

## BIBLICAL LITERALISM AND CONSTITUTIONAL ORIGINALISM

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*Critics of constitutional originalism have often described originalists as “fundamentalists” or “literalists” as a way of discrediting originalism. This comparison has obvious rhetorical force because it tends implicitly to taint originalism with guilt by association, given views in the academy of Protestant fundamentalism. But originalism’s critics are not the only ones who appear to have noticed the similarities between the two interpretive approaches; when they have entered the arena of policy and judicial politics, proponents of biblical literalism have generally embraced originalism as the correct approach to constitutional interpretation.*

*It is not surprising that both critics of constitutional originalism and proponents of biblical literalism have noted a connection between the two interpretive approaches, as there are some obvious similarities. Indeed, the similarities go beyond the caricatures that both critics and proponents have tended to offer. Literalism and originalism share a core commitment to the idea that their relevant texts have a timeless, fixed meaning that is readily ascertainable. In addition, both interpretive approaches are in significant part projects of restoration; both are deeply concerned about the loss of constraint that results from interpretation that is untethered to text; both have a strong, self-consciously populist impulse and an equally strong and self-conscious disdain for elite opinion, with respect to both interpretive norms and cultural values; and both maintain that all other approaches to their relevant texts are fundamentally illegitimate because they breach a duty of fidelity.*

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*Yet if we are to understand the force of the critics' comparison and, more important, the continuing attraction of originalism to conservative Protestants, we need not only a more nuanced appreciation of the similarities between the two approaches but also a better understanding of the differences. And, indeed, both critics of originalism and literalists who urge originalism as an approach to constitutional interpretation have failed to identify the fundamental differences between the two approaches. For literalism, interpretation is an act of faith in a God who is just and good. Accordingly, for the literalist, obedience to the biblical text—the word of God—is the highest human good. Originalism, in contrast, demands loyalty to the text regardless of its moral quality; just or good results are accidental rather than necessary features of originalist interpretation.*

*Originalism's critics have been perhaps too quick to assign to originalists assumptions that, even to literalists, are unique to the project of biblical interpretation. More important, literalists who have been attracted to originalism—including those whose attraction is instrumental—might want to take a closer look at the approach and its positivistic character before giving an unqualified endorsement to a theory that could just as well produce results anathema to their most deeply held (and biblically ordained) beliefs.*

#### INTRODUCTION

Many conservative Protestants contend that every word of the Bible must be taken literally. These biblical literalists accordingly pay close attention to the Bible's text, which, they believe, carries a meaning that is fixed, ascertainable, and timeless. Constitutional originalists contend that the Constitution's text is central to proper interpretation and that the meaning of the text is fixed, ascertainable, and, because it can answer questions that arise in the modern world, timeless. Given the obvious similarities between these two interpretive approaches, it is perhaps not surprising that Cass Sunstein, Morton Horwitz, and others have pejoratively used the label "fundamentalists" to describe originalists.<sup>1</sup> For similar reasons, it is not surprising that prominent conservative Protestant fundamentalists have praised

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1 See CASS R. SUNSTEIN, *RADICALS IN ROBES*, at xiii (2005) (using the label "fundamentalists" to describe originalists because their approach "bears an obvious resemblance to religious fundamentalism" insofar as it "represents an effort to restore literal meaning of a sacred text"); *id.* at xiv ("'Strict construction' of the Constitution finds a parallel in literal interpretation of . . . the Bible."); Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 663 (1989) (observing that "originalism in constitutional discourse is the equivalent of religious fundamentalism" and describing originalists and "constitutional literalists" as "fundamentalists"); see also Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 133 (comparing Justice Black to a

originalism as the proper approach to constitutional interpretation in the course of criticizing the Supreme Court's nonoriginalist decisionmaking.<sup>2</sup>

There plainly are important similarities between biblical literalism and constitutional originalism. The similarities extend beyond the obvious shared presuppositions that the relevant texts have a timeless, fixed meaning that is readily ascertainable. The modern movements to which literalism and originalism are central both arose in large part as reactions to competing approaches, and both movements are in significant part projects of restoration—of both the proper approach to interpretation and a particular set of values that have been under siege. Literalists and originalists alike contend that the text itself is available to control those who claim to be authoritative interpreters, and they are deeply concerned about the loss of constraint that results from interpretation that is untethered to text. Literalists and originalists share a strong, self-consciously populist impulse—based on the idea that the text is accessible to anyone who reads it—and an equally strong and self-conscious disdain for elite opinion, both with respect to interpretive norms and cultural values. Literalists and originalists defend their approaches with an air of absolute certainty about their approaches' legitimacy and correctness. And literalists and originalists contend that all other approaches are fundamentally illegitimate because they breach an obligation of fidelity.

But there are also very important differences between the two approaches. Central to biblical literalism is the claim that the Bible is both constitutive and representational—that is, that it both creates and describes the natural world—and that its authority arises from its unique status as the word of God. Accordingly, for the literalist, the duty of fidelity to the text of the Bible—to every passage and every statement, not only about doctrine or conduct, but also about history and natural science—arises from the fact that, as the word of God, it is both inerrantly truthful and inherently good. Originalism, in contrast, is a paradigmatic form of legal positivism. For the originalist, the legal duty to submit to the text has nothing to do with the Constitution's "truth" (a nonsensical concept as applied to that document) or "goodness." The legal duty, instead, arises solely from the character of the document as an authoritative legal text. But to the originalist, the question whether the Constitution is (or should be treated as)

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"Biblical fundamentalist" because "he wanted the sacred text instantly available so as to be able to resolve disputes by pointing to the text").

2 See *infra* notes 291–94 and accompanying text.

authoritative is conceptually separate from the question whether originalism is the correct interpretive methodology for authoritative legal texts. Indeed, the originalist judge's legal obligation is one of fidelity to the judgments embodied in the Constitution's text *even if* they are, in some broader sense, immoral judgments.

In short, both the critics of originalism who have sought to condemn it by comparing it to literalism and the literalists who have praised originalism as the natural and correct way to interpret the Constitution have perhaps focused too much on the similarities between the two approaches and neglected the important differences between them. We seek here to offer a more systematic comparison between biblical literalism and constitutional originalism. In so doing, we hope to illustrate both the force and limits of the comparison.<sup>3</sup> We also hope that the comparison will serve as a starting point for a discussion about the ways in which biblical literalism and constitutional originalism interact in a broader cultural narrative. Although we do not offer a comprehensive, sociological account of the respective appeals of literalism and originalism and although we cannot yet ground our intuitions in empirical data, we suggest several reasons why originalism holds great appeal, at least superficially, for those who accept the tenets of biblical literalism in their religious commitments. To be sure, we suspect that part of the reason that literalists are attracted to originalism is simply that they perceive originalism as more likely to produce substantive results—such as the validation of laws banning abortion and same-sex marriage—with which they agree. But there is also reason to believe that originalism has won biblical literalists as adherents to its political and cultural agenda precisely because of the familiarity of its interpretive approach.

Yet a person with a deep understanding of biblical literalism's presuppositions could readily conclude that, because the Constitution (like every other human document) is so obviously different in important ways from the Bible, interpretive approaches to the Bible are not easily generalized. Indeed, literalism and originalism are different in such fundamental ways that literalists should be more skeptical of originalism than they generally seem to be. Originalism's general commitment to legal positivism—and its specific commitment to the idea that judges should enforce the text of the Constitution even if the judges believe that the judgments embedded in the text are not nor-

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3 We are mindful that most scholars have approached the parallels between legal and religious interpretation, and between law and religion, "gingerly," Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 586 (1993), and we have endeavored to treat the views we describe here with nuance and respect.

matively good or desirable—is in stark tension with literalism’s commitment to biblically defined “absolute standards of law and justice.”<sup>4</sup> Whereas originalism requires the interpreter to enforce specific provisions of the text without regard to the interpreter’s personal moral judgments about the text, literalism is based on the premise that the interpreter has an obligation to apply the text because of its inherent truth and goodness, as the word of God.

It would, of course, be a Herculean task comprehensively to compare constitutional interpretation to biblical interpretation. Any such project would require not only deep knowledge of two fields that are themselves immense (and filled with multiple, competing interpretive approaches), but also attention to the many similarities and differences more generally between the Bible and the Constitution and their roles in their respective interpretive communities. As a result, the few book-length treatments of this question have tended to paint with very broad brushes.<sup>5</sup> This Article has a somewhat more modest scope. We are concerned specifically with only one particular approach to biblical interpretation (literalism) and only one particular approach to constitutional interpretation (originalism). To be sure, we note some of the important similarities and differences between the Bible and the Constitution in the course of our discussion, but we do so only to the extent that those differences are important to the particular claims that literalists and originalists make about their respective texts.

To engage in a meaningful comparison between literalism and originalism, it is necessary to understand the core commitments of the two approaches. In Part I, we provide overviews of those approaches. Both are more properly characterized as families of theories than discrete theories of their own, but we attempt to focus on the core commitments that the varying approaches within each tradition share. In Part II, we identify and explain the similarities and differences between literalism and originalism. Finally, in Part III, we offer some thoughts about what the comparison suggests about the relationship between the two interpretive approaches.

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4 Int’l Council on Biblical Inerrancy, The Chicago Statement on Biblical Application art. X (1986) [hereinafter *Biblical Application*], *available at* [http://library.dts.edu/Pages/TL/Special/ICBI\\_3.pdf](http://library.dts.edu/Pages/TL/Special/ICBI_3.pdf) (“We deny that legal positivism, or any other humanistic philosophy of law, is able to satisfy the need for absolute standards of law and justice.”).

5 *See, e.g.*, JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* 36 (2004) (“But given the massive authority of those texts, as well as the magisterial standing of those authorities, [comparing interpretation methods] . . . can be extremely broad in its implications.”).

## I. BIBLICAL LITERALISM AND CONSTITUTIONAL ORIGINALISM

### A. *Biblical Literalism*

According to a 2008 survey, roughly one-third of adults in the United States believe that the Bible is “the word of God . . . to be taken literally, word for word.”<sup>6</sup> Although many Muslims and some Jews hold similar views of scripture,<sup>7</sup> our discussion focuses on the understanding of biblical literalism characteristic of conservative Protestant Christianity.<sup>8</sup> The label “biblical literalism” encompasses a range of related theological doctrines.<sup>9</sup> Those who embrace the label might not accept all of the doctrinal implications, but theologians and biblical scholars working within that tradition generally identify three core features of biblical literalism. First, the authority of the Bible arises from its unique status as the word of God.<sup>10</sup> In and through the Bible, God communicates with humanity; the text represents the mind and will of God in material form.<sup>11</sup> Second, the Bible is inerrant and infal-

6 *U.S. Religious Landscape Survey*, PEW F. ON RELIGION & PUB. LIFE, 170 (Feb. 2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>; see also Frank Newport, *One-Third of Americans Believe the Bible Is Literally True*, GALLUP (May 25, 2007), <http://www.gallup.com/poll/27682/OneThird-Americans-Believe-Bible-Literally-True.aspx> (“About one-third of the American adult population believes the Bible is the actual word of God and is to be taken literally word for word.”).

7 See *U.S. Religious Landscape Survey*, *supra* note 6, at 170 (noting that fifty percent of Muslims and ten percent of Jews believe their holy book is to be taken literally).

8 The category of “conservative Protestantism” encompasses a wide and quite diverse range of religious practices and commitments. As we understand it, a shared opposition to liberal movements in theology and morality defines the category. We do not attempt to draw distinctions among those who fall within that category, but simply acknowledge the diversity—for example, between Fundamentalists and Evangelicals—of those included. For a discussion of related definitional issues, see GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* 1–6 (1991).

9 See VINCENT CRAPANZANO, *SERVING THE WORD* 3 (2000) (noting that the commitments of biblical literalism “form a constellation rather than a list of essential features shared by all”).

10 See Int’l Council on Biblical Inerrancy, *The Chicago Statement on Biblical Inerrancy* arts. I, III (1978) [hereinafter *Biblical Inerrancy*], available at [http://library.dts.edu/Pages/TL/Special/ICBI\\_1.pdf](http://library.dts.edu/Pages/TL/Special/ICBI_1.pdf) (“We affirm that the Holy Scriptures are to be received as the authoritative Word of God. We affirm that the written Word in its entirety is revelation given by God.”); Int’l Council on Biblical Inerrancy, *The Chicago Statement on Biblical Hermeneutics* 5 (1982) [hereinafter *Biblical Hermeneutics*], available at [http://library.dts.edu/Pages/TL/Special/ICBI\\_2.pdf](http://library.dts.edu/Pages/TL/Special/ICBI_2.pdf); see also J.I. PACKER, *BEYOND THE BATTLE FOR THE BIBLE* 17–19, 39–40 (1980) (discussing the relationship between the authority of biblical text and divine authority).

11 See Paul D. Feinberg, *The Meaning of Inerrancy*, in *INERRANCY* 267, 277–83 (Norman L. Geisler ed., 1980). See generally Wayne A. Grudem, *Scripture’s Self-Attestation*

libile.<sup>12</sup> God's communication with humanity consists of true propositions. The attribute of truthfulness applies not just to statements about doctrine or conduct, but also to statements about history and natural science.<sup>13</sup> Third, the meaning of the biblical text is accessible to all people through the ordinary exercise of reason, but faithful interpretation requires acceptance of the divine character of the text.<sup>14</sup>

The core features of modern biblical literalism first developed<sup>15</sup> in mid- and late-nineteenth century debates over higher criti-

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*and the Problem of Formulating a Doctrine of Scripture*, in *SCRIPTURE AND TRUTH* 19, 19–49 (D.A. Carson & John D. Woodbridge eds., Baker Books 1992) (1983) (examining the Bible's claim to be the infallible word of God).

12 See *Biblical Inerrancy*, *supra* note 10, art. XI (“We affirm that Scripture, having been given by divine inspiration, is infallible, so that, far from misleading us, it is true and reliable in all the matters it addresses.”); *id.* art. XII (“We affirm that Scripture in its entirety is inerrant, being free from all falsehood, fraud, or deceit.”); see also Feinberg, *supra* note 11, at 287–95 (examining many different definitions of “inerrancy”).

13 See *Biblical Hermeneutics*, *supra* note 10, art. XX (“We affirm that since God is the author of all truth, all truths, biblical and extrabiblical, are consistent and cohere, and that the Bible speaks truth when it touches on matters pertaining to nature, history, or anything else.”); see also Grudem, *supra* note 11, at 53–57 (“It is better to say that the whole purpose of Scripture is to say everything it does say, on whatever subject.”); John W. Wenham, *Christ's View of Scripture*, in *INERRANCY*, *supra* note 11, at 3, 22 (“The trouble is that such a distinction [between spiritual truth and historical truth] is nowhere to be found in Jesus' own teaching and seems to be precluded by His testimony both to the unqualified historical accuracy and the inspiration of the Old Testament.”).

14 See PACKER, *supra* note 10, at 53; Philip Edgcumbe Hughes, *The Truth of Scripture and the Problem of Historical Relativity*, in *SCRIPTURE AND TRUTH*, *supra* note 11, at 173, 175–77; Walter C. Kaiser, Jr., *Legitimate Hermeneutics*, in *INERRANCY*, *supra* note 11, at 117, 128–30; J. Barton Payne, *Higher Criticism and Biblical Inerrancy*, in *INERRANCY*, *supra* note 11, at 85, 94–95.

15 Although its distinctive contours have only emerged in the past two centuries, literalism has prominent antecedents throughout the history of Christian thought and finds parallels in Roman Catholic and Eastern Orthodox understandings of scripture. See generally Geoffrey W. Bromiley, *The Church Fathers and Holy Scripture*, in *SCRIPTURE AND TRUTH*, *supra* note 11, at 199, 199–219 (discussing the early church's understanding of the Bible); Robert D. Preus, *The View of the Bible Held by the Church: The Early Church Through Luther*, in *INERRANCY*, *supra* note 11, at 357, 357–82 (“The doctrine of verbal inspiration and the inerrancy and divine authority of Scripture has been the consistent teaching of the Christian church from the time of the apostles through the early church and Middle Ages to the Reformation era.”). On the development of literalism in the nineteenth and twentieth centuries, see PACKER, *supra* note 10, at 43–50; Hughes, *supra* note 14, at 179–85; James I. Packer, *The Adequacy of Human Language*, in *INERRANCY*, *supra* note 11, at 197, 201–06; and John D. Woodbridge & Randall H. Balmer, *The Princetonians and Biblical Authority: An Assessment of the Ernest Sandeen Proposal*, in *SCRIPTURE AND TRUTH*, *supra* note 11, at 251, 258–76.

cism<sup>16</sup> and theological liberalism,<sup>17</sup> and they featured prominently in early responses to Darwinian evolutionary theory.<sup>18</sup> But current understandings and the widespread popular appeal of biblical literalism have a more recent vintage: the cultural and religious upheavals of the 1960s and 1970s. As mainstream Protestant churches generally supported the wide range of liberal social causes during that period, including the separation of church and state, conservative religious bodies and leaders voiced concerns about the society's loss of religious and cultural moorings.<sup>19</sup> Evangelical Protestants' growing political engagement and influence represents one well-known response to that concern, and it was also reflected in a more prominent emphasis on biblical literalism.<sup>20</sup> The renewed emphasis on biblical literalism

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16 Higher criticism refers to scholarship that questions the authorship and form of received biblical texts and compares biblical texts to other writings from the ancient world. See John Barton, *Historical-Critical Approaches*, in THE CAMBRIDGE COMPANION TO BIBLICAL INTERPRETATION 9, 9–12 (John Barton ed., 1998). For example, higher critics generally deny that Moses was the author of the Pentateuch and suggest instead that the books compile the work of multiple authors who wrote in different historical periods and with significantly different concerns and religious ideas. See Joseph Blenkinsopp, *The Pentateuch*, in THE CAMBRIDGE COMPANION TO BIBLICAL INTERPRETATION, *supra*, 181, 183–86; Payne, *supra* note 14, at 101–03.

17 Liberal theology views religion as human experience of the divine and scripture as a record of that experience. In this view, faith does not consist in obedience to God-given propositions, but a far more subjective apprehension of divine presence and inspiration. See MARSDEN, *supra* note 8, at 35–36; PACKER, *supra* note 10, at 135–39; Norman L. Geisler, *Philosophical Presuppositions of Biblical Errancy*, in INERRANCY, *supra* note 11, at 307, 322–34.

18 See GEORGE M. MARSDEN, FUNDAMENTALISM AND AMERICAN CULTURE 113–17 (2d ed. 2006); MARSDEN, *supra* note 8, at 36–38; EARNEST R. SANDEEN, THE ROOTS OF FUNDAMENTALISM 106 (1970); see also Woodbridge & Balmer, *supra* note 15, at 258–69 (discussing several thinkers who “worried the Princetonians and other American Evangelicals decades before they experienced discomfiture over Darwin’s *Origin of Species*”).

19 See ROBERT BOOTH FOWLER, A NEW ENGAGEMENT 30–32, 191–211 (1982); MARSDEN, *supra* note 18, at 232–36. See generally Leonard I. Sweet, *The 1960s: The Crises of Liberal Christianity and the Public Emergence of Evangelicalism*, in EVANGELICALISM AND MODERN AMERICA 29, 29–45 (George Marsden ed., 1984) (discussing the response of Evangelicalism to liberal Christianity).

20 Conservative Protestants have not uniformly embraced biblical literalism. In many respects, the battle over biblical literalism has been more an internal struggle within Protestant Evangelicalism than a dispute between theological conservatives and liberals. See MARSDEN, *supra* note 8, at 75–76; PACKER, *supra* note 10, at 12–13; Millard J. Erickson, *Biblical Inerrancy: The Last Twenty-Five Years*, 25 J. EVANGELICAL THEOLOGICAL SOC’Y 387, 388–89 (1982); John S. Feinberg, *Truth, Meaning, and Inerrancy in Contemporary Evangelical Thought*, 26 J. EVANGELICAL THEOLOGICAL SOC’Y 17, 17–19 (1983); Mark A. Noll, *Evangelicals and the Study of the Bible*, in EVANGELICALISM AND MODERN AMERICA, *supra* note 19, at 103, 109–21.



addressed both a sense that the culture had rejected moral absolutes such as sexual fidelity within life-long marriage, as well as a worry that modernist sensibilities—including skepticism about the determinate meanings of texts—were making inroads even within conservative religious circles.<sup>21</sup>

The renewed emphasis on biblical literalism produced significant conflict within a number of conservative Protestant bodies, most notably the Southern Baptist Convention, as well as a flood of writings challenging or defending literalist views of biblical authority and interpretation.<sup>22</sup> Our account of biblical literalism primarily relies on the most prominent body of work to emerge from this era, a series of consensus statements and supporting scholarly publications by the International Council on Biblical Inerrancy (ICBI), a group of 300 academics and leaders within conservative Protestantism.<sup>23</sup>

## 1. Biblical Authority

Literalists claim that the Bible has authority—it deserves and commands obedience—because it is the word of God.<sup>24</sup> This claim specifically rejects the most basic assumption of liberal theology—that the Bible consists of human words about the human experience of God.<sup>25</sup> Instead, literalists claim that the Bible contains divine commu-

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21 See Payne, *supra* note 14, at 108–13 (“It may be that some former evangelical has come to feel that he has to accept the dictates of today’s criticism. That is a tragedy. It is an error from which we must protect the people of God for whom we happen to be responsible.”).

22 See BARRY HANKINS, *UNEASY IN BABYLON* 2–7, 31–39 (2002) (describing disputes over inerrancy within the Southern Baptist Convention). On the controversy over inerrancy within conservative Protestantism, see generally HAROLD LINDSELL, *THE BIBLE IN THE BALANCE* 13 (1979), proposing the thesis that “biblical inerrancy has become the focal point for defection in the modern church”; and JOHN D. WOODBRIDGE, *BIBLICAL AUTHORITY* (1982), defending the Bible’s complete infallibility in light of controversy.

23 See *Biblical Application*, *supra* note 4; *Biblical Hermeneutics*, *supra* note 10; *Biblical Inerrancy*, *supra* note 10. In addition to the three statements, the ICBI was also responsible for several collections of scholarly essays on themes addressed in the statements. See, e.g., JAMES MONTGOMERY BOICE, *DOES INERRANCY MATTER?* (1979) (defending inerrancy against popular objections); *THE FOUNDATION OF BIBLICAL AUTHORITY* (James Montgomery Boice ed., 1978) (the first scholarly production of the ICBI). See generally Norman L. Geisler, *Preface to INERRANCY*, *supra* note 11, at ix, ix (describing the ICBI).

