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ORIGINALISM V. DYNAMIC CONSTITUTIONALISM: IMPLICATIONS OF RELIGIOUS BELIEFS ON CONSTITUTIONAL INTERPRETATION

REV. TJ DENLEY*

I. INTRODUCTION

Judicial decision making and the influences on a judge's decision-making process has created much scholarship over the last thirty years.[1] Many studies examine judges, state and federal, of all levels, from trial to appellate courts, including Supreme Court Justices, to see

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[1] *See, e.g.,* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557-59 (1989).

if various factors affect their decision-making processes.[2] These studies have shown that judges' decision making is shaped more by their ideological nature and party affiliation, than by race or gender.[3]

The religious background of judges has been examined, but mostly to address the question whether judges should use their faith and moral beliefs to make decisions. Scholars argue both ways.[4] A few studies examine the influence of different religious backgrounds on judicial decision making.[5] Some ask whether Catholic Justices on the Supreme Court have voted in line with amicus briefs filed by the United States Conference of Catholic Bishops.[6] Others look at Supreme Court Justices and their religious affiliations.[7] Law Professor Sanford Levinson has even espoused a way of interpreting the constitution—a "Catholic" and

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[2] *See, e.g.,* Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 WM. & MARY BILL RTS. J. 43, 43-44, 46 (2006) [hereinafter Feldman I]; Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 242-43 (2019); Segal & Cover, *supra* note 1, at 562; Lewis M. Wasserman & James C. Hardy, *U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting in Establishment Clause Disputes Involving Public Education: 1947-2012*, 2 BRIT. J. AM. LEGAL STUD. 111, 114-16 (2013).

[3] *See, e.g*., William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, 65 POL. RESCH. Q. 820, 823 (2012); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 36-37 (2001); Harris & Sen, *supra* note 2, at 242; Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1049 (1996); Wasserman & Hardy, *supra* note 2, at 123-24.

[4] *See, e.g.,* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 933 (1989); Diana Ginn & David Blaikie, *Judges and Religious-Based Reasoning*, 19 CONST. F. CONSTITUTIONNEL 53, 53-54 (2011); Wendell L. Griffen, *The Case for Religious Values in Judicial Decision Making*, 81 MARQ. L. REV. 513, 513-21 (1998); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 538, 543, 547-48 (1998) [hereinafter Idleman I]; Sarah E. Hamill, *Judges and Religious-Based Reasoning: A Response to Ginn and Blaikie*, 21 CONST. F. CONSTITUTIONNEL 15, 15, 17-18, 21 (2012).

[5] *See, e.g.*, Thomas C. Berg & William G. Ross, *Some Religious Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 383-84 (1998); Blake, *supra* note 3, at 817; Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?* 45 CT. REV. 112, 112-13 (2009); Teresa S. Collett, *"The King's Good Servant, but God's First" The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277, 1278 (2000); John T. Noonan, Jr., *The Religion of the Justice: Does it Affect Constitutional Decision Making?*, 42 TULSA L. REV. 761, 761 (2007); Wasserman & Hardy, *supra* note 2, 118-23.

[6] Kevin C. Walsh, *Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs*, 26 STAN. L. & POL'Y REV. 411, 413-14 (2015).

[7] *See e.g.*, Wasserman & Hardy, *supra* note 2, 117-18.

a "Protestant" method of interpretation—that correlates historical approaches to scripture with current methods of interpretation.[8]

Religious faith affects the way Supreme Court Justices approach the Constitution and the laws that they are called to interpret.[9] This article examines how Catholics and Jews approach their sacred texts, and how these approaches tend to mirror textualism and originalism or dynamic constitutionalism.[10] For Catholic Justices, the Constitution is akin to a sacred document written for a specific time and place. For Jewish Justices, the Constitution is alive, lending itself to dynamic constitutionalism as a responsive document that is in dialogue with current challenges.[11] The educational and religious history of Catholic and Jewish Justices will be examined, and cases demonstrating the approaches to law and the Constitution will be discussed.[12] Finally, the implications of understanding these approaches will be analyzed.[13]

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[8] SANFORD LEVISON, CONSTITUTIONAL FAITH 27-30 (1988). Levinson equates a Catholic reading of the constitution with an interpretive method that favors looking at not only the text of the Constitution, but also precedent, with the Supreme Court as the "dispenser of ultimate interpretation." Whereas the Protestant reading of the Constitution is focused on the text only and the only authority behind interpretation is the individual interpreter. This paper does not draw from Levinson's framework.

[9] The term "interpret" is used generally, acknowledging that the Justices who ascribe to the originalist theory do not see themselves interpreting the Constitution but instead are determining what the framers intended to convey or what the text says. *See* Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 631-32 (1993).

[10] The author chooses to use the term dynamic constitutionalism as opposed to living constitution or other terms. *See infra* Part III.b; and *see, e.g.*, Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.L. REV. 1243, 1255-61 (2019) (providing an explanation of the many implications of the term "living constitution").

[11] The only current justice who is neither Catholic nor Jewish is Justice Ketanji Brown Jackson. *See infra* Part V.

[12] Specifically, this Article discusses the religious and educational history of Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, John G. Roberts, Jr., Samuel A. Alito, Jr., Sonia Sotomayor, Elena Kagan, Neil M. Gorsuch, Brett M. Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson. *See infra* Part V.

[13] *See infra* Part VI.

II. METHODS OF BIBLICAL INTERPRETATION

a. Types of Biblical Hermeneutics[14]

Biblical hermeneutics is almost as old as the Bible itself, yet until the Protestant Reformation, only clergy were understood or allowed to be able to interpret the Bible.[15] From the time of the Reformation to the early twentieth century, the standard method of interpretation was *sola scriptura*, or the idea that the original Biblical message, as it was written years ago, is the current Biblical message.[16] This is a focus on "the belief that every single line of scripture was exactly as God intended it to be, down to the last syllable."[17] Scholarship in biblical hermeneutics over the last one hundred years has changed the methods of analyzing and interpreting the Bible.[18] After the modernist/fundamentalist conflict[19] in the early Twentieth century, the concept of modernism gave rise to new methods of interpretation, including a historical-critical method, a literary approach, and a contextual approach.[20] The historical-critical method includes looking at the composition of the text, the text as it is written, the text as it is translated, the source, the form, and the socio-historical time of the writing.[21] The literary approach borrowed heavily from new literary analysis and looks at, among other things, the

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[14] "Hermeneutics refers to the defining of rules and methodologies used in interpreting texts." Donald K. McKim*, Approaches to Contemporary Hermeneutics: Major Emphases in Biblical Interpretation*, 39 REFORMED REV. 86, 86 (1986).

[15] Prior to the Protestant Reformation, the Bible was written in Latin and not available to laity. One aspect of the Protestant Reformation was the emphasis on the Bible in the common language and a focus on education, including teaching the ability to read. *See, e.g.*, JOHN H. LEITH, INTRODUCTION TO THE REFORMED TRADITION 77-79 (1977); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5-6 (1984).

[16] *See* McKim*, supra* note 14, at 87-88; *see, e.g.*, Grey, *supra* note 15, at 5.

[17] Margaret Bendroth, *Christian Fundamentalism in America*, OXFORD RSCH. ENCYC. (Feb. 27, 2017), https://doi.org/10.1093/acrefore/9780199340378.013.419.

[18] This will not be an in-depth discussion of methods of biblical interpretation. For those who are interested, *see generally*, JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION (2004).

[19] Briefly, during the 1920s, a split occurred in the reformed protestant movement between those who emphasized authority and fixed creeds, the fundamentalists, and those who emphasized freedom in religious thought and the ability for religion to respond to scientific progress and moral issues of the day, the modernist. *See* W.T. Conner, *Fundamentalism vs Modernism*, 2 SOC. SCI. 101, 101 (1927); Bradley J. Longfield, *For Church and Country: The Fundamentalist-Modernist Conflict in the Presbyterian Church*, 78 J. PRESBYTERIAN HIST. 35, 35 (2000).

[20] *See, e.g.*, McKim, *supra* note 14, at 88, 90-91.

[21] Adele Berlin & Marc Zvi Brettler, *The Modern Study of the Bible*, *in* THE JEWISH STUDY BIBLE, 2084, 2084-90 (Adele Berlin & Marc Zvi Brettler eds., Oxford Univ. Press 2004).

rhetoric of the author and the narrative the author is conveying.[22] The historical critical method and the literary approach take the original context and the original biblical message as a starting point for the current biblical message.[23] The contextual approach looks to the original context and the original biblical message, and then applies the contemporary context, to determine the biblical message for today.[24] In the latter half of the Twentieth Century, the contextual approach expanded to include cultural hermeneutics which use a liberationist lens, a feminist lens, or a queer lens, among others, to approach the text.[25]

i. Biblical Interpretation in the Catholic Church

The Catholic Church was slower than other faiths to adapt to the historical critical methods of interpretation, not formally adopting the "modern" methods of interpreting the Bible until the Second Vatican Council in 1965.[26] The Constitution on Divine Revelation of the Second Vatican Council, *Dei Verbum*, affirmed that the "books of Scripture must be acknowledged as teaching solidly, faithfully and without error that truth which God wanted put into sacred writings…for the sake of salvation" and that "all Scripture is divinely inspired."[27] Yet, *Dei Verbum* continued:

> However, since God speaks in Sacred Scripture through men in human fashion…the interpreter of Sacred Scripture, in order to see clearly what God wanted to communicate to us, should carefully investigate what meaning the sacred writers really intended, and what God wanted to manifest by means of their words.
>
> To search out the intention of the sacred writers, attention should be given, among other things, to 'literary forms.' For truth is set forth and expressed differently in texts which are variously historical, prophetic, poetic, or

[22] *Id.* at 2090-93.
[23] McKim, *supra* note 14, at 87-88.
[24] *Id.* at 88-89.
[25] Berlin & Brettler, *supra* note 21, at 2094-96.
[26] Pontifical Biblical Commission, *The Interpretation of the Bible in the Church*, ORIGINS (Jan. 6, 1994), https://www.catholic-resources.org/Church-Docs/PBC_Interp-FullText.htm. The statement prior to 1965 on Biblical interpretation came from Pope Leo XIII's *Providentissimus Deus* of Nov. 18, 1893. *Id.*
[27] DEI VERBUM [CONSTITUTION] Nov. 18, 1965, ch. III, para. 11 (Vatican) (citation omitted).

> of other forms of discourse. The interpreter must investigate what meaning the sacred writer intended to express and actually expressed in particular circumstances by using contemporary literary forms in accordance with the situation of his own time and culture…For the correct understanding of what the sacred author wanted to assert, due attention must be paid to the customary and characteristic styles of feeling, speaking and narrating which prevailed at the time of the sacred writer, and to the patterns men normally employed at that period in their everyday dealings with one another.[28]

While the *Dei Verbum* allows for the use of "literary forms" for assistance in interpreting the Bible, the guiding principle remains that interpretation rests on determining what God wanted to say through the inspired words as written in the Bible.[29] Thus, a traditional Catholic interpretation of the Bible follows closely to the original meaning of the words as written.[30]

A typical lay-Catholic would not necessarily be versed in the modern methods of literary criticism as applied to the Bible or the historical critical methods of interpreting the Bible.[31] The typical experience a practicing Catholic has with the Bible is one that is mediated by priests, who are limited in their interpretation of the Bible to the official interpretations taken by the Church and the Pope.[32] Father Raymond Brown, a Catholic biblical scholar, notes that traditional Catholics tend to object that the historical-critical approach "takes away from the absolute authority of the Bible."[33] Thus, a typical Catholic approach to the Bible involves a highly structured method leading to a single correct interpretation.[34]

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[28] *Id.* at ch. III, para. 12.

[29] *Id.*

[30] *Id.* at ch. VI, para. 24-25.

[31] RAYMOND E. BROWN, BIBLICAL EXEGESIS & CHURCH DOCTRINE 15-16 (1985).

[32] Blake, *supra* note 3, at 815.

[33] BROWN, *supra* note 31, at 16.

[34] *See id.*; *see also*, DEI VERBUM [CONSTITUTION] Nov. 18, 1965, (Vatican) (illustrating an emphasis on sacred tradition and the written word of God). According to Brown, the biblical interpretation should lie with the Catholic Church, i.e., one single correct interpretation.

ii. Jewish Methods of Interpretation

Jewish interpretation of the Tanakh, has three distinct aspects that are relevant to this Article.[35] First, there is no official interpretation of the Tanakh.[36] Second, in a similar vein, there is no official translation of the Tanakh, as most liturgical readings are read in Hebrew.[37] Third, Judaism looks to the Tanakh as a "perfectly harmonious unit written by one source: G-d."[38]

While Jewish scholars do use modern methods of biblical scholarship, one of the traditions of Jewish interpretation and corresponding method is called Midrash.[39] Midrash is a mode or process of studying sacred text, the term arising from the Hebrew root "דָּרַשׁ" which means to inquire or seek out, and can refer, usually in the Torah, to seeking God's will.[40] The term also refers to the results of the interpretive process, a collection of "primarily rabbinic exegesis tied to scriptural verses."[41]

The Midrash comes from the struggles of rabbis trying to understand a text that is unclear while utilizing that uncertain text to answer questions of Jewish law, referred to as halakhah.[42] Midrash is used to apply halakhah to certain facts.[43] Thus, Midrash serves two purposes. First, it aids the understanding of unclear texts while resolving conflicts between apparently divergent, conflicting portions of an overall text that

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[35] The Jewish Publication Society, *Preface to the 1985 JPS Edition* of THE JEWISH STUDY BIBLE, at xiii (Adele Berlin & Marc Zvi Brettler eds., Oxford Univ. Press 2004) (1985). The Tanakh is a collection of the Torah, the Stories of Moses; *Nevi'im*, the Prophets; and the *Kethuvim*, the Writings. *Id.* The Tanakh contains the same content as the Christian Old Testament, what is traditionally known as the Hebrew Scriptures, but in a different order. *Id.* at xiv.

[36] Adele Berlin & Marc Zvi Brettler, *Introduction: What is the Jewish Study Bible*, *in* THE JEWISH STUDY BIBLE, at ix (Adele Berlin & Marc Zvi Brettler eds., Oxford Univ. Press 2004) (1985). A famous rabbinical saying is: "There are seventy faces to the Torah." *Id*.

[37] *Id.* at x.

[38] Note, *Looking to the Statutory Intertext: Toward the Use of The Rabbinic Biblical Interpretative Stance in American Statutory Interpretation*, 115 HARV. L. REV. 1456, 1456 (2002). The author acknowledges that G-d is never to spelled out under certain Jewish teachings, and therefore adjusted the language in the source to respect this tradition in this part of the paper.

[39] David Stern, *Midrash and Jewish Interpretation, in* THE JEWISH STUDY BIBLE, 1863 (Adele Berlin & Marc Zvi Brettler eds., Oxford Univ. Press 2004) (1985).

[40] *Id.*

[41] Note, *supra* note 38, at 1457-58 (citation omitted); Stern, *supra* note 39, at 1863.

[42] Note, *supra* note 38, at 1457-58.

