SOVEREIGNTY MADE PRESENT:
A POLITICAL THEOLOGY OF CANADIAN CONSTITUTIONAL ORIGINALISM

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Abstract

This thesis develops an analogy between Canadian expressions of constitutional originalism, on the one hand, and American evangelical practices of interpreting the Bible as their holy scripture, on the other. It does so in defence of a comparative claim: there is something substantively similar about the way originalists read the Canadian Constitution and the way American evangelicals read the Protestant Bible in that they both do so theologically. Drawing on the political theology literature, this thesis develops that claim with sustained reference to originalist and evangelical interpretive methods and motives. At the level of method, constitutional originalism represents a reconstructive effort to identify and operationalize the historical decisions through which the Constitution's drafters formulated its final wording; and, at the level of motive, to an assertive effort to identify on that basis the Canadian citizenry's "sovereign self," of which the originalist interpreter is one part, as the Constitution's ultimate author.

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Introduction

This thesis develops an analogy between Canadian expressions of constitutional originalism, on the one hand, and American evangelical practices of interpreting the Bible as their holy scripture, on the other. It does so in defence of a comparative claim: there is something substantively similar about the way originalists read the Canadian Constitution and the way American evangelicals read the 66 books of the Protestant Bible in that they both do so theologically.

The analogy I am proposing between one school of constitutional interpretation and one Christian theological tradition will already be familiar, in at least certain respects, to legal scholars. In "Nomos and Narrative,"[1] Robert Cover identified a strand of American social life animated by what he termed "redemptive constitutionalism."[2] Unlike reformist movements, groups committed to the redemption of the American state insist upon "(1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other."[3] Radical antislavery constitutionalism and the anti-abortion right-to-life movement are both examples of such groups; and their "way of thinking about law and liberty…is obviously tied to the religious traditions that invoke the vocabulary of redemption."[4]

Jack Balkin picks up on the language of redemption in his hybridization of originalism and living constitutionalism, aptly called *Living Originalism*.[5] He writes: "The belief that the Constitution is a collective project of many generations, that it makes promises to the future that

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[1] Robert Cover, "Nomos and Narrative" in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* Law, Meaning, and Violence (Ann Arbor: University of Michigan Press, 1995) 95.

[2] *Ibid* at 132.

[3] *Ibid*.

[4] *Ibid*.

[5] Jack M Balkin, *Living Originalism* (Cambridge: Belknap Press, 2011).

are only imperfectly realized in the present, that we should have faith that the Constitution will become better over time, and that we should work for the eventual redemption of its promises in history I call *redemptive constitutionalism*."[6] The faith Balkin has in view here is a function of interpretation itself. "To interpret the Constitution presupposes a desire to be faithful to it," he thus writes, "at least for those who claim to be governed by it."[7] This is a knowing rather than a blind faith, however; well-aware that "legal interpretation takes place in a field of pain and death," to invoke an oft-quoted line of Cover's,[8] the faithful constitutional interpreter nonetheless believes in what the Constitution and the people governed by it might yet become.[9] Attributing "fallenness" to the Constitution in a move that explicitly recalls a Christian theological category, the redemptive constitutionalist looks for the ultimate redemption of the Constitution's sins through careful recognition of "those elements in the Constitution—both in the document itself and in its associated institutions—that make this redemption possible."[10] And this, in turn, demands that the redemptive constitutionalist read the constitutional text carefully, fully, and with an eye to its improved application.

As Balkin himself acknowledges,[11] his account of American constitutional life as a faith-based political project owes an intellectual debt to Sanford Levinson's analysis, in *Constitutional Faith*,[12] of the role the United States Constitution plays in that country's "civil religion." The

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[6] *Ibid* at 73.

[7] *Ibid* at 78.

[8] Robert Cover, "Violence and the Word" in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* Law, Meaning, and Violence (Ann Arbor: University of Michigan Press, 1995) 203 at 203. Balkin does not quote Cover, but he seems to have something similar to what Cover describes in view when he writes, e.g., that constitutional "faith, too, may be difficult to come by, especially when our views are in eclipse and people in power do terrible and shameful things in the name of the law, the Constitution, and the country" (Balkin, *supra* note 5 at 79).

[9] See, esp. Balkin, *supra* note 5 at 79.

[10] *Ibid* at 81.

[11] See *ibid* at 77.

[12] Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 2011).

Constitution is a secular analogue to a sacred religious text like the Bible, and the Supreme Court to a "holy institution," Levinson suggests; but far from being a source of national political unity, the religious qualities of the American constitutional order in fact provoke "fragmentation and disintegration" along theological lines.[13] There is, in the religious traditions of the West, an enduring tension between "Protestantism" and "Catholicism." The former "refers to either (1) an emphasis on the exclusivity of written Scripture or text as the basis of doctrine, or (2) the legitimacy of individual (or at least relatively nonhierarchical communitarian) interpretation as against the claims of a specific, hierarchically organized institution."[14] The latter describes "either (1) the legitimacy of unwritten tradition in addition to Scripture, or (2) the authority of a particular institution, hierarchically organized, to give binding interpretations of disputed aspects of relevant materials."[15] These, Levinson argues, map onto the major positions within the American constitutional tradition, which tend in either a Protestant or a Catholic direction on questions such as whether the constitutional text or the history of its interpretation is the ultimate source of constitutional doctrine;[16] or whether the individual citizen is empowered to interpret the Constitution for themselves.[17]

Although undoubtedly grounded in the particularities of the American constitutional tradition and its unique confluence of politics and faith, Levinson's project orients us well towards the religious dimensions of legal life in other countries too, among them Canada, that are governed by written constitutions. The attempt to look upon law "with religious eyes," as it

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[13] See, e.g., *ibid* at 17.
[14] *Ibid* at 27.
[15] *Ibid* at 27.
[16] See *ibid* at 30–37.
[17] See *ibid* at 46–50.

were, is particularly useful insofar as it gets us outside of law's own terms of reference such that we might conceptualize law's rule anew.

