. It has, that is, become far easier institutionally to move to box [3]. As what fidelity demands becomes contested, interpreters find it easier to focus on what is a second best solution to the problem of fidelity—the text. As this trend continues, it may indeed become institutionally impossible for a court to maintain a box [2] solution, fidelity notwithstanding, thereby forcing the court back to a box [3] reading.

Some box [3] readings, then, can be understood as the product of an institutional constraint upon the interpreter's search for fidel-
ity. These, we could say, are justified infidelities, where the justification here is a form of necessity. Likewise, of course, some box [3] interpretations have no such justification. If it were possible, institutionally, to be in box [2], but nonetheless the interpreter stayed in box [3], we could understand that move as an act of infidelity, just as the interpreter who selects a box [4] solution is selecting a solution of infidelity. But the point to realize is that often, at least for us, box [3] solutions are the most an institution can do, a confession of weakness in the face of contested understandings of box [2].

The shift of the New Deal is a prime example of this move to box [3]. As I have described, we can understand the interpretive strategy of the middle-republic justices as an effort to locate themselves in box [2]. They asserted, on grounds of fidelity, that it was necessary to imply limitations on Congress's powers in order to preserve the original balance between state and federal power. When these arguments were first made, they were made in a legal culture that would support them—in a culture where the dominant modes of legal thought supported the relatively strong federalism interest, where there were not universally compelling reasons to deviate from that balance, and where the values expressed in maintaining that balance were themselves relatively uncontested. These same ideas supported other areas of implied limitations on governmental power as well—Lochner v. New York being the primary example.

Slowly, however, for reasons beyond the scope of this essay, the legal culture supporting this old way of thinking began to erode. The ideas that supported these implied limitations on federal power themselves became contested. And finally the Depression devastated remaining uncontested ways of thinking—laissez-faire, rugged-individualism, federalism were all ideas drawn fundamentally into doubt by the destruction that the Depression brought.

As President Roosevelt struggled to combat the problems the Depression left, with an ever-expanding scope of federal intervention, the Court resisted, at first, again relying upon these box [2] arguments. But to make a box [2] argument stick requires a kind of cultural support that was rapidly beginning to disappear. The implied limitations on federal power first struck in the late nineteenth century were then-plausible understandings of the framers'
design. In the late 1930s, however, they had been rendered highly contestable at best. And once they seemed merely contestable, the Court was no longer in an institutional position to assert them. Whether the middle-republic justices' interpretation was the most faithful reading or not, it was a reading that was no longer supported by the legal culture. Once the support disappeared, so, too, did the reading. The Court then fell to box [3].

Now, it is important to isolate just why the readings the Court offered, when offering readings in box [2], were no longer supported. My claim is not that they were not supported because of some political act by "We the People." I do not believe that these foundations were repudiated by politics, for these foundations were not erected by politics. What served as the foundations to the middle-republic justices' rhetoric was a style of legal reasoning supported by a relatively homogeneous legal culture. Justices could, without embarrassment, in the late nineteenth century, draw highly formalistic distinctions between, for example, direct and indirect commerce, and the legal culture of the time supported such formalism, just as I have suggested the legal culture of Lieber's time supported his own, quite different, formalisms, and as the legal culture of the present context supports its own, quite different formalisms. But the legal culture changed. And as it changed, the style of argument that it would support changed as well. It is this cultural shift, I suggest, that weakens the institutional position of justices making box [2] arguments, and it is this cultural shift that eventually requires that they move to box [3].

The point about the New Deal recurs, I suggest, throughout American constitutional history. Indeed, we may today be seeing a second example, in the repudiation of the efforts of the Warren Court to protect what have become known as "criminal" rights. Let me sketch briefly the outline of the argument.

As has been repeatedly noted, the Fourth Amendment was originally concerned with limiting the conditions under which governmental actors could get immunity for invasions of individual privacy. It provided no affirmative remedy for those invasions. It

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60 This is Bruce Ackerman's account. See Bruce Ackerman, We the People 119-21 (1991).
61 Why it changed is beyond the scope of this essay. For a description of the beginnings of this change, see Lessig, supra note 41, at 461-62.
62 For an excellent account of this history, see Telford Taylor, Two Studies in Constitutional Interpretation (1969); Akhil R. Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994) (a more recent and expanded telling of the same story).
did not need to, since the amendment sat piggyback upon a common law system of tort, under which, an official’s invasion of privacy rights would give rise to a tort remedy for the benefit of the individual whose rights were invaded. The Fourth Amendment presumed this underlying structure and simply limited federal attempts to undercut it.

Over time, however, the value of this common law remedy eroded. It eroded in large part because the cost of invoking it exceeded any possible benefit that the remedy could return. Individuals were harmed by official invasions of their privacy, but the cost of prosecuting that harm was greater than the recovery. Thus, as would be expected, the remedy fell into disuse.

But the wrong against which the remedy was directed remained. Thus, when the Warren Court confronted this question, it realized that applying the text of the Fourth Amendment as written, without adding any constitutionally implied remedy, would yield a result that, while faithful to the original text, was unfaithful to the original meaning of that text. Or, again, it saw that changed circumstances had shifted “unchanged” Fourth Amendment law from box [1] into box [3].