24 See Packer, *supra* note 15, at 207–08; *Biblical Inerrancy*, *supra* note 10, exposition at 5.

25 See PACKER, *supra* note 10, at 135–37; J.I. Packer, *Infallible Scripture and the Role of Hermeneutics*, in *SCRIPTURE AND TRUTH*, *supra* note 11, at 325, 353–54; *Biblical Inerrancy*, *supra* note 10, art. III.

nication with humans. That communication certainly involved the mediation of human authors, but literalists believe that those authors were so fully under the inspiration of the Holy Spirit that the texts may properly be called the word of God.<sup>26</sup>

For literalists, the Bible embodies God's persistent self-disclosure to humanity.<sup>27</sup> Influenced by Kant, liberal theology generally emphasizes the unbridgeable distance between God and human reason and, thus, the inadequacy of human language to carry knowledge about the divine.<sup>28</sup> But literalists hold that the Bible bridges that divide. God has chosen to speak with humans, and God created humans with the capacity to receive and understand that speech.<sup>29</sup>

The Bible's status as the word of God is closely related to literalists' theological understanding of the person and work of Jesus.<sup>30</sup> The word of God (Bible) and the Word of God (Jesus) are inseparable. On this view, the Bible proclaims the coming of Jesus and provides the means for identifying him as the Messiah, and Jesus' own words authenticate the Bible as the word of God and testify to its authority and truthfulness.<sup>31</sup> Moreover, just as Jesus, in the traditional Nicene formula, is at once fully human and fully divine, so the Bible is fully the product of human authorship and fully the word of God.<sup>32</sup>

The reciprocity between Jesus and the Bible does not extend to the church. With respect to the church, the authority runs only in one direction. For literalists, the church is a human institution, and the Bible is supreme over all human institutions.<sup>33</sup> The Bible's

26 See Feinberg, *supra* note 11, at 277–83; Packer, *supra* note 15, at 198–99, 211–12; Biblical Inerrancy, *supra* note 10, arts. VI–X.

27 See Packer, *supra* note 15, at 199, 220–21.

28 See Geisler, *supra* note 17, at 322–27; Hughes, *supra* note 14, at 177–79; Packer, *supra* note 25, at 333; Packer, *supra* note 15, at 202–06, 215–16.

29 See Geisler, *supra* note 17, at 310; Packer, *supra* note 15, at 213–14; Biblical Hermeneutics, *supra* note 10, exposition at 5; Biblical Inerrancy, *supra* note 10, exposition at 5.

30 See Packer, *supra* note 15, at 216–19; Biblical Inerrancy, *supra* note 10, exposition at 6.

31 See PACKER, *supra* note 10, at 51; Paul Helm, *Faith, Evidence, and the Scriptures*, in *SCRIPTURE AND TRUTH*, *supra* note 11, at 303, 314; Wenham, *supra* note 13, at 17–18; Biblical Inerrancy, *supra* note 10, exposition at 6.

32 See Feinberg, *supra* note 11, at 282; Hughes, *supra* note 14, at 191–92; Packer, *supra* note 15, at 212–19; Biblical Hermeneutics, *supra* note 10, art. II (“We affirm that as Christ is God and Man in one person, so Scripture is, indivisibly, God’s Word in human language.”).

33 See PACKER, *supra* note 10, at 120–39; Biblical Inerrancy, *supra* note 10, art. II (“We affirm that the Scriptures are the supreme written norm by which God binds the conscience, and that the authority of the Church is subordinate to that of Scripture.”).

authority comes from its status as the word of God—a status established by the text itself—not from the church’s designation of certain books as canonical.<sup>34</sup> The church derives its authority from the Bible, and that authority is contingent on the church’s consistency with biblical doctrine.<sup>35</sup>

## 2. Biblical Inerrancy

In Article XII of the Chicago Statement on Biblical Inerrancy, the ICBI states, “We affirm that Scripture in its entirety is inerrant, being free from all falsehood, fraud, or deceit.”<sup>36</sup> The literalists’ claim of inerrancy derives from their underlying view of the Bible’s status as the inspired word of God. As God’s word, revealed through the inspiration of the Holy Spirit, the Bible possesses the divine attributes of truthfulness and perfection; errors and falsehoods would be inconsistent with the divine nature.<sup>37</sup>

Inerrancy has generated more controversy than any other aspect of literalism, though those conservative Protestants who have questioned the idea of inerrancy have typically questioned only specific aspects of the literalist understanding of inerrancy rather than the concept of biblical inerrancy itself. Two of those aspects deserve attention. First, as reflected in the ICBI statement quoted above, literalists contend that inerrancy attaches to the entirety of scripture.<sup>38</sup>

34 See Bromiley, *supra* note 15, at 204–05.

35 See PACKER, *supra* note 10, at 38–42, 64–71.

36 Biblical Inerrancy, *supra* note 10, art. XII.

37 See Greg L. Bahnsen, *The Inerrancy of the Autographa*, in INERRANCY, *supra* note 11, at 151, 189; D.A. Carson, *Redaction Criticism: On the Legitimacy and Illegitimacy of a Literary Tool*, in SCRIPTURE AND TRUTH, *supra* note 11, at 119, 142; Feinberg, *supra* note 11, at 286–87; Geisler, *supra* note 17, at 310. Literalists agree that this perfection belongs only to the *autographa*—the original manuscripts written by the biblical authors—and recognize that those manuscripts no longer survive; instead, we have only copies of the original manuscripts. See Bahnsen, *supra*, at 156–57; Hughes, *supra* note 14, at 192; Biblical Inerrancy, *supra* note 10, exposition at 7. Because copyists and editors inevitably introduce errors into texts, the Bible we possess is not properly designated as inerrant. But through careful comparison of the many manuscripts available we can have confidence that the modern text closely approximates the *autographa*. See Bahnsen, *supra*, at 172–74, 185–86; Biblical Inerrancy, *supra* note 10, exposition at 7.

38 See Biblical Hermeneutics, *supra* note 10, art. XX (“We affirm that since God is the author of all truth, all truths, biblical and extrabiblical, are consistent and cohere, and that the Bible speaks truth when it touches on matters pertaining to nature, history, or anything else.”); Biblical Inerrancy, *supra* note 10, art. XI (“We affirm that Scripture, having been given by divine inspiration, is infallible, so that, far from misleading us, it is true and reliable in all the matters it addresses.”); see also; Feinberg, *supra* note 11, at 294 (“Inerrancy means that when all facts are known, the Scriptures

Some conservative Protestants agree that the Bible does not err in statements of doctrine or human conduct, but they believe that it may err in other inessential statements of history or natural science.<sup>39</sup> But literalists reject any distinction among subjects. They contend that inerrancy applies both to historical events related in the Bible, such as the Israelites' exodus from Egypt and conquest of Palestine, and to the Bible's depiction of natural phenomena, including the creation narrative in Genesis.<sup>40</sup> For literalists, any concession of error in the Bible would imperil the reliability of the entire text because the text proclaims its own truthfulness and does not distinguish among categories of statements.<sup>41</sup> Such a concession would also wrongly imply the superiority of human reason over the biblical text because human reason would be empowered to decide which statements could be judged inessential and thus subjected to skeptical assessment.<sup>42</sup>

Second, the literalist account of inerrancy is tied to a propositional understanding of biblical revelation. In other words, the Bible consists of factual statements about God, and the claim of inerrancy reflects the objective truthfulness of each of those statements.<sup>43</sup> Crit-

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in their original autographs and properly interpreted will be shown to be wholly true in everything that they affirm, whether that has to do with doctrine or morality or with the social, physical, or life sciences.”).

39 See Bahnsen, *supra* note 37, at 182–84 (summarizing the view of limited inerrancy).

40 See Biblical Hermeneutics, *supra* note 10, art. XXII; Biblical Inerrancy, *supra* note 10, arts. XII–XIII.

41 See PACKER, *supra* note 10, at 17–19; Feinberg, *supra* note 11, at 284–88; Woodbridge & Balmer, *supra* note 15, at 275–76.

42 See PACKER, *supra* note 10, at 18–19; Bahnsen, *supra* note 37, at 180, 184; Feinberg, *supra* note 11, at 295; Payne, *supra* note 14, at 89–90; Biblical Inerrancy, *supra* note 10, exposition at 7–8.

43 See Biblical Hermeneutics, *supra* note 10, art. VI (“We affirm that the Bible expresses God’s truth in propositional statements, and we declare that biblical truth is both objective and absolute. We further affirm that a statement is true if it represents matters as they actually are, but is an error if it misrepresents the facts.”); see also Geisler, *supra* note 17, at 331–34 (arguing that philosophical approaches inconsistent with orthodox church teaching should be rejected because “they are incompatible with the Bible’s own claim about its divine authority and inerrancy”); Hughes, *supra* note 14, at 183–85 (“The faith of the New Testament is secure and immutable precisely because it is founded on absolutes.”); Packer, *supra* note 15, at 209 (“What believing Christians should hold, rather, is this: every assertion that the Bible, soundly exegeted, proves to be making, whether about matters of natural and historical fact within the created order or about the Creator’s own plans and actions, should be received as information given and taught by God as part of the total presentation, interpretation, and celebration of redemption that Scripture essentially is.”). The literalist account affirms that the Bible includes a variety of literary genres, and interpretation of any passage should account for its genre. Thus, statements not intended to

ics of literalism—including some within conservative Protestantism—question whether its emphasis on discrete propositions comes at the cost of broader themes within scripture.<sup>44</sup> But literalists claim that the emphasis is appropriate to the character of the text as divine instruction and that it is necessary to guard against the subjectivism that inevitably intrudes when interpreters are not bound to specific data points within the text.<sup>45</sup>

### 3. Biblical Interpretation

The literalist approach to biblical interpretation follows from these claims about the authority and inerrancy of scripture. At its core, this understanding reflects two key ideas: equality and obedience. Although the Bible is written in a manner that is fully accessible to the reason of all humans, faithful interpretation is nonetheless an act of submission in which human reason must accept its own limitations in the presence of the divine word.<sup>46</sup>

On the one hand, literalists emphasize the Bible's rational accessibility—that is, that the propositional truth statements of scripture can be understood by all people.<sup>47</sup> No special academic training is required to grasp the basic meaning of God's promises and commands.<sup>48</sup> Although a few scriptural passages are difficult even for scholars to interpret, such passages are rare and do not call into question the far greater number of texts that are clear.<sup>49</sup> This claim of accessibility is closely related to literalism's understanding of the role and authority of the church. Believers do not need intermediaries to

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be read as factual—e.g., those clearly intended as hyperbole—should not be interpreted as fact. But, literalists argue, recognition of the diverse genres does not license interpreters to deny the historicity of biblical texts that claim such status. See *Biblical Hermeneutics*, *supra* note 10, arts. XIII–XVI.

44 See MARK A. NOLL, *THE SCANDAL OF THE EVANGELICAL MIND* 133, 243–44 (1994).

45 See PACKER, *supra* note 10, at 43–45; Geisler, *supra* note 17, at 327–31 (discussing the implications of Kierkegaard's denial of propositional revelation); Packer, *supra* note 15, at 201–06; *Biblical Inerrancy*, *supra* note 10, exposition at 7–8.

46 See PACKER, *supra* note 10, at 41; *Biblical Hermeneutics*, *supra* note 10, arts. IV–V (the scriptures are clear but discernment requires the work of the Holy Spirit).

47 See Hughes, *supra* note 14, at 175–77; Kaiser, *supra* note 14, at 128–30.

48 See *Biblical Hermeneutics*, *supra* note 10, art. XXIV (“We affirm that a person is not dependent for understanding of Scripture on the expertise of biblical scholars.”); see also Hughes, *supra* note 14, at 176 (“To allow [the Bible] to become the book of the expert, on whose pronouncements the average person is dependent, is an abuse and inversion that can lead only to disastrous results.”).

49 See *Biblical Hermeneutics*, *supra* note 10, exposition at 5.

understand scripture, although preaching and instruction aid the believer's spiritual development.<sup>50</sup>

Moreover, literalists assert that the cultural context in which a particular book of the Bible was written does not diminish the book's significance for those who live in other times and places.<sup>51</sup> The application of a particular biblical absolute may be culturally conditioned, especially with respect to directions for human conduct, but the absolute itself transcends that context and remains binding across cultural distances.<sup>52</sup> Human reason, guided by the work of the Holy Spirit, is called to discern the absolute truths revealed within the cultural context of specific scriptural texts.

On the other hand, literalists contend that faithful interpretation of the Bible requires interpreters to presuppose the Bible's supernatural character, including the divine attributes of inerrancy and infallibility.<sup>53</sup> Those who come to the Bible without this presupposition will fall into the skepticism that characterizes higher biblical criticism and measure the Bible's statements against contemporary human notions of history, science, or morality.<sup>54</sup> Literalists defend this requirement on philosophical and theological grounds. In philosophical terms, literalists claim that readers inevitably approach texts with certain presuppositions; indeed, skeptics are strongly predisposed to disbelieve anything that does not fit within the boundaries of naturalistic explanation.<sup>55</sup> In other words, a naturalistic reader comes to the Bible already determined to reject the central truth statements of the text. A reading that presupposes the supernatural character of the Bible, however, is open to the full range of meaning offered by the text.<sup>56</sup>

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50 See Hughes, *supra* note 14, at 187–88; Biblical Hermeneutics, *supra* note 10, art. XXIV.

51 See Hughes, *supra* note 14, at 174–75; Packer, *supra* note 25, at 330.

52 See Packer, *supra* note 15, at 201; Biblical Hermeneutics, *supra* note 10, arts. VIII, XI.

53 See Packer, *supra* note 25, at 348–49; Biblical Hermeneutics, *supra* note 10, art. XIX.

54 See Geisler, *supra* note 17, at 333–34; Payne, *supra* note 14, at 108–11.

55 See Kaiser, *supra* note 14, at 138–39; Payne, *supra* note 14, at 87–88; Biblical Hermeneutics, *supra* note 10, art. XIX (“We affirm that any preunderstandings which the interpreter brings to Scripture should be in harmony with scriptural teaching and subject to correction by it.”).

56 See PACKER, *supra* note 10, at 19; Payne, *supra* note 14, at 88–93.

In theological terms, the willingness to accept supernatural claims reflects the believer's faithful submission to God.<sup>57</sup> For literalists, a reader of scripture faces a basic choice: evaluate the text against contemporary standards and reject whatever does not measure up to our cultural expectations or trust that God's word is reliable—as the Bible says—and subordinate the reader's own judgments to the truth revealed in the text.<sup>58</sup> In this respect, literalism calls on believers to conform themselves to the image of Jesus, whom literalists believe to have trusted in and submitted to the word of God.<sup>59</sup>

#### 4. An Example of Literalist Interpretation: Biblical Texts on Homosexuality

Because we anticipate that readers are more likely to be familiar with originalism as an approach to constitutional interpretation than with the literalist method of biblical interpretation, we offer as an example the disputed readings of Bible passages that seem to refer to homosexual intimacy. Several passages in the Jewish and Christian scriptures apparently declare homosexual acts to be sinful.<sup>60</sup> Most literalists claim that the passages in question unequivocally condemn homosexual activity.<sup>61</sup> They argue that the plain meaning of biblical

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57 See Hughes, *supra* note 14, at 193; Packer, *supra* note 25, at 351; Packer, *supra* note 15, at 216–19; Payne, *supra* note 14, at 95–96; Biblical Inerrancy, *supra* note 10, exposition at 6.

58 See Feinberg, *supra* note 11, at 295; Biblical Inerrancy, *supra* note 10, exposition at 7–8.

59 See Payne, *supra* note 14, at 111 (“[A] scholar [must become] willing to accept the lordship of Jesus Christ over his life . . .”).

60 See, e.g., *Leviticus* 18:22 (New Revised Standard Version) (“You shall not lie with a male as with a woman; it is an abomination.”); *Leviticus* 20:13 (“If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them.”); *Romans* 1:26–27 (“For this reason God gave them up to degrading passions. Their women exchanged natural intercourse for unnatural, and in the same way also the men, giving up natural intercourse with women, were consumed with passion for one another. Men committed shameless acts with men and received in their own persons the due penalty for their error.”).

61 See, e.g., James B. De Young, *The Contributions of the Septuagint to Biblical Sanctions Against Homosexuality*, 34 J. EVANGELICAL THEOLOGICAL SOC'Y 157, 157–77 (1991) (providing detailed literalist interpretation of the Bible's explicit prohibitions on homosexual relations); J.I. Packer, *Why I Walked: Sometimes Loving a Denomination Requires You to Fight*, CHRISTIANITY TODAY, Jan. 2003, at 46, 46–48 (describing the author's decision to leave his denomination because of his belief that the denomination's recognition of homosexual relations violated scriptural teaching). Literalist interpreters are not the only ones who reach this conclusion; some nonliteralist interpreters of the Bible also contend that the Bible deems homosexual conduct to be sinful. See, e.g., Ron Cassidy, *The Clear Teaching of the Bible on Homosexual Practice: A*

injunctions against same-sex intimacy expresses God's universal moral law, which is binding across time and cultures.<sup>62</sup>

Some nonliteralist interpreters have attempted to construe such passages in ways that do not condemn (at least some) contemporary same-sex intimate relationships.<sup>63</sup> Some interpreters contend that the passages refer to cultic sexual acts, homosexual prostitution, or sexual violence, rather than intimacy between same-sex partners in a committed relationship.<sup>64</sup> Others concede that the biblical texts condemn homosexual acts, but they argue that such condemnations should be reconsidered in light of modern understandings of human sexuality, just as many believers have reinterpreted biblical texts that call for the subordination of women.<sup>65</sup> Literalists argue, however, that attempts to reinterpret those texts reflect a desire to conform the Bible to con-

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*Response to Ian K. Duffield*, 115 EXPOSITORY TIMES 298, 298–99 (2004), available at <http://ext.sagepub.com/content/115/9/298.citation>.

62 See Kaiser, *supra* note 14, at 142–43; Biblical Application, *supra* note 4, art. VIII; Biblical Hermeneutics, *supra* note 10, exposition at 8.

63 The classic works in this genre are JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980), and ROBIN SCROGGS, THE NEW TESTAMENT AND HOMOSEXUALITY (1983). See also Ellen F. Davis, *Reasoning with Scripture*, 90 ANGLICAN THEOLOGICAL REV. 513, 514 (2008) (arguing that “the Bible does not unambiguously endorse any position [on committed homosexual relationships]”); Ian K. Duffield, *The Clear Teaching of the Bible? A Contribution to the Debate About Homosexuality and the Church of England*, 115 EXPOSITORY TIMES 109, 111 (2004), available at <http://ext.sagepub.com/content/115/4/109.citation> (arguing that Bible passages associated with homosexuality are ambiguous and are not necessarily “hostile to the inclusion of gays and lesbians in the church and its ministry”); Mark D. Smith, *Ancient Bisexuality and the Interpretation of Romans 1:26–27*, 64 J. AM. ACAD. RELIGION 223, 232–38 (1996) (exploring the ambiguous character of Romans 1:26–27, which has been traditionally interpreted as hostile to homosexuality). This grouping masks the significant differences among those who offer such interpretations of the relevant texts—while some may share the literalists’ methodology but simply disagree about the literal meaning of the texts, others reject the literalist approach and ground their interpretation in extrabiblical sources. Thanks to our colleague Jeff Powell for noting this important distinction.

64 See Duffield, *supra* note 63, at 111–13; Richard A. Norris, Jr., *Some Notes on the Current Debate Regarding Homosexuality and the Place of Homosexuals in the Church*, 90 ANGLICAN THEOLOGICAL REV. 437, 440–45, 450–51 (2008); Leslie Cushing Stahlberg, *Modern Day Moabites: The Bible and the Debate About Same-Sex Marriage*, 16 BIBLICAL INTERPRETATION 442, 455–62 (2008) (discussing liberal, nonliteralist strategies for interpreting texts on same-sex intimacy).

65 See Norris, *supra* note 64, at 447–48 (describing the need to read biblical injunctions in historical and cultural context); Stahlberg, *supra* note 64, at 448–50.



temporary cultural expectations and to avoid obedience to a clear command of God.<sup>66</sup>

### B. Modern American Constitutional Originalism

The label “originalism” embraces a wide range of interpretive theories,<sup>67</sup> but we use the term here to refer to the family of modern approaches that regard “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”<sup>68</sup> Although originalism in one form or another has deep historical roots, we have in mind the approach advanced by the modern American originalist movement, which arose in the 1970s and 1980s as a response by conservatives to the sweeping decisions of the Warren Court.

Disagreements among originalists are common,<sup>69</sup> but it is possible to identify several core commitments that originalists of all stripes

66 See Edith M. Humphrey, *What God Hath Not Joined: Why Marriage Was Designed for Male and Female*, CHRISTIANITY TODAY, Sept. 2004, at 36, 36; Packer, *supra* note 61, at 48–49.

67 See generally Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009) (demonstrating that “originalism” includes a broad range of unique theories of constitutional interpretation).

68 Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

69 To take just two recent important examples, originalists have clashed over the appropriate role of precedent. Compare Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 262–69 (2005) (arguing that the Court is not bound by precedent in certain situations), Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 27–28 (1994) (arguing that it is unconstitutional for the Supreme Court to follow a precedent that deviates from the constitutional text’s original meaning), and Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289–98 (2005) (“[S]tare decisis, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism.”), with ROBERT H. BORK, *THE TEMPTING OF AMERICA* 155–59 (1990) (stating that some decisions that are inconsistent with the original meaning “nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now”), Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1471–79 (2007) (explaining “how a principled popular sovereignty-based originalist can still apply stare decisis in at least some situations without unduly sacrificing normative constitutional legitimacy”), and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (describing himself as a “faint-hearted originalist” because he would sometimes allow judicial precedent or societal custom to trump the original meaning of the Constitution). Originalists have also clashed over the appropriate level of generality at which to seek the original meaning of the Constitution’s

tend to share. First, originalists generally agree that the Constitution's text has a fixed meaning, a conclusion that flows from the fact that the Constitution is written and enjoys the status of law. Second, originalists maintain that the Constitution's meaning is readily ascertainable. Third, originalists contend that courts that interpret the Constitution to mean something different from that fixed and ascertainable meaning are behaving contrary to law. We consider these assertions in turn.

### 1. Fixed Meaning and the Centrality of the Text

Almost all modern originalists “agree, explicitly or implicitly, that the meaning (or ‘semantic content’) of a given Constitutional provision was fixed at the time the provision was framed and ratified.”<sup>70</sup> For most originalists, this view derives from two of the Constitution's essential attributes: its “writtenness”<sup>71</sup> and its status as law.<sup>72</sup> On this view, writtenness entails originalism because words are committed to writing in order to convey an “identifiable meaning”<sup>73</sup> and to fix principles “against the transient shifts in the public mood or social condition.”<sup>74</sup> The Constitution's status as law means that its particular text is binding until changed through the procedures prescribed in Article

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major rights-granting provisions. Compare RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 253–69 (2004) (arguing that the Ninth Amendment and the Privileges or Immunities Clause mandate a “presumption of liberty”), with Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1083–97 (2005) (reviewing BARNETT, *supra*) (criticizing on originalist grounds Barnett's presumption of liberty).

