Note to Schmooze Participants: I purposely stripped out almost all of the references to simplify the essay. In addition, I make a number of references to Judeo-Christian principles, ideas, etc. I understand from some of my Jewish friends that this can be annoying, particularly when Judeo-Christian arguably just means Christian. To any I annoy, please accept my apologies and let me know if it annoys you. I meant only to carry the Judeo-Christian label forward in a context where the term suggests roots in pre-Christian writings.

TOWARD A JUDEO-CHRISTIAN CONSTITUTIONAL INTERPRETATION

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INTRODUCTION

Many people talk about Judeo-Christian values and the notion that the United States of America was founded on Judeo-Christian principles. However, many have no idea what that means other than that many Americans self-identify as Jews or Christians. However, Judeo-Christian principles might be profitably applied to specific legal issues. This article suggests the possibility of applying Judeo-Christian principles of biblical interpretation to constitutional interpretation.

The very simplified, Episcopalian-based version of Judeo-Christian biblical interpretation which I suggest has two large components. The first component focuses on using a small number of core principles and events to guide interpretation of a document even though the principles were developed and events occurred well after significant portions of the document were written. The teachings and ministry of Jesus Christ provide the core principles for a Judeo-Christian model of biblical interpretation. Indeed, the Bible – the Old and New Testaments – must be interpreted through the lens of Christ's ministry. The focus on Christ's ministry leads to the second component. The second component allows for the jettisoning of text that violates the core principles that illuminate the Bible even when the text is clear and even when the text was written before the core principles were developed. This matter of interpretation is not to be taken lightly. Similarly, a Judeo-Christian biblical interpretation demands that the interstices of the Bible be filled with material that is consistent with Christ's ministry.

As applied to the Constitution, a Judeo-Christian interpretation would take our most core principles and beliefs and place them at the center of our interpretation of the Constitution. Our vision of equality and federal-state relations largely, but not fully, embodied in the Reconstruction Amendments would provide the core principles for a Judeo-Christian model of constitutional interpretation. Those principles would be the mandatory lenses through which to view all constitutional text. This may not be revolutionary. However, explicitly jettisoning or ignoring constitutional text that is inconsistent with those principles may be more than most are willing to consider. In addition to jettisoning parts of the Constitution, a Judeo-Christian constitutional interpretation would demand that interstices in the Constitution be filled with material that is consistent with the core principles.

I. SIMILARITIES BETWEEN THE BIBLE AND THE CONSTITUTION

Similarities between the Bible and the Constitution and between biblical interpretation and constitutional interpretation abound. The Bible is a constitution for Christians. Its theology identifies Christians as Christians, tells Christians who they are, indicates how Christians should act and states what Christians should aspire to be. Similarly, the Constitution is our constitution. It literally constitutes us as a nation and as Americans. Indeed, some would argue that the Constitution reflects our civil religion.¹

The Bible and the Constitution are not just documents. Both the Bible and the Constitution provide ways of living. As texts for living, what they mean is more important than what they say. There is universal agreement regarding what the Constitution says and fairly significant agreement in the Christian world regarding what the Bible says, in translation. However, neither the Constitution nor the Bible is crystal clear regarding how some specific situations should be handled in today's world. Determining what the texts mean and how they apply to us is the job of interpretation.

As related to everyday living, the Bible and the Constitution can be interpreted for two very different reasons. They can be interpreted generally to determine how we should live. In these situations, the Bible and the Constitution may provide general guidance that is useful to keep us tethered to our principles. Conversely, the Bible and Constitution may need to be interpreted when we need to determine whether a specific law or behavior is consistent or inconsistent with those documents. In these situations, we may interpret the Bible and the Constitution to fill the interstices of the documents to divine their meaning with respect to situations that do not appear to be covered explicitly in the documents. Alternatively, we may interpret the documents to ensure that specific behavior is allowed, i.e., to assure ourselves that a particular course of conduct is constitutional or Christian. The documents may be massaged or reinterpreted to ensure that certain actions that we want to engage in or already have completed are not prohibited by the Bible or the Constitution. In these circumstances, interpreters may search the documents looking for the answers they want rather than the answers they need.