Thus, like the middle-republic justices, the Warren Court justices implied limitations on governmental power (here the power to use illegally seized evidence) to attempt to restore a balance more faithful to the framers’ design (again, to move Fourth Amendment law from box [3] to box [2]). Drawing not upon text but upon an implied structure underlying this text, the Warren Court created the exclusionary rule as a constitutional remedy to replace the now defunct trespass remedy.

As I have said, the ability to sustain a box [2] interpretation is contingent upon the dynamics of a legal culture. When the Warren Court did it, it in part sustained the interpretation by trading upon capital it had earned in the civil rights battles. It was, that is, simply carrying forward into other domains the practice it had begun in *Brown*.

Today, however, there is a clear erosion in the support the legal culture gives to this Warren Court response. Too many things have changed to make the claim that the Warren Court remedies are simply efforts to preserve the old system in a new context compelling. Thus, in response, we see a move away from Warren Court accommodations—box [2] interpretations—to text-based resolutions of these questions of criminal rights. In the face of cultural

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The jury on this shift, as it were, is still out—both as to its nature (whether populist or not) and as to its scope. But my reason for raising the point here is not to make predictions. It is, instead, simply to map what it is that would account, if anything can account, for this particular retreat—weakness, in the sense that the Court cannot continue to insist upon its two-step translations of Fourth Amendment rights when the culture around it slowly removes the cultural foundations for this insistence. If this weakness is to be justified, or if the response to this change is to be justified, then the justification must look to a more general account of the proper institutional role of judicial interpretation within a constitutional regime. And for this account, Lieber offers no leads.64

Let me close then by suggesting what this analysis suggests about the ultimate limitations in a Lieber-like method of interpretation. Again, what Lieber shows as clearly as anyone is why there is a box [3]—why, that is, following the text will often result in a reading unfaithful to the framers' meaning. His method, therefore, also suggests why interpreters (or constructors) must often seek a box [2] reading. But what his method misses is the institutional dimension to the possibility of achieving a box [2] solution. For where conceptions of what fidelity requires are contested, it is difficult for a court to defend a box [2] solution in the face of a box [3] alternative. Indeed, where the gap between the framers and us becomes as great as it is, what fidelity can plausibly be seen to require can often appear plainly inconsistent, forcing the interpreter back from this contested domain to what my colleague David Strauss calls, a focal point of agreement—the text.65

We, two hundred-plus years from the original framers, are in a world where this institutional dimension may trump all. Lieber gives us a method to launch beyond the text in the name of fidelity to the framers, but this legal culture no longer supports what such a hermeneutical enterprise would require. Sometimes it does, and

64 What Lieber does offer is constant paeans to the independence of the judiciary. See, e.g., LIEBER, supra note 4, at 171, 179, 227 [at 2011, 2017, 2047]. But independence is something to be earned, not assumed, and the question is under what conditions it can be sustained. It is again this third moving part of the interpretive enterprise—tuning the constructive move to institutional constraints—that Lieber leaves out.

65 David Strauss, Common Law Constitutionalism (unpublished manuscript, on file with author).
where the culture does support it, courts can remain in box [2].\textsuperscript{66} But more often, it does not. More often, that is, the skepticism surrounding any box [2] argument is such that the box [2] solution is unstable, and, over time, the Court migrates to box [3].

What should we conclude about this dynamic? It is my thought that we should use this dialectic to understand just why constitutionalism is not anymore really about fidelity, or if it is, why it is fundamentally a limited, contingent, or partial conception of fidelity. Interpretation, for us, is fundamentally a three-moment enterprise—first, finding an original meaning; second, projecting or translating that meaning into a current context; and, third, accounting for institutional constraints on the ability to support this translation. Lieber shows us the value of step two—in particular, why a text can fail, and how it has to be supplemented. But his arguments should also suggest why at some point a text becomes useless as a way of constraining actors to a set of principles or values. A gap between the contexts of writing and reading can become too great. And it is at this point that we need a guide—a way to work out just when, and with what justification, we must give up the pursuit of fidelity in the name of the text.

After two hundred years, in important ways, our text does not mean what the framers said. It reads, in this context, in ways inconsistent with the values they embraced. It follows that, in some cases, to follow this text is not to follow what the framers meant. But to move beyond the text, to a conception of what fidelity would be, would require a support we no longer, in important areas, have. In such cases, rallying around the text may be the most we can do, and, to cover our insecurity, we embrace notions like textualism. For textualism is our appearance of fidelity—but no doubt, only an appearance.\textsuperscript{67}

\textsuperscript{66} Again, there are a few examples here. The First Amendment is the best. The Fourteenth Amendment’s application to gender is a good second.

\textsuperscript{67} Compare:

Antebellum jurists had attempted to grapple with the growing gulf between their world and the world of the founders through theories of constitutional interpretation such as Francis Lieber’s theory of construed intent. . . . [But] by the late nineteenth century, the gulf between the world in which the jurists lived and the world of the framers had grown so large that even Lieber’s theory of construed intent could not bridge it.


I am grateful to Michael Herz for this point.