70 Lawrence B. Solum, *A Reader's Guide to Semantic Originalism and a Reply to Professor Griffin* 3 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 08-12, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1130665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130665).

71 See BARNETT, *supra* note 69, at 100–09; Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2049 (2006) (“The central feature of the [Constitution]—the first thing one notices about it, if not a dolt or a mystic—is its written-ness.”).

72 See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824 (1986) (“Any intelligible view of constitutional adjudication starts from the proposition that the Constitution is law.”).

73 OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 4 (1987) [hereinafter SOURCEBOOK].

74 KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 53 (1999); see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 313–14 (2d ed. 1997) (“In substituting a written Constitution and expressly providing for change by amendment, [the Framers] evidenced that they had created a ‘fixed’ Constitution, subject to change by that process alone.”).

V.<sup>75</sup> Accordingly, Nelson Lund has described the “foundation of originalist theory” as follows: “The Constitution is a written document that was publicly adopted as law, and it therefore means what its words meant to the relevant public audience at the time of its adoption.”<sup>76</sup>

To modern originalists, a corollary of the importance of the Constitution’s writtenness is that the constitutional text must be central to constitutional interpretation.<sup>77</sup> To be sure, some versions of originalism are more self-consciously textualist than others. Although many of the most prominent recent proponents of originalism describe their approach as “originalist textualism” or “original, objective-public-meaning textualism,” others—particularly those who advanced their views in the 1970s and 1980s—focused on the Framers’ original intent or the Framers’ subjective understanding of the text.<sup>78</sup> In addition, originalists hold a range of ideas about why exactly the text is

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75 See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 551 (1994) (“The central premise of originalism . . . is that the text of the Constitution is *law* that binds each and every one of us until and unless it is changed through the procedures set out in Article V.”); see also WHITTINGTON, *supra* note 74, at 55 (“[O]nly a fixed text can be adequately ratified, that is, legislated into fundamental law.”); Scalia, *supra* note 69, at 854 (arguing that the Constitution is “the sort of ‘law’ that is the business of the courts”).

76 Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1346 (2009).

77 See SOURCEBOOK, *supra* note 73, at 21 (“The text of the Constitution is our fundamental law and should remain our primary focus throughout the interpretive enterprise.”); Calabresi & Prakash, *supra* note 75, at 552 (stating that originalists give “priority to the plain dictionary meaning of the Constitution’s text” because they “believe that it and it alone is law”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) (“Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.”); Paulsen, *supra* note 69, at 289 (describing an originalist as one who “believes that the Constitution should be understood and applied in accordance with the objective meaning the words and phrases would have had to an informed general public at the time of their adoption”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . .”).

78 Compare Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132–33 (2003) (defining “original public meaning textualism”), and Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25 (2001) (focusing on original objective meaning), with BERGER, *supra* note 74, at 364 (defending original-intent originalism). See generally Colby & Smith, *supra* note 67, at 247–55 (describing the differences among original-intent originalism, original-understanding originalism, original-expected-application originalism, and original-objective-public-meaning textualism).

important. To some, it is important because of the demands of fidelity to the notion of popular sovereignty.<sup>79</sup> To others it is important because the Constitution is a form of law.<sup>80</sup> To still others, the text is important because the Constitution itself either implicitly or explicitly so specifies.<sup>81</sup> For yet others, it is important simply because of the nature of “interpretation.”<sup>82</sup> Notwithstanding this range of justifications and the disagreement among originalists over the proper interpretive object,<sup>83</sup> virtually all originalists stress the importance of text because the text encodes an authoritative set of instructions that embodies the sovereign will,<sup>84</sup> however defined.<sup>85</sup>

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79 See Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360–61 (1988); see also WHITTINGTON, *supra* note 74, at 59 (“The text is not simply a list of words but is the embodied will of the people.”); *id.* at 111–52, 154 (“The fundamental basis for the authority of originalism is its capacity to retain a space for the popular sovereign.”). See generally Lash, *supra* note 69, at 1440 (“The most common and most influential justification for originalism [is] popular sovereignty and the judicially enforced will of the people.”).

80 See BORK, *supra* note 69, at 144–45; WHITTINGTON, *supra* note 74, at 55 (“[O]nly a fixed text can be adequately ratified, that is, legislated into fundamental law.”).

81 See Kesavan & Paulsen, *supra* note 78, at 1127–28 (“[I]f one does decide to be bound by [the Constitution] . . . , one necessarily has decided to be bound by the text as law, because that is what the document itself appears to specify.”); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 N.W. U. L. REV. 857, 864–72 (2009) (arguing that Article VI’s reference to “This Constitution” demonstrates that “original-meaning textualism” is the constitutionally prescribed interpretive methodology).

82 See WHITTINGTON, *supra* note 74, at 4 (arguing that if we “take interpretation seriously . . . we [must] adopt an originalist approach to interpretation”); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 631–32 (1993) [hereinafter Graglia, *Constitutional Interpretation*] (“[I]t is difficult to see what ‘interpretation’ can usefully mean if it does not mean the attempt to determine the authorial intent.”); Lino A. Graglia, *“Interpreting” the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1024 (1992) [hereinafter Graglia, *Posner on Bork*] (“An entirely sufficient reason for originalism, is that interpreting a document *means* to attempt to discern the intent of the author; there is no other ‘interpretive methodology’ properly so called.”).

83 See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9–15 (2008) (defining originalism’s “object” as the “target of interpretation,” such as the Framers’ original intentions, the ratifiers’ understandings, or the original public meaning). Originalists have long debated whether the relevant object of the interpretive inquiry is the original intent, the original understanding, the original objective meaning, or something else, and even those who agree on the object sometimes disagree on the nature of the inquiry. The range of views on this question is dizzying. See generally Colby & Smith, *supra* note 67, at 247–55 (providing a typology of originalist views).

84 See Graglia, *Posner on Bork*, *supra* note 82, at 1023 (“Because the Constitution derived its legal authority only when it was ratified at state conventions, judges should take it to mean what it was understood to mean by the ratifiers or, more generally, the people they represented.”); McConnell, *supra* note 77, at 1132 (arguing that if “[a]ll

## 2. Readily Ascertainable Meaning

The originalist focus on the text depends upon the anterior premise that the meaning of the text is readily ascertainable. Justice Scalia, for example, has stated, “Often—indeed, I dare say usually—[the original meaning of the text] is easy to discern and simple to apply.”<sup>86</sup> To be sure, many originalists temper this claim by acknowledging, as has Justice Scalia, that “[s]ometimes (though not very often) there will be disagreement regarding the original meaning;

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power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it,” then “[i]t follows that the Constitution should be interpreted in accordance with their understanding”).

85 Even original-intent originalists such as Raoul Berger and Edwin Meese—whose approach generally sounded less “textualist” than the approach of more recent, original-public-meaning originalists—regularly focused their inquiry on the constitutional text. See, e.g., BERGER, *supra* note 74, app. B (describing “original intent” as “shorthand for the meaning attached by the Framers to the words they employed in the Constitution and its Amendments”); Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350–51 (1988) (“I understand, by original intention, the explanation that draftsmen gave of what their *words* were designed to accomplish, what their *words* mean.” (emphasis added)); Edwin Meese, Address Before the DC Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in SOURCEBOOK, *supra* note 73, app. B, at 8 (“Where the language of the Constitution is specific, it must be obeyed . . . . Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.”). The same is true for originalists who have urged fidelity to the Framers’ subjective original understanding. See, e.g., Calabresi, *supra* note 69, at 1081 (arguing that a judge should determine “what the original *language* actually meant to those who used the terms in question” (emphasis added)). And members of the vanguard of the current originalist movement, who have taken pains to distinguish their approach from original-intent originalists and original-understanding originalists, see Kesavan & Paulsen, *supra* note 78, at 1132 (“[W]hen we use the term ‘originalism,’ it is not in reference to a theory of ‘original intent’ or ‘original understanding.’”), have described their approach as a form of textualism, to which the constitutional text is, of course, central, see *id.* at 1131 (“[T]he proper approach must be one of ‘originalist’ textualism—faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

86 Scalia, *supra* note 77, at 45; see also SOURCEBOOK, *supra* note 73, at 32 (“In the overwhelming majority of cases, the indices of meaning—the words and structure and context of the Constitution—are sufficient to determine the original meaning.”); Kesavan & Paulsen, *supra* note 78, at 1129 n.54 (stating their belief that “there are always right answers to constitutional questions, and that textualism, specifically originalist textualism, always provides those answers”); Paulsen, *supra* note 71, at 2056 (stating that the rules of originalism “do not answer all questions, but they answer a lot of them”).

and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena.”<sup>87</sup> But most originalists consider these instances likely to be “exceedingly rare”;<sup>88</sup> as Justice Scalia has explained, “[the] originalist, if he does not have all the answers, has many of them.”<sup>89</sup>

### 3. The Duty of Fidelity to the Original Meaning of the Text

If the Constitution has a fixed and readily ascertainable meaning with the status of law, then it follows, originalists contend, that judges

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87 Scalia, *supra* note 77, at 45; see also Scalia, *supra* note 69, at 856 (explaining that originalism’s “greatest defect” is “the difficulty of applying it correctly,” because it is “often exceedingly difficult to plumb the original understanding of an ancient text”).

88 SOURCEBOOK, *supra* note 73, at 32 (conceding that “[on] exceedingly rare occasions, a certain aspect of original meaning might be impossible to determine, or two conflicting interpretations of original meaning might appear to be equally plausible”).

89 Scalia, *supra* note 77, at 46; see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 258 (1988) (“The good faith application of original intentions will resolve many cases in ways which are relatively free from doubt.”). Some originalists argue that when the constitutional text does not resolve a legal question, there is simply no judicial warrant for invoking the Constitution to invalidate government action; on this account, constitutional ambiguity is tantamount to constitutional silence. See, e.g., Graglia, *Constitutional Interpretation*, *supra* note 82, at 633 (“The absence of a clear constitutional basis for invalidation of a political choice should mean that the choice is not invalid . . . .”); McConnell, *supra* note 79, at 361 (“If the judge . . . concludes that he cannot *tell* whether a challenged governmental action is forbidden by the Constitution, then he is free to leave the determination of the legal rule to the elected authorities.”); Paulsen, *supra* note 71, at 2057 (“[I]f the meaning of the Constitution’s language fails to provide such a rule or standard . . . then a court has no basis for displacing the rule supplied by some other relevant source of law applicable to the case . . . .”). Some other proponents of originalism draw a distinction between “interpretation,” which involves the act of determining the original meaning of the constitutional text, and “construction,” which entails the formulation of administrable rules when the Constitution is ambiguous as applied to particular questions. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 1–19 (1999); Lawrence B. Solum, *Semantic Originalism* 2, 67–87 (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244). Theorists who have developed this distinction have tended to be more willing to acknowledge that the constitutional text is often vague or ambiguous. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108 (2001) (“While not indeterminate, the original meaning can be ‘underdeterminate.’”). These theorists appear (at least for the moment), however, to be in the minority of originalist thought. But even these theorists emphasize that when interpretation is “supplemented by constitutional construction,” the construction must be performed “within the bounds established by original meaning.” *Id.* at 108 (emphasis omitted).

have an obligation of fidelity to the original meaning of the text.<sup>90</sup> This duty of fidelity requires the interpreter to “be bound by the meaning of the words and phrases written down in the text,”<sup>91</sup> regardless of the interpreter’s personal views.<sup>92</sup>

If judges have a duty of fidelity to the original meaning of the text, originalists assert, then judges who seek to give the Constitution an avowedly different meaning are acting contrary to law. On this view, the concept of law “assumes that the rule has a [fixed] meaning independent of our own desires”;<sup>93</sup> because nonoriginalism inevitably requires the judge, freed from the Constitution’s fixed original meaning, to rely on his own values in determining constitutional meaning, it is inconsistent with the judge’s duty.<sup>94</sup> Relatedly, originalists generally agree that nonoriginalist approaches to interpretation fail the test of democratic legitimacy, a point originalists have made either

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90 See Whittington, *supra* note 68, at 609 (“The primary virtue claimed by the new originalism is one of constitutional fidelity . . .”).

91 Kesavan & Paulsen, *supra* note 78, at 1129; see also Graglia, *Posner on Bork*, *supra* note 82, at 1023 (“Because the Constitution derived its legal authority only when it was ratified at state conventions, judges should take it to mean what it was understood to mean by the ratifiers or, more generally, the people they represented.”); Scalia, *supra* note 77, at 22 (“The text is the law, and it is the text that must be observed.”).

92 See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 6 (1971) (“[A] legitimate Court must be controlled by principles exterior to the will of the Justices.”).

93 BORK, *supra* note 69, at 143; see also Lund, *supra* note 76, at 1370 (arguing that “living constitutionalism . . . does not treat the Constitution as binding law”).

94 See Bork, *supra* note 92, at 10–11; see also Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 *HARV. J.L. & PUB. POL’Y* 283, 287 (1996) (arguing that nonoriginalist approaches to constitutional interpretation are characterized by “the absence of respect for (or even acknowledgement of) law as a constraint”); Kesavan & Paulsen, *supra* note 78, at 1130 (“It is simply not consistent with the idea of the Constitution as binding law to adopt a hermeneutic of textualism that permits individuals to assign their own private, potentially idiosyncratic meanings to the words and phrases of the Constitution.”); McConnell, *supra* note 77, at 1129 (arguing that if courts employ nonoriginalism, then the Constitution is not law in any meaningful sense, but instead is simply “a makeweight”).

expressly<sup>95</sup> or couched in terms of the perils of “judicial activism”<sup>96</sup> or “judicial revisionism.”<sup>97</sup>

## II. COMPARING LITERALISM AND ORIGINALISM

It should be clear from these brief overviews of biblical literalism and constitutional originalism that there are some important similarities and differences between the two approaches. Given the importance of both the Bible and the Constitution, it is unsurprising to learn that there is no shortage of academic work comparing them and the ways in which they are interpreted. But most of that work is (for our purposes) incomplete.

Several commentators, for example, have noted that the Bible and the Constitution play similar roles for their respective communities.<sup>98</sup> Many have compared the Constitution to a sacred text<sup>99</sup> or

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95 See, e.g., Bork, *supra* note 92, at 6 (“[N]o argument that is both coherent and respectable can be made supporting [nonoriginalism] because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”); McConnell, *supra* note 79, at 360 (arguing that any approach other than originalism leads to the conclusion that the Constitution embodies “principles that the people did not choose,” and that “such a holding has no democratic legitimacy”).

96 See, e.g., Calabresi, *supra* note 69, at 1083; Graglia, *Posner on Bork*, *supra* note 82, at 1028, 1030.

97 See, e.g., Raoul Berger, *New Theories of “Interpretation”: The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 2 (1986).

98 See, e.g., CRAPANZANO, *supra* note 9, at 6 (noting that the Bible and the Constitution are “documents of ultimate authority” for their respective communities); PELIKAN, *supra* note 5, at 4–9 (noting that the Bible and the Constitution serve as foundational texts that provide constitutive and normative frameworks for particular communities); Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 54 (1985) (describing the Bible and the Constitution as “focal texts” for their respective interpretive communities); Gregory A. Kalscheur, *Christian Scripture and American Scripture: An Instructive Analogy?*, 21 J.L. & RELIGION 101, 101 (2006) (reviewing PELIKAN, *supra* note 5) (“The Bible plays a central normative role in the life of the Church, while the Constitution provides a normative framework for American law and politics.”).

99 See, e.g., HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 66 (1969) (referring to the Constitution as his “legal bible”); PELIKAN, *supra* note 5, at 22 (describing the Constitution as “the normative ‘American Scripture’”); Frank S. Alexander, *Introduction: Constituting a People*, 39 EMORY L.J. 1, 1 & n.2 (1990) (referring to the Constitution as a “religious document” insofar as it is a “text constituting a source of authority over time which legitimates power in the context of the individual and the community”); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 521 (2007) (describing American constitutionalism as a “creedal tradition organized around a central (or sacred) document”); Edward S. Corwin, *The Worship of the Constitution*, 4 CONST. REV. 3, 4–5 (1920) (noting our cul-



described it as the foundation of our “civil religion.”<sup>100</sup> It is also not difficult to find general comparisons between biblical and constitutional interpretation—by literary theorists,<sup>101</sup> biblical scholars,<sup>102</sup> and

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tural tendency to “worship” the Constitution); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 3 (1984) (noting that the Constitution “has been, virtually from the moment of its ratification, a sacred symbol”). Commentators have compared the founding to a “divine act,” Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 467 (1984), and noted that if the Constitution is tantamount to a sacred text, then the judges who interpret it exercise something like priestly authority, *see id.* (noting the “parallels between . . . the exegetical role of judges and of priests and prophets”); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 755 (1982) (“The judge also speaks with the authority of the Pope.”); W. Tarver Rountree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L.J. 203, 204 (1990) (noting that the Constitution is “protected and interpreted by a priesthood which sits in a temple”).

100 *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH 11 (1988) (noting that “[v]eneration’ of the Constitution has become a central . . . aspect of the American political tradition”); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294–95 (1937) (contending that the United States, which in “its early tradition had prohibited a state church,” ended up “getting a state church after all, although in a secular form”); Levinson, *supra* note 1, at 136 (“Constitutionalism, like religion, represents an attempt to render an otherwise chaotic order coherent, to supply a set of beliefs capable of channeling our conduct.”); Rountree, *supra* note 99, at 203–07 (drawing on anthropological and sociological concepts of religion in concluding that “the Constitution and the traditions which surround it are our national secular religion”); *cf.* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 19–25 (1983) (discussing the Bible as “an illustration of the ways in which precepts and narratives operate together to ground meaning,” including constitutional meaning). Although the term “civil religion” seems originally to have been used to describe a public morality with a distinctly religious flavor, *see* Robert Neelly Bellah, *Civil Religion in America*, 96 J. AM. ACAD. ARTS & SCI. 1, 1–21 (1967), most commentators from the legal academy have used the term to capture something much more secular, *see, e.g.*, Milner S. Ball, *Onward Constitutional Soldiers*, 87 MICH. L. REV. 1438, 1449 (1989) (reviewing LEVINSON, *supra*) (arguing that the metaphor should be viewed with the “recognition that American civil religion is unbelief”).

101 E.D. Hirsch argued that the Constitution and the Bible are “numinous” documents for which “the principles and methods of correct interpretation are as important as they are problematical.” E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION 20 (1976). He drew on the history of biblical and constitutional interpretation to identify “two philosophical camps”: “intuitionism,” in which “[t]he words of the text alone do not ‘contain’ the meaning to be communicated” but rather “institute a spiritual process which, beginning with the words, ultimately transcends the linguistic medium” and “positivism,” in which the “mystical distinction between the letter and the spirit is repudiated” and the text “means exactly what its words ‘say.’” *Id.* at 20–22.

102 In Jaroslav Pelikan’s comparison of biblical and constitutional interpretation, he gave attention to the common problems of the selection of interpretive methodology, *see* PELIKAN, *supra* note 5, at 65, textual ambiguity, *see id.* at 61, and the locus of interpretive authority, *see id.* at 70–71. Sandra Schneiders, a New Testament scholar,

legal scholars<sup>103</sup>—but these treatments have tended either to paint with a very broad brush<sup>104</sup> or to ignore the salient features of biblical literalism, constitutional originalism, or both.<sup>105</sup> And, as noted above,

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also briefly considered the analogy and contended that in both interpretive traditions, “the fundamental law must be constantly reinterpreted if it is not to become a musty relic either totally irrelevant to ongoing life or rigidly obstructive of the very societal experience it was formulated to promote.” SANDRA SCHNEIDERS, *THE REVELATORY TEXT* 66 (1991); see also Keith Bartholomew, *Biblical and Constitutional Interpretation and the Role of Originalism in Sixteenth- and Twentieth-Century Societies*, 82 *ANGLICAN THEOLOGICAL REV.* 537, 537–45 (2000) (comparing originalist interpretation of the U.S. Constitution with Protestant literalist biblical interpretation).

103 See LEVINSON, *supra* note 100, at 18–37; Levinson, *supra* note 1, at 125–36 (noting that the principal competing approaches to constitutional interpretation—both with respect to the role of the text and the role of the Supreme Court as authoritative interpreter—parallel the Protestant and Catholic approaches to the role of biblical text and the appropriate locus of authority for construing the text); see also MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 136–37 (1988) (focusing on the role of the text in religious and constitutional interpretation and on the “life” of the relevant “tradition and community”); Grey, *supra* note 99, at 3–9 (noting the “force of the analogy between Bible and Constitution” and arguing that the “Reformation and Counterreformation positions exemplify a general structural pattern: Long-lived authoritative writings generate opposing one-source and two-source . . . theories”); Paul W. Kahn, *The Question of Sovereignty*, 40 *STAN. J. INT’L L.* 259, 272 (2004) (“Debates over constitutional hermeneutics resemble debates over biblical hermeneutics, for both raise the question of how to be true to a revelatory text that provides the sacred ground of temporal unity for the community.”).

104 Both Sanford Levinson—in his discussion of the “protestant” strand in interpretation—and E.D. Hirsch—in his account of “positivism”—touched on one of the central features of both biblical literalism and constitutional originalism. See HIRSCH, *supra* note 101, at 20–22; LEVINSON, *supra* note 100, at 18–37. But their discussions did not seek fully to capture the nuances of either approach to the text.

105 Hirsch, for example, tended to associate intuitionism with biblical interpretation and positivism with legal interpretation, even though both approaches have played important roles in both traditions. See HIRSCH, *supra* note 101, at 20, 22. Schneiders’s account did not have in mind Protestant biblical literalism or constitutional originalism. See SCHNEIDERS, *supra* note 102, at 81–82 (“The notion that scripture is self-interpreting or that it delivers its ‘plain meaning’ to any well-intentioned reader is not only naive but at least materially irreverant.”); *id.* at 82 (arguing that the Constitution “can function as a norm only if it is constantly interpreted, and it can be interpreted only from within and in terms of the ongoing tradition of the nation”). Pelikan’s principal focus was on “the means and methods by which official interpreters read their normative texts,” PELIKAN, *supra* note 5, at 36, and specifically on the ways in which doctrine develops, which led him to focus mainly on the Catholic tradition for the Bible and on the common law (and largely nonoriginalist) tradition for the Constitution, see *id.* at 2. Although he devoted a chapter to the “*sensus literalis* and the quest for original intent,” *id.* at 76–114, he made clear that his consideration would not dwell on strict biblical literalism or modern constitutional originalism. He stressed that “for both texts . . . there must be a ‘spirit’ that is present within—and yet that somehow lies beyond—the ‘letter,’” *id.* at 76, and he dedicated much of the

some commentators have suggested similarities specifically between biblical literalism and constitutional originalism, but most have done so either in passing<sup>106</sup> or based on caricatures of both approaches to serve some broader polemical purpose.<sup>107</sup> But even those who have more carefully considered the similarities between the two approaches

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chapter to demonstrating why pure originalism is either impossible or undesirable as an approach to either text. *See id.* at 76–114. Perry similarly stressed a particular approach to sacred texts—one that focuses on the community’s “living tradition” and that treats the text as the “principal symbol” of “the fundamental aspirations of the tradition”—that is quite different from either biblical fundamentalism or constitutional originalism. PERRY, *supra* note 103, at 137–45. Thomas Grey noted some important differences between constitutional and biblical interpretation, but he did not appear to have literalist biblical interpretation in mind. *See* Grey, *supra* note 99, at 16–17 (“There is no ultimate mystery in what the Constitution is about . . . . [T]his secularist premise . . . makes constitutional interpretation, for all its complexities, something fundamentally different from the interpretation of a scripture that is conceived as the effort to express indirectly what in principle cannot be said directly.”). Some commentators have compared constitutional interpretation to biblical interpretations in other religious traditions. *See generally, e.g.*, Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997) (comparing originalism to traditions in Jewish law); Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121 (2000) (same).

