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A Textualist Response to Two Texts: Positive-Law Codification and Interpreting Section 1983

ABSTRACT. What is a textualist to do when there are two texts, each with a colorable claim to legitimacy? This question arises every time the text of a codified statute that has been enacted into positive law differs from the language originally drafted by Congress. Such changes between the original text and positive-law codification are the work of unelected revisers (today, the Office of the Law Revision Counsel), and though these changes are technically voted upon by Congress, Congress's review is cursory.

This Note proposes a path forward in the form of a novel canon the Note labels the "two texts canon." As a textualist, formalist rule, the two texts canon begins at step one with the codified positive-law text and ends there where that text is clear, including where changes during codification have contributed to that clear meaning. However, when the codified positive-law text is ambiguous or silent on the interpretive question at issue, the two texts canon insists at step two that interpretations of such ambiguity or silence in the codified positive-law text may not contradict the original text.

The Note concludes with the case study of Section 1983 and qualified immunity. Because the positive-law text of what is now Section 1983 is silent as to immunities, step two of the two texts canon requires that the original text should be applied. Because the original text explicitly abrogates qualified immunity, the Note urges that qualified immunity should be abolished.

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INTRODUCTION

What is a textualist to do when there are *two* texts, each with a colorable claim to legitimacy? This question arises every time the text of a codified statute that has been enacted into positive law differs from the language originally drafted by Congress. As one highly consequential example, scholars have recently rediscovered that the original text of 42 U.S.C. § 1983 (hereinafter Section 1983) specifically abrogated qualified immunity, despite the fact that the modern positive-law text, which is silent on the issue, has been read by the Supreme Court since 1967 to assume such immunity.[1] Solving the puzzle of two texts thus has the potential to determine the correct interpretation of Section 1983, thereby shaping courts' ability to remedy deprivations of rights.

Textualists have yet to offer an approach to the quandary of two texts. To do so, textualists will need to harmonize the seemingly conflicting results dictated by two core textualist values. Textualists espouse formalism,[2] and codified positive-law text is formally "legal evidence of the law[]"—meaning the codified positive-law text is conclusive.[3] So, should the codified positive-law text not govern?[4] Yet textualists also espouse democratic values,[5] like nondelegation of the legislative function,[6] and codified text is the work of unelected bureaucrats.[7]

1. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 204, 235-36 (2023).

2. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* 18 THE TANNER LECTURES ON HUMAN VALUES 79, 99-100 (Grethe B. Peterson ed., 1997) (addressing the critique that textualism amounts to formalism by proclaiming, "Long live formalism").

3. 1 U.S.C. § 204(a) (2018); *see* Stephan v. United States, 319 U.S. 423, 426 (1943) (explaining that text that is legal evidence of the law "prevail[s]" over text that is merely "prima facie" evidence of the law "when the two are inconsistent").

4. *See* 1 U.S.C. § 204(a) (2018); *see also* Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113, 113 (declaring that published statutes will be "legal evidence" of the law).

5. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1440-41 (2022) (noting a turn toward democracy as the guiding principle of textualism); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1736-38 (2021) (characterizing the democratic turn in textualism as populist).

6. *See infra* notes 148-151 and accompanying text (discussing the textualist Supreme Court's reliance on nondelegation principles in justifying the major-questions doctrine as a way to protect the Constitution's democratic structure); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) ("[T]extualism should be understood as a means of implementing a central and increasingly well-settled element of the separation of powers—the prohibition against legislative self-delegation.").

7. *See* 2 U.S.C. § 285b (2018) (describing the functions of the Office of the Law Revision Counsel).

Then, is it not imperative that the original text be defended? Although formalism and democracy are not inherently in tension within the textualist framework, they seem at first glance to push for diverging resolutions of the dilemma of two texts. This Note is a first attempt to propose a path forward in the form of a novel canon of statutory interpretation that I label the "two texts canon."

The problem of two texts is not just an academic puzzle. There is genuine disarray among the lower courts as to which text governs. The Fourth Circuit has reached something of a compromise that attempts to balance respect for the original text with respect for the codified positive-law text by searching for clarity in both:

> Even if there is a conflict between the original Congressional enactment contained in the Statutes at Large and a codification that has been enacted into positive law, the Statutes at Large control when (1) the meaning of the original enactment was "clear and quite different from the meaning . . . ascribe[d] to the codified law," and (2) "the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect."[8]

The Ninth and Second Circuits share the Fourth Circuit's intuition that clear meaning in the original text or clear statements of changed meaning in the codified text are particularly significant, though neither circuit has stated a generalizable approach to the problem of two texts.[9]

By contrast, while claiming to apply the Fourth Circuit's rule, the District Court for the District of Columbia has embraced a less nuanced position: "Where there is a discrepancy between the language in the United States Code and the Statutes at Large, the language in the Statutes at Large controls."[10] Such an unwavering preference for the Statutes at Large should be untenable. Codification statutes not only declare enacted titles of the Code to be positive law, but

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8. Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 263 F.3d 371, 378-79 (4th Cir. 2001) (alterations in original) (quoting Cass v. United States, 417 U.S. 72, 82 (1974)).

9. For an additional decision following clear meaning in the original text over ambiguous meaning in the codified text, see *United States v. Sforza*, 326 F.3d 107, 114 (2d Cir. 2003), which relies on "*express*[]" meaning conveyed in the Statutes at Large to fill in ambiguous meaning in positive-law provisions of the Code. For a decision engaging the issue of two texts and requiring a clear statement in the codified text for changed meaning to be found, see *Redmond-Issaquah Railroad Preservation Ass'n v. Surface Transportation Board*, 223 F.3d 1057, 1062 (9th Cir. 2000), which finds it unlikely that Congress would change the substantive meaning of original text in a positive-law codification without speaking clearly, particularly in light of other express substantive changes in the relevant statute.

10. LTMC/Dragonfly, Inc. v. Metro. Wash. Airports Auth., 699 F. Supp. 2d 281, 295 (D.D.C. 2010) (citing *Washington-Dulles Transp., Ltd.*, 263 F.3d at 378).

also repeal and replace the corresponding provisions of the Statutes at Large.[11] But even when they do not go so far as to assert that the Statutes at Large control over positive law, courts frequently side with the original text where conflicts are presented, claiming that changes in substantive meaning through codification are unlikely.[12]

At the other extreme, lower courts across multiple circuits routinely adhere to the codified text, either intentionally ignoring the original text or interpreting

11. *See* 1 U.S.C. § 204(a) (2018) (explaining that "the text" of the Code can be "enacted into positive law" by a vote of Congress so as to become "legal evidence of the laws" in all federal and state courts).

12. For an assortment of lower-court decisions actively discussing the problem of two texts and siding with the original text, see, for example, *United States v. Rivera*, 131 F.3d 222, 234-36 (1st Cir. 1997) (Torruella, C.J., concurring), which assumes, in light of no legislative history indicating that Congress intended to change the meaning of the text, that a federal positive-law criminal statute retained the same meaning as the statute originally passed by Congress; *American Cyanamid Co. v. Hammond Lead Products, Inc.*, 495 F.2d 1183, 1186 (3d Cir. 1974), which relies on Reviser's Notes and the lack of legislative-history evidence to conclude that the revision of the positive-law Judicial Code should not be read to have substantively changed the statutory meaning; *A.E.A. ex rel. Angelopoulos v. Volvo Penta of the Americas, LLC*, 77 F. Supp. 3d 481, 491 (E.D. Va. 2015), which relies on legislative history to conclude that additional language in positive-law codification was not intended as a change in meaning; *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d 1092, 1103 (5th Cir. 1982), which relies on legislative history suggesting positive-law codification was not intended to change meaning to conclude that an explicit requirement contained in the original text should still apply despite its omission in the revised text, *vacated*, 467 U.S. 1237 (mem.) (1984); *Carter v. Welles-Bowen Realty, Inc.*, 493 F. Supp. 2d 921, 927 (N.D. Ohio 2007) (quoting Finley v. United States, 490 U.S. 545, 554 (1989)), which refuses to conclude that by removing a phrase in an amendment consolidating statutory text, Congress could have changed its meaning "unless such intention is clearly expressed," *rev'd sub. nom. In re* Carter, 553 F.3d 979 (6th Cir. 2009); *Gonzalez v. Village of West Milwaukee*, 671 F.3d 649, 661-62 (7th Cir. 2012), which determines that a change in the arrangement of statutory provisions in positive-law codification cannot alter the meaning of the law; *Newton v. Federal Aviation Administration*, 457 F.3d 1133, 1143 (10th Cir. 2006), which reads general language in codified positive-law text ("certificates issued under this chapter") to apply only to enumerated lists contained in repealed-and-replaced original text (listing certificate types) based on the title of the revising statute, which asserted that codified text would not substantively change original text; *In re Bayou Shores SNF, LLC*, 828 F.3d 1297, 1319 (11th Cir. 2016), which applies the so-called "recodification canon of statutory construction," concludes that the Office of the Law Revision Counsel must have erred in changing the meaning of positive-law codified text and that this changed text should be ignored absent a clear indication of an intentional change in meaning, and does "not find it significant . . . that Congress enacted the error into positive law"; and *Gannett Satellite Information Network, LLC v. U.S. Department of Justice*, No. 22-cv-475, 2023 WL 2682121, at *6 (D.D.C. Mar. 29, 2023), which refuses to read the substitution of "chapter" for "title" in codification as changing the substantive effect of the statute because the change occurred during positive-law codification.

changes as substantively meaningful.[13] Several courts cite the rule from Sutherland's treatise on statutory construction: "[T]he text of a code section in an enacted title can be taken as authoritative and need not be checked or verified with the corresponding section in the original Statutes at Large . . . ."[14] This refusal to crack open the Statutes at Large in deference to the Code's superior formal legal status is also problematic, as it deprives the reader of powerful and potentially clear evidence of statutory meaning in cases where codified text is ambiguous and must be interpreted using other tools of construction.

The range of unsatisfactory approaches to the problem of two texts is particularly concerning given the frequency with which courts are called upon to interpret statutes contained in positive-law titles of the U.S. Code.[15] Nearly half of all federal statutory law is codified positive law, and the text of a statute in the Code almost always differs in some way from the text originally enacted by Congress and recorded in the Statutes at Large.[16] Thus, even as courts frequently

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13. For decisions observing the problem of two texts and siding with the modern, codified positive-law text over original text, see, for example, *Stoianoff v. Commissioner of Motor Vehicles*, 107 F. Supp. 2d 439, 445 (S.D.N.Y. 2000), which refuses to consider a provision that appears in the Statutes at Large version of the statute at issue because the provision was omitted from the main positive-law codified text and relegated to a note, *aff'd*, 12 F. App'x 33 (2d Cir. 2001); *Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748, 754 (W.D. Pa. 2006), which concludes that because Congress removed a phrase in consolidating an amendment, a practice analogous to positive-law codification, it must have intended to expand the scope of the provision; *Schmitt v. City of Detroit*, 395 F.3d 327, 329-31 (6th Cir. 2005), which explains that "[g]iven that Title 5 [of the U.S. Code] has the force of positive law, the viability of [a provision contained in the original text in the Statutes at Large] is premised upon whether it was codified"; *Borders v. United States*, No. 09-CV-616, 2010 WL 5093427, at *3 (S.D. Ohio Dec. 8, 2010), which asserts that positive law controls over the Statutes at Large; *Nichols v. Rysavy*, 809 F.2d 1317, 1327-28 (8th Cir. 1987), which rejects the argument that positive-law codification should not be read to change original text's meaning and instead relies on "clear and definitive" codified positive-law text; and *United States v. Romig*, Nos. 00CR355, 03-CV-2640, 2003 WL 22143730, at *1 n.2 (D. Minn. Aug. 18, 2003), which refuses to consider the Statutes at Large where a provision has been enacted as positive law.

14. 2 Norman J. Singer, Statutes and Statutory Construction § 36A:10, at 132 (6th ed. 2001). The treatise is often referred to as "Sutherland Statutory Construction." For cases citing Sutherland's treatise, see, for example, *Romig*, 2003 WL 22143730, at *1 n.2; and *Borders*, 2010 WL 5093427, at *3.

15. As a preliminary matter, an overwhelming majority of federal-court cases involve matters of statutory interpretation. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 527 (1947) ("[T]oday cases not resting on statutes are reduced almost to zero.").

16. *See* Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 263 F.3d 371, 378 (4th Cir. 2001) (noting that "slightly less than half" of the titles of the U.S. Code have been enacted into positive law). For a demonstration of the extent to which the text in a positive-law title of Code differs from the original text, consider a House Judiciary Committee report

confront the problem of two texts directly, reaching contradictory results,[17] the issue more frequently is presented but left unaddressed.[18] And although the problem is significant enough to have featured in dozens of Supreme Court opinions since 1884,[19] the Supreme Court has not squarely confronted the problem of two texts since 1989[20]—well before textualism became the dominant mode of statutory interpretation.[21] Existing Supreme Court decisions have stated a rule that is incompatible with textualism and with statutes governing codification because it favors the original text, unless Congress has clearly expressed an intent to change the meaning of that text.[22] While some lower courts continue to cite these cases (notably, one Eleventh Circuit opinion concluded the Court's precedents establish a "recodification canon"),[23] these cases are often ignored,

summarizing the line-by-line changes contained in a codification bill. *See* H.R. REP. NO. 113-44, at 6-7 (2013).

17. *See supra* notes 8-14.

18. For example, qualified-immunity precedents have consistently failed to consider the omission of a provision in the original text that specifically abrogated state common-law immunities. *See* Reinert, *supra* note 1, at 244 (noting that the Supreme Court's qualified-immunity jurisprudence "has entirely failed to grapple with the Civil Rights Act's enacted text"); *see also* Pierson v. Ray, 386 U.S. 547, 553-57 (1967) (creating qualified immunity and not considering the original text contained in the Civil Rights Act of 1871).

19. The first case to raise the issue after the first major codification effort was *United States v. Ryder*, 110 U.S. 729, 739-40 (1884). *See also In re* Bayou Shores SNF, LLC, 828 F.3d 1297, 1315-16 (11th Cir. 2016) (cataloguing a nonexhaustive list of twenty-two Supreme Court decisions engaging with the problem of two texts, omitting all cases concerning Section 1983 discussed in Part III, *infra*).

20. *See* Finley v. United States, 490 U.S. 545, 554 (1989). The Court continues to cite the rule from *Finley* in interpreting changes arising out of the 1948 recodification of the Judicial Code specifically, but the Court has not acknowledged the broader problem of two texts in recent years. *See* Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992); Keene Corp. v. United States, 508 U.S. 200, 209 (1993); Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 20 (2006); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136 (2008). One year after *Finley*, the Court considered a change in the meaning of codified text in *Ngiraingas v. Sanchez*, and Justice Brennan discussed *Finley* in dissent, but the majority did not explicitly take a generalizable approach to the problem. 495 U.S. 182, 187-92 (1990); *see id.* at 200 (Brennan, J., dissenting). The current status of *Finley* and its predecessor precedents addressing the problem of two texts is therefore unclear.

21. Justice Scalia joined the Court in 1986, and, as of 1989, textualism was largely the position of dissenting Justices. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 405, 417 (1991) (Scalia, J., dissenting) (making a case for textualism).

22. *See infra* notes 104-116.

23. *In re Bayou Shores SNF, LLC*, 828 F.3d at 1319 (summarizing Supreme Court and Eleventh Circuit cases to conclude that the so-called "recodification canon" required following the original text where the court surmised that if Congress had intended to make a fundamental change during positive-law codification, "it would [have] merit[ted] *some* mention"); *see also*

particularly where lower courts follow the codified positive-law text.[24] Updated guidance is urgently needed.

Resolving the problem of two texts could also provide the Supreme Court with the most promising legal hook for abolishing qualified immunity. Despite a slew of academic refutations of the atextual and ahistorical common-law and policy justifications for qualified immunity,[25] the Court has not responded, notably denying certiorari in Section 1983 cases proposing to abolish the doctrine like *Baxter v. Bracey* in 2020.[26] This may very well be because, notwithstanding the possibility of an unlikely-bedfellows coalition of conservative textualists and liberal supporters of civil-rights litigation,[27] the Justices are bound by stare decisis.[28] The original text of Section 1983 could burst through this barrier for reasons that will be explained in Part III. However, scholars and practitioners persist in framing the original text merely as evidence of congressional intent[29]—a strategy unlikely to persuade the textualist Court. Only by understanding the proper textualist response to two texts will it finally become clear that not only

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Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 263 F.3d 371, 378-79 (4th Cir. 2001) (quoting the Supreme Court's rule as stated in Cass v. United States, 417 U.S. 72, 82 (1974)).

24. *See, e.g.*, Borders v. United States, No. 09-CV-616, 2010 WL 5093427, at *3 (S.D. Ohio Dec. 8, 2010) (stating that the original text need not be considered once the codified text is positive law and not citing Supreme Court cases concerning positive-law codification); United States v. Romig, Nos. 00CR355, 03-CV-2640, 2003 WL 22143730, at *1 n.2 (D. Minn. Aug. 18, 2003) (same); Nichols v. Rysavy, 809 F.2d 1317, 1327 (8th Cir. 1987) (noting the litigants' reliance on Supreme Court authority stating that Congress does not intend to change the meaning of the law through codification but ignoring this authority and adhering to the codified positive-law text).

25. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (refuting the common-law justification for qualified immunity); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (refuting policy-based arguments in favor of qualified immunity with empirical evidence about government indemnification of officers facing Section 1983 liability).