But it will not suffice to restrict ourselves to the categories of "Protestant" and "Catholic" in our analogization between law and religion. Ignoring for the present purposes the limitations of relying upon Christian distinctions to ground that analogy, it still remains the case that Christianity itself contains a multiplicity of theological positions beyond the two that Levinson identified. There is within Protestantism, for example, significant differences of doctrine and practice between what we might term "establishment Protestants," such as Anglicans/Episcopalians, and evangelical Protestants, such as are represented by innumerable smaller denominations and independent churches. It is necessary, in other words, to pluralize Levinson's analysis if we are to develop it further with specificity and precision. That is the direction in which this thesis gestures.

My project is a political theology of Canadian constitutional originalism. It does not purport to compare law in general with religion in general. Rather, it looks to elaborate upon the interpretive possibilities that come from comparing a specific practice within a particular constitutional tradition with a cognate practice in a particular religious one.

Its aim, in doing so, is to solve for a particular interpretive problem within Canadian legal life: what do we learn about constitutional originalism, as it is practiced in Canada, by contextualizing it as a kind of theological project?

Originalists and evangelicals are both concerned with interpreting texts in and for present communities of readers who exist at a temporal distance from those texts' composition. Yet, where evangelical theologians attend explicitly to the theological assumptions that underlie their assertions about the authority and legitimacy of text and author, constitutional originalists do not.

The result is that the philosophical and conceptual foundations of constitutional originalism are more obscured than revealed by originalist scholarship itself.

The solution this thesis posits is to situate, conceptually, originalism in relation to American evangelicalism. It is helpful, in the first place, from the perspective of advancing scholarly knowledge. My approach encourages scholars of religion to treat legal entities as proper objects of their disciplinary gaze; and it encourages scholars of law to borrow from the analytical tools available in religious studies to better understand the theological dimensions of legal life. In short, the approach I take here expands the scope of two disciplinary projects.

Theoretically, moreover, the problem as stated here unsettles easy distinctions between legal life and religious life. The latter drives the former, in fact; and the former depends upon the latter for its vibrancy and key assertions. This means that uncritical divisions between law and religion must be rejected. Law and religion go together; they matter to and for one another. And insofar as scholars overlook the relationship between the two, they miss important facts about the nature of law's rule in the North American context, not least that what is at stake in modern questions of constitutional law is, in part, which modern theological project will prevail.

This last observation gives my solution to the problem posed above its critical and political urgency. So long as originalism and evangelicalism are treated in isolation from one another, the former can only be superficially understood and challenged. Originalism is allowed to set the (legal) terms of its own critique, preventing genuine revision to its tenets and genuine clarification of its contributions to law's overall rule. This thesis allows us, in other words, to take a preliminary step beyond originalism's own logic and it thereby sets the stage for larger interventions that rethink originalism's philosophical architecture with creativity and imagination.

This thesis is framed as an exercise in the political theology of constitutional originalism. I will delve more deeply into the contents of political theology, as a theory and as an interpretive method, in chapter three; as well as the contents of originalism, in chapter one. However, it is necessary at the outset, for the clarity of the overall discussion, to clear some ground with respect to the latter given how heavily originalism is caricatured in the popular legal imagination.

Originalism is not so much a singular approach to constitutional meaning-making as it is a family of interpretive theories that subdivide along generational lines. Early or "first-generation" originalists looked for the meaning of constitutional passages in the subjective intentions of the Constitution's framers.[18] More recent, "second-generation" expressions of originalism have eschewed this approach, searching out, instead, the Constitution's "original public meaning." The latter is nothing other than "the meaning that the words and phrases had (or would have had) to ordinary members of the public" in the Constitution's original reading context.[19] In other words, where originalists once looked to the mental states of the drafters to found the Constitution's meaning, they now look to linguistics and reception history.[20] It is primarily this newer manifestation of originalism that I have in view throughout this thesis, the principal exception being where a different, earlier manifestation is in view in some or other literature with which I am engaging (e.g., in Supreme Court of Canada case law).

Arguing that second-generation originalists are engaged in a task alike to evangelicals' theological engagement with their scripture, this thesis is subdivided into three major parts.

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[18] See, e.g., the description provided by Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60:2 Boston University Law Review 204–238 at 204.

[19] Lawrence Solum, "We Are All Originalists Now" in *Constitutional Originalism: A Debate* (Ithaca: Cornell University Press, 2011) 1 at 2–3.

[20] See *ibid* at 3.

Chapter one, entitled “Originalism in the Canadian Constitutional Context,” explores originalism’s Canadian manifestations in some depth. The burden of this chapter is to summarize the key moves that Canadian originalists make and to situate those moves against the backdrop of prevailing practices of purposive interpretation in Canada.

Chapter two, entitled “Evangelicals’ Theological Interpretation of Scripture,” introduces the second half of my analogy by way of an extended description of how evangelicals read and apply the biblical text. The burden of this chapter is to describe a particular kind of theological engagement with a particular kind of scripture, and from there to describe, in more general terms, what makes that engagement theological in the first place.

Chapter three, entitled “Originalism as a Theological Undertaking,” brings together the descriptions of the preceding two chapters to argue for the theological character of originalism in Canada. Situating its analysis in relation to Paul Kahn’s political theology and characterization of sovereignty in a constitutional democracy, the chapter addresses the points of contact between originalism and evangelicalism at the levels of method and motive. The burden of this chapter is to think through the problem to which this thesis is a response, namely, that there appears to be something theology-like about originalism as practiced in Canada.

A short conclusion follows that sums up the argument of this thesis, queries why originalism has had such a significant purchase on interpreters at the present historical juncture, and points towards potential future research directions.

Chapter One:
Originalism in the Canadian Constitutional Context

Scholars of constitutional originalism advocating for the migration of this interpretive theory from the United States to Canada have consistently argued that either (a) the Supreme Court of Canada has already incorporated originalism into its decision-making, or (b) originalism is otherwise compatible with existing Canadian common law doctrine. One of the central claims of this thesis is that there is something substantively theological about this revisionist effort to locate originalist reasoning in existing Canadian jurisprudence. The originalists engaged in this undertaking are working thereby to effect and instantiate a kind of sacred presence in the constitutional text.[21]

This chapter lays the groundwork for that argument by way of sustained engagement with a particular line of originalist scholarship that begins with the work of Bradley Miller, extends through the writings of Léonid Sirota and Benjamin Oliphant, and continues into the "new purposivism" of Kerri Froc. There is a dominant account of how the Supreme Court has interpreted Canada's Constitution over the past century, one that stresses the purposivist direction seemingly charted by the country's highest court. The four scholars whose arguments I survey here have taken it upon themselves to harmonize originalism with that dominant account. Far from being iconoclastic, in other words, Canadian expressions of originalism of the sort I describe here are deeply syncretistic. The key question, for me, is why: What drives interpreters to look for consonance between constitutional purposivism and constitutional originalism, as opposed to, say, simply advocating for the latter to usurp the former as the dominant orthodoxy amongst judicial decision makers?