106 *See, e.g.*, Grey, *supra* note 99, at 5 (“The scriptural analogue to constitutional textualism is the Protestant doctrine that the Bible is the sole vehicle of divine revelation (*sola scriptura*).”); H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1986) (“Just as in a scriptural religion, the most elaborate and established theological system can be challenged by the call *ad fontes* (‘back to the sources’); so in American constitutional law it is always possible to go back to the text, to challenge what currently is in the name of what once was written.”); *cf.* Anthony D’Amato, *The Contribution of the Infield Fly Rule to Western Civilization (and Vice Versa)*, 100 NW. U. L. REV. 189, 190 (2006) (satirically noting that the originalists “insist that every word in the Bible must be taken as gospel”); William B. Ewald, *The Protestant Revolutions and Western Law*, 22 CONST. COMMENT. 181, 189 (2005) (reviewing HAROLD J. BERMAN, *LAW AND REVOLUTION II* (2003)) (describing the original Lutherans as “radical originalists”).

107 *See, e.g.*, SUNSTEIN, *supra* note 1, at xiii–xiv (describing originalists as “fundamentalists” because their approach “bears an obvious resemblance to religious fundamentalism” insofar as it “represents an effort to restore the literal meaning of a sacred text”). Sunstein explained that he used the term “fundamentalism” instead of “originalism” because “the former term seems to me at once more accessible and illuminating for a general audience; originalists want to go back to what they see as fundamentals, and in any case, there is a clear link between the originalist method and certain claims about how to interpret religious texts.” Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2235 n.3 (2006). But his treatment of fundamentalism in either form was entirely critical.

have tended to do so relatively briefly,<sup>108</sup> as tangential to some broader analytical objective,<sup>109</sup> or from a very different methodological perspective.<sup>110</sup>

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108 See Frank S. Ravitch, *Interpreting Scripture/Interpreting Law*, 2009 MICH. ST. L. REV. 377, 383–85.

109 See Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1691 n.30 (1991) (arguing that Levinson's categorization of the competing approaches to interpretation "are more useful as heuristic devices than as complete accounts of Protestantism or Catholicism as such"); Garet, *supra* note 98, at 37–38 (comparing biblical and constitutional "literalism" in the course of a project to illuminate the nature of the "connection between textual interpretation and normative guidance that is definitive of the species of moral reflection that [he] call[s] normative hermeneutics"); Morton J. Horwitz, *The Constitution of Change—Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 34 (1993) (explaining that the comparison was part of a project seeking to determine whether it is possible "legitimately to incorporate changing ideals or values, or dynamic meanings or understandings of the state of the world, into constitutional doctrine that aspires to fundamentality"); Horwitz, *supra* note 1, at 663 (observing that "originalism in constitutional discourse is the equivalent of religious fundamentalism" and describing originalists and "constitutional literalists" as "fundamentalists"); Levinson, *supra* note 1, at 133 (analogizing Justice Black's focus on constitutional text to the approach of biblical fundamentalists, in the course of arguing that the Constitution has as much potential to divide the public as it has to unite it); Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 445–46 (2006) (noting the "analogous relationship between the legal interpretative method of textualism" and Protestant fundamentalism, but focusing on the characteristics of Justice Scalia's "judicial persona"); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1509–12 (1989) (noting similarities between originalism and the approach of "Christian fundamentalists" and "evangelicals and other conservative Protestants" to the Bible, but acknowledging that the comparisons were based on "generalization[s]," perhaps even "caricature[s]"); Michael Sink, *Restoring Our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921, 950 (2004) (tracing the development of Protestant fundamentalist "primitivism" and briefly comparing it to originalism); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1607 (1989) (noting that "Martin Luther's theory of biblical hermeneutics" is similar to the constitutional interpretive "theory called textualism or literalism").

110 Vincent Crapanzano, an anthropologist, wrote an engaging "critical ethnography" of literalism, focusing on Protestant fundamentalists and constitutional originalists. See CRAPANZANO, *supra* note 9, at xxi. Although Crapanzano did extensive fieldwork with fundamentalists, his account of originalism was based almost exclusively on "the analysis of law review articles, books, and court decisions." *Id.* This left little room for a detailed or systematic anthropological comparison between the two approaches. David Richards similarly recently compared originalism and fundamentalism, largely from a psychological perspective. See DAVID A.J. RICHARDS, *FUNDAMENTALISM IN AMERICAN RELIGION AND LAW* (2010). He concluded that both are animated by "the need to sustain the hierarchical authority of a patriarchal father over all others as the model for authority." *Id.* at 224; see also *id.* at 232 (arguing that his study

We seek to offer here a more nuanced account of both the similarities and the differences between literalism and originalism, with the hope that a more complete understanding of both the force and the limits of the comparison will enable a more fruitful consideration of the ways in which the two approaches interact in cultural and political narratives.

### A. *Similarities*

We begin with the similarities between biblical literalism and constitutional originalism. We focus on four core similarities, each of which entails several other commitments, as well. First, we discuss the centrality of text in both approaches. Second, we examine the extent to which both biblical literalism and constitutional originalism are reactive movements. Third, we consider the democratic and populist impulses that are common to both approaches. Fourth, we discuss the two approaches' commitment to the norm of fidelity in interpretation.

#### 1. The Commitment to Text

The most obvious similarity between biblical literalism and constitutional originalism is the centrality of the text to the interpretive enterprise. The similarity is perhaps unsurprising, given the two approaches' common roots. The traditional form of originalism—which, like modern originalism, treated the Constitution's meaning as static<sup>111</sup>—had diverse intellectual origins, but most commentators agree that it derived at least in part from the British Protestant “anti-interpretive tradition” in biblical interpretation—that is, the view, characterized by the slogan “*sola Scriptura*,” that “the only authoritative, and indeed the only safe, interpreter of Scripture was Scripture itself.”<sup>112</sup>

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“moved beyond” Crapanzano's because it identified the “common culture and psychology that underlies fundamentalism in both religion and law”).

111 See Horwitz, *supra* note 109, at 44.

112 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889 (1985); see also Balkin, *supra* note 99, at 505 (“The importance of the constitutional text as the launching pad for arguments about rights . . . [emerged in part from] the influence of Protestantism and its assertion that ordinary believers have authority to decide what the Bible and other sacred texts mean for themselves.”); Garet, *supra* note 98, at 75 (“Perhaps the Protestant demand for government by text has contributed to the shaping of our legal expectations.” (emphasis omitted)); Horwitz, *supra* note 109, at 49 (“Protestant biblical literalism powerfully shaped the anti-interpretative presuppositions of American culture.”). Some commentators have traced American reverence for the Constitution to early Americans' religiously

The shared commitment to text has led some commentators to focus on the extent to which literalists and originalists treat the authoritative text as sacred or as an object of reverence, which in turn has provided some of the polemical force of the comparison.<sup>113</sup> Cass Sunstein, for example, relied on originalists' treatment of the Constitution as a "sacred text" in labeling them "fundamentalists,"<sup>114</sup> and Morton Horwitz focused on "Constitution worship" in contending that "originalism in constitutional discourse is the equivalent of religious fundamentalism."<sup>115</sup> But this focus tends to miss the essential nature of both literalism's and originalism's commitment to the text.

Both literalists' and originalists' commitments to text derive from a particular shared set of claims about the meaning and accessibility of text. First, the literalist and originalist commitment to text is the product of a shared confidence that their respective focal texts have a "facticity" and that the words in the texts can bear determinate meaning.<sup>116</sup> Literalists emphasize the propositional character of the Bible's message.<sup>117</sup> Whereas proponents of liberal biblical interpretation focus on the Bible as an instrument for creating religious experience in readers, literalists identify the Bible as a repository of factual pro-

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inspired view of the importance of covenants. See LEVINSON, *supra* note 100, at 11; David S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 24–29 (1990).

113 See Grey, *supra* note 99, at 3 ("Just as Christians and Jews take the word of God as sovereign and the Bible as the word of God, so Americans take the will of the people as sovereign, at least in secular matters, and the Constitution as the most authoritative legal expression of that popular will."); *supra* note 99 and accompanying text. Analogies between the Constitution and other sacred texts are as old as the Republic itself. George Washington urged that the Constitution "be sacredly maintained," see George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205 (James D. Richardson ed., 1897), and in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), Chief Justice Marshall stressed the "reverence" with which Americans viewed all written constitutions—including, presumably, their own.

114 SUNSTEIN, *supra* note 1, at xiii–xiv ("Religious fundamentalism usually represents an effort to restore the literal meaning of a sacred text. . . . Some [legal] fundamentalists seem to approach the Constitution as if it were inspired directly by God.").

115 Horwitz, *supra* note 1, at 663.

116 See Garet, *supra* note 98, at 42 (describing "literalism," in both its legal and religious forms, as requiring "obedience" to a "series of commands issued by a sovereign text to the text's subjects"); Ravitch, *supra* note 108, at 378–79.

117 See Biblical Hermeneutics, *supra* note 10, art. VI ("We affirm that the Bible expresses God's truth in propositional statements, and we declare that biblical truth is both objective and absolute."); *id.* art. VII ("We affirm that the meaning expressed in each biblical text is single, definite and fixed."); see also MARSDEN, *supra* note 8, at 118–19 (discussing literalist understanding of the Bible as a source of factual propositions).

positions.<sup>118</sup> For literalists, the Bible communicates specific information about the identity and work of God, the human condition, and God's expectations for humanity.<sup>119</sup> Originalists similarly insist that the Constitution's provisions carry "fixed" meanings,<sup>120</sup> a claim that not only constitutes the "foundation of originalist theory,"<sup>121</sup> but that also is pointedly offered to distinguish originalism from its nonoriginalist alternatives.

Second, literalists and originalists have confidence that the relevant text's meaning is readily ascertainable.<sup>122</sup> Literalists contend that the Bible's propositional truths are rationally accessible to all people.<sup>123</sup> Literalists formalize this contention in the principle of perspicuity, which "means simply that the Bible is sufficiently clear in and of itself for believers to understand it."<sup>124</sup> Originalists likewise assert that the original meaning of the text is usually "easy to discern"<sup>125</sup> and can provide the "right answers to constitutional questions."<sup>126</sup> Literalists

118 See PACKER, *supra* note 10, at 135–38; Geisler, *supra* note 17, at 316–31 (surveying intellectual history of liberal biblical interpretation); Hughes, *supra* note 14, at 182–83; Packer, *supra* note 25, at 336–38, 342–43 (discussing liberal hermeneutic and evangelical-literalist critique).

119 See PACKER, *supra* note 10, at 39–40; Geisler, *supra* note 17, at 331 ("[T]here is never a time when we are asked to go beyond propositional revelation."); Packer, *supra* note 25, at 326–28, 333–34; Payne, *supra* note 14, at 96–99.

120 See, e.g., Solum, *supra* note 70, at 3.

121 Lund, *supra* note 76, at 1346.

122 Of course, virtually all theories of textual interpretation—including those associated with legal and religious traditions—presume that texts have meaning. See Francis J. Mootz III, *Faithful Hermeneutics*, 2009 MICH. ST. L. REV. 361, 364 ("[L]egal and religious hermeneutics are grounded in the belief that the text has something to say, and in the faith displayed by the interpreter that she can learn from the text."). But interpretive theories vary widely in the confidence with which they presume that the meaning is readily ascertainable.

123 See *Biblical Hermeneutics*, *supra* note 10, art. XXIII ("We affirm the clarity of Scripture and specifically of its message about salvation from sin."). See generally James Patrick Callahan, *Claritas Scripturae: The Role of Perspicuity in Protestant Hermeneutics*, 39 J. EVANGELICAL THEOLOGICAL SOC'Y 353, 353–55 (1996) (discussing the role of clarity in Protestant scriptural interpretation).

124 Kaiser, *supra* note 14, at 128; see also PACKER, *supra* note 10, at 41 ("[S]ince all sixty-six books [of the Bible] were written to be understood . . . their main teaching must be plain and clear, whatever uncertainties of detail remain."); Hughes, *supra* note 14, at 176 ("Whatever the difficulties and obscurities associated with particular passages (on which the expert may be able to throw some light), not only is the Bible's central message, in all its plainness and constancy, addressed to everyone, but it is also accessible to everyone.").

125 Scalia, *supra* note 77, at 45.

126 Kesavan & Paulsen, *supra* note 78, at 1129 n.54; see also Paulsen, *supra* note 71, at 2062 ("[T]he Constitution is reasonably easy to interpret and apply under straightforward criteria . . .").

and originalists alike acknowledge that sometimes the text is complicated or difficult to interpret, but they insist that such instances are the exception, not the rule, and that on the whole it is possible—both for experts<sup>127</sup> and for ordinary interpreters<sup>128</sup>—to discern the meaning of the text.

Third, literalists and originalists believe that the text governs for all time, even if it requires application to modern circumstances.<sup>129</sup> Literalists acknowledge that the Bible was written in historical and cultural contexts quite different from the contemporary world, but they assert that the Bible contains universal truths that remain accessible, relevant, and authoritative today.<sup>130</sup> As J.I. Packer writes, “We see

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127 See Hughes, *supra* note 14, at 175–76 (explaining the role of experts in clarifying obscure passages of scripture); Scalia, *supra* note 69, at 857 (conceding that the inquiry required by originalism is “a task sometimes better suited to the historian than the lawyer”); Biblical Hermeneutics, *supra* note 10, art. XXIV (noting the benefits of technical study of scripture by experts).

128 See Hughes, *supra* note 14, at 176 (“[N]ot only is the Bible’s central message, in all its plainness and constancy, addressed to everyone, but it is also accessible to everyone.”); Kaiser, *supra* note 14, at 128; Paulsen, *supra* note 71, at 2058 (“Constitutional law, while greatly interesting, is not a deeply mysterious thing. It takes a Yale professor to make it one.”).

129 See CRAPANZANO, *supra* note 9, at xxv (“The originary moments become, as it were, transhistorical, giving to the texts produced in that moment a timeless, authentic, and authoritative meaning.”); McConnell, *supra* note 109, at 1512 (“Constitutional interpretation, performed in the manner of . . . Christian fundamentalists, would seek specific answers to specific questions from a particular time in the past (presumably the founding), and would enforce those answers in today’s world, notwithstanding considerable pressure arising from changes in context and circumstance.”).

130 See Biblical Hermeneutics, *supra* note 10, art. XI (“We affirm that translations of the text of Scripture can communicate knowledge of God across all temporal and cultural boundaries. We deny that the meaning of biblical texts is so tied to the culture out of which they came that understanding of the same meaning in other cultures is impossible.”); see also Hughes, *supra* note 14, at 175 (“The Bible belongs integrally within the divine scheme of redemption. That is why its central message, which does not vary from age to age, is not at all culturally conditioned and why, precisely because it is directed to the heart of the human predicament, which also does not vary from age to age, it is unfailingly relevant to mankind in every period of history.”); Kaiser, *supra* note 14, at 139, 142–43 (explaining how interpreters can discover “the single meaning of the author in those places he includes cultural-historical elements”); Biblical Hermeneutics, *supra* note 10, art. VIII (“We affirm that the Bible contains teachings and mandates which apply to all cultural and situational contexts and other mandates which the Bible itself shows apply only to particular situations. We deny that the distinction between the universal and particular mandates of Scripture can be determined by cultural and situational factors. We further deny that universal mandates may ever be treated as culturally or situationally relative.”); Biblical Inerrancy, *supra* note 4, exposition at 7 (“Although Holy Scripture is nowhere culture-



instanced in the particular events of the Bible story the universal principles of God's will and work, and the essence of our interpretive task is to unshell these from their immediate setting in order to reapply them to our own situations."<sup>131</sup> Originalists similarly insist that the constitutional text's fixed meaning can readily be applied to modern circumstances. As former Chief Justice Rehnquist explained, "Merely because a particular activity may not have existed when the Constitution was adopted, or because the Framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct."<sup>132</sup>

## 2. Reaction and Restoration

Literalism and originalism are reactive movements (even if not solely reactionary), and both are self-consciously projects of restoration. Literalists and originalists claim that their respective approaches are naturally correct, that they were the original interpretive approach, and that they were long believed to be the correct approaches to interpretation until other, nontextualist movements gained traction.<sup>133</sup> We are agnostic about whether these historical claims are correct—that is, about whether literalism and originalism in fact preceded the more modern, nontextualist approaches to which they respond today.<sup>134</sup> We focus here on the fact that literalists and

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bound in the sense that its teaching lacks universal validity, it is sometimes culturally conditioned by the customs and conventional views of a particular period, so that the application of its principles today calls for a different sort of action.”).

131 Packer, *supra* note 25, at 351; *see also* Packer, *supra* note 15, at 201 (“[T]he universally valid truths [the biblical] record gives us as applied to particular Near Eastern folk of the far-off past, up to the first century A.D., need to be reapplied today. But since these universal truths are intrinsically clear and rational, such reapplication is always a practical possibility.”); Packer, *supra* note 25, at 329–32.

132 William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976); *accord* SOURCEBOOK, *supra* note 73, at 28 (distinguishing between “meaning,” which is “fixed and permanent,” and “application to modern issues” (emphasis omitted)); Bork, *supra* note 72, at 826 (arguing that the “text, structure, and history of the Constitution” provide a “major premise,” which is a “core value that the Framers intended to protect,” and that the interpreter “must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee”).

133 *See* Garet, *supra* note 98, at 78 (noting that biblical and constitutional literalists contend that their respective documents originally were read according to a literal understanding).

134 For instance, although Morton Horwitz has contended that originalism “has been the dominant interpretive paradigm for most of American constitutional history,” Horwitz, *supra* note 109, at 44, the wide variation that he acknowledges in the

originalists articulate the modern forms of their approaches as tradition-based antidotes to competing approaches that have gained adherents over time.

Literalists contend that their understanding of scripture—its authority, inerrancy, and accessibility—is the orthodox view, which Christians held consistently and without serious challenge from the time of Jesus and the apostles until the nineteenth century.<sup>135</sup> As the ICBI stated, “We affirm that the doctrine of inerrancy has been integral to the Church’s faith throughout its history. We deny that inerrancy is a doctrine invented by Scholastic Protestantism, or is a reactionary position postulated in response to negative higher criticism.”<sup>136</sup> Literalists acknowledge that some in the early church practiced allegorical interpretation of the biblical text, but they contend that literalism was universally recognized as the orthodox method and was consistently practiced by all of the church’s great theologians.<sup>137</sup>

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“strictness” with which judges approached constitutional text in the first 150 years of the nation’s history makes clear that the historical version of originalism embraced an even wider range of interpretive methodologies than does the modern originalist movement, *see id.* (“[A]n anti-literalist strand in some early American legal thought added a wrinkle to the originalist view: how strict or loose must an originalist be in construing the constitutional text? That question would loom large in more modern variations of the debate about whether the Constitution changes over time.”). Even many proponents of modern originalism acknowledge that sophisticated intellectual defenses of originalism are of relatively recent vintage and that there is reason to distinguish between their movement and its historical antecedents. *See* Whittington, *supra* note 68, at 599 (“[Historically,] originalism was not a terribly self-conscious theory of constitutional interpretation, in part because it was largely unchallenged as an important component of any viable approach to understanding constitutional meaning. Originalism, in its modern, self-conscious form, emerged only after traditional approaches had been challenged and, to some degree, displaced.”).

The historical claims of biblical literalists are also disputed. Literalists contend that their method of interpretation is ancient. *See, e.g.,* Preus, *supra* note 15, at 357 (“That the Bible is the Word of God, inerrant and of supreme divine authority, was a conviction held by all Christians and Christian teachers through the first 1,700 years of church history.”). Critics allege that literalism is a modern innovation rather than the orthodox—indeed, biblical—method of interpreting scriptures that literalists claim. *See generally* SANDEEN, *supra* note 18, at 103–31 (discussing the historical development of biblical literalism); Garet, *supra* note 98, at 78–82 (contesting literalist claims about the original interpretive approaches).

135 *See* PACKER, *supra* note 10, at 17, 45–46 ; Bahnsen, *supra* note 37, at 156–57; Geisler, *supra* note 17, at 307 (“Jesus, the biblical writers, and virtually all of the orthodox church fathers down through the centuries have held the doctrine of the full inspiration and inerrancy of Scripture . . . .”); Helm, *supra* note 31, at 311.

136 Biblical Inerrancy, *supra* note 4, art. XVI.

137 *See* Geisler, *supra* note 17, at 307–08; W. Robert Godfrey, *Biblical Authority in the Sixteenth and Seventeenth Centuries: A Question of Transition*, in *SCRIPTURE AND TRUTH*, *supra* note 11, at 225, 225–43; Packer, *supra* note 25, at 333–35. *See generally* Bromiley,

To be sure, critics argue that defining aspects of literalism, including total inerrancy of the Bible and the propositional character of divine revelation, arise from a distinctly modern epistemology rather than an ancient mode of interpretation.<sup>138</sup> But regardless of whether literalism is a theological innovation, its contemporary articulation represents a conservative Protestant reaction against specific intellectual and social trends over the past two centuries. These trends can be characterized in various ways, but three themes arise most frequently as objects of attack by literalists.

First, biblical literalists reacted against naturalist or materialist philosophies that treated supernatural phenomena as unreal.<sup>139</sup> Rejection of the supernatural results in denial of the Bible's miracles, God's direct involvement in creation, and the divinity of Jesus Christ.<sup>140</sup> While liberal Protestantism made peace with materialism by treating Jesus as a moral exemplar and teacher and by accepting Darwinian evolution, biblical literalism responded by asserting the reality—that is, facticity—of supernatural causes and events as described in the Bible.<sup>141</sup>

Second, biblical literalists reacted against the pervasive skepticism that defined modern historical scholarship. Instead of absolute trust in biblical authority, biblical critics in the nineteenth century adopted the methods of secular history, which treated ancient texts as unreliable until proven true by evidence obtained from outside the text

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*supra* note 15, at 199–219 (on church fathers' understanding of scripture); Gruden, *supra* note 11, at 19–49 (on Bible's view of scripture); Wenham, *supra* note 13, 3–34 (on view of scripture held by Jesus); Woodbridge & Balmer, *supra* note 15, at 254–58 (on view of scripture in Reformed tradition).

