

RESTORING OUR ANCIENT CONSTITUTIONAL FAITH

MICHAEL SINK*

INTRODUCTION	921
I. THE CONSTITUTION AS A SACRED TEXT	924
A. <i>America's Civil Religion</i>	924
B. <i>The Constitution as "Political Scriptures"</i>	927
II. PRIMITIVISM, THE AMERICAN RESTORATION MOVEMENT AND BIBLICAL INTERPRETATION	933
A. <i>Primitivism</i>	934
B. <i>The American Restoration Movement</i>	937
C. <i>Restorationist Interpretation of the Bible</i>	943
III. APPLYING THE PRIMITIVIST MODEL TO ORIGINALISM	950
A. <i>Originalism as a Parallel to Primitivism</i>	950
B. <i>Originalism, Judicial Tyranny and Value Selection</i>	955
CONCLUSION	961

INTRODUCTION

The 1987 United States Senate rejection of President Reagan's Supreme Court nominee, Robert H. Bork, was not only instructive for the constitutional issues that it brought to the national discourse surrounding the validity of originalist interpretation of the Constitution,¹ but also for the large public

* Candidate for Juris Doctor, University of Colorado School of Law, 2004. The author would like to thank Professor Robert F. Nagel and Jennifer Seidman for their invaluable assistance as well as Dr. Phil Roberts for his insight in the early stages of this project. Biblical quotations come from the New International Version. All views and mistakes are my own.

1. For the purposes of this paper, I rely on Paul Brest's definition of originalism as an "approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intention of its adopters," as opposed to "precedents and social values." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 & n. 1 (1980). In John Hart Ely's classic work on constitutional interpretation, he refers to both originalism and textualism as forms of "interpretivism." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-2 (1980). He notes:

What distinguishes interpretivism from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly

response that Bork's views generated.² Of particular interest is the massive public support of Bork's nomination by religious conservatives.³ Ostensibly, religious conservatives were in agreement with Bork that so-called judicial activism during the

discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.

Id.

2. For a contemporaneous discussion of the Bork nomination, see *The Bork Nomination: Essays and Reports*, 9 CARDOZO L. REV. (1987) which contains articles both in opposition to and in support of Bork's nomination, with authors ranging from Ronald Dworkin to Michael W. McConnell, now a judge on the Tenth Circuit Court of Appeals. See especially Monroe E. Price's *Preface*, stating that:

the debate over the nomination of Judge Robert H. Bork to the Supreme Court resulted in the most extraordinary national seminar on the Constitution and the role of the Court since, perhaps, the debate over secession. To say that it was the event of the bicentennial of the Constitution would be to understate dramatically the way in which the discussion seeped into the consciousness of the country and made individuals ponder basic questions about their society.

Id. at 1. In the words of Morton J. Horwitz:

The Bork nomination, I think, represented a critical moment in American constitutional history. . . . For a mass media era, the Bork hearings came as close to a serious and fundamental consideration of constitutional direction as we have ever had in America. . . . In some sense, it was no less than a constitutional referendum.

Horwitz, *Bork Nomination*, *supra* note 2, at 655. Tribe and Dorf comment:

The controversy [over how to interpret the Constitution] reached its most feverish pitch during the 1987 hearings on the nomination of Judge Robert H. Bork to serve as a Supreme Court justice. . . . [T]he Senate's decision to withhold its consent was based in large part on its rejection of Judge Bork's belief that a question for the 'original intent' of the Framers of the Constitution is the only proper method of interpreting the Constitution.

LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 3 (1991). See also ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK (1990).

3. To some extent this support continues. See, e.g., Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS (Jan. 1996), available at <http://www.firstthings.com/menus/ft9611.html>. The symposium includes an essay by Robert H. Bork entitled *Our Judicial Oligarchy*. Frank I. Michelman describes the First Things Symposium as a forum where:

noted social conservatives raised the alarms about recent American court decision in the fields of abortion and abortion protest, rights to refuse medical treatments or to assist suicide, gay rights, gender rights, distribution of sexually explicit media materials, and public religious observances. The alarms going up were not just moral, they were political.

Frank I. Michelman, *Living With Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 581-82 (2003) (footnotes omitted). More recently, see Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 27 (2003).

Warren and Burger courts generated constitutional decisions that violated general moral standards.⁴ Thus, in the eyes of religious conservatives, Bork's version of originalism would return the state of constitutional law to a higher moral level. Read in one light, this alignment of originalism and moral conservatism is merely another example of the union of politics and religion for the purpose of enacting a moral agenda. However, this alignment may also reveal a substantive and fundamental similarity between originalist interpretation of the United States Constitution and certain strains of conservative religious thought.

Constitutional scholars have previously noted the evangelical or even fundamentalist nature of originalism.⁵ However, because of the rather vague, indeterminate nature of these terms, they lack the requisite precision to serve as useful analytical tools. The purpose of this comment is to introduce the theological ideal of "primitivism" as a more precise subset of religious fundamentalism in order to more effectively explore the assumptions that underlie one of the most restrictive versions of originalist interpretation of the Constitution.

4. The most notable example is *Roe v. Wade*, 410 U.S. 113 (1973). See Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J.L. & PUB. POLY 427, 427 (1985) (describing the ongoing battle against *Roe*). For a discussion of whether judges should be swayed by such political or popular resistance when interpreting the Constitution, see Robert F. Nagel, *Disagreement and Interpretation*, LAW & CONTEMP. PROBS. 11 (Autumn 1993). To be fair, Bork does not argue that decisions like *Roe v. Wade* are constitutionally suspect simply because they violate his, and a large number of others', shared sense of morality. Rather, he notes that:

[i]f it is true that the problem with . . . the cases discussed is not that the courts made the wrong cultural choices, but that they rejected their duty to interpret the Constitution as it was originally understood, then it would be equally improper for the courts to respond to a different culture, one more congenial to . . . me. Their duty is to the law and nothing else.

Bork, *The Judge's Role in Law and Culture*, *supra* note 3, at 27 (referring to several cases including *Roe v. Wade*). However, Bork concedes that "if the . . . view of the judicial function I have outlined, had been observed by a Court majority, each of the cases . . . I find thoroughly objectionable would have come out the other way." *Id.* at 28.

5. See Horwitz, *Bork Nomination*, *supra* note 2, at 663 ("Originalists and constitutional literalists are fundamentalists."); Morton J. Horwitz, *The Supreme Court, 1992 Term: Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 116 (1993) [hereinafter Horwitz, *Fundamentality*] ("Originalism in constitutional theory is a form of legal fundamentalism."); Part III, *infra*.

Part I of this comment examines the correlation between religious and constitutional interpretation by examining the nature of both America's civil religion and the Constitution. Part II introduces the theological ideal of primitivism, as exemplified by the American Restoration Movement, and analyzes its similarity to originalist interpretation of the Constitution. Part III concludes by applying the lessons from the analysis of primitivism to assess the propriety of Bork's originalist interpretation of the Constitution.

I. THE CONSTITUTION AS A SACRED TEXT

It is an obvious point to note that the Constitution occupies a remarkable and unique position among American documents. What may not be as readily apparent is exactly how high the level of respect is for the Constitution.⁶ This section highlights the almost religious veneration of the Constitution as a political equivalent to the Bible.⁷ Part A provides a general overview of America's "civil religion" that permeates society and affects the political beliefs of Americans. Part B focuses on the Constitution itself as the sacred text of that civil religion.

A. America's Civil Religion

Religious belief and political institutions have frequently intertwined throughout American history. Although the First Amendment declares, "Congress shall make no law respecting the establishment of religion,"⁸ America has what scholars call a "civil religion."⁹ Some of its elements include a belief in the

6. For two excellent works relating to this topic, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) and MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986) [hereinafter, KAMMEN, *MACHINE*]. Many of the following examples were derived from these two works.

7. Various constitutional scholars have previously drawn this comparison, with relatively few actually laying a foundation for the analogy. For a list of articles using a comparison between religious and legal (including constitutional) interpretation, see *infra* note 48.

8. U.S. CONST., amend I.

9. The phrase "civil religion" originates from Rousseau. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin ed., 1968) (1762). Rousseau dedicated Book 4, Chapter 8, to what he called "The Civil Religion." He argued that "[t]here is thus a profession of faith which is purely civil and of which it is the sovereign's function to determine the articles, not strictly as religious dogmas, but as expressions of social conscience, without which it is impossi-

existence of God, the existence of an afterlife where good will be rewarded and evil punished, and that God intervenes in the affairs of nations, particularly on behalf of the United States.¹⁰ Although it does not encompass every religious group's belief, this form of civil religion is consistent with a majority of religious faiths in America.

Civil religion springs both from the widespread religious belief of the American citizenry as well as an interpretation of American history that regards the founding of the United States as an act of God's providence. For many early citizens, the founding of the United States was as much an act of divine providence as it was human effort.

This sense of divine purpose went well beyond the founding generation. As chronicled by Ruth Miller Elson, elementary school textbooks in the nineteenth century routinely attributed the founding of this country to divine influence.¹¹ Whether it involved the initial settling of North America¹² or the establishment of the United States as an independent nation,¹³ textbook authors routinely referred to Americans as

ble to be either a good citizen or a loyal subject." *Id.* at 186. See also SANFORD KESSLER, *TOCQUEVILLE'S CIVIL RELIGION* (1994); Robert N. Bellah, *Civil Religion in America*, 96 *DAEDALUS* 1 (1967), available at http://hirr.hartsem.edu/bellah/articles_5.htm; Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 *YALE L.J.* 1237 (1986).

10. See ROUSSEAU, *supra* note 9, at 186:

The dogmas of the civil religion must be simple and few in number, expressed precisely and without explanations or commentaries. The existence of an omnipotent, intelligent, benevolent divinity that foresees and provides; the life to come; the happiness of the just; the punishment of sinners; the sanctity of the social contract and the law—these are the positive dogmas.

11. RUTH MILLER ELSON, *GUARDIANS OF TRADITION; AMERICAN SCHOOLBOOKS OF THE NINETEENTH CENTURY* (1964) [hereinafter, ELSON, *GUARDIANS*]. Elson chronicles textbooks from as early as 1779 through as late as 1900. *Id.* at 349–414 (providing a "Bibliography of Textbooks Used").

12. See ELSON, *GUARDIANS*, *supra* note 11, at 59–60:

Sponsoring true religion and religious freedom, Americans are distinguished as the chosen people of God. . . . The analogy of the Americans to the ancient Hebrews, the chosen people of God, is used in many circumstances. The first American settlers were led from Europe to America just as the Hebrews were led to the Promised land. His hand was scarcely more conspicuous in bringing Israel out of Egypt, than in providing for the settlement of the Pilgrims in the New World.

13. See *id.* at 60:

The western migrant setting up a wilderness homestead is, like the Hebrew migrants to Egypt, under the direct protection of God. The most popular conception within this analogy compares Washington to Moses.

