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CHRISTIAN SCRIPTURE AND AMERICAN SCRIPTURE: AN INSTRUCTIVE ANALOGY?

INTERPRETING THE BIBLE AND THE CONSTITUTION. By Jaroslav Pelikan.
Yale University Press 2004. Pp. xiii, 216. \$30.00. ISBN: 0-300-10267-4.

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INTRODUCTION

As a Jesuit priest whose ministry includes the teaching of constitutional law, I regularly struggle with the task of interpreting two foundational normative texts¹: the Bible and the U.S. Constitution. The Bible plays a central normative role in the life of the Church, while the Constitution provides a normative framework for American law and politics. These texts ground the ongoing lives of both the Church and the American political community. Both of these textually constituted communities face the challenge of appropriating for contemporary experience a normative text produced in a significantly different historical context. But can American constitutional lawyers learn anything from the ways in which the Bible has been interpreted within the life of the Church?

Jaroslav Pelikan, eminent historian of the Church's doctrinal tradition² and Sterling Professor of History Emeritus at Yale, believes

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1. Cf. Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. Cal. L. Rev. 35, 37 (1985) (characterizing the interpretation of normative texts as a distinct "species of moral reflection").

2. See Jaroslav Pelikan, *The Christian Tradition: A History of the Development of Doctrine* (U. Chi. Press 1971-89) (a five-volume work); Jaroslav Pelikan, *Creeks and Confessions of Faith in the Christian Tradition* (Yale U. Press 2003) (a four-volume work) [hereinafter Pelikan, *Creeks*]. See especially vol. 4 of Pelikan's *Creeks and Confessions*, entitled *Credo: Historical and Theological Guide to Creeks and Confessions of Faith in the Christian Tradition* (Yale U. Press 2003) [hereinafter Pelikan, *Credo*], which examines the use of the Bible in creeks and confessions and the use of those creeks and confessions in the life of the churches. Pelikan notes:

[t]here is a direct continuity between that inquiry and [his current book], which compares the several versions of official hermeneutics that the councils and confessions of the

that those engaged in the enterprise of constitutional interpretation can indeed learn something from the history of biblical interpretation. Drawing on a life-long “study of the twenty centuries of interpreting Christian Scriptures,” Pelikan offers his new book, *Interpreting the Bible and the Constitution*, in the hope that it “may be of some help and illumination . . . to those who stand in the tradition of the two centuries of interpreting American Scripture.” (37)³

Pelikan brings to this effort a commitment to the idea that using “binocular vision” can help both theologians and lawyers to see their respective fields more clearly. (36)⁴ Rather than looking at the question of how to interpret foundational normative texts “through the monocular of law or the monocular of religion,”⁵ binocular vision promises to enable us to see the interpretive enterprise more clearly by using both eyes and the two lenses of law and theology. What does the use of Pelikan’s binoculars bring more clearly into focus?

Pelikan’s fascinating historical analysis succeeds admirably in helping us to see that a striking analogy can be drawn between the interpretation of both of these foundational normative texts. He acknowledges that he is not the first scholar to have recognized the parallel. (2)⁶ Indeed, there is a significant body of literature making note

church over the centuries have applied to Christian Scripture with the several versions of official hermeneutics that the Supreme Court over the centuries has applied to American Scripture. (3).

3. Pelikan also promises that “the theme of ‘Christian Scripture and American Scripture,’ as a comparative study of methods of interpretation, can be especially poignant, important, and instructive.” (18).

4. Pelikan developed the concept of “binocular vision” in describing Harold Berman’s innovative approach to studying the interrelationship of law and religion. See Jaroslav Pelikan, *Foreword to The Weightier Matters of the Law: Essays on Law and Religion* xi-xii (John Witte, Jr. & Frank Alexander eds., Scholar’s Press 1988). Given Berman’s example, Pelikan contends that “there should now be no excuse for scholars in either field to go on using a monocular instead of a binocular.” *Id.* at xii. See also John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Protestant Revolution* 29 (Cambridge U. Press 2002); (“The binocular of law and theology . . . brings into focus a considerably wider and fuller picture of the Lutheran Reformation than can be seen through the monocular of law or the monocular of theology alone”); John Witte, Jr., *A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion*, 42 *Emory L.J.* 523, 547 (1993); Berman’s “binocular of law and religion” allows us to “gain wholly new insights even into sources and subjects that no longer seemed capable of new interpretation”; “Through Berman’s binocular, one can see much more in these subjects than conventional viewpoints have allowed.”

5. John Witte, Jr. & Thomas C. Arthur, *The Three Uses of Law: A Protestant Source of the Purposes of Punishment?* 10 *J.L. & Relig.* 433, 433-434 (1994).

6. Constitutional historian Edwin Corwin, for example, opened a well-known monograph with this sentence: “The Reformation superseded an infallible Pope with an infallible Bible; the American Revolution replaced the sway of a king with that of a document.” Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* 1 (Cornell U. Press 1955). See also Michael J. Perry, *Morality, Politics & Law* 136 (Oxford U. Press 1988):

of the analogy.⁷ *Interpreting the Bible and the Constitution* makes a significant contribution to this literature by elegantly illustrating a host of methodological points of contact between the traditions of biblical and constitutional interpretation.

But I have to confess that my initial look through Pelikan's binoculars left me a bit frustrated and bleary-eyed. Pelikan never squarely answers the question that will be in the minds of most lawyers and judges who take up his book: Precisely how might this analogy prove helpful or illuminating to constitutional interpreters struggling to resolve contemporary interpretive controversies with fidelity to the normative text?

Perhaps a definitive answer to that question is not to be expected from a project that Pelikan himself describes as a "modest essay," (4) "an effort at a measure of scholarly reciprocity,"⁸ not intended as "a direct intervention in the fray of the current exegetical debates, whether biblical or constitutional." (37) Yet, even without prescribing definitive solutions to contemporary exegetical controversies, Pelikan's effort to elaborate an analogy between biblical and constitutional interpretation does ultimately help us to see a bit more clearly how the enterprise of interpreting a community's foundational text ought to be understood.

Interpreting the Bible and the Constitution reflects Pelikan's effort to explore a "very narrow" question: "What are the means and methods

There is an important analogy between, on the one hand, the role of the sacred text and the activity of interpreting the text, in the life of a religious tradition and community, and, on the other, the role of the constitutional text and the activity of interpreting the text, in the life of a political tradition and community.

See also Garet, *supra* n. 1; and Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984). Pelikan, however, contends that most prior considerations of this parallel "focused on the question of the authority of the two texts rather than on the question of the proper methods for interpreting them" (2) which is the question he has chosen to pursue.

7. See Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 Const. Commentary 511, 511-512 (1998):

As part of the continuing emphasis on hermeneutics in constitutional interpretation, a body of literature has emerged comparing constitutional textual analysis to Biblical hermeneutics. This scholarship has been based on the recognition that, like the Constitution, the Bible functions as an authoritative legal text that must be interpreted in order to serve as the foundation for a living community.

See also *id.* at 511 n. 6 (citing to the literature); Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. Rev. 1041, 1065-1069 (1999); cf. Jack Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 Tulsa L. Rev. 553, 571-578 (2003), discussing Levinson's distinction between constitutional Catholicism and constitutional Protestantism and the dynamics of constitutional change.

8. This "gift in return" (37) is offered in gratitude for the recent scholarship in legal history that "has been making a major contribution to the study of theology." (36) (citing the work of David Daube, Harold J. Berman and John T. Noonan).

by which official interpreters read their normative texts?" (36) His book offers us a comparative survey of the "constructions" produced by "those who bear official responsibility for binding interpretation" within their communities. (33) Thus, Pelikan seeks to compare the official councils, creeds, confessions, and liturgies of the Christian tradition with their analogue within the American constitutional tradition, "the decisions and opinions of the secular American equivalent of the ecumenical council, the Supreme Court." (33)

While the question driving Pelikan's inquiry may be narrow, he contends that the authority given these normative texts, along with the "magisterial standing" of their official interpreters, makes the question a "decisive" one—a question "that can be extremely broad in its implications." (36) This Article aims to examine the implications that flow from Pelikan's exploration of this "decisive" question. (36)

Part I of the Article focuses on Chapters One and Two of Pelikan's book, where he discusses the differences and analogies between the Bible and the Constitution that provide the foundation for methodological comparison. Part II of the Article will then examine the argument Pelikan develops in Chapters Three and Four, where he draws on the work of nineteenth-century theologian John Henry Newman in order to explore "the fundamental problem of the relation between the authority of the original text and the authority of developing doctrine in the ongoing life and history of the community." (75)

In the course of examining Pelikan's analogy, I also aim to put Pelikan's methodology of binocular vision to work by tentatively trying on the interpretive lenses of two additional scholars who, like Pelikan, have drawn attention to the analogy between biblical interpretation and constitutional interpretation. One lens will be provided by the approach to biblical interpretation developed by Sandra M. Schneiders in *The Revelatory Text: Interpreting the New Testament as Sacred Scripture*,⁹ while the other lens comes from the constitutional theory articulated by Michael J. Perry in *We the People: The Fourteenth Amendment and the Supreme Court*.¹⁰

In the end, Pelikan's binocular view of the history of biblical and constitutional interpretation allows us to see that the interpretation of such texts has been neither simply an exercise in static traditionalism nor an open invitation to freewheeling interpretive creativity disconnected

9. Sandra M. Schneiders, *The Revelatory Text: Interpreting the New Testament as Sacred Scripture* (Harper 1992).

10. Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (Oxford U. Press 2002).

from the foundational text.¹¹ Instead, Pelikan's exploration of the methodological analogies between biblical and constitutional interpretation implies (without using this formulation) that the process of interpreting texts which give rise to living communities might best be understood as a sort of developmental originalism which ought to manifest "creative fidelity."¹²

11. Cf. Antonin Scalia, *God's Justice and Ours*, First Things 17, 17 (May 2002) ("the Constitution that I interpret and apply is not living but dead"); Jeffrey Rosen, *Modest Proposal*, New Republic 21, 22 (Jan. 14, 2002) (describing Judge Richard Posner's interpretive approach as a "crude . . . pragmatism that looks to a particular case and presumes to reach a result that, in the judge's view, would be best for the country"); compare Justice Scalia's opinion announcing the judgment of the Court in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989):

Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

with Justice Brennan's dissent in *Michael H.*, 491 U.S. at 141:

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. This Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

12. See M. Cathleen Kaveny, *Response to John T. Noonan, Jr.*, in *The Catholic Theological Society of America Proceedings of the Fifty-Fourth Annual Convention* vol. 54, 57 (Michael Downey ed. 1999) [hereinafter Kaveny, *Response*] (noting that lawyers, judges, and theologians all share a vocation characterized by the call to "help transmit [their] tradition, attempting to carry it forward into new times, places, and cultural contexts with 'creative fidelity.'") (borrowing the term from Francis A. Sullivan, S.J., *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium* (Paulist Press 1996); M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr. on Love and Power in Human History*, 11 J.L. & Relig. 203, 207 (1994-95) [hereinafter Kaveny, *Listening for the Future*]:

[B]ecause human nature is essentially social, and human society also moves within time, those of us who are living today stand in community and conversation with the dead. The shape of our minds and hearts is informed by the ideas and purposes of our forebears much as the shape of our bodies is informed by their genetic material. We manifest our fidelity to the persons of the past not in slavish repetitions of old formulas, but in sensitively attempting to discern the core purposes of traditional doctrine, and creatively applying it to a new situation. Such a process requires us both to understand and to judge our predecessors. In sifting through their thought we must separate insights of perduring value from the rough bundle of time-bound presuppositions and failures of will and vision which trap them.