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[21] It is perhaps the case that all interpretation tries to effect sacred presence, and originalism simply does so in particular ways. I will gesture towards this and other potential avenues for further study of the law-religion nexus apropos of interpretive practice in the thesis's conclusion.

This chapter begins to puzzle through this question, although a full answer will have to wait until chapter three when we have more conceptual pieces available to us. The chapter's first section describes what I call the "conventional story" of Canadian constitutional law, a narrative that tells of originalism's repeated defeat at the hands of Canada's highest court and the concomitant triumph of living-tree purposivism. With the backdrop set, I turn in the subsequent two sections to a description of what I call the revisionist doctrinal effort by certain Canadian originalists to, as already noted, find originalism within existing Supreme Court jurisprudence. That project described, I turn in the final substantive section to a brief outline of the structure of desire that animates contemporary originalism and gesture thereby towards the theological dimensions of this interpretive project.

A. The Purposive Backdrop

There is a conventional story in Canadian constitutional law that tells of originalism's defeat. It begins with the "*Persons* Case,"[22] decided by the Judicial Committee of the Privy Council in 1929. There, Lord John Sankey wrote, now famously, that the *British North America* "Act planted in Canada a living tree capable of growth and expansion within its natural limits."[23] Since then, "living tree" purposivism has been the judiciary's preferred approach to interpreting and giving effect to the Constitution's provisions: this to the point that "originalism has never enjoyed significant support in Canada, either in the courts or the academy," as Peter Hogg and Wade Wright note in a polemical moment in their seminal treatise on constitutional law.[24]

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[22] *Edwards v Canada (Attorney General)*, [1930] AC 124; [1930] 1 DLR 98 (UK JCPC) ["the *Persons Case*"].

[23] *Ibid* at 106-107.

[24] Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2024) at §15.27.

The dominant story asserts that originalism has been raised and squarely rejected by the Supreme Court of Canada on several occasions since it became the country's court of last resort. In the *BC Motor Vehicle Reference*,[25] for example, Lamer J reasoned for the majority that "[i]f the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth."[26] While in the *Reference re Same-Sex Marriage*,[27] decided in 2004, the Supreme Court contrasted the "'frozen concepts' reasoning" of the originalist interveners before it with "one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[28] The latter passage has since been widely cited by the Canadian courts to found the principle that the meaning of the constitutional text must evolve to keep pace with changes in Canadian society.[29]

The Supreme Court's seminal explication of the principles and methodology that ought to guide purposive interpretation came in the 1985 decision of *R v Big M Drug Mart Ltd.*[30] There, Dickson J observed, citing the Supreme Court's earlier decision of *Hunter v Southam Inc.*,[31] that "[t]his Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*;" namely, that "[t]he meaning of a right or freedom guaranteed by the *Charter* was to

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[25] *Re BC Motor Vehicle Act,* 1985 CanLII 81 (SCC), [1985] 2 SCR 486 (*"BC Motor Vehicle Reference*").
[26] *Ibid* at para 53.
[27] 2004 SCC 79.
[28] *Ibid* at para 22.
[29] See, for example, *R v Kirkpatrick*, 2022 SCC 33 at para 265.
[30] 1985 CanLII 69 (SCC), [1985] 1 SCR 295 ["*Big M*"].
[31] 1984 CanLII 33 (SCC), [1984] 2 SCR 145 ["*Southam*"].

be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect."[32] As a practice, this approach was

> to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.[33]

"Generous" rather than "legalistic," the purposive interpretation Dickson J had in mind was to be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection;" and this on the basis of an analysis that placed the *Charter* "in its proper linguistic, philosophic and historical contexts."[34]

At stake for the Court in its long-standing embrace of living-tree purposivism is nothing other than the legitimacy of the Constitution in and for Canada as a self-governing democracy. The Court indicated as much in the *Quebec Secession Reference*,[35] which concerned, *inter alia*, the constitutionality of a province's unilateral secession from Confederation and the legal force of unwritten constitutional rules.[36] "In our constitutional tradition," the Court there observed, "legality and legitimacy are linked."[37] One way in which this link is evident in Canada's constitutional history is through the progressive adaptation of the country's governing institutions "to reflect changing social and political values."[38] The legitimacy of those institutions is predicated on their adherence to the principles of the rule of law, the Court reasoned. But so, too, is it a function of those institutions' democratic roots: "The system must be

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[32] See *Big M*, *supra* note 30 at para 116.
[33] See *ibid* at para 117.
[34] See *ibid*.
[35] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 ["*Quebec Secession Reference*"].
[36] See, e.g., *ibid* at para 32.
[37] *Ibid* at para 33.
[38] So *ibid*.

capable of reflecting the aspirations of the people."[39] Observance by judicial and political actors of Canada's unwritten constitutional rules—of which the Court identified four, namely, federalism, democracy, constitutionalism and the rule of law, and respect for minority rights[40]—is thus "essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree'" that Canadians have come to expect.[41]

The Court subsequently summed up its position with respect to the link between constitutional legitimacy and interpretive purposivism in the *Reference re Same-Sex Marriage*. There the Court insisted that "[a] large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document."[42] What makes living-tree purposivism compelling, in other words, is the degree to which, in the Court's mind, it operationalizes Canadians' own vision for their governing legal order: one that "succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted."[43] Purposivism is the Court's preferred response, it might otherwise be said, to whatever anxiety it might be feeling beneath the surface of its reasons as to its own legitimacy as the guardian of Canada's constitutional structure—this especially given that the Court can only indirectly claim a democratic mandate from the Canadian people to participate in the project of self-governance.