[43] *Id.* at 1458.

is "assumed to be perfectly and divinely harmonious."[44] Second, it addresses current challenges of daily living that are not addressed in the Tanakh, due to the technological and social advances that have occurred since the Tanakh was written.[45]

Midrash often takes the form of questions and debate. An example is the analysis of the commandment to eat matzo (unleavened bread) with lamb on the first night of Passover found in Exodus 12.[46] Many questions were raised by this commandment, such as: What is matzo? What grain can be used to make matzo? How much matzo must one eat? Until what time must the matzo be consumed?[47] Different rabbis have weighed in to answer these questions and have raised further questions, such as: Since the destruction of the temple in Jerusalem has made it nearly impossible to prepare lamb according to Jewish tradition, is this commandment to eat matzo still required?[48]

Another tradition of Jewish interpretation is that, when facing a challenge in one text, one looks first to that text in question, and if needed, looks to other texts to help comprehend the meaning of the first text.[49] When using another text to aid interpretation, rabbinical scholars have proclaimed that the second text is to be used only for the basic principles in that text.[50]

The Midrash of the commandment to eat matzo is a good example of using another text to help understand the initial text. A commandment exists to eat matzo on Passover independent of lamb.[51] Thus, matzo is to be consumed for Passover even if lamb cannot be slaughtered according to tradition. This demonstrates how a typical Jewish interpretation of the Tanakh involves a questioning of the texts and recognizes difficulties in the application of the halakha caused by modern day circumstances.[52]

One way the Midrashic method of interpretation is significant in Jewish tradition can be observed in the Passover Seder, where the youngest person at the Seder asks four questions beginning with: "Why

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[44] *Id.*

[45] *Id.*

[46] *Id.*; *see also Exodus* 12:8 (New Revised Standard Version).

[47] Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 452-53 (1997).

[48] *Id.* at 453-54.

[49] Note, *supra* note 38, at 1456.

[50] *Id.*

[51] *Exodus 12:18 (NRSV).*

[52] *See, e.g.*, Note, *supra* note 38, at 1459 (explaining how interpretation of the Tanakh changed after invention of electricity).

does this night differ from all other nights?"[53] These questions serve as an entry for the child into the retelling of the Exodus narrative and the first Passover, a modern-day midrash of the Passover story.[54] Thus, since Jewish families engage in a midrash of the Passover story at each Seder, many children raised in the Jewish faith are familiar with this method of interacting with texts from a young age.

b. Similarities Between Scriptural Interpretation and Constitutional Interpretation

Interpretations of the Bible share many similarities with interpretations of the Constitution because Scripture and the Constitution are both revered in society. The Constitution is often referred to as the United States' "sacred text" or "civil religion" and is seen as an "authoritative legal text" and a document of "ultimate authority" as is the Bible in Christian circles and the Tanakh in Jewish circles.[55] The Constitution was written to create a new nation and to voice new political principles.[56] The Constitution provides guidance and laws for the nation, while also providing constraints for society's actions in the present and the future.[57] It provides a structure, for the nation's legal system as well as aspirations for how the nation should operate.[58] It sets forth rights and

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[53] THE PASSOVER HAGGADAH 21. (Nahum N. Glatzer ed., Jacob Sloan trans., Schocken Books rev. ed. 1989) (1953). The questions continue as follows: "For on all other nights we eat either leavened or unleavened bread; why on this night only unleavened bread? On all other nights we eat all kinds of herbs; why on this night only bitter herbs? On all other nights we need not dip our herbs even once; why on this night must we dip them twice? On all other nights we eat either sitting up or reclining; why on this night do we all recline?" *Id.*

[54] *Exodus 12: 26-27*; Jeffrey H. Tigay, Exodus, *The Jewish Study Bible*, JPS 12.

[55] VINCENT CRAPANZANO, SERVING THE WORD: LITERALISM IN AMERICA FROM THE PULPIT TO THE BENCH 6 (2000); *see also* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 7 (2009) (stating Constitutionalism is referred to as the United States' "civil religion"); Grey, *supra* note 15, at 17, 23 (asking if the Constitution is not "the scripture of a national civil religion" and resembles the Bible as a "sacred text").

[56] Keith Bartholomew, *Biblical and Constitutional Interpretation and the Role of Originalism in Sixteenth and Twentieth-Century Societies*, 82 ANGLICAN THEO. REV. 537, 541 (2000).

[57] Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics,* 15 CONST. COMMENT. 511, 512 (1998) [hereinafter Levine II]; *see also*, Stephen D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 592 (1993) [hereinafter Smith I] ("[W]e treat legal texts, unlike most other texts, as provisionally binding us in our present and future actions.").

[58] Henry L. Chambers, Jr., *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92, 94-95 (2009).

values, as well as "mandates forms of life of the community[.]"[59] Like scripture, it is a written document with an assumption of unity of authorship, despite having been written and amended over a two-hundred-year span.[60]

Similar to scripture, the Constitution has a plain meaning, based upon the context of its writing, which is easily ascertainable.[61] Yet the Constitution also includes specific framing principles, or meanings behind the words of the text, which are found through interpretation of the text.[62] Also, similar to scripture, the Constitution may be approached and interpreted to determine a general principle, or standard, of how to structure the nation's laws, such as using due process and equal protection of the law as cornerstones of the legal system.[63] Yet, the Constitution can also be interpreted to determine what is permitted or prohibited, a sort of Constitutional code to live by.[64]

III. METHODS OF CONSTITUTIONAL INTERPRETATION

a. Originalism

Originalism is a method of legal interpretation that popularly arose in the 1970s and 1980s in an attempt to find a "neutral" or "objective" method of reading the Constitution to replace the perceived "subjective" or "political" value judgements of the Warren Court.[65] The Warren Court, originalists argue, combined the idea that the Constitution can change over time with an emphasis on the Bill of Rights being incorporated to the states through the Fourteenth Amendment.[66] Law Professor Morton Horowitz argues the best example of the Warren

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[59] CRAPANZANO, *supra* note 55, at 15, 233.

[60] *See* Stephen D. Smith, *Believing Like a Lawyer*, 40 B.C.L. REV. 1041, 1066 (1999) [hereinafter Smith II] (explaining the assumed unity of scripture).

[61] Bartholomew, *supra* note 56, at 537, 539.

[62] Smith II, *supra* note 60, at 1067-68.

[63] Chambers, Jr., *supra* note 58, at 95, 108.

[64] *Id.* at 96.

[65] Morton J. Horowitz, *The Constitution of Change Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 34-35 (1993) [hereinafter Horowitz I]; Logan E. Sawyer, III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 201 (2017). The Warren Court is the name used to refer to the time period when Earl Warren was Chief Justice of the Supreme Court, 1953 - 1969. *The Warren Court, 1953-1969*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-courts/warren-court-1953-1969/ (last visited Feb. 19, 2023).

[66] Morton J. Horowitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 660 (1989) [hereinafter Horowitz II].

Court's excesses is *Brown v. Board of Education*.[67] Horowitz argues *Brown* overturned *Plessy v. Ferguson*[68] not because the constitutional basis of "separate but equal" had changed, but "because of what separate but equal facilities had come to represent."[69] Thus, for originalists, *Brown* is a prime example of judges making moral judgements of law or making the law say what the judges want it to say, not what the law actually says.[70] Originalism provides an antidote to this temptation in that it can be seen as removing personal values and desires from judicial decision-making, as well as removing the ability to legislate social agenda through judicial decisions.[71]

One of the main proponents of originalism was Justice Antonin Scalia. In 1989, Justice Scalia wrote a law review article, "Originalism: The Lesser Evil," to discuss and describe originalism and the follies of nonoriginalism.[72] Justice Scalia noted the difficulties of correctly applying the originalist method in finding the original intent and understanding of the text.[73] Justice Scalia claimed to be a "faint hearted originalist[,]" favoring textualism.[74] Textualism "faithfully implements the Constitution" by looking to the "semantic meaning of a statute's words," *i.e.* the plain meaning of the words taken in context.[75] Justice

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[67] Horowitz II, *supra* note 66, at 660; Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (challenging the constitutionality of racial segregation in public schools).

[68] 163 U.S. 537 (1896) (challenging the constitutionality of racial segregation in public transportation and establishing the doctrine of "separate but equal.").

[69] *See* Horowitz II, *supra* note 66, at 660.

[70] *Cf. id.* ("*Brown v. Board of* Education is the ultimate expression of the idea of a living Constitution. The most famous opinion of the Warren Court was thought by its proponents to be justifiable only in terms of a living Constitution."). The idea of a "living constitution" has been posed as the antithesis of originalism its assertion that the Constitution is document fixed in the time and context in which it was written. *See, e.g.,* Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 864 (1989) [hereinafter Scalia I]. *See also* Julie Asher, *Alito Kicks Off Project on Originalism, Catholic intellectual tradition*, CATHOLIC REVIEW (Oct. 3, 2022), https://catholic-review.org/alito-kicks-off-project-on-originalism-catholic-intellectual-tradition/. ("One attraction of originalism was that it promised to impose clear limits and thus prevent judges from using constitutional decision-making as a vehicle for imposing their own policy preferences on the country[.]").

[71] *See* CRAPANZANO, *supra* note 55, at 282; Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 714-15 (2011).

[72] Scalia I, *supra* note 70.

[73] *Id.* at 856.

[74] *Id.* at 864; Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 123 (2016) [hereinafter Pushaw, Jr. I].

[75] Pushaw, Jr. I, *supra* note 74, at 123, 160; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 206 (1980).

Amy Coney Barrett appears to follow this understanding as she defines her understanding of originalism as having two basic claims: "First, the meaning of constitutional texts is fixed at the time of its ratification. Second, the original meaning of the text controls because 'it and it alone is law.'"[76] Justice Clarence Thomas has also stressed that judging "is unabashedly based on the proposition that there are right and wrong answers to legal questions."[77] Said another way, there is a fixed meaning to the text that is easily ascertainable, and if "courts…interpret the Constitution to mean something different from that fixed and ascertainable meaning[,]" the courts are acting contrary to the Constitution.[78]

b. Dynamic Constitutionalism[79]

Dynamic constitutionalism is often described inapposite to originalism, as if originalism is the primary method of interpretation and dynamic constitutionalism is a misguided method of interpretation.[80] Many scholars who follow dynamic constitutionalism, however, harken to Chief Justice John Marshall's opinion in *McCulloch v. Maryland*[81] as the genesis of the "living constitution."[82] Marshall, in *McCulloch*, allows that, "[t]his provision [the law in question] is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[83] Justice Harlan supported this idea in his dissent in *Poe v. Ullman*,[84] stating that the

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[76] James Maxeiner, *What on Earth is Originalism?*, THE GLOBALIST (Oct. 16, 2020), https://www.theglobalist.com/united-states-supreme-court-amy-coney-barrett-justice-scalia-rule-of-law-originalism-democracy/.

[77] Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996).

[78] Smith & Tuttle, *supra* note 71, at 710.

[79] There is no agreed upon name for this style of interpretation. It has been called legal pragmatism, living constitution, nonoriginalism, legal realism and judicial activism, among others. The author chooses to refer to it as "dynamic constitutionalism" because the Constitution, while written and necessarily preserved in its original and amended forms, is also dynamic and capable of growth. In this view, the Constitution is flexible enough to accommodate each context it must be applied to in which meaning and interpretation must expand due to technological and social advances.

[80] *See generally*, Graglia, *supra* note 9; Scalia I, *supra* note 70; Asher, *supra* note 70.

[81] McCulloch v. Maryland, 17 U.S. 316 (1819) (challenging the establishment of a national bank and whether Maryland's tax on the bank was constitutional).

[82] Philp C. Kissam, *Explaining Constitutional Law Publicly, or Everyman's Constitution*, 71 UMKC L. REV. 77, 81 (2002) (quoting *McCulloch*, 17 U.S. at 407, 415).

[83] *McCulloch*, 17 U.S. at 415.

[84] 367 U.S. 497 (1961) (Harlan J. dissenting). *Poe* was a constitutional challenge to Connecticut's ban on the prescription of contraceptives. *Id.* at 498 (majority opinion). Though, it was dismissed on justiciability grounds, Justice Harlan addressed the constitutionality of the statute at issue. *Id.* at 524 (Harlan J. dissenting).

evaluation of the constitutionality of a "sovereign operation[]" of a state must be rational, and that "approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government."[85]

Yet, it is hard to find a unified and concrete understanding of dynamic constitutionalism. The basic understanding of dynamic constitutionalism is that the Constitution is organic and an evolving document that can adapt to current circumstances, rather than being controlled by the "dead hand of the past."[86] One important aspect in this evolving document is that words are not always clear and can be understood to have multiple meanings.[87] Thus, for example, a statute could have more than one possible interpretation, especially if, as the legal scholar and Judge Richard Posner argues, one considers the text, the intent of the author, the overall purpose, and precedent regarding similar "statutory verbiage."[88]

An additional aspect of dynamic constitutionalism is the use of a general principle to understand the Constitution and apply it to new facts.[89] One of the most famous examples is the right of privacy.[90] Justice William O. Douglas found that a right to privacy was contained within the penumbra of the First Amendment in 1965.[91] Another example is Justice Stephen Breyer who finds the theme of "active liberty" resonating throughout the Constitution.[92] Breyer defines active liberty as the idea that the laws of the nation constitute a connection between the people and the government which includes and denotes responsibilities, participation and capacity for both parties.[93] Michael J. Perry,

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[85] *Id.* at 539-540.

[86] Kissam, *supra* note 82, at 89 (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 98-110 (1962)); Horowitz II, *supra* note 66, at 657; Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 29 (2007).

[87] Pushaw, Jr. I, *supra* note 74, at 163.

[88] *Id.* at 123-24 (citing Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

[89] *See* Kissam, *supra* note 82, at 81-82.

[90] *Right of Privacy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[91] Griswold v. Connecticut, 381 US 479, 483 (1965) (challenging the constitutionality of Connecticut's laws prohibiting the sale of contraceptives to married couples).

[92] *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION, 23-27 (2008); *see* René Reyes*, The Supreme Court's Catholic Majority: Doctrine, Discretion and Judicial Decision Making*, 85 ST. JOHN'S L. REV. 649, 667 (2011).

[93] BREYER, *supra* note 92, at 25-27.

another legal scholar, finds that the Constitution is a "symbol of fundamental aspirations of the political tradition" that denotes "certain basic, constitution aspirations or principles or ideals of the American political community and tradition."[94] This demonstrates how the Constitution can have more than one meaning—the meaning as it is written and the meaning of the current time.[95]

Yet, the Constitution also has the meaning of what earlier courts have determined, known in legal terms as precedents, but which can also be referred to as a Midrash of precedents. Similar to biblical Midrash, legal precedents are previous interpretations of the Constitution, collections of previous judicial understanding of law as applied to facts.[96] Justice Neil Gorsuch has spoken about the wisdom found in precedents, saying "[p]recedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."[97]

Dynamic constitutionalism, then, when it interprets the meaning of the text, is also in dialogue with precedents and must "mediate" the past with the present.[98] Thus, dynamic constitutionalism is truly dynamic because the Constitution is the Constitution of the Founders, the Constitution of the American tradition, and the Constitution of today, all of which must be interpreted in the current situation based upon the specific case and unique set of facts.

IV. INFLUENCES ON JUDICIAL DECISION MAKING

Scholars, beginning in the 1940s, began to look at judicial decision-making to understand how judges made decisions and what influenced their decision-making process, in order to determine whether judging was a value-neutral mechanical process, or a process influenced by outside factors.[99] This empirical research established that the ideological values and the policy preferences of Supreme Court Justices have an impact on their decision-making.[100] This is not surprising, as in

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94 MICHAEL PERRY, MORALITY, POLITICS AND LAW 133 (1988).
95 *Id.*
96 *Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014).
97 NEIL M. GORSUCH ET AL., A REPUBLIC, IF YOU CAN KEEP IT 217 (2019).
98 PERRY, *supra* note 94, at 138.
99 *See generally* Harris & Sen, *supra* note 2; Songer & Lindquist, *supra* note 3.
100 Harris & Sen, *supra* note 2, at 244; Songer & Lindquist, *supra* note 3, at 1049.

many high profile cases before the United States Supreme Court, it is quite common to have a non-unanimous decision.[101]

Chief Justice John Roberts, at his confirmation hearing, said that judges are "servants of the law" and have a limited role in the law, similar to umpires, who call balls and strikes.[102] Justice Clarence Thomas has spoken of being a Supreme Court Justice and being "bound by the will of the people as expressed by the Constitution and federal statutes."[103] Justice Scalia stated that his personal views on abortion and the death penalty did not affect how he ruled as a Justice, for he adhered to an "enduring" Constitution that means what it meant when it was adopted.[104] Justices Roberts, Thomas, and Scalia see judging as merely applying the law as written to find the right answer, not legislating from the bench.[105] For these Justices, judicial decision making is value-neutral and simple, *i.e*., the law means what it says.