God's chosen people whose actions fulfilled God's will. As Elson concludes, the nineteenth century textbooks teach that:

the United States is a Protestant nation with a divinely appointed mission. As the modern Chosen People its inhabitants have a special motive for piety, and concomitantly they have a special motive for patriotism. American nationalism and religion are thoroughly interwoven; love of the American nation is a correlative of love of God.¹⁴

Supreme Court Justice Brewer supported this evaluation when he stated in *Church of the Holy Trinity v. United States* that America is a "Christian nation."¹⁵

Aside from the interpretation of American history, civil religion is most often evident at important public moments in the political arena and is sometimes referred to as ceremonial deism.¹⁶ Examples of ceremonial deism include: the opening of federal legislative sessions with a prayer; Presidents adding "so help me God" at the end of the inaugural oath; the invocation to God before judicial proceedings (God save the United States and this Honorable Court); the existence of national holidays like National Prayer Day, Thanksgiving, and Christmas; the national motto "In God We Trust;"¹⁷ and of course the Pledge of Allegiance with its "one nation under God," language.¹⁸ Indi-

Thus the premise of the founders of New England themselves—that New England was the New Zion and they the New Hebrews—is thoroughly accepted in these schoolbooks for the entire United States.

Regarding the comparison of George Washington to Moses, see RICHARD V. PIERARD & ROBERT D. LINDER, *CIVIL RELIGION & THE PRESIDENCY* 65–86 (1988) (referring to Washington as the American Moses), and Robert P. Hay, *George Washington: American Moses*, 21 AM. Q. 780–91 (1969).

14. ELSON, *GUARDIANS*, *supra* note 11, at 62.

15. 143 U.S. 457, 471 (1892) (quoting *People v. Ruggles*, 8 Johns. 290, 294–95 (N.Y. Sup. Ct. 1811)) (holding that a statute prohibiting importation of foreign labor was not applicable to the importation of clergy).

16. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2141–42 (1996); William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002); Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669 (2003).

17. See generally *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952).

18. The Ninth Circuit recently invalidated the teacher-led recitation of the pledge of allegiance in schools as an impermissible establishment of religion because it contained the phrase "under God." *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002). *But see* *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d

vidual states also have been permitted to expressly invoke religious motifs.¹⁹

As H. Jefferson Powell notes, the expressions of civil religion that still abound today may be viewed by some as "a welcome reminder of some underlying equation of the United States and the biblical city on the hill."²⁰ If there is such a thriving civil religion in America, then Thomas Grey was right to ask, "[d]oes [the Constitution] not provide the scripture [for the] national civil religion?"²¹

B. The Constitution as "Political Scriptures"

The analogy between the Bible and the Constitution has been present in constitutional discourse among both politicians and ordinary citizens for over two hundred years.²² From its inception, the Constitution has been viewed as a revered and holy document, even by its drafters. Although Thomas Jefferson spurned "sanctimonious reverence"²³ of political documents, the author of the Constitution, James Madison, did not share his opinion. For Madison, the elevation of the Constitution above regular laws and texts protected it from continuous challenges and ensured public confidence in its permanence and stability. While praising the Constitution as a charter of lib-

437, 442–48 (7th Cir. 1992) (upholding a similar rule, despite the presence of the phrase "under God"). See generally Paul Andonin, *One Nation, Without God? A Note on the Ninth Circuit's Decision in Newdow v. United States Congress Holding that Reciting the Pledge of Allegiance in Public Schools Violates the Establishment Clause and Therefore Unconstitutional*, 33 SW. U. L. REV. 119 (2003); Michael K. Steenson, *Essay: Pledging Allegiance*, 29 WM. MITCHELL L. REV. 747 (2003); Rachel C. Steiner, *One Nation Indivisible: In Liberty We Trust*, 2003 WIS. L. REV. 937 (2003).

19. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature's ability to open the legislative session with an ecumenical prayer by a Christian minister); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding a municipality's ability to use a nativity scene as part of its holiday display).

20. H. Jefferson Powell, *The Earthly Peace of the Liberal Republic*, in MCCONNELL, ET AL, *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 91 (2001). This is a fact Powell laments, rather than embraces.

21. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 17 (1984).

22. James Madison made the comparison in 1792. James Madison, *Charters*, NATIONAL GAZETTE, Jan. 19, 1792, reprinted in JAMES MADISON: WRITINGS 502–504 (Jack N. Rakove, ed. 1999) [hereinafter Madison, *Charters*].

23. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 PAUL LEICESTER FORD, *WRITINGS OF THOMAS JEFFERSON* 42 (1899) ("[S]ome men look at Constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched.").

erty and a sacred trust, Madison noted that public opinion "should guarantee, with a holy zeal, these political scriptures from every attempt to add to or diminish from them."²⁴ Even before the ratification of the Constitution, Madison stated his belief that "a finger of the Almighty hand" was present in the making of the Constitution.²⁵

Elson describes how the Constitution continued to be taught as a divinely inspired document during the nineteenth century.²⁶ According to one textbook, the writing of the Constitution displayed "the finger of that Almighty Hand, which has been so frequently and signally extended to our relief in the critical stages of the revolution."²⁷

Far from promoting knowledge of the Constitution, the religious veneration of the Constitution may have obstructed a legitimate understanding of the history surrounding its adoption. So lavishly did textbook authors laud the ease of the adoption of the Constitution that Elson laments, "[t]he child reading these books was most unlikely to have any realistic appreciation of the difficulties of making and adopting the Federal Constitution, although—or perhaps because—it was exalted to biblical status."²⁸

So entrenched was the idea of the divine inspiration of the Constitution, that textbook authors generally frowned upon amending the Constitution, even though the Constitution expressly allows it.²⁹ "The question of amending and changing the Constitution is not often broached, but when it is the Jeffersonian concept of a fluid government is usually rejected. Many [authors]. . . warn seriously of the dangers of altering a constitution. The Constitution is 'an old and sacred bargain' to be revered and preserved."³⁰

The biblical status of the Constitution persisted throughout the twentieth century. In 1987, Chief Justice Warren Bur-

24. Madison, *Charters*, *supra* note 22, at 504.

25. THE FEDERALIST No. 37, at 238 (James Madison) (Jacob E. Cooke ed., 1961).

26. ELSON, *GUARDIANS*, *supra* note 11, at 60 ("The American Constitution is compared with the Mosaic code in one instance; it too is apparently of divine inspiration.").

27. *Id.* at 62.

28. *Id.* at 292.

29. This is in contrast with the claims of writers of both the Old and New Testaments, who expressly forbid adding to or taking away from the text of their writings. See, e.g., *Deuteronomy* 4:2; *Deuteronomy* 12:32; *Revelations* 22:18-19.

30. ELSON, *GUARDIANS*, *supra* note 11, at 293.

ger repeated John Quincy Adams's application of the Mosaic Law's instruction for textual veneration, found in Deuteronomy 11:19, 20, to the Constitution:

Teach the [Constitution's] principles, teach them to your children, speak of them when sitting in your home, speak of them when walking by the way, when lying down and when rising up, write them upon the doorplate of your home and upon your gates.³¹

Some Americans still believe that the Constitution is a divinely inspired document. Supreme Court nominee George Sutherland stated in 1922 that he believed the Constitution to be a "divinely inspired instrument."³² In recent history, former Arizona Governor Evan Mecham declared the Constitution to be divinely inspired.³³

While this reverence for the Constitution may merely be caused by ardent patriotism, or by the almost miraculous victory of the colonies in the American Revolution, there may also be something about the nature and text of the Constitution itself which lends it a biblical nature. The U.S. Supreme Court has even recognized the biblical origins of certain constitutional rights³⁴ and other legal rules.³⁵ Under this view, the

31. Former Chief Justice Warren Burger, Address as Chancellor of Charter Day ceremonies at The College of William and Mary, quoting John Quincy Adams's remarks celebrating the fiftieth anniversary of the Constitution, in Ben A. Franklin, *At William and Mary, a Post to Honor Burger*, N.Y. TIMES, Feb. 8, 1987, at 26.

32. KAMMEN, MACHINE, *supra* note 6, at 264.

33. LEVINSON, *supra* note 6, at 14.

34. See *Miranda v. Arizona*, 384 U.S. 436, 458 & n.27 (1966) (stating that the roots of the privilege against self-incrimination encompassed by the Fifth Amendment go back to ancient times). The *Miranda* Court notes that "[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible. 'To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.'" *Id.* at 458 n.27 (quoting Maimonides, *Mishneh Torah* (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 3, III Yale Judaica Series 52-53). See also 2 DAVID S. RUDSTEIN, ET AL., CRIMINAL CONSTITUTIONAL LAW ¶ 4.01[1] (2002) ("Roots of the privilege found in the Fifth Amendment may be traced to the Bible.").

35. See *United States v. Bajakajian*, 524 U.S. 321, 330 (1998). "The theory behind [civil *in rem* forfeitures] was the fiction that the action was directed against 'guilty property,' rather than against the offender himself." *Id.* The Court continues, "[t]he 'guilty property' theory behind *in rem* forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense. See *Exodus* 21:28." *Id.* at 330 n.5. The U.S. Supreme Court also seems to have an affinity for using the biblical text as a source of definitions for

Constitution may be viewed as a reformulation of scriptural truths and thus is little more than an abbreviated and reworded Bible.³⁶

In 1982, the United States Congress and President Reagan gave official support to this view, when they proclaimed that 1983 would be the year of the Bible. Public Law 97-280 stated that, "Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States."³⁷

Even the word choice of the Preamble suggests that the Founders recognized a divine origin of the Constitution's provisions. As James Boyd White has noted:

The Preamble makes additional claims for "the People" who are its author and its audience. The diction tells us, for example, that they are engaged in an act that is sacred as well as secular in character and authority, for we know that ministers are "ordained" and that churches as well as constitutions are "established."³⁸

Aside from the substantive provisions of the Constitution, the nature of the Constitution is reminiscent of the Bible. The first and most obvious point about the nature of the Constitution is that it is a written document. A written Constitution is the embodiment of the ideal of limited and restrained govern-

statutory phrases and as a model of clarity with which to contrast certain legal rules. See *Muscarello v. United States*, 524 U.S. 123, 129 (1998) (definitions of statutory phrases); *Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 527, 549-50 (1995) (Thomas, J., concurring) (model of clarity).

36. A more subtle and removed line of this argument is encompassed by scholars' attempts to locate the origin of the Constitution's political theory in the religious beliefs of the framers. For instance, Marci Hamilton has located the Constitutional Convention's focus on limited government and checks and balances in the Calvinist doctrine of the total depravity of man. Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 293 (Michael W. McConnell et al. eds., 2001). See also Fernando Rey Martinez, *The Religious Character of the American Constitution: Puritanism and Constitutionalism in the United States*, 12 KAN. J.L. & PUB. POL'Y 459 (2003).