26. 140 S. Ct. 1862, 1862 (2020) (mem.); *see also id.* at 1862-64 (Thomas, J., dissenting from denial of certiorari) ("Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.").

27. *See* Mullenix v. Luna, 577 U.S. 7, 24-26 (2015) (Sotomayor, J., dissenting); Ziglar v. Abassi, 582 U.S. 120, 159 (2017) (Thomas, J., concurring) (arguing that the Court's qualified-immunity "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act"); Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. 15, 18 (Sept. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-09/PA%20901_1.pdf [https://perma.cc/NH5J-J6NM].

28. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (describing "super-strong" statutory stare decisis).

29. *See, e.g.*, Reinert, *supra* note 1, at 238 (concluding that the Notwithstanding Clause "still speaks powerfully to Congress's intent").

was there no satisfying textual justification for qualified immunity in 1967, but also the original text *requires* that the doctrine be abolished today.

In Part I, this Note begins by explaining the phenomenon of codification. Codification emerged to organize and clarify the law as the legal system came to be dominated by statutes instead of judge-made law. Perhaps ironically given the significance of this shift in favor of the people's representatives, codification itself became the task of bureaucrats—today, in the age of the U.S. Code, of codifiers at the Office of the Law Revision Counsel (OLRC). Along with codification came statutes—today, 1 U.S.C. § 204(a)—providing that codified text could be enacted by Congress into positive law, thus becoming "legal evidence" of the law, as opposed to "prima facie" evidence of the law.[30] However, statutes this Note calls "meaning-conformity statutes," which Congress passes each time it enacts a positive-law codification, state that the enacted codified text has a meaning identical to that of the original text.[31] Worryingly, Congress does not meaningfully check OLRC's work to guard against changes in meaning.[32] This leaves to courts the task of effectuating both the command that codified text is positive law once enacted and the command that the codified text retains the meaning of the original text. Thus far, courts have failed to adequately harmonize these commands,[33] and the Supreme Court's pre-textualist approach instead subverts the positive-law status of enacted codified text in the Court's effort to prevent changes in meaning introduced through codification. A textualist update is urgently required.

In Part II, this Note derives the two texts canon by harmonizing 1 U.S.C. § 204(a) and meaning-conformity statutes. These commands also correspond to textualism's guiding ideals of formalism and democracy. Textualism's commitment to formalism requires textualists to begin and end the statutory-interpretation inquiry with the text whenever that text answers the question at issue.

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30. 1 U.S.C. § 204(a) (2018).

31. *See, e.g.*, Act of Dec. 18, 2010, Pub. L. No. 111-314, § 2, 124 Stat. 3328, 3328 (explaining that the enacted Title 51 of the U.S. Code conforms "to the understood policy, intent, and purpose of Congress in the original enactments"); Act of Dec. 19, 2014, Pub. L. No. 113-287, § 2, 128 Stat. 3094, 3094 (using the same language in enacting Title 54). The earliest enactments did not use this precise language, but they were still identified as acts to "revise, codify, and enact into law," rather than substantively amend, the new title of the U.S. Code. *See* Act of Aug. 10, 1956, ch. 1041, pmbl., 70 Stat. 1126, 1126 (1956) (enacting Title 10, "Armed Forces," and Title 32, "National Guard," of the U.S. Code).

32. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1666-67 (2020).

33. Rather than harmonizing applicable statutory commands, lower courts have tended to emphasize either the original text or the codified positive-law text, and even those that have attempted to strike a compromise have not achieved the harmony this Note seeks to advance with the two texts canon. *See supra* notes 8-14 and accompanying text.

When there are two texts, one original text and one codified positive-law text, the codified positive-law text alone is formally *the text*, per Article I of the Constitution as well as 1 U.S.C. § 204(a).[34] Accordingly, step one of the two texts canon holds that if the meaning of the codified positive-law text is clear, then that meaning is conclusive, and there is no need to look to the original text or any other interpretive tool.

However, textualism recognizes that formalism does not prevent recourse to aids for construction under certain, carefully delineated circumstances when the text itself cannot resolve the interpretive question. Specifically, contemporary textualism has come to endorse canons serving constitutional norms as legitimate tools for discerning the meaning of ambiguous text.[35] This is where textualism's commitment to democracy enters the picture. As used in this Note in relation to textualism, the admittedly capacious term "democracy" denotes textualism's focus on preserving the Constitution's design, which ostensibly assigns the legislative power exclusively to the people's representatives, not to unelected bureaucrats (or judges).[36] This focus on democracy produces step two of the two texts canon, which requires that interpretations of ambiguity or silence in the codified positive-law text may not contradict the original text. Maintaining the original text's status as inferior to formal text but superior to all other tools of construction protects the original work of the people's representatives against later distortions by unelected bureaucrats and judges.

Finally, in Part III, this Note applies the two texts canon to Section 1983 as perhaps the most significant case study for interpreting changes between original text and codified positive-law text. In proposing a broader textualist approach to the problem of two texts, this Note contributes to the ongoing effort led by scholars like Alexander A. Reinert, William Baude, and Joanna C.

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34. *See infra* notes 100–103, 128, 136 and accompanying text.

35. *See* West Virginia v. EPA, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (explaining that "clear-statement rules help courts" fulfill their duty "to ensure that acts of Congress are applied in accordance with the Constitution"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 169 (2010) (arguing that constitutionally inspired substantive canons are a legitimate exercise of judicial review where the judicial obligation to enforce the Constitution qualifies the judicial obligation to serve as a faithful agent of the legislature).

36. Although this Note typically uses the term democracy in this context, the Note also has occasion to discuss other senses in which textualism promotes democracy. Specifically, Section II.B considers how textualism's formalism itself promotes a distinct ideal also understood by scholars and textualist judges as "democracy": treating the ordinary meaning of the text as conclusive allows ordinary people to ascertain the meaning of the law so that they can rely on the law and hold elected representatives accountable for the laws they create.

Schwartz to challenge the Court's qualified-immunity jurisprudence,[37] providing fresh grounds for revisiting qualified immunity when an appropriate vehicle presents itself to the Court.

I. THE PROBLEM OF TWO TEXTS

Positive-law codification is an innovation integral to ensuring that law by democratically enacted statutes is organized, accessible, and reliable. Once enacted by Congress, codified positive-law text is formally *the law* and is therefore owed much the same deference courts show other statutory text. However, at the same time, codified positive-law text should be interpreted somewhat differently from other statutory text because, unlike other statutory text, codified positive-law text is shaped by unelected revisers, is not meaningfully reviewed by Congress, and is required by statute to retain the meaning of the original text it repeals and replaces. Part I puts these features of codified positive-law text on the table and shows that courts have thus far accounted for some, but not all, of these features in approaching the problem of two texts.

A. Codification Emerges

An "orgy of statute making" took place in the first half of the twentieth century.[38] First Reconstruction, then the Progressive Era, and then, most significantly, the New Deal supercharged the transformation of American law "from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."[39] The emergence of the age of statutes has long been understood by textualists as a turning point for democracy. In his famous lecture, *Common-Law Courts in a Civil-Law System*, Justice Scalia pointed to the "uncomfortable relationship of common-law lawmaking to democracy."[40] Scalia observed that "judges in fact 'make' the common law."[41] By contrast, statutes are the work of legislatures, and the judge's role is limited to interpretation and application of the intent of the

37. *See supra* notes 1, 25 and accompanying text (referencing the efforts of Alexander A. Reinert, William Baude, and Joanna C. Schwartz).

38. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 86 (2d ed. 2014).

39. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982); *see also* Frankfurter, *supra* note 15, at 527 (comparing the volume of enactments in a single twentieth-century session of Congress with the much smaller number of laws passed by Congress in its first five years).

40. Scalia, *supra* note 2, at 86.

41. *Id.*

legislature as represented in the text of the law.[42] Statutory interpretation as a field arose to reckon with the rise of statutes,[43] and textualism is one modern response to the challenge of calibrating judicial intervention so that democratic legislation can run free. This Note will return again and again to this textualist account of "democracy," defined as getting unelected actors out of the way of lawmaking by the people's elected representatives in Congress.

In addition to transforming the democratic roles of courts and Congress, the emergence of a new legal landscape dominated by statutes necessitated the rise of congressional bureaucracy to ensure that the work of the people's representatives could be utilized practically. In 1866, Congress authorized the first official revision and consolidation of federal statutes.[44] Prior to 1866, compilations were produced by private publishers but lacked any legal status,[45] and, beginning in 1845, federal law was officially recorded in the form of session laws in the Statutes at Large.[46] The Statutes at Large collected, and still collect today, all laws passed at the end of each session of Congress in chronological order by enactment date.[47] However, as the frequency with which legislation was passed began to increase during the Civil War and Reconstruction, it became clear that chronological organization was not conducive to modern legal research.[48] Codification solves this problem by organizing law by topic, ensuring lawyers need not comb through the Statutes at Large chronologically in search of relevant authority.[49]

It would be impossible for senators and representatives themselves both to legislate and to codify, so bureaucracy was needed to facilitate the democratic explosion of statutory law. However, tension with democracy lingers because codifiers, much like judges, are unelected. Just as the field of statutory interpretation grapples with the role of judges in interpreting statutes, considering how

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42. *Id.* at 91-93.

43. *See* Frankfurter, *supra* note 15, at 527-28.

44. Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74, 74-75.

45. *See* Cross & Gluck, *supra* note 32, at 1567-68. Privately produced compilations were prevalent until 1925. *Id.* at 1568 n.115.

46. *See* Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 133 (2010); *United States Statutes at Large*: *About This Collection*, LIBR. CONG., https://www.loc.gov/collections/united-states-statutes-at-large/about-this-collection [https://perma.cc/A96W-AC3T].

47. *Federal Statutes: A Beginner's Guide*, *Session Laws*, LIBR. CONG., https://guides.loc.gov/federal-statutes/session-laws [https://perma.cc/2PMJ-CFGA]. This practice continues today but is now supplemented by the U.S. Code, which is organized more reliably by subject. *Federal Statutes: A Beginner's Guide*, *United States Code*, LIBR. CONG., https://guides.loc.gov/federal-statutes/united-states-code [https://perma.cc/ZCR4-GL53].

48. *See* Cross & Gluck, *supra* note 32, at 1568.

49. *Id.*

their interventions can be tuned to enable rather than to impede Congress's democratic task, the field must also grapple with the role of bureaucratic codification in democracy. This Note attempts to do just that.

The story of the first codification is a cautionary tale. In 1866, Congress empowered a three-person commission "to revise, simplify, arrange, and consolidate" all the session laws that had accumulated to that point—but not to change the law substantively.[50] The task was later stripped from the commission and given to a single reviser, an attorney named Thomas Jefferson Durant, after the congressional committee overseeing the effort determined that the commission had been overzealous and their proposed codification *would* significantly change the law.[51] Durant's resulting compilation became the first edition of the Revised Statutes.[52]

In 1874, Congress took the novel step of enacting this first edition of the Revised Statutes into positive law, explicitly repealing and replacing "[a]ll acts of Congress passed prior to [December 1, 1873], any portion of which is embraced in any section of said revision."[53] Congress declared that the first edition of the Revised Statutes would be "legal evidence of the laws"[54]—in other words, positive law, and thus the definitive source of the law on which courts were to rely going forward.

Why did Congress take this step? In theory, transforming a codification into positive law furthers the benefits of codification itself.[55] While subject-matter codification makes statutory law more user-friendly generally,[56] this benefit is at its most potent when the legal researcher is working with a positive-law title of the codification because then, when she finds the law she needs, she has the text

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50. Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74, 74.

51. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938).

52. *Id.* at 1014.

53. *See* 74 Rev. Stat. § 5596 (1874) ("All acts of Congress passed prior to [December 1, 1873], any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof . . . .").

54. Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113, 113.

55. Jesse M. Cross and Abbe R. Gluck note other benefits of positive-law codification. For example, unenacted titles of the U.S. Code cause confusion when Congress amends statutes:

> To amend to one of the twenty-seven titles *not* enacted as positive law, Congress does have to amend to the underlying non-codified statute (e.g., "The Social Security Act is amended . . ."), not to the Code, because the Code for those sections is not enacted law to amend. These distinctions have caused much confusion and numerous mistakes . . . .

Cross & Gluck, *supra* note 32, at 1571.

56. *See supra* notes 47-49 and accompanying text.

of the law itself.[57] If she is working with an unenacted codification or an unenacted title within a codification, even if she finds the applicable law in the codification, she has only found informal evidence of the law, and so she theoretically ought to seek out the law itself in the positive-law text of the Statutes at Large, both to confirm that the text is the same and for proper citation.[58] Positive-law codification thus enhances clarity and expedience for those navigating statutory law.

However, the execution of the first positive-law codification was less than perfect. This mass repeal and replacement was undertaken without careful scrutiny of the revisers' changes to the seventeen volumes of the Statutes at Large that had accumulated by 1873.[59] The 1874 statute repealing and replacing all existing statutory law passed the Senate in a mere forty minutes.[60] Even if Durant, an unelected bureaucrat and just one fallible human codifier, worked scrupulously for nine months to expunge all changes in the law made by the three-person commission, Congress cannot be thought to have carefully checked his work and meaningfully endorsed each omission.[61]

It immediately became apparent that the Revised Statutes were riddled with errors.[62] "[S]ixty-nine errors were discovered" while the statute "was still on the press."[63] In the next few years, 183 further errors were discovered and corrected.[64] Even at the time, it was clear that still other errors were never legislatively fixed.[65] Learning from this process, Congress never again enacted an edition of the

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57. 1 U.S.C. § 204(a) (2018).

58. *See id.* (explaining that, unless enacted, the U.S. Code is prima facie evidence of the law while the Statutes at Large are legal evidence of the law).

59. *See* Dwan & Feidler, *supra* note 51, at 1012 ("It was almost a practical impossibility to make a thorough search of the statutes on many subjects.").

60. *Id.* at 1015 n.38 (citing 67 Cong. Rec. 12075 (1926) (statement of Rep. Fitzgerald)).

61. *Id.* at 1013-14. The bill was also "sent to many distinguished lawyers throughout the United States, so that the bill might be examined and made as nearly perfect as possible before it was reported to the House." *Id.* at 1014.

62. *Id.*; Andrew Winston, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, Libr. Cong. Blogs (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code [https://perma.cc/WL5N-HS3D].

63. Dwan & Feidler, *supra* note 51, at 1014.

64. *Id.*

65. *See, e.g.*, Winston, *supra* note 62 ("In December 1875, Secretary of War William Belknap submitted a collection of reports of heads of bureaus of the War Department setting forth numerous corrections to the portions of the *Revised Statutes of 1874* relating to that department.").

Revised Statutes into positive law, and eventually, the Revised Statutes were replaced with the U.S. Code in 1926.[66]

B. Codification Today

Today, the U.S. Code is compiled by unelected bureaucrats at the Office of the Law Revision Counsel (OLRC)—Durant's modern successors. Today's OLRC employs approximately thirteen employees, all attorneys, who specialize in either classification or codification.[67] OLRC is headed by the Law Revision Counsel, who is appointed by the House Speaker in a nonpartisan manner, typically through internal promotion.[68] Today's OLRC has been praised for its nonpartisan professionalism.[69] And unlike the Revised Statutes, the Code has never been enacted wholesale into positive law; rather, the Code is enacted title by title, and only half of the titles of the Code have been enacted into positive law to date.[70] This means that the task of positive-law codification today is accomplished in a more expert, professional, and manageable manner than it was in the nineteenth century.

These facts should give courts and other interpreters comfort in relying on codified positive-law text much as they would rely on any other positive-law text. As previously noted, the reliability of codified positive-law text is what makes it beneficial; a legal researcher can easily find relevant statutory authority by searching in the organized Code, and once she finds the applicable statute, she knows she has the text of the law itself, which she can trust a court to apply.

However, the process by which codified text is enacted into positive law remains meaningfully different from the process by which a bill becomes a law in the first instance. Three key differences necessitate subjecting codified positive-law text to rules of statutory interpretation somewhat modified from those that apply to original positive-law text.

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66. *See* Dwan & Feidler, *supra* note 51, at 1014-21 (explaining that subsequent editions of and supplements to the Revised Statutes were either not enacted into positive law and instead were to be treated as prima facie evidence of the law, were to give way to the first edition of the Revised Statutes in cases of conflict, or were not passed with any provision made whatsoever as to what kind of evidence of the law the codification would provide).

67. Cross & Gluck, *supra* note 32, at 1570.

68. *Id.* (citing Supplemental Appropriations Acts of 1975, Pub. L. No. 93-554, 88 Stat. 1771, 1777 (codified at 2 U.S.C. § 285c)).

69. *See id.* at 1631.

70. *See Positive Law Codification*, OFF. L. REVISION COUNS., https://uscode.house.gov/codification/legislation.shtml [https://perma.cc/G75V-UDEY] (noting that there are twenty-seven positive-law titles in the U.S. Code); Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 263 F.3d 371, 378 n.2 (4th Cir. 2001).