Justice Sonia Sotomayor, in a talk at the University of California Berkley Law School, took exception to the mechanical view of judging, stating that it is a valid goal, but questioned whether it is achievable in part or in all.[106] She noted that judges have a variety of experiences and thoughts which can lead to differing conclusions on the application of

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[101] *See, e.g*., Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. (U.S. June 24, 2022) (citation omitted).

[102] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of The United States: Hearings Before the S. Comm. on The Judiciary*, 109th Cong. 55-56 (2005) (testimony of John G. Roberts, Jr.) [hereinafter Roberts Hearings]. The full quote is:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. . . . Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.

Id.

[103] Thomas, *supra* note 77, at 2.

[104] Antonin Scalia, *God's Justice and Ours*, FIRST THINGS 17, 17 (May 2002) [hereinafter Scalia II].

[105] *See e.g*., Roberts Hearings, *supra* note 102, at 55; Scalia II, *supra* note 104, at 17; Thomas, *supra* note 77, at 5-6.

[106] Sonia Sotomayor, *A Latina Judge's Voice,* 13 BERKELEY LA RAZA L.J., 87, 91 (2002).

the law, as well as the facts that judges choose to see.[107] She then questioned "whether by ignoring our differences as women or men of color [judges and Justices] do a disservice both to the law and society . . . "[108] She stated that her gender and her Latina heritage do indeed affect her judging, as well as enrich the legal system overall.[109]

Supreme Court Justice Oliver Wendell Holmes Jr. alluded that judicial decision-making is not mechanical when he stated:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[110]

The experience that differentiate judges can be described as the social, religious, cultural, and political backgrounds of judges.[111] Scholars have looked to see specifically how the religious beliefs, premises, and worldview influence the judicial decision making process.[112] They have found that not only do the religious beliefs, premises, and worldview influence judges' decision-making, in some cases the religious orientation of the judge is a "substantial influence" on a judge's decision-making process.[113] Yet, the influence of these factors may exist only on a subconscious level, such that a judge may not even be aware

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107 *Id.* at 92.

108 *Id.* at 91.

109 *Id.* at 92; *Confirmation Hearing on the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. 66 (2009) (testimony of Sonia Sotomayor).

110 O. W. HOLMES, JR., THE COMMON LAW 1 (1881).

111 Collett, *supra* note 5, at 1284-85.

112 Rachel J. Cahill-O'Callaghan, *The Influence of Personal Values on Legal Judgements*, 40 J.L. & SOC'Y 596, 598, 621 (2013); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 34 (1997); Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 522 (2005) [hereinafter Idleman II].

113 Cahill-O'Callaghan, *supra* note 112, at 598, 602, 621; Feldman I, *supra* note 2, at 48 (quoting Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court:The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 521 (1999)); Green, *supra* note 112, at 34; Idleman II, *supra* note 112, at 522.

of the influence.[114] Even Robert Bork, a strong and early proponent of originalism, stated that there is an "inevitable bias that gets in" when reading a statute "because each of us sees the world [and] understands facts, through a lens composed of our morality and our understanding."[115]

Thus, while some Justices argue they are merely applying the law to the facts, when they approach the Constitution, they are acting within their "historical context embodied by communal traditions and structural roles" and bring with them their beliefs, premises, and worldviews.[116] These beliefs, premises, and world views have been shaped by their faith, their education, and their tradition and their culture.[117] Therefore, interpretation cannot be mechanical, as it is "simultaneously enabled and constrained by [] participation in communal traditions[.]"[118] It is influenced by one's political preferences and one's cultural background, which includes religion.[119]

V. THE FAITHS OF THE JUSTICES

Below are brief sketches of the known religious history of the Justices based on news articles, interviews, and other sources, including judicial opinions. The educational history of the Justices is referenced for its persuasive value. Focusing on the educational history of the Justices does not define their religious history and expression. The choice of public versus parochial education does not indicate religiosity nor is the decision influenced only by religiosity.[120] Other features such as socio-economic concerns and the nature of the local public schools

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114 Idleman II, *supra* note 112, at 534.

115 *Nomination of H. Robert Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 180 (1989) (testimony of Robert Bork). *See also* Blake, *supra* note 3, at 814.

116 Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89, 127 (2005) [hereinafter Feldman II].

117 *See, e.g.,* Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1060 (2006); Noonan, *supra* note 5, at 769; Robert J. Pushaw, Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretations*, 47 PEPP. L. REV. 463, 472 (2020).

118 Feldman I, *supra* note 2, at 46.

119 *Id.*

120 *See* Emily Pierce, *Private School vs. Public School: Parents Have Much to Consider, From Test Scores and Class Sizes to Diversity and Costs*, U.S. NEWS & WORLD REP. (Sept. 15, 2021), https://www.usnews.com/education/k12/articles/private-school-vs-public-school.

influence the decision of parochial versus public education.[121] Nevertheless, education does play a significant role in the formation of a person's belief system.[122] When possible, the Justice's own words about their faith are referenced to provide the best understanding about their beliefs.

Chief Justice John G. Roberts Jr. was raised Catholic and attended Catholic private schools from elementary through high school, prior to attending Harvard University and Harvard Law School.[123] Both the primary and secondary schools Chief Justice Roberts attended have a focus on the Catholic faith and state that the education they provide is faith-based.[124] While Chief Justice Roberts has rarely, if ever, spoken openly about his faith, it was a topic of much discussion during his confirmation.[125] Chief Justice Roberts stated during his confirmation, "I do know this, that my faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don't look to the Bible or any other religious source."[126] It has widely been reported that Chief Justice Roberts regularly attends

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[121] The information regarding the schools attended was accessed via the internet. The information gathered reflects the current mission and nature of the schools. The author acknowledges that each school and each student will live out their faith differently. The information is provided as an indicator of emphasis placed on religion in the education of students at each school.

[122] Feldman II, *supra* note 116, at 127.

[123] Chief Justice Roberts attended Notre Dame Catholic School in Michigan City, Indiana, graduating eighth grade in 1968, and La Lumiere School, in La Porte, Indiana, graduating from high school in 1973. Todd S. Purdum et al., *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES (July 21, 2005), https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html?searchResultPosition=1.

[124] Notre Dame Catholic School states its mission is "a ministry of the Notre Dame Catholic Community, [which] fosters learning through an unsurpassed faith-based education that prepares young people for extraordinary lives." NOTRE DAME CATH. CHURCH & SCH., https://notredameparish.net/ (last visited Nov. 20, 2022). La Lumiere School has a section in their mission statement for faith stating "[e]arnest exploration of faith is an integral part of education. . . . The Catholic faith serves as the bedrock of this pursuit, and its vision of the dignity of the human person gives us faith in one another, informing what we value and how we act." *Our Mission*, LA LUMIERE SCH., https://www.lalumiere.org/mission (last visited Nov. 20, 2022).

[125] Craig von Buseck, *Roberts' Religion on Media Mind*, CHRISTIAN BROAD. NETWORK, https://www.cbn.com/spirituallife/biblestudyandtheology/perspectives/vonbuseck_robertsreligion0508.aspx?mobile=false&q=spirituallife/BibleStudyAndTheology/Perspectives/vonBuseck_RobertsReligion0508.aspx&option=print (last visited Nov. 20, 2022).

[126] Roberts Hearings, *supra* note 102, at 227.

Catholic Mass at Church of the Little Flower in Bethesda, Maryland, and that his faith is an important aspect of his life.[127]

Justice Clarence Thomas was raised Catholic and even planned, as a young adult, to become a Roman Catholic Priest.[128] He attended a minor seminary[129] and a year of seminary.[130] His education from grammar school through college was in Catholic institutions.[131] He attended College of the Holy Cross in Worcester, Massachusetts prior to attending Yale Law School.[132] Justice Thomas has been more forthcoming than some of the Justices about his faith and has spoken about being "decidedly and unapologetically Catholic."[133] In 2020, a documentary about Justice Thomas' life and longtime Catholic faith called "Created Equal: Clarence Thomas in His Own Words" was released.[134]

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[127] *John Roberts' Catholic Connections*, BELIEFNET, https://www.beliefnet.com/news/2005/08/john-roberts-catholic-connections.aspx#92702DAF (last visited Feb. 19, 2023); Jonathan Turley, *The Faith of John Roberts*, L.A. TIMES (July 25, 2005, 12:00 AM), https://www.latimes.com/archives/la-xpm-2005-jul-25-oe-turley25-story.html; Purdum, *supra* note 123.

[128] Kevin J. Jones, *Justice Clarence Thomas Credits Catholic Nuns' Anti-Racist Example*, NAT'L CATH. REG. (Sept. 19, 2021), https://www.ncregister.com/cna/justice-clarence-thomas-credits-catholic-nuns-anti-racist-example.

[129] A minor seminary is a Catholic high school designed to prepare young men for seminary and the priesthood. *Minor Seminary*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/minor%20seminary (last visited Nov. 20, 2022).

[130] Jan Crawford Greenburg, *Clarence Thomas: A Silent Justice Speaks Out*, ABC NEWS (Sept. 30, 2007), https://abcnews.go.com/TheLaw/story?id=3664429&page=1. Thomas attended St. John Vianney's Minor Seminary in Isle of Hope, Savannah, Georgia and Conception Seminary College, a Roman Catholic seminary in Conception, Missouri. *Id. See also* Jones, *supra* note 128.

[131] Thomas attended St. Benedict the Moor Grammar School and St. Pius X High School, both in Savannah, Georgia. They closed in 1969 and 1971 respectively. *St. Benedict the Moor Catholic Church: Mother Church of Black Catholics in Georgia*, GA. HIST. SOC'Y, https://georgiahistory.com/ghmi_marker_updated/st-benedict-the-moor-catholic-church/ (June 16, 2014); Andria Segedy, *St. Pius X History: Savannah Churches, Community Opened Doors to Classical Education During Segregation*, SAVANNAH MORNING NEWS, https://www.savannahnow.com/story/lifestyle/2018/09/15/st-pius-x-history-savannah-churches-community-opened-doors-to-classical-education-during-segregation/10279398007/ (Sept. 17, 2018, 2:55 PM).

[132] *Current Members*, SUP. CT, https://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 20, 2022).

[133] *2018 Commencement Speaker Clarence Thomas' Catholic Faith Illuminated in New Film*, CHRISTENDOM COLL. (Feb. 20, 2020), https://www.christendom.edu/2020/02/20/2018-commencement-speaker-clarence-thomas-catholic-faith-illuminated-in-new-film/.

[134] Adelle M. Banks, *Justice Clarence Thomas Talks About His Faith in New Documentary*, RICH. FREE PRESS (Feb. 7, 2020, 6:00 AM), https://richmondfreepress.com/news/2020/feb/07/justice-clarence-thomas-talks-about-his-faith-new-/.

Justice Samuel Alito attended public school, graduating from Steinert High School in Hamilton Township, New Jersey.[135] He attended Princeton University and Yale Law School.[136] Like Chief Justice Roberts, Justice Alito has not spoken much about how his Catholic faith has impacted his life. Recently, in a conversation with a Catholic seminarian, however, Justice Alito spoke of his faith as giving him the answer for how to live his life.[137] He has spoken much regarding the trend of hostility toward those with "traditional moral beliefs" as well as the history of anti-Catholic bigotry.[138] Tellingly, Justice Alito has spoken of being "lifted…up from the status of second-class American" when John F. Kennedy was elected President of the United States.[139] Justice Alito has also described "growing up in a home where 'church and the family' were preeminent."[140]

Justice Neil M. Gorsuch was raised Catholic, attending weekly mass with his family, though he currently attends an Episcopal Church.[141] Justice Gorsuch graduated from Georgetown Preparatory School prior to attending Columbia University and Harvard Law School.[142] After law school, Justice Gorsuch studied the philosophy of law at Oxford University with John Finnis, an eminent Catholic

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135 Brian P. Smentkowski & Aaron M. Houck, *Samuel A. Alito, Jr.*, BRITANNICA, https://www.britannica.com/biography/Samuel-A-Alito-Jr (last updated June 24, 2022).

136 *Id.*

137 Eric Banecker, *Faith and Family Inform Justice Samuel Alito's Seat on The High Court*, CATH. PHILLY (May 18, 2017), https://catholicphilly.com/2017/05/commentaries/faith-and-family-inform-justice-samuel-alitos-seat-on-the-high-court/.

138 David Porter, *Alito: US's Dedication to Religious Liberty Being Tested*, HERALD & REV. (Mar. 17, 2017), https://herald-review.com/alito-u-s-dedication-to-religious-liberty-being-tested/article_8a7807bf-2e1f-5c68-bfe3-86904108b98f.html. *See also Espinoza v. Montana Dept. of Revenue,* 140 S. Ct. 2246 (2020) (Alito, J., concurring); *Davis v. Ermold*, 141 S. Ct. 3 (2020) (Thomas, J., concurring) (citing Obergefell v. Hodges, 576 U.S. 644 (2015) (in *Davis*, Justice Alito joined Justice Thomas in concurring with the denial of cert, but noting that "this petition provides a stark reminder of the consequences of *Obergefell* [on religious liberty].")

139 Porter, *supra* note 138.

140 Peter Smith, *Anti-Roe Justices a Part of Catholicism's Conservative Wing*, AP NEWS (June 30, 2022), https://apnews.com/article/abortion-supreme-court-catholic-ee063f7803eb354b4784289ce67037b4.

141 Daniel Burke, *What Is Neil Gorsuch's Religion? It's Complicated,* CNN, https://www.cnn. com /2017/03/18/politics/neil-gorsuch-religion/index.html (Mar. 22, 2017, 2:37 PM). *See also* Mark K. Matthews & John Frank, *What Neil Gorsuch's Faith and Writings Could Say About His Approach to Religion on the Supreme Court*, DENVER POST, https://www.denverpost.com/2017/02/10/neil-gorsuch-religion/ (Feb. 11, 2017, 11:20 PM).

142 Brian Duignan, *Neil Gorsuch*, BRITANNICA, https://www.britannica.com/biography/Neil-Gorsuch (last updated Feb. 10, 2023).

philosopher.[143] Justice Gorsuch has been a staunch defender of freedom of religion while on the bench, first on the Tenth Circuit Court of Appeals, and now on the Supreme Court.[144]

Justice Brett Kavanaugh was raised Catholic and, like Justice Gorsuch, attended Georgetown Preparatory School prior to attending Yale University and Yale Law School.[145] "Georgetown Prep's mission is to form men of competence, conscience, courage, and compassion; men of faith and men for and with others."[146] Justice Kavanaugh referenced that mission when his nomination was announced.[147] Justice Kavanaugh has spoken about his Catholic faith and his involvement in the Catholic community of Washington D.C.[148] He also participates in mission opportunities with his church.[149]

Justice Amy Coney Barrett was raised Catholic, attended St. Mary's Dominican High School, Rhodes College, and Notre Dame Law School.[150] Barrett taught at Notre Dame Law School as a Professor of Law.[151] She is also active in the People of Praise, "a charismatic

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[143] Burke, *supra* note 141.

[144] Jenna Reinbold, *For Neil Gorsuch, Religious Freedom Hasn't Gone Far Enough*, RELIGION & POL. (Aug. 25, 2020) https://religionandpolitics.org/2020/08/25/for-neil-gorsuch-religious-freedom-hasnt-gone-far-enough/; Duignan, *supra* note 142.