See also Symposium, *Fidelity in Constitutional Theory*, 65 Fordham L. Rev. 1247 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1264 (1993) (describing a notion of fidelity that offers "a way to understand how originalism can be dynamic without it being unfaithful.").

I. CHRISTIAN SCRIPTURE AND AMERICAN SCRIPTURE: FOUNDATIONS
FOR METHODOLOGICAL COMPARISON

Pelikan's interest in exploring the analogy between the Constitution and the Bible made an early appearance in his 1983 Jefferson Lecture, *The Vindication of Tradition*.¹³ Pelikan there noted that remarks of his late Yale colleague, Alexander Bickel, first prompted him to consider the analogy. Hearing Bickel speak about "development of doctrine" in the constitutional context, Pelikan began to articulate the implications of employing the technical theological term "development" in the realm of constitutional law. (120)¹⁴

Drawing on his own deep study of the development of theological doctrine, Pelikan recognized that the Constitution, like the Bible, is an ancient authoritative text by which a living community is constituted. The official interpreters of both texts are simultaneously subordinate to the text as a norm and capable of deciding what the ancient text means today. Moreover, in both traditions, it is to the development of doctrine, "far more than the mechanism of constitutional amendment or of dogmatic definition, [that] the community looks for guidance that will recognize change but preserve continuity."¹⁵

Those parallels work together to support Pelikan's analogy between the American-Constitutional tradition and the Judeo-Christian tradition. While Pelikan concedes that all analogies are susceptible of oversimplification, he nonetheless contends that this analogy is "profound and accurate," revealing that both traditions manifest a "capacity to develop while still maintaining [their] identity and continuity."¹⁶

In his current book, Pelikan builds on this insight by characterizing the Bible of the Christian Church (Christian Scripture)¹⁷ and the American Constitution (American Scripture)¹⁸ as their respective

13. Jaroslav Pelikan, *The Vindication of Tradition* 58 (Yale U. Press 1984).

14. The theological sense of the idea of development has its modern foundation in John Henry Newman's *An Essay on the Development of Christian Doctrine*. *Id.* Pelikan describes Newman's *Essay* as one of those "'works in the history of theology of which we can say that after their appearance nothing was ever again quite the same.'" (119) (quoting J.M. Cameron, *Introduction to John Henry Newman, An Essay on the Development of Christian Doctrine* 7 (J.M. Cameron ed., Penguin Books 1974) (originally published 1845)).

15. Pelikan, *supra* n. 13, at 59.

16. *Id.* at 58 (noting that such a capacity is one "mark by which to identify a living tradition").

17. Pelikan uses the term Christian Scripture to refer to the Christian canon of the Bible, both Old and New Testaments. (14).

18. Because Scripture is usually taken to mean a product of divine inspiration that "goes on to produce 'inspirations' in its readers," (18-19) Pelikan recognizes that the Declaration of

community's "normative Great Code": both texts are familiar and venerable. Each text has been adopted by its community as an authoritative norm to which official action is expected to conform. Each is intended to endure into the future, capable of application to the differing circumstances and unforeseen needs of future times. Over centuries, the words of these texts have been interpreted and reinterpreted, generating a body of authoritative commentary, yet neither of these texts prescribes the proper method for its interpretation. Nor does either text identify which textual interpreter possesses binding interpretive authority. (5)¹⁹

A. Parallel Interpretive Communities

Indeed, Pelikan notes that both Christian Scripture and American Scripture, sometimes in "strikingly parallel" ways, are the concern of four distinct interpretive communities, which "constantly interact with one another": (22)

1. "*We the people* in their voting booths and in their pews." (22) Just as Bruce Ackerman can identify "the locus of ongoing interpretation of American Scripture in the cumulative experience of 'we the people,' as reflected in such decisive events of American history as the Civil War and the New Deal," (24)²⁰ so too, Irenaeus and Origen in the second century appealed to the authority of the people as the ultimate arbiters of Christian doctrine. (24-25)²¹ In Pelikan's view, the "consent of the governed" as the foundation of the constitutional order finds its parallel in the theological notion of the *consensus fidelium*, which affirms "the

Independence and the Gettysburg Address might be better described as American Scripture than the Constitution. Pelikan, however, insists that it is the Constitution which serves as Scripture in American law:

[I]t is the Thirteenth and Fourteenth Amendments, and above all the requirement of "the equal protection of the laws" (amend. 14, sec. 1), that has been the subject of controversy over the logic of textual exegesis, and therefore of judicial interpretation [in decisive cases like *Brown v. Board of Education*]. And that makes the Constitution the normative "American Scripture" in a sense that the Declaration of Independence is not. (22).

19. Employing Northrup Frye's notion of "Great Code." See Northrop Frye, *The Great Code: The Bible and Literature* (Harcourt, Brace, Jovanovich 1982).

20. Citing Bruce A. Ackerman, *We the People* 25 (2 vols., Belknap Press 1991-98).

21. (25) (quoting Irenaeus, *Rule of Faith of Irenaeus*, in Pelikan, *Creeds*, supra n. 2, vol. 1, at 50; and Origen, *On First Principles* 1.4-8, in *id.* vol. 1, at 64-65). See also *id.* at (25-26):

[N]either patriarchs nor councils could have introduced novelties amongst us, because *the protector of religion is the very body of the church, even the people themselves*, who desire their religious worship to be ever unchanged and of the same kind as that of their fathers.

Quoting *Response of Eastern Orthodox Patriarchs to Pope Pius IX*, in Pelikan, *Creeds*, supra n. 2, vol. 3, at 282 (emphasis added).

role of the laity as bearers of authentic Catholic tradition.” (26-27)²²

2. “*The academic scholars* of the professoriat with their historical research and their footnotes, who are a learned and often quarrelsome lot.” (27) Both the Bible and the Constitution “have generated a scholarly tradition, without which it is no longer possible to interpret them.” (27) Yet, this “academification” (27)²³ in both traditions can create a chasm between the world of scholarship and the world of practice.

3. “*The professional and certified practitioners* with their briefs and their sermons, in their service to their clients for the day-to-day application of the text to the situations of human life.” (29) Professionals in both traditions, no matter how creatively they draw on their Scriptures, must still be able to make credible use of the normative text. As their communities’ Great Code, both the Bible and the Constitution must be interpreted in ways that those whose lives are governed by the normative text “will not find arbitrary, even if they disagree with it or cannot always follow its reasoning.” (30) In other words, interpreters of both the Bible and the Constitution “must be able to convince, not only persuade.” (30) Interpreters of both texts must be able to explain plausibly why their interpretation (however novel or unexpected) is, in fact, an authoritative reading of the community’s normative text.

4. “*The hierarchy* with their robes and their decrees—and they can trump all the others” (30) Pelikan contends that the teaching authority of the bishops finds its parallel in the infallible, because final, authority of the Supreme Court. Both hierarchies share the serious responsibility of interpreting their Scriptures with faithfulness to the normative text and the demands of the interpretive enterprise. Indeed, without ignoring the reality that both bishops and judges bring mixed motives (political and otherwise) to their interpretive work, Pelikan

22. The “classic modern formulation” of the notion of the *consensus fidelium* was articulated by John Henry Newman in his 1858 essay, *On Consulting the Faithful in Matters of Doctrine*. (27) See John Henry Newman, *On Consulting the Faithful in Matters of Doctrine*, in *Conscience, Consensus, and the Development of Doctrine: Revolutionary Texts by John Henry Cardinal Newman* 392-428 (James Gaffney ed., Image Books 1992). Pelikan notes that the *consensus fidelium*, largely as Newman understood it, “achieved official vindication” in Vatican II’s *Decree on the Apostolate of the Laity*. (27) Newman’s theology of doctrinal development plays a crucial role in Pelikan’s comparison of biblical and constitutional interpretation. See text, *infra* Part II.

23. “The real significance of constitutional theory is, I believe, as a sign of the increased academification of law school professors, who are much more inclined than they used to be to write for other professors rather than for judges and practitioners.” (27) (quoting Richard A. Posner, *Against Constitutional Theory*, in *The Unpredictable Constitution* 219 (Norman Dorsen ed., N.Y.U. Press 2002)).

wants to insist that we consider the possibility that textual and doctrinal debates are something more than “mere rationalization.” (35) The book focuses its attention on this fourth interpretive community in both traditions—those with official responsibility for binding interpretation.

B. Sandra Schneiders on Christian Scripture, American Scripture, and Parallel Interpretive Communities

Pelikan’s insight finds support in the work of New Testament scholar Sandra Schneiders, who has also noted the strikingly parallel ways in which interpretive communities within both the biblical and constitutional traditions interact in interpreting their respective community’s foundational text. Looking first to the biblical tradition, Schneiders explains that a reciprocal relationship exists between the Church and the Bible that plays a central role in biblical interpretation. The Church—“the community of the disciples of Jesus who have been baptized into his paschal mystery and filled with his Spirit and who live faithfully as his body in this world”—is the context in which the full and adequate meaning of the Bible emerges, the authoritative voice in conflicts of interpretation, and the primary addressee of the Bible as revelatory text.²⁴ This reciprocal relationship grounds a proper understanding of the way in which tradition functions in biblical interpretation.

Schneiders contends that the role of tradition is essential because of the very nature of the interpretation of foundational documents. She explains the role of tradition through the use of an analogy developed by Hans-Georg Gadamer:

the singularly enlightening analogy between legal hermeneutics in relation to the foundational documents of a civil society and biblical hermeneutics in relation to the foundational texts of Christianity.²⁵

Schneiders draws on this analogy in order to clarify the reciprocal relationship that exists between a community’s foundational experience, the community’s written formulation of its self-understanding, and the community’s ongoing task of interpreting the foundational text.

As Schneiders understands it, the life of a political community like that of the United States grows out of the experience of its founding

24. Sandra M. Schneiders, *The Revelatory Text: Interpreting the New Testament as Sacred Scripture* 64 (2d ed., Liturgical Press 1999).

25. *Id.* at 66. See Hans-Georg Gadamer, *Truth and Method* 324-341 (2d rev. ed. 1994). See also Linell E. Cady, *Hermeneutics and Tradition: The Role of the Past in Jurisprudence and Theology*, 79 Harv. Theological Rev. 439 (1986).

generation. That founding generation concretizes its self-understanding—its “basic vision, values, and essential beliefs”—in the constitutional text. By committing this foundational experience and self-understanding to writing as fundamental law, “the society and its experience become subject to the foundational vision and experience as preserved in the written documents of foundation.”²⁶

But, Schneiders argues, the fundamental law must be capable of reinterpretation as the community moves forward in history. Otherwise, the foundational constitutional text will “become a musty relic either totally irrelevant to ongoing life or rigidly obstructive of the very societal experience it was formulated to promote.”²⁷ While the whole political community has a role to play in the ongoing interpretive enterprise of bringing the foundational text into interaction with the ongoing life of the community, it makes sense to designate a subset of the community (for example, lawyers, judges, and constitutional scholars) as “special (though not independent or unique) agents of that community task.”²⁸ This ongoing process of interpretation (which gives rise to case reports and scholarly literature) eventually produces what Schneiders understands as “tradition”: “a normative body of community experience that is rendered relatively permanent in various ways and that functions with the foundational documents in the successive moments of interpretation.”²⁹

Similarly within the life of the Church, tradition finds its source in a foundational experience: the Christian community’s experience of Jesus of Nazareth as Savior, handing over the gift of shared life with God through the Holy Spirit that unites the community as the Body of Christ in the world. The apostolic witness to that foundational experience of divine self-gift in Jesus interprets and brings to expression that experience in a way that mediates the experience of the original event to a community extended in time. Some of that witness took written form, which the community recognized and acknowledged as adequate and sufficient, though not exhaustive, witness to the foundational experience.³⁰

Schneiders explains that this written witness, the New Testament scriptures, has a certain priority within the apostolic tradition because it is written. When speech is captured in writing, it becomes fixed in a

26. Schneiders, *supra* n. 24, at 66.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 76-77.

way that allows it to serve as a stable norm of interpretation. As a fixed text, the scriptural witness to the apostolic tradition functions as norm of the subsequent development of tradition. Tradition develops as the experience of divine self-gift unfolds in the life of the community, and the community may gain new insights into what that tradition means. The New Testament as norm ensures that tradition as it develops remains in continuity with the foundational experience of the community.