First, unlike the text of a new law published in the Statutes at Large, the text of codified positive-law enactments is significantly shaped by OLRC, sometimes even including text that was originally drafted by OLRC, not by Congress. The statute empowering OLRC explains that the function of the Office shall be to "prepare . . . one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments."[71] Thus, although OLRC has authority from Congress to rephrase and reorganize, OLRC must, in theory, do so without altering the "policy," "intent," or "purpose" of the enacting Congress—just as the nineteenth-century revisers were required to simplify but not change the meaning of legal text.[72]

How well OLRC lives up to this mandate is difficult to measure, but it is clear that OLRC's "revisions" are often significant. In addition to making minor textual edits and removing unnecessary or outdated language, today's OLRC frequently inserts so-called "no source" provisions which "*did not exist in any congressionally enacted law*, but that OLRC creates out of whole cloth."[73] For example, "if OLRC concludes that a new defined term will help it more easily articulate the policies that it is assembling in the title, it may *insert a new definition* into the title, and then use this newly defined term throughout the title."[74] While OLRC is bound to conform to the "policy" of the original enactment,[75] OLRC nevertheless periodically serves as the initial drafter of potentially meaningful or potentially ambiguous text, and OLRC frequently removes text the codifiers deem superfluous in their own professional judgment. Whether or not this means in any given instance that OLRC has acted ultra vires, the simple fact that OLRC shapes the text of codified positive-law enactments means that codified positive-law text is different from other positive-law text. Part II will further develop why caution is needed in interpreting text that is the work product of unelected bureaucrats, but for now, it suffices to say that OLRC codifiers are not elected to serve as senators and representatives and thus lack constitutional, as well as statutory, authority to legislate.[76]

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71. 2 U.S.C. § 285b(1) (2018).

72. *Id.* Because the Code and the first edition of the Revised Statutes share the same combination of statutes limiting the mandate of codifiers and clauses characterizing the limited purpose of codification, it is particularly logical to assume that similar interpretive principles should apply in both contexts. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *60 n.* ("It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with reference to each other . . . .").

73. Cross & Gluck, *supra* note 32, at 1664.

74. *Id.*

75. 2 U.S.C. § 285b(1) (2018).

76. *See infra* Section II.C.

Second, the process by which codified text is enacted into positive law requires a tailored interpretive approach because Congress does not meaningfully hold OLRC to its limited statutory mandate and constitutionally proper role. Codification bills, prepared by OLRC, are submitted to the Committee on the Judiciary of the House for introduction.[77] After introduction, review and comment takes place—directed by OLRC, not Congress—as OLRC "seeks input from Federal agencies, congressional committees, experts in the area of law being codified, and other interested persons."[78] Any resulting amendments are submitted to the House Judiciary Committee.[79] Then, with the Committee's approval, "the bill is [typically] passed by the House of Representatives under suspension of the rules and by the Senate by unanimous consent."[80] The use of suspension of the rules means debate is limited to a maximum of forty minutes, though in reality, debate is often briefer.[81] And under suspension of the rules, even if a representative were to catch a flaw in the codification bill, she would be prohibited from raising a floor amendment.[82] Tellingly, for the last five enacted codifications, no committee hearings were held, and all five bills passed without a single vote against them.[83] Furthermore, "[t]hese bills were rarely amended, and when they were, it was to make technical corrections or to incorporate revisions arising out of the OLRC review and comment process."[84]

Codification bills are set farther apart by the fact that they are longer and more tedious than other legislation, ensuring little, if any, attention is committed to reviewing them. The most recent codification bill enacting Title 54, "National Park Service and Related Programs," was 187 pages long.[85] In contrast, the average length of a statute passed by the 109th Congress, the last session for which figures are available, was around fifteen pages—much more manageable for

77. *Positive Law Codification*, *supra* note 70.

78. *Id.*

79. *Id.*

80. *Id.*

81. Jane A. Hudiburg, Cong. Rsch. Serv., R47327, Suspension of the Rules: House Practices in the 116th Congress (2019-2020) 10 (2022) (noting that the average debate time under suspension of the rules is thirteen and a half minutes).

82. *Id.* at 1. Admittedly, most bills and resolutions that receive floor action in the House today are, like codification bills, considered under suspension of the rules. *Id.* However, most of these measures are uncontroversial enactments concerning "government operations, such as the designation of federal facilities," in contrast to the array of provisions contained in any given title of Code, many of which may have been contentious when originally passed. *Id.*

83. Cross & Gluck, *supra* note 32, at 1667.

84. *Id.*

85. Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3094.

congressional staff, if not senators and representatives themselves, to digest.[86] The House Judiciary Committee's report on a codification bill provides somewhat better guidance, explaining directly which provisions were "[r]epealed as obsolete" or "[r]epealed as unnecessary" and providing one-sentence summaries for substantive changes line by line.[87] But these reports are scarcely shorter than codification bills themselves—the report on the codification bill for Title 54 spanned 105 pages.[88] Significant changes are needles in a generally tedious haystack, making it quite unlikely that they will ever be uncovered.

Even compared to other pieces of lengthy legislation, codification bills are particularly unlikely to be scrutinized by Congress. While Congress is well aware that controversial measures will be embedded in the necessary minutiae of, say, an omnibus spending bill,[89] empirical evidence suggests that even on Capitol Hill, there is "no knowledge of OLRC's editorial work."[90] Because senators, representatives, and their staff lack literacy about OLRC's function, they do not appreciate the extent of OLRC's efforts, and they are ill-equipped to confront the possibility that major changes in text could be worked through codification. Moreover, Congress's review of codification bills is uniquely inattentive because codification bills are especially unlikely to achieve political salience with

86. Christopher Beam, *Paper Weight: The Health Care Bill Is More than 1,000 Pages. Is That a Lot?*, Slate (Aug. 20, 2009, 6:12 PM), https://slate.com/news-and-politics/2009/08/is-1000-pages-long-for-a-piece-of-legislation.html [https://perma.cc/HF3U-PPGZ].

87. H. Comm. on the Judiciary, To Enact Title 54, United States Code, "National Park Service and Related Programs," as a Positive Law Title, H.R. Rep. No. 113-44, at 6-7 (2013). As one example, the report on the bill enacting Title 54 explained that in Section 101339 of the new title, "the word 'Service-wide' is substituted for 'agency-wide' because the provision applies only to the Service." *Id.* at 37.

88. *See generally id.* (spanning 105 pages).

89. It is well known that, in today's legislative climate, it is often necessary to include substantive, controversial legislative measures in omnibus spending packages. *See, e.g.*, Drew C. Aherne, Cong. Rsch. Serv., IN12324, Omnibus Appropriations: Overview of Recent Practice 3 (Aug. 14, 2024) ("Due to their scope, timing, and various other political factors, omnibus appropriations measures have often been used as vehicles to address other legislative priorities. Eleven of the 18 omnibus appropriations measures enacted from FY2012 through FY2024 included at least one additional division containing legislation unrelated to the appropriations process for that fiscal year."). It is clear that Congress closely evaluates the substantive measures in omnibus legislation, even bills that can be as long as 4,000 pages, because battles over which provisions are ultimately included and which are cut rage until the moment the bill is passed. Tami Luhby & Katie Lobosco, *Here's What's in the $1.7 Trillion Federal Spending Law*, CNN (Dec. 29, 2022, 11:09 PM EST), https://www.cnn.com/2022/12/20/politics/spending-bill-congress-omnibus/index.html [https://perma.cc/A4KC-QUMS].

90. Cross & Gluck, *supra* note 32, at 1664.

constituents, in contrast to other long and complex legislation.[91] As Jesse M. Cross and Abbe R. Gluck discovered, there is, in the words of a congressional staffer, a "total lack of political will" surrounding codification bills because senators and representatives have no incentive to boast to their constituents about the work they do codifying a title of the Code.[92] Cross and Gluck conclude, "Congress does not care about [positive-law codification] enough to supervise," and "it is difficult to find evidence that many members and even most staff pay much attention to" codification bills.[93] Thus, Congress formally approves enactments of the Code into positive law, but Congress's review does not act as a meaningful backstop preventing OLRC from exceeding its mandate. This, too, is a unique feature of codified positive-law text that interpreters should bear in mind.

Finally, the third distinguishing feature of codified positive-law text requiring a unique interpretive approach to codified positive-law text is the simplest: certain statutes actually require a particular interpretive approach to codified positive-law text. And as Part II will demonstrate, following these statutes produces guardrails that can ameliorate the preceding two concerns that codified positive-law text is the work of unelected revisers at OLRC and is not meaningfully reviewed by Congress. Two statutory directives are pertinent.

First, several statutes, which this Note will refer to as "meaning-conformity statutes," dictate that codified positive-law text must be interpreted according to the guarantee that the codified positive-law text retains the same meaning as the original text. OLRC's mandate, which requires OLRC to "conform[]" its revision to the original congressional intent, is one source of this guarantee.[94] More importantly, however, binding statutory commands in enacting statutes declare the codified text's "conformity" with "the understood policy, intent, and purpose of Congress in the original enactments."[95] Enacting statutes will also claim solely to be "revis[ing], codif[ying], and enact[ing] into law," rather than substantively

91. Tellingly, the press closely covers the passage of omnibus spending bills, informing the public about the measures contained therein. Luhby & Lobosco, *supra* note 89 (reporting on politically salient measures contained in an omnibus spending bill passed in 2022, and noting that the "sweeping package includes roughly $45 billion in emergency assistance to Ukraine and NATO allies, an overhaul of the electoral vote-counting law, protections for pregnant workers, an enhancement to retirement savings rules and a TikTok ban on federal devices").

92. Cross & Gluck, *supra* note 32, at 1631.

93. *Id.* at 1631, 1667.

94. *Id.*

95. Act of Dec. 18, 2010, Pub. L. No. 111-314, § 2(b), 124 Stat. 3328, 3328; Act of Dec. 19, 2014, Pub. L. No. 113-287, § 2(b), 128 Stat. 3094, 3094. In fact, these purpose clauses use identical language.

altering, the original text they repeal and replace.[96] Even if one might argue that Congress's enactment of the codification bill supersedes OLRC's mandate, as Congress itself officially enacts the Code into positive law, the contemporaneous purpose clauses in codification bills themselves constitute Congress's own controlling pledge that the enactment has not changed the meaning of the law contained therein. Purpose clauses are just as binding as any other statutory text, so the interpretive approach to codified positive-law text must account for these purpose clauses and other meaning-conformity statutes.[97] Part II will show that an interpretive approach that accounts for meaning-conformity statutes is an interpretive approach that also guards against the concern that codified positive-law text is the work of OLRC rubberstamped, not critically reviewed, by Congress.

However, a second rule for interpreting codified positive-law text is required by statute. Although meaning-conformity statutes and the unique, unchecked role OLRC plays in the creation of codified positive-law text might counsel in favor of an interpretive approach that applies greater scrutiny to that text, codified positive-law text is still officially the law and must be treated as such. Per 1 U.S.C. § 204(a), Congress has determined that, ordinarily, the U.S. Code "shall . . . establish prima facie the laws of the United States."[98] As the Supreme Court has explained, this means that, in the first instance, when there is a difference between the law as codified and the Statutes at Large, the Statutes at Large control.[99] However, 1 U.S.C. § 204(a) further explains that when a title of the Code is "enacted into positive law" by a vote of Congress, it becomes "legal evidence of the laws" in all federal and state courts, much like the first edition of the Revised Statutes.[100] To be legal evidence of the law means that the enacted text

96. Act of Aug. 10, 1956, ch. 1041, pmbl., 70 Stat. 1126, 1126.

97. Textualists should not doubt the value of relying on the explicit statutory text contained in this preamble or other purpose clauses. "A preamble, purpose clause, or recital is a permissible indicator of meaning." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 217 (2012); *see also* 1 Joseph Story, Commentaries on the Constitution of the United States 326 (Lawbook Exchange, Ltd., 2d ed. 2005) (1833) ("[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.").

98. 1 U.S.C. § 204(a) (2018).

99. *See, e.g.*, U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) ("Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law . . . it is the Statutes at Large that provides the 'legal evidence of laws.'"); United States v. Welden, 377 U.S. 95, 98 n.4 (1964) ("[T]he very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent."); *see also* Reinert, *supra* note 1, at 237 n.243 (collecting relevant cases).

100. 1 U.S.C. § 204(a) (2018); *accord* Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113, 113.

is conclusive; if there is a discrepancy between text that is legal evidence of the law and other text, the text that is legal evidence of the law prevails.[101] It is particularly clear that codified positive-law text is to be conclusive because, as was the case with the Revised Statutes of 1874, when a title of the Code is enacted into positive law, original enactments are formally repealed and replaced; the original text ceases to exist as formal statutory text.[102] Thus, though the interpretive approach to codified positive-law text must account for meaning-conformity statutes and legitimate concerns about how OLRC shapes codified positive-law text unchecked, the interpretive approach to codified positive-law text is legally bound by 1 U.S.C. § 204(a) to treat codified positive-law text as controlling evidence of the law's meaning.

Although lower courts have not always followed its lead,[103] the Supreme Court has attempted to formulate an interpretive approach that accounts for the foregoing features of codified positive-law text since the emergence of codification in the late nineteenth century. While the approach that has emerged is rightly concerned with limiting codifiers' ability to alter Congress's original work and with meaning-conformity statutes, the Court's approach wrongly ignores 1 U.S.C. § 204(a).

C. Pre-Textualist Canons for Interpreting Codified Positive-Law Text

The Supreme Court has long been anxious to calibrate its approach to codified positive-law text to ensure codification does not become a vehicle for smuggling new meaning into statutory text.[104] However, the Court's pre-textualist

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101. *See Indep. Ins. Agents of Am.*, 508 U.S. at 448; *Welden*, 377 U.S. at 98 n.4.

102. *Positive Law Codification*, *supra* note 70.

103. *See supra* notes 8-14 (describing the diversity of lower court approaches). Scholars of statutory interpretation have noted that interpretive methodology does not ordinarily receive stare decisis effect and is not treated as binding on lower courts. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 756 (2013) (noting that scholars generally think of interpretive methodology as a "legal category that seems to sit in between law and individual judicial philosophy"). Thus, the failure of lower courts to adhere to Supreme Court precedents addressing the problem of two texts is perhaps not surprising, though greater consistency would still be desirable, particularly for the reasons discussed in this Note as to the merits of the two texts canon.

104. A similar issue had arisen even before the Revised Statutes in instances where statutes were amended with minor "alterations of phraseology" — in other words, revised without being systematically codified. Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 502 (1871). In *Stewart*, the Supreme Court explained, "A change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature." *Id.* However, the Court simultaneously acknowledged that there was a "substantial addition and omission." *Id.* The Court stated, "It is a rule of law that where a revising statute, or one

precedents tended to forsake 1 U.S.C. § 204(a)'s dictate that codified positive-law text is legal evidence of the law. As Part II will explain, the rules announced by the pre-textualist Court are in need of a textualist update that harmonizes both the command that codified positive-law text retains the meaning of the original text and the command that codified positive-law text is the law.

Today's textualist court has not yet addressed the status of these cases confronting the problem of two texts, though they have never been abrogated.[105] The cases considered in this Section purport to present the Court's approach to two texts, but the Court nevertheless routinely confronts codified positive-law text without so much as acknowledging the issue, notably, as Part III will describe, in many cases interpreting Section 1983.[106] A textualist update to these cases would thus provide beneficial clarity and correct a misguided approach.

In 1884, soon after the passage of the Revised Statutes, Justice Bradley wrote in *United States v. Ryder*, "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."[107] In the twentieth century, the Court applied similar principles to the U.S. Code, articulating a generalizable clear-statement rule that placed the burden on Congress when enacting positive-law titles of the Code to speak clearly if it intended to change the meaning of the original text. In *Fourco Glass Co. v. Transmirra Products Corp.*, the Court concluded that even where Congress has enacted a title of the Code into positive law, any "change of arrangement . . . cannot be regarded as altering the scope and purpose of the enactment."[108] The Court explained, "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is *clearly expressed*."[109] The Court reiterated this holding in *Muniz v. Hoffman* in 1975[110] and in *Finley v. United States* in 1989.[111] By requiring a clear

enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled." *Id.*

105. *See supra* note 20 and accompanying text.

106. Reinert, *supra* note 1, at 208-15, 244 (summarizing qualified-immunity precedents and concluding that the Court has failed to consider the original text of the Civil Rights Act of 1871, which differs from the codified positive-law text, in formulating and revising the doctrine).

107. 110 U.S. 729, 740 (1884).

108. 353 U.S. 222, 227 (1957) (quoting Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 198-99, (1912)); *see also* Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972) (endorsing the rule from *Fourco Glass Co.*).

109. *Fourco Glass Co.*, 353 U.S. at 227 (emphasis added).

110. 422 U.S. 454, 470-72 (1975).

111. 490 U.S. 545, 554 (1989) (quoting *Fourco Glass Co.*, 353 U.S. at 227) (relying on the context of the enactment to find that the change in language was not substantive in light of its mere updating of language to reflect the new Federal Rules of Civil Procedure).

statement in the positive-law codified text to override the original text, the rule of *Fourco Glass Co.*, *Muniz*, and *Finley* fixed the meaning of statutes to their original text. These twentieth-century precedents thus obeyed meaning-conformity statutes but ignored 1 U.S.C. § 204(a) by treating the original text, not the codified text, as legal evidence of the law.