37. Pub. L. No. 97-280, 96 Stat. 1211.

38. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 240 (1984). Compare the use of "Ordain and Establish" by Madison in the Constitution, U.S. CONST. pmbl., with "governments are instituted among men" by Jefferson in the Declaration of Independence, *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776). However, the Declaration of Independence does make four references to deity, whereas the Constitution makes none. *THE DECLARATION OF INDEPENDENCE* paras. 1, 2, 32.

ment. Chief Justice John Marshall relied on the written nature of the Constitution when he described the United States as "a government of laws and not men."³⁹

The ideal of limited government is one that has roots in early Christian ideas about the relationship between individuals as moral actors and individuals as political actors.⁴⁰ Michael W. McConnell has argued that "the division between temporal and spiritual authority in Christian thought gave rise to what would become the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of equality among all human beings."⁴¹

This idea of two separate sources of law for the Christian became especially important once Christianity became the official religion of the Roman Empire and when, for the first time, Christians could control civil laws. During this period, theologians, such as Augustine, began to define the Christian ideal of earthly government. Concerned about the growth of individual power and cognizant of a superior divine law, constitutionalism as a guarantor of limited government became a recurring the-

39. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

40. The New Testament stresses the eternal, non-temporal nature of the kingdom of God. From the Book of John: "Jesus said, 'My kingdom is not of this world. If were, my servants would fight to prevent my arrest by the Jews. But now my kingdom is from another place.'" *John* 18:36. Christians were to be obedient to rulers, so long as obedience to the laws did not violate the laws of God:

Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore he who resists authority has opposed the ordinance of God Wherefore it is necessary to be in subjection, not only because of wrath, but also for conscience' sake. For because of this you also pay taxes, for rulers are servants of God, devoting themselves to this very thing. Render to all what is due them: tax to whom tax is due; custom to whom custom; fear to whom fear; honor to whom honor.

Romans 13:1-7.

And when they had brought [the apostles], they stood them before the Council. And the high priest questioned them, saying, "We gave you strict orders not to continue teaching in this name, and behold, you have filled Jerusalem with your teaching, and intend to bring this man's blood upon us." But Peter and the apostles answered and said, "We must obey God rather than men."

Acts 5:27-29. Thus, although Christians are to be subject to governing rulers, civil authority was clearly subordinate to divine authority.

41. Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, 5-6, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (Michael W. McConnell et al. eds. 2001).

ory of Christian civil government. In fact several scholars find constitutional government inherent in Christian doctrine, particularly in the writings of Augustine.⁴² Robert Kraynak has observed that, "Christianity does not require a specific form of government (such as democracy) nor a specific theory of social justice (such as human rights); but it does have a distinctive view of politics . . . that we can recognize today as a type of 'constitutionalism.'"⁴³

Additionally, scholars have noted how the authoritarian nature of the Constitution reveals an almost biblical or even supernatural character. The nature of the Constitution presumes that it may not only create a government out of words, but also control itself. The tone of the Constitution reveals this authoritarian and almost divine message.

Authority is claimed to tell each branch of the government what its powers are and, subject to the power of amendment, to do so with finality. This claim to control even the elected representatives of the people is extraordinary, and the voice that makes it is a voice of nearly superhuman authority. It admits no qualification and no modification except on its own terms.⁴⁴

This authoritarian and normative nature of the Constitution as the supreme legal text of the land bespeaks a sacred character similar to that of the Bible.⁴⁵

42. GRAHAM WALKER, *MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS* (1990) chs. 3-4; Gerhart Niemeyer, *Augustine's Political Philosophy?*, in *THE CHRISTIAN VISION: MAN IN SOCIETY*, 51-75 (1984); JEAN BETHKE ELSHTAIN, *AUGUSTINE AND THE LIMITS OF POLITICS* (1995).

43. ROBERT P. KRAYNAK, *CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD* 203-04 (2001).

44. *Id.* at 242.

45. See *INTERPRETING LAW AND LITERATURE; A HERMENEUTIC READER*, at ix (Sanford Levinson & Steven Mailloux eds., 1988) ("[T]he Sacred Text defined itself as normatively binding, and debates about textual meaning necessarily became debates about how lives should be lived. Legal texts are similarly normative for cultures recognizing their authority"). Peter Goodrich has applied this observation to the process of interpretation itself, noting:

[T]he legal concept of interpretation is theological in its derivation and that it is unjustifiably authoritarian in its practice. The exegetical and hermeneutic traditions of religious and legal interpretation, it is argued, survive in and crucially continue to support the persistent contemporary privileging of the law as definite written text, as code (caudex) or unitary and univocal inscription of a sovereign will.

Whether based on the underlying similarities between the Constitution and the Bible, or simply on the common public perception of the Constitution as political scripture, the connection between the two likely influences interpretations of the Constitution. Based on the perceived similarity between the two documents, biblical interpreters may transfer their values and methods from one arena to another, if for no other reason than out of sheer habit.⁴⁶ Thus, members of conservative religious groups may be predisposed to endorse constitutional theories premised on the finding of the intent of the author. Whether or not they should is an entirely separate matter.⁴⁷

II. PRIMITIVISM, THE AMERICAN RESTORATION MOVEMENT AND BIBLICAL INTERPRETATION

Scholarly comparisons between biblical and constitutional interpretation have yielded several interesting illustrations of common interpretive issues.⁴⁸ This part introduces the reli-

Peter Goodrich, *Historical Aspects of Legal Interpretation*, 61 IND. L. J. 331, 333 (1985-86).

46. Max Lerner, *Constitution and Court as Symbols*, 42 YALE L. J. 1290, 1294 (1936-37). For an interesting reference to what may be an overt crossover between the two texts, see *Long v. Comm'r*, 50 T.C. M. (CCH) 524, 524 (1985), which notes that the defendant "attended instructional classes twice per week for approximately 6 months. The instruction related to the 'interpretation, understanding, and preparation of the Bible under the New Testament, certain sacred scriptures and the constitution of the United States.'" *Id.*

47. See *infra* Part III. For an article criticizing such use of Biblical interpretation in the constitutional arena, see Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359 (1988), which notes:

Literary criticism and biblical hermeneutics are held up to us as models. We lawyers, it is said, should learn how to read the Constitution from modern methods of reading such texts as Hamlet or the Bible. . . . I do not read the Bible with the same purpose or in the same way that I read Hamlet; and reading the Constitution has yet a different purpose and a different interpretive method. Interpretation is like architecture, in this important respect: form must follow function.

Id. It may be that McConnell is merely objecting to the use of "modern," "subjective," and "indeterminate" methods of Biblical interpretation as models:

It has become fashionable these days for legal academics to seek their inspiration not from the interpretive methods of John Marshall, Joseph Story, or Chancellor Kent, but from interpretive methods in other disciplines, the more subjective and indeterminate the better. . . . I am not sure I much like modern methods of reading Hamlet, and am quite confident I do not like modern methods of reading the Bible.

Id.

48. See Samuel J. Levine, *Unenumerated Constitutional Rights and Unenu-*

gious idea of primitivism into the current discussion of American constitutional law. It is done in the hope that primitivism will serve as a useful tool with which to analyze the foundational assumptions that underlie originalism in order to explore if an originalist interpretation of the Constitution is appropriate. Section A introduces the idea of primitivism as a theological ideal. Section B illustrates primitivism's features within a particular religious group, namely the American Restoration Movement. Section C will illustrate primitivist biblical interpretation by looking at specific practices of the American Restoration Movement.

A. Primitivism

Broadly defined, primitivism is the elevation of some ancient period or practice to serve as a model for current belief and conduct.⁴⁹ The dominant feature of primitivism is that it is

merated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics, 15 CONST. COMM. 511, 511 (1998) ("[A] body of literature has emerged comparing constitutional textual analysis to Biblical hermeneutics."). Levine's note 6 lists the following books and articles as having raised the comparison: Jim Chen, Book Review, 11 CONST. COMM. 599 (1994-95); Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); David R. Dow, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 HOUSTON L. REV. 543 (1992); Edward McGlynn Gaffney, Jr., *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TULANE L. REV. 1143, 1166 n.102 (1990); Grey, *supra* note 21; Horwitz, *Fundamentality*, *supra* note 5, at 48-51 & 50 n.90; *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997); LEVINSON, *supra* note 6; Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989); Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583 (1993).

49. Frank H. Little has been credited with beginning the scholarly interest in primitivism with his book, *THE ORIGINS OF SECTARIAN PROTESTANTISM* (1964), which explored primitivism in the 16th century Anabaptists. See Richard T. Hughes, *Preface: The Meaning of the Restoration Vision*, in *THE PRIMITIVE CHURCH IN THE MODERN WORLD*, at ix (Richard T. Hughes ed., 1995) [hereinafter, HUGHES, *PRIMITIVE CHURCH*]. In addition to Littell's *THE ORIGINS OF SECTARIAN PROTESTANTISM* and Hughes' *PRIMITIVE CHURCH*, several other books are helpful for understanding primitivism. See THEODORE DWIGHT BOZEMAN, *TO LIVE ANCIENT LIVES: THE PRIMITIVIST DIMENSION IN PROTESTANTISM* (1988); RICHARD T. HUGHES & C. LEONARD ALLEN, *ILLUSIONS OF INNOCENCE: PROTESTANT PRIMITIVISM IN AMERICA, 1630-1875* (1988) [hereinafter, HUGHES & ALLEN, *ILLUSIONS OF INNOCENCE*]; RICHARD T. HUGHES, *THE AMERICAN QUEST FOR THE PRIMITIVE CHURCH* (Richard T. Hughes ed., 1988) [hereinafter, HUGHES, *AMERICAN QUEST*].

ahistorical.⁵⁰ The intervening period of time between the model and the present is irrelevant for purposes of understanding or applying the model. Primitivists attempt to strictly adhere to the historical model without regard for modern developments or even for modern understandings of the period of history that serves as the model.⁵¹

The term primitivism and its cousin, restorationism, are roughly synonymous.⁵² Restorationism adopts the major primitivist assumptions, but also maintains that churches have abandoned and need to restore the primitive model. As Richard T. Hughes has described it:

[r]estorationism involves the attempt to recover some important belief or practice from the time of pure beginnings that believers are convinced has been lost, defiled, or corrupted. . . . Without a fall, a loss, or an apostasy, the notion of restoration is simply unintelligible. On these points, all [r]estorationists agree.⁵³

As is somewhat apparent in Hughes' observation, several themes continually appear in restorationist argument and literature. These themes underlie various assumptions of primitivist thought and may be termed perfection, patternism, permanence, apostasy, and consequence.

Perfection is the assertion that the primitive model is desirable because it is pure, perfect or ideal. Patternism extends the perfect model by arguing that the model was designed or intended by its creators to effectively govern future generations. Permanence is the assumption that the model does not need, or is not intended to change or grow. This idea flows from the notion of perfection, and insists that the perfection of

50. See Grant Wacker, *Playing for Keeps: The Primitivist Impulse in Early Pentecostalism*, in HUGHES, *AMERICAN QUEST*, *supra* note 49, at 196, 197 ("I shall use [primitivism] in a broadly generic manner to refer to any effort to deny history, or to deny the contingencies of historical existence, by returning to the time before time, to the golden age that preceded the corruptions of life in history").

51. See HUGHES, *PRIMITIVE CHURCH*, *supra* note 49, at xi. ("[R]estorationists seek to apprehend some particular dimension of the founding age, unmediated through subsequent understandings").

52. See *id.* at xii. ("In my judgment, it is far more productive to use *primitivism* and *restorationism* as roughly synonymous and therefore interchangeable").