At the heart of all valid preaching of the Gospel in every age is the “apostolic faith,” that is, the Christ-event as it was experienced by his disciples in Jesus of Nazareth. And the touchstone of authenticity, the norm by which to test for the continuity of faith, is the apostolic tradition itself normed by the New Testament.³¹

Schneiders, like Pelikan believes this normative role of the New Testament is analogous to the role played by written texts in relationship to the ongoing national tradition rooted in the foundational experience of the United States. The Declaration of Independence, the Constitution, and the “official collateral literature” (like the Federalist Papers) become the touchstone of fidelity for the authenticity for later developments in American life. The authoritative founding documents allow us to identify and justify later developments as “true developments of the American tradition rather than subversions of it.”³²

In order to serve as norm for ongoing development in community life, the scriptural witness must be interpreted, and Schneiders insists that tradition—the ongoing life of the community constituted by the text—has a role in that interpretation. The Church acknowledged the texts received into the New Testament canon as “the uniquely privileged written formulation of apostolic tradition,” and thus the Church, “by its own operation . . . created and established the norm of its own tradition.”³³ Because scripture is produced as part of tradition and as witness to tradition, it can only function as a norm when interpreted within the tradition.

Who is responsible for this interpretation? The community as the whole body of the faithful, each of whom is recipient of the gift of the Holy Spirit, possesses the primary role in the work of interpretation. But, Schneiders acknowledges, within the Church, some formal provision must be made for authoritative interpretation. Not all

31. *Id.* at 78.

32. *Id.* at 81.

33. *Id.*

believers are equally prepared for the task of interpretation, so the Church needs biblical scholars, preachers, and teachers, as well as pastoral authority overseeing and integrating the interpretive efforts of believers, scholars, and ministers of the Word in order to ensure continuity in a unified tradition.

Schneiders again draws on the legal analogy to illustrate this point, comparing the dialectic relationship between the community of believers and the authoritative interpretive role of the teaching office of the Church to that of the relationship between the civil community as whole and the Supreme Court. All citizens have a role in carrying the principles of the republic into daily life, with lawyers, judges, and constitutional scholars having a particular interpretive responsibility within the life of the republic. The Supreme Court, in turn, serves as the final court of appeals that

is really necessary if a large and diverse community is to achieve and maintain an ongoing consensual fidelity to its foundational vision by means of the interpretive reactualization of its foundational documents.³⁴

C. Cruxes of Interpretation and the Interpretive Imperative

As they carry out their official responsibility to offer binding interpretations of the normative text, Pelikan observes that the hierarchical interpreters in both traditions frequently have been forced to take up the sort of passage that Scripture scholars have described as a *crux interpretum*—“a difficulty which it torments or troubles one greatly to interpret or explain.” (38) In the face of the issues and ambiguities of interpretation posed by such texts, those who seek to make sense of the text are charged with what Pelikan characterizes as an interpretive imperative. They must interpret the normative text, and they are expected to get it right. The various interpretive communities in both traditions “have long taken [this interpretive imperative] with utmost seriousness as the mission statement that validates their very existence.” (40)

Yet the very need to interpret itself has been a *crux interpretum*. Why can't we just read the words of the text and give them their plain meaning? The Protestant Reformation, for example, gave rise to claims that the institutional interpretation of Scripture should be replaced by “the simple sense of an uninterpreted *sola Scriptura*.” (45) In response,

34. *Id.* at 85.

Catholic and Orthodox Christians insisted on an ecclesial role in the interpretation of Scripture.

Pelikan notes that this anti-interpretive tradition of Anglo-American Protestantism influenced early constitutional hermeneutics. But, Pelikan explains,

[I]t soon became clear . . . that neither in Protestantism nor in the early American Republic would it be possible to maintain the oxymoron of an “anti-interpretive tradition of interpretation,” because the experience of textual interpretation in every community demonstrates that the only real alternative to hermeneutics is bad hermeneutics. (48)

The proper *method* of interpretation to be applied to the normative text has also been a *crux interpretum*. Ambiguous texts give rise to multiple interpretations. Such texts lead Pelikan to pose an inescapable question: How are we to prevent the process of interpretation from degenerating into a “freewheeling” and “capricious” “Humpty-Dumpty textual manipulation” which substitutes “the *ipse dixit* of the court for the authority of what Justice Byron Raymond White called ‘textual support in the constitutional language’ itself?” (49) Is there some purpose given by the interpretive process itself that can guide the process in a way that isn’t capricious or simply a reflection of purposes that the interpreter brings in from outside the process?³⁵

Drawing on the motto of eighteenth-century exegete Johann Bengel—“Apply yourself totally to the text, apply its total content to yourself” (52)—Pelikan suggests that normative texts may in fact have an internal structure and purpose that can, at least to some extent, guide the interpreter, apart from the “interests, difficulties, or enthusiasms” (53) that the interpreter brings to the text. The commentary tradition among both scripture scholars and constitutional lawyers exemplifies this sort of meditation on the text in an effort to discern “the internal order governing the development of the text and the arrangement of its parts.” (53)³⁶

35. See (50, 52) for Pelikan’s criticism of Posner’s suggestion that we haven’t learned much about interpretation other than the fact that “interpretation is always relative to a purpose that is not given by the interpretive process itself but that is brought in from the outside and guides the process.” (50).

36. The stated purpose underlying Thomas Aquinas’ commentaries on the books of the Bible was

“[T]o treat the text, not by reference to the reader’s own interests, difficulties, or enthusiasms, even if they are inspired by his faith, but rather according to the internal order governing the development of the text and the arrangement of its parts.” Especially in the law, this method of study commends itself as a way of understanding any monumental text of jurisprudence.

Pelikan suggests that Justice Hugo Black's stance toward the constitutional text—always available in his pocket for meditation—might embody this sort of careful, on-going, clause-by-clause meditative search for guidance in the text itself. In Black's words:

Th[e] Constitution is my legal bible; its plan of our government is my plan and its destiny my destiny. I cherish every word of it, from the first to the last, and I personally deplore even the slightest deviation from its least important commands. I have thoroughly enjoyed my small part in trying to preserve our Constitution with the earnest desire that it may meet the fondest hope of its creators, which was to keep this nation strong and great through countless ages. (55)³⁷

Pelikan concludes the first half of his essay by pointing to several interpretive ambiguities shared by both texts—including the ambiguity that is inherent in the symbolic nature of language. For example, Justice Felix Frankfurter's observations "could apply equally to either text":

[I]n dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. *Words being symbols do not speak without a gloss.* (61)³⁸ (emphasis added)

D. Christian Scripture and American Scripture: Fundamentally Different?

In the midst of all these similarities between Christian Scripture

(53) (quoting Marie-Dominique Chenu, *Toward Understanding Saint Thomas* 250 (A.M. Landry & D. Hughes trans., H. Regnery Co. 1964)).

37. Quoting Hugo Black, *A Constitutional Faith* 64, 66 (Alfred A. Knopf 1968). Note that Black's statement, which he himself labeled "a confession of my articles of constitutional faith," "could have come from a champion of biblical literalism." (55).

38. Quoting *Rochin v. Cal.*, 342 U.S. 165, 169 (1952). Pelikan notes that Chief Justice John Marshall similarly

put his exegesis into the context of a comprehensive theory of language and semantics, which would be applicable to the biblical no less than to the constitutional text: "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense."

(105) (quoting *McCulloch v. Md.*, 17 U.S. 316, 414 (1819)). See also (44-45) ("the thickness of legal meaning" makes the need of interpretation a *crux interpretum*) quoting Robert M. Cover, "Nomos" and Narrative, 97 Harv. L. Rev. 4, 19-25 (1983)). Other shared interpretive ambiguities include the lack of any textually explicit prescription for a correct method of interpretation, questions within both traditions regarding the propriety of supplementing the text with some concept of natural law, and ambiguity within both law and theology with respect to the identity of the specific entity holding the authority to provide a definitive interpretation of the normative Scripture.

and American Scripture, Pelikan also wants to draw our attention to one “fundamental difference” between the two texts: “the Bible is meant to be prayed and believed, and only therefore acted upon. This is so because the church defines itself by its liturgy: *lex orandi lex credendi*, ‘the rule of prayer is the rule of faith.’” (15)³⁹

This fundamental difference should lead us to ask questions with critical importance to the enterprise of constitutional interpretation: Does a similar rule, rooted in the experience of the life of the community constituted by the text, provide normative guidance for constitutional interpretation? Is the movement from inspired Christian Scripture to Christian doctrine an apt analogy for the movement from politically crafted constitutional text to judicial decision? Or, does the religious character of the biblical text make the interpretation of that text something intrinsically different from constitutional interpretation? And finally, does the political nature of the constitutional text make the interpretation of that text fundamentally different from biblical interpretation? For example, does the constitutional community’s (rarely exercised) power to amend the text through a political act inevitably give rise to interpretive dynamics that are intrinsically different from those that govern interpretation of the revealed scriptural text? These are questions to which Pelikan’s book provides no explicit answer.

II. *SENSUS LITERALIS* IN CORRELATION WITH *SENSUS PLENIOR*: THE ORIGINALIST IMPULSE AND THE IDEA OF DEVELOPMENT

Chapters Three and Four of Pelikan’s essay explore a critical issue marking the history of both interpretive traditions: how ought the interpreter understand the relationship between the authority of the original text and the authority of developing doctrine in the ongoing life and history of the community? Both traditions, for example, recognize that “there must be a ‘spirit’ that is present within—and yet that somehow lies beyond—the ‘letter’” of the text. (76)⁴⁰ Accordingly,

39. Citing Pelikan, *Credo*, *supra* n. 2, at 166-178. See also Kaveny, *Response*, *supra* n. 12, at 57: “No matter how flawed in her institutional manifestation, the church is and will remain a mystery, the body of Christ, and the gateway to eternal life—something that no legal or political tradition, however perfect, could ever hope to be.”