The attempt to interpret the documents to determine the appropriateness of specific conduct can be problematic. Efforts to interpret the documents to find firm solutions in the context of actual disputes that are not already resolved in their texts can put pressure on them to do something they may not have been written to do. Though they are structured as codes in places, the Bible and Constitution are more about listing principles than listing rules. They tend to provide a way of living. Looking at them to resolve disputes can lead to referencing them to help us justify living the civic and personal lives we want to live rather than pointing us in the direction of the lives we ought to live. Some behavior that would appear to violate biblical or constitution principles, but may not violate biblical or constitutional commands, may be deemed not unchristian or not unconstitutional. That the documents are more standards than rules raises the stickier point that behavior that is unchristian or unconstitutional from a principled standpoint may yet be deemed irremediable.

¹ See SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-53 (1988).

II. JUDEO-CHRISTIAN BIBLICAL INTERPRETATION

A. The Primacy of Jesus' Ministry

The Christian Bible is composed of the Old Testament and the New Testament. For Christians, the Old Testament covers the Old Covenant that God had with his chosen people, the Jews. The New Testament chronicles Jesus' life and ministry and reveals the New Covenant that Jesus brought to those who would become Christians. Biblical interpretation by Christians occur through the lens of Christ's teachings. The Episcopal Catechism notes, "We understand the meaning of the Bible by the help of the Holy Spirit, who guides the Church in the true interpretation of the Scriptures." In divining the meaning of the Bible, Bible passages are read through the lens of Jesus Christ's ministry which is thought by Episcopalians to focus on two key commandments that constitute what is known as the Summary of the Law:

Hear what our Lord Jesus Christ saith: Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it: Thou shalt love thy neighbor as thyself. On these two commandments hang all the Law and the Prophets.³

The primacy of Christ's ministry to Christians may be a reason why the term Judeo-Christian may grate on some Jews and on some Christians. Interpretations of the Old Testament, which came before Christ, must be consistent with Christ's ministry. Similarly, interpretations of the New Testament – which begins with Christ's ministry and includes teachings of the early Christian church – must be consistent with Christ's ministry. To the extent that Christ's ministry was – in some respects – the fulfillment of the Old Testament, the Old Testament is largely consistent with Christ's ministry. However, to the extent that the New Testament is a bit of a break with the Old Testament, part of the Old Testament or at least some of the practices espoused in the Old Testament can be and must be jettisoned if they are deemed inconsistent with Christ's teaching. This is hardly surprising to Christians, who view Christ's teaching as primary and the Old Testament as somewhat secondary. Simply, a Judeo-Christian or Christian interpretation of the Bible begins and arguably ends with Jesus' ministry, even though reason and tradition have historically played a key role in the Episcopal Church's biblical interpretation tradition.

Of course, non-Christians need not consider Christ's ministry to be anything more than persuasive or not so persuasive discussion of Old Testament writings. They can interpret the Old Testament in the same way as they would in the absence of Christ's ministry or at least can treat the Old Testament as primary and Christ's teaching as secondary, such that any inconsistency between Christ's teaching and the Old Testament can be resolved in the Old Testament's favor. Indeed, for those who believe the Old Testament to be the unerring word of God, attempts to reinterpret or jettison parts of it could be viewed as heretical. This viewpoint is consistent with not being a Christian, but does not necessarily require any hostility toward Christianity. Though

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² See THE BOOK OF COMMON PRAYER (Catechism) 853-54.

³ See THE BOOK OF COMMON PRAYER (Catechism) 851.

a Christian and non-Christian interpretation of the Bible can coexist and lead to similar conclusions regarding how we should live our lives, it may do so purely through happenstance.

B. Jettisoning Text

Anything that is inconsistent with Christ's ministry, including parts of Old Testament books that are nevertheless considered by Christians to be the work of humans inspired by God, must be discarded or reinterpreted until it is consistent with Christ's ministry. The United States Supreme Court has made clear that courts are not supposed to become involved in making decisions regarding religious doctrine and orthodoxy. Nonetheless, when ecclesiastical matters are key issues to resolving a case, courts may be required to intervene even as they claim to avoid such entanglements. Eventually, the Court may be required to resolve a dispute between the Episcopal Diocese of Virginia (the "Diocese") and a group of breakaway congregations that have declared themselves separate from the Diocese. Of course, the separation is not the key dispute. The dispute is over the property that the breakaway parishes and the diocese each claim they own. Though the Virginia courts have claimed that the issue is not related to doctrine, it may become and an issue of doctrine and orthodoxy before long.

1. The Legal Case⁵

The case continues in the Virginia judicial system, with the latest round going to the breakaway parishes. At this point, the courts are focused on determining how a particular Virginia statute applies to the dispute. The statute allows congregations that must decide between belonging to two branches of the same church to make that choice and keep parish property. In one of its rulings, the court determined that it could apply the statute to the breakaway parish situation without determining matters of church doctrine. Consequently, the court ruled that the statute is not unconstitutional on its face.