53. *Id.* at x. But see Henry Warner Bowden, *Perplexity over a Protean Principle: A Response*, in HUGHES, *AMERICAN QUEST* *supra* note 49, at 176 ("[T]here is no meaning intrinsic to the title [restoration], and we can find no common agreement on any set of organizational forms or ideas").

the model is timeless and that modern adaptation is not only unnecessary, but detracts from the perfection of the model. Apostasy is the assertion by Restorationists that current practice has fallen away from the model and is in need of reform. The final theme is that of consequence which asserts that if the primitive model is not restored, either disastrous consequences will result or positive goals will not be achieved.

In the Christian religious context, primitivism and restorationism seek to model the present-day Christian community, the church, after the example of the Christian church at the time of its founding, the first century after Jesus. The primary, if not exclusive, source of information for Restorationists about the first century church is found within the text of the twenty-seven books of the New Testament.

Christian primitivism is largely a product of the Protestant Reformation which aimed to rid Christianity of perceived abuses created by the hierarchy of the Catholic Church.⁵⁴ Contrary to the Catholic position, many reformers felt that all tradition was of human origin and was responsible for the abuses in the Church. Thus, many reformers⁵⁵ sought to divorce themselves from human traditions and strictly return to the model of the first century church. Reformers chose the first century church because the Bible contained an historical record and pattern which could be relied upon as untainted by human tradition.

This notion of primitivism correlates to a method of interpreting the Bible. As Demetrius Teigas has observed, early Protestants sought to escape from the impurities of Catholic tradition by rediscovering "some initial 'original' meaning that was embedded in the texts of the Bible."⁵⁶ Hughes contrasts

54. HUGHES & ALLEN, ILLUSIONS OF INNOCENCE, *supra* note 49, at 3.

55. As Ronald E. Osborn puts it:

Strictly speaking, the European backgrounds are backgrounds only. Similar restoration efforts, with variations in detail, are to be seen in the labors of John Wycliffe, of the Anabaptists, of Ulrich Zwingli, of English Independents and Baptists, and especially of various small British groups in the late eighteenth century. Most important in direct contribution of ideas or personalities to the Disciples were the small movement led by John Glas and his son-in-law Robert Sanderman in Scotland, the revivalism of the Haldane brothers (Robert and James Alexander), and the work of the Scotch Baptists. These groups, especially the latter three, gave little thought to the problem of Christian union; their concern was apostolic purity, conceived in literal and legalistic terms.

Ronald E. Osborn, *Disciples of Christ*, in VERGLIUS FERM, *THE AMERICAN*

this group of Restorationists with other Christian believers, including some modern Protestants, by noting that the principle difference lies in the fact that non-Restorationists:

are uncomfortable speaking of an apostasy or a fall, . . . do not view the founding age as more normative than other periods in Christian history, or . . . think the founding age important but self-consciously interpret its meaning in light of later events and developments.⁵⁷

Although primitivism is a theological doctrine, it also serves as an interpretive theory through which to view the biblical text. Primitivism seeks to locate in the text of scripture, especially the New Testament, the pure form of Christianity as practiced by Christians in the first century. This model of Christianity must be teased out from the various narratives and letters composing the New Testament. Thus Primitivism essentially joins an historical ideal with the interpretation of an authoritative text and argues for the binding effect of that original meaning. Perhaps the best way to illustrate this joiner of an historical ideal and an authoritative text is by examining the interpretative practices of a notable primitivist religious group, the American Restoration Movement.

B. The American Restoration Movement

The Restoration Movement, also known as the Stone-Campbell movement,⁵⁸ in America is traceable back to the early 1800s and to the revival movement that swept the frontier states.⁵⁹ Its modern descendants include the Disciples of

CHURCH OF THE PROTESTANT HERITAGE 390 (1953) [hereinafter Osborn, *Disciples of Christ*].

56. DEMETRIUS TEIGAS, KNOWLEDGE AND HERMENEUTIC UNDERSTANDING 27 (1995).

57. *Id.* at x–xi.

58. The movement was also alternately known as the Stone-Campbell Movement, the Disciples of Christ or the Christian Church. After the group began to divide into different wings around 1900, the separate groups adopted different names. See *infra* note 59.

59. See WINFRED ERNEST GARRISON, RELIGION FOLLOWS THE FRONTIER; A HISTORY OF THE DISCIPLES OF CHRIST (1931). By all accounts the three most prominent leaders in the movement were Thomas and Alexander Campbell and Barton Stone. Thomas and Alexander Campbell, along with others who had separated themselves off from the Baptist and Presbyterian Churches, later merged with Barton Stone. Since the Restoration movement was a grassroots movement

Christ, Christian Churches, Churches of Christ (institutional and non-institutional), and Independent Churches of Christ. For the most part, the Restoration movement lacks a centralized government, settling instead for local autonomous congregational units.⁶⁰

Although numerous religious groups could serve as an example of primitivism, the American Restoration Movement ("Restoration Movement") was an ideal model in that it was, at least initially, an American phenomenon that occurred close to the founding of this country.⁶¹ Thus the history of the Restoration Movement is relatively contemporaneous with the history of the Constitution. Hopefully by narrowing the focus to this particular group, the point will be clearer, if not initially as broad.⁶²

The Restoration Movement was essentially a primitivist movement designed to return Christians to the pure form of Christianity practiced in the first century.⁶³ Restorationists be-

that eventually aggregated into a larger group, there is no precise date of origin for the group. The most important beginning landmark may be the publication of Thomas Campbell's *DECLARATION & ADDRESS* in 1809 which introduced many of the theological themes that would dominate the Restoration movement for years to come. See *Preface*, *THE QUEST FOR CHRISTIAN UNITY, PEACE, AND PURITY IN THOMAS CAMPBELL'S DECLARATION & ADDRESS: TEXT AND STUDIES*, at xv (Thomas H. Olbricht & Hans Rollmann eds., 2000).

60. Osborn, *Disciples of Christ*, *supra* note 55, at 389. The Disciples are slightly more organized than the Churches of Christ but are still not generally hierarchical in nature. See WILLIAM J. WHALEN, *SEPARATED BRETHREN: A SURVEY OF NON-CATHOLIC CHRISTIAN DENOMINATIONS IN THE UNITED STATES* 100 (1958) ("The fundamentalist Churches of Christ keep no records and are even more loosely organized than the Disciples since they have no annual convention, and no local, state, or national associations.").

61. FRANK MEAD, *HANDBOOK OF DENOMINATIONS IN THE UNITED STATES* 95 (10th ed. 1995) ("Among the dozen largest religious groups in the United States, the Christian Church (Disciples of Christ) might be called the most American."). See also WHALEN, *supra* note 60, at 94 ("[T]he *Disciples of Christ* represent the most successful indigenous Christian denomination in the United States. During its relatively short 125 years this church has grown to become the sixth largest Protestant denomination in the country.").

62. It is important to keep in mind through the following discussion of primitivism the potentially broader application of primitivism outside of the American Restoration Movement, especially if there is a significant overlap between primitivism, fundamentalism, and evangelicalism. In 1984, Martin Marty estimated the number of Americans who were considered to be evangelical as 40-50 million, and the number of Americans who were viewed as fundamentalists as 10-20 million. Martin Marty, *Fundamentalism as a Social Phenomenon*, in *EVANGELICALS AND MODERN AMERICA* 56-68 (George M. Marsden ed., 1984).

63. In Osborn's words:

The Disciples of Christ are a predominately American communion, non-

lieved that church traditions and creeds, whether Catholic or Protestant, caused erroneous teachings that divided the numerous Christian denominations.⁶⁴ The Restoration's commitment to the text of Scripture was a product of its view of the evils of denominationalism and human innovation.⁶⁵

Despite its uniform focus on the pattern of the church laid down in the New Testament, the Restoration Movement actually promulgated two different ideologies.⁶⁶ The first group consisted of those Restorationists who viewed the primitive church as the only pure and divinely authorized method of church organization and belief and thus aimed to restore the primitive church.⁶⁷ They believed that any departure from the

creedal but biblical in doctrine, congregational in polity, historically committed to the dual goals of Christian unity and the restoration of the simple Christianity of the New Testament. Because of their devotion to these goals, and because in their life as a people they have sought to fulfill the conditions for attaining them, Disciples have not liked to think of themselves as a denomination, nor yet as a church. They prefer to speak of "the brotherhood," or "our communion," or, less frequently, "our movement."

Osborn, *Disciples of Christ*, *supra* note 55, at 389.

64. Earl West states:

Protestantism . . . was colored in the nineteenth century by deep denominational bigotry. Different religious parties were all too abundant on the American frontier. Prominent religious leaders in each denomination were vitriolic in their attacks upon others. Each insisted he was right, and that the Bible taught his particular kind of religious beliefs. Each denomination, therefore, insisted upon the authority of its creed. Religious bigotry, therefore, went hand in hand with religious partyism.

. . . .

It was . . . held desirous that men should lay down all party names and be called Christians and Christians only. It was also held that men should renounce all human creeds and follow the Bible as their only authority in matters of faith and practice. The particular motto which Thomas Campbell coined was 'Where the Bible speaks, we speak; where the Bible is silent, we are silent.'

Earl West, *Churches of Christ*, in VERGIlius FERM, *THE AMERICAN CHURCH OF THE PROTESTANT HERITAGE* 417 (1953) [hereinafter West, *Churches of Christ*].

65. WHALEN, *supra* note 60, at 95 ("Disciples pride themselves on being members of a creedless church. 'No creed but Christ' is a familiar maxim.")

66. *Id.* at 94 (stating that the Disciples of Christ were initially "[p]ledged to the twin objectives of Christian Unity and the restoration of the church in its New Testament form"); Osborn, *Disciples of Christ*, *supra* note 55, at 389 ("The Disciples of Christ . . . [have been] historically committed to dual goals of Christian unity and the restoration of the simple Christianity of the New Testament.")

67. F.W. Mattox expresses the primitivist, undenominational viewpoint quite well:

We are on safe ground when we say that any change in doctrine or organization from that found in the New Testament is a departure. This is

divinely intended pattern would result in eternal condemnation. The second group of Restorationists aimed to foster unity among Christians and believed that by restoring the ancient church, they would unite the various denominational creeds and form a single, harmonious Christian community. These unity-oriented Restorationists believed that all Christians, irrespective of denominational affiliation, could agree that the first century church offered an acceptable pattern of organization and belief; these Restorationists believed that this consensus would eliminate the need to compromise on contentious issues or traditions.

These different ideological groups, those focused on accuracy and those focused on unity, initially banded together because they shared a common method of accomplishing their desired goals: restoring the ancient church.⁶⁸ Over time, however, tension began to grow between accuracy and unity as members of the Restoration Movement began to confront various internal controversies.⁶⁹ Disputes involving the use of instrumental

the only test needed. Any claim to undenominationalism rests solely upon this principle. If the church under Apostolic guidance taught or practiced a certain thing the adherence to this same teaching or practice today cannot be said to be denominational. Any departure from such teaching and practice, however, is denominational and cannot be said to be characteristic of the Eternal Kingdom. In order to remain undenominational we must adhere to the New Testament pattern.