The failings of a clear-statement approach are best illustrated by the Court's 1974 decision in *Cass v. United States*.[112] In *Cass*, the Court concluded that where "the meaning of the predecessor statute is clear and quite different from the meaning petitioners would ascribe to the codified law" and where "the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect," the original text should trump the codified text.[113] This was so despite the fact that the Court was aware that the relevant provision had indeed been enacted in positive law.[114] The *Cass* Court put its total disregard for the positive-law status of enacted codified text on the table, explaining that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[115] In addition to ignoring 1 U.S.C. § 204(a), the *Cass* rule permitting courts to turn to "aid[s] to construction" when the text itself is clear is no longer the prevailing mode of statutory interpretation. Textualism's central premise is that clear text governs and is preferable to any other evidence of meaning.[116] The rule of *Ryder*, *Fourco Glass Co.*, *Muniz*, *Finley*, and *Cass*, however, subordinates the codified positive-law text—which is *the text*—to the original text—which, formally, is not text at all but some other, secondary indication of meaning. These precedents are thus due for a textualist update that harmonizes meaning-conformity statutes with 1 U.S.C. § 204(a), while considering textualist objections to the fact that codified text is shaped by OLRC without careful congressional review.

II. DERIVING A TEXTUALIST APPROACH TO TWO TEXTS

Harmonizing the twin commands that codified positive-law text is the law and that that law has the same meaning as the original text will yield a new canon of construction when considered in light of textualist first principles. Textualism

112. 417 U.S. 72 (1974).

113. *Id.* at 82. The Court noted, "We are unpersuaded by petitioners' claim that the codified version is nevertheless to be accepted as correctly expressing the will of Congress and as a mere unexplained version of the language of prior law . . . .". *Id.*

114. *See id.*

115. *Id.* at 78-79 (quoting United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940)).

116. *See* Culbertson v. Berryhill, 538 U.S. 53, 59 (2019).

espouses formalism, and formalist values are advanced by strict adherence to 1 U.S.C. § 204(a)'s command that once enacted, codified positive-law text is legal evidence of the law, and the original text has no legal status once replaced (except whatever legal status might be conferred on the original text by statutes holding that the codified text retains the meaning of the original text). However, textualism also espouses democracy, and that principle urges caution concerning codification by unelected bureaucrats – the same caution embodied in meaning-conformity statutes (but not so much caution that judges override Congress's design for codified text to become positive law).

This Part will interrogate the tension between formalism and 1 U.S.C. § 204(a), on the one hand, and democracy and meaning-conformity statutes, on the other. In doing so, it will advance a novel two texts canon, consisting of the following steps and corollaries:

> Step One: Codified positive-law text is the law, so that is where courts should begin their textualist inquiry. If the meaning of the codified positive-law text is clear on its face, the inquiry is at its end.
>
> > Corollary One: Changes made during positive-law codification that leave the codified positive-law text with a facially clear meaning are binding and cannot be overcome by considering the original text.
>
> Step Two: If the codified positive-law text is not clear, interpretations of ambiguity or silence in the codified positive-law text may not contradict (the clear meaning of) the original text.[117]
>
> > Corollary Two: Changes made during positive-law codification that leave the codified positive-law text ambiguous or silent on a particular issue are not binding and can be overcome by considering the original text.[118]

The corollaries are not offered to add substance to the two steps of the two texts canon. Rather, the corollaries specify how each step operates on different kinds of omissions and additions during codification, in light of the two texts canon's refusal to compare codified positive-law text and original text so as to derive meaning by attributing intentionality to the fact of change.

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117. This Note is not firmly committed as to whether the meaning of the original text must itself be absolutely clear to be persuasive. *See infra* Section II.E.

118. Silence, unlike additional clear terms, is never inherently meaningful, but not all omissions will render the positive-law text ambiguous by leaving the text silent on a relevant issue.

A. The Need for Harmony

Before proceeding, it is important to understand why harmonizing the statutory commands that codified positive-law text is the law and that codified positive-law text expresses the same meaning as the original text is a necessary enterprise. After all, these directives seem inherently contradictory at first glance. However, harmony is mandatory because these seemingly conflicting commands are not just free-floating formalist and democratic ideals but actual statutory requirements. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[119] This harmony canon underlies the principle, articulated in *Branch v. Smith*, that "repeals by implication are not favored," which requires courts to construe a successive statute to be in harmony with that which preceded it unless conflict is unavoidable.[120] The harmony canon is endorsed by textualists, including Justice Scalia, as well as purposivists for good reason.[121] Harmonizing statutes gives effect to as much text as possible, respecting simultaneously multiple democratic enactments by Congress rather than choosing among them as the judge sees fit.[122]

Two things must therefore be true: per 1 U.S.C. § 204(a), positive-law Code is formally legal evidence of the law, meaning it should trump the original text, and, per meaning-conformity statutes, positive-law Code holds the same meaning as the original text, meaning that courts should somehow credit the original meaning of the original text in at least some instances. But how can it be possible to respect the enduring meaning of original text while nevertheless treating the codified text as dispositive? Sections II.B and II.C will show that doing so requires embracing the formalist principle that courts should follow text that is legal evidence of the law when it is clear. At the same time, harmonizing the statutory commands also requires recognizing that this formalism is compatible with the practical reality that even text that is legal evidence of the law cannot always be the beginning and end of the statutory interpretation inquiry. When

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119. Morton v. Mancari, 417 U.S. 535, 551 (1974).

120. 538 U.S. 254, 273 (2003) (plurality opinion) (quoting Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 193 (1968)). The case goes on to explain, "An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Id.* (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

121. *Branch*, 538 U.S. at 273 (adopting the canon against implied repeals in a plurality opinion by Justice Scalia, a textualist); *Morton*, 417 U.S. at 550 (relying on the canon in an opinion concerned with congressional intent and legislative history).

122. SCALIA & GARNER, *supra* note 97, at 327; Jesse W. Markham, Jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy,"* 45 GONZ. L. REV. 437, 440 (2009).

clear text is not forthcoming, meaning-conformity statutes and attendant democratic values can be given effect.

B. Formalism and Adhering to Clear Codified Positive-Law Text

Following 1 U.S.C. § 204(a) furthers textualist, formalist principles. Textualism has long boasted of its own formalism.[123] Textualists are formalists in that they hold rigidly to the Article I, Section 7 command that when a bill has been passed by both houses of Congress and signed by the President, it is the law, but where any of these steps is missing, the document lacks legal status. This is the formalist problem with legislative history; because legislative history is never voted upon, it should not be used to controvert legally binding text.[124] Justice Scalia used the following example to illustrate the broader formalism of the rule of law:

> If, for example, a citizen performs an act . . . which is prohibited by a widely publicized bill proposed by the administration and passed by both Houses of Congress, *but not yet signed by the President*, that [act] is lawful. It is of no consequence that everyone knows both Houses of Congress and the President wish to prevent that [act].[125]

This formalism produces the "bedrock principle of textualism" which insists "that federal courts cannot contradict the plain language of a statute."[126] As Justice Thomas recently wrote for a unanimous Court, "We 'begi[n] with the language of the statute itself, and that is also where the inquiry should end, [when] the statute's language is plain.'"[127] This is so because nothing else—no legislative history, canon, or other aid to construction, including the original text of a subsequently codified enactment—is the law.[128]

Applying these insights to the case of two texts reveals that it is of no consequence to the legal status of enacted positive-law code that "everyone knows"

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123. Scalia, *supra* note 2, at 100 (addressing the critique that textualism amounts to formalism by proclaiming, "Long live formalism[!]").

124. *Id.* at 109 ("The committee report has no claim to our attention except on the assumption that it was the *basis* for the house's vote . . . . A statute, however, has a claim to our attention simply because Article I, section 7, of the Constitution provides that since it has been passed by the prescribed majority . . . it is a law.").

125. *Id.* at 99.

126. Barrett, *supra* note 35, at 164.

127. Culbertson v. Berryhill, 586 U.S. 53, 58 (2019) (first alteration in original) (quoting Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016)).

128. Bostock v. Clayton County, 590 U.S. 644, 654 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President.").

codification is meant to clarify, not change, the law.[129] As explained in Part I, 1 U.S.C. § 204(a) establishes that codified text, once enacted into positive law, becomes legal evidence of the law. Moreover, codified positive-law text is voted upon by both houses of Congress and signed by the President. Under Article I, Section 7, this makes it the law. By contrast, although the original text once held this formal status, the original text is *repealed* through bicameralism and presentment when a new title of Code is enacted into positive law. Thus, under Article I, Section 7, the original text *is not* the law. To a strict formalist, the original text has the same legal status as a yet-to-be-enacted bill or legislative history—none at all.

Applying the "bedrock principle of textualism" that plain text governs to codified positive-law text produces step one of the two texts canon.[130] In the case of two texts, "the language of the statute itself" is the language of the positive-law codified statute recorded in the enacted portion of the U.S. Code.[131] If the plain language of that codified positive-law text answers the question at issue, "the inquiry should end."[132] The plain text does not on its face divulge that a somewhat differently phrased original text once existed, so the interpreter properly beginning with the codified positive-law text will not even have reason for curiosity about the original text. Thus, in contrast to the wayward assertions of *Cass* and other precedents, this Note's two texts canon refuses to override the clear text of what is currently formally the law.

In light of OLRC's unchecked role in shaping codified positive-law text and the existence of meaning-conformity statutes, courts might wonder whether this textualist insistence on formalism is fully warranted in the case of codified positive-law text. This may well be the origin of the Supreme Court's rule in *Cass* and other pre-textualist decisions. However, in 1 U.S.C. § 204(a), Congress itself has spoken to declare codified positive-law text dispositive over original text, so courts do not have discretion to ignore codified positive-law text's status as legal evidence of the law. Moreover, three key textualist justifications for beginning and ending with plain text generally remain applicable in the case of codified positive-law text.

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129. Scalia, *supra* note 2, at 99.

130. Barrett, *supra* note 35, at 164.

131. *Culbertson*, 586 U.S. at 58.

132. *Id.*

First, many textualists believe the Constitution itself requires this formalist approach.[133] Only the text qualifies as law under Article I, Section 7,[134] so it would be unconstitutional to treat other sources of meaning, like legislative history or repealed original text, as equally important. On this account, a rule like that of *Fourco Glass Co.*, *Cass*, and other pre-textualist precedents, providing that the codified positive-law text can only override the original text where Congress's intent is clearly expressed,[135] violates Article I, Section 7 by treating the original text—something that has been repealed under Article I, Section 7—as superior to the codified positive-law text, which has become the law under Article I, Section 7.

Second, treating the text of the law—in this case, the codified positive-law text—as dispositive provides notice to the "ordinary people" governed by the law.[136] Formalist adherence to the text ensures that ordinary people governed by the law will not be taken by surprise by a court applying legislative history, an obscure canon, or, in this case, original text that has been formally repealed.[137] As Justice Kavanaugh put it, "[J]udicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact" by allowing "[c]itizens and legislators" to "ascertain the law by reading the words of the statute."[138] Ordinary people cannot ascertain the meaning of law by reading the words of the statute if codified positive-law text is routinely overridden by original text. Just as an ordinary person would not read the text of a statute in light of its legislative history (ordinary people presumably having no idea where to find legislative history in the first place), an ordinary

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133. Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 82 (2017) ("Intents are irrelevant even if discernable . . . because our Constitution provides for the enactment and approval of texts, not of intents.").

134. U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . . [and if the House and Senate override the veto] it shall become a Law.").

135. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957) ("For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.").

136. For a discussion of how contemporary textualism emphasizes "ordinary meaning" and treats "ordinary people" as the audience of statutes, see Tobia et al., *supra* note 5, at 1440-41; and Eskridge & Nourse, *supra* note 5, at 1738.

137. Textualism has long been justified based on this notice principle. In his Tanner Lecture, Justice Scalia contrasted relying on the "objectified" meaning a "reasonable person" would glean from the text of the law with using legislative history or other tools to ascertain the unknowable intent of the lawgiver. *See* Scalia, *supra* note 2, at 92. He compared the latter to "the tyrant Nero" who "used to have his edicts posted high up on the pillars, so that they would be more difficult to read, thus entrapping some into inadvertent violation." *Id.*

138. Bostock v. Clayton County, 590 U.S. 644, 785 (2020) (Kavanaugh, J., dissenting).

person would not read a piece of positive-law text in the U.S. Code in light of its original text lurking somewhere in the recesses of the Statutes at Large (ordinary people presumably having no idea that multiple versions of statutes exist due to the obscure process of positive-law codification).

Notice is particularly important in the case of positive-law codification. The value of notice is served when the governed can ascertain the law and depend on courts to apply the law accordingly, and codification furthers this goal through its aim to make the law user-friendly.[139] As Part I explained, the benefit of codification is that it makes it easier for a legal researcher—call her an ordinary legal researcher—to find the authority she needs because the law is simplified and arranged by subject. This benefit is enhanced when codified text is enacted into positive law, thus allowing the researcher to be confident that the law she finds in the organized code is indeed dispositive.[140] But this benefit is subverted if the researcher cannot predict when a judge will revert to the original text anyway. If courts apply the original text rather than the codified text that is formally the law, then codification only leads the researcher astray.[141]

Third and finally, textualists have long maintained that formalist adherence to the plain language of text—over all other tools of interpretation—restrains unelected judges.[142] The text is democratically enacted, but other interpretive tools, like legislative history, are never voted upon, or, like canons, are judge-made to begin with and are applied at judges' discretion.[143] In the case of positive-law codification, faithfully applying the codified positive-law text prioritizes text that has formally been democratically enacted over an unelected judge's choice between the original text and the codified positive-law text. Not only does the choice to apply the original text introduce a new element of judicial discretion, but it also subverts Congress's directive embodied in 1 U.S.C. § 204(a).[144] Thus, even as one might wonder about the democratic risk of failing to restrain

139. Cross & Gluck, *supra* note 32, at 1567-68.

140. *See* 1 U.S.C. § 204(a) (2018).

141. Contemporary textualists often speak of the value of notice to "ordinary people." However, legal researchers who actually read the U.S. Code may not be "ordinary people" but rather "ordinary lawyers." Because some textualists also speak of notice values from the perspective of the ordinary lawyer, the difference is not significant for this Note's purposes. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2209 (2017).

142. Scalia, *supra* note 2, at 93 (advocating for textualism because purposivism allows judges to fill in the amorphous intent of the legislature with their own "objectives and desires").

143. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118-19 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (explaining that certain canons "leave the bar and the public understandably skeptical that courts are really acting as neutral, impartial umpires in certain statutory interpretation cases").

144. 1 U.S.C. § 204(a) (2018) (providing that when so enacted, a title of the Code "*shall* be legal evidence of the laws therein contained" (emphasis added)).

unelected codifiers by applying formalism to codified positive-law text, applying formalism in this case advances a different dimension of democracy—restraining unelected judges in deference to Congress.

However, as important as these formalist insights and 1 U.S.C. § 204(a) are in justifying beginning with the codified positive-law text, that text cannot always resolve the interpretive inquiry.

C. Democracy and Turning to the Original Text in Cases of Ambiguity

Formalism does not prevent textualists from recognizing that there are circumstances that necessitate looking beyond the text where that text is less than clear. Although textualists agree, on formalist grounds, that canons "can never be applied to overcome the plain language of a statute,"[145] there are contentious debates within textualism over when ambiguity might appropriately necessitate the application of a canon. The textualists on the Supreme Court disagree as to when and why ambiguity should be resolved via canon; some Justices oppose overeager use of substantive canons, like lenity or constitutional avoidance,[146] while others embrace such tools.[147] However, recent cases support a trend favoring canons that advance constitutional values. Step two of the two texts canon can serve as one such tool for reckoning with ambiguity in codified positive-law text.

For example, the major-questions doctrine, perhaps the most significant rule of statutory interpretation announced by the contemporary textualist Court, protects Article I's design that lawmaking power rest exclusively with Congress. The doctrine requires courts to assume that Congress would not have delegated authority to decide major questions to administrative agencies without a clear statement of congressional authorization explicit in statutory text.[148] Chief

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145. Barrett, *supra* note 35, at 164 ("The bedrock principle of textualism, and the basis on which it has distinguished itself from other interpretive approaches, is its insistence that federal courts cannot contradict the plain language of a statute, whether in the service of legislative intention or in the exercise of a judicial power to render the law more just.").

146. *See* Kavanaugh, *supra* note 143, at 2136-39. *Compare* Wooden v. United States, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (endorsing lenity because of its historical pedigree and value in advancing constitutional values like due process), *with id.* at 378 (Kavanaugh, J., concurring) (rejecting lenity except in cases of grievous ambiguity because canons triggered by textual ambiguity are difficult to fairly administer since "ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis").

147. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring).

148. *Id.* at 723 (majority opinion) ("Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince us

Justice Roberts's majority opinion in *West Virginia v. EPA* framed the doctrine as a tool to preserve "separation of powers"—specifically, the separation between the Article I lawmaking function and the Article II executive function.[149] As Justice Gorsuch explained in his concurrence, the doctrine is one of many "'clear-statement' rules" designed to help the judiciary fulfill its duty "to ensure that acts of Congress are applied in accordance with the Constitution."[150] Gorsuch then traced the historical pedigree of constitutional clear-statement canons—such as those presuming Congress does not impose retroactive liability or abrogate sovereign immunity without speaking clearly—back to the Founding and Chief Justice Marshall.[151] This Note's two texts canon is therefore in good historical as well as contemporary company in protecting a similar constitutional value to that defended by the major-questions doctrine—namely, Congress's exclusive Article I lawmaking authority.