Outside of the courts, the purposive approach has found substantial defense in the scholarly literature, especially recently.

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[39] See *ibid* at para 67.
[40] See *ibid* at para 49.
[41] See *ibid* at para 52.
[42] See the *Reference re Same-Sex Marriage*, *supra* note 27 at para 23.
[43] See *ibid*.

Jacob Weinrib's work is exemplary for the philosophical depth and texture with which it makes the case for living-tree readings of Canada's Constitution. "Purposive interpretation is a doctrine in search of a theory capable of guiding its principled development," Weinrib tells readers of his 2024 article, "What is Purposive Interpretation?"[44] His goal in this article is to articulate purposive theory over and against its principal objections. To that end, Weinrib identifies two key moves within purposive interpretation that require explanation: the move from text to purpose, and the move from purpose to context.[45]

The first of these begins with the presumption that the Constitution elaborates a "unified system of standards."[46] Thus, where a purpose is attributed to an individual provision within that corpus, it must also be capable of making sense of the purposes of the corpus as a whole, and vice versa.[47] Purposes may not be contradictory, nor may they duplicate one another. Rather, "[p]urposive interpretation strives to understand a constitutional bill of rights as a differentiated unity."[48] Constitutional coherence is the overarching goal of the purposive approach, on Weinrib's account, such that "constitutional interpretation is adequate to the extent that it formulates a system of standards that illuminates a constitutional bill of rights in whole and part and, in so doing, enables each provision to be given effect."[49]

The second move, from purpose to context, is nothing other than an effort, principally by the judiciary, to give full, but not excessive, effect to the content of each constitutional

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[44] Jacob Weinrib, "What is Purposive Interpretation?" (2024) 74:1 University of Toronto Law Journal 74–108 at 108.

[45] *Ibid* at 87.

[46] *Ibid* at 89.

[47] *Ibid*.

[48] *Ibid* at 90.

[49] *Ibid* at 92. It is certainly arguable whether this, as a matter of fact or of theory, is actually the main reason purposivism has been adopted by the Canadian courts. I am suggesting here that a better explanation is that the courts are trying to found their own legitimacy as guardians of Canada's constitutional order.

guarantee.[50] This move charts a narrow path between "undershooting" a given right, on the one hand, and "overshooting" it, on the other. Purposive interpretation eschews the former because it "immunizes some aspect of social reality" from the requirement that the state "bring social reality fully into conformity with the purposes of constitutional rights."[51] Likewise, it eschews the latter because "overshooting affords protections that the purpose of the right precludes,"[52] with the result that rights are made to conflict with one another and the overall justification of the constitutional regime thereby impaired:[53] "the problem is that as soon as one says that the exercise of public authority must answer to something that stands above rights, then rights neither regulate public authority nor protect persons from the moral conception that does. And with that, the point of constitutional rights is lost."[54]

Weinrib makes extensive reference to the Supreme Court's post-*Charter* jurisprudence to ground his argument that not only is purposive interpretation justified in its own right, but it is also representative of the dominant approach by Canada's court of last resort. In its *BC Motor Vehicle Reference*,[55] for instance, the Supreme Court rejected the newer versions of originalism articulated, in the United States, by scholars like Randy Barnett and Evan Bernick under the banner of "new originalism."[56] Moreover, the Court enunciated a commitment to purposive interpretation, and the demand of constitutional coherence that that approach imposes on the courts, in *Dubois v the Queen*.[57] And though "the Supreme Court of Canada's most recent

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[50] See *ibid* at 93.
[51] *Ibid*.
[52] *Ibid* at 94.
[53] See, esp., *Ibid* at 94–100.
[54] *Ibid* at 96. The assumption, here, would seem to be that rights are self-interpreting and, indeed, self-applying. That is not an assumption that the originalists discussed below would share, nor is it one that is intuitively plausible or theoretically satisfying.
[55] *Supra* note 25.
[56] Weinrib, *supra* note 44 at 105.
[57] 1985 CanLII 10 (SCC), [1985] 2 SCR 350; cited in *Ibid* at 89.

discussions of purposive interpretation make no reference to the ideal of constitutional coherence and exhibit no awareness of how earlier cases expounded it,"[58] Weinrib remarks with reference to *Quebec (Attorney General) v 9147-0732 Québec Inc*[59] and *Toronto (City) v Ontario (Attorney General)*,[60] it remains the case that the Supreme Court "retains a commitment to the term purposive interpretation."[61] Implicit in Weinrib's argument is a certain hope that, by lending this approach greater theoretical certainty, the Supreme Court's commitment to that interpretive approach can become more than surficial.

Vanessa MacDonnell's recent scholarship on the "enduring wisdom" that the purposive approach represents strikes a similarly optimistic tenor.[62] The approach itself "fits well with the Constitution [Canadians] have," MacDonnell reminds her readers: "a constitution which is a hybrid of law and politics, of written and nonwritten elements, and of pragmatic and normative demands."[63] The Supreme Court's early *Charter* jurisprudence, reflected in *Southam*[64] and *Big M*,[65] "emphasized a right's purpose," with the *BC Motor Vehicle Reference* imposing limits on the courts' appeals to constitutional history.[66] This established "the general approach to interpretation," one in which inquiries into the minds of the *Charter*'s drafters played a restricted role.[67]

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[58] *Ibid* at 91.
[59] 2020 SCC 32 ["*Québec Inc*"].
[60] 2021 SCC 34 ["*Toronto*"].
[61] Weinrib, *supra* note 44 at 91.
[62] See Vanessa MacDonnell, "Enduring Wisdom: The Purposive Approach to Charter Interpretation" in Howard Kislowicz, Richard J Moon & Kerri Anne Froc, eds, *Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982* (Vancouver: University of British Columbia Press, 2024) 369.
[63] *Ibid* at 370.
[64] *Supra* note 31.
[65] *Supra* note 30.
[66] MacDonell, *supra* note 62 at 373.
[67] *Ibid* at 374.