F.W. MATTOX, *THE ETERNAL KINGDOM* 107-108 (1961).

68. West, *Churches of Christ*, *supra* note 64, at 417. "The goal to be achieved by this 'restoration movement,' as it came to be called, was the unit of all God's people. The method of achieving it was the restoration of primitive Christianity." *Id.*

69. Osborn, *Disciples of Christ*, *supra* note 55, at 397.

The controversies of this era arose from basic differences in conceptions of the movement. On the one hand stood those who held that its foremost mission was the restoration of the ancient order, that in its early days it had actually achieved such a restoration, that recent "innovations" were unscriptural and consequently sinful. With great ardor various persons of this persuasion opposed some or all of the new developments, such as missionary societies, the use of mechanical instruments or of choirs in worship, the setting up of Sunday schools, the admission of unimmersed persons . . . to the communion table, the employment of fulltime resident pastors, the acquiesce of some ministers in being designated "Reverend." To theses brethren the silence of the Scriptures on any matter meant its prohibition. On the other hand stood leaders . . . who held such a view of restoration to be narrow and legalistic, who regarded the silence of the Scriptures as leaving a matter open to the wisdom of the churches, who spoke of the innovations as legitimate "expedients."

music in worship services and missionary societies to pool resources and evangelize were among the first issues that confronted the Restoration Movement. Both issues involved practices that the New Testament failed to address, but that arguably could improve the functioning of the church, from both a personal fulfillment and organizational perspective.

Instrumental music was condemned by those interested in accuracy as the reintroduction of a denominational tradition that ran contrary to the a cappella style of singing evidenced in the New Testament. Those primarily interested in unity argued that the text was silent about the use of instruments and that their presence enhanced the worship service and therefore could attract more members to the church. Likewise, the use of missionary societies to pool individual churches' funds and to send out trained missionaries to foreign nations triggered ideological factions. Those individuals focused on accuracy claimed that missionary societies were unheard of in the first century and were a human innovation; their very existence challenged the perfectionist ideal of the divinely created church in the first century.⁷⁰ Unity-minded Restorationists argued that missionary societies simply enabled churches to accomplish their biblically-appointed evangelistic responsibilities and would successfully extend the borders of the church much more quickly and efficiently than if each church acted in isolation.

Disagreement over these issues, and others like them, eventually forced an informal separation among accuracy- and unity-focused Restorationists near the end of the nineteenth century. This division was formally recognized in 1906 by the U.S. Census which identified two separate groups, the Disciples of Christ and the Churches of Christ, with the former consisting primarily of the unity-minded Restorationists and the latter consisting of the accuracy-minded Restorationists.⁷¹

Id.

70. See, e.g., West, *Churches of Christ*, *supra* note 64, at 425–26:

[A] Missionary Society was unknown to the New Testament, for during primitive days all of the mission work that was done was accomplished by and through the church of Christ It was felt that the establishment of the Society was a departure from apostolic Christianity, an abandonment of the earlier principles of the restoration movement, and by and large, an elevation of human wisdom over divine, for divine wisdom established no institution to do mission work other than the church.

71. In Osborn's words:

The disaffection over innovations increased until lines began to be

During the twentieth century, both groups factionalized further. The Disciples of Christ split into the Disciples of Christ and the Christian Church, and the Church of Christ split into Churches of Christ (Institutional) and Churches of Christ (Non-Institutional)⁷² with the Disciples of Christ and Churches of Christ (Institutional) representing the more unity-minded group within their respective branches.

Almost invariably, unity-minded Restorationists preferred a more expansive role of the local church as they believed that primitivism was only a means to an end. Thus, the hyper-accuracy of the accuracy-minded Restorationists was not only unnecessary as an end unto itself, but in fact was actually counterproductive to a goal of unity. For their part, accuracy-minded Restorationists thought that the tolerance of "unauthorized" conduct betrayed the goal of accuracy and impliedly rejected the authority of the New Testament pattern. All other values, such as unity, were ultimately subservient to discerning the truth laid out in the New Testament: better to be alone and right, than unified and wrong.

Although each division centered on particular doctrinal issues, every division essentially reflected an argument about which local church activities were authorized by the New Testament. For example, although the division between Churches of Christ (Institutional) and Churches of Christ (Non-

drawn. Those who opposed musical instruments and societies as unscriptural could not conscientiously offer fellowship to persons who used them. Decisions on these matters were taken by congregations, and by 1906 (at the request of the 'conservatives') the Federal religious census recognized the existence of two distinct groups—Churches of Christ (construing the New Testament strictly) and Disciples of Christ. The separation has continued to the present, with the two groups drawing farther apart as each has followed out the logic of its position.

Osborn, *Disciples of Christ*, *supra* note 55, at 398. Similarly, in the words of Whalen:

By 1906 the conservative and progressive wings had split into the *Churches of Christ* and the *Disciples of Christ*. Today the two branches are separate denominations with no formal and little informal fellowship or co-operation. If anything, the breach is widening as the Churches of Christ harden into rigid Biblical literalism and fundamentalism and the Disciples drift toward rationalism and Unitarianism.

WHALEN, *supra* note 60, at 98 (1958),

72. Followers of the Non-Institutional Churches of Christ were often referred to as "Anti's" for their opposition to an expansive role of the church. Ferrell Jenkins, *Please Don't Call Us "Anti" (An Update on the Non-Institutional Churches of Christ)* 55th Anniversary Pepperdine University Bible Lectures (May 1, 1998), <http://www.bibleworld.com/notanti.pdf>.

Institutional) in the 1950s centered around whether the Bible authorized church sponsorship of secular institutions that performed biblical tasks (Orphans' and Widows' homes, or bible colleges), the arguments in support and opposition echoed those advanced during the controversy about missionary societies between Disciples of Christ and Churches of Christ in the 1860s.⁷³ The next section aims to explore some of the interpretive methods used by the Restorationists and how unity-minded Restorationists eventually began to challenge the assumptions of primitivism.

C. Restorationist Interpretation of the Bible

To Restorationists, the New Testament serves as a blueprint for the function and organization of the church.⁷⁴ In fact some Restorationists refer to the New Testament as the Constitution of the church.⁷⁵ Thomas Campbell articulated this analogy when he stated in his Declaration and Address in 1809 that "the New Testament is as perfect a constitution for the worship, discipline and government of the New Testament church, and as perfect a rule for the particular duties of its members."⁷⁶

73. Whalen states:

Paradoxically, the unity-minded Disciples movement simply added another denomination to the roster of Protestant churches and sects. In fact, later disagreement over the precise nature of New Testament Christianity led to the schism of conservative *Churches of Christ*.

WHALEN, *supra* note 60, at 94 (1958).

74. In what is perhaps an ironic aspect of the Restoration emphasis on the pattern of the church laid down in the New Testament, there is actually no text that supports the Restorationist's purpose of returning to the purity of the New Testament church. Roy B. Ward, "The Restoration Principle": A Critical Analysis, 8 RESTORATION Q. 1 (1965), http://www.restorationquarterly.org/Volume_008/rq00804ward.htm. The New Testament is silent on how to interpret itself in order to accomplish the Restorationist ideal because the authors of the New Testament were in fact writing to the true, and pure church, so much of what Restorationists seek to find in the New Testament may be assumed by the authors to be known to their audience, and therefore left unwritten. Despite this methodological hurdle, Restorationists look to how the New Testament church was commanded to view the apostles teaching in order to determine how they should approach the New Testament. Furthermore some methodological guidance is gained from examining how the New Testament writers interpreted and used the Old Testament scriptures in their writing.

75. F. LAGARD SMITH, THE CULTURAL CHURCH 38, 194.

76. Thomas Campbell, *Declaration and Address*, in THE QUEST FOR CHRISTIAN UNITY, PEACE, AND PURITY IN THOMAS CAMPBELL'S DECLARATION AND ADDRESS: TEXT AND STUDIES 18 (Thomas Olbricht & Hans Rolmann eds 2000) [hereinafter Campbell, *Declaration and Address*].

Restorationists generally view the New Testament as a new law (or covenant) instituted by Jesus that supplanted the old Mosaic Law that governed the Jewish nation. Admittedly, however, Restorationists recognize that the New Testament differs from the Mosaic Law in that the New Testament is not written in the format of a legal code or even a theological treatise. Rather it is largely written in either an historical or epistolary style which can make its prescriptions hard to identify and apply as a legal code.

Thus, Restorationists struggle to determine whether a particular passage or event applies to church governance and operation.⁷⁷ Typically this is accomplished by identifying whether a particular verse falls into one of two categories: an express command or an approved example. The categories of express command and approved example are designed to identify relevant passages written by the apostles with the aim of instructing churches regarding their operation.⁷⁸ Restorationists view statements or examples that cannot be fairly interpreted as binding commands or examples intended to illustrate normative conduct as historical material ancillary to the operation of the church. Authority can also be secondarily derived by necessary inference from either a command or an example.⁷⁹

77. What Restorationists define as their hermeneutic is a method of establishing authority for conducting certain religious activities, rather than simply ascertaining the meaning of the text. In other words, their hermeneutic is designed to tell churches what they can and cannot do as a collective institution: a sort of construct for determining the enumerated powers of the local church.

78. An example of the use of express command and approved example might serve to ground the Restoration hermeneutic. A common example is the Restorationists' weekly observance of the communion, or Lord's Supper instituted by Jesus on the Passover before his death. The New Testament church was commanded by Paul to observe the Lord's Supper in remembrance of Jesus and was therefore a required element of worship. Paul's example in Acts 20 of waiting seven days in Troas to be able to partake of the Lord's Supper with the Christians there means that the Lord's Supper was taken only on Sundays otherwise they could have observed it sooner to prevent Paul from having to wait. *Acts* 20:7.

79. There are also two possible necessary inferences in play with regard to the weekly observance of the communion. The first inference relates to the use unleavened bread in the communion service. It is almost certain that Jesus used unleavened bread when instituting the Lord's Supper (communion) because the event occurred during the observance of the Jewish Passover feast during which leaven is removed from the house. The other inference with regard to the communion relates to the frequency of its observance. Restorationists participate in the communion weekly and draw support for that practice from the phrase, "[o]n the first day of the week we came together to break bread" by implying that the purpose of the weekly meeting was to observe the communion. *Id.*

Notice that necessary inference does not work to establish authority of its

According to Restorationists, only express commands and approved examples establish the scope of powers given to the church by the New Testament. In accord with the view of the New Testament church as a perfect model, any additional exercise of authority outside of that indicated by the text would be an illegitimate usurpation of power. In other words, if there is no command or example, the activity is unauthorized and therefore impermissible. This is sometimes referred to as respect for the "silence of the scriptures."⁸⁰ This respect for the "silence of scriptures" is a product of the Restorationists' view that scripture is the repository for Divine revelation, rather than the result of any explicit biblical passage.

The Restorationist system for determining Biblical authority essentially operates as an enumerated powers doctrine. The tripartite method defines the scope of the powers of New Testament church more than it tells a reader what a passage actually means. By limiting the work and worship of the church to things commanded, demonstrated or implied by the apostles, Restorationists seek to restore the primitive church.