Applying canons to preserve constitutional values is not only the practice of contemporary textualists; it is also theoretically compatible with the textualist commitment to judges serving as faithful agents of Congress.[152] In her article *Substantive Canons and Faithful Agency* (published before she joined the Court), Justice Barrett grappled with whether textualism can coherently endorse substantive canons and argued that *constitutionally inspired* substantive canons are legitimate exercises of judicial review.[153] She explained, "Instead of pursuing undifferentiated social values—however sound and desirable they may be—constitutionally inspired canons draw from an identifiable, closed set of norms."[154] Barrett further observed that judges are justified in deviating from the "norm of faithful agency" to Congress in order to protect constitutional values: "When a conflict exists between a statute and the Constitution, federal courts are obliged to side with the Constitution, rendering the exercise of judicial review itself a significant exception to the norm of faithful agency."[155] Thus, for Barrett, although the textualist judge's role should ordinarily recede to that of a faithful

otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

149. *Id.*

150. *Id.* at 736 (Gorsuch, J., concurring).

151. *Id.*

152. Textualists have long noted the importance of deference to Congress. *See* Scalia, *supra* note 2, at 86 (advocating for textualism as a way to curtail the common-law judge's historical lawmaking function in light of the relative democratic authority of statutory law).

153. Barrett, *supra* note 35, at 125, 169.

154. *Id.* at 111.

155. *Id.* at 112.

agent of Congress, intervention may occasionally be justified to protect identifiable higher constitutional values.

Before describing how the two texts canon works as a constitutionally inspired canon, it is necessary to specify the particular constitutional value with which step two of the two texts canon is concerned. The two texts canon aims to preserve the constitutional assignment of all Article I lawmaking power to Congress. OLRC is an agency housed under the auspices of the House of Representatives and is thus technically a creature of Article I.[156] Nevertheless, Article I confers "[a]ll legislative Powers" exclusively on "Congress," which "shall consist of a Senate and House of Representatives."[157] The Senate and House are in turn to be "composed of," respectively, "two Senators from each State," elected according to the Seventeenth Amendment, and "Members chosen every second Year by the People."[158] The Constitution lays out additional qualifications for senators and members of the House beyond the requirement that they be elected by the people: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[159] Because the codifiers at OLRC (and its historical predecessors) are not subject to these qualifications, they are not legislators and therefore lack constitutional authority to change the meaning of the law.

In his *West Virginia v. EPA* concurrence, Justice Gorsuch quoted James Madison in explaining the democratic stakes of the Constitution's design that lawmaking be handled exclusively by the people's representatives in the House and Senate: "[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people'" through periodic elections.[160] By contrast, Gorsuch contended, the Constitution rejected a model of government administered by unaccountable "ministers."[161] That OLRC is fundamentally composed of "ministers," not "the people's elected representatives," is therefore constitutionally

156. *Positive Law Codification*, *supra* note 70.

157. U.S. CONST. art. I, § 2.

158. *Id.* art. I, § 3; *id.* amend. XVII.

159. *Id.* art. I, § 2.

160. West Virginia v. EPA, 597 U.S. 697, 737-38 (2022) (Gorsuch, J., concurring) (second and third alterations in original) (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961)).

161. *Id.* at 737 (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

troubling in light of the largely unchecked role OLRC plays in producing positive-law titles of the Code.[162]

As described in Section I.B, OLRC frequently (a) removes text drafted by Congress based on subjective determinations about redundancy, (b) originates text, including potentially significant provisions like definitions, and (c) organizes the Code.[163] If unchecked, these are all potentially legislative acts taking place outside of Article I's designated process. Although codification bills must, in theory, obtain congressional approval, legislators do not meaningfully review OLRC's additions and subtractions because codification bills are long, tedious, and lack political salience.[164] Although OLRC may not set out to usurp Article I power,[165] inadvertent extraconstitutional legislating is a real possibility.

Meaning-conformity statutes are themselves expressions of the democratic concern that codifiers should not perform the legislative function constitutionally assigned to Congress. OLRC is constitutional *because* its mandate is limited by 2 U.S.C. § 285b to compiling and restating the law in a way that "conforms to the understood policy, intent, and purpose of the Congress in the original enactments."[166] And Congress recommits to this Article I design each time it attaches a meaning-conformity statute in the form of a purpose clause to a new enactment of a title of the Code. Under the harmony canon, courts must give effect to these meaning-conformity statutes just as they must follow 1 U.S.C. § 204(a). The ideal opportunity to give effect to meaning-conformity statutes is presented when courts must resolve an ambiguity by turning to a constitutionally inspired canon because it so happens that meaning-conformity statutes themselves advance the democratic Article I principle that senators and representatives, not unelected bureaucrats, hold the power to change the meaning of the law.

Having laid out the relevant constitutional and democratic values, it is now possible to explain how the two texts canon can support these values and effectuate meaning-conformity statutes. A rule that prioritized the codified text and forbade recourse to the original text would unnecessarily repeal meaning-conformity statutes by implication and permit any and all introductions of ambiguity by unelected codifiers to become opportunities for the meaning of the law to change through subsequent interpretations. To be sure, Congress may change the law by ratifying changes that create unambiguous text, even when those changes originated with codifiers, and formalism requires textualists to respect such changes. But there is no such justification for allowing ambiguous or silent

162. *Id.*

163. *See supra* notes 67-72.

164. *See supra* notes 84-92.

165. 2 U.S.C. § 285b (2018).

166. *Id.*

codified positive-law text to outweigh the original work of the people's representatives.

In the absence of the two texts canon, ambiguities in positive-law codified text give rise to interpretations by courts and litigants deploying other canons and policy rationales.[167] This means that ambiguity or silence introduced by an unelected reviser, and missed in a cursory review by the codifying Congress, is liable to become a vessel into which new meaning will be poured by a judge. That judge, in turn, may invoke legislative history (which is never voted upon),[168] a substantive canon (but which one?),[169] common law (but do we not live in an age of statutes?),[170] a dictionary (cherry-picked to promote a preordained outcome),[171] or perhaps even naked policy rationales.[172] Step two of the two texts canon averts such an unnecessary change in meaning by antidemocratic processes—first codification, then judicial lawmaking—by protecting the original meaning of the original text in the face of contradictory interpretations of ambiguity or silence in the codified positive-law text.

One might worry that step two of the two texts canon does not go far enough by focusing only on silence or ambiguity introduced during codification. Unelected codifiers also make changes during codification that leave the text clear, and, occasionally, with a meaning different from that of the original text, and even these changes may escape Congress's notice during the enactment process.[173] However, step one of the two texts canon treats clear text produced by codification as the law under Article I, Section 7 and legal evidence of the law under 1 U.S.C. § 204(a). Might this permit occasional lawmaking by revisers and infringe meaning-conformity statutes when codified positive-law text has a meaning that, though facially unambiguous, differs from the original text?

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167. Consider the example of qualified immunity, which judges admit is a judicial policy choice not dictated by a reading of the text of Section 1983. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (admitting to relying on policy reasoning to create qualified immunity despite the silence of the positive-law codified text of Section 1983 on the issue); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (acknowledging that qualified immunity is based on a policy rationale).

168. *See infra* notes 194-195 and accompanying text.

169. Brian G. Slocum & Kevin Tobia, *The Linguistic* and *Substantive Canons*, 137 Harv. L. Rev. 70, 98-99 (2023) (discussing strategies for resolving conflict among substantive canons).

170. Scalia & Garner, *supra* note 97, at 318 (describing the common-law canon as "a relic of the courts' historical hostility to the emergence of statutory law").

171. Sam Capparelli, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of* Bostock v. Clayton County, 88 U. Chi. L. Rev. 1419, 1425 (2021) ("There are enough dictionaries—and dictionary definitions—that, by picking among the plethora of options, a judge could find support for almost any possible argument.").

172. *See supra* note 165.

173. *See supra* Section I.B.

Perhaps. However, fully addressing these concerns would require abandoning step one and either (a) permitting original text to trump all terms added during codification, even those that leave the codified positive-law text clear on its face, or (b) permitting courts to consider case-by-case evidence as to whether Congress intended to change the law's meaning. The latter is untenable as an inquiry into legislative intent that would likely invite reliance on legislative history.[174] And both the latter and the former are unacceptable because they would empower unelected judges to strike words from a statute that Congress has formally identified as legal evidence of the law and enacted through bicameralism and presentment.[175] Rejecting plain positive-law text in favor of original text is akin to allowing legislative history or some other canon to trump plain text, and, for the formalist reasons explained in Section II.B, textualists categorically refuse to allow other interpretive tools to override clear text.[176]

Nevertheless, step two is justified in going as far as it does. Despite step one's textualist, formalist commitment that clear text is clear text, step two of the two texts canon is warranted as a way to defend constitutional values. At step two, the ship of relying on clear positive-law text has sailed. The judge must interpret; the only question is on what tools she will rely. Step two of the two texts canon directs the judge's attention to the original text over any other canon she could use because doing so prevents an ambiguity introduced through codification from snowballing into judicial lawmaking. And the original text is superior to all other possible indications of meaning because meaning-conformity statutes import the original text back into the interpretive inquiry and, as Section II.E will further develop, the original text is unlike all other interpretive tools in that it was once subject to bicameralism and presentment.[177]

This is not to say that there is no tension between step one and step two. True, the codified positive-law text is the work of unelected revisers, is not meaningfully reviewed by Congress, and is subject to meaning-conformity statutes.[178] This is the two texts canon's pragmatic Article I (Sections 2 and 3) insight: whatever technical approval Congress may provide, there is a risk in positive-law codification that revisers, who are not constitutionally assigned legislative power, will effectively legislate.[179] But it is equally true that, once enacted, codified text

174. *See, e.g.*, Muniz v. Hoffman, 422 U.S. 454, 467-69, 472 (1975) (relying on legislative intent and legislative history to justify the conclusion that Congress did not intend to change the meaning of the law through a particular change made during positive-law codification).

175. *See supra* notes 134-141.

176. Scalia, *supra* note 2, at 105-06 (criticizing a brief for beginning with legislative history and turning to the text only when the legislative history was declared ambiguous).

177. *See infra* text accompanying notes 194-195.

178. *See supra* Section I.B.

179. *See supra* notes 166-167.

becomes formally the law and legal evidence of the law.[180] This is the two text canon's distinct, formalist Article I (Section 7) insight about the legal status of the text: despite the practical reasons to doubt whether Congress has meaningfully approved the revisers' work, codified positive-law text is literally voted on by Congress, while original text is repealed.[181] These pragmatic and formalist insights must be balanced. The two texts canon balances these insights the way textualism typically balances the paramount status of text against other significant interpretive considerations: text is text, but ambiguity, by necessity, may open the door to a narrow set of other considerations, like constitutional principles.[182] Although there are good reasons to approach codified positive-law text with unique caution, this caution must fall short of overriding textualism's driving commitment to the plain meaning of the text.[183] Otherwise, the primacy of plain text in statutory interpretation would be vulnerable whenever a similarly "good reason" appeared to doubt the text.[184]

D. The Corollaries: Clear Changes Versus Changes That Leave Ambiguity or Silence

It is now possible to summarize the two texts canon's diverging treatments of changes that leave the text clear at corollary one and changes that leave the text either ambiguous or silent at corollary two. The two texts canon begins at step one with the codified positive-law text itself. At this initial stage, the canon does not permit comparing positive-law text, which is the law, with the original text, which is not the law.[185] Once the positive-law codified text is enacted and published in the Code, there is nothing to indicate what, if any, language was added, omitted, or otherwise changed during revision. A clear term added during codification, the paradigmatic example of a change that leaves the codified

180. *See supra* Sections I.B, II.B.

181. *See Positive Law Codification*, *supra* note 70; 1 U.S.C. § 204(a) (2018); U.S. CONST. art. I, § 7.

182. *See supra* notes 145-155.

183. Barrett, *supra* note 35, at 164 (calling the supremacy of plain text textualism's "bedrock principle").

184. For example, "good reasons" could be raised to treat omnibus bills and appropriations bills differently from more concise, more focused legislation or to question text that interpreters know was in fact originally drafted by lobbyists. These reasons may look less persuasive than those for approaching codified positive-law text with caution, but it is difficult to imagine drawing a principled line.

185. Even at step two, the two texts canon does not compare the codified and original text and derive meaning from the comparison. When step two does examine the original text as a preferable source of meaning to any contrary interpretation of silence or ambiguity in the codified positive-law text, step two examines the original text as text, not in search of an account of intentionality behind the fact of change.

positive-law text clear, simply becomes an indistinguishable part of an overall clear statute that, like any other clear positive-law text, should be the beginning and end of the interpretive inquiry.[186] Accordingly, additions of clear terms are binding per corollary one in that they actually change the meaning of the statute. A reader of the Code would read the positive-law text containing those clear terms and find it clear,[187] leaving no need to seek evidence of meaning elsewhere, whether in the original text or through any other tool in the textualist toolkit. Even if the reader were to learn of such clear positive-law text's provenance, step one and corollary one counsel that she ought not use this information external to the text to cast doubt on the positive-law text's plain meaning.

One can also imagine scenarios where omissions of original text result in codified positive-law text that is clear on its face. For example, in many instances, if the original text contained an exception ("no vehicles in the park, except on Sundays"), and that exception were omitted during codification ("no vehicles in the park"), the reader of the codified positive-law text would find the codified positive-law text clear (the text does not contain any exceptions, so the reader would have no reason to imagine such a particular exception as the park being open to vehicles on Sundays).[188] The effect of such an omission is therefore binding in that the exception found in the original text (or other language which, once excised, leaves the codified positive-law text with an unambiguous meaning) ceases to exist, and an interpreter must not point to the original text, which is not the law, to resurrect meaning that is absent in the codified positive-law text, which is the law.

By contrast, at step two, if the codified positive-law text is not clear, the original text should be considered before turning to other interpretive tools. Corollary two recognizes that changes that leave the text ambiguous or silent on an issue are not binding and can be overridden by the original text. For example, putting aside the example of the omitted exception giving rise to clear text, to which corollary one applies, omissions will frequently leave only silence or ambiguity in their wake, particularly where the original text spoke to an issue, but the omission of terms causes the codified positive-law text to fail to address the

186. Note that the reader does not compare the original and codified positive-law text, observe the addition of a clear term, and use this to conclude that Congress must have intended to add the meaning contained in the clear term to the statute.

187. For the purposes of this passage, a "reader of . . . the positive-law text" is someone observing the final product of positive-law codification as it appears in the Code itself, not a codification bill or the Judiciary Committee's report. One could think of this as an "ordinary reader," or outsider's view of the statute, as opposed to the internal perspective of a member of Congress reading the committee report. However, the sophistication of the audience is not significant.

188. The "no vehicles in the park" example is drawn from H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958).

issue.[189] To use the "no vehicles in the park" example again, if the original text proclaimed "no vehicles, such as cars, trucks, bicycles, or scooters, in the park," but the codified positive-law text read simply "no vehicles, such as cars, trucks, or bicycles, in the park," the omission of "or scooters" would mean that the codified positive-law text is silent as to whether scooters are permitted in the park. This silence does not inherently indicate that scooters are *not* prohibited in the park; rather, this silence leaves ambiguity as to whether the word "vehicles" encompasses scooters. Rather than permitting this ambiguity to become an opportunity for a judge to determine, for example, as a matter of policy whether it is good for scooters to be in the park, the judge or other interpreter should look to the original text and realize that scooters were clearly within the sweep of the statute as originally drafted by Congress and validated through the Article I, Section 7 process. Corollary two thus recognizes that omissions that create silence or ambiguity do not result in binding changes to the statute's meaning; the original text can clarify the issue, ensuring the meaning of the original text is retained.

Corollary two further functions as a rejection of an alternative view that would find the fact that language was omitted inherently meaningful. In the "no vehicles in the park" example, corollary two holds that the fact that the phrase "or scooter" was omitted should not be considered an indication that Congress intended to exclude scooters from the statute's embrace and thereby permit scooters in the park.[190] As a textualist rule, the two texts canon refuses to engage in an intentionalist analysis of the mere fact that a word or phrase was dropped from the statute. Moreover, as the Supreme Court has recognized in other

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189. The key here is the silence or ambiguity, not the fact that an omission occurred. Readers of codified positive-law text do not go looking for additions and omissions; they read the text as it appears in the Code. In the context of corollary two, an omission would not be apparent to the reader as an omission; rather, she would only discover that an omission occurred upon proceeding to step two after finding the text silent or ambiguous in that the text failed to answer her interpretive question. The original text may answer her question via language that was omitted, though in other cases, the original text may not be helpful if the ambiguity or silence was not a product of codification.

190. As an initial matter, a reader of the text ("no vehicles, such as cars, trucks, or bicycles in the park") would not know that the text ever spoke to the issue of scooters, so she would have no reason to conclude up front that the text's failure to include scooters among its enumeration of kinds of vehicles was significant. The reader would instead simply be aware of the fact that the text fails to answer her interpretive question. This recognition of the text's silence is what justifies her in proceeding to step two. At step two, she would learn that the original text did address scooters, and she should treat that original text addressing scooters as text—in other words, as dispositive evidence that scooters are vehicles not permitted in the park. She should not consider the intention behind the decision to omit scooters, which would only lead to intentionalist confusion as to whether the change was intended as a simplification or a determination that scooters should be allowed in the park.

contexts, "many or perhaps most statutory ambiguities may be unintentional,"[191] so it would be particularly inappropriate to deem an introduction of ambiguity or silence brought about by positive-law codification to be indicative of Congress's substantive intent. And most importantly, in addition to the typical textualist objections to intentionalist reasoning, in the specific case of positive-law codification, Congress has explicitly—indeed, textually—disavowed the intent to change the meaning of the law in meaning-conformity statutes.[192] If a judge or other interpreter were to interpret simplifications and other revisions made during codification as indications that Congress intended to change the meaning of the law, where no such change is manifested on the face of the positive-law text itself, such an interpretation would violate meaning-conformity statutes.