[145] Aaron M. Houck & Brian P. Smentowski, *Brett Kavanaugh*, BRITANNICA, https://www.britannica.com/biography/Brett-Kavanaugh (last visited Feb. 8, 2023).

[146] *Jesuit Mission and Identity*, GEO. PREPARATORY SCH., https://www.gprep.org/about/mission (last visited Nov. 20, 2022).

[147] Sarah Mervosh, *Kavanaugh and Gorsuch Both Went to the Same Elite Prep School*, N.Y. TIMES (July 10, 2018) https://www.nytimes.com/2018/07/10/us/kavanaugh-gorsuch-georgetown-prep.html.

[148] Ephrat Livini, *Supreme Court Nominee Brett Kavanaugh Is Religious—Just Like All the Siting Justices*, QUARTZ (July 10, 2018) https://qz.com/1324757/supreme-court-nominee-brett-kavanaugh-is-religious-just-like-all-the-sitting-justices/.

[149] *Id.*

[150] Aaron M. Houck, *Amy Coney Barrett*, BRITANNICA, https://www.britannica.com/biography/Amy-Coney-Barrett (last updated Jan. 24, 2023) [hereinafter Houck, *Amy Coney Barrett*]. Both St. Mary's Dominican High School and Notre Dame Law School have a strong emphasis on faith. St. Mary's website states that "Our commitment to the four pillars of Dominican life that are integrated into all aspects of the DHS experience: prayer, study, community, and service" and that "Dominican students develop not only academically, but also spiritually and socially." *Welcome to Dominican*, ST. MARY'S DOMINICAN HIGH SCH., https://www.stmarysdominican.org/about-dhs/welcome-to-dominican/ (last visited Nov. 20, 2022). Notre Dame Law School states its "approach to legal education is informed and inspired by faith. Students are trained to view the law as a vocation in service to others, to explore the moral and ethical dimensions of the law, and to discover their unique roles in furthering the cause of justice." *The Law School*, NOTRE DAME L. SCH., https://law.nd.edu/ (last visited Nov. 20, 2022).

[151] Houck, *Amy Coney Barrett*, *supra* note 150.

Christian community."[152] Justice Coney Barrett has said that a legal career should be "a means to the end of serving God" or an "end [to] building the Kingdom of God."[153]

Justice Stephen Breyer was raised Jewish and attended Lowell High School, a public high school in San Francisco, California before attending Stanford University and Harvard Law School.[154] Justice Breyer has spoken about his Jewish faith and the affect it has on his understanding of the law, noting "[j]ustice is so central to Judaism" and that the law emphasizes justice.[155]

Justice Sonia Sotomayor grew up Catholic in Puerto Rican communities in the Bronx, New York.[156] She attended Catholic schools from elementary school through high school, prior to attending Princeton University and Yale Law School.[157] Justice Sotomayor has said she is a "spiritual person" but "maybe not traditionally religious."[158] At the time of her confirmation in 2009, Justice Sotomayor was not a member of a

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[152] *Who We Are*, PEOPLE OF PRAISE https://peopleofpraise.org/ (last visited Nov. 20, 2022). Much has been written about People of Praise, but Barrett has not spoken about her time in People of Praise. Tom Gjelten, *Amy Coney Barrett's Catholicism Is Controversial but May Not Be Confirmation Issue*, NPR (Sept. 29, 2020, 5:42 PM) https://www.npr.org/2020/09/29/917943045/amy-coney-Barretts-catholicism-is-controversial-but-may-not-be-confirmation-issue.

[153] Stephanie Kirchgaessner, *Amy Coney Barrett: Spotlight Falls on Secretive Catholic Group People of Praise*, THE GUARDIAN (Sept. 26, 2020, 8:29 AM) https://www.theguardian.com/us-news/2020/sep/26/amy-coney-Barrett-supreme-court-donald-trump-people-of-praise; Gjelten, *supra* note 152.

[154] *Stephen G. Breyer*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/stephen-g-breyer (last visited Nov. 20, 2022).

[155] Breyer, *supra* note 154. *See also Supreme Court Justice Breyer Speak About Jewish Identity and Social Justice*, PBS: RELIGION AND ETHICS NEWSWEEKLY (Nov. 14, 2014) https://www.pbs.org/wnet/religionandethicsheadlines/jewish-federation-general-assembly/.

[156] Chelsey Parrott-Sheffer, *Sonia Sotomayor*, BRITANNICA, https://www.britannica.com/biography/Sonia-Sotomayor (last updated Feb. 19, 2023); David Gonzalez, *As Her Old School Faces the End, a Justice Reminisces*, N.Y. TIMES, Jan. 25, 2013, at A17.

[157] Parrott-Sheffer, *supra* note 156. Justice Sotomayor attended Blessed Sacrament School and Cardinal Spellman High school. Adam Liptak*, Washington Is Home (for Now at Least), but Sotomayor Stays True to New York*, N.Y. TIMES, Jan. 13, 2013, at A13. Blessed Sacrament School was closed in 2013. Gonzalez, *supra* note 156. Cardinal Spellman High School's mission statement includes "[w]e emphasize personal development and we foster a commitment to others that empowers our diverse student population to become leaders who make a difference in our community, nation, and world." CARDINAL SPELLMAN HIGH SCH. https://www.cardinalspellman.org/index.jsp (last visited Nov. 20, 2022).

[158] Liptak*, supra* note 157; Laurie Goodstein, *Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There*, N.Y. TIMES (May 30, 2009) https://www.nytimes.com/2009/05/31/us/politics/31catholics.html.

parish.[159] Justice Sotomayor does not attend church regularly, attending only "for family celebrations and major religious events."[160] Justice Sotomayor, based on her Puerto Rican heritage and New York City upbringing, identifies as a "Nuyorican" which possibly influences her faith and her expression of Catholicism.[161] As an educated Nuyorican, Justice Sotomayor most likely would be familiar with Liberation Theology, a theology founded in Latin America in the late 1960s and early 1970s that focuses on "the poor and oppressed" and the sinful systems of oppression, which has and continues to influence Puerto Rican Catholic theology.[162] Justice Sotomayor, in her memoir, also speaks of her love for Pope Paul VI and his efforts to continue the work of Vatican II to "make the Church more responsive and open to ordinary people."[163]

Justice Elena Kagan was raised Jewish, had a bat mitzvah— the first one at her Modern Orthodox synagogue—and attended Hunter College High School, a public high school affiliated with Hunter College in New York.[164] She graduated from Princeton University and Oxford University, with a Master of Philosophy, prior to attending Harvard Law School.[165] Justice Kagan currently identifies as a "Conservative Jew[,]" though she rarely discusses her faith publicly.[166] Justice Kagan, however, has spoken of the importance of social justice in her religious upbringing and the importance of social justice to the legal field.[167]

Justice Ketanji Brown Jackson is presumed to have been raised Christian and attended Miami Palmetto Senior High School, a public high school in Miami, Florida, before attending Harvard University and

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159 Goodstein, *supra* note 158; Parrott-Sheffer, *supra* note 156.

160 Zachary Baron Shemtob, *The Catholic and Jewish Court: Explaining the Absence of Protestants on the Nation's Highest Judicial Body*, 27 J.L. & RELIGION 359, 386 (2011).

161 Goodstein, *supra* note 158; *See* Jennifer Ludden, *Sotomayor Shaped by Her 'Nuyorican' Roots*, NPR (June 17, 2009, 10:13 AM) https://www.npr.org/2009/06/17/105401608/sotomayor-shaped-by-her-nuyorican-roots ("[Justice Sotomayor] has called herself 'Nuyorican' — a term derived from blending the words 'New York' and 'Puerto Rican.'").

162 *Liberation Theology*, BRITANNICA, https://www.britannica.com/topic/liberation-theology (last updated Jan. 4, 2023). *See* ERIC DANIEL BARRETO, HISPANIC AMERICAN RELIGIOUS CULTURES 476 (vol. 2) (Miguel A. De La Torre ed. 2009).

163 SONIA SOTOMAYOR, MY BELOVED WORLD 85 (Knopf) (2013).

164 Lisa W. Foderaro, *Growing Up, Kagan Tested Boundaries of Her Faith*, N.Y. TIMES (May 12, 2010), https://www.nytimes.com/2010/05/13/nyregion/13synagogue.html; *About Campus Schools*, HUNTER COLL. CAMPUS. SCHS., https://www.hunterschools.org/about/about-campus-schools (last visited Feb. 23, 2023).

165 *Current Members*, *supra* note 132.

166 Foderaro, *supra* note at 164.

167 Shemtob, *supra* note 160 at 390.

Harvard Law School.[168] While Justice Jackson has affirmed her faith in God and gratitude for the many blessings in her life, she has not spoken much about her faith.[169] During her confirmation hearing, Justice Jackson, although reluctant to answer Senator Graham's questions about attending church, acknowledged that she attends a non-denominational Christian church.[170] She also stated that her faith is "very important" to her.[171]

While Justices Antonin Scalia, Ruth Bader Ginsburg, and Anthony Kennedy are no longer serving on the Supreme Court, their faith and approach to the Constitution are significant examples of the influence of religion on Constitutional interpretation.[172] As such, their religious history also will be examined.

Justice Antonin Scalia was raised Catholic and attended Xavier High School, a Jesuit high school, before attending Georgetown University and Harvard Law School.[173] Justice Scalia was known for his

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[168] Aaron M. Houck, *Ketanji Brown Jackson*, BRITANNICA, https://www.britannica.com/biography/Ketanji-Brown-Jackson (last updated Oct. 5, 2022). Other than identifying as a nondenominational Protestant, Justice Jackson has only spoken in vague terms of her religion and faith. *See infra* note 170 and accompanying text; Peter Smith, *Jackson Invokes Her Christian Faith, Stays Mum on Specifics*, AP NEWS (Mar. 23, 2022), https://apnews.com/article/biden-stephen-breyer-us-supreme-court-religion-judiciary-e87c64f1d5eb5cb61c8125df55ff8059.

[169] Adelle M. Banks, *Ketanji Brown Jackson Publicly Expresses Thanks to God but Keeps Faith History Private*, RELIGIOUS NEWS SERV. (Mar. 21, 2022), https://religionnews.com/2022/03/21/ketanji-brown-jackson-publicly-expresses-thanks-to-god-but-faith-history-is-private/.

[170] Senate Judiciary Committee, *Confirmation Hearing for Supreme Court Nominee Ketanji Brown Jackson, Day 2 Part 1*, C-SPAN (Mar. 22, 2022), https://www.c-span.org/video/?518342-1/confirmation-hearing-supreme-court-nominee-ketanji-brown-jackson-day-2 [hereinafter Jackson Hearings].

[171] Justin Collings & Hal Boyd, *Constitutional Roots of Ketanji Brown Jackson's Public Faith*, RELIGION & POL. (Mar. 29, 2022), https://religionandpolitics.org/2022/03/29/the-constitutional-roots-of-ketanji-brown-jacksons-public-faith/.

[172] *See infra* Part VI.

[173] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html. Xavier High School is a Jesuit military and college preparatory school. *Mission & History*, XAVIER HIGH SCH., https://www.xavierhs.org/about-us/mission-history (last visited Jan. 14, 2023).

> Xavier teaches students to take responsibility for their lives, to lead with integrity, to act justly in service of others, to pursue excellence in every endeavor and to deepen their relationship with God. Ultimately, Xavier forms young men who will go forth to transform the world for God's greater glory.

Id. See also Who We Are, GEO. UNIV., https://www.georgetown.edu/who-we-are/ (last visited Jan. 14, 2023). "Our holistic approach to education, the rigorous spirit of inquiry that makes our community and alumni a force for change in the world, our

dedication to textualism and originalism.[174] Justice Scalia was a devout Catholic and stated that he "vehemently denied that he let his Catholic beliefs dictate his legal judgment."[175] He once said, "I am hard pressed to tell you of a single opinion of mine that would have come out differently if I were not Catholic."[176] Yet, Catholicism was central to Justice Scalia as a person, specifically adopting a conservative version of Catholicism that highlights traditions such as the traditional Latin Mass.[177]

Justice Ruth Bader Ginsburg was raised Jewish and attended James Madison High School, a public high school in Brooklyn, prior to attending Cornell University and Harvard Law School, and ultimately graduating from Columbia Law School.[178] Justice Ginsburg was proud of her faith, stating "I am a judge, born, raised, and proud of being a Jew," and echoed Justice Breyer's thoughts on Judaism, that "the demand for justice runs through the entirety of the Jewish tradition."[179] Justice Ginsburg also "admitted a strong 'devotion to Jewish ethical values.'"[180]

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commitment to social justice – all underly everything we do as an institution with a rich Catholic and Jesuit heritage." *Id.*

[174] Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10/.

[175] Elizabeth Dias, *How Scalia's Faith Reshaped the Supreme Court*, TIME (Feb. 13, 2016, 8:23 PM), https://time.com/4220768/antonin-scalia-dead-catholic-legacy/; Tom Gjelten, *Scalia Expressed His Faith with the Same Fervor as His Court Opinions*, NPR (Feb. 14, 2016, 3:07 PM), https://www.npr.org/2016/02/14/466722712/scalia-expressed-his-faith-with-the-same-fervor-as-his-court-opinions.

[176] Shemtob, *supra* note 160, at 377.

[177] *Id.* at 376. *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1311 n.61 (1990). The Latin Mass was common prior to Vatican II and is said completely in Latin, with the priest facing the altar and his back to the congregation. Phillip Pullella, *Return of Latin Mass Sparks Old Vestment Hunt*, REUTERS (July 24, 2007, 6:40 PM), https://www.reuters.com/article/us-pope-latin-rite/return-of-latin-mass-sparks-old-vestment-hunt-idUSL2089393020070724. *See also* Ruth Graham, *Old Latin Mass Finds New American Audience, Despite Pope's Disapproval*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2022/11/15/us/latin-mass-revival.html (noting "Latin Mass adherents tend to be socially conservative and tradition-minded.").

[178] *Ruth Bader Ginsburg*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/supct/justices/ginsburg.bio.clr.html (last visited Jan. 15, 2023).

[179] The American Jewish Committee, Advertisement, *What Being Jewish Means to Me*, N.Y. TIMES, Jan. 14, 1996, at E13; Gary Fields & Sally Stapleton, *Ginsburg's Empathy Born of Jewish History and Discrimination*, AP NEWS (Sept. 14, 2020) https://apnews.com/article/ruth-bader-ginsburg-race-and-ethnicity-discrimination-us-supreme-court-courts-1a8a92b60bd08a3ac05c29a787ff399e; *see supra* note 155 and accompanying notes.

[180] Shemtob, *supra* note 160, at 380.

Justice Anthony Kennedy was raised Catholic and attended C. K. McClatchy High School, a public high school in Sacramento, California, prior to attending Stanford University and Harvard Law School.[181] Justice Kennedy is known to be a devout "practicing Catholic," having grown up attending Catholic mass every weekend and serving as an altar boy.[182] Also, Justice Kennedy appears to have been influenced by Catholic moral theology.[183]

VI. FAITH INFLUENCES INTERPRETATION

Having established religion affects judicial decision making, and having examined the faith of the Justices, the question that remains: Does the faith of a Justice affect how a Justice approaches the Constitution? This Article posits that Justices can be put into two camps, those who favor rules, which gives answers and certainty, and those who favors standards, which guide but do not specifically proscribe an outcome.[184] Those who tend to follow the originalist and textualist methods of interpretation tend to be strict Catholic and fundamentalist in belief and tend to ascribe to bright line rules.[185] Those who follow dynamic constitutionalism are more secular or Jewish in belief and tend to ascribe to standards and balancing tests to determine outcomes.[186] Rules tend to appeal to those who are more "conservative," while standards appear to appeal to those who are more "liberal."[187]

Rules, in the context of the law, can be understood as binding decisionmakers by requiring them "to respond in a determinate way to the presence of delimited triggering facts."[188] Standards, as opposed to a determinate response, cause decisionmakers to look at "the direct application of the background principle[s] or policy to a fact situation."[189]

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[181] Mark Walsh, *Justice Kennedy Retiring from High Court, Had Deep Imprint in Education Arena*, EDUC. WK. (June 27, 2018), https://www.edweek.org/policy-politics/justice-kennedy-retiring-from-high-court-had-deep-imprint-in-education-arena/2018/06; Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME (June 18, 2012), https://content.time.com/time/subscriber/article/0,33009,2116699-4,00.html.