40. Citing 2 Cor 3:6: “[God] has made us competent to be ministers of a new covenant, not of letter but of spirit; for the letter kills, but the Spirit gives life.” (NRSV). See also (108), quoting John Marshall Harlan, dissenting in *The Civil Rights Cases*, 109 U.S. 3, 26 (1883):

“It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul.” By this I do not mean that the determination of these cases should have been materially controlled by

genuine interpretation of both American Scripture and Christian Scripture has required the interpreter “to go beyond the *sensus literalis*⁴¹ to find the *sensus plenior*, the ‘fuller meaning.’” (79) Both traditions allow for “analogical extensions” in order to apply a particular text to previously unforeseen situations. (79)

At the same time, both traditions have recognized that there are risks involved in the search for the *sensus plenior*. At some point, interpretive creativity can lead to “interpretations” without foundation in the normative text. The Christian tradition has included attempts to broaden biblical authority “by appeal to alleged ‘unwritten traditions,’” (84) while the constitutional tradition has seen the Supreme Court exercise constitutional authority on the basis of

alleged “penumbras, formed by emanations from those guarantees that help give them life and substance,” which, “while . . . not expressly included,” are “necessary in making the express guarantees fully meaningful.” (81)⁴²

Pelikan notes that, within both traditions, attempts to rely perhaps too heavily on the claimed *sensus plenior* of a text have led to calls for interpretation to be restrained by “the higher judgment of primitive authority, original intent, and the *sensus literalis*.” (84)

A. The *Sensus Literalis* and the Originalist Impulse

The Reformation originalist impulse, for example, stemmed from the conviction that Christ’s doctrine should be recovered in its native form, because that native form was thought to be the purest form. For the reformers, this native form possesses authoritative purity, because it is closest to the authoritative sacred events giving rise to the Christian community: the life, teaching, death, and resurrection of Jesus. The Protestant rejection of tradition in the name of *sola Scriptura* thus gave heightened standing to “the original and authentic Scripture in its *sensus*

considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

41. Pelikan insists that the *sensus literalis* should not be taken to mean “the literal sense,” or “the literalistic sense,” but signifies “the original intent of the passage.” For example, Pelikan asks, what is “the original intent and *sensus literalis* of the petition” in the Lord’s Prayer asking for “our daily bread”—is this simply a petition for bread? Luther, “a vigorous advocate of the *sensus literalis*,” held this petition to mean “everything required to satisfy our bodily needs.” Luther was answering the question, “What does this *mean*?” to pray for daily bread, not merely “What does the term ‘daily bread’ suggest to you by free association or according to a spiritual sense?” (77) (emphasis in original).

42. Quoting *Griswold v. Conn.*, 381 U.S. 479, 484 (1965).

literalis.”⁴³

For example, early nineteenth-century Protestant theologian Thomas Campbell,⁴⁴ argued that his approach to Scripture reflected the desire to allow the interpreter to “come fairly and firmly to *original ground* upon clear and certain premises and take up things *just as the apostles left them . . . disentangled from the accruing embarrassment of intervening ages.*” (88)⁴⁵ Simply by changing one word—apostles to framers—Pelikan asserts that “Campbell’s motto would summarize equally well the originalist impulse as applied to the Constitution.” (88)

B. *Sensus Literalis* in Correlation with *Sensus Plenior*

Still, Pelikan explains, the originalist impulse in interpretation, whether biblical or constitutional, presents its own set of risks. Reliance on the originalist impulse alone “runs the constant danger of substituting pedantry for living experience,” (98) raises difficult questions of *how* to recover the authentic original meaning, and may direct us to privilege a historical record that is “at best ambiguous, [with] statements . . . readily be[ing] found to support either side of the proposition.” (99)⁴⁶ Thus, in the history of both biblical and constitutional interpretation,

alongside the authority of their original charters and in continuous interaction with that authority, the ongoing and cumulative interpretations of the Great Code in the form of tradition and precedent have come to occupy a privileged position of authority in their own right. (115)

Within the interpretive community formed by the Christian Scriptures, Pelikan argues that this continuous interaction or correlation between text and tradition as authoritative norms can be seen in the

43. Within modern Catholic theology, the originalist impulse plays an important, if not exclusive role. Pelikan calls attention to the Second Vatican Council’s *Dogmatic Constitution on Divine Revelation, Dei Verbum*, which:

stressed the authority of “the *original texts* of the sacred books,” and urged that “if the interpreter of Holy Scripture is to understand what God has wished to communicate to us, he must carefully investigate what meaning the biblical writers *actually had in mind*; that will also be what God chose to manifest through their words.”

(114) (quoting *Dei Verbum*, emphasis added by Pelikan). For the text of *Dei Verbum* see *Vatican Council II: The Conciliar and Post Conciliar Documents* 750-765 (Austin Flannery, O.P. ed., new rev. ed., Costello Publ. 1975).

44. See Michael Sink, Comment, *Restoring Our Ancient Constitutional Faith*, 75 U. Colo. L. Rev. 921, 937 n. 59 (2004) characterizing Thomas Campbell’s *Declaration & Address* (1809) as the beginning landmark of the primitivist American Restoration movement.

45. (Emphasis in original).

46. Quoting Justice Brennan’s concurrence in *Abington v. Schempp*, 374 U.S. 203, 237 (1963). Brennan’s “critique[] could apply to the authority of original intent in the interpretation of Christian Scripture as well as of American Scripture.” (99).

decrees of the early ecumenical councils. As successive councils articulated creedal affirmations and doctrinal definitions, they consistently insisted on their continuity with what had gone before.

The Council of Ephesus, for example, which declared the propriety of acknowledging Mary as *Theotokos*, Mother of God, asserted that its statement of faith should not be understood as an “addition,” but rather “in the manner of a full statement, even as we have received and possess it [the faith] from of old *from the Holy Scriptures and from the tradition of the holy fathers.*” (116-117) Similarly, the Third Council of Constantinople declared that it was “following without deviation” all of the things taught by the five earlier “holy and universal councils,” to which “this holy and universal council of ours has also, in its turn, under God’s inspiration [*theopneustōs*], set its seal.” (117)⁴⁷

Pelikan’s life-long study of the development of Christian doctrine leads him to conclude that, “in one form or another, the relation between continuity and change has been a central concern of Christian thought from the beginning.”⁴⁸ The Church’s ongoing experience of life in the Spirit *requires* doctrinal development—“precisely in order to preserve . . . continuity”⁴⁹ with the revelation made manifest in the scriptural text.

Thus, for example, the Church’s lived experience eventually demanded the articulation of the central Christian doctrine of the Trinity (which does not emerge fully formed directly out of scripture itself):

[I]t is the events of the history of the church from the first century to the fourth century—missionary growth, persecution and martyrdom, apostasy and sainthood, orthodoxy and heresy, discipline and worship, and the consolation of the Holy Spirit in life and in death—that provide a kind of “database”⁵⁰

from which the Church drew the resources it used to affirm in the *Nicene Creed* the full divinity of Son and Spirit with the Father in the triune oneness of God.

The *Nicene Creed* emerges as an interpretive development generated by a scripturally rooted theological controversy. Readers of *Interpreting the Bible and the Constitution* might better appreciate Pelikan’s discussion of the developmental dynamic of continuity-in-

47. *Theopneustōs* is “the technical New Testament term for divine inspiration (2 Tim 3:16) that had originally been applied to the Old Testament Scriptures.” (117).

48. Pelikan, *Credo*, *supra* n. 2, at 18.

49. *Id.* at 28.

50. *Id.* See also *id.* at 31: “[T]he spiritual experience of the Church is also a form of Revelation[.]” quoting Georges V. Florovsky, *The Eastern Fathers of the Fourth Century* 156 (Notable & Academic Books 1989).

change that is driven by the correlation between *sensus literalis* and *sensus plenior* in light of the following extremely abbreviated account of the development of Trinitarian doctrine.⁵¹

The scriptural foundation that the early Church inherited from Judaism proclaimed the oneness of God: “Hear, O Israel: The Lord our God is one Lord.”⁵² Indeed, the *Creed* grows out of that “ancient confession of faith” of Israel,” as the Christian community “struggle[d] to place a new experience of God through Jesus and the Holy Spirit in the church within a longer story, which is . . . everywhere presupposed.”⁵³ Within that longer story of God’s relationship with Israel, the experience of the Christian community given expression in the New Testament scriptures witnessed to the gift of salvation offered to humanity through the life, death, and resurrection of Jesus.

Yet the scriptural language that the early Church used to express its experience of Jesus was itself ambiguous. Some texts, for example, can be read to express strong claims about the divinity of Jesus.⁵⁴ At the same time other scriptural texts can be read in a way that characterizes Jesus as a creature with a position subordinate to the Father.⁵⁵ By the fourth century, a priest from Alexandria named Arius had popularized a version of Christian teaching which stressed these latter texts. Arius understood Jesus as a creature; an exalted creature with a uniquely privileged role in salvation, but a creature nonetheless. The controversy provoked by Arius thus exposed significant tension in a Christian community striving to hold together a set of foundational principles: (1) God is one, (2) only God can offer definitive salvation to humanity, and (3) Jesus is the source of salvation and the risen Lord who is properly worshipped as God by the grateful community.⁵⁶

This tension bore fruit in the doctrinal development articulated in 325 in the *Creed* composed by Council of Nicea, which had been called in response to the Arian crisis. The *Nicene Creed* begins with words

51. For a helpful, brief account of this doctrinal development, see Luke Timothy Johnson, *The Creed: What Christians Believe and Why It Matters* (Doubleday 2003) (especially pp. 103-132, 216-235).

52. Deut 6:4 (RSV).

53. Johnson, *supra* n. 51, at 72. See also *id.* at 12: “[T]he specific character of the Christian experience of Jesus made it necessary to alter the *Shema* [Deut 6:4] and, with it, the story of God and God’s people.”

54. See e.g. John 1:1-18; John 10:30.

55. See e.g. Prov 8:22; Mark 13:32; John 14:28; Acts 2:36; Rom 8:29; Col 1:15; Heb 3:2. See also Johnson, *supra* n. 51, at 131.

56. Cf. Johnson, *supra* n. 51, at 132: “[I]t remains important to deny that the Son is a creature, for at stake is the reality of salvation. Is it God who saves us in Jesus or not? The creed says yes, Arius said, no, not exactly.”

that affirm Christianity's continuity with *Deuteronomy* 6:4, "We believe in one God." The *Creed* then goes beyond the literal text of the New Testament by drawing on the Greek philosophical concept of "substance" in order to explicitly affirm the full divinity of Christ and the triune oneness of God. Jesus Christ is affirmed as "the only-begotten Son of God, Begotten from the Father before all time, Light from Light, True God from True God, begotten not made [one in Being with] of the same substance as the Father." Finally, the Spirit is affirmed as "Lord and Giver of life," to be worshipped "with the Father and the Son."⁵⁷

Continuity is thus maintained between *both* the community's scriptural affirmation that "the Lord our God is one Lord" *and* the community's experience of salvation from God through Jesus and the gift of the Spirit (as expressed in the New Testament scriptures) by means of a new, extra-scriptural doctrinal formulation that creatively emerges from the tension. The Council of Nicea's understanding of the texts of scripture in light of the experience of the Christian community produces an official interpretation of scripture that can only be understood as a creative doctrinal development—affirmation of the triune oneness of God.

