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Abstract

Interpreters determine the meaning of language. To interpret literary and biblical texts, scholars have developed detailed rules, methods, and theories of human understanding. This branch of knowledge, "hermeneutics," features three basic approaches. First, "textualists" treat words as directly conveying their ordinary meaning to a competent reader today. Second, "contextualists" maintain that verbal meaning depends on generally shared linguistic conventions in the particular historical and cultural environment of the author—and that therefore translations or commentaries are necessary to make the writing intelligible to a modern reader. Third, "hermeneutic circle" scholars argue that texts have no objective meaning. Rather, a person's subjective perspectives and norms affect his or her understanding of a text, which then generates new meanings that in turn may influence future readers.

These three methodologies have parallels in the legal field. Most importantly, judges and scholars have interpreted the United States Constitution by employing (1) textualism, (2) originalism—discerning the meaning of constitutional provisions in historical

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context, or (3) subjective "living constitutionalism." Similarly, federal statutes have been analyzed by applying textualism, context-based pragmatism, or freewheeling "dynamic interpretation."

In this Essay, I will begin by summarizing the three main approaches to literary and biblical hermeneutics. I will then explore their analogues in federal constitutional and statutory interpretation.

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I. INTRODUCTION

Interpretation is the process of determining the meaning of words. To interpret literary, biblical, and legal texts, scholars have developed and applied myriad rules, methods, and theories of human understanding—"hermeneutics."[1] A detailed treatment of this subject would require volumes. In this brief essay, therefore, I must oversimplify analysis.[2] Initially, I will describe three basic approaches to literary and biblical hermeneutics.[3] I will then show how those methodologies have parallels in the interpretation of the federal Constitution and statutes.[4]

1. *See, e.g.*, Donald K. McKim, *Approaches to Contemporary Hermeneutics: Major Emphases in Biblical Interpretation*, *in* A GUIDE TO CONTEMPORARY HERMENEUTICS 86, 86 (Donald K. McKim ed., 1986); Peter Szondi & Timothy Bahti, *Introduction to Literary Hermeneutics*, 10 NEW LITERARY HIST. 17, 17 (1978), https://www.jstor.org/stable/pdf/468303.pdf.

2. This Essay is intended primarily for generalists. Accordingly, I will set forth (1) a radically distilled version of my published work on constitutional and statutory interpretation, and (2) an elementary summary of literary and biblical hermeneutics. Moreover, I recognize that many scholars have applied such hermeneutics to illuminate understanding of the Constitution and statutes. Although I cannot engage all of this literature, four sources deserve special note.

First, Professor Garet has argued that hermeneutics often has a "normative" dimension because readers invest certain texts with a unique authority and value that prompts moral reflection and action: The Bible provides spiritual and ethical guidance; the Constitution aims to promote justice and the common good; and serious fiction can awaken our moral sensibilities. *See* Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 37, 37–54 (1985). In all three areas, however, interpreters have disagreed about whether the focus should be on the text alone or rather supplemented by tradition and the opinions of an authoritative institution. *See id.* at 48–134.

Second, a renowned scholar of Christian history has provided an especially valuable comparison of biblical and constitutional hermeneutics. *See* JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION (2004). His many insights will be cited throughout this essay.

Third, an eminent law professor has analogized the Constitution to a sacred text. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). In particular, Professor Levinson emphasizes that both documents are written, enduring, and treated as the highest authority. *Id.* at 9–53.

Fourth, serious studies applying Literary Theory to legal texts (especially the Constitution) began in the late 1970s and flourished over the next two decades, but have gradually declined in influence. *See* RICHARD POSNER, LAW AND LITERATURE (3d ed. 2009). The main problem is that various "critical" approaches, which posit that the reading of texts is inherently subjective, have not been accepted by attorneys or judges because their profession assumes that laws have an objectively ascertainable meaning.

3. *See infra* Part II.

4. *See infra* Part III.

II. LITERARY AND BIBLICAL INTERPRETATION

A. Textualism

One naturally understands a text to convey its perceived ordinary meaning, which often triggers an immediate and personal response.[5] For example, any competent reader can quickly grasp the mastery of storytelling and style exhibited by Homer, Dante, or the Bronte sisters. An intellectual can provide further insights, but these classical works speak directly to us across the centuries.

Similarly, people can look at a biblical story and intuitively get a direct message that is relevant to their lives.[6] For instance, when Jesus is on the cross and sees his many tormentors, he says: "Father, forgive them, for they do not know what they are doing."[7] The meaning is obvious and visceral: If Christ can seek forgiveness for those who mocked and crucified him, we should be able to pardon far lesser offenses.

In short, the benefit of an immediate, subjective response to a literary or biblical text is that we receive an unfiltered message, as if the author is addressing us individually.[8] This simple approach, however, can easily lead us astray, for three reasons.

First, readers tend to take words literally in their linguistic and grammatical sense. The author, however, may have intended an allegorical, symbolic, or spiritual meaning.[9]

Second, almost everyone today will be mistaken about certain language

5. *See, e.g.*, RAY JACKENDOFF, A USER'S GUIDE TO THOUGHT AND MEANING 38–40 (2012).

6. *See* McKim, *supra* note 1, at 86–87 (discussing this "intuitive" approach); Richard N. Soulen & R. Kendall Soulen, *Hermeneutics*, *in* HANDBOOK OF BIBLICAL CRITICISM 73–75 (4th ed. 2011) (noting that pre-modern hermeneutics assumed that biblical texts contained eternal truths that were always applicable and that this traditional approach has survived in certain conservative Christian circles).

7. *Luke* 23:34.

8. *See, e.g.*, RAYMOND W. GIBBS, JR., INTENTIONS IN THE EXPERIENCE OF MEANING 7–8 (1999). This idea fueled the Protestant Reformation, as Martin Luther and others contended that (1) Scripture alone was the source of religious doctrine, and (2) individuals could legitimately interpret the Bible, unaided by Church authorities (contrary to Catholic teaching). *See* LEVINSON, *supra* note 2, at 18–19, 24–27; PELIKAN, *supra* note 2, at 2, 28, 40, 45–47, 66, 86, 100–02, 110, 116; Garet, *supra* note 2, at 45–46, 48-49, 52–55, 58–59, 61–62, 67, 70–75, 81–82, 92–93.

9. *See* Szondi & Bahti, *supra* note 1, at 21–25; McKim, *supra* note 1, at 87; PELIKAN, *supra* note 2, at 43–44; Soulen & Soulen, *supra* note 6, at 74; Georgia Warnke, *Hermeneutics*, OXFORD RES. ENCYCLOPEDIA OF LITERATURE 1, 1–14 (2016), https://dx.doi.org/10.1093/acrefore/9780190201098.013.114.

in older writings, particularly figures of speech that have no modern currency.[10] To illustrate, Jesus proclaimed: "[I]t is easier for a camel to pass through the eye of a needle than for a rich man to enter the Kingdom of God."[11] A camel cannot fit through the hole at the end of a needle, so one would instinctively conclude that it's impossible for a rich person to get to heaven. By historical and contemporary global standards, most Americans are "rich," so Christian Americans are in big trouble—unless "eye of the needle" had a different meaning in its time and place.

Third, sometimes words can be distorted to mean whatever the reader wishes, especially if they are considered in isolation.[12] Consider a famous line from Shakespeare: "The first thing we do, let's kill all the lawyers."[13] That statement apparently condemns attorneys as so evil that they should be murdered. Likewise, Jesus declared: "The poor you will always have with you . . . ."[14] On its face, that remark indicates that poverty is a permanent fact of life, which might suggest not bothering to help poor folks. As we will see, both of those facially plausible interpretations are incorrect.[15]

The foregoing problems have led to a different approach. Most modern scholars examine words not in a vacuum, but rather in their linguistic, literary, and historical context.

B. Contextualism

Linguists, who scientifically study the nature and functions of language, have influenced hermeneuticists to posit that the meaning of words depends on generally understood language-related conventions in the particular historical and cultural environment of the writer and reader.[16] Accordingly, these scholars initially seek to discover that original "grammatical" understanding,

10. *See* Szondi & Bahti, *supra* note 1, at 21–23 (describing how literary interpreters change words in classical works, like Homer's epics, to make them comprehensible to contemporary readers).