[182] Calabresi & Von Drehle, *supra* note 181; Shemtob, *supra* note 160, at 378.

[183] Scot Powe, *Robes and Vestments*, NEW REPUBLIC (Apr. 13, 2010), https://newrepublic.com/article/74201/robes-and-vestments.

[184] *See infra* Parts VI.a., VI.b.

[185] *See infra* pp. 128-29 and text accompanying notes 228-34.

[186] *See infra* pp. 144-45.

[187] Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 96 (1992).

[188] *Id.* at 58.

[189] *Id.*

Standards give more discretion to the decisionmaker and allow them to examine "all [the] factors [and] the totality of the circumstances."[190] In contrast, rules focus the decisionmaker on facts and away from "irreducibl[e] arbitrary and subjective value choices[.]"[191] Rules produce one correct answer. Standards allow for multiple answers. For example, a fifty mile per hour speed limit is a rule, whereas requiring drivers to "[travel] at a safe speed" on a roadway is a standard.[192]

a. Rules

Rules, with their formalism and elimination of discretion, speak more to the originalist and textualist methods of interpretation.[193] As such, rules speak to the Catholic method of interpretation and it is one correct way to understand Scripture.[194] Originalism and textualism as well as the Catholic method of interpretation allow for anyone to be able to find the one "correct" meaning of the text, which then can be applied to a specific factual situation.[195]

Originalism and textualism can also be seen as an outgrowth of the fundamentalist and modernist debate of the 1920s, as a secular kind

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190 *Id.* at 58-59.

191 *Id.* at 58.

192 *Id.* at 60 n.247.

193 *See* Smith & Tuttle, *supra* note 71, at 710; Sullivan, *supra* note 187, at 58.

194 DEI VERBUM [CONSTITUTION] Nov. 18, 1965, art. 12 (Vatican).

> However, since God speaks in Sacred Scripture through men in human fashion, [] the interpreter of Sacred Scripture, in order to see clearly what God wanted to communicate to us, should carefully investigate what meaning the sacred writers really intended, and what God wanted to manifest by means of their words.
>
> To search out the intention of the sacred writers, attention should be given, among other things, to "literary forms." For truth is set forth and expressed differently in texts which are variously historical, prophetic, poetic, or of other forms of discourse. The interpreter must investigate what meaning the sacred writer intended to express and actually expressed in particular circumstances by using contemporary literary forms in accordance with the situation of his own time and culture. [] For the correct understanding of what the sacred author wanted to assert, due attention must be paid to the customary and characteristic styles of feeling, speaking and narrating which prevailed at the time of the sacred writer, and to the patterns men normally employed at that period in their everyday dealings with one another.

Id.

195 *See id.*; Smith & Tuttle, *supra* note 71, at 710; Sullivan, *supra* note 187, at 58.

of fundamentalism.[196] As Law Professor Horowitz put it, "constitutional law has always tended toward incorporating a pre-modern vision of timeless and unchanging truths. . . ."[197] This search for "timeless and unchanging truths" is a search that evangelicals and fundamentalist have also engaged in since the 1920s.[198] Studies of evangelicals have found that almost half "believe that there is 'only [o]ne true way to interpret the teachings of my religion.'"[199] The connection between "biblical literalism" and originalism and textualism, has not gone unnoticed by scholars.[200] There is also a connection between a more conservative faith and legal conservatives because "the leading evangelical legal organizations decry flexible interpretations of the Constitution."[201] Originalism, textualism, and fundamentalism all stem from an orthodox framework that highlights "an external, definable, and transcendent authority" such as the Constitution or the Bible, which serves as a "fixed moral truth" that can be a basis of belief.[202] These methods of constitutional interpretation also have a function of "promoting social order and continuity."[203]

Scholars have questioned whether some who are originalist or textualist follow that method of interpretation due to the results the originalist and textualist mode of interpretation produces, which tie into

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196 *Kissing Cousins: Biblical Inerrancy + Constitutional Originalism*, *Straight White American Jesus* (Sept. 27, 2021) (downloaded using Apple podcasts). It is interesting to note that one of the first people to espouse a modern originalist/textualist view was Attorney General Edwin Meese, who was known to be a biblical inerrantist. *Id. See also* Horowitz II, *supra* note 66, at 663; Austin Lee Steelman, *How Evangelicalism's Twin Seeds of Biblical Literalism and Constitutional Originalism Spelled the End of* Roe, RELIGION DISPATCHES (May 3, 2022), https://religiondispatches.org/how-evangelicalisms-twin-seeds-of-biblical-literalism-and-constitutional-originalism-spelled-the-end-of-roe/.

197 Horowitz I, *supra* note 65, at 34.

198 *Id.*; *Kissing Cousins: Biblical Inerrancy + Constitutional Originalism*, *supra* note 196; *see* Longfield, *supra* note 19.

199 Greene, *supra* note 55, at 80 (quoting PEW F. ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 2008 (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.).

200 *See generally* David. A. Skeel, Jr., *What Were Jesus and the Pharisees Talking About When They Talked About Law?*, 23 J.L. & RELIGION 141, 144-45 (2007) (discussing the basis for interpretation of "evangelicals' insistence on originalism and textualism"); Smith & Tuttle, *supra* note 71, at 693 (discussing the various ways originalism is criticized).

201 *See* Skeel, *supra* note 200, at 143.

202 Kissam, *supra* note 82 at 122-23 (quoting JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42-44, 107-13, 117-22 (1991).

203 CRAPANZANO, *supra* note 55 at 16. They differ in that fundamentalism focuses on manipulation of adherents' imagination and prayer due to their "fallen condition" whereas originalism/textualism is focused on society as a whole. *Id.*

a more conservative political and cultural agenda, or if some are only conservative because that is the result of an originalist or textualist interpretation method.[204] Some scholars have pondered whether the familiarity of the interpretive approach, a literalist approach, is a draw for some to the originalist and textualist interpretive method.[205]

This Article builds on that inquiry and posits that the conservative Justices are originalist or textualist because they are conservative in their faith.[206] The Justices who ascribe to the originalist or textualist method of interpretation are those with the most significant Catholic backgrounds.[207]Justices Roberts, Thomas, Gorsuch, Kavanaugh, Coney Barrett, Scalia all attended Catholic schools that believed Catholicism was an important part of their pedagogy.[208] While Justice Alito attended public school, he appears to have been steeped in Catholicism and has discussed growing up in a home where church and family were a main focus.[209]

Much has been written about Justice Scalia and his approach to the Constitution as an originalist and textualist.[210] Not as much has been written about how Justice Scalia's Catholic faith has influenced that approach.[211] Law Professor George Kannar argues that Justice Scalia's upbringing in an immigrant Catholic household and education in a pre-Vatican II church,[212] which focused on rules and where the Baltimore

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[204] *See* Smith & Tuttle, *supra* note 71 at 696; *see also* Sara C. Benesh & Jason Czarnezki, *The Ideology of Legal Interpretation*, 29 WASH. U.J.L. & POL'Y 113, 131-32 (2009); Sawyer, *supra* note 65 at 215.

[205] Smith & Tuttle, *supra* note 71 at 696.

[206] *See supra* Section V.

[207] *See supra* Section V.

[208] *See supra* notes 124, 131, 145, 150, 173 and accompanying text.

[209] Smith, *supra* note 140.

[210] *See generally* Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685 (1991) (describing Justice Scalia's thoughts, use of, and methods regarding precedent, evidencing that much has been written about Justice Scalia's use of precedent); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000) (explaining the methodology that Justice Scalia uses when deciding cases, which goes towards the depth of articles written about his approach to precedent).

[211] *See* Berg & Ross, *supra* note 5, at 403 (showing that it is challenging to find data and information about how and if Justice Scalia's Catholic faith influenced his approach, and that all one can rely on is what he stated in his confirmation hearing); *see also* Donald L. Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329 (1992) (demonstrating that not much has been written about how Justice Scalia's faith influences his approach outside of speculation based on his religious beliefs).

[212] Kannar, *supra* note 177 at 1316. The Second Vatican Council, popularly known as Vatican II, 1962-1965, was a council of Catholic religious leaders who gathered in

Catechism[213] taught students to "pars[e] out the answers" to complex theological questions, gave Justice Scalia a "habit of mind" that was predisposed to originalism and textualism.[214] Kannar looks at Justice Scalia's approach to criminal justice cases before the Supreme Court to demonstrate how Justice Scalia favors rules over "ad hoc policy."[215] Justice Scalia, stated a preference for rules in his article *The Rule of Law as a Law of Rules* stating that "it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text."[216] According to Kannar's logic, the same reasoning would apply to Justice Kennedy, born the same year as Justice Scalia, 1936; Justice Thomas, born twelve years later, in 1948; Justice Alito, born in 1950; and Chief Justice Roberts, born in 1955.[217] All of these Justices were raised in a pre-Vatican II church.[218]

In an unconnected study, the theory that Catholicism affected judicial decision-making was tested by looking at the voting habits of the Supreme Court Justices in cases where the United States Conference of Catholic Bishops filed amicus curiae briefs.[219] As the author of the study notes, there is no Catholic position on questions of constitutional

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Rome to discuss and settle doctrinal issues. *Second Vatican Council*, BRITANNICA, https://www.britannica.com/event/Second-Vatican-Council (last updated Feb. 17, 2023). The documents that came out of Vatican II tended to be more progressive. *Id.* Vatican II was the first such council since the First Vatican Council in 1869-1870. *Trends in Christianity: Liberalization in the Roman Catholic Church*, MACROHISTORY: WORLDHISTORY, http://www.fsmitha.com/h2/ch29.htm (last visited Jan. 15, 2023). Various reforms included that Mass would be led by a priest in the local language with the priest facing the congregation, rather than spoken in Latin and with the priest's back to the congregation. *Id.* Further, the reforms included the absolution of Jews in the killing of Jesus Christ, an openness to other religions, and the end of the requirement to fast from meat on Friday except during Lent. *Id.*

213 *See* Kannar, *supra* note 177 at 1313. *A Catechism of Christian Doctrine: Prepared and Enjoined by Order of the Third Council of Baltimore* (the Baltimore Catechism) was the standard Catholic school text from 1885 until the late 1960s. *Id.* at n. 80.

214 *Id.* at 1313, 1315. Questions such as "[w]hat three things does it take to make a sin mortal?" *Id.* at 1315.

215 *Id.* at 1321-23.

216 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

217 Brian P. Smentkowksi, *Anthony Kennedy*, BRITANNICA, https://www.britannica.com/biography/Anthony-Kennedy (last updated Feb. 11, 2023); Aaron M. Houck & Brian P. Smentkowski, *Antonin Scalia*, BRITANNICA, https://www.britannica.com/biography/Antonin-Scalia (last updated Feb. 9, 2023). *See Current Members*, *supra* note 132.

218 The Second Vatican Council, popularly known as Vatican II, was active from 1962 to 1965. *Second Vatican Council*, *supra* note 212.

219 Walsh, *supra* note 6, at 411-14.

law, but the amicus curiae briefs of the Catholic Bishops are the closest approximation of the Catholic position.[220] Looking at twenty-two cases in which the Catholic Bishops filed amicus curiae briefs from 1986 through the October 2004 term, Justices Scalia, Kennedy, and Thomas voted on the side that the Catholic Bishops advocated more than seventy-nine percent of the time.[221] Justices Scalia and Thomas, interestingly, both voted against the position of the Catholic Bishops on three cases, two of which involved the death penalty.[222] Justice Scalia discussed his views on the death penalty, stating that "[i]t was clearly permitted when the Eighth Amendment was adopted…And so it is clearly permitted today."[223] For Justices Scalia and Thomas, the most important part of making a judicial decision is the text of the Constitution, and since the Eighth Amendment allows for the death penalty, the death penalty cannot be unconstitutional.[224]

During the Roberts Court, from the October 2005 term through the October 2013 term, the Catholic Bishops filed amicus curiae briefs in ten cases, though one case was decided on the issue of standing and thus, not counted in the study.[225] Chief Justice Roberts agreed with the Catholic Bishops on all nine cases, whereas Justices Scalia and Thomas agreed on eight out of the nine.[226] Justice Alito agreed on five out of

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[220] *Id.* at 413.

[221] Walsh, *supra* note 6, at 424. This Article focuses on the Roberts Court and the future, and thus, ignores Justices who were not members of the Roberts Court. The Roberts Court is the name used to refer to the current court with John Roberts as Chief Justice of the Supreme Court, 2005 – current. *See Current Members*, *supra* note 132.

[222] Walsh, *supra* note 6 at 426. The two cases are *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). *Id.* at n.69.

[223] Scalia II, *supra* note 104.

[224] *See* Atkins v. Virginia, 536 U.S. at 337-38 (2002) (Scalia, Roberts, and Thomas, JJ., dissenting) ("Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."); Roper v. Simmons, 543 U.S. at 608 (2005) (Scalia, Roberts, and Thomas, JJ., dissenting) ("Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.").

[225] Walsh, *supra* note 6 at 428-29. *Hollingsworth v. Perry*, 570 U.S. 693, was decided "on standing grounds unrelated to the merits[.]" *Id.* at 429.

[226] *Id.*

six.[227] Justice Kennedy agreed on six out of nine.[228] Finally, Justice Sotomayor agreed on two out of five.[229] This does not prove that the Justices voted the way they did because the Catholic Bishops advocated a position. It is because, like the Catholic Bishops, the Justices approach the Constitution in a similar way as they approach the Bible, which produces similar results. The non-Catholic Justices all voted with the Catholic Bishops less than fifty percent of the time, with Justice Kagan agreeing with the Catholic Bishops in only one out of four cases.[230]

Two of the cases in which the Catholic Bishops filed amicus curiae briefs were *Gonzalez v. Carhart* and *U.S. v. Windsor*. In *Carhart*, while Justice Kennedy wrote the opinion of the Court, Justice Thomas wrote a concurring opinion, which Justice Scalia joined.[231] In *Windsor*, Justice Kennedy again wrote the opinion of the Court, and Justice Alito wrote a dissenting opinion in which Justice Thomas joined.[232] These opinions help highlight the approaches these justices have taken when making decisions.

Justice Thomas' concurrence in *Carhart*, which Justice Scalia joined, is very simple:

> I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973), has no basis in the Constitution. *See Casey*, *supra*, at 979, (Scalia, J., concurring in judgment

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[227] *Id.* Justice Alito joined the Court in January 2006. *See Current Members*, *supra* note 132.

[228] Walsh, supra note 6 at 429. Justice Kennedy joined the Court in February 1988. *Justices 1789 to Present*, SUP. CT., https://www.supremecourt.gov/about/members_text.aspx (last visited Jan. 15, 2023).

[229] Walsh, *supra* note 6 at 429. Justice Sotomayor joined the Court in August 2009. *See Current Members*, *supra* note 132.

[230] Walsh, *supra* note 6 at 429. Justice Kagan joined the Court in August 2010. *See Current Members*, *supra* note 132.

[231] *See* Gonzalez v. Carhart, 550 U.S. 124, 130 (2007). *Carhart* was a challenge to the constitutionality of the Partial–Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2000 ed., Supp. IV). *Id.* at 132.