Therefore, the Nicene response to the Arian controversy supports Pelikan's assertion that it is sometimes the unwillingness to grow beyond the literal text that produces infidelity; it is the "failure to recognize that the tradition of divine revelation is a living reality and a dynamic force, driven by the Holy Spirit as 'lordly and life-giving,' . . . [that] produces heresy."⁵⁸ Pelikan thus concludes that

there is obviously a radical change, but . . . a no less demonstrable continuity, from the confession of the oneness of God voiced in *The Shema* of the Book of Deuteronomy to the confession of the triune oneness of God formulated

in the *Nicene Creed*.⁵⁹ Continuity and change are not only noncontradictory; "they are to be seen as mutually supportive and as mutually affirming."⁶⁰

57. For the text of the *Nicene-Constantinopolitan Creed*, see Johnson, *supra* n. 51, at 37-38.

58. Pelikan, *Credo*, *supra* n. 2, at 28 (quoting the *Nicene-Constantinopolitan Creed*).

59. *Id.* See Deut 6:4 ("Hear, O Israel: The Lord our God is one Lord.") (RSV).

60. *Id.* at 28-29. See also *id.* at 31:

[T]he mystery of creedal continuity and the mystery of creedal development—and the mystery of how there can be both continuity and development—are to be interpreted dialectically, in the light of the doctrine of the person of Christ, confessed by the councils and in the creeds, as the exemplar both of continuity and of change.

Pelikan's immersion in this creedal manifestation of the need to change in order to preserve continuity allows him to recognize that the struggle to preserve continuity in the midst of change is part of the constitutional tradition as well. He calls attention, for example, to Charles Evans Hughes drawing on John Marshall's reminder that "it is a *constitution* we are expounding," (118)⁶¹ not a narrow legal code. Marshall's insight allows Hughes to argue that "it is no answer . . . to insist that what the provision meant to the vision of that day it must mean to the vision of our time." (118)⁶² Marshall and Hughes seem to recognize that there is something in the nature of a constitution as a foundational normative document that calls for openness to changes in meaning in light of changes in "the vision of our time."

C. The Idea of Development: Acknowledging Change-in-Continuity

An authoritative body of doctrine, whether announced by a Church council or by the Supreme Court, unquestionably "grows" over time. Yet "growth" is a word possessing an ambiguity of its own. How do we know whether a growth is malignant or benign? How do we know that the doctrinal "growth" that interpretation can produce actually conforms to the interpretive imperative to "get it right" when engaged in interpretation? (119)

This critical question leads Pelikan to call upon the idea of development articulated by the nineteenth-century theologian, John Henry Newman. Pelikan invokes Newman's work to assert that "the only way for the Supreme Court or a Church council to defend a growth as not malignant but benign has been to show that 'an inner dimension of tradition' . . . is in fact 'the idea of development.'" (119)⁶³

61. Quoting *McCulloch*, 17 U.S. at 407.

62. Quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 442-443 (1934).

63. Quoting Yves M.J. Congar, *Tradition and Traditions: An Historical and a Theological Essay* 211 (Michael Naseby & Thomas Rainborough trans., Macmillan 1967). Newman thought of development

as the opening out of the aspects of an "idea" which retains its original meaning through different historical forms. With Newman—not that he was the only one, but he was and remains to this day the *locus classicus* for the question—the idea of development became an inner dimension of [the idea] of tradition. He made a decisive contribution to the problem of the relationship between magisterium [i.e., the church's ongoing authority to teach] and history in tradition.

Cf. Joseph E. Capizzi, *For What Shall We Repent? Reflections on the American Bishops, Their Teaching, and Slavery in the United States, 1839-1861*, 65 *Theological Stud.* 767, 768 (2004): "Doctrine develops, and one responsibility of the theologian is to scrutinize church teaching and make necessary distinctions between development and departure. The notion of doctrinal development entails a notion of doctrinal continuity."

Newman contended that doctrinal increase, variation, and expansion “are the necessary attendants on any philosophy or polity which takes possession of the intellect and heart, and has had any wide or extended dominion”:

[F]rom the nature of the human mind, time is necessary for the full comprehension and perfection of great ideas; and . . . the highest and most wonderful truths, though communicated to the world once for all by inspired teachers, could not be comprehended all at once by the recipients, but, as being received and transmitted by minds not inspired and through media which were human, have required only the longer time and deeper thought for their full elucidation. This may be called the *Theory of Development of Doctrine*. . . .⁶⁴

Newman explained that the lived implications of an idea—for example, the rights of man⁶⁵—only emerge through the community’s experience of living with that idea over time. Initially “there will be a time of confusion, when conceptions and misconceptions are in conflict, and it is uncertain whether anything is to come of the idea at all.”⁶⁶ As the community continues to live with the idea, “judgments and aspects will accumulate,” and “[a]fter a while some definite teaching emerges.”⁶⁷ The implications of the idea “will be gradually wrought out,” and, the idea will,

in proportion to its native vigor and subtlety, introduce itself into the framework and details of social life, changing public opinion, and strengthening or undermining the foundations of established order. Thus in time it will have grown into an ethical code, or into a system of government, or into a theology, or into a ritual, according to its capabilities; and this body of thought, thus laboriously gained, will after all be little more than the proper representation of one idea, being in substance what the idea meant from the first, its complete image as seen in a combination of diversified aspects, with the suggestions and corrections of many minds, and the illustration of many experiences.⁶⁸

Thus, through encounter with the world and with competing ideas, through controversy and trial and error, a “great idea is duly . . . understood” and “fully exhibited.”⁶⁹ Through all of this, the idea may

64. Newman, *supra* n. 14, at 67.

65. *Id.* at 72.

66. *Id.* at 73.

67. *Id.*

68. *Id.* at 73.

69. *Id.* at 75.

need to change “in order to remain the same”; in order to be faithful to itself in changed circumstances.⁷⁰ “In a higher world it is otherwise, but here below to live is to change, and to be perfect is to have changed often.”⁷¹

Pelikan contends that the notion of “development of doctrine” seems to have become a “quasi-technical term in the study of the Constitution.” (120) While citing a number of legal scholars in support of this claim,⁷² Pelikan surprisingly did not make reference to the work of John T. Noonan, Jr. at this point in his essay, even though the body of Noonan’s work manifests a profound appropriation of Newman’s idea of development.

For example, explicitly drawing on Newman’s *Essay*, Noonan has argued that the concept of development is key to understanding the work of the Supreme Court in relation to the free exercise of religion:

In the course of time Christian doctrine has undergone many shifts and turns and is noticeably expanded from its evangelical form. How account for the changes? By supposing that the process has been one in which an idea or set of ideas have had their implications worked out, with the basic or dominant idea gradually driving out ideas incompatible with that dominant idea’s mastery; or to put it in less Hegelian terms, human beings in conflict have come to see that commitment to certain basic principles excludes accommodations and deviations once accepted as normal. So, for example, Christianity has gone from endorsing slavery to abhorring it, all as a firmer grasp of the central commandment of charity has been had. Something similar has happened, and is happening, in the realm of free exercise.⁷³

70. *Id.*

71. *Id.* Some variations are consistent “with identity in political and religious developments,” while others are inconsistent; “[t]herefore ‘one cause of corruption in religion is the refusal to follow the course of doctrine as it moves on, and an obstinacy in the notions of the past.’” (125) (quoting Newman, *Essay on Development*, *supra* n. 14, at 179).

72. See (120) & (176) (referencing Robert Bork’s invocation of Newman). See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 352 (Free Press 1990); and the appearance of the idea of “development of doctrine” in the work of Edward Levi and Donald Gianella. See Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, Pt. II; 81 Harv. L. Rev. 513 (1968); Edward H. Levi, *An Introduction to Legal Reasoning* 14 (U. Chi. Press 1949).

73. John T. Noonan, Jr., *The Tensions and the Ideals*, in *Religious Human Rights in Global Perspective: Legal Perspectives* 603-604 (Johan D. Van der Vyver & John Witte, Jr. eds., M. Nijhoff Publishers 1996). See also John T. Noonan, Jr., *A Church that Can and Cannot Change: The Development of Catholic Moral Teaching* (U. Notre Dame Press 2005); Symposium, *God, the Person, History and the Law: Themes from the Work of Judge John T. Noonan, Jr.*, 1 U. St. Thomas L.J. 1 (2003), including several essays discussing Noonan’s approach to development of doctrine; John T. Noonan, Jr., *Experience and the Development of Moral Doctrine*, in *The*

Newman sometimes used organic images to describe development:

This process . . . by which the aspects of an idea are brought into consistency and form, I call its development, being *the germination and maturation* of some truth or apparent truth on a large mental field.⁷⁴

Pelikan notes that, in both theology and constitutional law, the term “development” has been used as “a more ‘organic’ metaphor to describe doctrinal change.” (120)

The Christian tradition, for example, sometimes characterized the reality of change as development in the sense of a progressive unfolding of revelation under the guidance of the Holy Spirit. God’s people gradually grew into the capacity to receive the revelation of God’s self as Father, Son, and Spirit. Consider Gregory of Nazianzus’ description of one dimension of the development of Trinitarian doctrine. While the Old Testament proclaimed the Father and the New Testament manifested the Son,

[n]ow the Spirit himself dwells among us, and supplies us with a clearer demonstration of himself . . . that by gradual additions . . . the light of the Trinity might shine upon the more illuminated. For this reason it was, I think, that he [the Spirit] *gradually* came to dwell in the disciples, measuring himself out to them according to their capacity to receive him. (120-121)⁷⁵

Pelikan sees an analogous notion of organic development in the following description of constitutional interpretation from Justice Holmes:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, *we must realize that they [the words of the Constitution] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a*

Catholic Theological of America Proceedings of the Fifty-Fourth Annual Convention vol. 54, 43, 43-46 (Michael Downey ed. 1999); John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 209-210 (U. Cal. Press 1998).

74. Newman, *An Essay on the Development of Doctrine*, *supra* n. 14, at 73 (emphasis added).

75. *Cf.* (78-79): “[W]hile the whole law is spiritual, the inspired meaning is not recognized by all, but only by those who are gifted with the grace of the Holy Spirit in the word of wisdom and knowledge,” quoting Origen, *On First Principles* 1.8, in *Creeds*, *supra* n. 2, at vol. 1, 64-65; and 79: “[T]he carnal man, the slave of the letter, is incapable by himself of deciphering this [the need to preserve the Old Testament in the Christian canon because it contains the type of Christ] . . . Christ himself must grant that spiritual understanding.” quoting Jean Daniélou, *From Shadows to Reality: Studies in the Biblical Typology of the Fathers* 282 (Wulstan Hibberd trans., Newman Press 1960).

century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. (121)⁷⁶ (emphasis added)

Even this argument invoking development and experience, though, is subject to what Pelikan characterizes as a “textualist” qualification. In the same opinion quoted above, Justice Holmes concluded that “[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution.” (121)⁷⁷

The use of organic imagery to describe development should not, however, be understood to imply that the process of development always (or usually) involves the gradual unfolding of an idea as it inevitably progresses towards its full elaboration.⁷⁸ Newman, Noonan, and Pelikan all recognize the conflictive and often chaotic way in which doctrine develops in actual practice.