Using this hermeneutic, Restorationists create a dichotomy between commands for the church as an organization, and commands for the Christian as an individual. In many circumstances, Restorationists believe that activities in which

own force. It works only in connection with a command or an approved example. For instance, another necessary inference often used in the context of the Lord's Supper, is that the bread used in the Lord's Supper must be unleavened. This is inferred because when Jesus established the Lord's Supper in Jerusalem, it was the time of Passover and there was no leaven in any of the Jews' homes. In fact, Jesus transformed the actual Passover meal which involved only unleavened bread into the Lord's Supper. Thus the inference of unleavened bread is only controlling because it is associated with the approved example of Christ partaking of the Lord's Supper, and his express command to "do this in remembrance of me." *Luke* 22:19. In fact, the example listed above of Paul waiting seven days to partake of the Lord's Supper in Troas, requires the inference in order to make sense. Because Paul had to wait, Restorationists infer that the Christians in Troas must not have observed the Lord's Supper on any day other than Sunday.

Of the three categories, necessary inference is closest to what is generally considered an interpretive rule. For a discussion of how the use of necessary inference has affected Restorationist doctrine and attitudes, see MICHAEL W. CASEY, *THE BATTLE OVER HERMENEUTICS IN THE STONE-CAMPBELL MOVEMENT, 1800-1870* (1998).

80. A potential conflict occurs with the use of necessary inference and what constitutes a "necessary" inference. In effect, necessary inference can be used as a tool to avoid the silence of the Scriptures by implying into the passage something that was not actually written in words by the author. See SMITH, *supra* note 75, at 194-95.

churches are prohibited from engaging are permissible activities when engaged in by individual Christians.

While much of Restorationist Biblical interpretation emphasizes the text of Scripture, it is essentially an originalist form of interpretation. Unlike modern constitutional interpretation, textualist and originalist interpretation are not two competing forms of interpretation. Under Restorationist doctrine, the text of Scripture, as a product of God, completely captures the intent of the author and nothing more.

Like the other elements of Restorationist practice, this view of interpretation is premised on New Testament patterns. The apostles, Jesus' chosen leaders of the church, were trained to follow and teach God's will.⁸¹ They continually admonished Christians to do the same. Thus, the apostle Paul commented to the church in Colossae that "since the day we heard about you, we have not stopped praying for you and asking God to fill you with the knowledge of *his will*."⁸² Paul admonished his younger protégé, Timothy, that "[a]ll Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness, so that the man of God may be thoroughly equipped for every good work."⁸³ As the apostles recorded their oral teachings, their writings were also viewed, after their deaths, as a repository of the will of God.

Therefore, although written by men, the New Testament was determined to be of Divine origin both because it represented the written teachings of divinely chosen apostles and because God prompted its writing. Thus the Divine will and purpose of God was wedded with written documents produced by men. According to Thomas Campbell, "the Scriptures [are the] perfect and entire revelation of the Divine will."⁸⁴

Consequently, Restorationist hermeneutics is properly considered originalist.⁸⁵ Restoration author Clinton Lockhart

81. The apostle Paul specifically notes that he was appointed to know God's will. *Acts* 22:14; *Ephesians* 1:9.

82. *Colossians* 1:9 (emphasis added).

83. 2 *Timothy* 3:16, 17.

84. Campbell, *Declaration and Address*, *supra* note 76, at 18.

85. This is so not only in the sense that the individual human author's view of his book is controlling, but also in that each human author serves as a mouthpiece of God whose intent behind the text is controlling. A notable example from the Mosaic Law occurs in the book of Exodus between God, Moses, and Aaron. "Then the LORD said to Moses, 'See, I have made you like God to Pharaoh, and your brother Aaron will be your prophet. You are to say everything I command you, and your brother Aaron is to tell Pharaoh to let the Israelites go out of his coun-

argued that there is no legitimate alternative to originalist biblical interpretation.

It is not the privilege of any interpreter to impose his own thought upon the words of an author, nor in any way to modify the author's meaning. . . . His only province is to apprehend the precise thought imparted by the author's words, and leave the author responsible for the character of his thought. To do otherwise, is to make the author say what the interpreter wishes, which makes the interpretation a mockery.⁸⁶

This is particularly true where the interpretation of the document has eternal consequences.⁸⁷

Restorationists trace much of their hermeneutic theory back to Alexander Campbell, who in turn relied heavily on John Locke.⁸⁸ Restorationists still rely on Locke's essentially originalist approach to scripture.

Writing about Paul's epistles, Locke said that to understand an author requires us to "understand his terms, in the sense

try." *Exodus 7:1, 2.*

86. CLINTON LOCKHART, *PRINCIPLES OF INTERPRETATION* 19 (1915). This is consistent with most conservative Christian views of interpretation. For instance, a conservative Christian encyclopedia also limits the definition of interpretation to originalism:

Interpretation has as its goal the discovery of the thought processes and the meanings of the writer, or writers, of the books of the Bible. . . . Biblical material is of such a nature as to demand special consideration. The doctrine of inspiration holds the Biblical interpreter to a proper regard for the fundamental character of Scripture. It demands a recognition of the theological significance of Scripture, resting upon the revelation of God that is not found in any other lit. The extraordinary character of Scripture transcends the usual and ordinary analysis of non-Biblical materials.

H. L. Drumwright, Jr., "Interpretation," 33 *THE ZONDERVAN PICTORIAL ENCYCLOPEDIA OF THE BIBLE*. 297 (Merrill C. Tenney ed., 1976).

87. As one evangelical author aptly described the primitivist idea about the unique nature of biblical interpretation:

Make a mistake in the interpretation of one of Shakespeare's plays, falsely scan a piece of Spenserian verse, and there is unlikely to be an entailment of eternal consequence; but we cannot lightly accept a similar laxity in the interpretation of scripture. We are dealing with God's thoughts: we are obligated to take the greatest pains to understand them truly and to explain them clearly.

D. A. CARSON, *EXEGETICAL FALLACIES* 15 (1996).

88. DALE A. JORGENSON, *THEOLOGICAL AND AESTHETIC ROOTS IN THE STONE-CAMPBELL MOVEMENT* 64-67 (1989).

he uses them, and not as they are appropriated, by each man's particular philosophy, to conceptions that never entered the mind" of that author. Using the author's own words, we should "paint his very ideas and thoughts in our minds."⁸⁹

In other words, Locke's view was that the words in a text represent a concrete idea in the mind of the speaker, and that it is the interpreter's duty to properly ascertain that meaning. The serious nature of biblical interpretation poses a particularly difficult problem for Restorationists when members arrive at incompatible interpretations of the text. This problem is compounded because there is no hierarchal structure to resolve any interpretive dispute outside of the local autonomous congregation.

As a result of the competing Restorationist ideals of accuracy and unity, there are competing attitudes toward interpretative differences. Restorationists who have focused more on achieving unity have frequently advocated tolerance among matters of opinion or questions that they deem incapable of a clear determination. This drive for tolerance is premised on the assumption that an objective reading of the text will not resolve many disputes among individual interpreters because, despite the text's divine inspiration, the answer to the dispute is unknowable. Therefore, unity-focused Restorationists tolerate competing interpretations even though one may actually be closer to the original intent of the author than the other.

On the other hand is the competing Restorationist notion that the Bible is the perfect model of the church revealed by God. Here, the assumption is that humans should be able to read the Bible and understand what God wants them to know, lest it impugn the perfect nature of God's pattern. Therefore accuracy-minded Restorationists attribute differences in interpretation to poor interpretive methods, or ulterior and imperfect motives. These Restorationists generally believe that interpretative differences matter because God has not prioritized essential from nonessential beliefs. Thus, in absence of such guidance, the accuracy-minded Restorationists must solve each and every interpretive difference even if it means splintering the local congregation into several groups.

89. SMITH, *supra* note 75, at 123, quoting JOHN LOCKE, PARAPHRASES OF ST. PAUL'S EPISTLES, in III WORKS 21.

When the tension between these two groups becomes severe enough, the unity-minded individuals may resort to the notion that the New Testament pattern is only a means to a unified end, rather than an end in itself. Thus many members of the more unity-minded groups ultimately deny the binding nature of the New Testament pattern.⁹⁰

Unity-minded Restorationists do not necessarily reject the idea that the New Testament contains the inspired revelations of God, but rather maintain that God did not intend for the New Testament to bind Christians indeterminately. Again Boring suggests, "Disciples have rightfully abandoned an ecclesiology that regarded the kingdom of God and the church as virtually identical, with the church being "set up" on Pentecost and the Bible being regarded as the 'constitution' for the church."⁹¹ In other words, unity-minded Restorationists, like the Disciples, believe that God did not intend for the supposed pattern laid out in the New Testament to govern future generations. Therefore, because these Restorationists need not strictly adhere to the New Testament pattern, they pursued more general moral goals such as unity and equality.

The eventual divergence between accuracy-minded Restorationists and unity-minded Restorationists centered on their foundational assumption about the binding force of the example of the church laid out in the New Testament. Unity-minded Restorationists believed that the New Testament provided guidance to future generations by articulating moral values to be pursued. Unity-minded Restorationists would not deny that there are some truths which must be accurately maintained but that the values they pursue are among those truths. These Restorationists generally view the New Testament as more of a suggestion or starting point from which to accomplish other substantive moral goals. Without fearing eternal consequences, they prefer other values over strict accuracy. In other words, sometimes biblical values, such as unity, outweigh the more limited biblical value of accuracy.

90. M. Eugene Boring, a Disciples of Christ scholar, has argued that "[h]istorical criticism lets us see that there was no unified pattern in early Christianity to be restored, but the dynamism of an early Christian movement that adapted its structures to changing situations." M. EUGENE BORING, DISCIPLES AND THE BIBLE 412 (1997).

91. *Id.*

Accuracy-minded Restorationists prize strict accuracy in all matters regardless of its secondary impacts on other moral values. They believe that the New Testament aimed primarily to convey truths about the organization of the church. All interpretive efforts were aimed at ascertaining precisely whether the Bible affirmatively authorizes any possible variation or modification in church organization and practice. If no authorization can be found, these Restorationists condemn the practice. Ultimately the fear of eternal judgment for even small departures from the New Testament pattern forced the primary valuation of absolute accuracy over all else.

The relationship between these two groups, including their respective selection of different ultimate values and the effect of this selection on their interpretive methods, is instructive regarding the dynamics of constitutional interpretation. This is especially true where the constitutional methods of interpretation stress adherence to the text. The next Part highlights some similarities between Restorationist and constitutional interpretive communities to illustrate some of the dynamics of originalism.

III. APPLYING THE PRIMITIVIST MODEL TO ORIGINALISM

Primitivist biblical interpretation as exemplified by the American Restoration Movement offers several lessons about constitutional interpretation. Section A highlights the similarities between Restorationist interpretation and constitutional interpretation. Section B applies the lessons from the discussion of primitivist values and the example of the American Restoration Movement to the strong form of constitutional originalism typified by Robert Bork.