[232] U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013). *Windsor* was a challenge to the constitutionality of the Defense of Marriage Act (DOMA) which denied federal recognition of same-sex marriage. *Id.* at 2682.

> in part and dissenting in part); *Stenberg v. Carhart*, 530 U.S. 914, 980–983, (2000) (Thomas, J., dissenting).[233]

For Justices Thomas and Scalia, the issue is simple. Abortion is not in the Constitution and because of that, the issue is moot.[234] The opinion of the Court written by Justice Kennedy painstakingly goes through the undue burden test set forth in *Planned Parenthood of Southeastern Pa. v. Casey*[235] to determine the constitutionality of the statute in question, finding that "[r]espondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception."[236] Yet, Justice Thomas only needs to reference the Constitution to see that abortion is not mentioned.[237]

Justice Alito takes a very similar approach in *Windsor* in his dissent, which Justice Thomas joined, finding that there is no right to same-sex marriage in the Constitution.[238] Justice Alito opens his dissent with these lines:

> Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels.[239]

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233 *Carhart*, 550 U.S. at 168-69 (Thomas, J. concurring).

234 *Id.* at 169.

235 505 U.S. 833 (1992). Casey was a constitutional challenge to Pennsylvania Abortion Control Act of 1982. *Id.* at 844. Casey upheld Roe v. Wade, 410 U.S. 113 (1973) and established the "undue burden test" when evaluating state-imposed restrictions on abortion. *Id.* at 846, 874.

236 *Carhart*, 550 U.S. at 168.

237 *Id.* at 169 (Thomas, J. concurring).

238 U.S. v. Windsor, 570 U.S. 744, 802-03 (2013) (Alito, J. dissenting).

239 *Id.* at 802.

Again, the answer is simple.[240] There is no guarantee of same-sex marriage in the Constitution.[241] The opinion of the Court, again written by Justice Kennedy, provides "discrete examples [to] establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy" as well as "the extent of the state power and authority over marriage as a matter of history and tradition" before finding that DOMA violated the Fifth Amendment's Due Process Clause.[242] In both *Carhart* and *Windsor*, Justices Alito, Thomas, and Scalia relied on an originalist reading of the text.[243] Abortion and same sex marriage are not mentioned in the Constitution; therefore, the Constitution does not address these issues or provide for such rights.[244]

Lawrence v. Texas demonstrates the divide between the Justices in more stark terms.[245] The opinion of the Court, again written by Justice Kennedy, addressed the question of "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[246] Justice Scalia's dissent, which Justices Thomas and Chief Justice Roberts joined, focuses on the right to "homosexual sodomy[,]" which Justice Scalia does not find as a fundamental right or as a right in the Constitution.[247] Justice Scalia again is taking an originalist approach, framing the dispute as "the right to homosexual sodomy" and whether the Constitution addresses it.[248] Justice Kennedy and the Court, however, examined the principle of the right of two adults to engage in private conduct in their home and found that this right is included in the Constitution, under the right to privacy that emanates from several Constitutional provisions.[249]

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[240] *Id.* at 807 ("Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law.") (emphasis added).

[241] *Id.*

[242] *Id.* at 765-66, 774 (majority opinion).

[243] *Id.* at 802, 807 (Alito, J. dissenting); Gonzalez v. Carhart, 550 U.S. 124, 168-69 (2007) (Thomas, J. concurring).

[244] *Carhart*, 550 U.S. at 168-69 (Thomas, J. concurring); *Windsor*, 570 U.S. at 807 (Alito, J. dissenting).

[245] 539 U.S. 558 (2003). *Lawrence* was a challenge to the constitutionality of Texas's criminal statutes that prohibited sexual conduct between consenting adults of the same sex. *Id.* at 562.

[246] *Id.* at 564.

[247] *Id.* at 586 (Scalia, J. dissenting).

[248] *Id.* at 594-96.

[249] *Id.* at 564-65 (majority opinion).

Justice Thomas quickly asserts in his dissent that there is no right to privacy in the Constitution. His dissent is short and to the point:

> I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.
>
> Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" *Id.* at 530. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," *ibid*., or as the Court terms it today, the 'liberty of the person both in its spatial and more transcendent dimensions,' *ante*, at 562.[250]

Again, he finds no right to privacy in the Constitution and that is the end of that matter.

In *Dobbs v. Jackson Women's Health*, Justice Alito, who wrote the majority opinion for the Court, demonstrates how to approach a case with an originalist framework.[251] Justice Alito's opinion focuses on whether the Constitution "confers" a right to abortion:

> First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to 'liberty' protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we have described as 'ordered liberty.' Finally, we consider whether a right to

[250] *Id.* at 605-06 (Thomas, J. dissenting).

[251] No. 19-1392, slip op. at 1-2 (U.S. June 24, 2022).

> obtain an abortion is part of a broader entrenched right that is supported by other precedents.[252]

In the process of explaining why *Roe v. Wade*[253] and *Casey* were wrongly decided, Justice Alito concludes the right to privacy elucidated by *Roe* does not address "what is distinctive about abortion: its effect on what *Roe* termed 'potential life.'"[254] Thus, according to Justice Alito the right to an abortion does not fall under the right to privacy.[255] Justice Alito also references the Fourteenth Amendment and notes that:

> Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise.[256]

Again, Justice Alito is looking only to the text of the Constitution to see what is permitted or prohibited. As Justice Alito notes in the introduction to *Dobbs*, in *Roe* "[e]ven though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one."[257]

Justice Thomas argues for a stricter originalism with his concurring opinion, stating:

> I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that 'due process of law' merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. . . . Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.[258]

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252 *Id.* at 8-9.
253 410 U.S. 113 (1973).
254 *Dobbs*, slip op. at 49.
255 *Id.* at 48-49.
256 *Id.* at 25-26.
257 *Id.* at 1.
258 *Id.* at 1-2 (Thomas, J. concurring) (emphasis in original).

Building on this, Justice Thomas argues for a textualist understanding of the Constitution in which the Court should:

> 'follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.' *Carlton*, 512 U. S., at 42 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.[259]

For Justice Thomas, if the words are not in the text of the Constitution, the rights do not exist. Thus, *Dobbs* is simple, and the only right answer is there is no right to abortion, nor any right to privacy in the Constitution.[260]

Burwell v. Hobby Lobby is a clear and significant example of religion framing the Justices' approach to a case.[261] Justice Gorsuch was a judge on the Tenth Circuit Court of Appeals when *Hobby Lobby Stores Inc. v. Sebelius* was heard.[262] In their verified civil complaint, the Greens alleged that the:

> family's religious beliefs forbid them from facilitating activities they regard as immoral or harmful. For instance, they refuse to sell shot glasses at Hobby Lobby. They once declined an offer from a liquor store to take over one of their building leases, because they did not want to facilitate alcohol use in the neighborhood around the store. Taking the liquor store's offer would have saved them hundreds of thousands of dollars a month. Similarly, the family refused to allow their trucks to 'back-haul' beer shipments for a major distributor, even

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[259] *Id.* at 7.

[260] *Id.* at 3-5, 7.

[261] 573 U.S. 682 (2014). *Hobby Lobby* was a constitutional challenge to the Affordable Care Act, specifically the requirement for companies to provide certain contraceptives to female employees. *Id.* at 696-97. Hobby Lobby Inc. is a closely held for-profit company that the Green family owns and runs according to their Christian religious beliefs. *Id.* at 702-03.

[262] 723 F.3d 1114 (2013).

> though the profits from doing so would have been substantial.[263]

These actions listed in the complaint do not implicate the morality of the Green family because "facilitate," in this sense, means "to make easier."[264]

The complaint continues: "The Green family also believes it would violate their faith to deliberately provide health insurance that would facilitate access to abortion-causing drugs and devices, even if those items were paid for by an insurer or a plan administrator and not by Hobby Lobby itself."[265] Yet, Justice Gorsuch, in his concurrence to the Tenth Circuit's opinion, frames the Greens objection as complicity. Justice Gorsuch states:

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The Green family members are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case.[266]

Justice Gorsuch is making a theological statement by framing the dilemma as being a participant in an immoral act, not just making it easier.[267] Under this rendition of the facts, the action of providing abortion-causing drugs gives moral culpability to the Greens.[268] They are now morally implicated in the process.[269] In the opinion of the Court,

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263 Verified Complaint at 11, Hobby Lobby Stores Inc. v. Sebelius, 870 F.Supp.2d 1278 (W.D. Okla. 2012) (No. CIV–12–1000–HE).

264 *Facilitate*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/facilitate (last updated Feb. 11, 2023).

265 Verified Complaint, *supra* note 263, at 11.

266 *Hobby Lobby*, 723 F.3d at 1152 (Gorsuch, J. concurring).

267 Merriam Webster dictionary defines complicity as "helping to commit a crime or do wrong in some way." *Complicit*, MERRIAM WEBSTER DICT., https://www.merriam-webster.com/dictionary/complicit (last updated Feb. 11, 2023).

268 *See* THOMAS AQUINAS, THE SUMMA THEOLOGICA, II-II, q. 62, a. 7 (trans. Fathers of the English Dominican Province) (Benziger Bros. ed., 1947), https://www.ccel.org/a/aquinas/summa/SS/SS062.html#SSQ62A7THEP1 (last visited Jan. 17, 2023).

269 *See id*.

Justice Alito goes even further than the Greens and Justice Gorsuch. Justice Alito states both in the text of the opinion and corresponding footnote:

> The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.
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> See, e.g., Oderberg, The Ethics of Co-operation in Wrongdoing, in Modern Moral Philosophy 203–228 (A. O'Hear ed. 2004); T. Higgins, Man as Man: The Science and Art of Ethics 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—i.e., "physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent"—"present troublesome difficulties in application"); 1 H. Davis, Moral and Pastoral Theology 341 (1935) (Cooperation occurs "when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does"). 270

In this part of the opinion, Justice Alito has introduced the Catholic theological concept of "cooperation" into the discussion.

Cooperation is an Eighteenth Century theological doctrine of the Catholic Church that, until recently, was a discussion topic primarily for Catholic theologians or those in academia.[271] By introducing the theological concept of cooperation, Justice Alito indicated the Greens have now gone from facilitating the sin to being actually guilty of the sin itself.[272] This progression from facilitation to complicity to cooperation is only achievable due to importation of religious concepts, most likely stemming from the Justices' religious education.[273] Thus, the religious education of the Justices does affect their decision-making by creating

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[270] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 573 U.S. 682, 724 (2014).

[271] *Formal and Material Cooperation*, 20 ETHICS & MEDICS, 1 (1995). Amy Coney Barrett, prior to being appointed to the Supreme Court, co-authored an article that addressed the issue of "cooperation with evil" for Catholic judges who are involved in the sentencing of the death penalty. *See* John H. Garvey & Amy Coney Barrett, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

[272] *Formal and Material Cooperation*, *supra* note 271.

[273] *See* Kannar, *supra* note 177, at 1311-12, 1315.

a habit of mind and way of thinking that prefers rules and one correct answer to standards and uncertainty.

Interestingly though, one way Catholicism and originalism appear to have not shaped the judicial decision-making process of some Justices is the emphasis, or lack thereof, on *stare decisis*. *Stare decisis*, from the Latin "to stand by things decided," is a theory of "[f]idelity to precedent."[274] *Stare decisis* enables the Court to remain an "unbiased, and predictable decisionmaker that decides cases according to the law rather than the Justices' individual policy preferences."[275] *Stare decisis* is similar to the role of the Pope and the Church in Catholic scriptural interpretation where they mediate and constrain the interpretation of Scripture.[276] Yet, Justices Scalia and Thomas, possibly the most Catholic of the Justices, have openly abandoned reliance on *stare decisis*.[277]

Justice Alito praises the theory of *stare decisis* in *Dobbs*, saying "it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past[,]" but he also acknowledges in "appropriate circumstances" constitutional decisions may be overruled.[278] Justice Alito does not specify what those circumstances are, only including a partial list of Supreme Court cases that have been overturned.[279] Justice Alito then examines in detail the factors that he sees strongly support overruling *Roe* and *Casey*.[280] Justice Alito even states that "[t]he Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles."[281]

Yet, in *Dobbs*, Justice Thomas is willing to counter Justice Alito's reliance on *stare decisis* to overrule all the substantive due

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[274] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 377 (2010) (Roberts, J., concurring); BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 4 (2018) (citing James C. Rehnquist, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 B.U.L. REV. 345, 347 (1986).

[275] MURRILL, *supra* note 274, at 7.

[276] *See supra* text accompanying note 34. Rabbinical assemblies in Judaism can perform a similar function of stare decisis by mediating and constraining the interpretation of Scripture. *See generally Rabbinical Assembly of Conservative Judaism*, https://www.rabbinicalassembly.org/ (last visited Apr. 10, 2023).

[277] *See, e.g.*, *Gamble v. United States*, No. 17-646 (U.S. June 17, 2019) (Thomas, J., concurring); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann et al., 1st ed. 1997) [hereinafter SCALIA III].

[278] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 39-40 (U.S. June 24, 2022).

[279] *Id.* at 41-43 n.48.

[280] *Id.* at 43-66.

[281] *Id.* at 66.

process cases because they are "demonstrably erroneous."[282] In *Gamble v. United States,* Justice Thomas found that *stare decisis* "does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."[283] Thus, Justice Thomas does not see *stare decisis* as part of originalism.

Similarly, Justice Scalia stated that *stare decisis* was not part of his understanding of originalism but was a "pragmatic *exception* to it."[284] Amy Coney Barrett, prior to becoming a Supreme Court Justice, argued that for Justice Scalia *stare decisis* meant looking at the "history and traditions of the American people."[285] Like Justice Thomas, for Justice Scalia, *stare decisis* does not apply if the original decision was wrongly decided, or if the decision does not hew to the original intent of the Constitution.[286]

Stare decisis is a principle that should appeal to originalists. In *Dobbs*, Justices Kavanaugh and Chief Justice Roberts both wrote concurring opinions highlighting the importance of *stare decisis*.[287] As Justice Lewis Powell, Jr. notes, *stare decisis* gives the court legitimacy, continuity, and stability.[288] Powell contemplates that if *stare decisis* were eliminated it "would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."[289] Why Justices Scalia and Thomas abandoned *stare decisis* is a question that cannot be answered in this paper, but is a question to consider in the future.

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[282] *Id.* at 3 (Thomas, J., concurring).

[283] Gamble v. United States, No. 17-646, slip op. at 2 (U.S. June 17, 2019) (Thomas, J., concurring). *Gamble* was a challenge to the dual sovereignty doctrine and double jeopardy. The opinion of the Court, written by Justice Alito, used "the [Double Jeopardy] Clause's text, other historical evidence, and 170 years of precedent" to find against the defendant Gamble. *Id.* at 1-2 (majority opinion).

[284] SCALIA III, *supra* note 277, at 140.

[285] Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1923 (2017).

[286] Barrett, *supra* note 285, at 1933. *See* CRAPANZANO, *supra* note 55, at 305-08.

[287] *Dobbs*, slip op. at 1-12 (Roberts, C.J., concurring); *Dobbs*, slip op. at 5-10 (Kavanaugh, J., concurring).

[288] *See* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286-87, 289 (1990).