Newman, for example, insisted that the development of an idea “is not like an investigation worked out on paper, in which each successive advance is a pure evolution from a foregoing.”⁷⁹ Instead, development emerges out of “the warfare of ideas” as human beings argue about the implications of the idea in light of their insights and experience:

[Development] is carried on through and by means of communities of men and their leaders and guides; and it employs their minds as its instruments, and depends on them while it uses them This it is that imparts to the history both of states and of religions its specially turbulent and polemical character. Such is the explanation of the wranglings, whether of schools or of parliaments. It is the warfare of ideas under their various aspects striving for the mastery. . . .⁸⁰

This understanding of development clearly informs John Noonan’s reading of the U.S. Supreme Court’s free exercise jurisprudence. The results of the Court’s work “inspected closely, appear chaotic.”⁸¹ But the idea of development can help us to see what is happening. “By trial and error, by exaggeration and careful qualification, by broad declarations and hairsplitting distinctions, by retreats and reaffirmations,

76. Quoting *Mo. v. Holland*, 252 U.S. 416, 433 (1920).

77. *Id.*

78. See Kaveny, *Response supra* n. 12, at 61, critiquing a crude organic growth model of development.

79. Newman, *Essay on the Development of Doctrine, supra* n. 14, at 74.

80. *Id.*

81. Noonan, *Tensions, supra* n. 73, at 603.

human beings in conflict are developing doctrine.”⁸²

While the movement of the Court’s free exercise precedents since 1940 might generally be in the direction of protecting religious freedom, Noonan cautions that “no institutional guarantee has been given that the movement will continue or be uninterrupted.”⁸³ Pelikan draws a similar insight—which he suggests is “even more true of developments in biblical interpretation by councils, synods, and confessions” than it is of the Supreme Court’s interpretation of the Constitution—from Edward H. Levi: “The development proceeds in shifts; occasionally there are abrupt changes in direction.” (124)⁸⁴

D. Authentic Development and Interpretative Fidelity

Pelikan characterizes authentic development of theological doctrine—healthy, benign growth within the tradition—as “a faithful interpretation of the original deposit in Scripture and even a faithful interpretation of the subsequent tradition.” (122) Thus, the council fathers at Vatican II defended their “innovative affirmation of religious liberty” on the ground that it reflected “the sacred tradition and teaching of the church from which it continually draws new insights in harmony with the old.” (122)⁸⁵ The foundational normative revelation is not changed, but what fidelity to that revelation requires of us in light of who the revelation has made us to be is made evident through our experience.⁸⁶

82. *Id.* See Noonan, *Experience*, *supra* n. 73, at 56:

These developments [in moral doctrine] would not have occurred without challenges to convention, without argument, without conflict, without prayer, without the assistance of the Holy Spirit, and without connection with the core constituents of Christianity. Experience, raw experience, has not carried the day. Without experience, however, these developments could not have come to be considered or brought to fruition.

See also Noonan, *Lustre*, *supra* n. 73, at 209-210.

83. Noonan, *Tensions*, *supra* n. 73, at 603.

84. Quoting Edward Hirsch Levi, *An Introduction to Legal Reasoning* 59-60 (U. Chi. Press 1949).

85. Quoting the Second Vatican Council’s *Decree on Religious Liberty, Dignitatis Humanae*. For the quoted text of *Dignitatis Humanae* see *Vatican Council II*, *supra* n. 43, at 799. *Dignitatis Humanae* is drawing on a saying of Jesus found at Matt 13:52, which Pelikan quotes from the New English Bible translation, “A teacher of the law can produce from his store both the new and the old.” (122)

86. Noonan, *Experience* *supra* n. 73, at 56:

[T]here cannot be an endless regress into further experience; some insights are primordial, and these are provided or confirmed by the words and the conduct of Christ. The revelation is not added to but what it requires is made evident in experience. As *Dei Verbum* tersely put it: “insight grows into the realities as into the words that have been handed on.”

(citing *Dei Verbum*, *supra* n. 43, at 754: “The Tradition that comes from the apostles makes progress in the Church, with the help of the Holy Spirit. There is a growth in insight into the

But what does interpretive fidelity look like in the context of constitutional interpretation? What is the original deposit to which the interpreter must be faithful—the constitutional text, or the ongoing life of the communal “organism” the text constitutes, which inevitably grows in ways the framers of the text could not have anticipated? What might it mean for the constitutional tradition to have “the idea of development” as an “inner dimension,” in the absence of the guidance of the indwelling Holy Spirit? How do constitutional interpreters reach the conclusion that their new insights are in harmony with the old to which they are called to be faithful? How is healthy constitutional fidelity to be distinguished from malignant infidelity? And who is the ultimate arbiter of fidelity?

The recent work of Michael Perry suggests a further critical question that theorists of scriptural/constitutional interpretation and doctrinal development must address: What sort of stance should official, hierarchical interpreters assume with respect to other members of the community constituted by the text? Should official, hierarchical interpreters approach their job with an aggressive sense of their own role as ultimate decision makers or with a more deferential sense of their penultimacy within the community as a whole? To continue Pelikan’s analogy, how much deference should the official, hierarchical interpreters give to the interpretive views of “we the people,” whether those views are manifest in the *consensus fidelium* of the people in the pews or in the democratic will of the people expressed in the voting booth, legislative chambers, and presidential elections?⁸⁷

Interpreting the Bible and the Constitution does not take up directly any of these questions. Pelikan’s earlier work on tradition, however, suggests that fidelity is not to be realized in definitive answers to such questions. Instead, fidelity for Pelikan lies in the community’s ongoing willingness to engage in dialogue over the very issue of what authentic fidelity might look like. In *The Vindication of Tradition*, for example, Pelikan notes that the struggle to acknowledge change while preserving continuity will involve ongoing disagreement and “unremitting controversy” over the proper path of doctrinal

realities and words that are being passed on.”).

87. See Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 Wake Forest L. Rev. 635, 679 (2003). See also Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 Const. Commentary 205, 230 (2003): “Judicial supremacy is not the logical or inevitable product of experience and progress. It remains now, as it was in the beginning, but one side in a recurrent and ongoing struggle to determine the proper role of ordinary citizens in a republic.”

development.⁸⁸ Indeed, such controversy fuels the scholarly work of constitutional lawyers and Church historians.

Yet, in the face of disagreement and controversy, “the demonstrated ability to sustain and eventually to accept the development of doctrine is witness to the vitality of a tradition.”⁸⁹ Pelikan contends that the answers to questions about developmental fidelity are to be found neither in a historical relativism that denies continuity nor in a strict constructionism that “proceeds as though development were not real and were only the application of an unchanging and unchangeable authority to outward change.”⁹⁰

Pelikan recognizes that historical relativism and strict constructionism have had (and continue to have) their adherents in the interpretive communities of both the Church and the American republic. But, Pelikan concludes,

their accumulated wisdom has taught them to recognize . . . that *development is real but that it goes on within the limits of identity, which the tradition defines and continues to redefine . . .*. Ultimately, . . . tradition will be vindicated for us, for each of us as an individual and for us as communities, by how it manages to accord with our deepest intuitions and highest aspirations (intuitions and aspirations which, if I am right in what I have been saying, are themselves imbedded in the tradition).⁹¹

E. Transformative Appropriation through Dialogue Among Text, Tradition, and Community

Pelikan in *The Vindication of Tradition* thus suggests that authentic development is dependent on a community’s commitment to seek new answers to new questions arising from new experiences by struggling creatively to bring the resources of text and tradition to bear on those questions in ways that maintain the community’s self-identity in the face of change. The work of New Testament scholar Sandra Schneiders again provides a complementary elaboration of this developmental dynamic.

Like Pelikan, Schneiders sees doctrinal development in both theology and law emerging from an ongoing dialogue between text and tradition within the community constituted by the foundational text. Just as Pelikan locates the touchstone for authentic, faithful development in

88. Pelikan, *supra* n. 13, at 59.

89. *Id.*

90. *Id.*

91. *Id.* at 59-60 (emphasis added).

the intuitions and aspirations embedded in a textually constituted tradition, Schneiders argues that a textually constituted community's way of seeing the world and living in the world is changed by its ongoing efforts to be faithful to the world called into life by the text.

The textually constituted community enters into and is transformed by the world projected by the text, and "now lives a transformed reality."⁹² Schneiders describes this experience of understanding as a process that can be characterized as transformative appropriation.⁹³ Understanding in this sense involves the movement from asking, "What does the text say?" to asking, "What does the text mean for me and my community, and how is this text calling me to live?"

As a community interprets its foundational text, the community is transformed by the world projected by the text and generates a history that becomes part of its tradition and experience. The interaction between the text and the consciousness created by that historical experience and tradition allows the community to look at its foundational text in a new way, drawing its meaning forward even though the words of the text have not changed.⁹⁴

Schneiders points to the developing meaning of the text of the Declaration of Independence as an example of this process. A written text like the Declaration's phrase, "All men are created equal," is not invariably tied to its original eighteenth-century application to adult, white, property-owning males. Today that phrase is understood to include all people:

The question behind this text is not, Who is equal? but, What is the basis of the equality that we acknowledge among men? The answer is, Their humanity. Consequently, if humanity is predicated of others outside the circle of those the framers originally had in mind, the affirmation of equality applies to them as well, regardless of the limitations in the minds of the framers of

92. Schneiders, *supra* n. 24, at 172.

93. See e.g. *id.* at 157, 158-159, 169-178.

94. See *id.* at 161:

Both jurisprudence and speculative theology have been offered as clarifying instances of the "applied" character of true understanding. One does not really know what a law means, that is, one does not really understand it, unless one sees how it functions in relation to the case under consideration, which is, of course, not the case in terms of which the law was formulated. One does not understand theologically a datum of faith, for example, salvation through Jesus' death and resurrection, unless one sees what it means in terms of the people (including oneself) who inhabit one's own historical situation, which is quite different from the situation in which Jesus' paschal mystery originally occurred.

the Declaration.⁹⁵

The meaning of the biblical text, in Schneiders' view, develops in the same way, through an ongoing dialogue with the text about its subject matter. The contemporary believer does not simply submit to New Testament texts that accept slavery, anti-Jewish polemic, or the subjugation of women. Instead,

the text has a surplus of meaning that interacts with the historical consciousness of contemporary Christians who, partly because of their very formation in Gospel values (i.e., because of the effective history of the Gospel itself), have come to see the moral unacceptability of slavery, anti-Semitism, and patriarchy.⁹⁶

Through this sort of dialogue with the text, a text that is as "thoroughly human as Jesus himself," the New Testament text continues to serve as a privileged locus of revelatory encounter between God and humanity.⁹⁷ The community's dialogue about what fidelity to the original revelation demands—the community's ongoing effort to remain faithful to the truth of its identity in changed circumstances or in light of new (or newly understood) experience—may in fact demand development in doctrine.

F. Notes for Authentic Development

Interpreting the Bible and the Constitution allows Pelikan to return to the idea of development (understood as a tradition's ability to embody continuity-in-change) that he previously addressed in *The Vindication of Tradition*. The concluding pages of the book suggest that John Henry Newman's *Essay on the Development of Christian Doctrine* can provide guidance to those seeking to distinguish a state of authentic or healthy development within a tradition from that of corruption or decay.

Newman's *Essay* proposed seven "notes" that might serve as criteria illuminating whether or not a doctrinal change can be characterized as an authentic development within the tradition rather than a corruption of the tradition: (1) preservation of its type or idea, (2) continuity of its principles, (3) its power of assimilation, (4) its logical sequence, (5) its anticipation of its future, (6) conservative action on its past, and (7) its chronic vigor. (124)

Pelikan credits Thomas Grey for calling attention to the potential contribution that Newman's work might make to our understanding of

95. *Id.* at 176.

96. *Id.*

97. *Id.* at 178.