138 See SANDEEN, *supra* note 18, at 103–31 (describing biblical literalism as a nineteenth-century innovation); see also GARY DORRIEN, *THE REMAKING OF EVANGELICAL THEOLOGY* 6–7, 25 (1998) (describing biblical literalism as a modern development); D.G. HART, *DECONSTRUCTING EVANGELICALISM* 145–47 (2004) (same); MARSDEN, *supra* note 18, at 112 (same); MARSDEN, *supra* note 8, at 36–38, 117–18 (same).

139 See Geisler, *supra* note 17, at 311–31 (discussing sources of philosophical themes in conflict with literalism); Hughes, *supra* note 14, at 177–84 (same); Kaiser, *supra* note 14, at 138–39 (discussing modern predisposition to deny supernaturalism). Biblical literalism was not the only Protestant theological reaction to the modern embrace of materialism and naturalism. Twentieth-century Protestant neo-Orthodoxy, exemplified by the work of Karl Barth, represents a response that is very different, but no less strident, than biblical literalism. See generally DOUGLAS JOHN HALL, *REMEMBERED VOICES* 11–25 (1998) (describing Barth's theology).

140 See MARK A. NOLL, *BETWEEN FAITH AND CRITICISM* 145–46 (1991).

141 See Geisler, *supra* note 17, at 331–34 (providing a literalist response to philosophical presuppositions of modernist interpreters).

itself.<sup>142</sup> For literalists, this skepticism was doubly destructive, as it both undermined confidence in the biblical authors and asserted the authority of contemporary interpreters to decide which, if any, parts of the text were true.<sup>143</sup>

Third, biblical literalists reacted against subjectivism, which played a central role in liberal Protestantism's response to naturalism and skepticism. Subjectivist interpretations treated the Bible as a tool for creating individual experiences of the divine.<sup>144</sup> Scripture's objective truth was irrelevant; it operated in the realm of spirit rather than fact, and its validity was measured solely through its capacity to reveal God to readers. For literalists, this subjectivism stripped the Bible of its revelatory content, both in terms of the specific information about the God who encounters readers through the text and the specific obligations that God imposes on readers.<sup>145</sup> On this view, subjectivism leaves the interpreter free of the text's theological and moral constraints.

The specific contours of contemporary biblical literalism reflect the importance of these three concerns. Against materialism, literalists argued that faithful interpretation of scripture requires a hermeneutic that presupposes the reality of the supernatural.<sup>146</sup> Against skepticism, literalists asserted the Bible's self-authenticating reliability based on the doctrine of divine inspiration and the corresponding rejection of human competence to make judgments about the text's

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142 See MARSDEN, *supra* note 8, at 36–37; NOLL, *supra* note 140, at 12–13; PACKER, *supra* note 10, at 118; see also Payne, *supra* note 14, at 87–101 (describing and providing examples of philosophical skepticism in higher biblical criticism).

143 See PACKER, *supra* note 10, at 109–10; Payne, *supra* note 14, at 94–95 (coming out against interpretive methods that place humans in judgment over divine text); see also Bahnsen, *supra* note 15, at 184 (“[S]omeone holding to limited inerrancy who identifies the original text has simply found something that is only *possibly* true (and thus possibly false).”); Feinberg, *supra* note 11, at 295 (“[H]e will declare that the aforementioned control is restricted and will affirm at least his own relative and finite omniscience as critic.”); Woodbridge & Balmer, *supra* note 37, at 270 (acknowledging that a fellow scholar “does not appear to have minimized the import of the Holy Spirit in confirming the Bible’s authority to the believer.”).

144 See Geisler, *supra* note 17, at 329–31 (on Soren Kierkegaard); Hughes, *supra* note 14, at 181–83 (on Rudolf Bultmann); Biblical Hermeneutics, *supra* note 10, at 8 (critique of existentialist understanding of biblical revelation).

145 See Geisler, *supra* note 17, at 330–31 (“We are not confronted in Scripture with the choice between God’s revelation and the God of that revelation. All we know about God comes through His revelation. . . . [T]here is never a time when we are asked to go beyond propositional revelation.”); Hughes, *supra* note 14, at 183 (“[T]he objective character of Scripture as truth given by God comes before and validates my subjective experience of its truth.”).

146 See Kaiser, *supra* note 14, at 138–39.

validity.<sup>147</sup> Against subjectivism, literalists proclaimed the objectivity of the specific truths contained in the Bible. Individual experience of revelation is secondary in both time and importance to the propositional content of the text.<sup>148</sup>

The chronology of literalism's development also reflects its reactive character. Materialism, skepticism, and subjectivism made their first serious inroads into American Protestant thought in the mid-nineteenth century, with the growing prestige of German-influenced Protestant liberal theology and the historical-critical method in biblical interpretation.<sup>149</sup> In response to these developments, Protestant conservatives—led by the Princeton Seminary faculty—articulated the core elements of literalism.<sup>150</sup> The 1960s and 1970s brought a second wave of sustained attention to biblical literalism, although this wave focused more on disputes within conservative Protestantism than debates with liberal theology and hermeneutics. This second wave had two quite different sources. First, the renewed attention to literalism arose from concern that some leaders and institutions within conservative Protestantism were making significant theological concessions in the pursuit of greater public or academic prestige, such as Billy Graham's willingness to meet and work with liberal Protestants or the openness of some Evangelical seminaries to historical criticism and existentialist theology.<sup>151</sup> Second, conservative Protestantism was reinvigorated by widespread dismay at the perceived political, cultural, and moral chaos of the late 1960s.<sup>152</sup> Biblical literalism was invoked in response to both concerns: it served as one, and perhaps the sole, theological doctrine around which disparate elements of conservative Protestantism could gather, notwithstanding substantial theological disagreements about other doctrines, and it also served as a litmus test to assess the fidelity of those who claimed to be Evangelicals or Fundamentalists.<sup>153</sup>

Originalism has followed a similar trajectory. Originalists maintain that originalism (even if not then so labeled) was the widely accepted approach to constitutional interpretation until the middle of

147 See Payne, *supra* note 14, at 90–101.

148 See Packer, *supra* note 25, at 343–44.

149 See MARSDEN, *supra* note 18, at 120–21, 170 (discussing reactions to higher criticism); MARSDEN, *supra* note 8, at 36–37; NOLL, *supra* note 140, at 11–15.

150 See MARSDEN, *supra* note 18, at 109–19.

151 See DORRIEN, *supra* note 138, at 114–23; HART, *supra* note 138, at 141–50; MARSDEN, *supra* note 18, at 276–78.

152 James Davison Hunter, *The Evangelical Worldview Since 1890*, in *PIETY AND POLITICS* 19, 44–49 (Richard John Neuhaus & Michael Cromartie eds., 1987).

153 See HART, *supra* note 138, at 131–51.

the twentieth century.<sup>154</sup> At that point, the Court began to apply a more dynamic approach to constitutional interpretation and, in cases such as *Home Building & Loan Ass'n v. Blaisdell*<sup>155</sup> and *Brown v. Board of Education*,<sup>156</sup> explicitly departed from a strict originalist approach.<sup>157</sup> By the end of Chief Justice Earl Warren's tenure, during which the Court read the Constitution's major rights-granting provisions quite expansively, "anything resembling textualism or originalism was in full retreat, routed by the Warren Court's decisions and methodology . . . . Textualism and originalism were largely ignored by the academy, disparaged as essentially irrelevant and out of tune with the times."<sup>158</sup>

Conservative judges,<sup>159</sup> scholars,<sup>160</sup> and political figures<sup>161</sup> reacted to these developments by urging that the Constitution be

154 See, e.g., SOURCEBOOK, *supra* note 73, at 2–3 (arguing that originalism "predominated in constitutional adjudication for the first 150 years of our Nation's history"); Berger, *supra* note 97, 2–3 (disclaiming the assertion that originalism "sprang full-armed from the brow of Raoul Berger" and arguing instead that originalism is "a view deeply rooted in our history" (quoting Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975))); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 384 (1985) ("It was not until the latter half of this century . . . that it began to be suggested seriously, and with elaborate argument, that courts had power to create and enforce against the majority will values that were not in some real sense to be found in the Constitution."); see also Horwitz, *supra* note 109, at 44 ("It was not until the progressive era early in the twentieth century that this originalist understanding waned and a more dynamic vision of constitutional meaning began to be articulated.").

155 290 U.S. 398 (1934).

156 347 U.S. 483 (1954).

157 See *Brown*, 347 U.S. at 492–93 ("[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."); *Blaisdell*, 290 U.S. at 442–43 ("It is no answer to . . . insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.").

158 Kesavan & Paulsen, *supra* note 78, at 1134.

159 See *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Comm. on the Judiciary*, 92d Cong. 19 (1971) (Statement of William H. Rehnquist) (pledging that he would not, in the words of Sen. McClellan, "disregard the intent of the framers of the Constitution and change it to achieve a result that I thought might be desirable for society"); Rehnquist, *supra* note 132, at 694–96 (criticizing the "notion of a living Constitution"); Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in SOURCEBOOK, *supra* note 73, app. C.

160 See BERGER, *supra* note 74, at 402–10; Bork, *supra* note 92, at 10.

interpreted to give effect to the intent of the Framers (or, eventually, the meaning of the constitutional text). Keith Whittington, who has offered one of the most sophisticated defenses of originalism,<sup>162</sup> explains that “originalism was a reactive theory motivated by substantial disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.”<sup>163</sup> On the political front, Richard Nixon regularly attacked the Warren Court and pledged to appoint “strict constructionists,” by which he unmistakably “meant judges who would oppose the Warren Court’s expansion of individual rights.”<sup>164</sup> Early academic proponents also framed their embrace of originalism as an antidote to the perceived excesses of the Warren Court.<sup>165</sup> In *The Tempting of America*, for example, Robert Bork offered his most detailed justification for originalism, but he presented the case largely as a response to the Warren Court and liberal constitutional theorists.<sup>166</sup> Raoul Berger similarly framed his tract *Government by Judiciary* as a response to what he saw as the Warren Court’s activism and the destabilizing theories of liberal law professors.<sup>167</sup>

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161 See Meese, *supra* note 85. For a more detailed account of the evolution of the modern originalist movement, see Colby & Smith, *supra* note 67, at 247–62, and Kesavan & Paulsen, *supra* note 78, at 1134–48.

162 See WHITTINGTON, *supra* note 74, at 77–109; see also WHITTINGTON, *supra* note 89, at 223–28 (explaining a theory of historical construction as it applies to the separation of powers).

163 Whittington, *supra* note 68, at 601.

164 *Id.* at 600.

165 See *id.* at 601 (explaining that originalism “was largely developed as a mode of criticism” of the Warren Court and “[a]bove all” was “a way of explaining what the Court had done wrong”).

166 Bork argued that the power of judges “to read their likes and dislikes into the Constitution” came to “its full fruition” with the Warren Court, which “occupies a unique place in American law” as “first and alone . . . a legislator of policy.” BORK, *supra* note 69, at 67–69. In Bork’s view, the “catalogue of the Warren Court’s legislative alterations of the Constitution is a thick one,” and he stressed that an “adequate discussion of the Warren Court’s unprincipled activism . . . would take up an entire book.” *Id.* at 72–73. He also set his sights on the theorists of liberal constitutional revisionism, *id.* at 187–240, who “have in common the fact that they would depart . . . from the actual Constitution of the United States” to create one that is “more liberal, egalitarian, and socially permissive than either the actual Constitution or the legislative opinion of the American people,” *id.* at 207. Keith Whittington has described Bork’s originalism as “mostly negative and critical.” Whittington, *supra* note 68, at 608.

167 Berger was not particularly cagey about whom he had in mind when he chastised the Court for “its continuing revision of the Constitution under the guise of interpretation.” BERGER, *supra* note 74, at 1. He described the Warren Court as a “fifteen-year interlude during which libertarian aspirations at length were gratified,”

To be sure, some more recent academic proponents of originalism arguably are “more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine.”<sup>168</sup> Indeed, given the conservative ascendancy on the Supreme Court and the lower federal courts that began in the 1980s, originalism could hardly have thrived if it had continued to be solely reactive and negative. Of course, a good deal of originalist scholarship remains largely reactive to the perceived excesses of nonoriginalism.<sup>169</sup> But even assuming that some academic proponents of originalism today are just as likely to offer positive accounts of originalism as they are to offer critiques of the Warren Court or liberal “revisionism,” originalism retains political and cultural salience largely because of its reactive quality. As Robert Post and Reva Siegel have explained, originalism’s power today rests in its ability to connect “constitutional law to a living political culture” and to provide “its proponents a compelling language in which to seek constitutional change through adjudication and politics.”<sup>170</sup> On this account, originalism—whether couched in the language of “strict construction,”<sup>171</sup> suggested as an antidote to judges who “legislate from the bench,”<sup>172</sup> or offered as a promise, either explicit or tacit, to ensure that *Roe v. Wade*<sup>173</sup> is overruled<sup>174</sup>—helps to fuse “contemporary political concerns with authoritative constitutional narrative.”<sup>175</sup> As with the originalism of the 1970s and

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*id.* at 357, bemoaned the “‘revolutionary’ changes wrought by the Warren Court,” *id.* at 307, and criticized the Warren Court for improperly taking “the lead in deciding what national policy ought to be,” *id.* at 327. A brief look at the table of contents makes clear that the book was designed methodically to demonstrate that some of the Warren Court’s most important decisions—on school desegregation, reapportionment, and incorporation—were incorrect. *See id.* at XIII–XIV. Berger likewise took on those scholars who were “[i]ntoxicated by the Warren Court’s libertarian breakthrough,” *id.* at 309, lamenting their “[a]ctivist [f]light [f]rom the Constitution,” Berger, *supra* note 154, at 1.

168 Whittington, *supra* note 68, at 608.

169 *See, e.g.*, Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 314, 335–48 (2005).

170 Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006).

171 *See* DONALD GRIER STEPHENSON JR., *CAMPAIGNS AND THE COURT* 181 (1999).

172 *See* Elisabeth Bumiller, *Team Is Preparing Nominee for Tough Senate Hearing*, N.Y. TIMES, Oct. 21, 2005, at A18 (quoting President George W. Bush).

173 410 U.S. 113 (1973).

174 *See* David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL’Y 1, 5 (2009) (“I think what ‘strict construction’ usually means today is: ‘*Roe v. Wade* was wrong.’”).

175 Post & Siegel, *supra* note 170, at 572.



1980s, originalism today continues to “identif[y] the Constitution with the body politic that the Warren Court betrayed” and equates the written Constitution with a “mythologically unified and homogeneous nation of the past, which must be safeguarded from the tumultuous contamination of the present.”<sup>176</sup>

Whatever one can say about the original approaches to biblical or constitutional interpretation, modern literalism and originalism are as much reactive and negative movements—that is, movements defined in contrast to what they are not—as they are affirmative cases for particular interpretive approaches. Indeed, as the above accounts show, the parallels exist at an even deeper level in that both were reactions to the perceived excesses of a class of magisterial interpreters. Protestant biblical literalism can be seen more broadly in the Protestant anti-interpretive tradition, which originally arose in reaction to the Roman Catholic Church’s asserted authority as the privileged interpreter of the Bible,<sup>177</sup> but more recently it has focused its opposition on scholars who apply contemporary historical and literary methods for critical scrutiny of the text.<sup>178</sup> Modern originalism arose specifically as a reaction to the Warren Court, which aggressively championed the notion of judicial supremacy<sup>179</sup> and offered capacious interpretations of the Constitution, and to the liberal scholars who enabled the Court.

Literalism and originalism are not only reactive movements, but also self-conscious projects of restoration. Indeed, the ICBI understood restoration as its primary mission, as expressed in the Council’s concluding report:

[The Council’s] goal, under God, was to seek by means of scholarly writing and teaching to restore the ebbing confidence of Christian people in the total trustworthiness of the Scriptures. Because this loss of confidence leads both to loss of clarity in stating the absolutes of authentic Christianity and to loss of muscle in maintaining them, the task was felt to be urgent.<sup>180</sup>

As reflected in the Council’s statement, this restoration works on two distinct levels.

The first, more obvious, emphasis is on restoration of a specific method of interpretation and specific theological and moral teachings

176 *Id.*

177 See LEVINSON, *supra* note 100, at 25–27.

178 See generally NOLL, *supra* note 140, at 11–13 (describing the relationship between new universities, new critical methods, and Biblical literalism); Payne, *supra* note 14, at 85–113 (discussing higher criticism and arguing that it is not a scientific methodology).

179 See *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958).

180 Biblical Application, *supra* note 4, exposition at 9.

received from scripture. As we noted above, literalists assert that they are recalling Christians to the understanding of scripture held by “Jesus, the biblical writers, and virtually all of the orthodox church fathers down through the centuries.”<sup>181</sup> That understanding, literalists claim, needs to be restored to its place at the center of Christian faith after the past two centuries of skeptical and existential interpretation of scripture have led many believers astray.<sup>182</sup> For literalists, this restoration of method has direct implications for theological and moral teaching.<sup>183</sup> In recovering a proper faith in the literal meaning of scripture, Christians will also return to traditional principles of doctrine and morals. In the nineteenth century, this effort focused primarily on disputes with theological liberals over doctrinal questions, such as the divinity of Christ and the concept of divine judgment.<sup>184</sup> But since the 1970s, literalists have placed equal—and perhaps even greater—stress on restoration of traditional Christian moral teachings.<sup>185</sup> Against widespread moral relativism, especially on questions of sexuality, family, and human life,<sup>186</sup> literalists have argued for a return to traditional moral absolutes. A literal reading of the Bible,

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181 Geisler, *supra* note 17, at 307; *see supra* note 135 and accompanying text.

182 *See* Biblical Inerrancy, *supra* note 10, at 7 (“In our affirmation of the authority of Scripture as involving its total truth, we are consciously standing with Christ and His apostles, indeed with the whole Bible and with the main stream of Church history from the first days until very recently. We are concerned at the casual, inadvertent, and seemingly thoughtless way in which a belief of such far-reaching importance has been given up by so many in our day.”); *see also* PACKER, *supra* note 10, at 12, 17–19 (noting that Jesus Christ, the apostles, and all orthodox teachers of the church have consistently affirmed the inerrancy of scripture).

183 *See* Biblical Inerrancy, *supra* note 10, exposition at 7–8 (“We are conscious too that great and grave confusion results from ceasing to maintain the total truth of the Bible whose authority one professes to acknowledge. The result of taking this step is that the Bible which God gave loses its authority, and what has authority instead is a Bible reduced in content according to the demands of one’s critical reasonings and in principle reducible still further once one has started. This means that at bottom independent reason now has authority, as opposed to Scriptural teaching. If this is not seen and if for the time being basic evangelical doctrines are still held, persons denying the full truth of Scripture may claim an evangelical identity while methodologically they have moved away from the evangelical principle of knowledge to an unstable subjectivism, and will find it hard not to move further.”).

184 *See* MARSDEN, *supra* note 8, at 32–39 (describing nineteenth century conflicts between Protestant conservatives and liberals on doctrinal questions).

185 *See* A. JAMES REICHLEY, FAITH IN POLITICS 294–95 (2002) (describing Evangelical and Fundamentalist perceptions of moral decline); Biblical Application, *supra* note 4, exposition at 10–11 (discussing reclaiming historic Christian moral commitments).

186 *See* Sweet, *supra* note 19, at 32–37 (describing the emergence of liberal Protestant moral relativism during the 1960s).

they contend, provides clear injunctions against homosexuality and divorce, clear instructions on the ordering of family life (parent over child, husband over wife), and clear protections for those at the beginning and ending of life.<sup>187</sup>

Although less obvious than its commitment to specific restorations—of literal interpretation and traditional doctrine and morals—biblical literalism also invokes a more fundamental reverence for the past as an antidote to modernity's reverence for all things new. In the eyes of literalists, modern intellectual, cultural, and moral trends reject traditional views precisely because they are traditional, reflecting a pervasive bias in favor of the novel and unsettled at the expense of the familiar and settled.<sup>188</sup> Indeed, literalist opposition to evolutionary theory can be partly, though of course not wholly, explained by the parallels drawn between Darwinian natural selection and modernist ideas of cultural and intellectual progress, under which the new is always better than the old.<sup>189</sup> Against contemporary culture's embrace of new ways and ideas, literalism seeks to restore the authority of old ways and ideas.<sup>190</sup>

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187 See *Biblical Application*, *supra* note 4, arts. V–VIII (discussing biblical principles governing human life, marriage and family, and sexuality); *Biblical Hermeneutics*, *supra* note 10, exposition at 8 (discussing homosexuality); see also FOWLER, *supra* note 19, at 191–211 (discussing moral concerns of Evangelicals and Fundamentalists about marriage, family, and sexuality); MARSDEN, *supra* note 18, at 239–43 (same).

188 See NOLL, *supra* note 140, at 34 (stating that in the late nineteenth century, Protestant conservative scholars rejected “the European assumption—fueled more by Hegel than by Darwin—that later was always better, earlier always more primitive”); *id.* at 146–48 (describing conservative Protestant antimodernism); see also MARSDEN, *supra* note 18, at 244–47 (describing Protestant conservative appeals for restoration of traditional religious values against modernist secularizing influences).

189 We do not mean to discount literalists' interpretation of Genesis as the basis for their rejection of any naturalistic account of human origins. But that interpretation needs to be understood within literalism's broader antimodernism. See MARSDEN, *supra* note 8, at 153–81 (discussing the links between literalists' hostility to evolution and their antimodernism); see also NOLL, *supra* note 44, at 188–89 (describing the roots of creation science movement).