11. *Matthew* 19:24.

12. "'When *I* use a word,' Humpty Dumpty said . . . 'it means just what I choose it to mean.'" LEWIS CARROLL, THROUGH THE LOOKING GLASS 79 (Dover Publications 1872).

13. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

14. *Matthew* 26:11.

15. *See infra* Section II.B.

16. *See* Szondi & Bahti, *supra* note 1, at 17–28. Although this process can be complicated, the basic concept is easy to grasp. To illustrate, when my Irish wife first told me her uncle was a "chemist," I assumed he was a scientist who specialized in chemistry (the conventional understanding in America), whereas she meant "pharmacist" (the standard usage in the British Isles).

as well as the author's intent (dubbed "psychological" interpretation), and then close the historical and cultural gaps through translations or commentaries that make the text intelligible to a modern reader.[17]

Contextual approaches to non-religious writings are usually grouped under the broad term "Literary Theory."[18] Most relevant here is its "Structuralist" branch, which focuses on how individual words, phrases, sentences, and paragraphs fit into an overall framework—and how substance, form, style, and structure interact.[19] For example, *Othello* contains many memorable sayings, such as "Men should be what they seem," and "Trifles light as air are to the jealous confirmations strong as proofs of Holy Writ."[20] Deeper exploration, however, reveals a perfectly structured play, as each sentence, scene, and act—which features the evil Iago planting seeds of doubt in Othello's mind that his wife Desdemona is unfaithful—builds up to the climax in Act 5, when Othello kills her, and then realizes Iago has misled him and commits suicide.[21]

Likewise, in *Henry VI, Part 2*, Dick the Butcher does not say "let's kill all the lawyers" because they are bad.[22] On the contrary, a holistic reading of the play reveals that Dick is part of a murderous rebel group, and he realizes that eliminating attorneys will lead to a breakdown in law and social order, which will help the renegades seize power.[23]

The foregoing scholarly techniques have been borrowed from Biblical Studies.[24] "Exegesis" seeks to unearth what a sacred text likely meant to its

17. *See id.* at 21–26; McKim, *supra* note 1, at 87–89. This approach to hermeneutics traces to the early nineteenth century work of F.D.E. Schleiermacher. He set forth methods that could be applied systematically to determine both the objective "grammatical" meaning of any text—literary, biblical, or philosophical—and the subjective intent of its author. *See* Warnke, *supra* note 9, at 1–5.

18. TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION, at viii (3d ed. 2008).

19. *See id*. at 79–110. I will use "Structuralism" in this basic integrative sense and not delve into the more complicated permutations that have been set forth by professors of linguistics and literature. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 69–72, 100–02 (1999) (critiquing this scholarship).

20. WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.

21. A.C. BRADLEY, SHAKESPEAREAN TRAGEDY 49–51, 134 (Anboco 2016) (1904).

22. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

23. *See* Jacob Gershman, *To Kill or Not to Kill All the Lawyers? That Is the Question*, WALL STREET J. (Aug. 18, 2014, 7:31 AM), https://www.wsj.com/articles/shakespeare-says-lets-kill-all-the-lawyers-but-some-attorneys-object-1408329001.

24. *See, e.g.*, Garet, *supra* note 2, at 112 ("The links in the transmission of ideas between theological and literary interpretation can be quite complex."). F.D.E. Schleiermacher pioneered modern hermeneutics in all fields, including Bible studies. *See* Warnke, *supra* note 9, at 2. He accepted neutral theories of human understanding based on Enlightenment rationalism, but maintained that such understanding reflects "a dialogical interaction between the contemporary interpreter and the text as an

author and intended audience.[25] This approach requires fluency in the original language used (say, Ancient Hebrew, Aramaic, or Greek) and knowledge of the linguistic and cultural conventions of the historical era in which the writing appeared.[26] That original meaning has gradually become obscured as the Bible was translated into Latin, then re-translated into English and just about every other language.[27]

Returning to my earlier example, "eye of the needle" may not have referred to the hole in a sewing needle.[28] Rather, there are several possible meanings in context. For instance, the "eye of the needle" might have signified the low and narrow gate in the wall protecting Jerusalem, which a camel could pass through only if it shed the goods it was carrying.[29] Likewise, a rich man would be so laden with worldly things, and so attached to them, that he would have to cast them aside before he could get to heaven.[30] Alternatively, Jesus may have been speaking hyperbolically, as he sometimes did—like when he told the hypocrite to remove the "beam" in his own eye before judging others.[31] Third, Jesus himself illuminated his intended message when he followed up his "eye of the needle" image by declaring: "For human beings, this is impossible, but for God all things are possible."[32]

Learning the relevant ancient languages and their underlying cultures takes years of study. But such mastery is just the starting point, for two distinct reasons.

First, Judaism, Catholicism, and Orthodox Christianity hold that (1) the Bible has been supplemented by unwritten traditions, and (2) a hierarchical

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expression of past religious consciousness," and thereby "allows for the irreducible meaningfulness of sacred texts." *See* Soulen & Soulen, *supra* note 6, at 73, 75 (summarizing the work of Schleiermacher and his intellectual heirs).

25. *See* McKim, *supra* note 1, at 86–88, 90.

26. *See id.* at 87–88, 91; PELIKAN, *supra* note 2, at 12–14, 28, 41–42, 104–05, 112–14; Robert L. Thomas, *Issues of Biblical Interpretation*, 58 S. CAL. L. REV. 29, 32–34 (1985).

27. *See* JOHN H. HAYES & CARL R. HOLLADAY, BIBLICAL EXEGESIS: A BEGINNER'S HANDBOOK 12–13 (Westminster John Knox Press 3d ed. 2007) (1934); *see also* PELIKAN, *supra* note 2, at 12–14, 28, 41–42, 51–52, 104–05, 108–14 (observing that a learned interpretation of the original Bible requires laborious study because it was written so long ago in many ancient languages, and its subsequent translation into about 2000 languages has further obscured meaning).

28. *See supra* note 11 and accompanying text.

29. *See* KENNETH E. BAILEY, THROUGH PEASANT EYES: MORE LUCAN PARABLES, THEIR CULTURE AND STYLE 166 (1980).

30. *See* LEON MORRIS, THE GOSPEL ACCORDING TO MATTHEW 487–97 (1992).

31. *Matthew* 7:5.

32. *Matthew* 19:26.

institution can give an authoritative interpretation of disputed religious materials.[33]

Second, the Bible is not only a compendium of religious precepts, but one of the world's greatest works of literature[34]—and the major influence on classical Western authors ranging from Dante to Milton to Dostoyevsky to Melville. Consequently, the tools of Literary Theory can be applied to it, especially Structuralism.[35] Most obviously, almost every major saying or event in the New Testament has an antecedent in the Old Testament.[36] Similarly, from a literary standpoint, poring over a Gospel word-for-word and line-by-line yields countless memorable insights and images, but a holistic reading reveals that all of the individual phrases and sentences build up to the ultimate transformative event—Jesus's death and resurrection.[37]

Likewise, against the background of the entire Gospels, it becomes clear that Jesus did not say "the poor you will always have with you" to suggest that we should not care about them.[38] In fact, his consistent message is exactly the opposite.[39] Rather, what Jesus meant was that his contemporaries would only have him for a short time, so that those who honored him should not be criticized on the ground that their money could be better spent on the poor.[40]

Finally, the Bible contains an array of literary genres—such as narratives, poems, songs, parables, and letters—and thereby defies any "one size fits all" interpretive approach.[41] Thus, specialization in a particular literary form is

33. *See, e.g.*, LEVINSON, *supra* note 2, at 18–27; PELIKAN, *supra* note 2, at 28–33, 37, 56–57; Garet, *supra* note 2, at 48, 54–55, 57–62, 67, 70–71, 74–76. One strain of Jewish thought, however, recognizes the validity of individual readings of the Torah's text. LEVINSON, *supra* note 2, at 19–20, 23–24.