“the relation between original intent and development of doctrine in the interpretation of the United States Constitution.” (124)⁹⁸ And interestingly, Pelikan explains that several of the examples Newman himself uses in deploying his various “notes” are drawn from developments in law and politics: “some of the most telling observations in Newman’s *Essay* deal . . . with our theme of the similarities between theology and jurisprudence as venues for the development of doctrine.” (123)

The closing section of Pelikan’s book guides us through the seven notes in an effort to illustrate how each of the notes has served as an implicit interpretive tool by the Supreme Court at various point in its history. Pelikan, for example, sees the note of “preservation of its type or idea” at work in the Supreme Court’s developing doctrine rooted in the phrase “due process of law.” (127) Pelikan explains that the Court long-ago recognized that this phrase brings into the text of the Constitution a “type” or “idea” regarding the protection of liberty from government usurpation that is itself drawn from *Magna Carta*.⁹⁹

[T]he *preservation*-and, indeed, expansion-of this *type* went on to bring about, after a long period of relative inactivity, what has sometimes been described as a “due process revolution” in the twentieth century. (128)

Yet many jurists and constitutional scholars would certainly dispute Pelikan’s claim that the Supreme Court’s reliance on the phrase “due process of law” as a source for doctrinal innovation can *appropriately* be characterized as a manifestation of the note of “preservation of its type or idea.” That the Court frequently uses the phrase as a textual hook for doctrinal innovation is no guarantee that a change in doctrine is a benign growth in the “idea” of “due process of law” rather than a corruption of that idea.¹⁰⁰

98. See Grey, *supra* n. 6, at 8 n. 26.

99. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856): “The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50) says they mean due process of law.” (quoted by Pelikan at (128).

100. See e.g. Andrew T. Hyman, *The Little Word “Due,”* 38 Akron L. Rev. 1, 44 (2005): “Many scholars and jurists of all political persuasions have expressed doubts about using the Due Process Clause to strike down substantive statutes that are subjectivistically undue, and those doubts are nothing new.” See also *id.* at 8 the Supreme Court has “undermined [the] core meaning” of the Due Process Clause by regularly using it to override laws enacted by elected representatives; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935-936 (1973) criticizing the Court’s reliance on the Due Process Clause in *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Tex.*, 539 U.S. 558, 592-594 (2003) (Scalia, J., dissenting, criticizing the majority’s due process analysis).

Pelikan discusses the note of “continuity of its principles” with similar generality. This note reflects Newman’s conviction that “the life of doctrines may be said to consist in the law or principle which they embody.” (129)¹⁰¹ Thus, it is because “developments in Christianity . . . have been conducted all along on definite and continuous principles that the type of Religion has remained from first to last unalterable.” (129)¹⁰² Pelikan sees this note at work in the Supreme Court’s repeated attempts to call upon such “definite and continuous principles” in its interpretation of the Constitution. (129)¹⁰³

In Pelikan’s view, Justice Chase articulated a criterion similar to Newman’s “continuity of principles” in the following passage from *Calder v. Bull*¹⁰⁴:

This *fundamental principle* flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit There are certain *vital principles* in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power An act of the legislature (for I cannot call it a law), contrary to *the great first principles* of the social compact, cannot be considered a rightful exercise of legislative authority The *general principles* of law and reason forbid [certain acts of legislation]. (130)¹⁰⁵

Similarly, John Marshall in *Fletcher v. Peck*¹⁰⁶ referred to authoritative non-textual constitutional “*principles* which are common to our free institutions.” (129)¹⁰⁷ Justice Holmes’ dissent in *Lochner v. New York*¹⁰⁸ argued that legislation reflecting majoritarian opinion could be declared unconstitutional when “a rational and fair man necessarily would admit that the statute proposed would infringe *fundamental principles* as they have been understood by the traditions of our people and our law.” (131)¹⁰⁹ And Justice Cardozo maintained that the Court could identify certain rights as constituting “the very essence of a scheme of ordered liberty, . . . *principles of justice* so rooted in the

101. Quoting Newman, *An Essay on the Development of Christian Doctrine*, *supra* n. 14, at 180.

102. *Id.* at 289.

103. *Id.* (explaining that a “quest” for such principles “has been an ongoing preoccupation of the Supreme Court.”).

104. 3 U.S. 386 (1798).

105. Quoting *id.* at 388-389 (emphasis supplied by Pelikan).

106. 10 U.S. 87 (1810).

107. Quoting *id.* at 139 (emphasis supplied by Pelikan).

108. 198 U.S. 45 (1905).

109. Quoting *id.* at 76 (Holmes, J., dissenting) (emphasis added by Pelikan).

traditions and conscience of our people as to be ranked as fundamental.” (131-132)¹¹⁰

The difficulty, however, in relying on the continuity of these principles as a criterion capable of distinguishing authentic development from doctrinal corruption was long-ago recognized. Indeed, the difficulty was recognized in *Calder v. Bull* itself, the very case that Pelikan points to as an example of Newman’s note of “continuity of principles” in action. (130) Justice Iredell, writing separately in *Calder*, directly challenged Justice Chase’s invocation of non-textual general principles of law:

It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. *The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject*; and all that the Court could properly say, in such an event, would be, that the Legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.¹¹¹

There may indeed be a continuity to the Court’s ongoing “quest” for such principles. Yet Justice Iredell’s words suggest that the Court’s “ongoing preoccupation” with the quest (129) may not be enough to help us discern which doctrinal variations embody continuity with fundamental principles and which manifest departure from those principles. In our time, as in Justice Iredell’s, the fight may be over our ability to identify the relevant principles themselves, not to mention what those principles actually require in particular controversies. The “ablest and purest” of people continue to “differ[] upon the subject” in many cases.¹¹²

110. *Id.* at 131-132 (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)) (emphasis added by Pelikan).

111. *Calder*, *supra* n. 91, at 398-399 (emphasis added). Pelikan in fact cites Iredell’s opinion as evidence of the Court’s ongoing quest for “definite and continuous principles” to guide doctrinal development. *See* (130) (“James Iredell felt constrained to articulate ‘the *general principles*, which influence me, on this point, succinctly and clearly,’” (quoting 3 U.S. at 398) (emphasis added by Pelikan). But the “general principles” guiding Justice Iredell are clearly somewhat different from those relied upon by Justice Chase.

112. *Id.*

G. An Alternative Example of the Note of “Continuity in its Principles”: Michael Perry on Constitutional Interpretation

A more persuasive example of the note of “continuity in its principles” working as a guide to fidelity in the midst of development might be found in the constitutional theory developed by Michael Perry. Interestingly, Perry’s theory exemplifies Pelikan’s insight that the interpretation of foundational normative texts involves a correlation between the *sensus literalis* and the *sensus plenior*, while also illustrating how a commitment to the note of “continuity in its principles” can provide a foundation for authentic doctrinal development.

1. Michael Perry’s Theory of Constitutional Interpretation

Perry understands constitutional interpretation as the effort to discern and articulate the norm which “We the people” originally understood themselves to be communicating through the language of the constitutional text.¹¹³ This norm underlying the text might be understood in Newman’s terms as the principle that takes flesh in doctrine.

Sometimes simply reading the language of the text will allow one to discern the norm. Each state is to have two senators. The President must be at least thirty-five years old. Sometimes, however, the constitutional text does not so clearly identify the underlying normative principle that “We the people” understood it to communicate. Such a text, therefore, calls for significant interpretive inquiry if we are to determine what directive “We the people” meant to issue through the text. A text that is vague or ambiguous will have to be “translate[d] or decode[d]” so that we can identify the normative principle that the text represents and communicates.¹¹⁴

This process requires us to engage in a historical inquiry. What norm *was* the provision understood to communicate by the generation of “We the people” that put the provision into the Constitution? Thus, the objective of the historical inquiry is to learn what norm or principle that generation meant to establish—*not* to establish how that generation would have resolved the particular constitutional issue that we are interested in resolving today.

113. Perry, *supra* n. 10, at 24. Whose understanding is relevant? Those who proposed the language of the text, those who ratified it, and “We the people” in whose name the language was proposed and ratified. *See e.g. id.* at 52.

114. *Id.* at 34.

How that generation might have resolved our contemporary conflict may well be relevant to our interpretive inquiry, because it might help us to discern how wide or narrow they believed the norm they established to be. But in the end, what matters for our interpretation today is our identification of the norm they established, “not what they would have believed to be the correct way of resolving (on the basis of their norm) our conflict.”¹¹⁵ Their belief about the correct answer to our conflict is not binding on us because “they might have been mistaken about the contextual requirements of the norm.”¹¹⁶

Interpreting the constitutional text tells us what norm or principle the applicable textual language establishes, but that norm must then be “specified” in the context of a conflict in which the norm is implicated. Perry explains that the process of “specifying” a norm in a particular context is the process of deciding how an indeterminate norm requires us to decide a case.¹¹⁷ A norm is indeterminate when people who agree about the relevant facts and the applicable norm can reasonably disagree with one another as to how, given the norm, a particular conflict should be resolved. Specifying an indeterminate norm, therefore, challenges the judge to decide

how best to achieve, how best to “instantiate”, in the context of a particular conflict, the political-moral value (or values) at the heart of the norm; [specification] is the challenge of discerning what way of achieving that value, what way of embodying it, best reconciles all the various and sometimes competing interests of the political community at stake in the conflict.¹¹⁸

Specification understood in this way is not a process of deduction or simple application of a general rule to a specific case; instead it is an exercise of good judgment. Perry calls on Gadamer’s comparison of the process of specification in law and theology to illustrate the element of creative decision making that is involved in the moment of specification:

In both legal and theological hermeneutics there is the essential tension between the text set down—of the law, or of the proclamation—on the one hand and, on the other, the sense arrived at by its application in the particular moment of interpretation, either in judgment or in preaching. A law is not there to be understood historically, but to be made concretely valid through being interpreted. Similarly, a religious proclamation is not there

115. *Id.* at 26.

116. *Id.*

117. *Id.* at 28.

118. *Id.* at 29.

to be understood as a merely historical document, but to be taken in a way in which it exercises its saving effect. This includes the fact that the text, whether law or gospel, if it is to be understood properly, i.e., according to the claim it makes, must be understood at every moment, in every particular situation, in a new and different way. Understanding here is always application.¹¹⁹

Thus, specification for Perry seems to be analogous to what Sandra Schneiders calls transformative appropriation—how is the world projected by the text, the claim made on us by the political-moral value embodied in the norm, to be made concrete in the context of a particular conflict?¹²⁰

Perry notes that in many constitutional cases the Supreme Court will have already identified and articulated, in a prior decision accepted as authoritative, the norm that a given constitutional text represents. Moreover, the process of specifying the applicable norm may already have begun in the body of prior precedents which have produced authoritative constitutional doctrine with respect to the norm. Thus, the specification of an indeterminate constitutional norm can be understood as a “temporally extended process,” which is “analogous to the ongoing judicial development of—including the occasional revision of—the ‘common law.’”¹²¹ The challenge of specification then becomes that of further developing the existing doctrine—“to shape further the norm that is both the warrant for and the foundation of the doctrine.”¹²²

In sum, Perry’s theory of constitutional interpretation reflects the correlation between the *sensus literalis* and the *sensus plenior* that Pelikan identifies as the inherent dynamic of interpretation.¹²³ For Perry, constitutional interpretation involves two different interpretive moments, which must be kept analytically distinct. The first is an originalist moment of interpreting the constitutional text—the effort to discern what norm or principle the text represents. Here, the relevant question is, “What norm was this provision understood to communicate by the ‘We the people’ whose representatives put the provision into the

119. *Id.* at 198, n. 60 (quoting Gadamer, *supra* n. 25, at 308-309). *See also id.* at 29:

[A] court asked to apply a rule must decide in light of information not available to the promulgators of the rule, what the rule should mean in its new setting. That is a creative decision, involving discretion, the weighing of consequences, and, in short, a kind of legislative judgment. . . .