Ambiguous terms added during codification receive the same treatment under corollary two as omissions that create silence or ambiguity because, by definition, ambiguous terms do not contribute clear meaning to the codified positive-law text. It would be just as inappropriate to derive meaning from the fact of the addition of ambiguous language as it would be to derive meaning from the fact of an omission.

E. Responding to Textualist Counterarguments

Before turning to the case study, it is necessary to consider three counterarguments. First, one might worry that relying on original text at step two is comparable to relying on legislative history, which textualists deem entirely off-limits. Original text is literally a piece of the history of a piece of legislation, now lacking legal status, like legislative history. However, that is where the similarities end. Legislative history earns textualists' disdain because it is manipulable, both by its drafters, who are often staffers and lobbyists rather than senators and representatives themselves, and by the judges who cite it.[193] Textualists also reject legislative history because, even if legislative history were capable of capturing the views of individual members of Congress accurately, legislative history cannot possibly capture the intentions of a majority of both houses of

191. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 398-402 (2024).

192. *See, e.g.*, Act of Dec. 18, 2010, Pub. L. No. 111-314, § 2, 124 Stat. 3328, 3328 (enacting Title 51 U.S.C. as positive law); Act of Dec. 19, 2014, Pub. L. No. 113-287, § 2, 128 Stat. 3094, 3094 (enacting Title 54 U.S.C. as positive law); Act of Aug. 10, 1956, ch. 1041, pmbl., 70 Stat. 1126, 1126 (enacting Titles 10 and 32 U.S.C. as positive law).

193. *See* Scalia, *supra* note 2, at 108 ("One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten 'floor debate'—or, even better, insert into a committee report.").

Congress.[194] Most importantly, textualists reject legislative history because legislative history is not voted upon by both houses of Congress and signed by the President and therefore is not the law.[195] In these respects, original text considered at step two of the two texts canon is nothing like legislative history.

Unlike legislative history, the original text is not manipulable because it is fixed at the time of original enactment. Furthermore, the original text was voted upon by both houses of Congress and signed by the President and therefore, at least at one point in time, was reliable evidence of the meaning conveyed by the majority of the enacting Congress and satisfied the constitutional standards set by Article I, Section 7. The fact that the original text was set in stone by Congress through the majoritarian processes of bicameralism and presentment distinguishes it from all other possible indications of a statute's meaning. The same cannot be said of other canons or judicial reasoning based on policy preferences, let alone legislative history. Thus, step two of the two texts canon is justified in relying on the original text above contradictory interpretations drawing on other interpretive techniques.

Second, one might raise an objection to the two texts canon on the grounds that it requires a subjective judicial determination of how much ambiguity in the codified positive-law text is enough to invoke step two.[196] In an influential book review titled *Fixing Statutory Interpretation*, Justice Kavanaugh argued that "because it is so difficult to make . . . clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity."[197] Kavanaugh might approach a piece of codified positive-law text and ask, as he did in the book review, "If the statute is 60-40 in one direction, is that enough to call it clear? How about 80-20?"[198] Although Kavanaugh's concern about ambiguity triggers cannot be entirely assuaged, the two texts canon is distinguishable from those that trouble him. Specifically, Kavanaugh is concerned with canons such as *Chevron*, which, before it was overturned, directed judges to, "in cases of textual ambiguity, defer to an agency's reasonable interpretation of a statute," and constitutional avoidance, which directs that where text is ambiguous, "avoid interpretations

194. *See* Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 458 (2014) (Scalia, J., dissenting) (arguing that the Court had treated "a few isolated snippets of legislative history" as "authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress").

195. Easterbrook, *supra* note 133, at 91 (arguing that drawing evidence of meaning from the enactment process is "illegitimate" because legislative history is "insufficient to constitute legislation under our system of governance").

196. *See* Kavanaugh, *supra* note 143, at 2136-39.

197. *Id.* at 2121.

198. *Id.* at 2137.

raising constitutional questions."[199] For Kavanaugh, these canons are problematic because once invoked, they completely untether the search for meaning from the text itself to focus on unrelated considerations, and this drastic departure from the text is triggered by the judge's subjective ambiguity determination.[200]

In contrast to these truly atextual guides to statutory meaning, the original text is as close to the text as any tool of construction can be. Furthermore, the two texts canon only comes into play when an ambiguity emerging from codification has already been seized upon, say, by a litigant seeking to rely on some other substantive canon or policy consideration. The two texts canon, in fact, constrains the judge's reliance on ambiguity by dictating that an alternative interpretation of ambiguity in the codified text cannot trump the original text. Thus, the two texts canon can be thought of not as a new ambiguity-trigger canon, but as a canon that responds to the problem of ambiguity-trigger canons with a rule of hierarchy among sources of meaning.[201]

Third, a textualist might object to step two of the two texts canon on the grounds that the risk of unrestrained judicial discretion driving the search for meaning in ambiguous codified positive-law text is reproduced in the search for meaning in the original text. Might judges and other interpreters simply see what they want to see in original text when that text is itself less than clear? For those troubled by this prospect, the two texts canon could be further refined to confine judicial discretion at step two. One could require that step two of the two texts canon only apply where the original text is itself clear on the issue left ambiguous in the codified positive-law text. This would avoid a far-ranging inquiry into the meaning of the original text that might, for example, apply to the original text the very canons thought problematic in reading the codified positive-law text. This clarity condition — call it corollary three — might read:

> Corollary Three: The inquiry into the original text stops once it is determined whether or not the original text contains a provision that clearly resolves the interpretive question.

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199. *Id.* at 2135.

200. *Id.* at 2139-40.

201. William N. Eskridge and Philip P. Frickey have espoused the idea of hierarchy among tools of statutory interpretation in their famous funnel model:

> [T]he model suggests the hierarchy of sources that the Court has in fact assumed. For example, in formulating her preunderstanding of the statute and in testing it, the interpreter will value more highly a good argument based on the statutory text than a conflicting and equally strong argument based upon the statutory purpose.

William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990).

Existing precedents have tended to embrace such a restriction. The Supreme Court's rule in *Cass* required the original text to be clear,[202] and the Fourth Circuit has maintained that "the Statutes at Large control" only when "the meaning of the original enactment was '*clear and quite different* from the meaning . . . ascribe[d] to the codified law.'"[203] Although these precedents have other flaws, the fact that courts already seem to apply something like corollary three suggests corollary three has intuitive appeal.

However, this Note is agnostic as to whether corollary three is necessary. The original text is unique among interpretive tools because the original text was, at some point, the product of Article I bicameralism and presentment and even now has legitimacy conferred on it by meaning-conformity statutes. Accordingly, courts may be justified in allowing less-than-clear (but still persuasive) original text to influence their reading of the codified positive-law text, rather than depending on other canons or policy-based reasoning. Furthermore, corollary three would mean requiring an additional clarity-versus-ambiguity determination, and although corollary three avoids diverting judicial attention from the text in other ways, it may do little to assuage Justice Kavanaugh's concern about ambiguity triggers.[204]

Finally, because the two texts canon embraces clear codified positive-law text, even where it is the product of changes made during codification, but does not embrace silent or ambiguous codified positive-law text caused by changes made during codification, the two texts canon is liable to be compared to a clear-statement rule. The rule may thereby be "accused of requiring Congress to use magic words to accomplish a particular result."[205] True clear-statement rules have been criticized for violating Congress's legislative supremacy by overriding clear text in favor of judicially imposed norms — like the norms against reading a statute to waive sovereign immunity or delegate authority to an agency to decide a major question — whenever Congress has not expressed itself with precisely the words courts require.[206] Here, however, the two texts canon accepts the codified

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202. Cass v. United States, 417 U.S. 72, 82 (1974).

203. Washington-Dulles Transp., Ltd., v. Metro. Wash. Airports Auth., 263 F.3d 371, 378-79 (4th Cir. 2001) (alterations in original) (emphasis added) (quoting *Cass*, 417 U.S. at 82).

204. Kavanaugh, *supra* note 143, at 2135.

205. Barrett, *supra* note 35, at 166; *see also* INS v. St. Cyr, 533 U.S. 289, 333-34 (2001) (Scalia, J., dissenting) ("[C]lear statement [of congressional intent to strip habeas jurisdiction] has never meant the kind of magic words demanded by the Court today . . . ."); Dellmuth v. Muth, 491 U.S. 223, 239 (1989) (Brennan, J., dissenting) ("[T]he Court in the Eleventh Amendment context insists on setting up ever-tighter drafting regulations that Congress must have followed . . . in order to abrogate immunity . . . .").

206. Barrett, *supra* note 35, at 167 ("[A]ggressive use of clear statement rules violates the baseline rule of legislative supremacy,").

positive-law text and looks no further, except where an interpretation thereof contradicts the original text. The canon's embrace of clear terms in the codified positive-law text is not a search for magic words, but rather a commitment to treating all clear positive-law text as equally binding. In fact, it was the pre-textualist clear-statement rule of *Cass* and its brethren that required Congress to speak clearly if it wanted the positive-law text to be taken seriously despite differing from the original text. The two texts canon aims to replace this pre-textualist clear-statement rule.

III. APPLYING THE TWO TEXTS CANON TO A CASE STUDY: SECTION 1983

Perhaps the most important statute in which the problem of two texts arises is Section 1983, a Reconstruction Era innovation that creates a tort-like cause of action for plaintiffs whose constitutional or federal statutory rights have been violated by officials acting "under color of" state law.[207] Section 1983 is a particularly telling case study in the conundrum of two texts because the text of Section 1983 changed in at least three highly significant ways between its original enactment in the Civil Rights Act of 1871 and its positive-law codification in the first edition of the Revised Statutes in 1874.[208] Thus far, courts have taken two of these changes seriously, finding that the additions of the phrase "and laws" and the phrase "Territory or the District of Columbia" during codification changed the meaning of Section 1983 to embrace federal statutory as well as constitutional rights and official actions taken under color of territorial law.[209] However, the Supreme Court has not yet seriously confronted (and lower courts are only beginning to note[210]) the third change to the text of Section 1983 brought

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207. 42 U.S.C. § 1983 (2018).

208. Of course, the name "Section 1983" comes from the location of the provision in Title 42 of the U.S. Code, which records the same wording as the 1874 text of the Revised Statutes. The Revised Statutes language is still the only text that is legal evidence of the law in this case because the Revised Statutes repealed the original text in the Statutes at Large. *See* Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113, 113 (stating that the Revised Statutes "shall be legal evidence of the laws and treaties therein contained"); 24 Rev. Stat. § 1979 (1874) (providing the text of Section 1983). And Title 42 of the U.S. Code has never been enacted into positive law. *See* OFF. L. REVISION COUNS., https://uscode.house.gov/browse.xhtml [https://perma.cc/U7RJ-FLBT] (indicating this fact).

209. *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (addressing "and laws"); Ngiraingas v. Sanchez, 495 U.S. 182, 191 (1990) (addressing "Territory or the District of Columbia").

210. *See, e.g.*, Thomas v. Johnson, No. H-23-662, 2023 WL 5254689, at *7 (S.D. Tex. Aug. 15, 2023) (inviting the Supreme Court to consider Reinert's "lost-text research" and the Notwithstanding Clause (quoting Rogers v. Jarrett, 63 F.4th 971, 981 (5th Cir. 2023) (Willet, J., concurring))).

about by the revision process—the omission of what Alexander A. Reinert has labeled the "Notwithstanding Clause."[211]

In *Qualified Immunity's Flawed Foundation*, Reinert purports to discover that the original text of the Notwithstanding Clause as enacted in the Civil Rights Act of 1871 explicitly abrogated qualified immunity.[212] Qualified immunity is a doctrine that protects government officers from facing Section 1983 liability except where the officers have violated rights that are "clearly established," typically based on how closely the facts of the rights violation compare to in-circuit precedent.[213] The text of Section 1983, as enacted into positive law in the Revised Statutes and now recorded in the U.S. Code, says nothing about immunities. However, the original 1871 text of the Civil Rights Act categorically declared, per Reinert's Notwithstanding Clause, that Section 1983 liability exists, "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding."[214] Reinert contends that this text provides that immunity grounded in state law must not limit the reach of Section 1983, thus refuting Supreme Court precedents devising qualified immunity based on state common law.[215]

However, Reinert ultimately treats the original text as evidence of congressional intent, not textualist evidence of the meaning of the positive-law text.[216] Once the Notwithstanding Clause argument is marred by its atextual interest in congressional intent,[217] it is unlikely to go far with the textualists on the Supreme Court. Thus, the two texts canon is necessary to demonstrate that the Notwithstanding Clause is textualist evidence of the meaning of Section 1983.

Additionally, as Sections III.D and III.E will discuss, the two texts canon is needed to understand why Reinert's Notwithstanding Clause should trump the ambiguous codified positive-law text of Section 1983 in abolishing immunities rooted in state law while the clear additions of the phrase "and laws" and the phrase "Territory or the District of Columbia" during codification should remain

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211. Reinert, *supra* note 1, at 207.

212. *Id.* at 238-39.

213. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Schweikert, *supra* note 27, at 18 (arguing that qualified immunity is unnecessary to identify frivolous lawsuits).

214. Reinert, *supra* note 1, at 235 (emphasis omitted); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13.

215. Reinert, *supra* note 1, at 238.

216. *Id.* (concluding that the Notwithstanding Clause "still speaks powerfully to Congress's intent").

217. *See, e.g.*, Scalia, *supra* note 2, at 92-93 (criticizing the search for legislative intent and instead proposing that textualists must search for objective intent); Barrett, *supra* note 141, at 2195 (describing how textualists "view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver").

binding. While a total reversion to the original text of the Civil Rights Act of 1871 risks jeopardizing these other changes in the text, which are in fact pillars of modern civil-rights litigation, the two texts canon recognizes the difference between language that is clear in the codified positive-law text, even if that language was added during codification, and interpretations of ambiguity or silence in the codified text that contradict the original text.

A. Section 1983 and Qualified Immunity

Before applying the two texts canon to the Notwithstanding Clause, it is important to understand the relationship between qualified-immunity jurisprudence and the text of Section 1983. Qualified immunity was invented by the Supreme Court in 1967 in *Pierson v. Ray*.[218] In *Pierson*, the Court contemplated a Section 1983 claim based on a false arrest.[219] The *Pierson* Court concluded that at common law, police officers had a defense of "good faith and probable cause" to the tort of false arrest, which, the Court reasoned, should extend to protect police officers from Section 1983 liability for false arrests because Congress presumably understood itself to be legislating against the backdrop of state common law when it designed Section 1983.[220] Whether the Court was correct that good-faith immunity existed at common law is doubtful.[221] Recent scholarship by William Baude, among others, presents overwhelming evidence that no such

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218. 386 U.S. 547, 557 (1967). Before *Pierson*, courts did not apply immunity to Section 1983; as Reinert points out, prior to *Pierson*, "even the Supreme Court had affirmed damages awards against state officials on multiple occasions without any mention of common law immunity doctrine." Reinert, *supra* note 1, at 240 (citing Smith v. Allwright, 321 U.S. 649, 650-52 (1944); Lane v. Wilson, 307 U.S. 268, 269 (1939); Nixon v. Herndon, 273 U.S. 536, 539-41 (1927)).

219. *Pierson*, 386 U.S. at 550, 555.

220. *Id.* at 555, 557. *Pierson* justified qualified immunity, not based on any indication in the text that Congress created immunity to Section 1983, but based on an *absence* of an indication in the *legislative history* that Congress intended for immunity *not* to apply. *See id.* at 554 ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities.").

221. *See, e.g.*, Ziglar v. Abassi, 582 U.S. 120, 159 (2017) (Thomas, J., concurring) (arguing that the Court's qualified-immunity "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act"); McKinney v. City of Middletown, 49 F.4th 730, 757 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]here was no common law background that provided a generalized immunity that was anything like qualified immunity."); Horvath v. City of Leander, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (explaining that neither the "common law of 1871" nor "the early practice of § 1983 litigation" supports the qualified-immunity defense); Sosa v. Martin County, 57 F.4th 1297, 1304 (11th Cir. 2023) (Jordan, J., concurring in the judgment) ("[T]he Supreme Court's governing (and judicially-created) qualified immunity jurisprudence is far removed from the principles existing in the early 1870s . . . .").

immunity existed for constitutional violations and certainly did not apply across all torts.[222] Nevertheless, the Court soon expanded qualified immunity beyond false arrests[223] and transformed the subjective defense of good faith into an analysis of "the objective reasonableness of an official's conduct, as measured by reference to clearly established law."[224] The Court continues to claim qualified immunity is justified by "common law protections 'well grounded in history and reason.'"[225] Because qualified immunity has been divorced from text since its genesis, a textualist reading of Section 1983 applying the two texts canon is needed.

Common law is not the only justification judges offer for qualified immunity. In his dissent in *Crawford-El v. Britton*, Justice Scalia argued that it was "just as well" that the Court's qualified-immunity doctrine has not been "faithful to the common-law immunities that existed when § 1983 was enacted."[226] The Court's "*essentially legislative activity* of crafting a sensible scheme of qualified immunities" was justified, according to Scalia, because the Court had also extended the reach of Section 1983 beyond unconstitutional acts taken under explicit state-law authority when, in *Monroe v. Pape*, the Court held that Section 1983 applied to unconstitutional acts not sanctioned by state law but nevertheless "under color of" the authority given to officials by the state.[227] Because these policy and common-law rationales for qualified immunity lack a textual hook, they should be overcome by the textualist two texts canon.