34. *See* McKim, *supra* note 1, at 86, 90; Charles W. Collier, *Law as Interpretation*, 76 CHI. KENT L. REV. 779, 786–93 (2000); *see also* PELIKAN, *supra* note 2, at 30 ("Christian Scripture is . . . the supreme epic and the inexhaustible source of poetic figures or literary allusions and the most fruitful of all texts for thousands of musical compositions . . . .").

35. *See* McKim, *supra* note 1, at 86, 90–91 (noting that many scholars have addressed how different elements of the Bible's text relate to each other fit into an overall framework).

36. *See* Soulen & Soulen, *supra* note 6, at 74; Garet, *supra* note 2, at 99–100; *see also* Szondi & Bahti, *supra* note 1, at 23–24 (illustrating this point by connecting Abraham's willingness to sacrifice his son Isaac with God's allowing the death of Jesus); PELIKAN, *supra* note 2, at 9, 43–44 (stressing that the Old Testament prophesied Jesus's life, death, and resurrection).

37. *See* JOEL S. KAMINSKY & JOEL N. LOHR, THE HEBREW BIBLE FOR BEGINNERS 44–47 (2015).

38. *See supra* note 14 and accompanying text.

39. *See* ANNA CASE-WINTERS, MATTHEW 291–92 (2015).

40. *See id.* at 291–93; DAVID L. TURNER, MATTHEW 619 (2008).

41. *See* PELIKAN, *supra* note 2, at 30, 60–61, 65–66; McKim, *supra* note 1, at 90–91; *see also* Soulen & Soulen, *supra* note 6, at 75 (describing the work of scholars like Ricouer in this area).

necessary to gain a full understanding of the text.[42]

Applying a sophisticated contextual methodology to interpret literary and sacred texts has the obvious advantage of deepening our understanding of, and appreciation for, these works.[43] The danger is becoming so technical or esoteric as to miss the visceral personal impact of a poem, play, novel, or biblical passage.[44] It is like a baseball sabermetrician so obsessed with statistical analysis that he fails to see the magic of a perfectly turned double play.

Most scholars employ contextualism. Others, however, have used this approach as a baseline and added another element: the reader's subjective viewpoint.

C. The "Hermeneutic Circle"

Interpretation has traditionally been characterized as a set of procedures that an informed reader could apply systematically to ascertain the definitive objective meaning of any text.[45] More recently, however, philosophers have maintained that our understanding of a writing occurs through a complex dialogical process: Every person has historically and culturally conditioned preconceptions, perspectives, prejudices, interests, traditions, purposes, and projects—as well as interactions with other readers—that profoundly affect one's understanding.[46] This "hermeneutic circle"—the ongoing dynamic interplay between text and interpreters—produces new understandings about subject matter that cannot be attained simply by focusing on linguistic and grammatical conventions or the author's intent.[47] Indeed, one version of this theory

42. *See* THE LITERARY GUIDE TO THE BIBLE 5 (Robert Alter & Frank Kermode eds., 1987); *see also* C.S. LEWIS, REFLECTIONS ON THE PSALMS 3 (1958) ("[T]he Bible, since it is after all literature, cannot properly be read except as literature; and the different parts of it as the different sorts of literature they are.").

43. *See* Elizabeth Struthers Malbon, *Structuralism, Hermeneutics, and Contextual Meaning*, 51 J. AM. ACAD. RELIGION 207, 207–22 (1983).

44. *See* Rita Felski, *"Context Stinks!,"* 42 NEW LITERARY HIST. 573, 573–90 (2011).

45. *See supra* note 1 and accompanying text.

46. This theory was developed principally by Martin Heidigger and Hans-Georg Gadamer. *See* Szondi & Bahti, *supra* note 1, at 17, 19–20, 26–27; Warnke, *supra* note 9, at 1–14. For a well-known update of this approach that similarly rejects the illusion of an objective textual meaning distinct from the reader, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980).

47. *See* Szondi & Bahti, *supra* note 1, at 17, 19–20, 26–27; Warnke, *supra* note 9, at 1, 5–8. In his pioneering work, Schleiermacher had a different conception of a hermeneutic circle. In both grammatical and psychological interpretation, the reader begins a text with a preliminary conception of its whole (e.g., an ode) and a basic background of the author's life and aims and then, after reading each

asserts that a text's meaning to the reader is entirely independent on this intent.[48]

Biblical scholarship has followed a similar trend. Initially, one tries to discern the Bible's meaning in its historical setting, but then considers contemporary culture to gain a richer understanding of the message today.[49] Relatedly, modern readers must also recognize the "hermeneutic circle": Their personalities, viewpoints, linguistic conventions, and cultural norms are dynamically influencing their understanding of the text.[50]

The "hermeneutic circle" captures the complexity of interpretation by bringing subjective (often subconscious) factors to the surface.[51] Its main drawback is implied in its very name: Going around in endless intellectual cycles, by design, ignores or obscures the concrete message the author is attempting to convey.[52]

D. Summary

The three foregoing approaches to interpretation—textualism, contextualism, and the "hermeneutic circle"—have been refined into many sub-categories. An exhaustive analysis would exceed both the scope of this essay and my expertise. Rather, I have deliberately sketched these three theories in broad terms to illuminate analogies with the methods that are applied to construe legal documents.

III. CONSTITUTIONAL AND STATUTORY INTERPRETATION

Judges and scholars have devoted special attention to two types of laws, the federal Constitution and statutes. Each has spawned three main interpretive approaches that roughly correspond with those developed by literary[53]

part, closes the circle by gaining a complete understanding of the entire work and the author's intent. *See* Warnke, *supra* note 9, at 5, 8. By contrast, modern scholars deny the possibility of a final, total understanding.

48. *See* PELIKAN, *supra* note 2, at 93–94 (citing theorists who maintain that a writer's intent is neither available nor desirable in judging literature).

49. *See* McKim, *supra* note 1, at 88.

50. *See id.* at 88–89, 91.

51. *See id.* at 88–89.

52. *See id.*

53. *See* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 376–77 (1982) (emphasizing that Literary Criticism debates over textual meaning have parallels in contemporary legal analysis,

and biblical scholars, despite some obvious ways that such legal documents differ from creative writing and the Bible.[54]

particularly in constitutional theory).

54. Three distinctions are especially important. First, the Constitution establishes basic government structures and, along with statutes, sets forth legal rules—characteristics lacking in novels, poems, and plays. *See* PELIKAN, *supra* note 2, at 60; *see also* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 (1984) (arguing that the normative authority of legal texts makes them different in kind from literary ones). The Bible falls somewhere in the middle, as it employs various literary forms but also contains elements of a legal code. *See* PELIKAN, *supra* note 2, at 2, 6–12, 30–33, 60–61, 65–66, 95. Unlike literature or federal laws, however, the Bible is revered by its adherents as divinely inspired and hence worthy of belief, prayer, and actions such as worship and service. *See id.* at 15; *see also id.* at 13–14 (noting that the Constitution can be amended, but not the Bible, except insofar as Christians might claim that the New Testament effectively "amended" the Old); *cf.* Grey, *supra*, at 13–20 (maintaining that the Constitution, like all legal documents and unlike the Bible, carries a presumption that it will be interpreted literally, even though today few believe that the Court is simply implementing the Constitution's language).

Second, there is no recognized final authority on the meaning of literary works, and any interpretation of them has no real-world effect. By contrast, although anyone can read the Constitution and Bible—and those texts do not expressly say what interpretive method should be used or who can ultimately resolve disputes—in practice such definitive authority has been successfully asserted. *See* PELIKAN, *supra* note 2, at 2, 22–33, 36, 45–48, 56–58, 65–75, 92–95. For example, in deciding cases, the Supreme Court can compel enforcement of its construction of the Constitution and other laws, and citizens have a moral obligation to comply. *See id.* at 92–95; LEVINSON, *supra* note 2, at 3–8 (observing that legal interpretation has coercive force, which makes application of Literary Criticism difficult). Similarly, in hierarchical religions, a single person or group can render a conclusive interpretation of the Bible, which the faithful must obey. *See* PELIKAN, *supra* note 2, at 30–33.