However, it is one that, MacDonnell recognizes, has seemingly given way in recent years to "a more text- and history-forward version of the purposive approach."[68] In *Québec Inc*[69] and *Toronto*,[70] decided in 2020 and 2021, respectively, MacDonnell sees an approach to the constitutional text that represents "a shift in the general approach to *Charter* interpretation:"[71]

> In *Québec Inc*, the majority emphasized the "primacy of the text" but was still careful to connect its analysis to an existing line of cases stating that the principled approach must begin with the text. In *Toronto v Ontario*, the Court went further. It inverted the key doctrinal statements in *Big M Drug Mart* in a way that significantly narrows the scope of individual rights. Rather than stating that the *Charter* should be interpreted in a large and liberal manner but not overshoot the mark, the majority said the opposite: that interpretations of *Charter* rights should not overshoot the mark, while acknowledging that freedom of expression has been interpreted broadly. In other words, the majority treated a statement that was once understood as a limit on an otherwise generous interpretation of rights – "don't overshoot the mark" – as the governing principle.[72]

Similarly, in *R v Stillman*,[73] MacDonnell finds that the Supreme Court majority emphasized text and history while de-emphasizing other elements of the purposive approach.[74] This and other then-recent decisions, such as *Ontario (Attorney General) v G*,[75] suggest to MacDonnell that the Court had lately adopted "some of the hallmarks of originalist reasoning: significant reliance on text, an emphasis on 'framers' intent,' examination of what the framers might have done but chose not to do, and characterization of the Constitution as a bargain or compact."[76]

It is that shift that MacDonnell seeks to rebut, and the classical emphases of purposive interpretation that she seeks to defend. Reducing constitutional interpretation to the explication and description of the *Charter*'s text and history risks turning this corpus into an "ossified"

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[68] *Ibid* at 375.
[69] *Supra* note 59.
[70] *Supra* note 60.
[71] MacDonnell, *supra* note 62 at 377.
[72] *Ibid*.
[73] 2019 SCC 40 ["*Stillman*"].
[74] MacDonnell, *supra* note 62 at 380.
[75] 2020 SCC 38.
[76] MacDonnell, *supra* note 62 at 382.

collection of guarantees, not unlike the anemic *Canadian Bill of Rights*[77] that predated it.[78] Also significant, to MacDonnell's mind, is the fact that "the *Charter* is not unidimensional. It is not just text, or just historic comprise, or just values. It is not just law or just politics, wholly written or wholly unwritten. It is all of these things at once."[79] Overly textualist or historicist approaches "strip away part of what makes the *Charter* what it is,"[80] forcing it onto a kind of procrustean bed where much is lost at questionable gain. Indeed, the Court's apparent turn towards textualism and historicism in the cases MacDonnell discusses reflected a change in perspective, away from large and generous efforts to protect rights at common law and towards restrictive efforts to delineate the outer bounds of constitutional guarantees in order to limit their scope.[81]

MacDonnell's anxiety about the future of *Charter* protections is one that Weinrib shares in his own way. The spirited defense that each scholar offers of the Supreme Court's classic interpretive emphases in the post-*Charter* era is perhaps best understood as an attempt to course correct Canada's court of last resort in the light of at-the-time-recent judicial developments, elaborated upon more fully below, that seemed to strike out in an originalist direction. It is certainly also a direct effort to rebut the line of scholarly argumentation that seemed to underlie those developments, namely, the efforts by certain Canadian originalists to re-narrate the conventional story presented above in an effort to make Canadian jurisprudence more hospitable to originalist interpretive priorities. It is to this revisionist doctrinal analysis that I will turn shortly.

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[77] SC 1960, c 44.
[78] MacDonnell, *supra* note 62 at 383.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid* at 383–384.

Recent Supreme Court caselaw suggests that purposivism is less under threat than Weinrib and MacDonell imagined. Indeed, the Court has found as recently as the 2024 decision of *Canada (Attorney General) v Power* that "the proper approach to *Charter* interpretation" is to afford its guarantees the "generous and expansive interpretation" described in *Big M* and *Southam*,[82] and to do so in the light of "the constitutional principles" that underlie its textual wording.[83] While in the 2025 decision of *John Howard Society of Saskatchewan v Saskatchewan (Attorney General)* the Supreme Court accepted a line of cases on the interpretation of the *Charter*'s section 11 rights that "rejected formalistic interpretations that seek to preserve an inflexible distinction between the sentence and conditions of imprisonment. Instead, this Court has adopted a purposive method of constitutional interpretation that gives effective protection to the underlying interests that the *Charter* right at issue is intended to secure."[84]

The Court's commitment to living-tree purposivism has continued, in other words, through to the present day. But it is a commitment that appears, in many respects, to be surficial rather than deep. Even the defenses of living-tree purposivism offered of late by authoritative speakers in Canada's legal academy have seemingly been spurred by the feeling that the Court's prevailing interpretive orthodoxy is under threat, rather than by any abiding affection for purposivism as a theory or a method. That threat is constitutional originalism, which has developed against the purposive backdrop just described even as purposivism has developed in opposition to originalism's claims. It is to the interpretive tenets of this emergent approach that I now turn in earnest.

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[82] 2024 SCC 26 ["*Power*"] at para 26.

[83] *Ibid* at para 27, citing *Reference re Senate Reform*, 2014 SCC 32 at para 26.

[84] 2025 SCC 6 ["*John Howard*"] at para 47; citing *Canada (Attorney General) v Whaling*, 2014 SCC 20, among other decisions.

B. Retelling the Story of Originalism in Canada

In recent years, the conventional constitutional law story has come under attack from a select group of scholars who claim that originalism is, in fact, alive and well in the jurisprudence of Canada's highest court—persistent judicial protestations to the contrary notwithstanding. Bradley Miller, since 2015 a justice of the Court of Appeal for Ontario (and before that a professor of law and then a justice of the Ontario Superior Court of Justice), laid the groundwork for this retelling of Canada's constitutional story with his 2009 article "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada."[85] There, Miller set out to define the contours of "living tree constitutionalism" and assess the degree to which it is, in fact, as incompatible with constitutional originalism as its proponents insist.