Though the Virginia court is adamant in its stance that it will not have to decide church doctrine issues, it may not be correct in denying the need to consider and analyze church doctrine before resolving the issue or applying the statute. The statute at issue is not applicable unless the congregations have a choice in deciding which church to join. The Episcopal Church of the United States of America (ECUSA) is a hierarchical and territory-based church. It is recognized as the Anglican Communion's church in the United States and the Diocese of Virginia is the ECUSA's recognized diocese for the localities where the breakaway parishes are located. Consequently, there arguably is never a choice regarding which branch of the Episcopal Church a parish wishes to join. That is, until the ECUSA ceases to be the Anglican Communion's recognized church in the United States or until the Diocese of Virginia ceases to be the ECUSA's diocese for its territory, a choice to leave the Diocese and associate with another group is not a choice between two branches of the same church, but a decision to leave the church. From a doctrinal perspective, choosing to leave the Diocese of Virginia to join another Anglican group is akin to joining a different denomination entirely, even if the other Anglican group has ties with the worldwide Anglican Communion. To be clear, this is not necessarily the only way to

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⁴ See, e.g., Jones v. Wolf, 443 U.S. 595 (1979).

⁵ The legal case is detailed in a Letter Opinion on the Constitutionality of Va. Code §57-9(A), In Re: Multi-Circuit Episcopal Church Property Litigation (CL 2007-0248724)(June 27, 2008).

interpret ECUSA doctrine, but coming to a different conclusion requires the interpretation of church doctrine.

Apart from the issue of whether the breakaway parishes are leaving the ECUSA is whether the breakaway parishes are choosing to align with organizations that are the true heirs of the Anglican tradition. The breakaway parishes argue that the organizations that they are joining are maintaining orthodox Anglican thought and that the ECUSA has abandoned orthodoxy to the point that it has left the Anglican fold. Understandably, this is an issue that courts do not want to decide and are not allowed to decide under U.S. Supreme Court doctrine. However, the issue of which organization – the ECUSA or the organizations joined by the breakaway parishes – is the true repository of Anglican orthodoxy in the United States, as illuminated in large part through the debate about the role of gay people in the church, is the crux of the dispute between the ECUSA and the breakaway parishes. It is more central to the real issue underlying the breakup than the issues the courts are willing to decide.

2. Orthodoxy and Jettisoning Text

A core issue in the dispute between the breakaway parishes and the Diocese of Virginia/ECUSA is the role of gay people in the church. In 2004, the General Convention of the ECUSA approved the Diocese of New Hampshire's decision to elect the Rt. Rev. V. Gene Robinson, a non-celibate gay man, bishop. This decision is not the only one on which the breakaway parishes differ with the Diocese/ECUSA. However, it is a major one that could be thought to have been the final indignity that guaranteed the break.

At the center of the dispute about the role of gays in the church is the interpretation of scripture. The two groups appear to interpret the Bible differently and reach different conclusions regarding how the Bible resolves current disputes. There is language in the Bible, principally from the Old Testament book Leviticus, which appears to condemn homosexual behavior as sinful. What this language means for today is at the heart of the dispute between the groups.

The breakaway parishes tend to view the language in the Bible regarding homosexuality as the last word on the appropriateness of elevating gays to positions of power in the church. Biblical language that suggests that homosexual activity is sinful suggests that those who engage in such behavior openly and without the recognition of its sinfulness are not fit to serve as bishops in God's church. According to the breakaway parishes, those who do not take the biblical passages as correct statements of God's law are to be viewed as unorthodox. The refusal of the ECUSA to read a number of other biblical passages in a literalist way marks the ECUSA, according to the breakaway parishes, as unorthodox and an inappropriate receptacle for Anglican authority in the United States. However, it is clear that the breakaway parishes believe they are reading passages through the lens of Christ's ministry.