Third, the Bible was composed by multiple authors in several languages over many centuries (most recently two millennia ago) and has since been translated into countless languages, which makes it exceedingly hard to discern the true meaning and intent of the original text. *See id.* at 109. By comparison, the Constitution was written entirely in English by a single Convention in the summer of 1787. *See id.* at 104–06 (stressing that, unlike the Bible, the Constitution's exact content is undisputed, and its English words are uncorrupted by translation, thereby making it easily amenable to parsing for English grammar and semantics). Consequently, any competent reader can examine the original Constitution, as well as the published records of the Convention and Ratification debates, and get a reasonably sound understanding of its specific terms and overall purposes. Likewise, the amendments were written in plain English and supported by extensive public explanations. *See* WHITTINGTON, *supra* note 19, at 161–64.

Thus, an open-minded analysis of the Constitution's text and related historical materials typically reveals the probable intended meaning, which unfortunately has been distorted over the years by Justices who did not do the necessary reading, sought to reach a result not grounded in the Constitution, or both. *See infra* notes 69–73 and accompanying text. My main point is that any difficulties in determining the original understanding of the Constitution pale in comparison to those involved in biblical exegesis. *See* PELIKAN, *supra* note 2, at 61.

A. The Constitution

As I have previously noted, "[m]ethods of constitutional interpretation range across a broad spectrum, with many important differences, subtleties, and overlaps."[55] For the sake of simplicity, however, I will shoehorn them into three groups.

1. Textualism

The Constitution can be interpreted by determining the ordinary meaning of its words. Even the most dedicated textualists, however, examine the particular language at issue in light of related provisions and the Constitution's overall framework[56] (similar to Structuralism in literary and biblical studies).[57]

Sometimes, that simple method works fine. For example, Article I, Section 8, Clause 4 empowers Congress "[t]o establish . . . uniform laws on the subject of bankruptcies," which clearly authorizes debtor-creditor legislation. Having a similarly obvious meaning are the President's Article II power to grant pardons (i.e., forgiving any crimes) and the Supreme Court's "judicial

55. Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1187 (2002).

56. *See, e.g.*, WHITTINGTON, *supra* note 19, at 165–67, 176; Richard Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 591–92 (1995). Here I am combining approaches that can be treated as distinct. A textualist places heaviest emphasis on the likeliest understanding of the Constitution's words held by a reasonably competent reader, then considers whether that plain meaning comports with structural precepts like federalism and separation of powers. *See* Pushaw, *supra* note 55, at 1188. By contrast, a structuralist reasons deductively by starting with broad constitutional principles, which then illuminate the particular clause in dispute. *See id.* at 1185, 1187–91.

57. Genuine interpretation of any document—literary, biblical, or legal—always begins with a careful analysis of its text that follows its internal logical order. *See* PELIKAN, *supra* note 2, at 33–36, 52–53; *see also id.* at 36 (declaring that interpretations of the Constitution and the Bible "are certainly a great deal more than parsing the grammar and probing the vocabulary of an authoritative text—but they [can] never be less!").

Literary Theory can be useful because the Constitution "is no different [than] other pieces of writing." *See* LEVINSON, *supra* note 2, at 50. Similarly, the Constitution has long been treated as akin to a sacred text because it is (1) written and permanent (like religious covenants), and (2) a higher authority to which everyone must submit. *See id.* at 11–19, 96, 151–52 (making this point, but highlighting the paradox that these two characteristics do not produce unity); *see also* PELIKAN, *supra* note 2, at 2, 6–8, 15 (analogizing methods of interpreting the Bible and the Constitution because both are written, venerable, familiar, contain certain ordinary words that have acquired a specialized meaning, and have been adopted by the relevant community as establishing enduring principles that apply to all kinds of problems and needs—even those the authors could not foresee).

power" to decide "cases" (i.e., rendering a judgment after applying the governing law to the facts).[58]

As with literary and biblical textualism, however, problems arise when the Constitution's language is vague, ambiguous,[59] or has an arcane meaning that a modern reader cannot readily grasp. To illustrate, many important constitutional cases concern the Fourteenth Amendment's provision that prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[60] On its face, this Due Process Clause appears to have a straightforward meaning: Before states can take someone's "life" (by execution), "liberty" (through physical confinement), or "property" (via a fine or seizure order), they must first provide traditional judicial "process." The Supreme Court has long recognized certain core procedural requirements, such as notice of the charges or claims and a fair trial or hearing before an impartial decision-maker.[61]

But the Court has also construed "liberty" as importing substantive content. Initially, the Justices incorporated against the states most of the fundamental liberties enumerated in the Bill of Rights that limited the federal government—for instance, the First Amendment's freedom of speech and religion;[62] the Fourth Amendment's protection against "unreasonable

58. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 398, 402–07, 417–27, 431–34, 436–44 (1994).

59. Neither the original Constitution nor its amendments became legally effective until they were ratified by a supermajority of "We the People," which presupposed that ordinary folks could understand constitutional provisions based on standard English usage. *See* WHITTINGTON, *supra* note 19, at 1–16, 47–68, 76–159, 213–19; *see also* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404–08, 414–26, 437–38 (1985) (contending that anyone who is fluent in English can read the Constitution and get a good general understanding of governmental operations and relationships, as well as individual rights). *But see* Levinson, *supra* note 53, at 375 (deriding "the purported commands of an allegedly comprehensible Constitution"); *id.* at 378–79 (to similar effect). Although the Constitution has some linguistic imperfections, Supreme Court Justices and scholars tend to exaggerate these flaws and to find even seemingly clear provisions to be indefinite because doing so enables them to claim novel meanings. Perhaps the best example is the Court's creative construction of the assertedly vague word "liberty." *See infra* notes 62–81 and accompanying text.

60. U.S. CONST. amend. XIV, § 1.

61. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267–71 (1971) (citing longstanding precedent and extending it to require notice and a hearing before welfare benefits are terminated).

62. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (speech); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (free exercise).

searches and seizures;"[63] and the Eighth Amendment's ban on "cruel and unusual punishment[s]."[64]

That expansion was defensible on textual grounds, as "liberty" in the Fourteenth Amendment could reasonably be interpreted as cross-referencing the basic freedoms listed in the first eight Amendments.[65] But the Justices have gone much further and interpreted "liberty" based on their perception of its contemporary meaning, which has reflected popular political and social currents.[66] For example, in the late nineteenth and early twentieth centuries, conservatives defined "liberty" to include "freedom of contract" and therefore invalidated certain Progressive legislation designed to protect workers (e.g., maximum hour laws) as interfering with employment contracts.[67] Such cases had at least an arguable basis in the original Constitution, which sought to protect economic liberty in various ways.[68]

The Warren Court, however, began to discover "liberties" that had virtually no foundation in the Constitution by portraying it as a living document that contained general words which could be imbued with new meanings derived from the Justices' views about changing norms of justice, morality, and social progress.[69] To illustrate, the Court has declared that Fourteenth Amendment "liberty" includes freedom from state interference in matters such as

63. *See* Mapp v. Ohio, 367 U.S. 643, 650–60 (1961).

64. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962).

65. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 386–91 (2005) (agreeing with the Court's incorporation of the Bill of Rights against the states via the Fourteenth Amendment, but arguing that the Court should have done so under the Privileges or Immunities Clause rather than the Due Process Clause).

66. *See, e.g.*, *infra* notes 67–73 and accompanying text.

67. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 627–37 (4th ed. 2011) (citing cases).

68. *See* DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1–39, 90–129 (2011).

69. *See* Pushaw, *supra* note 55, at 1205; *see also* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 522, 526–31, 577–78, 589 (2008) [hereinafter Pushaw, *Perils*].