Faulty common-law and naked policy justifications for qualified immunity have indeed grown increasingly untenable in the eyes of qualified immunity's critics.[228] Justice Thomas has urged the Court to "reconsider [its] qualified

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222. Baude, *supra* note 25, at 60-61; *see also* Schwartz, *supra* note 25, at 1801-03 ("When the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability."); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 67-70 (1989) ("But while these cases often purport to follow the contours of 1871 common law in deciding the scope of the immunity granted to each official, modern principles of tort law always seem to have influenced the Court's decisions." (footnote omitted)).

223. *See* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

224. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

225. Filarsky v. Delia, 566 U.S. 377, 383-84 (2012) (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976)).

226. 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting); *see also* Baude, *supra* note 25, at 62-69 (criticizing Justice Scalia's view).

227. *Crawford-El*, 523 U.S. at 611-12 (Scalia, J., dissenting) (emphasis added) (discussing Monroe v. Pape, 365 U.S. 167, 172-87 (1961)).

228. Justice Scalia called "[t]he rule that statutes in derogation of the common law shall be narrowly construed" a "sheer judicial power-grab." Scalia, *supra* note 2, at 103. Specifically, Scalia

immunity jurisprudence" because qualified immunity rests on a "freewheeling policy choice[]," rather than "the intent of Congress in enacting" Section 1983."[229] Lower-court judges, from Judge Calabresi of the Second Circuit to Judge Ho of the Fifth Circuit, have echoed these concerns.[230] These critiques have coincided with growing awareness of the urgency of holding state officials, particularly police officers, accountable for constitutional violations.[231] However, the Supreme Court has thus far failed to grant certiorari to reevaluate qualified immunity.[232] One explanation for the hesitation may be stare decisis, perhaps

thought reliance on common law in statutory interpretation was motivated by "the courts' historical hostility to the emergence of statutory law." SCALIA & GARNER, *supra* note 97, at 318 (2012). Some textualists on the contemporary Court have also sought to limit the use of common law in interpreting statutes. For example, in *Van Buren v. United States*, Justice Barrett, writing for the majority, stated: "But common-law principles 'should be imported into statutory text only when Congress employs a common-law term'—not when Congress has outlined an offense 'analogous to a common-law crime without using common-law terms.'" 593 U.S. 374, 384 n.4 (2021) (quoting Carter v. United States, 530 U.S. 255, 265 (2000)).

229. Ziglar v. Abassi, 582 U.S. 120, 159-60 (Thomas, J., concurring) (first quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012); and then quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)). Justice Sotomayor is also a vocal critic of qualified immunity. *See, e.g.*, Kisela v. Hughes, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting) (criticizing the Court's "one-sided" qualified-immunity jurisprudence, which nearly always favors defendants); Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) ("By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow.").

230. *See, e.g.*, McKinney v. City of Middletown, 49 F.4th 730, 757 (2d Cir. 2022) (Calabresi, J., dissenting) ("[T]he Court has turned more and more to justifying qualified immunity as good policy, even if Congress didn't enact it."); Horvath v. City of Leander, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("The 'clearly established' requirement is controversial because it lacks any basis in the text or original understanding of § 1983. Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement.").

231. Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Once and for All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable [https://perma.cc/8GC3-FLBS] (calling for the abolition of qualified immunity in light of police brutality, including the police killings of George Floyd, Breonna Taylor, and Ahmaud Arbery).

232. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (mem.). Most recently, the Supreme Court denied certiorari in *Cunningham v. Baltimore County*. No. 24-578, 2025 WL 299518, at *1 (U.S. Jan. 27, 2025). In that case, the Maryland Supreme Court applied qualified immunity because it could not find a case with similar facts to those presented, where a police officer shot a woman, who posed no imminent threat, on a factual record that indicated the police officer was hot and frustrated but nevertheless shot through a wall into a room where he knew the woman was present with her five-year-old son. *See* Cunningham v. Baltimore County, 317 A.3d 1213, 1220-21, 1233-39 (Md. 2024).

even "super-strong" statutory stare decisis.[233] To overcome stare decisis and push the Supreme Court to act, a new justification for overturning qualified immunity is needed that goes beyond existing critiques refuting the prevailing justifications for the doctrine to demonstrate affirmatively and textually that the doctrine is unlawful.

Enter the original text of Section 1983.[234] Judges have already contended that the original text should trigger a "seismic" shift in our understanding of Section 1983.[235] While Reinert and early advocates adopting his argument have deployed the original text to demonstrate that Congress never intended for state-law immunities to limit Section 1983,[236] applying the two texts canon will offer advocates a textualist path to persuading the Supreme Court to overcome stare decisis and abolish qualified immunity.

B. Applying the Two Texts Canon to the Notwithstanding Clause

The first step in applying the two texts canon to Section 1983 is to confirm that the two texts canon applies to positive-law codified text emerging out of the Revised Statutes of 1874 just as it applies to positive-law titles of the U.S. Code. Formally, Section 5596 of the Revised Statutes repealed the Notwithstanding Clause alongside the rest of the original text of the Civil Rights Act of 1871 in the mass repeal and replacement of 1874.[237] And according to "An Act providing for publication of the revised statutes and the laws of the United

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233. Eskridge, *supra* note 28, at 1362.

234. *See* Price v. Montgomery County, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring) (discussing Reinert's work); Pike v. Budd, No. 22-cv-00360, 2023 WL 3997267, at *12 n.18 (D. Me. June 14, 2023) (same); Crosland v. City of Philadelphia, 676 F. Supp. 3d 364, 372 n.8 (E.D. Pa. 2023) (same).

235. Rogers v. Jarrett, 63 F.4th 971, 981 (5th Cir. 2023) (Willett, J., concurring); *see also* Erie v. Hunter, 675 F. Supp. 3d 647, 652 n.2 (M.D. La. 2023) (joining Judge Willett's call for the Supreme Court to grapple with the original text which "inarguably eliminates *all* . . . immunities"); Thomas v. Johnson, No. H-23-662, 2023 WL 5254689, at *7 (S.D. Tex. Aug. 15, 2023) (noting that lower courts are "bound by current law and must wait for the justices [of the Supreme Court] to turn from their occasional criticisms of the allegedly atextual and ahistorical doctrine to its abrogation or modification" based on the rediscovered text).

236. *Compare* Petition for a Writ of Certiorari at 5, Rogers v. Jarrett, 144 S. Ct. 193 (2023) (No. 23-93) (treating the Notwithstanding Clause as the legally binding "actual, original text of Section 1983" without acknowledging the fact that the original text was technically repealed during the creation of the Revised Statutes), *with* Conditional Cross-Petition for a Writ of Certiorari at 2, Jackson v. Dutra, 144 S. Ct. 1094 (2024) (No. 23-514) (arguing that the Notwithstanding Clause "demonstrates Congress's intent to abrogate immunities" (emphasis omitted)), *and* Petition for a Writ of Certiorari at 21, Martinez v. Jenneiahn, 144 S. Ct. 811 (2024) (No. 23-611) (treating the original text as evidence of "congressional intent").

237. 74 Rev. Stat. § 5596 (1874).

States," only the current text of Section 1983 is legal evidence of the law.[238] However, the Forty-Third Congress enacted the Revised Statutes of 1874, including Section 5596, in "An Act To revise and consolidate the statutes of the United States."[239] Per this title, much like the meaning-conformity purpose clauses and titles accompanying modern codification bills, the Revised Statutes were explicitly committed to organizing and simplifying the law, not altering the law.[240] Further, when the codification project began in 1866, Congress gave the revising commission authority to "revise, simplify, arrange, and consolidate all statutes of the United States," not to alter the meaning of the law.[241] Subsequent editions of the Revised Statutes made clear that these codifiers were "not clothed with power to change the substance or to alter the language" of the previously enacted text.[242]

Just as the two texts canon harmonizes modern meaning-conformity statutes with 1 U.S.C. § 204(a), the two texts canon must harmonize the Revised Statutes's commitment to maintaining the meaning of the law with the first edition of the Revised Statutes's status as legal evidence of the law. At step one, the original text cannot override the clear meaning of the codified positive-law text, including meaning traceable to clear terms added during codification. However, the original text should control over contrary interpretations of ambiguity or silence in the codified positive-law text at step two.

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238. *See* Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113, 113 (stating that the Revised Statutes "shall be legal evidence of the laws and treaties therein contained").

239. 74 Rev. Stat. § 5596 (1874). Textualists accept the use of titles as interpretive tools. *See, e.g.*, Patel v. Garland, 596 U.S. 328, 365 (2022) (Gorsuch, J., dissenting) (accusing the majority of "ignor[ing] the statute's very title").

240. In fact, modern codification bills have used almost-identical language. Act of Aug. 10, 1956, ch. 1041, pmbl., 70 Stat. 1126, 1126.

241. Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74, 74. It is important to emphasize that the statutes empowering the first commission, empowering Durant, and explaining the purpose of codification were not repealed. The repeal only applied to "acts of Congress passed prior to [December 1, 1873], *any portion of which is embraced in any section of said revision*." 74 Rev. Stat. § 5596 (1874) (emphasis added). The empowering statutes were not "embraced" by the revision and are nowhere to be found outside of the Statutes at Large. Accordingly, the Supreme Court has cited the 1866 statute providing the revisers' initial mandate as evidence of the meaning of laws contained in the first edition of the Revised Statutes, specifically explaining that the Revised Statutes should not be read as repealing a prior statute because "[s]uch an inference would be inconsistent with Congress's delineation in § 3 of the Act of June 27, 1866 [the provision empowering the revisers], of specific procedures to be followed in connection with the submission of substantive proposals by the revisers." Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976).

242. Geo. S. Boutwell, *Preface* to Revised Statutes of the United States, Passed at the First Session of the Forty-Third Congress, 1873-'74, at v, v (2d ed. 1878).

To apply step one to Section 1983, the interpreter should "'begi[n] with the language of the statute itself'"[243] – the codified positive-law text. The modern text of Section 1983, as enacted into positive law in the Revised Statutes of 1874 and left unaltered since, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .[244]

The word "immunity" certainly does not appear in this text, nor does any similar phrase speaking to "defenses" or "limitations" on liability.[245] There also is no clause in Section 1983 indicating that "[e]very person . . . shall be liable" *except* under some set of circumstances resembling qualified immunity (when the constitutional violation is not clearly established).[246] A reader wondering whether there are defenses to Section 1983 liability would read this text and have no answer, requiring her to move beyond step one of the two texts canon.[247]

Moreover, since *Pierson*, the Supreme Court has interpreted this text to create qualified immunity based on an inference that Congress must have silently expected Section 1983 to incorporate common-law tort defenses.[248] Because the Court's application of the common-law canon was premised on the positive-

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243. Culbertson v. Berryhill, 586 U.S. 53, 58 (2019) (alteration in original) (quoting Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016)).

244. 42 U.S.C. § 1983 (2018).

245. *See* Reinert, *supra* note 1, at 235 ("The version of Section 1983 one finds in the United States Code appears silent as to any common law defenses."); Baude, *supra* note 25, at 50 ("Neither version of the text, you will notice if you wade through them, makes any reference to immunity.").

246. In fact, the modern text does include an "except," but it is quite narrow. The text provides that liability exists, "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (2018). This text also has nothing to do with qualified immunity.

247. If anything, this text counsels against immunities in that it categorically declares "[e]very person" who violates federal rights under the color of state law "shall be liable." *Id.* Were it not for decades of precedent applying canons to derive qualified immunity, one might say Section 1983 abrogates qualified immunity at step one of the two texts canon.

248. Pierson v. Ray, 386 U.S. 547, 554-57 (1967).

law text's silence on the issue of immunities,[249] it is particularly urgent to proceed to step two.

Turning to step two, the originally enacted portion of the Civil Rights Act of 1871, which later became Section 1983, read:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured . . . .[250]

The italicized clause is Reinert's Notwithstanding Clause.[251] According to Reinert, "[I]t is a fair inference that this clause meant to encompass state common law principles."[252] In full, Reinert explains, the original text of Section 1983 should be read to mean that Congress created liability that was to apply notwithstanding any state law, including state common-law defenses like qualified immunity, that might prevent an officer from being held liable.[253]

Reinert's reading is sound. State common law is certainly "any" state "law."[254] Any doubt the modern reader might harbor as to this unambiguous reading can be put to rest by reading the plain language of the original text through the eyes of a reader at the time of enactment. Late-nineteenth-century dictionaries confirm that state common law comprises "rule[s] of action founded on long

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249. The Court in *Pierson* did not itself describe the text as "silent" or "ambiguous" as to immunities in moving beyond the text of Section 1983 to consider common law. Rather, the Court emphasized the lack of a clear expression in the legislative history that Congress intended to abolish all common-law immunities. *Id.* at 554. Although the Court's decidedly pre-textualist reasoning seeking clear statements in legislative history muddles the issue, it nevertheless seems fair to describe *Pierson* as premised on the silence or ambiguity of the text of Section 1983 as to immunities. In addressing the issues of common-law judicial immunity (distinct from qualified immunity, though related), the Court explained, "[W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 555. This language implies the Court's belief that Congress did not address immunities in the text of Section 1983, at least not clearly.

250. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (emphasis added) (codified as amended at 42 U.S.C. § 1983).

251. Reinert, *supra* note 1, at 235.

252. *Id.*

253. *Id.*

254. Civil Rights Act of 1871 § 1.

usage."[255] This reading is also in keeping with the Supreme Court's own nineteenth-century conflation of "common law" with "usage and custom."[256] Thus, the original text is clear now and was even clearer at the time of enactment. Whether or not one subscribes to corollary three of the two texts canon, which would require the original text to be clear before applying step two, the clear original text here is precisely the kind of text that the two texts canon deems superior to the Court's common-law and policy justifications.

A brief pause is necessary to note that reference to historical dictionaries and case law does not suggest the original text is not clear on its face, which would implicate the optional corollary three. Rather, these tools are helpful in the case of the comparatively old original text of Section 1983 because textualists tend to fix plain meaning to the meaning the text would have conveyed to a reader at the time of enactment.[257] While judges can understand the text of a relatively modern statute through the eyes of an ordinary person without much help,[258] historical aids may be required for a judge to ascertain time-fixed meaning in the case of a statute originally enacted in 1871.[259]

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255. *See* Noah Webster, Webster's Complete Dictionary of the English Language 757 (London, George Bell & Sons 1886) (emphasis added).

256. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 659 (1834) (observing that "[t]he judicial decisions, the usages and customs of the respective states" constitute the "common law"); Strother v. Lucas, 37 U.S. (12 Pet.) 410, 436-37 (1838) ("Every country has a common law of usage and custom.").

257. Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018) ("[E]very statute's meaning is fixed at the time of enactment . . . ." (emphasis omitted)); Atl. Richfield Co. v. Christian, 590 U.S. 1, 38 (2020) (Gorsuch, J., concurring) ("When interpreting a statute, this Court applies the law's ordinary public meaning at the time of the statute's adoption, here 1980." (citing *Wis. Cent. Ltd.*, 585 U.S. at 283-84)). Notably, both Justice Gorsuch's majority and Justice Kavanaugh's dissent in *Bostock v. Clayton County* agreed that the meaning of Title VII was fixed "at the time of its enactment." 590 U.S. 644, 654 (2020); *see id.* at 784 (Kavanaugh, J., dissenting).

258. Textualists also find tools like dictionaries and certain grammatical canons to be unobjectionable even in confirming the ordinary meaning of contemporary statutes. *See, e.g.*, Niz-Chavez v. Garland, 593 U.S. 155, 169 (2021) (justifying reliance on grammar, dictionaries, and statutory structure as part of evaluating ordinary meaning because "the rules that govern language often inform how ordinary people understand the rules that govern them"). These tools are often applied to make clear text even clearer. *See, e.g.*, Van Buren v. United States, 593 U.S. 374, 381-82, 385-87 (2021) (applying dictionary definitions, the rule against superfluities, and textual context while maintaining that the interpretive inquiry was "start[ing] where we always do: with the text of the statute"). The fact that an interpreter might benefit from these tools in looking at the original text would not inherently render the original text so ambiguous as to hold at corollary three that step two should not be applied.

259. *See, e.g.*, *Wis. Cent. Ltd.*, 585 U.S. at 277-78 (relying on dictionaries from the mid-twentieth century to ascertain the meaning of "money" in a statute originally enacted in 1937).

And regardless, this Note maintains that corollary three is not strictly necessary, so one could still rely on the Notwithstanding Clause without finding the original text crystal clear (though it is hard to imagine how the original text here could be any more unambiguous). If one were to somehow find the plain meaning of the original text of the Notwithstanding Clause ambiguous, still other evidence could be marshaled to defend Reinert's reading. The rule against superfluities favors reading the Notwithstanding Clause to have a meaning that does more than duplicate the "under color of" state law clause. The Clause clarifies that liability applies not only in spite of the officer being cloaked in state authority in the first place, but also in spite of state law more broadly.[260] And, for those interested in historical context, Reinert's reading is in keeping with the Civil Rights Act's broader role in using federal power to curb state discrimination against Black people, notwithstanding state laws designed to maintain the status quo.[261]

Thus, step two of the two texts canon reveals that the original text of the Civil Rights Act of 1871 explicitly declared that the new constitutional tort's liability was not to be restricted by state common law, directly contradicting the Supreme Court's conclusion that Congress intended for state common-law defenses to apply. Qualified immunity should be abolished to prevent courts from continuing to use ambiguities introduced by unelected revisers to justify pursuing their own judicial policy preferences.