A. Originalism as a Parallel to Primitivism

Professor Morton Horwitz, a legal historian for Harvard Law School, has on several occasions compared originalism with evangelical fundamentalism.⁹² Horwitz has noted that,

92. Horwitz spends more time expressly dealing with fundamentalism than evangelicalism, see Horwitz, *Bork Nomination*, *supra* note 2, but based on his merger of the two in the following quotation, the frequent references to fundamentalism may imply a reference to evangelicalism as well.

As eighteenth-century Newtonian mechanics launched American constitutional theory on a static course, the powerful cultural influence of Protestant thought in America reinforced the static, literalist theory of interpretation. . . . Protestants insisted that the Bible ought to be widely printed and made available to everyone in order to avoid priestly interpretations that distorted biblical text. Protestant anti-interpretativism, textualism, literalism, and biblicalism were eventually absorbed into evangelical fundamentalism.⁹³

Elsewhere, Horwitz has made the analogy more explicit. While discussing the Bork nomination, Horwitz argued that "[t]o the extent that Constitution worship is America's secular religion, and all religions have a tendency towards fundamentalism, originalism in constitutional discourse is the equivalent of religious fundamentalism."⁹⁴ He also argues that "[o]riginalists and constitutional literalists are fundamentalists. The argument about a living Constitution versus originalism is parallel to the question of modern and adaptable religion versus the old time religion. When put in these terms, one can see why the idea of a living Constitution has had such a difficult time in American culture."⁹⁵

Although apt, Horwitz's equation of originalism and fundamentalism / evangelicalism⁹⁶ is relatively imprecise for the

93. Horwitz, *Fundamentality*, *supra* note 5, at 41–42.

94. Horwitz, *Bork Nomination*, *supra* note 2, at 663. See also *id.* ("Originalists and constitutional literalists are fundamentalists."); Horwitz, *Fundamentality*, *supra* note 5, at 116 ("Originalism in constitutional theory is a form of legal fundamentalism."). Horwitz roots the fundamentalist nature of originalism in the religious mindset surrounding legal and constitutional interpretation that dominated in the late eighteenth century. Horwitz notes:

Because it grew out of traditional conceptions of fundamentality that were rooted in religious structures of meaning, constitutional law has always tended toward incorporating a pre-modern vision of timeless and unchanging truths—toward, in a word, equating legal fundamentality with legal fundamentalism.

Horwitz, *Fundamentality*, *supra* note 5, at 34.

95. Horwitz, *Bork Nomination*, *supra* note 2, at 663.

96. I separate the term fundamentalist from evangelicalism because there has been a growing rift between individuals who classify themselves as fundamentalist or evangelical. See Edward P. Myers, *Churches of Christ (A Cappella) Are We Evangelical?*, in *EVANGELICALISM & THE STONE-CAMPBELL MOVEMENT* 50, 53 (William R. Baker ed., 2002) ("In recent years, there seems to have been a definite distinction between what it means to be evangelical and fundamental to the point that most evangelicals no longer care to be considered fundamental."); William R. Baker, *Christian Churches (Independent) Are We Evangelical?*, in

simple reason that the term "fundamentalism" (and for that matter "evangelicalism") has been drained of any useful analytical meaning.⁹⁷ According to Richard V. Pierard and Robert D. Linder,

[t]he problem of definition is a knotty one. Four terms . . . defy precise definition: (1) evangelical, (2) fundamentalist, (3) the New Political Right, and (4) the New Religious Right. . . . [A]fter devoting eighty-six pages to a survey of "The evangelical Tradition in America," . . . church historian Leonard Sweet could only conclude that "more study" was needed before any consensus might be reached on a working definition of either evangelicalism or fundamentalism.⁹⁸

Clearly Horwitz does not have in mind that originalism, like fundamentalism, simply lies at the conservative end of its interpretive spectrum. Rather he observes that "[t]he cultural domination of American fundamentalist religion also stood in the way of the rise of an historical consciousness. The religious focus on timeless truths outside of history resisted any conception of law (or religion) that emphasized the contingent and changeable nature of truth."⁹⁹ What authors like Horowitz seem to have in mind with their emphasis on originalism's "pre-modern vision of timeless and unchanged truths"¹⁰⁰ is

EVANGELICALISM & THE STONE-CAMPBELL MOVEMENT 29, 36-42 (William R. Baker ed., 2002) [hereinafter Baker, *Evangelical Christian Churches*] (locating the beginning of the separation with Billy Graham's acceptance of sponsorship from NY City's liberal council of churches in 1957).

Interestingly, the disagreement between the two emerging groups centers more on the method of interacting with the secular world, rather than any substantive disagreement about how to interpret scripture. See Baker, *Evangelical Christian Churches*, *supra*, at 36 ("Although fundamentalists may accuse evangelicals of becoming too 'genteel' and 'worldly,' evangelicalism has not really shifted from its fundamentalist moorings of allegiance to the Bible.") (quoting Marty, *supra* note 62, at 205); see also CARL HENRY, EVANGELICALS IN SEARCH OF IDENTITY 31 (1976). But see PIERARD & LINDER, *supra* note 13, at 302 n.9 ("The problem [of definition] is compounded when one tries to differentiate evangelical from fundamentalist because, as political scientist James Reichele notes, the distinction between the two was and remains 'somewhat hazy.'").

97. Regarding the problem of definition relating to evangelicalism and fundamentalism, see LEONARD I. SWEET, THE EVANGELICAL TRADITION IN AMERICA 86 (1984).

98. PIERARD & LINDER, *supra* note 13, at 302 n.9 (quoting SWEET, *supra* note 97, at 86 (1984)).

99. Horwitz, *Fundamentality*, *supra* note 5, at 43.

100. *Id.* at 34.

something more precisely labeled primitivism, rather than simply fundamentalism, or even more broadly evangelicalism.

This is not to imply that fundamentalism is somehow categorically distinct from primitivism, or even evangelicalism. In fact, many primitivist groups, including members of the Restoration Movement, have been classified as fundamentalist¹⁰¹ and evangelical.¹⁰² Without passing on the exact relationship between the two groups,¹⁰³ it is sufficient to note that use of the more precise characterization of primitivism is most likely to contribute a meaningful comparison and analysis between "fundamentalist" biblical interpretation, and "fundamentalist" constitutional interpretation.

Aside from simply being "fundamentalist," primitivism and originalism share many similarities: both interpret texts generations removed from their authors (Bible/Constitution); both documents serve as blueprints that delegate powers to collec-

101. See, e.g., WHALEN, *supra* note 60. Whalen states:

Disciples pride themselves on being members of a creedless church. "No creed but Christ" is a familiar maxim, and they will admit to their fellowship and to their communion table all baptized person who wish to participate As a result you will find Disciples who approach Unitarian positions and others who would be logically classified as fundamentalists, although most of those in the latter category would likely gravitate toward the Churches of Christ.

Id. at 95. "If anything, the breach [between the Churches of Christ and the Disciples of Christ] is widening as the Churches of Christ harden into a rigid Biblical literalism and fundamentalism and the Disciples drift toward rationalism and Unitarianism." *Id.* at 98.

102. See, e.g., William R. Baker, *Conclusion*, in EVANGELICALISM & THE STONE-CAMPBELL MOVEMENT 235 (William R. Baker ed., 2002) ("This volume evidences that the Stone-Campbell Restoration Movement as manifest in Churches of Christ and Christian Churches today is a valid, though distinct, expression of evangelicalism."); Baker, *Independent Christian Churches* *supra* note 96, at 29.

103. In Hughes' words:

[H]istorians of American religion have persistently sought to understand primitivists as something other than what they really are. If historians wish to subsume primitivists under the labels "evangelical," "conservative," or "fundamentalist" . . . then these historians simply guarantee their own inability to understand the meaning of restorationist movements and their place in American life and culture."

HUGHES, AMERICAN QUEST, *supra* note 49, at xi. Because of the difficulty in defining precisely what constitutes fundamentalism, it is impossible to determine with any certainty the exact relationship between evangelicalism, fundamentalism, and primitivism. Even limiting the discussion to fundamentalism and primitivism is unhelpful, as it is difficult to tell whether primitivism is a subset or variety of fundamentalism, or whether it is an overlapping group with some independent and exclusive characteristics.

tive actors (church authority/enumerated powers); both reserve freedom of activity to the local unit (individual Christians/States and individual citizens); both involve significant consequences;¹⁰⁴ both appeal to a vision of an historical ideal (New Testament church/Madisonian government); and both attempt to follow the original intent of the authors (apostles/founders). It is this last similarity which warrants the most attention.

Within the Restoration movement, both groups accept the general inspiration of the New Testament and value the teachings contained therein. The difference lies in whether the individual interpreter places greater emphasis on accuracy or unity. Ultimately, the value chosen determines the interpretive method used. Yet both Restorationist groups proclaim allegiance to the Biblical text.

Likewise, constitutional interpretation involves the selection of values by the interpreter. Setting aside the possibility of judges enforcing values not present in the Constitution itself, merely emphasizing the text of the Constitution or even the intent of its framers does not eliminate the importance of value selection. In other words, within the interpretive camp which focuses attention on the text of the Constitution, judges may not feel entirely constrained by the fixed and limited intentions of the framers. Analogizing to the Restorationist context, originalists like Bork occupy roughly the same position as the accuracy-minded group of Restorationists; both groups elevate one value above all others.¹⁰⁵ Contrawise, others who value adherence to the text may simultaneously consider more open ended inquires about the values found in the Constitution

104. According to E. D. Hirsch, "hermeneutical theorizing was [initially] confined almost exclusively to two domains where correct interpretation was a matter of life and death (or Heaven and Hell)—the study of scripture and the study of law." E. D. HIRSCH, JR. *THE AIMS OF INTERPRETATION* 19-20 (1972).

105. See Osborn, *Disciples of Christ*, *supra* note 55, at 410 n.25.

No historian of the [restoration] movement has adequately examined the role of sectionalism in this schism. To begin with, the vast preponderance of churches opposing the innovations was in the defeated South; while several of the most prominent leaders of the "progressives" had served in the Union army. Can the root of some of the bitterness be found here? . . . Again, the way in which the leaders of the Churches of Christ interpreted the New Testament is strikingly similar to the manner in which John C. Calhoun and other southern leaders strictly construed the Constitution of the United States.

Id.

much like unity-minded Restorationists do with the New Testament. The next section explores this comparison.

B. Originalism, Judicial Tyranny and Value Selection

All forms of interpretive theories that allow judges to exercise discretion seek to legitimize judicial authority.¹⁰⁶ The very attempt to justify a particular theory presupposes some underlying legitimating values to which the proponent appeals. An interpretive theory will largely depend upon which underlying value or set of values the individual interpreter chooses to elevate. This is true whether the text at issue is the Bible or the Constitution.

Interpreters of the Constitution could appeal to any number of constitutional or social values, which may or may not be textually based. Even confining the discussion to the text itself, the Constitution can be at times a "mysterious document,"¹⁰⁷ filled with "majestic generalities,"¹⁰⁸ that "give latitude to those who would . . . interpret the instrument."¹⁰⁹ Some of these values might include: the avoidance of judicial tyranny; systematic enhancement of democracy; structural values including federalism, nationalism and separation of powers; morality; economic efficiency; natural law; consistency or predictability; universality; libertarianism; populism; pragmatism; rationalism; racial/gender equality; economic equality and the

106. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 1 (1971) [hereinafter Bork, *Neutral Principles*] ("The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate?").