"Living constitutionalism" can be classified as a species of textualism because it focuses on the words of the Constitution. *See* Section II.A.1. Nonetheless, the Warren Court approach of giving fresh meaning to broad constitutional terms based on the felt needs and norms of modern society, even if that meaning could not possibly have been held by the provisions' drafters or ratifiers, is quite different from traditional textualism. *See* Pushaw, *supra* note 55, at 1208. Thus, I recognize that "living constitutionalism" is usually treated as a separate category. *See id.* at 1205–06.

contraception,[70] abortion,[71] and sodomy between consenting adults.[72] By contrast, a majority of Justices have rejected other claims of "liberty," such as the right to physician-assisted suicide.[73]

This "living Constitution" approach might be defended because, as with literary and biblical works, a subjective response to the text allows the Constitution to speak to us directly and with immediate relevance.[74] For instance, living constitutionalism yielded an undiluted Fourteenth Amendment legal principle of "equality" that was applied to prohibit gender discrimination, which would strike most Americans as just, despite being contrary to the views of that Amendment's drafters and ratifiers.[75]

As with literary and biblical interpretation, however, language in the Constitution can often be twisted to mean whatever one wishes. Perhaps most importantly, "liberty" can be interpreted to include—or not include—a broad array of "freedoms," so the Court's choices are arbitrary. For instance, putting morality and ethics to one side, logic hardly dictates defining "liberty" to encompass the freedom to terminate life at its inception (abortion),[76] but not at its late stages (physician-assisted suicide for terminally ill patients).[77] Either both are allowed, or neither is.

Moreover, the Court invariably celebrates its new recognition of one group's "liberty" as an unalloyed positive good, without giving proper weight

70. *See* Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965).

71. *See* Roe v. Wade, 410 U.S. 113, 152–66 (1973).

72. *See* Lawrence v. Texas, 539 U.S. 558, 564–79 (2003).

73. *See* Washington v. Glucksberg, 521 U.S. 702, 719–35 (1997).

74. This individualized interpretation of the Constitution's terms is similar to the Protestant focus on a believer's personal, unmediated reading of the Bible itself. *See* LEVINSON, *supra* note 2, at 18, 26–27, 29–33, 46–47, 185; PELIKAN, *supra* note 2, at 2, 45–48, 100–04, 110. Moreover, even a lay person who recognized the value of professionals—scholars; attorneys and judges interpreting the law; or spiritual leaders such as bishops, priests, ministers, or rabbis immersed in the Bible—would be loath to accept an "expert" opinion about the relevant text that was arbitrary or otherwise unconvincing. *See* PELIKAN, *supra* note 2, at 22–30.

75. The Fourteenth Amendment was understood as outlawing discrimination based on race, not sex. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161–64. Nonetheless, influenced by the feminist movement of the 1960s and 1970s, the Court interpreted the "equality" standard and "anti-caste" principle as extending to gender. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 211–15, 294–96, 303–05 (2012).

76. *See, e.g.*, *Roe*, 410 U.S. at 155.

77. *See, e.g.*, *Glucksberg*, 521 U.S. at 735.

to the adverse effects on others.[78] To take but one example, the Court's creation of generous First Amendment rights to freedom of speech and press has effectively permitted the defamation of public figures—even those dragged into the public eye involuntarily.[79]

Finally, allowing Justices to assert unchecked discretion to interpret "liberty" (or any other term in the Constitution)—and thereby announce new rights as supreme law—enables them to impose their subjective views on hundreds of millions of Americans. Ceding such power to unelected, life-tenured judges subverts the very idea of the written Constitution as (1) the fundamental law that a supermajority of "We the People" established and can amend under Article V, and (2) a framework in which contested political, ideological, moral, and social issues can be worked out through democratic processes—not judicial fiat.[80] The Court's practice of reading the Constitution however it wishes has had dramatic real-world effects that distinguish such interpretation from academic debates over the meaning of, say, Hamlet.[81]

These problems with textualism and the "living Constitution" extend to all areas of constitutional law. This freewheeling jurisprudence generated a backlash, starting in the 1980s, as conservatives embraced "originalism": identifying the historical meaning of constitutional provisions.[82]

78. Perhaps the most timely example is the Court's creation of various constitutional rights for gays and lesbians, which has resulted in ongoing clashes with the free exercise rights of religious believers. *See, e.g.*, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2017) (holding that a state agency did not act in a religiously neutral manner in applying its law prohibiting sexual-orientation discrimination to a Christian baker who declined to create a custom wedding cake for a gay couple, despite the Court's recognition two years earlier of a Fourteenth Amendment right to same-sex marriage).

79. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 264–84 (1964).

80. *See* Pushaw, *supra* note 55, at 1205 (citing Justice Scalia and Lino Graglia); *see also* WHITTINGTON, *supra* note 19, at 1–16, 35–62, 110–59, 195–208, 213–19. *But see* Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation*,*"* 58 S. CAL. L. REV. 551, 556, 575–87 (1985) (rejecting the argument that non-originalist judicial review is undemocratic).

81. *See* Pushaw, *supra* note 55, at 1205.

82. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–48 (1997).

2. Originalism

Scholars have continuously refined originalism, but have generally searched for three types of historical evidence.[83] First, original "meaning" refers to the likeliest signification of the Constitution's words to an average literate person, as illustrated in dictionaries, popular books, newspapers, pamphlets, and the like.[84] Second, original "intent" identifies the purposes and goals of the Constitution's Framers, which can be gleaned from the Records of the 1787 Philadelphia Convention.[85] Third, the original "understanding" of those who ratified the Constitution can be pieced together from the voluminous published debates in each state's ratifying convention and other contemporaneous sources,[86] most notably *The Federalist Papers*.

Of course, the Constitution was not written in a secret code, so the original meaning, intent, and understanding often converge. But not always. If there is a discrepancy, most originalists would assign controlling weight to the contemporaneous understanding,[87] because the Constitution did not become law until conventions in at least nine of thirteen states ratified it.[88] Moreover, the Convention delegates sometimes (1) included, but never discussed, a specific constitutional clause; (2) failed to anticipate a particular issue at all; or (3) considered the issue but could not agree on specific wording and hence compromised on general language.[89] All of these deficiencies left future government officials with the task of fleshing out meaning in practice.[90] Finally, originalists emphasize that the Constitution provides that "We the People" can

83. I have long used this threefold typology. *See* Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 478 n.35 (1998) (citing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7–11, 13 (1996)).

84. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448–49, 466 (1994).

85. THE RECORDS OF THE FEDERAL CONVENTION (Max Farrand ed., 1911).

86. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1901).

87. *See* SCALIA, *supra* note 82, at 37–38 (insisting on the primacy of the original public understanding of the Constitution, regardless of the subjective intent of the Framers).

88. U.S. CONST. art. VII.

89. *See* Pushaw, *supra* note 55, at 1195.

90. *Id.* For example, neither the Constitution nor contemporaneous historical records contain any express statements about the inherent powers of the federal judiciary. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 822 (2001). Consequently, the existence and scope of such powers must be deduced from general principles of constitutional theory and structure, as well as early federal legislative and judicial practice. *Id.*

amend it through specified procedures, so that the Court need not—and should not—imaginatively reinterpret the Constitution to keep it in tune with the times.[91]

Originalism resembles (1) linguistic and hermeneutic analysis of the historical meaning of literary texts, and (2) biblical studies that strive to unearth the contemporaneous sense of the language used, the intent of its author, the understanding of the audience, or some combination.[92] Furthermore, originalists use a form of Literary Theory (Structuralism) to discern how a particular phrase in the Constitution—e.g., Congress's power "to regulate Commerce . . . among the several States"—fits in with the larger framework of its immediately surrounding provisions, other parts of the Constitution, and broad animating principles like federalism and separation of powers.[93]

Originalism can be justified as a faithful way to interpret the Constitution as true law and, relatedly, as preserving limits on judges in a constitutional democracy.[94] Nonetheless, originalism has many drawbacks. Most obviously, determining collective "intent" or "understanding" is difficult, and

91. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–57, 862–64 (1989).

92. *See supra* notes 53–54 and accompanying text. The New Testament and the Constitution were each written in a specific historical period, so contemporaneous commentary about their respective meanings has unique weight. *See* PELIKAN, *supra* note 2, at 84–93.