"The symbol gives rise to thought," the great twentieth-century philosopher Paul Ricoeur taught us.[86] And this is true, Miller insists, with respect to the commitments that make up modern Canadian constitutionalism: jurists have allowed the metaphor of the Constitution as a "living tree" to overdetermine their constitutional reasoning. In particular, Miller finds, living tree constitutionalism inclines proponents towards (a) "progressive interpretation;" (b) "purposive methodology;" (c) a rejection of "original intent" and the "meaning of the framers" as valid reference points in constitutional interpretation; and (d) "the presence of other constraints on judicial interpretation."[87]

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[85] "Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada" (2009) 22:2 Canadian Journal of Law and Jurisprudence 331–354. Miller was not the first to take aim in the scholarly literature at living-tree purposivism. Three years earlier, Grant Huscroft published an article attacking this approach for, *inter alia*, permitting "fundamental change to intended meaning," preventing judges from closing the door to "fundamental interpretive change," and increasing the amount of uncertainty within the constitutional system. See Grant Huscroft, "The Trouble with Living Tree Interpretation" (2006) 25:1 University of Queensland Law Journal 3–24 at 15–19. Nonetheless, Miller is notable for being at the vanguard of the effort to re-narrate the story of Canadian constitutional law along originalist lines.

[86] See *The Symbolism of Evil*, translated by Emerson Buchanan (Boston: Beacon, 1967) at 247–257.

[87] Miller, "Beguiled by Metaphors", *supra* note 85 at 333.

Miller strikes a pedagogical tone in discussing these four interpretive commitments. "The Canadian constitutional academy has, for the most part, denounced originalism without engaging with (or even acknowledging) originalist scholarship since the mid-1980s," he writes at the beginning of the article.[88] His analysis is thus meant as a corrective intervention into contemporary constitutional discourse and an attempt to show the compatibility of more recent originalist thinking with Supreme Court jurisprudence. The results "surprise" him.[89] He finds, for example, that the "New Originalists" operating in the United States at the time—scholars like Jack Balkin, Randy Barnett, Lawrence Solum, and Keith Whittington—reject many of the same tenets of the old originalism that living tree constitutionalists do: chiefly, that "the original intentions of the framers can resolve the meaning of the constitutional text."[90]

Indeed, in elaborating upon the four central commitments of living tree constitutionalism, Miller finds the Supreme Court's jurisprudence to be rather more compatible with recent originalist scholarship than is usually believed.

Take the *Persons* case.[91] In the usual telling, it stands for the Privy Council's adoption of progressive interpretation over and against the Supreme Court's originalism.[92] But this framing has remarkably little to say, Miller finds, about what progressive interpretation actually entails as an approach to constitutional meaning making.[93] Does it imply a commitment on the part of the interpreter to the evolution of legal rules, or to the evolution of the Constitution's semantic content?[94]

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[88] *Ibid* at 331.
[89] e.g., *ibid* at 343.
[90] *Ibid*.
[91] *Supra* note 22.
[92] This usual telling has been the subject of a spirited defense by Peter C Oliver, "Enduring Metaphors: The Persons Case and the Living Tree" (2022) 48:1 Queen's Law Journal 44–82. That article is a direct rebuttal to Miller's work, including in Miller, "Beguiled by Metaphors", *supra* note 85.
[93] Miller, "Beguiled by Metaphors", *supra* note 85 at 334–336.
[94] *Ibid* at 336.

Referencing the Supreme Court's division of powers jurisprudence, Miller finds that progressive interpretation implies a commitment to changes with respect to legal rules. He has two sorts of changes in view here. The first, "social" changes, are those "changes in the common life of a community that, whatever their cause, require some sort of government response (perhaps co-ordination, perhaps prohibition)." Crucially, Canadian history discloses social changes that were unforeseeable to the Constitution's framers, went unaccounted for in the Constitution's wording, and have since required jurisdictional adjudication by the Supreme Court.[95] The introduction of flight and the emergence of an aviation industry is one such change.[96] Originalists have "no problem" with courts filling in the gaps, as it were, of the constitutional text in order to account for these sorts of developments.[97] The second, "moral" changes, are harder to define, but entail some sort of evolution in popular ethical judgment over time.[98] These, too, need pose little problem for the originalist who could well accept that "the Canadian Charter instructs its interpreters to construct legal rules from essentially contested concepts such as equality, principles of fundamental justice, etc., and that current day interpreters are not bound by the imperfect grasp of these principles at any previous point in time."[99] But this last conclusion would require a more textured engagement with originalist theory than Canadian judicial commentators are yet in a position to provide.

The purposive approach to constitutional interpretation, too, is compatible with the tenets of newer forms of originalism. As articulated in *Big M*,[100] this approach is one that indexes the

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[95] *Ibid* at 337.
[96] See *Johannesson v. Municipality of West St. Paul*, 1951 CanLII 55 (SCC), [1952] 1 SCR 292.
[97] Miller, "Beguiled by Metaphors", *supra* note 85 at 338.
[98] *Ibid*.
[99] *Ibid* at 339.
[100] *Supra* note 30.

meaning of constitutional phrases to their teleology.[101] But, importantly for Miller, that teleological content is not widely understood to be determined by the intentions of the Constitution's framers or drafters. Rather,

> In place of the framers' purposes, the Court employs the fiction that the *Charter* is an organic creature—a "living tree"—that has *its own* purpose which is neither the framers' nor the Courts', nor any identifiable person's or group's. The "purpose" of the *Charter* is, in reality, a judicial construct, the product of an interpretation of the *Charter*'s abstract language.[102]

Methodologically, purposive interpretation is frequently reduced to the proposition, derived from the language used in *Big M*,[103] that *Charter* rights ought to be given the widest and most generous description by the courts.[104] But in point of fact, Miller insists, the purposive interpretation envisioned in *Big M* is rather more expansive,[105] insisting that "the interpreter is to be guided by *fidelity to the text* (read as a whole and not in isolation), is to consider the whole of the *historical context* of the right or freedom in question, and is to consider appropriate limits suggested by the *linguistic*, *philosophical*, *and historical contexts* (including the past and present commitments and policies of the state)."[106] Miller is not prepared to reject this approach wholesale; rather, he is interested in emphasizing the degree to which it is already compatible with newer forms of originalist thinking.