107. John Paul Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437, 437 (1985). "The Constitution of the United States is a mysterious document. The wisdom that created the Constitution is evidenced not only by the handful of clues that are set forth in its text, but also by what the document does not say." *Id.*

108. *Fay v. New York*, 332 U.S. 261, 282 (1947).

109. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 692, 693 (1976). In Rehnquist's words:

The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. . . . Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to those cases that the framers might not have foreseen.

Id.

list continues. Thus a judge will find a multitude of values at his disposal throughout various provisions of the Constitution. As Justice Breyer has described it, "the historical origin of each provision . . . typically tells a story that helps a judge identify the provision's central objective or value, thereby providing an interpretive key that promises a degree of interpretive consistency."¹¹⁰

At a minimum, originalism requires interpreters to remain faithful to the values incorporated in the text of the Constitution by the framers. How those values are to be applied to modern problems is up to the interpreter to decide. Thus, Robert Bork acknowledges, that "all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. The premise states a core value that the Framers intended to protect."¹¹¹ Accordingly, "courts must not hesitate to apply old values to new circumstances. A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty."¹¹²

Yet, certain forms of originalism, typified by Robert Bork, seem to be unnerved by the potentially broad reach of this acknowledgment and attempts to constrain judges' abilities to protect constitutional values. Thus, Bork notes a concern that "[o]bviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be protected, the judge must not state it with so much generality that he transforms it."¹¹³ More alarmingly, Bork argues that

[e]very clash between a minority claiming freedom and a majority claiming power to regulate involves a choice be-

110. Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 TEX. L. REV. 761, 767 (2000).

111. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) [hereinafter Bork, *The Constitution*]. Bork continues:

[W]hen we understand that the Bill of Rights gives us major premises and not specific conclusions, the document is not at all anachronistic. The major values specified in the Bill of Rights are timeless in the sense that they must be preserved by any government we would regard as free.

Id. at 827.

112. *Id.*

113. *Id.*

tween the gratifications of the two groups. 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.¹¹⁴

To be clear, Bork is not simply addressing cases involving issues with no constitutional bearing that might not be supported by constitutional values.

In this context, Bork is challenging *Griswold v. Connecticut*, a case involving a "clash" between a married couple's interest in using contraception and the State's interest in forbidding it.¹¹⁵ The Court invalidated the law regulating access to contraception based on a right to privacy extrapolated from previous decisions and provisions in the Bill of Rights which protect the home. Bork viewed this as an unprincipled decision based on specious reasoning.¹¹⁶

Here, Bork's version of originalism becomes severely restrictive. He argues that "[w]here the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy."¹¹⁷ The import is that a judge faced with a case that arguably implicates two competing constitutional values cannot decide the issue unless the Constitution expresses a preference for one value over another. The net result, Bork argues, is that judges lack authority to invalidate any law unless it specifically violates some provision of the Constitution that is preferred by the text over the governmental interest.¹¹⁸ "If we have constitutional rights and liberties already, rights and liberties specified by the Constitution, the Court need make no fundamental value choices in order to protect them."¹¹⁹ This is precisely the reason many found Bork's views so upsetting.¹²⁰

114. Bork, *Neutral Principles*, *supra* note 106, at 9.

115. 381 U.S. 470 (1965).

116. Bork, *Neutral Principles*, *supra* note 106, at 7-9.

117. *Id.* at 10.

118. *Id.* at 10-11 ("Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.").

119. *Id.* at 5.

120. Ronald R. Garet, *Creation and Commitment: Lincoln, Thomas, and the Declaration of Independence*, 65 S. CAL. L. REV. 1477, 1483 (1992) ("The final, fatal image of Judge Bork was of a man who, turning conservatism upside down,

Yet this position seems inconsistent with Bork's earlier assertions about the flexibility that judges have when applying constitutional values to modern day scenarios which the Framers could not envision.¹²¹ He ignores that the selection of one value will ultimately jeopardize the protection of others,¹²² and that he is in fact selecting one value over another by protecting majoritarian legislation from tyrannical judicial intervention. Clearly, Bork betrays an incessant concern about judicial tyranny.¹²³ This concern about judicial tyranny is essentially a concern about the usurpation of the democratic process by unelected judges who cannot easily be reigned in. And this concern about tyranny trumps all other values.¹²⁴

believed that we enjoy only those rights against government that the official legal texts expressly give us.”).

121. Bork, *The Constitution*, *supra* note 111, at 827.

122. Many other originalists, and arguably Justice Thomas, do allow some mitigation of the universal application of this narrow form of intent by allowing additional values created by the framers other than the concern of judicial tyranny to come into play. Garett avers:

What sank Judge Bork . . . was not so much his adherence to the intent of the Framers as his professed disbelief in natural rights. . . . By contrast, Clarence Thomas's celebration of the Declaration of Independence seems less legalistic in the bad sense, more supportive of natural rights that we enjoy just because we are human persons.

Garett, *supra* note 120, at 1483. Justice Thomas has certainly expressed a willingness to reverse or modify previously established lines of constitutional law based on original intent. For example, Thomas's concurring opinion in *United-States v. Lopez* states that “at an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.” 514 U.S. 549, 602 (1995) (Thomas, J. concurring). Thomas states, in *Whitman v. American Trucking Association*:

As it is, none of the parties to these cases has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.

531 U.S. 457, 487 (2001) (Thomas, J. concurring).

123. Bork, *The Constitution*, *supra* note 111, at 824 (“Those who argue that original intention is crucial do so in order to draw sharp line between judicial power and democratic authority.”); *Id.* at 825 (“[A]ny defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges.”); *Id.* at 829 (“A concept of original intent . . . is essential to prevent courts from invading the proper domain of democratic government.”); *Id.* at 832 (“The conclusion . . . must be that only by limiting themselves to the historic intention underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law.”).

124. Robert H. Bork, *Commentary: The Impossibility of Finding Welfare*

In other words, Bork's attempt to identify neutral principles that will eliminate the need for value selections is in fact a value selection. It is the elevation of the value of neutrality above all others. This concern for neutrality is not based on any perceived bias on the part of judges against particular parties to a case, but rather a more generalized concern that judicial value selection would amount to tyranny, a rule by judges that could not be checked. Yet Bork disputes this claim. He asks, "is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not."¹²⁵ However, Bork's only response is to point out that without neutral principles, "the Court violates the postulates . . . that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority."¹²⁶

The real issue is not whether using the value of neutrality to ensure against judicial tyranny is a principled value, i.e. one supported by legitimate justifications, but whether it is superior to all other values so that it always prevails in a value conflict. Bork purports to have met this burden by describing the fundamental issue in constitutional law: the Madisonian dilemma.¹²⁷ Essentially, he argues that the framers designed the Constitution to protect both the rights of majorities and minorities, and that neither group can be trusted to draw the line. Therefore, Courts, having been entrusted with the task of line drawing, must be careful not to tip the balance in favor of one side or another.

There are two problems with Bork's argument. The first is that it is entirely self-referencing. Bork's entire discussion of the Madisonian dilemma is couched in terms of tyranny. In essence, Bork asserts that the Madisonian dilemma is the most important fundamental issue underlying the Constitution and further that it is concerned solely with avoiding either tyranny by the majority or the minority. However, there is no objective basis for the claim that the Madisonian dilemma really is the most important issue underlying the Constitution. Nor is there any comparison among constitutional values, like between

Rights in the Constitution, 1979 WASH. U. L. Q. 695, 701 (1979) ("Equality is not the only value in society; we must balance degrees of it against other values. That balance is preeminently a matter for the political process, not for the courts.").

125. Bork, *Neutral Principles*, *supra* note 106, at 2.

126. *Id.* at 3.

127. *Id.*

equality and tyranny. In other words, Bork's argument presupposes his conclusion and thus collapses. If judges are incapable of choosing one constitutional value over another, then to the extent judicial tyranny is a constitutional value, as evidenced by the Madisonian dilemma, judges are incapable of choosing it over any other constitutional value with which it might conflict.

The second problem is that his argument is internally inconsistent. If judges must avoid unfairly tipping the scale in favor of minorities or majorities, then it must not water down either of their rights. But Bork's formulation does precisely that. Bork argues that "[s]ociety consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution."¹²⁸ Yet this ignores the fact that the Constitution is in fact a majority enactment limiting itself, and therefore subject to change by a majority, albeit a supermajority. This is significant, because Bork previously admitted that the Madisonian dilemma consists of the fact that "neither the majority nor the minority can be trusted to define the freedom of the other."¹²⁹ But to the extent the Constitution is a majoritarian document, it does just that. This problem is compounded, not aided, by Bork's limitations on courts' abilities to weight competing constitutional values. The result is that wherever the asserted values of majorities and minorities are in conflict, which they will always be, majorities will always win.

Not only does originalism invoke a idyllic historical motif similar to that of primitivism, it also involves a choice between competing methodologies. On the one hand are originalist interpretive theories that, like the unity-minded Restorationists, look to the text of the Constitution and the intent behind it, in order to ascertain the various values involved and then weigh them to determine the outcome. However, like the accuracy-minded Restorationists, some forms of originalism, like Robert Bork's, are little more than the elevation of one value over all others.

The particular benefit of the comparison with primitivism is that it helps to isolate the motivations behind interpretive

128. *Id.*

129. *Id.*

theories. Thus, both restrictive interpretive theories are motivated by a deep-seeded concern about disastrous and potentially long-lasting effects of departing from the theory. Yet in the end, the concern about judicial tyranny is relatively far less significant than accuracy-minded Restorationists concern over eternal judgment. This is largely because religious interpreters ultimately have only one concern to address: eternal consequence. Whereas constitutional interpreters must face a wide-array of potentially disastrous problems, one of which is judicial tyranny. But in the face of other constitutional values, concerns about judicial tyranny must, from time to time, give way to more pressing concerns. This is particularly true where the value at issue affects the lives of Americans, who are the ultimate judges of constitutional interpretation.

CONCLUSION

Primitivist interpretation of the Bible, as illustrated by the American Restoration Movement, demonstrates that the initial selection of interpretive values affects methodological choices. The same is true when interpreting the Constitution. Constitutional adjudication requires that judges select between values generally inferable from the document to determine the outcomes of cases. Some forms of originalism, as typified by Robert Bork, elevate one value above all others: the avoidance of judicial tyranny. Although clearly important, there is no intrinsic reason why that value is more important than other constitutional values. Furthermore, once Bork's interpretive theory is viewed as the elevation of a single constitutional value above all others, its claims for judicial neutrality sound hollow. Interpreting the Constitution is a difficult task, fraught with many dangers including the potential for judicial overreaching. Ultimately, however, any form of restraint exercised by the life-appointed judges of the Federal Courts will have to be self-imposed, and pretextual claims of judicial neutrality only confuse the real issue: how should courts weigh constitutional values in a manner consistent with our constitutional faith?