[289] *Id.* at 288.

b. Standards

In contrast to rules, standards, with their flexibility and ability to adapt to changing circumstances and contexts, speak more to dynamic constitutionalism.[290] Standards speak to the Midrashic method of interpretation, which finds more than one meaning in the text, including the text as it is written, the text as earlier communities and courts have found meaning, and the current meaning.[291] Both dynamic constitutionalism and the Midrashic method of interpretation do not assume that words have only one meaning.[292] Standards and dynamic constitutionalism allow for discretion as well as the ability to carry an overarching theme through the interpretation, such as active liberty, equality, or justice.[293]

The Justices who strongly adhere to a dynamic constitutionalism are mostly Jewish.[294] Justices Breyer, Ginsburg, and Kagan are all proudly Jewish and have all spoken about their faith, and how the thread of justice runs through Judaism.[295] Justice Sotomayor adheres to dynamic constitutionalism though she attended Catholic schools.[296] Justice Sotomayor has stated, however that she is more spiritual than religious, and she appears to be more socially Catholic than traditionally Catholic.[297]

Standards also allow for moral discourse, which takes into account the overarching themes, contrasting those with the constitutional text and considering the specific facts and cases at issue.[298] *Gonzalez v. Carhart*, in which Justice Ginsburg wrote a dissent that Justices Breyer, Stevens and Souter joined, is a good example of this moral discourse.[299] Justice Ginsburg approached the case with the Midrash from the Court's previous decisions in *Roe* and *Casey*.[300] Justice Ginsburg states:

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290 *See, e.g.*, Horwitz I, *supra* note 65, at 52-54; Kissam, *supra* note 82, at 89; Parshall, *supra* note 86, at 29-34.

291 Note, *supra* note 38, at 1458; Stern, *supra* note 39.

292 *See* Pushaw, Jr, II, *supra* note 117, at 475-79.

293 *See* Kissam, *supra* note 82.

294 *See infra* Part V.

295 *See infra* Part V.

296 Cardinal Spellman High School, which Justice Sotomayor attended, appears to be more focused on academics and preparation for college than faith. CARDINAL SPELLMAN HIGH SCH., https://www. cardinalspellman.org/ (last visited Jan. 17, 2023).

297 Shemtob, *supra* note 160, at 386-87.

298 *See, e.g.*, Horwitz I, *supra* note 65, at 52; Kissam, *supra* note 82, at 89-90; Parshall, *supra* note 86, at 29-30.

299 Gonzalez v. Carhart, 550 U.S. 124 (2007) (Ginsburg, J., dissenting).

300 *See id.*

> In reaffirming *Roe,* the *Casey* Court described the centrality of 'the decision whether to bear . . . a child,' *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), to a woman's 'dignity and autonomy,' her 'personhood' and 'destiny,' her 'conception of . . . her place in society.' 505 U.S., at 851–52, 112 S.Ct. 2791. Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect 'the health of the woman.' *Id.*, at 846, 112 S.Ct. 2791.[301]

In *Carhart*, Justice Ginsburg is not looking at the original meaning of the Constitution or what the text of the Constitution is, she is using the standard given in *Casey*—whether the bill protects the health of the women—aware that the health of the woman affects her "dignity and autonomy," her "personhood," "destiny," and her "conception of . . . her place in society" as her starting point.[302]

Justice Ginsburg is aware that more than just the right to an abortion or the undefined right to privacy is at stake in *Carhart*, for she also says "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[303] With the frames of autonomy and equal citizenship in place, Justice Ginsburg then analyzes the issue in *Carhart*, whether the Partial–Birth Abortion Ban places an undue burden on those seeking to end a pregnancy past viability.[304] Justice Ginsburg concludes her dissent, bringing together the frames of *Roe* and *Casey*, in addition to the theme of autonomy for women, to write that:

> the notion that the Partial–Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. *See supra*, at 1641, n. 2; *supra*, at 1643, n. 4. When 'a statute burdens

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301 *Id.* at 170.
302 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851-52 (1992).
303 550 U.S. at 172 (Ginsburg, J., dissenting)
304 *Id*. at 187-90.

> constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.' *Stenberg*, 530 U.S., at 952, 120 S.Ct. 2597 (Ginsburg, J., concurring) (quoting *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (C.A.7 1999) (Posner, C. J., dissenting)).[305]

In line with Justice Ginsburg's *Casey* dissent, Justices Breyer, Sotomayor and Kagan's dissent in *Dobbs* is another form of the moral discourse with the themes of liberty and equality woven through the discourse. They begin their dissent with their understanding of *Roe* and *Casey*:

> For half a century, *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. See *Casey*, 505 U.S., at 853; *Gonzales* v. *Carhart*, 550 U. S. 124, 171–172 (2007) (Ginsburg, J., dissenting). Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.[306]

The dissent then frames their understanding of the effects of the majority's opinion in stark terms "[w]hatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[307]

For these Justices, the majority's opinion finding that the right to privacy does not exist when faced with "potential life" is more than

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[305] *Id*. at 191.

[306] Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. at 1 (U.S. June 24, 2022) (Breyer, Sotomayor, Kagan, JJ., dissenting).

[307] *Id*. at 4.

just a simple black and white answer.[308] They see the greater picture: the right to individual freedom, equal rights for all, the realities of the right to privacy, and the totality of circumstances for women when facing the decision to end a pregnancy.[309] They understand "that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[310] The dissent notes:

> Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections.[311]

Similar to the right of women to vote, codified in the Nineteenth Amendment, the Justices believe the right to bodily integrity and the right to privacy can be found in the Constitution even if it was not understood to be there when ratified.[312]

Justice Kagan's dissent in *Rucho v. Common Cause* is an example of legal Midrash that looks at the totality of the circumstances.[313] The majority opinion in *Rucho*, written by Chief Justice Roberts, and joined by Justices Thomas, Alito, Gorsuch and Kavanaugh, found that partisan gerrymandering, which has been around since almost the beginning of the nation, is not justiciable because "[e]xcessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is 'incompatible with democratic principles,'. . .does not mean that the solution lies with the federal judiciary."[314]

Chief Justice Roberts stated some of the complications in deciding this case:

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308 *Id*. at 49.
309 *See generally id*. at 1-60.
310 *Id*. at 18.
311 *Id*. at 14-15.
312 *Id*.
313 139 S. Ct. 2484 (2019) (Kagan, J., dissenting). *Rucho* was a challenge to partisan gerrymandering in North Carolina and Maryland. *Id*. at 2509.
314 *Id*. at 2506 (majority opinion) (citation omitted).

> Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton*, 566 U. S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d (2012).
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> And it is only after determining how to define fairness that you can even begin to answer the determinative question: 'How much is too much?' At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court 'reverse gerrymander' other parts of a State to counteract 'natural' gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.[315]

Chief Justice Roberts appears to struggle with how to find the one correct answer and is uncomfortable with trying to find an answer in such a murky situation. Justice Kagan, in her dissent, though, is willing to address the issue.[316] She begins her dissent:

> For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities… And checking [gerrymanderers] is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial

[315] *Id*. at 2500-01.

[316] *Id*. at 2509 (Kagan, J., dissenting).

> standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.[317]

Justice Kagan also realizes that while the majority is correct that partisan gerrymandering has been around since "the Republic's earliest days[,]" modern technology allows partisan gerrymandering down "to precinct-level or city-block-level data[] and…data sets providing wide-ranging information about even individual voters" enables partisan gerrymandering to be "far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides."[318] She concludes "[t]hese are not your grandfather's—let alone the Framers'—gerrymanders."[319]

Justice Kagan is willing to struggle with the current circumstances, to look at the Midrash of precedents and come to a conclusion. She closes her dissent with these lines:

> Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.[320]

Justice Sonia Sotomayor, in her dissent in *Utah v. Strieff*, which Justice Ginsburg joined, also uses legal Midrash, as seen through her

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317 *Id*.
318 *Id*. at 2512-13.
319 *Id*. at 2513.
320 *Id*. at 2525.

awareness of current circumstances, her willingness to access information outside the text, and her ability to see systemic issues.[321] Fundamentalists, because of their emphasis on a personal relation with Jesus Christ, fail to see systemic issues, reducing issues such as systemic racism to failures in personal relationships.[322] Justice Thomas, in the opinion of the Court, demonstrates this failure:

> Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.[323]

Justice Sotomayor counters this claim in her dissent, stating "[m]ost striking about the Court's opinion is its insistence that the event here was 'isolated,' with 'no indication that this unlawful stop was part of any systemic or recurrent police misconduct.' Respectfully, nothing about this case is isolated."[324]

Justice Sotomayor then spends the next few pages explaining "[o]utstanding warrants are surprisingly common."[325] Justice Sotomayor sees the systemic issue of outstanding warrants being an entry into the criminal legal system. She notes that in Ferguson, Missouri, a town of only 21,000 people, there are 16,000 outstanding warrants.[326] Justice Sotomayor closes this section of her dissent with the following lines:

> The majority does not suggest what makes this case 'isolated' from these and countless other examples. Nor does

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[321] 579 U.S. 232 (2016) (Sotomayor, J., dissenting). *Strieff* addressed whether evidence found after a lawful arrest on an outstanding arrest warrant found during an unlawful investigatory stop must be suppressed. *Id*. at 235 (majority opinion).

[322] *See, e.g.*, MICHAEL O. EMERSON & CHRISTIAN SMITH, DIVIDED BY FAITH: EVANGELICAL RELIGION AND THE PROBLEM OF RACE IN AMERICA 77-78 (2000); *It's in the Code, Ep. 11: We Live in a Fallen World*, *Straight White American Jesus*, (July 6, 2022) (downloaded using Apple podcasts).

[323] *Strieff*, 579 U.S. at 242.

[324] *Id*. at 249 (Sotomayor, J., dissenting) (citations omitted).

[325] *Id*. at 249-51.

[326] *Id*. at 250.

> it offer guidance for how a defendant can prove that his arrest was the result of 'widespread' misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.[327]

Justice Sotomayor is willing to look at the system and see how it works as a whole, whereas Justice Thomas is looking only at the actions of one individual officer. Justice Sotomayor also speaks from her professional experience describing an encounter with a police officer through the lens of a person stopped, citing the precedent that allows for each step.[328] She concludes her dissent with these powerful lines:

> But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim Crow 95–136 (2010). For generations, [B]lack and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.,* W. E. B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015) . . . We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, The Miner's Canary 274–283(2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.[329]

Justice Sotomayor uses her experience, her ability to see systemic issues and her knowledge to demonstrate the reality of police stops and how those police stops disproportionately affect people of color.[330] For Justice Sotomayor, the law includes not only the meaning

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[327] *Id*. at 251-52.
[328] *Id*. at 252-53.
[329] *Id*. at 254.
[330] *Id*. at 252-54.

of the words, "[t]he right of the people to be secure in their persons…against unreasonable searches and seizures," but also the meaning of the principles behind them—the freedom to know that your body is not "subject to invasion while courts excuse the violation of your rights" and that people are "citizen[s] of a democracy" not "the subject of a carceral state, just waiting to be cataloged."[331]

Finally, Justice Kennedy is the best example of religious expression affecting constitutional interpretation.[332] As noted, Justice Kennedy is a devout Catholic, though he attended public schools.[333] Yet, Justice Kennedy has spoken of his belief that the Constitution "survives because it has meaning and force and significance and inspiration in the context of our own day and age. It is a living thing."[334] Justice Kennedy noted "[e]ach generation has the right to help shape its own destiny, its own future. It must do so consistently, however, by protecting those fundamental principles of freedom, which must be the underpinning of a decent, free, and progressive society."[335]

Justice Kennedy, in his confirmation hearing, spoke of what he sees as central to the rule of law; that "there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go."[336] When asked about drawing this line, specifically in reference to "private consensual activities[,]" Justice Kennedy referenced:

> the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.[337]

Justice Kennedy is not easily placed into a judicial philosophy since he seems to adhere to the principles rather than a theory of judicial

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331 U.S. CONST. amend. IV; *Strieff*, 579 U.S. at 254.

332 *See infra* text accompanying notes 329-59.

333 *See supra* notes 181-83 and accompanying text.

334 Parshall, *supra* note 86, at 35 (citation omitted) (emphasis omitted).

335 *Id.* at 36 (citation omitted).

336 *Nomination of Anthony M. Kennedy to be Assoc. Justice of The United States: Hearings Before Comm. on the Judiciary United States Senate,* 100th Cong., Anthony Kennedy, 86 (testimony of Anthony Kennedy) [hereinafter *Kennedy Hearings*].

337 *Id.* at 180.

decisions making.[338] In his confirmation hearing, Justice Kennedy stated that "the object of our [constitutional interpretation] inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed."[339] Justice Kennedy frames that intention in a viewpoint that prioritizes the principles of personal liberty and human dignity, limitations on governmental interference with that liberty, and "a robust conception of judicial power."[340] Justice Kennedy has elucidated these principles stating that "[t]here's a rule of law, [and it has] three parts. One: the government is bound by the law. Two: all people are treated equally. And three: there are certain enduring human rights that must be protected."[341] This "ideal of human dignity [is] shaped in rhetoric and substance by post-Vatican II Catholicism."[342]

Scholar Frank Colucci has noted the similarities between Justice Kennedy's rhetoric of liberty and human dignity to Papal Encyclicals such as *Dignitatis Humanae*,[343] *Persona Humana*,[344] and *Evangelium Vitae*,[345] among others.[346] These Papal Encyclicals are part of a tradition

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338 FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 1-5 (2009).

339 *Kennedy Hearings*, *supra* note 336, at 86 (testimony of Anthony Kennedy).

340 *See* ANDREW NOLAN, *ET AL*., CONG. RSCH. SERV., R45256, JUSTICE ANTHONY KENNEDY: HIS JURISPRUDENCE AND THE FUTURE OF THE COURT 4, 8, 10 (2018); Jack Goldsmith, *Justice Kennedy's Retirement Leaves the Future of U.S. Constitutional Law Entirely Up for Grabs*, WASH. POST (July 27, 2018, 2:26 PM), https://www.washingtonpost.com/opinions/justice-kennedys-retirement-is-the-biggest-event-in-us-jurisprudence-in-at-least-15-years/2018/06/27/746db704-585d-11e7-b38e-35fd8e0c288f_story.html.

341 *Interview: Justices Stephen Breyer & Anthony Kennedy*, PBS: FRONTLINE (Nov. 23, 1999), https://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html.

342 COLUCCI, *supra* note 338, at 170.

343 *Id.* at 31-33. *See also* Pope Paul VI, *Declaration on Religious Freedom Dignitatis Humanae*, para. 1, 2, 9 (Dec. 7, 1965), https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

344 COLUCCI, *supra* note 338, at 33-35. *See also* Sacred Congregation for the Doctrine of the Faith*, Persona Humana: Declaration on Certain Questions Concerning Sexual Ethics* (Dec. 29, 1975), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html.

345 COLUCCI, *supra* note 338, at 72-73. *See also* Ioannes Paulus PP II, *Evangelium Vitae*, (Mar. 25, 1995), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html.

346 COLUCCI, *supra* note 338, at 71.

of Catholic moral theology,[347] which include other encyclicals and statements from the United States Conference of Catholic Bishops that address dignity and liberty such as a statement on Rights and Responsibilities, [348] or Papal Encyclicals such as *Gaudium Et Spes*, [349] *Laudato Si'*, [350] and *Pacem In Terris*.[351] Thus, Justice Kennedy appears to draw more from Catholicism's moral theology than its doctrinal stance.[352]

Justice Kennedy combines this understanding of Catholic moral theology with dynamic constitutionalism and finds "that there are neutral principles of law. . . transcendent principles illuminating the idea of freedom and human spirituality. . . ' that 'in the hands of a sensitive, dedicated, and independent judiciary, can contribute to making our society, more decent, more compassionate, more tolerant[.]'"[353] This frame of interpretation can be seen in Justice Kennedy's opinions of the Court in *Lawrence* and *Windsor*.[354]

In *Lawrence*, Justice Kennedy begins the opinion of the Court with the concept of liberty: "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places" and "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[355] This is a very different starting place than Justice Scalia's framing of a right to

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[347] Moral theology in Catholicism is similar to a religious ethic that teaches how to behave and includes Catholic social teaching and medical and sexual ethics, among other issues. CHARLES E. CURRAN, CATHOLIC MORAL THEOLOGY IN THE UNITED STATES: A HISTORY xi (2008).