In looking to the different aspects of constitutional meaning emphasized in *Big M*, Miller observes, living-tree constitutionalism envisions some role for the intentions of the Constitution's framers, albeit a limited one.[107] Indeed, he finds that "the orthodox Canadian view is that while

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[101] Miller, "Beguiled by Metaphors", *supra* note 85 at 339–340.
[102] *Ibid* at 340.
[103] *Supra* note 30.
[104] Miller, "Beguiled by Metaphors," *supra* note 73 at 341.
[105] See, especially, *Big M*, *supra* note 30 at 344.
[106] Miller, "Beguiled by Metaphors", *supra* note 85 at 341.
[107] *Ibid* at 342.

original intentions or understandings may be relevant to interpretation, the judge may decide that they have little or no weight. What they cannot do is *bind*."[108] This last point is one that Miller himself rejects (he believes original meanings can and should bind), but it is important for his retelling of the constitutional-law story all the same. In the *BC Motor Vehicle Reference*,[109] for example, the Supreme Court majority found that the intentions of the *Charter*'s framers ought not to be ignored in judicial reasoning; however, they should be afforded "*minimal* weight in interpreting the *Charter*."[110] Minimal weight amounts to some, rather than no, weight, Miller reminds his readers;[111] and, thus, the Supreme Court was already conceding some place for originalist analysis as early as this decision.

Miller recognizes, of course, that in many cases the Supreme Court makes no mention of framers' intentions, whether because the language of the constitutional provision being interpreted implies that judges themselves are to settle its meaning or because of judicial oversight.[112] But where framers' intentions do factor into the Court's decision-making, Miller finds there to be a decidedly utilitarian appeal to this originalist move. When faced with the need to overturn established precedent, Miller thus argues with reference to *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*,[113] the Court appeals to the original intentions that underlie a given constitutional passage in order to "soften the apparent threat to the ideal of the rule of law that is posed by overturning a comparatively recent

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[108] *Ibid* at 343.
[109] *Supra* note 25.
[110] Miller, "Beguiled by Metaphors", *supra* note 85 at 344.
[111] *Ibid*.
[112] *Ibid*.
[113] 2007 SCC 27.

precedent."[114] This, too, speaks to the compatibility of originalist thinking with the constitutional interpretation actually practiced by the Supreme Court.

Miller's purpose, in insisting on this final point, is to move Canadian legal discourse away from unhelpful metaphorical contrasts between "frozen concepts" and "living tree" reasoning; and to allow it to benefit from debates over constitutional interpretation taking place in the United States and Australia.[115] Miller recognizes that living tree constitutionalism is the legal "orthodoxy" for the Supreme Court and its commentators, as already noted. But focus on the tenets of that orthodoxy unhelpfully precludes a more nuanced engagement with the diversity of reading practices that prevails amongst Canada's constitutional interpreters. And, thus, Miller intends for his study to function as a prolegomenon to further assessment of the degree to which Supreme Court jurisprudence harmonizes with recent originalist theory.

In more recent years, Léonid Sirota and Benjamin Oliphant, among others,[116] have taken up that project with vigour. In a series of articles, the two have documented the originalist elements of Supreme Court and Privy Council decisions with an eye to demonstrating "that partly or even wholly originalist decisions are part and parcel of our constitutional law, and that they are too numerous to be regarded as aberrations or wished away."[117]

Sirota and Oliphant thus note, with reference to division of powers case law, that the Privy Council was resorting to originalist interpretive moves even after the *Persons Case* supposedly rejected that approach. In the *Aeronautics Reference*,[118] for example, Lord Sankey

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[114] Miller, "Beguiled by Metaphors", *supra* note 85 at 347.

[115] *Ibid* at 354.

[116] See also, e.g., WJ Waluchow, "The Living Tree" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 891.

[117] Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50 University of British Columbia Law Review 505–576 at 510.

[118] [1932] AC 54, [1932] 1 DLR 58 (UK JCPC).

himself insisted, Sirota and Oliphant tell us, that "the Constitution should not be made to change from its original content."[119] While in the subsequently decided *Labour Conventions Reference*,[120] the Privy Council placed the interpretive accent on Canada's "original structure" as set forth in the country's founding documents, not on that structure's "capacity for growth."[121]

In more recent jurisprudence, the Supreme Court has "not by and large purported to change the core definitions of the terms of sections 91 and 92 of the *Constitution Act, 1867*;"[122] but has, rather, decided cases on the basis of reconstructed "legislative intent," as determined on an originalist basis through "an examination of the text, context, and historical background or understanding, while paying little attention to the subjective intent of the framers or their original intended applications."[123] In the *Securities Reference*,[124] for instance, the Supreme Court praised the Privy Council's *Parsons* case as "[t]he first and still a leading statement of the scope of the trade and commerce power,"[125] which fact is notable because the Privy Council reached its decision "primarily with reference to the words' original meaning [in the *British North America Act* being interpreted] as indicated by their use in other related documents and as part of a contextual reading of the (then relatively young) statute."[126]

Similar observations can be made for *Charter* jurisprudence, Sirota and Oliphant inform us. The *BC Motor Vehicle Reference* stands, in the usual telling noted already, for the proposition that the intentions of the *Charter*'s framers are not determinative of the meaning of the *Charter*'s provisions; a "purposive" interpretive approach must be taken, instead. Yet "in concluding that

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[119] Sirota & Oliphant, *supra* note 117 at 513.
[120] [1937] AC 326, [1937] 1 DLR 673 (UK JCPC).
[121] Sirota & Oliphant, *supra* note 117 at 514.
[122] *Ibid* at 515.
[123] *Ibid*.
[124] *Reference re Securities Act,* 2011 SCC 66 ("*Securities Reference*").
[125] Ibid at para 75; citing *Citizens Insurance Co of Canada v Parsons*, (1881) 7 App Cas 96, [1881-85] All ER Rep 1179 ("*Parsons*").
[126] Sirota & Oliphant, *supra* note 117 at 516.