Not surprisingly, those who tend to support the decision of the ECUSA General Convention' decision with respect to Bishop Robinson also tend to view the Old Testament passages

⁶ See, e.g., *Leviticus* 18: 22 and 20:13.

differently. They tend to read the passages in context and through the lens of Jesus Christ's ministry. That is, the passages most widely cited by the dissenters to support a limited role for gays in today's Episcopal Church tend to be in close proximity to passages that condemn behavior that would never be considered justifiable reasons to limit the role of those engaging in such behavior in today's Episcopal Church.⁷

Whether the breakaway parishes are correct or whether the ECUSA is correct about the proper role of gay people in the church is not important to this essay. What is important is the fact that both groups are more than willing to ignore parts of the Bible with which they do not feel compelled to agree. The ECUSA ignores the linguistic prohibitions in Leviticus that they wish to ignore. Similarly, the breakaway parishes more selectively ignore the linguistic prohibitions in Leviticus that they wish to ignore, even though they claim to be orthodox in their reading of the Bible. The point is simply that jettisoning text that does not fit with one's vision of Christ's ministry is not terribly problematic under a Judeo-Christian mode of biblical interpretation.

III.JUDEO-CHRISTIAN CONSTITUTIONAL INTERPRETATION

A. The Primacy of the Civil War and the Reconstruction Amendments

In choosing the small number of events and principles that ought to illuminate a Judeo-Christian constitutional interpretation, the Civil War and the principles underlying the Reconstruction Amendments are the most obvious ones. The Civil War was the deadliest war the United States has ever seen in terms of the percentage of the population lost. The psychological toll of the Civil War may also have been its most devastating cost. However, for constitutional interpretation purposes, the fact that the Civil War tore the nation and its governing structure apart at a fundamental level and ultimately required that it be stitched back together through the Reconstruction Amendments – the 13th, 14th and 15th amendments – explains why it must be considered the seminal event in American constitutional history. The Civil War was similar in effect to Christ's ministry. It challenged and changed the rules of the game and rebuilt society on a similar, but different, foundation. The post-Civil War foundation was based on looking at people, citizens, the states and the nation differently than they were looked at before the War.

The Reconstruction Amendments were the partial fulfillment of the Civil War's promise and the partial fulfillment of many of the equality principles noted in the Declaration of Independence and the Constitution, but not fully reflected in the world those documents created. Through their language and subsequent interpretation, the Reconstruction Amendments introduced a formal equality that created a single mass of equal citizens who were all to be given the same legal and civil rights under the Constitution. Though the language of the Reconstruction Amendments appears to provide explicitly for the full equality of former male slaves given its language with respect to suffrage, its principles suggest an equality of citizenship

⁷ See, e.g., *Leviticus* 19:27 (concerning the cutting of one's hair and beard) and 19:19 (prohibiting the planting of two kinds of seed in the same field). Though some might claim that this chapter of Leviticus does not state the prohibition as strongly as the prohibitions against homosexuality, Leviticus 19 includes commandment-level admonitions such as do not steal and do not lie. This would suggest that the violation of any of the admonitions in the chapter would be sinful.

the breadth of which had never been seen. Those principles have been largely fulfilled in the fullness of time and subsequent interpretation of the Constitution.⁸

The Reconstruction Amendments were also transformative in how they realigned the role and prerogatives of states in the federal system. The states remained sovereign in some respects, but their role as subservient to, rather than co-equal with, the Union was unquestioned in the wake of the Reconstruction Amendments. In addition, states were limited in their prerogatives regarding how to treat their citizens. Rather than accept governmental prerogative that allowed governments to choose favorites among groups of citizens, the Reconstruction Amendments demand equality for citizens with respect to legal rights.

The primacy of the principles underlying the Reconstruction Amendments – equality of citizens and the role of the state in the federal government – may appear inconsistent with parts of the Constitution. This is no surprise given that the Reconstruction Amendments fundamentally altered the Constitution. There is a fundamental tension between U.S. constitutionalism before the Civil War and U.S. constitutionalism after Reconstruction Amendments. Were the Reconstruction Amendments merely a continuation and specification of what went before, they would not be so momentous. In this way, the Reconstruction Amendments are similar in role to that played by Christ's ministry in Judeo-Christian biblical interpretation. The very nature of the enterprise guarantees tension between what went before and what is now in place. The key is to require that the new understanding be primary. This is where one has to consider what to do with the portions of text that are inconsistent with the new primary principles. The point of making the principles primary is to require that they prevail over contrary text, as well as inform unclear text and determine issues on which the text is silent.

B. Jettisoning Constitutional Text and Filling Interstices

Under a Judeo-Christian constitutional interpretation suggested above, the principles underlying the Reconstruction Amendments are not merely some of a number of principles that should illuminate constitutional interpretation. They are the primary principles that must illuminate constitutional interpretation. Consequently, in reviewing constitutional text, the mere fact that clear constitutional text exists does not mean that it will remain a basis for making a decision in the real world. The words may not be literally excised from the text, but they may be treated as nullities. This tracks how many Christians and Christian churches interpret the Bible. Those portions that are inconsistent with Christ's ministry or, in some cases, that are not required by Christ's ministry are simply ignored or essentially jettisoned.