An insightful study demonstrates that Biblical literalists, like constitutional originalists, believe that (1) texts have a fixed meaning that is readily ascertainable; (2) interpretations unmoored from text reflect elite opinion and result in a lack of restraint that leads to illegitimate results; and (3) original text must be restored. *See* Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 694–95, 716–50, 762–63 (2011). Yet Professors Smith and Tuttle highlight a critical difference that should give biblical fundamentalists pause before embracing originalism: Such literalists strictly adhere to the text as the Word of God, which must necessarily be true, good, and just. *Id.* at 695, 697–709, 750–51, 754. By contrast, originalists demand fidelity to the Constitution's text, even if the outcome is one that a Christian would find bad or unjust. *Id.* at 695–97, 714–16, 751–53; *cf.* Frank S. Ravitch, *Interpreting Scripture/Interpreting Law*, 2009 MICH. ST. L. REV. 377 (2009) (assailing "dogmatic" literalism in both biblical and constitutional interpretation (including textualism and originalism) as relying on an illusion of objectivity).

93. *See supra* notes 19–23 and accompanying text; *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 4–56 (1999) (providing such a historical and structural analysis).

94. *See* Pushaw, *supra* note 55, at 1194–95. Keith Whittington has persuasively contended that, because "We the People" ratified the Constitution as an authoritative written text which established a fundamental and fixed law that constrains government, originalism is the judiciary's best method of genuinely "interpreting" the Constitution—discovering the likely intended meaning of its specific legal rules (including those that limit government). WHITTINGTON, *supra* note 19, at 1–16, 35–62, 77–219. When originalist judicial review reveals that this meaning cannot reasonably be determined,

therefore often the best a historian can do is narrow the range of possible meanings rather than pinpoint a definitive one.[95] Furthermore, originalism requires a historian's expertise and a vast amount of time—two resources that most lawyers and all the Justices lack.[96] Consequently, the Court typically cobbles together historical tidbits provided in attorneys' briefs to justify a result—so-called "law office history."[97] Moreover, assuming that the historical meaning of a constitutional provision can be accurately identified, enforcing it today (as strict originalists insist) is often not practical because of subsequent legal, political, ideological, social, moral, and economic changes.[98] Finally, *stare decisis* requires adherence to precedent—even decisions that no credible historian considers correct—and all Justices (even self-styled originalists)[99] pay more attention to cases than any other source.[100]

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however, courts should defer to the constitutional constructions of political officials. *Id*. at 89–90, 161–62, 209–12.

95. *See* Pushaw, *supra* note 55, at 1195, 1197, 1201.

96. *See id.* at 1191–94, 1197.

97. *See id.* at 1191.

98. *See id.* at 1195–98, 1200–02.

99. *See* SCALIA, *supra* note 87, at 138–39.

100. *See* Pushaw, *supra* note 55, at 1196–97, 1202–04 (citing distinguished scholars who have developed this argument such as Akhil Amar, Barry Cushman, Barry Friedman, Henry Monaghan, and David Strauss). Once again, I recognize that a "precedential" focus on the doctrine developed in Supreme Court cases and the longstanding practices of the political branches could be placed into a separate interpretive category. *Id.*

Anglo-American courts have gradually developed common law in areas like contracts, property, and torts. "*Stare decisis* commands judges to follow established precedent absent compelling reasons for departure—most pertinently, concerns that a rule has become unacceptable in light of changed social conditions. Moreover, common law is subject to legislative override." Pushaw, *Perils*, *supra* note 69, at 521. In interpreting the Constitution, however, the modern Supreme Court has fashioned "an idiosyncratic common law in which *stare decisis* is either invoked selectively (to defend a previous revolutionary case implementing some preferred policy that had no constitutional roots) or flatly rejected, prior decisions are freely modified, and legislatures have no input." *Id.* at 525; *see also id.* at 577–91 (substantiating this thesis through an analysis of the Court's major cases). Most importantly, over the past eighty years constitutional law has not evolved incrementally but rather has undergone two seismic shifts in which entrenched precedent was discarded wholesale. *Id.* at 521–22, 577–78.

First, the New Deal Revolution (1937–1943) destroyed the longstanding federalist idea of limited federal power and robust state reserved power. *See id.* at 522, 577.

Second, the Warren Court (1954–1968) "dismantled most precedent concerning individual rights and reinterpreted the Constitution to implement ideas about liberty and equality that incorporated progressive social and moral views." *Id.* at 522. Except for *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), which held that the Equal Protection Clause forbade state racial discrimination, these decisions had almost no foundation in the Constitution itself. Pushaw, *Perils*, *supra* note 69, at 522–23. The most important case, *Baker v. Carr*, 369 U.S. 186 (1962), imaginatively read the Equal Protection Clause as containing a "one person, one vote" standard. *See* Robert J. Pushaw, Jr., Bush v. Gore*:*

In short, although judges and scholars routinely seek to ascertain the historical understanding of the Constitution's language, the reality is that unwritten tradition and definitive Court precedent—which sometimes stray far outside the text—have created doctrines that play a critical role in deciding actual cases.[101] This process strongly resembles the Catholic approach to interpreting the Bible: A final authority (the Papacy) determines the meaning of a disputed provision by evaluating its text in light of history, longstanding custom, and precedent.[102]

Despite the many problems of originalism, it has had a huge impact on constitutional theory and practice.[103] Although conservatives developed this methodology, some liberal scholars have co-opted it—not as a source of en-

Looking at Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMM. 359, 359–67 (2001) [hereinafter Pushaw, Bush v. Gore]. The Court also invented a right to privacy in sexual matters involving consenting adults. *See* Griswold v. Connecticut, 381 U.S. 479, 480–86 (1965). Other landmark Warren Court opinions completely reshaped constitutional criminal procedure in a pro-defendant manner and effectively rewrote the First Amendment Clauses concerning religion and freedom of expression. *See* Pushaw, *Perils*, *supra* note 69, at 522, 578.

Remarkably, the major Warren Court cases have survived even after conservative Republicans attained a permanent majority in 1991. *See* Robert J. Pushaw, Jr., *Enforcing Principled Constitutional Limits on Federal Power: A Neo-Federalist Refinement of Justice Cardozo's Jurisprudence*, 60 WM. & MARY L. REV. 937, 941, 960–61 (2019) [hereinafter Pushaw, *Enforcing*]. This durability has resulted from a combination of liberal Justices who agree with the original opinion and moderate Republicans like Stewart, Powell, O'Connor, Kennedy, and Roberts who feel duty-bound to honor *stare decisis* and maintain legal stability by keeping the basic holdings intact, albeit with case-by-case revisions. Pushaw, *Perils*, *supra* note 69, at 523–24, 578.

101. *See, e.g.*, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5–9 (1998); *cf.* WHITTINGTON, *supra* note 19, at 169–74, 213 (suggesting that the Court should gradually, not abruptly, modify its "living Constitution" precedent to move closer to the correct original constitutional meaning).

102. Several scholars have articulated this theme of a "Catholic" method of authoritatively interpreting the Constitution. *See, e.g.*, LEVINSON, *supra* note 2, at 28–50, 185; PELIKAN, *supra* note 2, at 2, 10–12, 30–36, 115–19; Garet, *supra* note 2, at 48–49, 55, 57, 61, 67–69, 74–77, 85, 88–89, 91–99, 125–27, 134. Moreover, with both the Bible and the Constitution, the "letter"—the literal, original meaning of the text—often is later expressed in a broader principle that captures the fuller "spirit" of the provision, which can be applied to new but analogous situations in an ongoing process of organically developing the doctrine in light of experience. PELIKAN, *supra* note 2, at 8–12, 76–84, 115–22. Faithful development requires interpretations that (1) add or assimilate a concept that merely illustrates or corroborates a doctrine's basic idea and permanent underlying principles, which are preserved in a way that demonstrates their enduring vigor; and (2) make deductions or inferences from existing doctrine in logical sequence. *See id.* at 122–48.

103. *See* Brian A. Lichter & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 491–94 (2009).

forceable legal rules, but rather as an important foundation upon which Americans can gradually build.[104]

3. Neo-Federalism and "Living Originalism"

The most nuanced approaches to constitutional interpretation evaluate all relevant evidence.[105] For example, Bruce Ackerman and Akhil Amar have applied "Neo-Federalism," which aims to (1) recover the understanding of the Constitution's text, structure, and political theory shared by its drafters and ratifiers, and (2) apply their classical constitutional principles and values that remain useful in addressing modern legal issues.[106] More recently, Jack Balkin has proposed "living originalism": treating the Constitution's historical meaning not as fixed law, but rather as an initial framework that is fleshed out through constitutional construction by all Americans (not only judges), thereby ensuring democratic legitimacy.[107] Accordingly, the original semantic meaning of constitutional language might convey determinate legal rules, general legal standards (like "liberty" and "equal protection"), or basic principles (such as federalism) that can validly be employed by later generations in ways that those who wrote and ratified the provision did not expect.[108]

Neo-Federalism and "living originalism" can be sophisticated yet practi-

104. *See infra* Section III.A.3.

105. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1243–46 (1987) (observing that the conventional types of constitutional argument are usually ranked in the following order of importance—text, the Framers' intent, constitutional theory, precedent, and moral or policy values—but that these sources tend to be sufficiently related so as to point toward a single result).

106. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 19–20, 34–57, 165–67 (1991); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 207–09, 230–31 (1985). I have long followed this approach. *See, e.g.*, Pushaw, *supra* note 58, at 397.

107. *See* JACK BALKIN, LIVING ORIGINALISM (2011).

108. *Id.* at 3–137, 256–73, 277–339. A good illustration is the Court's interpretation of Fourteenth Amendment equality as banning gender discrimination, which the drafters and ratifiers did not anticipate. *See id*. at 8–13, 18, 25–28, 198, 220–44, 249–55, 263–67; *see also supra* note 74 and accompanying text.

cal interpretive methods—as long as they are applied without political or ideological bias,[109] as illustrated in Professor Amar's pathbreaking work on federal court jurisdiction[110] and criminal procedure.[111] Unfortunately, these approaches are often deployed not to conduct an impartial inquiry into the original meaning of a constitutional provision, but rather to cherry-pick historical sources to support an expansive constitutional standard or principle that rationalizes a modern liberal policy result—for instance, the validity of New Deal and Great Society legislation[112] or the Warren Court-created individual rights.[113]

The idea that the Constitution has an original meaning, yet can evolve,

109. *See* Pushaw, *supra* note 55, at 1206–11 (recommending and applying such "apolitical Neo-Federalism").

110. *See* Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 847–51, 856–64, 873–83, 890–97 (supporting and elaborating upon the arguments in Amar, *supra* note 106); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (painstakingly recapturing the original meaning of popular sovereignty and federal-state relations to challenge various Supreme Court doctrines, most notably state sovereign immunity).

111. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997) (rejecting the conventional liberal wisdom praising the Court for creating strong new protections for accused criminals under the Fourth, Fifth, and Sixth Amendments—most importantly, arguing that the remedy for unlawfully obtained evidence should not be excluding evidence and letting the guilty walk, but rather civil damages suits and sanctions).

112. *See, e.g.*, Pushaw, *supra* note 55, at 1207–08 (elaborating upon this criticism of Professor Ackerman).

113. *See, e.g.*, AMAR, *supra* note 75, at 84, 88, 112–21, 126–27, 129, 146, 151–56, 159–67, 170–76, 179–89, 192–99, 211–30, 271, 288, 357, 387, 441, 463.

For instance, abundant linguistic and historical evidence reveals that the interstate "commerce" Congress could regulate included a core of voluntary "trade" (buying, selling, and transporting goods), as well as related activities geared toward the marketplace such as manufacturing goods for sale and paid services like banking, insurance, and labor. *See* Nelson & Pushaw, *supra* note 93, at 9–67 (citing thousands of supporting sources). Nonetheless, Professors Amar and Balkin claim that "commerce" originally meant "interaction" (not merely economic but also social and political), which gives Congress historical cover to regulate anything it deems to be in the national interest or beyond the competence of individual states—including virtually all modern liberal federal laws. *See* AMAR, *supra* note 65, at 107–08; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5–6, 15–29 (2010). Remarkably, Amar and Balkin do not cite anyone during the era of the Constitution's framing, ratification, or early implementation who suggested such an expansive view of "commerce," but instead selectively cobble together obscure references to their preferred meaning from irrelevant foreign sources and non-legal English usages that had often become obsolete by 1787. *See* Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress's Powers*, 2012 U. ILL. L. REV. 1703, 1705–54.

bears some resemblance to the cyclical method of literary and biblical interpretation.[114] In particular, the initial step is always to ascertain the historical understanding of a text.[115] The next inquiry for literary or biblical scholars is to recognize that, just as the words are transmitting meanings to the reader, his or her subjective perspective is affecting the meaning attributed to the text—the hermeneutic circle.[116] By contrast, no Justice—and few lawyers—would publicly endorse the legitimacy of injecting one's personal views (whether based on politics, ideology, religion, morality, or idiosyncratic experiences) to determine the legal meaning of the Constitution.[117]

That reticence reflects the classical Anglo-American idea that judges impartially identify and apply an objective "law" consisting of stable rules.[118] As social scientists have demonstrated, however, judges' personal attitudes significantly affect their legal decision-making.[119] Yet even the most activist Justices, liberal or conservative, cloak their preferences behind a veil of formal legal analysis by citing (however selectively) the Constitution's text, structure, history, and precedent.[120]

The foregoing discussion suggests that it is extremely difficult for consti-

114. *See supra* Section II.C. (discussing the "hermeneutic circle").

115. *See supra* Section II.A. (describing the primacy of textual analysis). *But see* Henry L. Chambers, Jr., *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92 (2009) (contending that Christians sometimes disregard biblical text that is inconsistent with core principles of Jesus's ministry, and that interpreters of the Constitution can likewise rely on its overarching principles such as equality to justify results that conflict with individual constitutional provisions).

116. *See supra* Section II.C.

117. The modern Literary Theory tenet that texts inherently have no ascertainable objective meaning, but rather depend on the reader's subjective views, is inconsistent with basic premises of law—and would render futile any effort to develop constitutional legal principles and interpretive methods. *See* WHITTINGTON, *supra* note 19, at 47–77, 88–109, 176–82; *cf*. David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136, 137–76 (1985) (recognizing that literary deconstructionists have influenced Critical Legal Studies (CLS) academics to assert that legal "interpretation" does not seek an objective understanding of text but instead disguises and reinforces political, social, and economic inequality, but arguing that CLS adherents do not fully understand Literary Theory and also exaggerate the subjectivity involved in reading legal documents). *But see* Levinson, *supra* note 53, at 375–77, 384–96 (lamenting, but accepting, that legal writings are intrinsically indeterminate).

118. *See* Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons From Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 66–67, 76 (2010).

119. *See* Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1265–76 (2002) (summarizing the "attitudinal" and "strategic" models of judicial behavior, which show that judges rationally seek to maximize their preferences).

120. *See* CASS R. SUNSTEIN, RADICALS IN ROBES 31–34 (2005).

tutional interpreters to remain neutral. The very awareness of this fact, however, can enhance objectivity in fair-minded legal thinkers by leading them to consciously recognize their biases and attempt to overcome them. Thus, a good test to determine if a method of constitutional interpretation is impartial is whether its application leads to a variety of results—liberal, conservative, and moderate.[121]

B. Statutory Interpretation

Parties often contest the meaning of a particular word, phrase, or provision in a statute. The appropriate way to resolve such disputes has received ever-increasing attention over the past few decades. The many permutations of statutory interpretation can be boiled down to three main approaches: textualist, pragmatic, and dynamic.[122]

1. Textualism

Today, no Justice or reputable scholar employs the simple method favored by old-fashioned literary or biblical interpreters: effectuating the reader's subjective perception of the "plain meaning" of written language. Rather, modern "textualists" have borrowed insights from linguists and literary Structuralists. The aim is to determine the ordinary semantic meaning of words—their most likely usage to a reasonable person familiar with both prevailing linguistic conventions (such as dictionary definitions and standard

121. I have tried to do so by applying an "apolitical Neo-Federalist" approach. *See* Pushaw, *supra* note 55, at 1209–11. For example, I have published extensive scholarship urging federal courts to either exercise or decline jurisdiction in specific factual contexts, regardless of whether that result will affect access for plaintiffs with liberal or conservative views. *See, e.g.*, Pushaw, *supra* note 58, at 399, 472–512 (setting forth neutral rules of standing, ripeness, mootness, and the political question doctrine grounded in the Constitution's text, history, and separation-of-powers structure); Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1516–19, 1541–71 (2007) (proposing objective, historically rooted Article III principles for determining whether a case "arises under" federal law). Similarly, I have developed, along with Grant Nelson, a textually and historically based Commerce Clause framework that has been criticized on both the right (for allowing too much federal regulatory legislation) and the left (for not permitting Congress unlimited power to regulate non-commercial issues to achieve liberal social and cultural goals). *See* Pushaw, *Obamacare*, *supra* note 113, at 1708–34, 1738–43, 1750–54; *see also* Nelson & Pushaw, *supra* note 93, at 119 (predicting such criticism).