[348] *Rights and Responsibilities*, U.S. CONF. OF CATH. BISHOPS, https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/rights-and-responsibilities#:~:text=The%20Catholic%20tradition%20teaches%20that,things%20required%20for%20human%20decency (last visited Feb 23, 2023).

[349] Pope Paul VI, Pastoral Constitution on The Church in The Modern World *Gaudium Et Spes* (Dec. 7, 1965) para. 26, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

[350] Encyclical Letter *Laudato Si'* Of the Holy Father Francis on Care for Our Common Home, (June 18, 2015) ¶ 157.

[351] *Pacem In Terris* Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, And Liberty (April 11, 1963), ¶ 11.

[352] The doctrinal stance is a focus on beliefs of the Catholic church and how a typical Catholic should believe. The Baltimore Catechism is an example of a doctrinal stance. *See* Michael L. Rustad & Thomas H. Koenig, *A Hard Day's Night: Hierarchy, History & Happiness in Legal Education,* 58 SYRACUSE L. REV. 261, 286-87 n.157 (2008).

[353] Parshall, *supra* note 86, at 36 (citation omitted).

[354] *See* Lawrence v. Texas, 539 U.S. 558 (2003); *infra* notes 355-59 and accompanying text. *See* United States v. Windsor, 570 U.S. 744 (2013); *infra* notes 360-64 and accompanying text.

[355] *Lawrence*, 539 U.S. at 562.

"homosexual sodomy" or Justice Thomas' "uncommonly silly" law.[356] For Justice Kennedy, the issue is the right to engage in intimate conduct in private.[357]

Justice Kennedy states that the Court in *Bowers v. Hardwick*,[358] which upheld a similar statute banning sodomy in 1986, "misapprehended the claim of liberty" presented to them as the right to consensual sodomy, similar to Justices Scalia's dissent which casts the case in a similar light.[359] Justice Kennedy counters this misapprehension with the argument:

> [t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[360]

Thus, Justice Kennedy counters the originalist view of case as a right to homosexual sodomy with the theme of liberty and dignity woven throughout the opinion.[361]

In *U.S. v. Windsor*, Justice Kennedy begins the opinion of the Court with the story of Edith Windsor and Thea Spyer's life and marriage.[362] Justice Kennedy then highlights the "urgency of this issue for same-sex couples who want[] to affirm their commitment to one another before their children, their family, their friends, and their

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356 *Id.* at 586, 593-98 (Scalia, J. dissenting); *Id.* at 605-06 (Thomas, J. dissenting) *(*quoting *Griswold v. Connecticut,* 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

357 *Lawrence*, 539 U.S. at 564.

358 478 U.S. 186 (1986). *Bowers* was a constitutional challenge to a Georgia law that criminalized sodomy. *Id.* at 187-88.

359 *Lawrence*, 539 U.S. at 567; *id.* at 586, 593-99 (Scalia, J. dissenting).

360 *Id.* at 567 (majority opinion).

361 COLUCCI, *supra* note 338, at 22-24, 26-27.

362 U.S. v. Windsor*,* 570 U.S. 744, 749-53 (2013).

community."[363] Justice Kennedy refers to marriage between members of the same sex as the ability "to occupy the same status and dignity as that of a man and woman in lawful marriage" and the desire to be "given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other."[364]

Justice Kennedy again is countering the originalist view of the case as a right to same-sex marriage, instead focusing on the commitment between two people and the dignity afforded that commitment. Justice Kennedy concludes the opinion:

> [t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[365]

Again, Justice Kennedy is carrying the theme of personhood and dignity throughout this opinion, as he did with liberty through *Lawrence*. This focus on personhood, dignity and liberty is similar to teachings from the United States Conference of Catholic Bishops and Papal Encyclicals.[366]

Interestingly, Justices Kennedy and Scalia are of the same generation, raised as Catholics in a pre-Vatican II United States.[367] Both come from strong Catholic families, and both are active in their faith.[368] Yet, Justice Scalia is a proponent of originalism and textualism, whereas Justice Kennedy creates a version of dynamic constitutionalism that takes into account Catholic moral theory.[369] Justice Kennedy favors language from encyclicals like *Evangelium Vit*ae, yet Justice Scalia sees *Evangelium Vitae* as ignoring or rejecting long standing church teaching on punishment as retribution.[370]

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363 *Id.* at 763-64.
364 *Id.* at 763.
365 *Id.* at 775.
366 *See* COLUCCI, *supra* note 338, at 31-35, 71-74; *supra* notes 343-345 and accompanying text.
367 *See* sources cited *supra* note 217.
368 *Supra* Part V.
369 *See, e.g.,* Kannar, *supra* note 177, at 1307, 1317.
370 COLUCCI, *supra* note 338, at 31-35, 70-74; *Session Three: Religion, Politics and the Death Penalty*, PEW RSCH. CTR. (Jan. 25, 2002), https://www.pewresearch.org/religion/2002/01/25/session-three-religion-politics-and-the-death-penalty/.

The main difference between the two is their education in that Justice Scalia attended Catholic schools and Justice Kennedy attended public school.[371] Justice Scalia attended Georgetown University, while Justice Kennedy attended Stanford University.[372] Both Justices Scalia and Kennedy attended Harvard Law School, graduating in 1960 and 1961 respectfully.[373] Justice Scalia favors a more conservative Catholicism, preferring the Latin Mass.[374] Justice Scalia's doctrinal Catholicism guides his interpretation method to originalism and textualism, while Justice Kennedy's emphasis on moral theology guides his interpretation method to dynamic constitutionalism.

VII. IMPLICATIONS

"Sometimes small gestures can have unexpected consequences."[375] Thus begins the opinion of the Court in *Bostock v. Clayton County, Georgia*, written by Justice Gorsuch, and joined by Chief Justice Roberts, Justices Ginsburg, Breyer, Sotomayor and Kagan.[376] The opinion continues:

> Major initiatives practically guarantee [unexpected consequences]. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.[377]

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371 *See supra* Part V.

372 *See supra* Part V.

373 *See* sources cited *supra* note 217.

374 *See supra* note 177 and accompanying text. Shemtob, *supra* note 160, at 376.

375 Bostock v. Clayton County, Ga., No. 17-1618, slip op. at 2 (U.S. June 15, 2020). *Bostock* addressed the issue whether Title VII, in the Civil Rights Act, protects lesbian, gay, bisexual and transgender employees. *See id.*

376 *Id.* at 1-2.

377 *Id.* at 2.

In reading *Bostock*, one might be surprised to see Chief Justice Roberts and Justice Gorsuch agreeing with Justices Ginsburg, Breyer, Sotomayor and Kagan in a case addressing the rights of lesbian, gay, bisexual and transgender (LGBTQ+) employees. Yet, Justice Gorsuch still finds that Title VII does cover LGBT employees because:

> [j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.[378]

As demonstrated above, knowing that Justice Gorsuch and Chief Justice Roberts are more likely to agree with a textualist argument in a case such as *Bostock* can help attorneys better advocate for their clients and positions. The attorney for Bostock and Zarda indeed began her argument before the Court with a textualist approach:

> When a [sic] employer fires a male employee for dating men but does not fire female employees who date men, he violates Title VII. The employer has, in the words of Section 703(a), discriminated against the man because he treats that man worse than women who want to do the same thing. And that discrimination is because of sex, again in the words of Section 703(a), because the adverse employment action is based on the male employee's failure to conform to a particular expectation about how men should behave; namely, that men should be attracted only to women and not to men.[379]

This set the attorney for Bostock and Zarda's argument in a textualist frame from which she was able to show how discrimination against LGBT people is based on sex not sexual orientation. Whereas the attorney for Clayton County, Georgia and Altitude Express, Inc. began his argument with case law and the appellate court's opinion,

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[378] *Id.* at 33.

[379] Transcript of Oral Argument at 4, Bostock v. Clayton County, Ga., No. 17-1618, (U.S. June 15, 2020).

specifically the dissent.[380] In *Dobbs*, the attorney for Jackson Women's Health Organization opened her argument arguing stare decisis and the respect for precedents:

> Mississippi's ban on abortion two months before viability is flatly unconstitutional under decades of precedent. Mississippi asks the Court to dismantle this precedent and allow states to force women to remain pregnant and give birth against their will.[381]

Yet, the Solicitor General for Mississippi began his argument with references to the Constitution: "*Roe* versus *Wade* and *Planned Parenthood* versus *Casey* haunt our country. They have no basis in the Constitution. They have no home in our history or traditions. They've damaged the democratic process. They've poisoned the law. They've choked off compromise."[382] The Solicitor General for Mississippi posed the question for the Court not just about the law in question but also about the right to an abortion and whether it is indeed in the Constitution.

Correlation does not imply causation. Just because one advocate begins an argument with the Constitution does not mean that the justices will blindly accept that position. It might, though, frame the argument in a way that speaks to a Justice's "habit of mind" and make the argument more palatable to the Justices.[383] Shaping an argument for the specific judge an attorney is appearing before is not unheard of in criminal law.[384] As in criminal law, tailoring your argument to the Justices could be helpful when presenting an argument before the U.S. Supreme Court.

An example of a way to approach an argument using the "habit of mind" of the conservative majority of the current Court is the following argument by the advocate for Clayton County, Georgia and Altitude Express Inc, in *Bostock.* First, begin with a textualist or originalist argument that focuses on the idea that when passed in 1964, Title VII's ban on discrimination "because of . . . sex" was based on the meaning of "the state of being male or female."[385] Second, include the intent of the Congressman who amended the Title VII to include discrimination

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[380] *Id.* at 31-32.

[381] Transcript of Oral Argument at 47, Dobbs v. Jackson Women's Health Organization, No. 19-1392 (U.S. June 24, 2022).

[382] *Id.* at 4.

[383] *See* Kannar, *supra* note 177, at 1313.

[384] *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 149-51 (Princeton University Press, 2020).

[385] *Sex*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/sex (last visited Jan. 16, 2023).

based on sex noting that it was not added to expand the meaning of Title VII, but to act as a poison pill.[386] The argument can then be shifted to other points that need to be addressed. This argument begins with a textualist/originalist frame that allows the Justices to have a base they can relate to and connect to the other arguments.

Another example of using a textualist/originalist frame to present an argument by the attorney for Jackson Women's Health in *Dobbs* is to show how bodily integrity and bodily autonomy is "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[387] For example, quoting from cases that have shown bodily integrity, such as *Union Pacific R. Co. v. Botsford* in 1891:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[388]

Or *Meyer v. Nebraska* from 1923:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized

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386 Congressman Howard Smith (D-VA) was known to be "a staunch opponent of civil rights" and offered the amendment to Title VII on the floor of the House that added "because of . . . sex." *Women's Rights and the Civil Rights Act of 1964, Women's Rights*, NAT'L ARCHIVES, https://www.archives.gov/women/1964-civil-rights-act (last visited Jan. 16, 2023).

387 Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. at 5 (U.S. June 24, 2022) (citation omitted).

388 Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891). *Botsford* addressed whether a person suing for negligence resulting in physical injuries must submit to a "surgical examination as to the extent of the injury sued for." *See id.*

> at common law as essential to the orderly pursuit of happiness by free men.[389]

Or finally *Skinner v. State of Okl. ex rel. Williamson* from 1942: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[390]

These cases demonstrate the right of an individual to the "possession and control of his own person," as well the freedom to seek "those privileges . . . as essential to the orderly pursuit of happiness by free men."[391] That is bodily integrity and bodily autonomy are not new concepts that were created out of nowhere in *Griswold*, *Roe* and *Casey*, but instead are deeply rooted in the Constitution.

These two sample arguments are examples of ways to frame arguments knowing the "habit of mind" of the Justices, which may allow the justices to see an unfamiliar argument in a familiar light.[392]

VIII. CONCLUSION

In the Scalia lecture at Harvard Law School in 2015, Justice Kagan quipped, "[w]e are all textualist now," even though her dissents have shown adherence to a dynamic constitutionalism.[393] Textualism has become the watch word for current Justices, and those who are nominated, as when Justice Ketanji Brown Jackson commented during her confirmation hearings, "I am focusing on original public meaning because I'm constrained to interpret the text" and the "adherence to the text" "is a constraint on my authority."[394] Yet, Justice Jackson most likely adheres to a dynamic constitutionalism method of interpretation

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389 Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *Meyer* was a challenge to a Nebraska law that criminalized the teaching of a foreign language to a student not yet in the eighth grade. *See id.*

390 Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 541 (1942). *Skinner* was a challenge to Oklahoma's Habitual Criminal Sterilization Act, which forcibly sterilized males who were convicted of two or more crimes "amounting to felonies involving moral turpitude." *Id.* at 536.

391 *Botsford*, 141 U.S. at 251; *Meyer* 262 U.S. at 399.

392 *See* Kannar, *supra* note 177, at 1313; CLAIR, *supra* note 384 at 149-151.

393 Harvard University, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, HARV. UNIV. (Nov. 25, 2015), https://hls.harvard.edu/today/in-scalia-lecture-kagan-discusses-statutory-interpretation/.

394 Mark Joseph Stern, *Ketanji Brown Jackson's Shrewd Tactic to Win Conservative Praise*, SLATE (Mar. 22, 2022, 6:03 PM), https://slate.com/news-and-politics/2022/03/ketanji-brown-jackson-originalism-textualism-conservative.html.

as seen by her educational and religious history, as well as her cultural and ethnic background.[395]

While Justices Kagan and Jackson are more likely to espouse dynamic constitutionalism as opposed to textualism and originalism, their deference to textualism and originalism is telling.[396] With the current six-member majority of the Supreme Court who espouse originalist and textualist methods of interpretation, framing an argument that considers and incorporates that method of interpretation may be a wise move.

With the end of the most recent Supreme Court term, where the originalist method of Constitutional interpretation reigned ascendant, becoming familiar with the way of thinking that the current Justices have may be necessary. Especially since issues such as the independent legislative theory, affirmative action in higher education, redistricting, and further challenges to the Environmental Protection Agency are on the Court's docket for the coming term.[397]

Additionally, an area for further study may be to look at the role of precedent and *stare decisis* in the originalist/textualist method of interpretation. While currently, there is some respect for *stare decisis* and precedent, the rise of the so called "super precedent" and with Thomas' view on precedent, the importance of *stare decisis* and precedent is in question.[398] Finally, future scholars could continue to analyze the foregoing discussion of religion and the role it plays in Constitutional interpreation and judicial reasoning.

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[395] Jackson Hearings, *supra* note 170; Banks, *supra* note 169; Collings & Boyd, *supra* note 171.

[396] *See, e.g.*, Transcript of Oral Argument at 57-58, *Merrill v. Milligan*, No. 21-1086 (2022); Mark Joseph Stern, *Hear Ketanji Brown Jackson Use Progressive Originalism to Refute Alabama's Attack on the Voting Rights Act*, SLATE (Oct. 4, 2022, 1:23 PM), https://slate.com/news-and-politics/2022/10/ketanji-brown-jackson-voting-rights-originalism.html.

[397] *October Term 2022*, SCOTUSBLOG, https://www.scotusblog.com/case-files/terms/ot2022/ (last visited Jan. 17, 2023).

[398] Super precedent, or super *stare decisis*, is the idea that some cases are more precedential because they have been affirmed multiple times by the Supreme Court. *See, e.g.*, *Gamble v. United States*, No. 17-646, slip op. at 1-17 (U.S. June 17, 2019) (Thomas, J., concurring); Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376, 376 (4th Cir. 2000). *See, generally,* Michael Gerhardt, *Super Precedent,* 90 MINN. L. REV. 1204 (2006); *Roberts Hearings*, supra note 102.