The proposed Judeo-Christian constitutional interpretation may ignore those requirements that may have seemed sensible in the past, but do not necessarily reflect the core principles of our Constitution. For example, the age requirements for holding federal office might be jettisoned. If an issue respecting the age requirements arose in litigation, the question almost everyone would ask is simply whether a candidate for federal office meets the requirements.

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⁸ See generally, Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 EMORY L.J. 1397 (2002); Henry L. Chambers, Jr., Dred Scott: Tiered Citizenship and Tiered Personhood, 82 CHICAGO-KENT L.R. 209 (2007).

Whether the age requirements were viewed as silly or inconsistent with principles of equality would not be deemed relevant to whether the text will be controlling. A Judeo-Christian constitutional interpretation would ask whether the age requirements are consistent with or required by the core principles of equality that were accorded primary status in the wake of the Civil War. If the age requirements get in the way of equality, they would be ignored. The age requirements would not necessarily be excised from the Constitution and might legitimately guide decisions of citizens regarding whether to vote for a 33-year-old presidential candidate. However, they could not serve as a basis for a challenge to the actual election of the presidential candidate.

As important in some situations would be the notion that core principles would fill any interstices that existed in the Constitution or even that existed in the Reconstruction Amendments. For example, consider how the intent to discriminate ought to be treated under a Judeo-Christian vision of constitutional interpretation. The 14th Amendment is arguably silent regarding whether the intent to discriminate is necessary for its own violation. In interpreting this question, a court would ask whether the known principles of the Reconstruction Amendments illuminate how this aspect of the 14th Amendment should be interpreted. This may sound odd, but it is common in the context of Judeo-Christian biblical interpretation. The importance of many of Jesus' acts is unclear. Referencing other parts of his ministry to determine the meaning of unclear portions is fairly standard. In taking this approach to the issue of whether a 14th Amendment violation must require the intent to discriminate, it is entirely likely that the intent to discriminate would not be required by the Constitution.

The examples above merely scratch the surface of the constitutional text that could be jettisoned or reinterpreted with the vision of Judeo-Christian constitutional interpretation noted above. Certainly, this form of interpretation could devolve into a parlor game of finding the constitutional provision one likes least and trying to excise it. However, that is not the point of this exercise any more than biblical interpretation is a parlor game featuring biblical passages. Rather, the point is to consider what a constitution, the Constitution of the United States, really means. If it is literally just a mass of words that governs us, so be it. However, if it is supposed to provide a way of living, it could and arguably should be made as consistent as possible with that way of living. If that requires ignoring passages that do not fit the way of living reflected in core portion of the document – the Reconstruction Amendments – so be it.

CONCLUSION

The simple notion underlying a Judeo-Christian constitutional interpretation is that we are what we are. In the same way that a Judeo-Christian biblical interpretation focuses on core principles and interprets a holy text through those core principles, a Judeo-Christian constitutional interpretation should proceed by discovering its core principles and applying those principles to our civil religious text. The mere fact that text found its way into the Constitution is no reason for keeping it there if it is not consistent with the principles that are supposed to illuminate the Constitution and reflect who we are. Some may deem the Constitution and all of its text as a full reflection who we are, warts and all. For those people, a Judeo-Christian constitutional interpretation would be anathema. However, others might prefer a Constitution – the foundational document of our federal government and our liberty – that can be reformed to

reflect who we want to be. At the least, they may prefer that the Constitution reflect who we want to be whenever the document is used to resolve actual disputes.

A Judeo-Christian constitutional interpretation would require a willingness to jettison or explicitly ignore clear and appropriately ratified constitutional text, coupled with the willingness to interpret uncertain constitutional text through the lens of our core Reconstruction Amendment provisions. This is not simply about constitutional amendment outside of Article V or repeal by implication or a somewhat aggressive results-driven interpretation of the Constitution. A Judeo-Christian constitutional interpretation is about treating the Constitution as a text that must conform to our views of the America in which we want to live. Indeed, it may help eliminate some of those constitutional stupidities a group of wise professors once cataloged. Ultimately, the goal may be impossible to achieve or simply unwise, but it is worthwhile to consider.