122. The following analysis is a condensed version of a lengthy article. *See* Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121 (2016).

grammar) and the statute's context, particularly its subject matter and overall structure.[123] Textualism was the dominant form of statutory interpretation until the 1940s, was revived by Justice Scalia and others in the 1980s, and is now the majority approach.[124]

2. Pragmatism

Pragmatists such as Justice Breyer assume that language does not have a single plain meaning, but is usually ambiguous or vague.[125] Therefore, the statute's text, while important, is merely the starting point that must be illuminated by other evidence such as (1) Congress's general purposes and policy goals; (2) its specific intent manifested in legislative history (i.e., how the bill evolved, including comments by members); and (3) cases interpreting similar statutory verbiage.[126] Because all of this evidence typically points in different directions, one must choose the construction that will produce the optimal practical result.[127]

The main problem with pragmatism is that, as applied, it gives judges vast discretion, which is usually exercised to reach outcomes that conform to their political, ideological, or personal preferences.[128] For example, a clever judge can often define Congress's overarching purpose at a very high level of generality (e.g., to "help the poor" or "clean the environment"), and then twist a specific provision beyond all recognition to further that goal.[129] Likewise, it is easy to comb through legislative history and find a remark by some Representative or Senator that a statute means X, even though it says Y.[130] Such legislators hope that a judge will later seize on that statement to support the incorrect interpretation—one that they could not persuade their fellow members to incorporate into the final statute.[131]

Pragmatism bears some resemblance to contextualism in literary and biblical interpretation insofar as it considers the text in light of history (i.e., the

123. *See id.* at 123, 131–32, 158–60, 170–73, 231.
124. *See id*. at 143–78, 230.
125. *See id*. at 123, 163, 169.
126. *See id*. at 123–24, 129–30, 150–58, 163–67, 172–73, 230.
127. *See id*. at 124, 129–30, 166–67, 225–27, 230.
128. *See id*. at 124, 130–31, 169, 226–33.
129. *See id*. at 130–31, 157–58.
130. *See id*. at 131, 169, 231.
131. *See id*. at 130–31, 156–58, 231.

legislative record preceding enactment).[132] Unlike those nonlegal types of interpretation, however, pragmatism often does not lead judges to consult this history to determine the probable meaning of a statute's language but rather to give them cover in rewriting the law.[133]

3. Dynamic Statutory Interpretation

Under this approach, the meaning intended by the enacting legislature is not binding.[134] Instead, if the judge concludes that the statute has become outdated or insufficiently effective, he or she can adjust the law to accommodate changed circumstances.[135]

Dynamic statutory interpretation has the virtue of intellectual honesty, but the vice of undermining the Constitution's system of separation of powers.[136] Article I grants Congress "legislative power" to enact and amend statutes according to the voters' will, whereas Article III grants courts only "judicial power"—to apply that law to the facts, not revise it based on the judge's opinion that the legislature should have changed the statute.[137]

Dynamic statutory interpretation is quite similar to "Living Originalism" in constitutional law and the "hermeneutic circle" in literary and biblical studies, as the reader's personal perspectives shape the text's meaning.[138] Not surprisingly, all of these approaches suffer from the same fatal flaw: The reader is no longer actually "interpreting" a text (i.e., trying to determine its meaning), but rather is imposing his or her views onto the text.[139]

Over the past thirty years, Supreme Court Justices have increasingly used textualist rhetoric, but made decisions pragmatically or dynamically.[140] By following this odd course, the Justices have arrogated to themselves vast

132. *See supra* Section II.B.

133. *See* Pushaw, *supra* note 122, at 124, 131, 169, 225.

134. *See id*. at 168–69.

135. *See id.*

136. *See id.* at 171.

137. *See id*. at 131–32, 140–43, 160–61, 169, 231–32.

138. *See supra* notes 45–52, 107–08 and accompanying text.

139. *See supra* notes 46–48. Of course, the "hermeneutic circle" model would reject such a dichotomy between objective interpretation and subjective interposition of the reader's perspective. *See supra* Section II.C. As applied to legal texts, however, such an approach would effectively reject the entire premise of written law—that people will understand what the government prescribes and proscribes. *See supra* notes 114–120 and accompanying text.

140. *See* Pushaw, *supra* note 122, at 124, 129, 171–78, 225–30, 233.

power to effectively amend any statute while denying that they are doing so.[141] And the Court tends to get away with such subterfuge.[142]

Nonetheless, such politically driven decisions have gradually eroded Americans' respect for the Court and the very ideal of impartial law. That is why I have argued that the Court should consistently apply a rigorous textualist approach.[143] Congress's enacted text is the law, and courts have a duty to enforce it.[144] Once they venture beyond the text to consider general purposes, legislative history (which often runs thousands of pages and would be impossible for even the most conscientious judge to read in full), or real-world policy results, the judges inevitably substitute their own views for those of the legislature.[145] That violates separation of powers, which presupposes that courts will merely implement a statute as written and that Congress, if it chooses, can amend it.[146]

141. *See id*. at 124–25, 225–27, 230, 233. The most famous recent example involved a statutory provision, enacted under Congress's power to regulate interstate commerce, that required all Americans to purchase health insurance or pay a "penalty." Patient Protection and Affordable Care Act of 2013 (ACA), 26 U.S.C. § 5000A (2017). All of the Justices declared that they were applying a textualist approach, but only four of them actually did so by holding that a "penalty" was a "penalty" (i.e., a monetary punishment for violating a regulatory law). *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 661–69 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

However, Chief Justice Roberts and four colleagues ruled that the "penalty" under the Commerce Clause could also be read as a "tax" (i.e., an enforced contribution to support the government), and thus sustainable under Congress's Taxing Clause power, which is virtually plenary. *Id.* at 561–74 (Roberts, C.J.); *accord id.* at 589, 623 (Ginsburg, J., joined by Breyer, Sotomayor & Kagan, JJ., concurring in part, dissenting in part). That conclusion was so bizarre that it can be rationally explained primarily as a political and pragmatic calculus. In the summer before the 2012 Presidential election, five Republican Justices would have incurred sharp public criticism for striking down the signature achievement of the incumbent Democratic President. *See* Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 1994–99, 2026–33, 2041–53 (2013).

142. *See* Pushaw, *supra* note 122, at 125, 129, 229 (suggesting that the Court has succeeded because (1) it is held in much higher esteem than Congress, and (2) any particular statute at issue usually is of interest to a very small group).

143. *See id.* at 131–33, 229–33.

144. *See id.* at 131–33.

145. *See id.* at 130–32.

146. *See id.* at 131–32, 139–49, 160–61, 171.

IV. CONCLUSION

The textual, contextual, and "hermeneutic circle" methods of reading literary and biblical texts have influenced interpretation of the federal Constitution and statutes, even if legal analysts have often been unaware of this impact. Indeed, every approach to constitutional and statutory construction has an antecedent or analogue in literary or biblical hermeneutics.

At this moment, five Justices—Roberts, Thomas, Alito, Gorsuch, and Kavanaugh—have formally declared that they are constitutional originalists and statutory textualists.[147] Officially, then, the Court is properly moving away from a free-form "interpretation" that actually amends the Constitution and statutes. Nonetheless, those Justices (especially Roberts) should be more consistent in applying those interpretive approaches, even when they don't like the result.

147. *See* John O. McGinnis, *Which Justices Are Originalists?*, LAW & LIBERTY (Nov 9, 2019), https://www.lawliberty.org/2018/11/09/which-justices-are-originalists.

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