190 At its final Summit, the ICBI issued a statement with the following conclusion:

The Summit findings turn their back on all forms of that modern Athenianism that seeks only to speak or hear some new thing. Instead of pursuing novelty, they offer updated applications of an older, more stable, arguably wiser and demonstrably more biblical heritage of belief. Thus to swim against the stream of current thought is a gesture, not of timidity, but of boldness, and not of eccentricity, but of conscience. The Summit members are united in the belief that the only good way for church and community today lies along the old paths. Thus, on historic questions like the sanctity of life, of sex, and of the family, and the God-given role of the state, in its regulating of political, judicial, and economic aspects of community life, as

Many modern originalists likewise self-consciously view originalism as a project of restoration.<sup>191</sup> They urge a “return to lost principles” of interpretation<sup>192</sup> and bemoan the “heresy” that the “orthodoxy” of originalism has fallen out of favor among scholars and judges.<sup>193</sup> Others have been even more explicit about their projects of restoration. In pressing his case for originalism, Stephen Presser argued that the “Supreme Court has lost its way, and it is time for the people to recapture the Constitution and the country,”<sup>194</sup> a project that he described as “An Act of Recovery.”<sup>195</sup> And Randy Barnett, in the aptly named *Restoring the Lost Constitution*, lamented that “the enacted Constitution has been lost and even forgotten” because of wayward judicial decisions, but he argued that if “we commit ourselves to adhere to the original meaning of the text,” its “restoration” will be “within our grasp.”<sup>196</sup>

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also on questions with new late-twentieth-century angles, like the legitimacy of nuclear war and the stewardship of the natural order, the continuing validity of standpoints maintained in the Christian past is constantly asserted.

Biblical Application, *supra* note 4, exposition at 11.

191 Cf. Post & Siegel, *supra* note 170, at 561, 572 (2006) (arguing that the political practice of originalism reflects a “politics of ‘restoration,’ which aims to restore an imagined past magically ‘secure from the ravages of history and a turbulent time’” (quoting Edward W. Said, *Invention, Memory, and Place*, 26 CRITICAL INQUIRY 175, 177 (2000))).

192 See Kesavan & Paulsen, *supra* note 78, at 1135; see also SUNSTEIN, *supra* note 1, at 26 (arguing that originalists “think that constitutional interpretation requires an act of *rediscovery*”); Horwitz, *supra* note 109, at 65 (describing the modern originalist movement as a “‘Great Awakening’ very much in the spirit of those earlier recurrent surges of evangelical enthusiasm with which religious Americans expressed their yearnings for a return to a truer and simpler past” (footnote omitted)).

193 BORK, *supra* note 69, at 6–7, 143; see also *id.* at 138 (describing nonoriginalism as “the brilliant flower of decay”); *id.* at 141 (describing the “traditional and once dominant theory of original understanding” and lamenting the rise of “revisionist” theories). Richard Posner described Bork’s book as a “summons to holy war,” noting that “religious imagery . . . permeates [Bork’s] discussion of originalism and its enemies.” Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1368–69 (1990).

194 STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION 5 (1994).

195 *Id.* at 11. Presser used several religious metaphors to press his case. He lamented that “[f]or a generation longer than did the Children of Israel we Americans have been wandering in a wilderness” because “our guides who have themselves lost their way have been sitting on the United States Supreme Court.” *Id.* at 3. He also urged a return to the “judicial land of Canaan.” *Id.* at 22.

196 BARNETT, *supra* note 69, at 1–5. Some originalists lament not only the drift from what they see as the unassailably correct method for interpreting the Constitution, but also the departure from traditional values. See RICHARDS, *supra* note 110, at 3 (“Originalism has had the appeal it has had not on its normative merits, but as the expression of a reactionary psychology that sought to limit and even reverse the advances made in the 1960s and later.”). Robert Bork’s *The Tempting of America*, for

### 3. The Democratic and Populist Impulse

Literalism and originalism have strong democratic and populist impulses. These impulses tend to follow from the commitment, described above, to the idea that the text has a fixed and readily ascertainable meaning. The very idea of an accessible text is a populist one: if the text contains a readily determinable meaning, then its meaning is available to anyone who reads it; if its meaning is accessible to anyone who reads it, then its meaning need not be filtered through elite interpreters; and if the text is accessible without the need for elite interpreters, then people can readily challenge the authority of self-appointed elite interpreters when they stray from the text.<sup>197</sup> These related claims—that no special training is required to interpret the text because the words have accessible meaning and that the document itself is thus available to control those who claim to be authoritative interpreters, whether they are priests or judges—are important elements in the narratives of both literalism and originalism.

Literalism is closely linked with a democratic idea of biblical interpretation under which all believers are equally capable of understanding scripture and the authority of religious institutions is

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example, was not simply an effort to restore originalism to its rightful place, but was also an opportunity for Bork to criticize liberal political and cultural views. BORK, *supra* note 69, at 11 (explaining that the book was not “ultimately about legal theory,” but instead was about “who we are and how we live”). He bemoaned the “dis-integrat[ion]” of “shared values and moral first principles.” *Id.* at 10; *see also id.* (“[W]e seem to be experiencing in our law, our politics, and our culture . . . a kind of restless and unprogrammatic radicalism that does not share but attacks traditional values and assumptions.”). He was even more explicit that his prescriptions were offered as an antidote to liberal political views in a later book whose title said it all. *See* ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* (1996). We recognize that, in light of originalism’s evolution, *see* Colby & Smith, *supra* note 67, at 247–62, and Robert Bork’s increasing stridency, Bork is perhaps no longer a perfectly representative originalist, if there ever were such a person. But his work—particularly his writings for a broad, nonacademic audience—tend to capture the particular cultural appeal of originalism to at least some of its proponents.

<sup>197</sup> *See, e.g.* CRAPANZANO, *supra* note 9, at 16 (arguing that biblical and legal literalism are “thought to be a way to eliminate potentially dangerous plays with language and meaning encouraged by language’s figurative, symbolic, allegorical, and rhetorical potentials”); Levinson, *supra* note 1, at 129 (noting the “strong push” in “certain Protestant arguments” to a “radically deinstitutionalized relationship between the individual believer and the God revealed in Scripture”); Grey, *supra* note 99, at 7 (“In both religion and law . . . [t]extualists point to the concrete objectivity of the text, and contrast it with the difficulty of establishing the content of a supposed unwritten law or oral revelation.”).

subordinate to the plain meaning of the biblical text.<sup>198</sup> This democratic idea of interpretation owes much to the Protestant Reformation's belief in the "priesthood of believers."<sup>199</sup> For Luther, Calvin, and other Reformers, the individual Christian has no need of a human intercessor before God, as Jesus alone takes that role. The Reformation principle thus denies special religious status to priests; all believers have equal standing before and access to God.<sup>200</sup> Literalism expands the idea of believers' equality by denying that any class of biblical interpreters has privileged access to scriptural meaning.

The democratic idea of interpretation operates as both affirmation and critique. As an affirmation, the idea stresses the clarity and accessibility of the Bible's core teachings. To the literalist, although the meaning of some passages is obscure, uncertainty about those passages does not undermine certainty about the far greater number of clear passages, nor does that uncertainty call into question the meaning of fundamental doctrines.<sup>201</sup> All who read the Bible, regardless of cultural or historical setting, are able to grasp the text's meaning.<sup>202</sup>

The democratic idea also functions as a critique with two distinct targets: the church and the academy. With respect to the church, literalism invokes the traditional Protestant claim that the Bible takes precedence, in both history and authority, to any ecclesiastical body.<sup>203</sup> This claim takes a populist turn when coupled with the literalist assertion that the Bible's meaning is fully accessible to all believers. In this view, every believer has the power to hold the church

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198 See *Biblical Inerrancy*, *supra* note 10, arts. I–II (addressing the relationship between church and Bible); *Biblical Hermeneutics*, *supra* note 10, arts. XXIII–XXIV (addressing clarity and accessibility of scripture).

199 NOLL, *supra* note 140, at 150–51 (connecting literalist interpretation with a "priesthood of all believers").

200 See PAUL ALTHAUS, *THE THEOLOGY OF MARTIN LUTHER* 313–18 (Robert C. Schultz trans., Fortress Press 1966) (1963).

201 See Kaiser, *supra* note 14, at 128–30.

202 See MARS DEN, *supra* note 18, at 110, 116 (addressing perspicuity); Hughes, *supra* note 14, at 175–76; *Biblical Hermeneutics*, *supra* note 10, exposition at 5 ("God has caused Scripture so to be written, and the Spirit so ministers with it, that all who read it, humbly seeking God's help, will be able to understand its saving message.").

203 See PACKER, *supra* note 10, at 64–65; 1 CLAUDE WELCH, *PROTESTANT THOUGHT IN THE NINETEENTH CENTURY* 201 (1988) (addressing rejection of the church's authority over text); *Biblical Application*, *supra* note 4, art. IV (addressing nature and authority of church).

accountable by requiring it to conform doctrine, polity, and practice to the plain meaning of scripture.<sup>204</sup>

Literalism's populist critique applies with equal force to the academy. Indeed, the two critiques take similar form: for literalists, the modern academy also impermissibly asserts its authority over the biblical text.<sup>205</sup> Instead of ecclesiastical privilege, the academy imposes on the text critical methodologies that presuppose beliefs that are hostile to the plain meaning of the Bible. Naturalist and materialist ideologies require interpreters to reject the Bible's record of supernatural and miraculous events, while skeptical historical and literary techniques instill doubts about the accuracy and authorship of scripture.<sup>206</sup> For literalists, these critical methodologies effectively obscure meaning and deny that ordinary readers are capable of understanding the text.<sup>207</sup> Indeed, to literalists the modern academy's criticisms are doubly destructive because scholars both take away plain meaning and, unlike ecclesiastical interpreters, leave no authority in place. That destruction of traditional authority is not an accident, but a core tenet of modernist beliefs. All that remains is subjectivity—each reader's freedom to pick and choose favorite passages, making the text say anything that the reader desires.<sup>208</sup> Literalism asserts the same authority against subjectivism that it asserts against ecclesiastical privilege: the plain meaning of text, accessible to all who read the Bible.

Originalists likewise contend that the Constitution is generally accessible to the typical reader and that its text ought to control those who claim to be authoritative interpreters. Originalists have con-

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204 See PACKER, *supra* note 10, at 39–42, 120–39 (addressing interpretive principles through which believers use the Bible to judge the church); *Biblical Application*, *supra* note 4, exposition at 9–10 (addressing the church being under the authority of the Bible).

205 See NOLL, *supra* note 140, at 150–54 (addressing literalism and modern biblical scholarship).

206 See Carson, *supra* note 37, at 123–28 (addressing subjectivism in redaction criticism); Geisler, *supra* note 17, at 311–31 (on philosophical positions, basic to modern hermeneutics, that undermine literalism); Packer, *supra* note 15, at 201–06 (on skepticism in modern hermeneutics); Payne, *supra* note 14, at 87–90 (addressing skepticism in negative higher criticism).

207 See Hughes, *supra* note 14, at 175–76, 187 (addressing elitism of academic biblical criticism).

208 See PACKER, *supra* note 10, at 42–45 (arguing that critical interpretive methodologies result from “intellectual arrogance and self-reliance” and produce “the rot of subjectivism”); Packer, *supra* note 25, at 344 (arguing that critical hermeneutics result in subjectivism); *Biblical Inerrancy*, *supra* note 10, at 7–8 (on dangers of subjectivism).

tended not only that the original meaning of the text usually “is easy to discern and simple to apply,”<sup>209</sup> but also that one need not be a “jurisprudential sophisticate” to understand the text.<sup>210</sup> Indeed, although there is variation among originalists on the question of the relevant audience for determining original meaning, many modern originalists have looked to the understanding of some version of the “reasonable American person”<sup>211</sup> at the time of ratification to determine the Constitution’s original meaning. To be sure, under this approach the reasonable American person is generally a fiction, conceived in hypothetical terms,<sup>212</sup> and the evidence for the text’s objective meaning to this hypothetical person typically (though not always) comes from contemporaneous commentary by elite interpreters.<sup>213</sup> But the focus on the typical reader of the Constitution’s text underscores originalism’s commitment to the idea that the text is accessible to the ordinary reader.<sup>214</sup>

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209 Scalia, *supra* note 77, at 45.

210 Graglia, *Constitutional Interpretation*, *supra* note 82, at 632–33 (observing that the “Constitution, happily, is a very short document, easily printable on fourteen or fifteen pages,” and that one does “not have to be a jurisprudential sophisticate” to know how its words should apply to questions of constitutional law).

211 Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

212 See Kesavan & Paulsen, *supra* note 78, at 1132 (explaining that the proper inquiry asks how the text “would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted”); Lawson & Seidman, *supra* note 211, at 48 (arguing that the “touchstone” is “the hypothetical understandings of a reasonable person who is artificially constructed by lawyers”).

213 See Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 396–98 (2002) (explaining permissible evidence for determining original meaning); Scalia, *supra* note 77, at 38 (“I will consult the writings of [Hamilton and Madison] . . . not because they were Framers and therefore their intent is authoritative and must be law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”).

214 Accordingly, originalists often point to the generally straightforward nature of the constitutional text. For example, Justice Scalia has responded to the Court’s Confrontation Clause cases involving sexual abuse of children by explaining that “[t]he Confrontation Clause . . . requires confrontation.” Scalia, *supra* note 77, at 46. One cannot help but notice, however, that the energy and intelligence that contemporary academic originalists have expended in the course of attempting to discern the original meaning of the constitutional text tends to belie the claim that it is a straightforward task to interpret and apply the text. Articles seeking to shed light on the original meaning of various brief clauses of the Constitution, for example, often are quite long and nuanced. See, e.g., Barnett, *supra* note 89, at 111–47 (explaining the



Originalists contend that this accessible text is (or ought to be) a powerful source of control over the judges charged with serving as authoritative interpreters of the document. In this way, originalists contend, their approach to the text enhances popular, democratic decisionmaking, for two related reasons. First, originalists claim that originalism is significantly more likely than nonoriginalist approaches to constrain judges from imposing their personal preferences under the guise of interpretation. Originalists have contended that because originalism “lash[es] judges to the solid mast of history”<sup>215</sup> and text—objective criteria that are “exterior to the will of the Justices”<sup>216</sup>—the approach is “less likely to aggravate the most significant weakness of the system of judicial review,” which is that “the judges will mistake their own predilections for the law.”<sup>217</sup>

Second, originalists have frequently asserted that their approach preserves a greater space for popular, democratic decisionmaking by confining legitimate judicial invalidation of democratically enacted legislation to cases implicating the plain meaning of the Constitution.<sup>218</sup> Nonoriginalist approaches, in contrast, replace government by the people with “government by judiciary.”<sup>219</sup> On this view, when judges depart from the original meaning to invalidate democratically enacted legislation, “they usurp powers not given to them by the people [and] transform our constitutional democracy into a judicial aristocracy.”<sup>220</sup>

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original meaning of the Commerce Clause); Lawson, *supra* note 85, at 335–404 (discussing the source and meaning of the nondelegation principle).

215 Whittington, *supra* note 68, at 602.

216 Bork, *supra* note 92, at 6.

217 Scalia, *supra* note 69, at 863.

218 Robert Bork, for example, has contended that originalism is crucial if we are to “draw a sharp line between judicial power and democratic authority,” Bork, *supra* note 72, at 824, because faithful adherence to originalism means that “[e]ntire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the Framers intended democratic government,” *id.* at 827. See also William N. Eskridge, Jr., Lawrence’s *Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1043 (2004) (“Although such original meaning will sometimes trump the will of current majorities, it is ultimately consistent with democracy because it reflects the will of engaged supermajorities.”).

219 BERGER, *supra* note 74, at 466.

220 SOURCEBOOK, *supra* note 73, at 5; see also Graglia, *Posner on Bork*, *supra* note 82, at 1026 (“If the end is democracy, that end is served when judge-restraining originalism permits the results of the democratic political process to stand.”). Some originalists have argued that it is unconstitutional, notwithstanding the traditional doctrine of *stare decisis*, for the Supreme Court to follow a precedent that deviates from the constitutional text’s original, objective meaning. See *supra* note 69 and accompanying text.

Literalists and originalists also are similar in that they both self-consciously recognize—and, indeed, tend to celebrate—that their views about both interpretation and the cultural norms that are likely to be produced by those approaches to interpretation are inconsistent with elite opinion. As a result, literalists and originalists often identify themselves as members of a besieged minority, but they offer their arguments with open disdain for the intellectualism of the proponents of other views and with an air of absolute certainty in the correctness of their approach.<sup>221</sup>

Literalism belongs within the strain of conservative Protestantism that, for at least the last century, has understood itself to be “a beleaguered and ridiculed minority.”<sup>222</sup> The mockery suffered by William Jennings Bryan during the Scopes evolution trial is but the most vivid example of elite culture’s scorn for literalist beliefs. The chief reason for this scorn, literalists contend, is their rejection of modernity’s moral relativism and religious pluralism. Whereas liberal Protestants accommodated faith to the culture’s expectations, literalists refused. Instead, they reasserted the unique validity of biblical faith and the absolute demands of biblical morality.<sup>223</sup> In the view of most academics and cultural elites, literalists contend, that faith in absolutes deserves contempt. Most literalists accept, and perhaps even embrace, such contempt because it matches the biblical observation that the world sees God’s wisdom as “foolishness.”<sup>224</sup> When literalism is rejected and disparaged, it mirrors Christ’s own humbling before the world.<sup>225</sup>

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This is similar to Protestant claims about the proper role of the Church’s extratextual interpretations of the Bible.

221 See H. Jefferson Powell, *Interpretation as Obedience*, 3 JURIST: BOOKS-ON-LAW 2 (2000) (reviewing CRAPANZANO, *supra* note 9), available at <http://jurist.law.pitt.edu/lawbooks/reviews.htm> (“Literalism in constitutional interpretation provides the originalist with a rhetorical stance that invests personal moral outrage with supposedly impersonal legal authority.”).

222 MARSDEN, *supra* note 8, at 111.

223 See Hughes, *supra* note 14, at 176–77 (contending that the historical confession of Christians is now regarded as “meaningless and unacceptable to modern scientific man,” and that this view is held by “those who wish to accommodate [Christian faith] to the spirit of the age and thus to win the world’s favor”); Biblical Application, *supra* note 4, at 10 (arguing against mainstream Protestantism’s consistent accommodation to modernity); see also Hughes, *supra* note 14, at 185–86 (arguing that modern scholars reject literalism for its failure to embrace relativism and pluralism).

224 1 *Corinthians* 3:19 (New Revised Standard Version); see Payne, *supra* note 14, at 108 (describing the experience of literalist graduate students in biblical studies).

225 See Packer, *supra* note 15, at 216–19 (describing the world’s rejection of literalism as foolish and the necessity for humility in embracing literalism and developing

However, literalists strenuously reject cultural and academic caricatures that portray them as irrational.<sup>226</sup> Instead, literalists regularly portray their opponents as “anti-intellectual” for their close-minded reading of scripture.<sup>227</sup> Skeptical readers, literalists contend, refuse to examine the philosophical presuppositions that prevent them from considering the possibility of divine action in history. Although skeptics claim to be rational, to literalists such skepticism amounts to willful blindness; true rationality demands a mind open to acceptance of the Bible on its own, inerrant terms.<sup>228</sup>

Originalists similarly often seem well aware that their approach is disfavored among the elite and that the results that it is likely to produce are similarly viewed with disdain by the elite. Even though the originalist movement today is robust—it has prominent adherents on the Supreme Court<sup>229</sup> and in academia,<sup>230</sup> and it has strong political

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broader parallels between the condescension of God in Christ and the cultural predicament of biblical literalism).

226 For an example of such a claim, see RICHARDS, *supra* note 110, at 8 (“At the heart of fundamentalism is a form of irrationalism, a sectarian conception of certainty—itsself demonstrably unreasonable—that refuses to be open to contemporary argument and experience.”).

227 See Packer, *supra* note 25, at 327 (criticizing the “anti-intellectual subjectivism of liberals and existentialists”); see also Payne, *supra* note 14, at 90–95 (discussing the “limits” of a critic—“of deciding just how far the critic can or should go”).

228 See Geisler, *supra* note 17, at 333 (describing the irrationality of antiliteralists’ philosophical presuppositions); see also Kaiser, *supra* note 14, at 138–39 (“Why then should these very characteristics of revelation, which were so helpful to the people in their first reception of the message, now be used as an argument against its trustworthiness by a later generation . . . ?”); Payne, *supra* note 14, at 104, 108–09 (arguing that these critics refuse “to view [their] biblical subject within a supernaturalistic framework, which alone is appropriate to its divine nature”).

229 Justices Scalia and Thomas have proclaimed in their speeches and academic writing that they are committed to the originalist enterprise. See Scalia, *supra* note 69, at 862; Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996). They have regularly sought in their judicial opinions to move the Court towards an originalist approach to constitutional interpretation. See *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). In addition, several other Justices of the Supreme Court have indicated some support for the approach, and it has become increasingly common for even the more liberal Justices to advance arguments based on the original meaning. See, e.g., *Heller*, 554 U.S. at 636 (Stevens, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 764 (1999) (Souter, J., dissenting).

230 Originalism is also a regular subject for scholarly treatment, with academic proponents producing countless defenses of the methodology and symposia regularly dedicated to the topic. See, e.g., Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 885–96 (2008); Brian A. Litcher & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 491–94 (2009).

salience,<sup>231</sup> both in electoral campaigns<sup>232</sup> and battles over judicial nominations<sup>233</sup>—many originalists seem to identify as members of a besieged minority. Steven Calabresi, for example, has bemoaned that originalism “is the view of only a small, though growing, minority in the legal academy” and has complained that it is “often dismissed as either hopelessly naïve or as cynical obfuscation.”<sup>234</sup> In addition, although the most popular narrative of originalism—advanced by originalists themselves—is that it is “neutral” and apolitical,<sup>235</sup> originalists seem quite aware that their approach is likely to lead to results that are inconsistent with elite values.<sup>236</sup> Indeed, a common theme in originalists’ arguments is that nonoriginalist decisionmaking

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231 See Post & Siegel, *supra* note 170, at 561, 572.

232 See Frank B. Cross et al., *The Reagan Revolution in the Network of Law*, 57 EMORY L.J. 1227, 1229 (2008) (“The makeup of the federal judiciary was a significant issue in the 1980 presidential election. Ronald Reagan argued that the judiciary had lost its grounding in originalism and restraint and made political decisions suited for the legislature.”).

233 See, e.g., Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 72 (2009) (“It has become typical for the public interrogation of a Supreme Court nominee to include extensive discussion of the nominee’s ‘judicial philosophy.’ Abetted by this process, constitutional methodology, and originalism in particular, has become a site for popular political mobilization.” (footnote omitted)).

234 Steven G. Calabresi, Op-Ed., *The Right Judicial Litmus Test*, WALL ST. J., Oct. 1, 2007, at A23; see also Jonathan R. Macey, *Originalism as an “IsM,”* 19 HARV. J.L. & PUB. POL’Y 301, 301 (1996) (“[A]mong constitutional law scholars at elite schools, the idea of being an originalist is tantamount to being some sort of intellectual Luddite.”); Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 774 (complaining that “a devotee of the Framers’ intent is likely to be labeled . . . intellectually backward”); Scalia, *supra* note 77, at 38 (calling nonoriginalism the “ascendant school of constitutional interpretation”). Tom Levinson has contended that Justice Scalia’s “judicial persona resembles that of a fundamentalist because of his attitude toward contemporary culture and his colleagues, his approach toward legal interpretation, and his ambition for the widescale penetration of his distinctive perspective.” Levinson, *supra* note 109, at 447; see also *id.* at 448–55 (identifying the “essential characteristics” of fundamentalism).