(quoting Richard A. Posner, *What am I? A Potted Plant?*, *New Republic* 23, 24 (Sept. 28, 1987)).

120. *See text, supra*, at Pt. II.A.

121. Perry, *supra* n. 10, at 47.

122. *Id.*

123. *See text, supra*, at Pt. II.B.

Constitution?”¹²⁴ This question must not, however, be confused with a different, relevant, *but nondeterminative* inquiry: How would the generation of “We the people” that established the norm have believed our conflict should be resolved on the basis of the norm they established?¹²⁵

The second interpretive moment demands the interpretation of the constitutional norm—the effort to give shape to the norm in the context of a conflict in which the norm is implicated but indeterminate. Here the note of “continuity in its principles” comes into play. The interpreter must ask, what does it mean for us to faithfully apply—here and now in this present conflict—the normative principle represented by the constitutional text?

2. “Continuity in its principles” and Interpretation of the Fourteenth Amendment

What norms did “We the people” establish when they added the second sentence of section one of the Fourteenth Amendment to the constitutional text? The sentence contains three prohibitions on state action:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹²⁶

What principles did “We the people” understand that configuration of words to communicate?

In order to discern and articulate the normative principles underlying the text of the Fourteenth Amendment, Perry investigates the historical context that gave rise to enactment of the Amendment, and how the language of the text would have been understood within that context. He notes that the enactors of the Amendment aimed most directly at constitutionalizing the Civil Rights Act of 1866, which sought to prevent the former Confederate states from maintaining the subordinate position of the newly freed slaves through institutionalized

124. Perry, *supra* n. 10, at 34.

125. Perry contends that it is “wildly implausible” in our political-legal culture to think that those who enact legal texts (especially constitutional texts) would understand themselves to be intending that all conflicts under the norm they are establishing should be resolved just as they would have resolved them; this “is an implausible construal of what many legal norms are taken to be—even by those who establish the norms.” Perry, *id.* at 31.

126. U.S. Const. amend. XIV, § 1.

discrimination in the form of “the infamous Black Codes.”¹²⁷

Perry maintains that each of the three prohibitions in section one of the Fourteenth Amendment addresses one of the basic ways in which state actors were seen to be oppressing ex-slaves and others. The text of the provision, however, was framed in language broad enough to indicate that it was understood to communicate norms transcending the particular historical circumstances that led to the Amendment’s enactment. Perry’s review of the historical record and the extensive literature interpreting that record leads him to conclude that this text communicates a fairly complex set of norms:

—*a due process norm*

[No state actor] shall damage or destroy a person’s life, liberty, or property extrajudicially or otherwise “outside the law.” . . . [S]tate actors may deprive a person of life, liberty, or property, if at all, only pursuant to “due process of law,” which, whatever else it might have been understood to refer to, was understood to refer to the process of law that, under state law, is due ordinary citizens . . .¹²⁸

—*an equal protection norm*

[S]tate actors [are required] to give every person within the state’s jurisdiction the very same protection (“equal protection”) that, under state law, is due ordinary citizens . . . , the same protection “of the laws.” What laws? At a minimum, laws designed to protect life, liberty, or property . . . Relatedly, the equal protection norm . . . also forbids states to make or enforce protective laws that are themselves racially or otherwise invidiously discriminatory.¹²⁹

—*a privileges or immunities norm*

No state may make or enforce any law that denies to some of its citizens, or otherwise lessens or diminishes their enjoyment of, any protected privilege or immunity enjoyed by other of its citizens, if the differential treatment

- (1) is based on a view to the effect that the disfavored citizens are not truly or fully human—that they are, at best, defective, even debased or degraded human beings; or
- (2) is based on hostility to one or more constitutionally protected choices; or finally,
- (3) is otherwise not reasonably designed to accomplish a legitimate

127. Perry, *supra* n. 10, at 50.

128. *Id.* at 81.

129. *Id.*

governmental purpose.¹³⁰

Perry recognizes that, as we look back on the historical record, different participants in the enactment process may seem to have different ideas about precisely what the proposed constitutional text might mean in practice. Both “We the people” and their representatives may have experienced confusion “about precisely what norm was being established.” In the face of that confusion, how ought we to proceed as we seek to identify the norm represented by the text?

The interpreter’s task is to try articulate the norm that best captures what “We the people” and their representatives were trying to do.¹³¹ Perry believes that the complex set of norms he has articulated best reflects “the various concerns that inspired” the enactment of the Fourteenth Amendment and “best captures the fundamental point or trajectory of [the] antidiscrimination project” undertaken by “We the people.”¹³² This complex norm, moreover, can be articulated as a constitutional antidiscrimination principle:

Whatever else section one was meant to do, it was meant to achieve and protect, against the states, a fuller measure of equality for a particular group of Americans, a group that had long been regarded and treated as less than truly, fully human.¹³³

While the history of section one of the Fourteenth Amendment is crucial to the process of discerning and articulating the antidiscrimination principle established by section one of the Fourteenth Amendment, today that principle may well have implications that run contrary to the expectations and understandings of “We the people” who enacted the provision. One can be mistaken about the implications of a constitutional principle to which one is committed. Thus fidelity to the principle may require doctrinal development, and such a faithful development will be marked by “continuity in principle.”

For example, “We the people” in 1868 would not have understood their antidiscrimination norm to call into question governmental distinctions on the basis of sex. Yet, when we are faced with a constitutional conflict requiring us to specify the Fourteenth Amendment norms in the context of sex discrimination, we are not bound by their understanding of what their principle requires. We have to give shape to the norm in a particular context based on our understanding of what the norm requires today.

130. *Id.* at 76.

131. *Id.* at 74-75.

132. *Id.* at 76.

133. *Id.* at 84.

We can see, in a way that the generation that gave us the Fourteenth Amendment could not, what faithful continuity in principle demands of us. We can see that discrimination against women often denies the full humanity of women. We are, thus, obligated to specify their norm in a way that acknowledges this reality. Perry thus espouses a constitutional theory that includes a significant originalist moment, but that necessarily allows for considerable development in the way in which constitutional principles are specified in new contexts over time. “Continuity in principle” will be the mark of faithful development; the interpreter strives to apply the original principle with fidelity in new contexts, even when that might require the principle to be applied in ways in which its framers would not have expected.

H. Pelikan’s Understanding of the “Notes” of Faithful Development— Only Useful in Retrospect?

In what will certainly be a source of frustration to lawyers and judges taking up Pelikan’s work, the essay concludes in a fashion which suggests that the notes of faithful development might be of more use to the historian of doctrine than they will be to a judge who must make a decision in a particular case. As Pelikan describes them, the notes seem to emerge from the historian’s retrospective search within a tradition for evidence of continuity in the midst of change. As such, they may not provide much help to a judge faced with the present task of deciding which of a number of possible interpretations of a constitutional text would most faithfully carry the tradition into the future.¹³⁴

This retrospective character of Pelikan’s utilization of Newman’s notes is most evident in his concluding elaboration of the note of “chronic vigor,” where Pelikan turns to the opening words of the American Scripture, “we the people.” (148-149) He asserts that, even though “the content of ‘we the people’ has shifted” through the course of the life of the American republic, “the authority of ‘we the people’ has continued and grown.” (148)

It is, moreover, retrospective appreciation of the chronic vigor of the *constitutional system* of “we the people” that Pelikan takes as the mark of faithful development. He brings his essay to a close by applying to the community constituted by American Scripture the words that Newman used to describe the Catholic Church:

134. *Cf.* (124), where Pelikan explains that Newman’s “tests” or “notes” are, “in Owen Chadwick’s phrase, ‘rather pegs on which to hang a *historical* thesis than solid supports for a doctrinal explanation.’”

When we consider the succession of ages during which the [constitutional] system has endured, the severity of trials it has undergone, the sudden and wonderful changes without and within which have befallen it, . . . it is quite inconceivable that it should not have been broken up and lost, were it a corruption [. . .] Yet it is still living, if there be a living [. . .] philosophy in the world; vigorous, energetic, persuasive, progressive; . . . it grows and is not overgrown; it spreads out, yet is not enfeebled; it is ever germinating, yet ever consistent with itself. (149)¹³⁵

The touchstone of faithful development is thus creative change that preserves identity: “ever germinating, yet ever consistent with itself.”

CONCLUSION

Pelikan’s elegantly elaborated analogy fails to provide much specific guidance to lawyers and judges looking for answers to contemporary constitutional questions. Moreover, his provocative suggestion that broad implications flow from examining the parallels between official interpretation of scripture and official interpretation of the Constitution (36) prompts a host of questions that remain unexplored in this book.¹³⁶ Yet the experience of looking at interpretation through the theology-and-law lenses of Pelikan’s binoculars does bring the character of the interpretive process into sharper focus. Pelikan helps us to see more clearly that the process of interpreting texts which give rise to living communities might best be understood as a sort of developmental originalism that ought to manifest creative fidelity.

The goal of the enterprise of interpreting foundational normative texts—whether in the Church or in the American political community—is creative fidelity to the text in the midst of the change inevitably generated by the ongoing experience of the community given life by that text. The interpretive imperative to realize faithful continuity-in-change calls the interpreter *both* to be sensitive to an originalist moment in interpretation *and* open to allowing the lived experience of the community to shed new light on the text. Faithful interpretation thus demands an ongoing correlation between the *sensus literalis* and *sensus plenior* of the foundational text.

The creative tension generated by the correlation between the *sensus literalis* and the *sensus plenior*, and by the reciprocal relationship between the foundational text and the tradition that is generated by the

135. Quoting Newman, *Essay on Development*, *supra* n. 14, at 378.

136. See text following *supra* n. 39, and text following *supra* nn. 86 & 87.

text and embodied in the lived experience of the community founded upon the text, will produce development in doctrine. The challenge facing the interpreter is thus to answer a question inherent in the enterprise of interpreting foundational, normative texts. *Is a proposed interpretation of the foundational text an authentic, healthy development or a malignant corruption—is this interpretation a manifestation of continuity-in-identity within the community given life by the text, or is it evidence of decay and decline?*

Pelikan does not offer the constitutional interpreter a definitive roadmap leading directly to the resolution of difficult interpretive questions in particular cases.¹³⁷ Yet, in the end, Pelikan's binocular interpretive vision does help to focus our attention on the central question with which official interpreters striving for creative fidelity must wrestle if a living community constituted by a foundational normative text is to endure: Is the proposed textual interpretation an authentic, healthy development manifesting creative continuity-in-identity, or is it a malignant corruption of the identity of the community given life by the text?

137. Indeed, in the midst of the developmental interpretive process, it might not be entirely clear where the path of fidelity ultimately leads. See Noonan, *Lustre*, *supra* n. 73, at 209-210: "But do I know how it [i.e., the developmental process] will turn out or where I am in it?" "Remember," Cleo said, "what Madison said, that Free Exercise was 'an experiment.' You're part of the experiment. You do have two hundred years of experience and some notable examples to guide you You can be confident that your voice and example will advance the experiment. The very incoherencies you and your advisors have encountered are opportunities for creative improvement."