C. The Two Texts Canon and Stare Decisis for Qualified-Immunity Precedents

Since qualified immunity can be defended on stare decisis grounds, the original text is necessary in the fight to abolish qualified immunity. Although the modern text of Section 1983 certainly does not create qualified immunity, the

260. The Supreme Court, including its textualist Justices, frequently endorses the rule against superfluities. *See* Liu v. SEC, 591 U.S. 71, 88 (2020) (endorsing the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute" (quoting Parker Drilling Mgmt. Servs., Ltd. v. Newton, 587 U.S. 601, 611 (2019))); *Van Buren*, 593 U.S. at 385 (applying the rule against superfluities); Patel v. Garland, 596 U.S. 328, 355 (2022) (Gorsuch, J., dissenting) (same).

261. For a discussion of the history and purpose of Section 1983 in the context of the broader Civil Rights Act of 1871, see Briscoe v. LaHue, 460 U.S. 325, 336-40 (1983); Monroe v. Pape, 365 U.S. 167, 171 (1961); and ERWIN CHEMERINSKY, FEDERAL JURISDICTION 469-73 (4th ed. 2003), which reviews the history and purpose of Section 1983. Consider in particular the drastic federal intervention authorized by "[a]n Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," which empowered the President to suspend the writ of habeas corpus and take other drastic measures to dismantle the Ku Klux Klan and assert federal authority over the states who were uninterested in protecting the safety and civil rights, particularly suffrage, of African Americans. Civil Rights Act of 1871, ch. 22, §§ 2, 4, 17 Stat. 13, 13-15.

original text does something more by proving that qualified immunity is *prohibited* by the best textualist reading of the statute.

Super-strong statutory stare decisis is rooted in the idea that courts should exhibit restraint in the face of statutory precedents, "shifting policymaking responsibility back to Congress."[262] The logic goes that if Congress disagrees with the Court's prior interpretation of a statute, Congress has the power to rectify the interpretive error by amending the statute.[263] Nevertheless, this inference that Congress intends to leave a judicial precedent undisturbed is based on silence, not a clear expression of Congress's will subject to Article I, Section 7. Textualists generally reject such inferences from legislative silence as intentionalist fictions,[264] but they may tolerate this reasoning in many applications of statutory stare decisis to serve the greater good of constraining judicial intervention.

However, here, the intentionalist inference from congressional silence underlying statutory stare decisis must be weighed against the textualist insights underlying the two texts canon. The two texts canon shows that, according to binding meaning-conformity statutes, the text of Section 1983 retains the meaning of the original text of the Civil Rights Act of 1871. The last Congress to speak clearly on the issue, the Congress acting in 1871, explicitly abrogated qualified immunity. Such an explicit textual abrogation must overcome a flawed inference that Congress has tacitly accepted qualified immunity since 1967, just as it must overcome contradictory interpretations of the alleged ambiguity or silence of the modern text of Section 1983.[265] In the hierarchy of tools of statutory interpretation, the text is paramount, but the original text is a close second. Statutory stare decisis might justify looking to prior judicial interpretations as binding indications of a statute's meaning in many instances, but judicial precedents should nevertheless rank below the original text.

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262. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005).

263. *Id.*

264. Textualists typically reject any claim that congressional silence has meaning. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) (rejecting an inference from congressional silence in interpreting Title VII's silence on the issue of affirmative action in employment); Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 8-13 (1988) (discussing various interpretations of the meaning of congressional silence).

265. Other arguments for abolishing qualified immunity might be outweighed by an inference from silence. Demonstrating that the Court's policy rationales for qualified immunity are not empirically supported, Schwartz, *supra* note 25, at 1803-14, or that common law at the time of Section 1983 did not actually create generalizable immunity for state officials, Baude, *supra* note 25, at 55-62, shows that the Court's precedents are unsound. But Congress's acceptance of precedents with poor reasoning could still be persuasive if no superior, textual indication of the statute's meaning were available. Accordingly, it is significant that the two texts canon leads to affirmative evidence of the meaning of the text.

Adhering to this hierarchy furthers the same commitment to judicial restraint that statutory stare decisis claims to advance. In meaning-conformity statutes, Congress has declared that the currently operative text holds the same meaning as the original text, and original text was also once subject to Congress's approval through bicameralism and presentment. Thus, courts can be thought to be deferring to Congress when they prioritize original text, which is Congress's original work that retains lingering congressional validation through meaning-conformity statutes, over prior judicial interpretations, which are the work of unelected judges. In these narrow circumstances, therefore, overriding statutory stare decisis is justified as a superior way of promoting judicial restraint vis-à-vis Congress.

All other factors courts consider in evaluating stare decisis also point in favor of overturning qualified immunity.[266] In light of the rediscovered original text, to say nothing of changes in the field of statutory interpretation, the legal justification for qualified immunity has eroded.[267] Qualified immunity has proven unworkable, as evidenced by the litany of cases readjusting the doctrine since 1967.[268] Qualified immunity has disrupted the law by causing stagnation in constitutional law, as the immunity determination prevents courts from reaching constitutional questions.[269] And qualified immunity has not generated reliance interests, unless one thinks state officials rely on their ability to violate federal rights, which is a kind of reliance interest that courts reject.[270]

Thus, the case study of Section 1983 reveals the powerful potential of the two texts canon. Although the canon is modest in that it respects the formal status of positive-law codifications as legal evidence of the law, it can have a profound impact where an interpretation of the codified positive-law text relies on ambiguity or silence to contradict the original text. In the case of qualified immunity, the canon should prevent courts from relying on a democratically illegitimate

266. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022) (enumerating factors that weigh "strongly in favor of overruling" precedent: "the nature of [the] error, the quality of [the] reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance").

267. *Cf.* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 458 (2015) (noting that legal developments like changes in judicial doctrine have often provided a basis for reversing statutory decisions).

268. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 555 (1967) (creating a subjective "good-faith" defense to Section 1983); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (finding a subjective standard to be unworkable and replacing it with the objective test used today); Saucier v. Katz, 533 U.S. 194, 201 (2001) (announcing the requirement that courts reach the merits of a plaintiff's Section 1983 claim before reaching the question whether qualified immunity applies); Pearson v. Callahan, 555 U.S. 223, 233-36 (2009) (overruling *Saucier*'s sequencing requirement).

269. Schwartz, *supra* note 25, at 1815-17.

270. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700 (1978).

change in meaning introduced by unelected bureaucrats and seized upon by unelected judges to facilitate their favored policy of impeding civil-rights litigation.

D. Applying the Two Texts Canon to "or Territory or the District of Columbia"

Looking to the other changes in the codified text of Section 1983 sheds more light on the two texts canon's applicability where changes have been made during positive-law codification that leave the text clear. Unlike the omission of the Notwithstanding Clause, which left the codified positive-law text silent, such clear changes should be treated as binding.

While the 1871 text of the Civil Rights Act did not mention territories at all, the codified version applies liability to "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State *or Territory or the District of Columbi*a, subjects" a person within the jurisdiction of the United States to a deprivation of federal rights.[271] Under step one of the two texts canon, the phrase "or Territory" is unambiguous. If this ambiguity determination remains elusive, imagine the perspective of an ordinary person or ordinary legal researcher interpreting the phrase "or Territory." Such an ordinary reader curious about whether officers acting under color of territorial law may be held liable under Section 1983 would look at the text of Section 1983, widely available in compilations of the U.S. Code and discoverable with a simple Google search. The text's plain language would answer her question, leaving her with no need for any other canon of construction. Such an ordinary reader would not think to examine historical records of the original 1871 text, so she would have no cause for confusion about the fact that the original text did not mention territories.[272] Accordingly, the applicability of Section 1983 liability to rights-violating actions taken "under color of" territorial law cannot be ignored or refuted by the original text. Because the two texts canon is formalist in that it begins with the positive-law text and ends there if that text is clear, there is no need to look beyond the positive-law text in this case.

And indeed, the Supreme Court reached this conclusion in *Ngiraingas v. Sanchez*, explaining that when Congress first added the phrase "or Territory" in the 1874 positive-law codification, Congress ensured that "a person acting under color of territorial law could be liable under the statute."[273] Thus, even as the two

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271. 42 U.S.C. § 1983 (2018) (emphasis added).

272. Nor would she know such a thing as the original text existed or be capable of finding it without happening upon Reinert's article or combing the full text of the 1871 Civil Rights Act, which is accessible through the archives of the Library of Congress but otherwise difficult to find online.

273. 495 U.S. 182, 191 (1990).

texts canon produces the perhaps dramatic result of calling for qualified immunity to be overturned, the two texts canon more humbly preserves existing precedent interpreting the clear phrase "or Territory" in the positive-law codified text of Section 1983. This is good news for plaintiffs whose rights have been violated by actions taken "under color of" territorial law.

E. Applying the Two Texts Canon to "and laws"

Similarly, the two texts canon recognizes the addition of "and laws" in the codified Section 1983 as a change that left the codified positive-law text with a facially clear meaning. The original text of the Civil Rights Act of 1871 only protected against deprivations of "rights, privileges, or immunities secured by the Constitution of the United States."[274] However, the codified text protects against deprivations of "rights, privileges, or immunities secured by the Constitution *and laws*."[275] Just as was the case with "or Territory," "and laws" is unambiguous at step one of the two texts canon. No other interpretive device is needed to understand that "Constitution and laws of the United States" means the Constitution and other federal laws. The only other federal laws besides the Constitution are federal statutes and, to a lesser extent, federal common law. Therefore, the two texts canon dictates that Section 1983 protects rights created by federal statutes.

Interpreting "and laws" as binding text not to be subverted by the original text is highly consequential because much of the Section 1983 litigation involves statutory rights rather than constitutional rights. Section 1983 has been pivotal in protecting rights secured by the Medicaid Act, the broader Social Security Act, and the Federal Nursing Home Reform Act, and Section 1983 seems poised to become increasingly essential in protecting rights secured under Section 2 of the Voting Rights Act.[276] And indeed, the breadth of Section 1983's protection of

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274. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

275. 42 U.S.C. § 1983 (2018) (emphasis added).

276. *See, e.g.*, Michael A. Platt, *Westside Mothers and Medicaid: Will This Mean the End of Private Enforcement of Federal Funding Conditions Using Section 1983?*, 51 AM. U. L. REV. 273, 284-87 (2001) (discussing Section 1983 and the Medicaid Act); Maine v. Thiboutot, 448 U.S. 1, 3-4 (1980) (considering whether Section 1983 applies to the Social Security Act); Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 172 (2023) (holding that Section 1983 applies to two provisions of the Federal Nursing Home Reform Act). Before 2023, it seemed clear that the Voting Rights Act provided its own cause of action, but the Eighth Circuit recently became the first circuit court to hold that Section 2 of the Voting Right Act does not provide a private right of action, which has led voting-rights advocates to predict that they will need to rely on Section 1983 to enforce the most important remaining provision of the Voting Rights Act going forward. *See* Courtney Cohn, *Arkansas NAACP Will Not Appeal Decision That Gutted Voting*

statutory rights has been imperiled in recent years by litigation pressing to exclude from Section 1983's reach statutory rights created under Congress's Spending Clause power, though the Supreme Court held this onslaught at bay in *Health & Hospital Corp. of Marion County v. Talevski*.[277] Were the Supreme Court to announce now that the original text of the Civil Rights Act of 1871 governs qualified immunity in absolute terms rather than under the more cautious two texts canon, litigants would likely leap at the chance to argue that the original text precludes the application of Section 1983 in cases concerning statutory rather than constitutional rights.

Fortunately, the Supreme Court has consistently held that "and laws" "means what it says."[278] In *Maine v. Thiboutot*, the key case establishing the Court's reading of "and laws," the Justices wrestled with the original text of the Civil Rights Act of 1871 and both sides debated whether the legislative history evinced a congressional intent to add statutory rights to Section 1983's sphere of protection.[279] Justice Brennan's opinion concluded, "Given that Congress attached no modifiers to the phrase, the plain language [of 'and laws'] . . . broadly encompasses violations of federal statutory as well as constitutional law."[280]

Comparing the omission of the Notwithstanding Clause with the additions of "or Territory" and "and laws" to Section 1983 thus clarifies the difference between step one/corollary one and step two/corollary two of the two texts canon. The relevant distinction is not simply that the omission of the Notwithstanding Clause was an omission and the additions of "or Territory" and "and laws" were additions. Such reflexive reliance on comparison between the original and codified text would miss the essential formalism of the two texts canon, which insists on beginning the interpretive inquiry with the positive-law text and ending there if that text is clear. In the cases of "or Territory" and "and laws," a reader would have no doubt of the meaning of the positive-law text and therefore no need to

Rights Act in Seven States, Democracy Docket (July 1, 2024), https://www.democracydocket.com/analysis/arkansas-naacp-will-not-appeal-decision-that-gutted-voting-rights-act-in-seven-states [https://perma.cc/SYB9-NHNB].

277. 599 U.S. at 172 (finding that provisions of the Federal Nursing Home Reform Act "unambiguously create § 1983-enforceable rights," despite having been enacted under Congress's Spending Clause power).

278. *Id.* at 171 (quoting *Thiboutot*, 448 U.S. at 4).

279. *Compare Thiboutot*, 448 U.S. at 7-8 ("Representative Lawrence, in a speech to the House of Representatives that began by observing that the revisers had very often changed the meaning of existing statutes, referred to the civil rights statutes as 'possibly [showing] verbal modifications bordering on legislation.'" (alteration in original) (citation omitted) (quoting 2 Cong. Rec. 827 (1874) (statement of Rep. Lawrence))), *with id.* at 18 (Powell, J., dissenting) ("There was no mention of the addition of 'and laws' nor any hint that the reach of § 1983 was to be extended [in the remarks of Representative Lawrence in the legislative history].").

280. *Id.* at 4 (majority opinion).

seek out other evidence of the text's meaning. By contrast, the positive-law codified text of Section 1983 says nothing about immunities. The reader would never imagine such a thing could flow from the words on the pages of the Revised Statutes or of the U.S. Code, and indeed, the Court has never hidden that it has relied on common law and policy to justify the doctrine.[281] Given this admitted reliance on the ambiguity of the silent positive-law text, the two texts canon requires that the original text of the Notwithstanding Clause intervene to abolish qualified immunity.

CONCLUSION

Around the turn of the twentieth century, law transformed from common law made by unelected judges into statutory law made by the people's elected representatives. The rise of positive-law codification facilitated this victory for democratic government. But paradoxically, even as the rise of statutes enabled a retreat from antidemocratic judicial intervention, it also demanded a novel form of bureaucratic intervention. Legislatures needed unelected, expert revisers to simplify and organize the law. This Note's two texts canon invites a modest degree of judicial intervention back into the picture to protect the overall democratic legitimacy of positive-law codification while recognizing the formal legal status of codified positive-law text.

The two texts canon balances textualism's dual commitments to formalism and democracy. Formally, codified positive-law text is the law under Article I, Section 7 and legal evidence of the law under 1 U.S.C. § 204(a). However, meaning-conformity statutes state that the codified positive-law text contains the same meaning as the original text, protecting Congress's exclusive legislative authority by holding that the bureaucratic codification process does not ordinarily change the meaning of the law. Harmonizing these statutes calls for a canon of construction that respects the codified text as positive law, beginning and ending the textualist inquiry with that text when it is clear, including when its clear meaning is attributable to changes made during codification. But when a subsequent interpretation of ambiguity or silence in the codified positive-law text contradicts the meaning of the original text, the interpretation is inconsistent with meaning-conformity statutes. Such an interpretation also violates the Constitution's vision for democratic lawmaking, which assigns all Article I lawmaking power to senators and representatives, not unelected bureaucrats. Thus, to protect democratic values, textualists are justified in relying on the original text to

281. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 594 (1998) (acknowledging that qualified immunity cannot be found in the text of Section 1983).

reject contradictory interpretations of ambiguity or silence in the codified positive-law text.

Although this rule delegates some authority to judges to determine when statutes are clear versus ambiguous, the rule actually protects against interpretive abuses of ambiguity in the codified positive-law text. The two texts canon constrains the judge by enforcing the hierarchy of tools of interpretation, which must place original text voted upon by the people's representatives and legally defined as having the same meaning as the codified positive-law text above purely judicially crafted tools, like other canons or policy, to say nothing of legislative history. The rule is therefore modest in that it defers to the formal text whenever it can but defers to Congress's original meaning when it must. In doing so, it elevates both the codified positive-law text and original text, with their Article I, Section 7 credentials, over all other indications of meaning.

But this modesty does not mean that the two texts canon lacks powerful potential. In the case of qualified immunity, courts have long rested the doctrine on policy and common-law justifications imposed upon the silent codified positive-law text of Section 1983. The two texts canon provides the first purely textualist reason to reject these precedents, overcoming statutory stare decisis.

Thus, qualified immunity should be abolished posthaste. Abolishing qualified immunity based on the original text of the Civil Rights Act of 1871 would be a victory for textualism, formalism, and democracy. It would also point toward a transsubstantive textualist approach to two texts that can provide necessary guidance to lower courts going forward, preserving the Constitution's design for a democratic government of laws made by representatives accountable to the people.