235 See, e.g., BORK, *supra* note 80, at 7 (arguing that originalism requires “political neutrality of judging”); SOURCEBOOK, *supra* note 73, at 45 (arguing that originalism “advances neither a conservative nor a liberal political agenda”); Paulsen, *supra* note 71, at 2049 (“[O]riginal-meaning textualism is no mere cover for conservative political preferences, that it can yield surprisingly liberal political results on occasion, and that the methodology cannot fairly be reduced to a caricature.”).

236 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (complaining that the Court’s decision was “the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”).

reflects the views of liberal elites whose values do not command majority support.<sup>237</sup>

Although originalists feel marginalized by elites, they have tended to assert their claims about the correctness of their approach with an air of impressive self-confidence and certainty.<sup>238</sup> Steven Calabresi, for example, has contended that originalism is “so obvious that it should hardly need a name, let alone a defense.”<sup>239</sup> Others have described originalism as “axiomatic”<sup>240</sup> and “almost self-evidently correct.”<sup>241</sup> To originalists, “there *is* a single, ‘true’ method of constitutional interpretation”;<sup>242</sup> all “[o]ther approaches to interpretation are *simply wrong*.”<sup>243</sup>

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237 See, e.g., BORK, *supra* note 69, at 9 (“The abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that cannot achieve those results democratically.”); Graglia, *Constitutional Interpretation*, *supra* note 82, at 634–45 (arguing that nonoriginalist “judicial activism” is “favored by the American cultural elite . . . because it is the only means available in our system for keeping control of public policy out of the hands of the American people”). Bork and Graglia single out liberal judges. See BORK, *supra* note 69, at 8 (contending that judges “are by definition members of the intellectual class” and as such “tend to have values antagonistic to a traditional, bourgeois society”); *id.* at 17 (describing judges as “elites” whose views do not “command the allegiance of a majority of the people”); *id.* at 246 (arguing that there is “little doubt that this intellectual class bias has infiltrated our jurisprudence”); Graglia, *Constitutional Interpretation*, *supra* note 82, at 635 (referring sarcastically to the people as “clods” and to judges as “a superior class of people”). They also single out law professors who do not share the traditional cultural and moral values that the broader society holds. See BORK, *supra* note 69, at 241 (stating that “the theorists of left-liberal constitutional revisionism” are “best understood as the academic spokesmen for, and the rationalizers of, the dominant attitudes” of the intellectual class and are “rooted in a powerful American subculture whose opinions differ markedly from those of most Americans”); Bork, *supra* note 154, at 394 (arguing that nonoriginalist theories all “lead to approximately the same place,” that is, to the “political and social stance . . . characteristic of the professoriate”); Graglia, *Posner on Bork*, *supra* note 82, at 1022 (arguing that “sophisticated academics” prefer government by judges because of the “almost uniformly leftward results that judicial policymaking has produced for the past four decades”).

238 See Colby & Smith, *supra* note 67, at 241–43.

239 Calabresi, *supra* note 234, at A23.

240 BeVier, *supra* note 94, at 285.

241 Graglia, *Posner on Bork*, *supra* note 82, at 1020.

242 Kesavan & Paulsen, *supra* note 78, at 1129; see also Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 529 (1998) (reviewing JACK N. RAKOVE, *ORIGINAL MEANINGS* (1996)) (“Originalism’s advocates claim that it supplies the one, true interpretive method . . .”).

243 Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1834 (1997) (emphasis added). Robert Burt circumspectly noted this similarity between literalism and originalism when he described Justice Scalia’s approach as the “selec-

#### 4. The Idea of the Faithful Interpreter

Literalism and originalism share a deep commitment to the norm of fidelity in interpretation, which holds that an interpreter has an obligation to conform decisionmaking to the text.<sup>244</sup> Literalists and originalists contend that the act of interpretation involves a form of self-abnegation, in which the interpreter's will is suppressed and replaced by the demands of the text. As a result, both literalists and originalists contend that other approaches to interpretation are illegitimate because they are unfaithful to the text and thus permit the interpreter to usurp authority that is not rightfully his. This concern about free-form, untethered interpretation—and the related idea that the text is a powerful constraint over interpreters—is central to the conventional accounts of literalism and originalism.<sup>245</sup>

At its most basic level, literalism understands scriptural interpretation to be an act of worship because the Bible is sacred. Through its words, God encounters and instructs humans.<sup>246</sup> The sacredness of the Bible is especially evident in its relationship to Jesus Christ. The authoritative status of the Bible is inseparable from that of Jesus' himself. Jesus recognizes the Bible as God's Word, and the Bible proclaims Jesus' identity as Messiah.<sup>247</sup> Because of this bond between Jesus and the Bible, the believer's relationship with Jesus determines the proper attitude toward scripture:

[F]aithful discipleship to Christ must be held to involve conscientious acceptance of all that Scripture teaches, whether in the indicative or the imperative mood, and the common idea that loyalty to Christ can consist with skeptical or selective approaches to Scripture must be dismissed as a perverse and indefensible fancy.<sup>248</sup>

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tive authoritative mode in religious interpretive practice.” Burt, *supra* note 109, at 1693. This approach “is characteristically reflected in the style of discourse common to the practitioners of this interpretive perspective—a tone of certainty, an inclination toward authoritatively pronounced rules, an emphasis on clear-cut resolution of conflicting claims.” *Id.* at 1692.

244 Cf. Garet, *supra* note 98, at 42 (explaining that literalism (of the biblical or constitutional variety) “pictures normative hermeneutics as a series of commands issued by a sovereign text to the text's subjects,” and, thus, “the act of reading is defined as a form of obedience to those commands”).

245 See Ravitch, *supra* note 108, at 385 (claiming that literalists and originalists “seem to have a deep faith in the objectivity of their approaches”).

246 See Biblical Hermeneutics, *supra* note 10, exposition at 5–6 (describing the authority of the Bible as the word of God).

247 See PACKER, *supra* note 10, at 51; Helm, *supra* note 31, at 311, 314; Biblical Inerrancy, *supra* note 10, exposition at 6;

248 Biblical Application, *supra* note 4, at 9–10.

For literalists, faithfulness to Jesus requires obedience to the inerrant biblical text.<sup>249</sup>

The fruits of a believing reader's obedient submission to inerrancy contrast sharply with those of skeptical interpreters. To literalists, the denial of inerrancy results from the original sin of pride, through which humans trust in their own reason instead of submitting to God's will.<sup>250</sup> On this view, the skeptical reader deploys critical techniques to break free of the Bible's clear commands or denies the propositional character of revelation in order to substitute meanings that are more culturally attractive than the text would otherwise permit.<sup>251</sup>

By contrast, the faithful interpreter approaches the text in the same manner that a believer draws near to God—in reverence and humility.<sup>252</sup> Rather than using reason to judge the historical accuracy or moral validity of a particular passage, the believer submits himself to the instruction and direction offered by the text, and he allows the plain meaning of the Bible to judge him.<sup>253</sup> Moreover, in submitting to the plain meaning of scripture, the believer follows the example of Christ, who placed his complete trust in the Bible.<sup>254</sup> To the literalist,

249 See PACKER, *supra* note 10, at 60–61; Payne, *supra* note 14, at 111 (recognizing inerrancy as part of accepting Lordship of Christ).

250 J.I. Packer writes:

Not only at the pastoral and evangelical level does doubt about the truth of some Scripture breed doubt about the truth of all Scripture, and so make the church's task harder, but methodologically whenever one prefers a human idea to a biblical assertion one abandons the evangelical principle of constant and absolute submission to what is written, and indulges that habit of mind which has been the mother of intellectual arrogance and self-reliance in all its unlovely forms since the serpent entrapped Eve in Eden.

PACKER, *supra* note 10, at 43–44; see also Payne, *supra* note 14, at 112 (describing negative biblical criticism as evidence of sinful pride).

251 See PACKER, *supra* note 10, at 42–45 (describing the dangers of skeptical interpretation).

252 See *id.* at 19, 71; Hughes, *supra* note 14, at 193 (relating approaching scripture with reverence); Packer, *supra* note 15, at 216–18 (detailing regarding the Bible with obedience and humility); Payne, *supra* note 14, at 95 (citing obedience as the proper response to revelation, not critique).

253 See PACKER, *supra* note 10, at 44 (“[H]e who makes his own judgment his ground for rejecting anything in the Bible thereby logically makes his own judgment, rather than trust in God's truthfulness, his ground for accepting everything in the Bible that he does accept.”); Biblical Hermeneutics, *supra* note 10, exposition at 7 (outlining steps for interpretation of the Bible and stressing duty of faithfulness in each step).

254 See Feinberg, *supra* note 11, at 295; Packer, *supra* note 15, at 216; Payne, *supra* note 14, at 111–12.

therefore, faithful interpretation requires submission to the clear meaning of the biblical text.

Originalists similarly believe that interpreters owe a duty of fidelity to the constitutional text.<sup>255</sup> We have already seen how the text is central in originalist interpretation.<sup>256</sup> But the originalist commitment to the norm of fidelity to text is not simply the logical conclusion of the premise that the Constitution is written and a form of law. Originalists also believe that the norm of fidelity requires a form of judicial self-abnegation—or what Michael McConnell calls “judicial humility”<sup>257</sup>—which requires the judge to suppress his own will and replace it with the mandate of the text.<sup>258</sup> Accordingly, originalists have regularly stressed that their commitment to originalism entails a willingness to subordinate their personal views to the demands of the text.<sup>259</sup>

Originalists typically couch their arguments about the norm of fidelity in the language of judicial restraint. As Steven Smith has explained, a “central concern of originalism is that judges be *con-*

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255 Of course, originalists conceive of the obligation of fidelity as a legal, rather than a moral, one. But originalist arguments about fidelity tend to evoke what Lon Fuller called the “inner morality” of the law, LON FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969), and thus, in this sense, are quite similar to biblical literalists’ claims about the moral obligation of fidelity to the text. We explore the ways in which originalists’ conception of the obligation differs from literalists’ conceptions. See *infra* Part II.B.

256 See *supra* notes 69–84 and accompanying text.

257 Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1292 (1997).

258 See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 *HARV. L. REV.* 2387, 2415 (2006) (“Textualist and originalist judges, at least in principle, will on occasion vote to uphold laws they deeply disagree with, or to strike down laws they would favor, because the basis for constitutional judging . . . is independent of their own preferences.”).

259 See BERGER, *supra* note 74, at 6 (noting, before arguing that the Court’s conclusion in *Brown v. Board of Education* was wrong because it was inconsistent with the original meaning of the Fourteenth Amendment, that he “regard[ed] segregation as a blot on our society”); Paulsen, *supra* note 71, at 2049 (explaining support for originalism even though it “can yield surprisingly liberal political results on occasion,” results with which the author presumably disagrees); see also BORK, *supra* note 69, at 177 (“A theory of judging that allows the courts to choose political results is wrong, no matter in which direction the results tend.”); *id.* at 230–35 (noting that he is sympathetic to the libertarian aims of Richard Epstein and Bernard Siegan, but concluding that they do not “establish satisfactorily that those ends may be reached through the Court”); Scalia, *supra* note 77, at 23 (“To be a textualist . . . [o]ne need only hold the belief that judges have no authority to pursue those broader social purposes or write those new laws.”).



*strained* by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless.”<sup>260</sup> As we noted above, originalists contend that faithful adherence to the original meaning of the constitutional text is likely to constrain judges from imposing their personal views under the guise of interpretation. Originalists further contend that because nonoriginalist approaches by definition do not treat the constitutional text as the sole touchstone of constitutional meaning, their application inevitably results in “the imposition of the judge’s merely personal values on the rest of us.”<sup>261</sup>

Implicit in this criticism of nonoriginalism—or any interpretive approach that is untethered to the constitutional text—is skepticism that human reason alone is sufficient to produce legitimate results. Justice Scalia, for example, has argued that a “glaring defect” with nonoriginalism “is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution” of constitutional meaning once originalism is abandoned.<sup>262</sup> Freed from the obligation of fidelity to text, Justice Scalia has argued, nonoriginalists will simply “divide into as many camps as there are individual views of the good, the true, and the beautiful.”<sup>263</sup> Original-

260 Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989).

261 Bork, *supra* note 154, at 387; *see also* Bork, *supra* note 92, at 9 (“When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure.”). Although these views were for at least two decades the orthodoxy in originalist thought, several prominent originalists have recently deemphasized the importance of judicial restraint and backed away from the claim that originalism is uniquely able to constrain judges. *See, e.g.*, John Harrison, *On the Hypotheses that Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL’Y 473, 473–83 (2008); Whittington, *supra* note 68, at 608–09. Instead of urging judges to “get out of the way of legislatures,” these theorists have insisted simply that judges must “uphold the original Constitution—nothing more, but also nothing less.” Whittington, *supra* note 68, at 609. These new originalists often have pressed for more, not less, judicial interference with democratically enacted legislation. *See, e.g.*, BARNETT, *supra* note 69, at 263. But even these originalists regularly contend that originalism, by limiting the judicial role to a fixed historical baseline, is substantially more likely than other approaches to constrain the ability of judges to impose their views under the guise of constitutional interpretation. *See, e.g.*, WHITTINGTON, *supra* note 74, at 89–99, 204–06; Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 23 (2006).

262 Scalia, *supra* note 77, at 44–45; *accord* Scalia, *supra* note 69, at 862–63 (“I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.”).

263 Scalia, *supra* note 77, at 45; *accord* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617 (1999) (“It takes a theory to beat a theory and,

ists contend that their approach's fidelity to the text, by contrast, eliminates most of the indeterminacy—and thus the possibility of judicial mischief—that follows from reliance on human reason divorced from the constraint of text.<sup>264</sup>

### B. Differences

Given these important similarities between literalism and originalism, it is not surprising that many commentators have focused on them—often as a way of criticizing originalism—and that many literalists, when they have entered the political fray, have urged originalism as the correct method for interpreting the Constitution. But there are important differences between the two interpretive approaches that limit the utility of the comparison. In this subpart, we consider differences in the ways that literalists and originalists conceive of the scope and jurisdiction of their relevant texts and the source and justification of the duty of the interpreter.

#### 1. The Scope and Jurisdiction of the Text

The first fundamental difference between literalism and originalism derives from the starkly different nature, scope, and jurisdiction of their respective texts. Literalists believe that the Bible is truly universal. The Bible describes God's act of calling all creation into existence and establishing the moral and natural law through which all creation is ordered.<sup>265</sup> On this account, God preceded and created all. Accordingly, in literalists' view, the text of the Bible, which is the word of God, purports to create, to portray, and to order. To literalists, the normative and the descriptive are intertwined in the Bible; its character is both constitutive and representational. The Bible

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after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative.”); *cf.* Rehnquist, *supra* note 132, at 704 (“Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments.”).

264 See BeVier, *supra* note 94, at 288 (describing “impersonality” as a virtue of originalism). On the role of faith and reason in biblical and constitutional interpretation, see Francis J. Mootz III, *Belief and Interpretation: Meditations on Pelikan's “Interpreting the Bible and the Constitution,”* 21 J.L. & RELIGION 385, 386–98 (2006), comparing the role of belief in interpreting the Bible and the Constitution; and Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1065–69, 1113 (1999), arguing that conventional legal discourse reflects a kind of “faith” that we can discern “the law” and analogizing to scriptural interpretation.

265 See Biblical Application, *supra* note 4, arts. I–III; Biblical Hermeneutics, *supra* note 10, at exposition 5; Biblical Inerrancy, *supra* note 10, exposition at 5.

recounts not only God's creation of the world and its natural and moral ordering, but also purports to record history and to depict the natural world. Its representational character makes it perfectly sensible to ask whether the Bible (or a particular passage therein) is "true." And, of course, to literalists, the answer must be "yes."

Originalists, by contrast, recognize that the Constitution is limited both in scope and ambition. It creates a legal structure and a government that is both geographically and jurisdictionally limited. But originalists deny that the Constitution purports to depict a material reality. The Constitution is constitutive, but not representational. It would not make sense to ask whether the Constitution (or one of its provisions) is "true." This hints at, although does not fully capture, the most profound difference between literalism and originalism, which concerns the duty of the interpreter.

## 2. The Duty of the Interpreter

As we noted above, the idea of submission in interpretation is central to both literalism and originalism. To both literalists and originalists, faithful interpretation requires the subordination of individual desires, interests, and even (at times) reason to the demands of the text. But the source and justification of the interpreter's duty to submit are profoundly different in literalism and originalism.

To the literalist, the duty to submit to the text arises both from the divine character of the text and the specific divine attributes of the text's author. The interpreter must obey because of his relationship with God; the literalist submits to the text because God, its author, is omnipotent, omniscient, and good. To the literalist, the text is truthful in what it depicts and reliable in its directions for human life because of its divine authorship.

The literalist's belief in the necessity of submission to the text is not a form of blind obedience to despotic will. On the contrary, the literalist's obligation of submission to the text (and to God) arises from trust in the goodness of God and from a confidence that the Bible brings God's word of salvation, the highest good, to humans. Accordingly, the literalist believes that God's will and goodness correspond. To the literalist, it makes sense to ask whether the Bible (or a particular passage therein) is "good." And the literalist's answer ("yes") is inextricably tied to the literalist's reason for submission to the text.

For most originalists, in contrast, the legal duty to submit to the text arises solely from the character of the document as an authoritative legal text. To originalists, the act of constitutional interpretation

is conceptually separate from the decision whether to be bound by the Constitution in the first place.<sup>266</sup> As many originalists have acknowledged, the latter decision necessarily entails political or moral judgment.<sup>267</sup> But most originalists today maintain that once we decide to treat the Constitution as authoritative, the individual interpreter should not rely on extraconstitutional moral sources in the act of

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266 See, e.g., Barnett, *supra* note 263, at 636 (“We are bound because we *today*—right here, right now—profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment. We can easily jettison that original meaning by disclaiming our commitment to a written constitution, but this is a choice both courts and scholars have been generally unwilling to make.”); Kesavan & Paulsen, *supra* note 78, at 1127–28 (“One might legitimately decide, as a political matter, not to treat ‘this Constitution’ as authoritative—that is, not to agree to be bound by the written document as supreme law in the first place. But if one does decide to be bound by it . . . one necessarily has decided to be bound by the text as law . . . .”); Lawson, *supra* note 243, at 1825 (“One can be a strict interpretive originalist and forcefully deny that the Constitution has any political legitimacy.”); *id.* at 1834 (“Interpretation must precede evaluation, rather than vice versa. The Constitution’s merit as a constitution depends on its meaning, and one should not prejudice that question by allowing preconceptions about merit to affect the interpretive enterprise.”); Paulsen, *supra* note 71, at 2062 (“The question of whether one wishes to use the Constitution as a set of legal governing rules is not a question of constitutional law or constitutional interpretation. It is a question of political theory about constitution-making and constitution-following. As such, it is a distinct question from the question of what those legal governing rules are.”).

267 See, e.g., Kesavan & Paulsen, *supra* note 78, at 1127–28 (defending objective original meaning as an object of interpretation but acknowledging that “[o]ne might legitimately decide, as a political matter, not to treat ‘this Constitution’ as authoritative”); Lawson & Seidman, *supra* note 211, at 53 (describing the question whether we should “follow the instructions in the Constitution” as a “question of political morality, not of interpretive theory”).

interpretation.<sup>268</sup> On this view, originalism is a quintessential example of legal positivism.<sup>269</sup>

In this sense, the project of originalist interpretation is divorced from the morality of any particular interpretation of the text. Of course, in some broader sense (such as that famously described by Lon Fuller), the originalist judge's interpretive obligations derive from the "internal morality" of the law.<sup>270</sup> But for an originalist, the

268 To be more precise, originalist scholarship suggests two possible points at which the interpreter might exercise moral judgment. The first, as noted above, is in deciding whether to treat the Constitution as authoritative. See Lawson, *supra* note 243, at 1836 ("It is highly improbable that any plausible argument for the Constitution's authority can be made that does not, at least to some extent, depend on the Constitution's substance."). The second is in deciding whether to adopt originalism as the appropriate interpretive methodology. Some originalists acknowledge that this choice itself necessarily involves moral judgment; on this view, an interpreter might choose originalism because it will promote some morally or normatively desirable end. See, e.g., McConnell, *supra* note 79, at 360 (arguing that an essential characteristic of any theory of constitutional interpretation is that the Constitution "must be understood as having its origins in the consent of the governed"); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917, 919 (2008) (arguing that originalism will enforce "entrenched" constitutional norms that are "desirable" because they were "passed primarily under appropriate supermajority rules"); Steven D. Smith, *Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. (forthcoming 2011) (manuscript at 4–5) (on file with authors) (stating that the "central and animating normative purpose [of originalism] . . . is to empower *people* . . . to deliberate and then adopt constitutional provisions with the confidence that these will mean and do pretty much what the human beings who adopt them understand and intend the provisions to mean and do"), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1535057](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535057). But other originalists insist that originalism is not a normative theory at all, but rather is simply entailed by the character of a written text. See Solum, *supra* note 89, at 29–32 (distinguishing between normative and semantic originalism); *id.* at 30 ("What words mean is one thing; what we should do about their meaning is another.").

269 Of course, as Steven D. Smith has noted, "[t]his is not to say that originalists cannot believe in transcendent realities or truths," or that originalists cannot "believe that constitutional provisions are sometimes adopted on the basis of, or as a way of implementing, moral principles or values." Smith, *supra* note 268, at 5. But, as he explains, the "originalis[t] insists" that "what counts as law"—and thus what the originalist must interpret—is the constitutional text itself, not some extraconstitutional set of moral principles. *Id.* at 5–6.

270 FULLER, *supra* note 255, at 42; see also *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 180–82 (1987) (response of Robert H. Bork) (defining "judicial restraint" as "the morality of the jurist who self-consciously renounces power and tries to enforce the will of the lawmaker"); Garet, *supra* note 98, at 37–39 (discussing the "connection between textual interpretation and normative guidance" and concluding that the "practices of Constitution-reading" are a "pervasive activity undertaken with reference to serious objects").

act of constitutional interpretation should not be guided by the judge's personal morality. Indeed, originalists believe that it is illegitimate for a judge to ignore a provision of the Constitution simply because he thinks that the provision is unwise or undesirable. To the originalist, it is the judge's legal obligation to enforce the provision as written, regardless of his personal views about its goodness, because the provision is a part of an authoritative legal document. Of course, sometimes (and perhaps often)—to the extent, that is, that the original meaning of the Constitution is consistent with extraconstitutional moral sources—originalist interpretation will lead judges to interpret the Constitution in ways that are morally desirable. But on the originalist account, such an outcome is entirely accidental.<sup>271</sup>

### III. IMPLICATIONS OF THE COMPARISON

Although there are important similarities between literalism and originalism, it should also be clear at this point that there are very important differences that go to the heart of the interpretive enterprise for both. Literalists believe that the Bible is (and must be) inerently true, inherently good, and universal in its scope. In addition, literalists believe that biblical interpretation requires the interpreter to accept these characteristics as a precondition to faithful interpretation. Yet it would make no sense for an originalist to ask whether the Constitution is true, as it does not purport to describe a material reality. Originalists believe that the Constitution's scope is quite narrow. And the originalist's obligation to the constitutional text arises wholly independently of the goodness of the document. Originalism, unlike literalism, is in this sense deeply positivistic.

To be sure, given the obvious and important similarities between the two approaches, it is not surprising that critics of originalism have pointed to the comparison to underscore the defects of originalism as a method of constitutional interpretation. Of course, implicit in this charge is the pejorative suggestion that literalism itself is not an intellectually respectable or defensible method of interpretation. Nor is it surprising to find prominent literalists, when they enter the political fray, urging originalism as the proper approach to constitutional interpretation. In urging originalism, literalists have tended to promote its virtues as the method most consistent with the idea of the

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271 Cf. Garet, *supra* note 98, at 75 (“[T]he anthropological assumptions that render [the Protestant commitment to text] sensible on the theological side carry much less force on the legal side. Belief in total depravity creates a good reason to trust solely in Scriptural revelation. It supplies no good reason to trust solely in Constitution.”).

restrained interpreter. But those who have made the connection, for whatever reason, between literalism and originalism have tended to miss the relevance of the important differences that we have described.

Consider the ways in which critics of originalism have made the comparison. Cass Sunstein has described originalists as “fundamentalists” because their approach “bears an obvious resemblance to religious fundamentalism,” which “usually represents an effort to restore the literal meaning of a sacred text.”<sup>272</sup> Sunstein contends that fundamentalism in constitutional law “is destructive and pernicious” because it would “freeze the document in the eighteenth century,” and that fundamentalists are “arrogant and wrong” to insist that “theirs is the only legitimate approach to the Constitution.”<sup>273</sup> Morton Horwitz similarly has claimed that “originalism in constitutional discourse is the equivalent of religious fundamentalism” because of its “literalism” and its rejection of the idea of a “living Constitution.”<sup>274</sup> Horwitz noted that the conservative movement launched modern originalism in the 1980s as a “Great Awakening,” in the spirit of earlier American evangelicals, designed to restore the original Constitution.<sup>275</sup> He also focused on the extent to which originalists “insist that their constitutional vision reflects timeless textual truths.”<sup>276</sup> This “legal fundamentalism,” he argued, “has constantly threatened to bring constitutional change to a halt.”<sup>277</sup>

These comparisons have obvious rhetorical force, as they tend to capture what originalism’s critics suggest are some of its greatest defects: a slavish obedience to the past at the expense of present values, a misguided belief in the determinacy of text, and a misplaced confidence in the interpreter’s ability to distance himself from the act of interpretation. Implicit in the criticism is the suggestion that literalism suffers from these same defects.<sup>278</sup> The basic object of these

272 SUNSTEIN, *supra* note 1, at xiii.

273 *Id.*

274 Horwitz, *supra* note 1, at 663; *accord* Horwitz, *supra* note 109, at 116 (“Originalism in constitutional theory is a form of legal fundamentalism . . .”).

275 Horwitz, *supra* note 109, at 65.

276 *Id.*; *accord id.* at 34 (noting that originalism rests “on the notion that fundamental law is timeless and unchanging”).

277 *Id.* at 116. Sanford Levinson has also briefly compared originalism to fundamentalism, but he did not appear to use the comparison as a pejorative. *See* Levinson, *supra* note 1, at 133–34 (analogizing Justice Black’s textualism to the approach of a “Biblical fundamentalist” to illustrate the “Protestant” strain in constitutional interpretation).

278 To be sure, Sunstein disclaims any intention to “say anything about religious fundamentalism.” SUNSTEIN, *supra* note 1, at xiv; *accord* Sunstein, *supra* note 107, at

critics' comparison is the suggestion that literalism, with its uncritical acceptance of the determinacy and authority of the text, is a mindless and anti-intellectual form of interpretation, and thus, by association, so is originalism.

It is not our object here to assess the validity of these objections to literalist or originalist interpretation. Instead, our consideration of the similarities and differences between the two approaches suggests that these critics have relied perhaps too heavily on the similarities without any attention to what the differences suggest for the utility of the comparison. Although literalism requires a form of faithful submission to the text and a set of presuppositions that are not scientifically or empirically testable, it is not an irrational approach. Its presuppositions may be entirely foreign to those who have compared originalism to literalism, but the interpretive approach has an internal coherence if one is willing to accept those presuppositions. More important, when literalists declare that the Bible is clear and authoritative, they are not making a broader claim about the nature of all texts. Instead, they are asserting that the Bible has those characteristics because of its divine origin and status.

Whatever one can say about the sensibility or propriety of literalism's presuppositions, they are simply not ones that originalists hold about the Constitution. Originalists certainly do, as Sunstein charges, seek to "restore the literal meaning" of the Constitution<sup>279</sup> and insist, as Horwitz observes, that the Constitution's text embodies "timeless truths."<sup>280</sup> But originalists do not believe that the interpreter must accept, as a precondition to interpretation, that the Constitution is clear and authoritative because it is inerrantly true and inherently good. Originalist claims about the determinacy and authoritativeness of the Constitution derive from a different set of claims about the nature of text and the source of legal authority in our constitutional system. The pejorative comparison tends to miss this crucial differ-

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2235 n.3 ("[O]riginalists want to go back to what they see as fundamentals, and in any case, there is a clear link between the originalist method and certain claims about how to interpret religious texts."). But his criticism of legal fundamentalists, on the heels of his comparison of their approach to that of religious fundamentalists, makes this claim difficult to accept. See Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2208 n.4 (2006) (reviewing SUNSTEIN, *supra* note 1) ("One suspects that Sunstein links religious fundamentalism to originalism because he wishes to saddle his originalist adversaries with extraneous baggage.").

279 SUNSTEIN, *supra* note 1, at xiii.

280 Horwitz, *supra* note 109, at 92.



ence between literalists' and originalists' claims about their respective texts.

Literalists who have urged the Court to follow an originalist approach have similarly downplayed or ignored these important differences between the two approaches. It has become commonplace for prominent conservative Protestant literalists to support originalism as the proper approach to constitutional interpretation. For example, James Dobson, the founder of the Family Research Council and Focus on the Family, Jerry Falwell, the cofounder of the Moral Majority, and Richard Land, the president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention in the United States, have urged the appointment of "strict constructionists"<sup>281</sup>—that is, judges who will "interpret the Constitution as it was originally written and understood, rather than endeavor to rewrite it or ignore it altogether."<sup>282</sup> Many other prominent literalists have promoted originalism by urging opposition to "judicial activism,"<sup>283</sup> a popular label for nonoriginalist decisionmaking. As Albert Mohler, the president of the Southern Baptist Theological Seminary and the host of a popular conservative Protestant radio program, has argued, "Americans should demand judicial nominees who will understand the limited role of the courts and will resist siren calls to legislate and press social agendas from the bench" and who recognize that the "actual text of the Constitution must control judicial interpretation."<sup>284</sup>

One possible reason for literalists' attraction to originalism is simple instrumentalism: originalism tends to produce results consistent with most literalists' deeply held substantive beliefs.<sup>285</sup> Originalism,

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281 See *Meet the Press* (NBC Television Broadcast Nov. 28, 2004), transcript available at <http://www.msnbc.msn.com/id/6601018> [hereinafter *Meet the Press*] (describing the elements of Jerry Falwell's Faith and Values Coalition Platform in 2008, which included the confirmation of "strict constructionist" federal judges); *id.* ("I think what the president must do . . . is appoint justices and appeals court judges who are strict constructionists." (quoting Richard Land)).

282 James C. Dobson, *Dr. Dobson: The Battles Ahead*, CITIZENLINK (Jan. 4, 2006), <http://www.citizenlink.com/2006/01/focus-action-the-battles-ahead> (last visited Oct. 10, 2010).

283 See, e.g., Charles Colson & Nancy Pearcey, *Scout's Dishonor*, CHRISTIANITY TODAY, Nov. 15, 1999, at 128, 128; Christopher M. Gacek et al., *Assessing Judge Sonia Sotomayor Before Her Confirmation Hearings*, INFOCUS (July 2009), <http://downloads.frc.org/EF/EF09G30.pdf>.

284 Albert Mohler, Jr., *The Rule of Law and the Role of Judges—Why the Nomination of Samuel Alito Matters*, ALBERTMOHLER.COM, (Dec. 13, 2005), <http://www.albertmohler.com/2005/12/13/the-rule-of-law-and-the-role-of-judges—why-the-nomination-of-samuel-alito-matters>.

285 See RICHARDS, *supra* note 110, at 226–27 ("'Originalism' has come to enjoy the political support it does . . . among politicians in the Republican Party, because it

moreover, is perhaps most likely to produce substantive results popular among literalists with respect to the issues that are of most interest to religious conservatives, including disputes about human sexuality, family relationships, and the beginning and end of human life. Literalists have been most insistent in their opposition to nonoriginalist approaches to constitutional interpretation when confronting judicial decisions about these matters. Accordingly, literalists have regularly expressed hostility to “judicial activism” and pressed for “strict construction” of the Constitution when addressing abortion, same-sex intimacy, and assisted suicide.<sup>286</sup> Indeed, the modern originalist movement arose largely in response to the perceived excesses of substantive due process jurisprudence, in which the Court has identified and offered judicial protection to unenumerated (and controversial) rights. It therefore is not surprising that literalists have embraced originalism as an antidote to this jurisprudence.

The connection between originalism and results attractive to literalists, however, is not necessary, but contingent. One can imagine literalists becoming more sympathetic to nonoriginalist judicial decisionmaking if such an approach were deployed to prevent popular majorities from acting through democratic processes to adopt policies towards which most literalists are hostile. For example, if the Court overruled *Roe v. Wade* and declared that all embryos and fetuses, from the moment of conception, are “persons” entitled to life and liberty under the Due Process Clause—that is, entitled to rights that exist because of substantive due process—such that the states could no longer constitutionally choose to permit abortion, is it clear that literalists would condemn the decision as “judicial activism”? After all, it would be difficult to construct an originalist argument that fetuses are “persons” within the meaning of the Due Process Clause.<sup>287</sup> Indeed, although Jerry Falwell and others have promoted “strict construction-

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leads to what appears to its advocates to be a neutral and attractive constitutional theory that gives untrammled expression to fundamentalist religious views in American politics.”).

286 See, e.g., Charles W. Colson, *Kingdoms in Conflict*, FIRST THINGS, Nov. 11, 1996, at 34, 37 (“Most orthodox Christians are likely to find it impossible to support a political regime under which the judiciary—without any legislative license—sanctions abortion, euthanasia, and homosexual marriage.”); Albert Mohler, Jr., *For the Record: My Address at “Justice Sunday,”* ALBERTMOHLER.COM (Apr. 26, 2005), <http://www.albertmohler.com/2005/04/26/for-the-record-my-address-at-justice-sunday> (urging originalism as antidote to *Roe v. Wade* and *Lawrence v. Texas*).

287 See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 336–40 (2007) (concluding that fetuses were not “persons” within the original meaning of the Fourteenth Amendment); Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 415 (2007) (arguing that the unborn, “at least in the early

ist” judges as a cure for the perceived excesses of *Roe v. Wade*, they have also called for the appointment of “pro-life” judges,<sup>288</sup> a qualification that may, in the end, trump the commitment to originalism. If in fact literalists’ embrace of originalism is solely instrumental, then we would expect to find that embrace substantially weakened if other approaches to constitutional interpretation begin to produce more attractive results.

But instrumentalism is not the only possible explanation for the view widely expressed among conservative Protestants that the Court should follow an originalist methodology in constitutional interpretation. For at least some literalists, the appeal of originalism might arise from a principled understanding of the judicial role. On this view, literalists are attracted to originalism’s familiar concern about the dangers of subjective, untethered interpretation that follows from a more capacious understanding of the judicial role.<sup>289</sup> Of course, a literalist attracted to originalism for this reason might on occasion be forced to confront positive law that conflicts with his understanding of biblical truth. In such cases, a literalist might conclude that the judge can address the conflict by resigning his office; but as long as he acts within the judicial role, on this view, he is bound by the law. This view does not require the conclusion that literalism and originalism are parallel in all important respects.

But there is reason to suspect that, for at least some literalists, the source of originalism’s appeal is deeper. Originalism may be attractive to literalists because of its methodological familiarity.<sup>290</sup> As we noted above, literalism and originalism share a commitment to the idea that written texts have meanings that are determinate and readily ascertainable. In addition, both approaches focus on the interpreter’s obligation of fidelity to the text, and they share a deep concern about

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stages of pregnancy, are neither ‘citizens’ nor ‘persons’ under the original meaning of the Constitution”).

288 See *Meet the Press*, *supra* note 281.

289 Although he is not a biblical literalist and instead writes from the Catholic Natural Law tradition, Gerard Bradley offers a defense of originalist constitutional interpretation that could offer a principled basis for a literalist’s endorsement of originalism. Bradley argues that “originalism neither implies nor entails a moral obligation on the part of contemporary judges, legislators, or citizens to obey the will of the founders, no matter what.” Gerard V. Bradley, *Natural Law, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 277, 288 (Michael W. McConnell et al. eds., 2001). In other words, judges required by originalist interpretation to apply laws in ways that bring about unjust results may simply refuse to continue serving in that role.

290 See Kahn, *supra* note 103, at 272 (“[O]ne can see immediately the attraction of [legal] fundamentalism to both the religious and the religiously informed political imagination.”).

the possibility of subjective interpretation untethered to text. Some literalists have stressed this connection. For example, Albert Mohler contended at a “Justice Sunday” event in 2005 that just as literalists have responded to modern approaches to biblical interpretation by affirming that the Bible’s “text is the inerrant and infallible word of God” and “must constrain our interpretations,” the Justices of the Supreme Court must stop “reading into the Constitution what they [want] to find” and “expanding the Constitution by re-interpretation.”<sup>291</sup> For this reason, Morton Horwitz,<sup>292</sup> Jamal Greene,<sup>293</sup> and others<sup>294</sup> have suggested that the prevalence of evangelical and fundamentalist Protestantism in the United States accounts for the enduring, and perhaps unique, popularity of originalism in the United States.<sup>295</sup> But this view fails to account for the significant differences between the source and nature of literalism’s and originalism’s claims about text and interpretive fidelity.

As we have explained, literalists and originalists reach their conclusions about the authority and determinacy of text by very different routes. For literalists, the authority and determinacy of the biblical text derives from its status as the word of God. On this view, the Bible

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291 Mohler, *supra* note 286.

292 Horwitz, *supra* note 109, at 49 (“Protestant biblical literalism powerfully shaped the anti-interpretative presuppositions of American culture . . .”).

293 Greene, *supra* note 233, at 7 (“[T]he originalism movement that so glorifies the Constitution’s original understanding is conspicuously commingled with an evangelical movement that tends to disfavor departures from the original meaning of God’s word.”).

294 See, e.g., George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1310 (1990) (arguing that originalism’s resonance is partially attributable to “the revival of religious fundamentalism, particularly Christian fundamentalism,” because “the analogy between a literal interpretation of the religious Bible and an ‘originalist’ interpretation of the civil one is not hard to make or understand”); Philip C. Kissam, *Explaining Constitutional Law Publicly or, Everyman’s Constitution*, 71 UMKC L. REV. 77, 123 (2002) (“[I]t would not be surprising if judges holding fundamentalist religious or moral beliefs were attracted to originalist theories of constitutional interpretation . . .”); David A. Skeel, Jr., *What Were Jesus and the Pharisees Talking About When They Talked About Law?*, 23 J.L. & RELIGION 141, 144–45 (2007) (“[T]he resonance within the evangelical community of complaints about the refusal of ‘unelected judges’ to be bound by the statutory text also owes something to the tradition of Biblical literalism in American evangelicalism.”); cf. Garet, *supra* note 98, at 45 (arguing that the interpreter’s “worldview” tends to be correlated with the interpretive approaches that he finds appealing).

295 It is also possible that literalism and originalism share a psychological orientation, and that the “persistence of American fundamentalism in religion” explains the attraction of originalism. RICHARDS, *supra* note 110, at 10. See generally Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117 (2007) (discussing the concept of “cultural cognition”).

is clear and unchanging because God intends it to be intelligible to and binding on all. But for literalists, these attributes apply uniquely to the Bible. Biblical literalism thus does not commit its adherents to the view that all texts are similarly determinate and authoritative. Originalists, in contrast, generally profess to be agnostic about whether the Constitution ought to be treated as binding,<sup>296</sup> and those who have argued that it should have differed on the reason.<sup>297</sup> Originalists simply agree that, once the authority of the text is assumed, originalism naturally follows. To originalists, the constitutional text is determinate in the same way that all written texts are determinate: words carry a fixed meaning and are used to convey that meaning. For originalists, in other words, the Constitution's authoritativeness does not derive from any divine origin, or even because those who drafted and voted on its ratification were, in some meaningful sense, good or wise. Given these important differences, a committed biblical literalist could readily conclude that a different approach to interpretation is warranted for the Constitution.<sup>298</sup>

Yet another possibility is that literalists believe that the original meaning is itself bound up with divine values—that is, that the constitutional text itself enshrines biblical values. On this view, the touch-

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296 See, e.g., Lawson, *supra* note 85, at 335 (“Whether judges or other public officials should decide cases based on [the Constitution’s] original meaning is a question of normative political theory, on which I am (at least officially) agnostic.”).

297 See *supra* notes 266–70 and accompanying text. Compare WHITTINGTON, *supra* note 74, at 110–52 (using popular sovereignty as a justification for originalism), and McConnell, *supra* note 79, at 360, with BARNETT, *supra* note 69, at 85 (rejecting the popular sovereignty justification because of impossibility of unanimous consent and arguing that a constitution is “legitimate if it provides adequate procedural assurances that enacted laws properly respect the rights of those on whom they are imposed”).

298 Some literalists argue that the principles of textual interpretation applicable to the Bible also apply to other texts, because the Bible rests on natural principles of communication:

The general principles of interpreting are not learned, invented, or discovered by people. They are part and parcel of the nature of man as a being made in the image of God. Given the gift of communication and speech itself, man already began to practice the principles of hermeneutics. . . . In human conversation, the speaker is always the author; the person spoken to is always the interpreter. Correct understanding must always begin with the meanings the speaker attaches to his own words.

Kaiser, *supra* note 14, at 120. Nonetheless, biblical interpretation makes unique claims on readers because no other text is recognized as communicating divine instruction; that status alone requires the reader to refrain from skeptical criticism of the text, and to adopt an attitude of submission. See *Biblical Inerrancy*, *supra* note 10, exposition at 6 (regarding Christians’ attitude of reverence toward Jesus Christ and the Bible).

stone of interpretation is a perceived consonance between the Constitution and the Bible. Accordingly, the Bible becomes a legitimate source for the conferral of meaning of the constitutional text.<sup>299</sup> There is no inherent inconsistency between this view and originalism if in fact the Constitution was originally understood to embody a biblically based view of political ordering. Although we cannot here demonstrate why the Constitution's original meaning did not incorporate the Bible by reference, it suffices to note that no prominent originalist contends that the Constitution in fact did so.<sup>300</sup> To be sure, the Bible was influential to many of the Framers.<sup>301</sup> But to an originalist, the Bible is simply not an independently authoritative source of constitutional meaning. Accordingly, for the literalist who seeks a method of constitutional interpretation that allows for the infusion of biblical values, originalism is not a viable methodology.

Indeed, literalists should recognize that a full embrace of originalism requires interpreters to disavow reliance on moral sources extrinsic to the Constitution—including, of course, the Bible—in fidelity to the original meaning of the constitutional text. Whereas literalism is based on the premise that we have a duty to the biblical text because of its divine origin, and thus its inherent goodness and truthfulness, originalism requires fidelity to the text regardless of—indeed, at times even in spite of—the moral character of its provisions. Although the tenets of biblical literalism do not preclude the embrace of such an approach to the Constitution, there is reason to suspect that literalists who understand this difference would be significantly more skeptical about originalism as an approach to constitutional interpretation.

#### IV. CONCLUSION

It is not surprising that critics of originalism and proponents of literalism have noted a connection between the two interpretive approaches. Although their observations often seem to have been

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299 See, e.g., Brief Amicus Curiae of the Family Research Council, Inc. & Focus on the Family in Support of the Petitioners at 2, *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (No. 03-1693) (arguing that “biblical ethical monotheism underlies American constitutional and legal traditions”); PETER MARSHALL & DAVID MANUEL, *FROM SEA TO SHINING SEA* (2009) (asserting biblical roots of the U.S. Constitution).

300 See generally MARK A. NOLL ET AL., *THE SEARCH FOR CHRISTIAN AMERICA* (1989) (assessing and rejecting arguments for a strong historical link between biblical faith and the founding of the United States).

301 See generally DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* (2006); FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* (2006).

based on the most obvious similarities between literalism and originalism, we have demonstrated that the similarities are in fact deeper and more nuanced than most observers—both critics and proponents—have recognized.

Yet both critics of originalism and literalists who urge originalism as an approach to constitutional interpretation have failed to identify the fundamental differences between the two approaches. For literalism, interpretation is an act of faith in a God who is just and good. Accordingly, for the literalist, obedience to the biblical text—the word of God—is the highest human good. Originalism, in contrast, demands loyalty to a text regardless of its moral quality; just or good results are accidental rather than necessary features of originalist interpretation.

To be sure, it is easy to see why critics of originalism have been quick to point out the similarities between the two approaches. The force of the charge, of course, is based on originalism's guilt by association. But whatever one can say about literalism's presuppositions—and in particular literalism's mandate of unquestioning acceptance of the determinacy, authority, and content of the text—originalism simply does not require the interpreter to accept, as a precondition to interpretation, that the Constitution is clear and authoritative because it is inerrantly true and inherently good. Originalism's critics, in other words, have been perhaps too quick to assign to originalists assumptions that, even to literalists, are unique to the project of biblical interpretation.

It is also not difficult to see why many literalists have been attracted to originalism when they have entered the debate about constitutional interpretation. Originalism not only has generally produced substantively conservative results, particularly in cases involving family, sexuality, and human life—matters about which many literalists care deeply—but it also has a methodological familiarity that surely is attractive. But originalism's avowed commitment to moral neutrality—in theory, even if not always in application—also means that those results are contingent, not necessary. Indeed, literalists might want to take a closer look at originalism, and its positivistic character, before giving an unqualified endorsement to a theory that could just as well produce results anathema to their most deeply held (and biblically ordained) beliefs.