the term 'principles of fundamental justice' has a broader, more substantive meaning than that intended or anticipated by the framers, Lamer J relied primarily on both the text and context of section 7, which are the standard fare of New Originalism and generally to be preferred over intentions not manifested in the text itself."[127] That decision might well be incompatible with early versions of originalist thinking, obsessed as they were with divining the framers' subjective beliefs; but originalists themselves have moved on to focus, instead, on the "original public meaning" of the constitutional text.[128] The upshot is that "there is no necessary incompatibility between (most) modern versions of originalism and the notion that the constitutional applications may change and must be sensibly applied to new realities often unimagined by its framers."[129] It is thus incorrect to state that the Supreme Court rejected originalism in deciding the *BC Motor Vehicle Reference* when the version of originalism that the justices on Canada's highest court disavowed in 1985 is the same one most contemporary originalists would reject, too.[130]

Something similar can be said, Sirota tells us, about other decisions pertaining to *Charter* interpretation, notably the so-called "purposivist trilogy" of *Stillman*,[131] *R v Poulin*,[132] and *Québec Inc*.[133] The majorities in each of these decisions insisted on invoking "the purposes of constitutional rights to choose among conflicting readings of constitutional provisions, or supplement them where necessary, or even to give purposes direct effect regardless of textual

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[127] Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected Originalism?" (2016) 42 Queen's Law Journal 107–164 at 138. See, also, Léonid Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation" (2021) 47:1 Queen's Law Journal 78–111 at 107.

[128] Oliphant & Sirota, *supra* note 127 at 158–159.

[129] *Ibid* at 158.

[130] Indeed, as noted in my Introduction, it is the newer versions of originalism that are in view in the present project, too.

[131] *Supra* note 73.

[132] 2019 SCC 47 ["*Poulin*"].

[133] *Supra* note 59.

detail."[134] Yet the majority reasons are "purposivist in name rather than in fact."[135] Not only do they fail to deploy the "living tree" metaphor, but more substantively, they all "accept that constitutional text is a dominant consideration in interpretation, and that pre-entrenchment materials are pre-eminently, if not exclusively, relevant in ascertaining its meaning."[136] Indeed, the *Stillman* majority's reasons themselves are "the most obviously originalist of the three," in that they rest their analysis on the meaning the term "military law" had in case law, statements by officials, and statutory regimes from the period immediately preceding the *Charter*'s coming into force; and not at all on what that phrase has come to mean since 1982.[137] It is the arguments of the dissent, by contrast, that looked to historical evidence from the post-1982 period to track the term's semantic evolution and thereby to "read[] into the phrase 'military law' a limitation that is, in its view, desirable, but has no obvious foundation in the constitutional text."[138]

Politically, Sirota and Oliphant's project reflects their own conservatism with respect to the development and application of constitutional rights. There is a sense in which all originalism is necessarily conservative to the extent that it pines for past meanings of the constitutional text and prioritizes these over and against progressive ones that evolve with the larger social context. Sirota and Oliphant take exception to this popular equation between constitutional originalism and conservative politics.[139] Yet, the conservatism of their own approach is evident in their persistent concern to avoid expanding the scope of constitutional protections in the absence of formal amendments to the constitutional text,[140] which as the two would know are especially

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[134] Sirota, *supra* note 127 at 100.
[135] *Ibid* at 102.
[136] *Ibid*.
[137] *Ibid* at 100.
[138] *Ibid*.
[139] See, e.g., Sirota & Oliphant, *supra* note 117 at 561–562.
[140] Oliphant & Sirota, *supra* note 127 at 156.

difficult to enact under Canada's constitutional regime.[141] It is evident, too, in their stated worry that to allow judges to effect such an expansion would be to politicize the courts by permitting judges "to enact their preferences into fundamental law,"[142] as if the desire for narrowly circumscribed constitutional rights could not also be a matter of preference and choice on the part of a judiciary that has traditionally represented the socially dominant classes in Canadian society.[143]

Methodologically, Sirota and Oliphant's project is an historical exercise in retelling Canada's constitutional story. There is, indeed, a sense in which the Court's surficial purposivism, in their analysis, comes to produce originalism in uniquely Canadian ways; by forcing originalists to masquerade as purposivists in order to make their positions palatable to the judiciary, it allows originalists to ground their arguments in purposivist case law and thereby synergize the two interpretive approaches. That is to say: Hybridizations of purposivism and originalism are the norm in Canadian legal reasoning. Sirota thus opines, with reference to the reasons in the purposivist trilogy, that "mislabeling an originalist or textualist interpretation as purposivist makes it possible for the adherents of an entirely different version of purposivism to invoke cases that contradict their views as support for them."[144] In other words, because originalism remains a "dirty word" in Canadian legal discourse, the justices on Canada's Supreme Court must describe their originalist interpretive moves as purposivist ones in order to ensure their decisions have surficial compliance with prevailing interpretive priorities. The

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[141] So, e.g., Robert Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alberta Law Review 85–113.

[142] Sirota & Oliphant, *supra* note 117 at 565.

[143] On the sociopolitical makeup of the judiciary, see, e.g., Howard Kislowicz, Richard J Moon & Kerri Anne Froc, "Introduction: The Surprising Constitution" in Howard Kislowicz, Richard J Moon & Kerri Anne Froc, eds, *Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982* (Vancouver: University of British Columbia Press, 2024) 3 at 4.

[144] Sirota, *supra* note 127 at 106.

extension of this claim is that there is a debate between originalism and purposivism lurking beneath the surface of Canadian judicial decision making, which Sirota and Oliphant understand themselves to have discovered, and that originalism is in fact "winning." "It would be better," Sirota thus comments in a revealing passage, "for the sake of transparency and clarity of thought of subsequent judges as well as commentators if judges inclined to textualism and originalism could own their interpretive choices."[145]

In describing the originalist taboo and its failure to suppress originalist thought with any real force, Sirota and Oliphant strike a theological tone. Because of rulings like the *Persons Case*[146] and the *BC Motor Vehicle Reference*,[147] they write, "the notion that the Canadian Constitution evolves organically has become an article of faith in our constitutional theology, with the perceived effect that there is no room for the originalist sin committed by many American constitutional lawyers."[148] That perception is not rooted in fact, the two go on to insist, because they "believe that originalism in fact plays an important, and perhaps ineradicable, role in how we interpret the Constitution."[149]

It is among my contentions in this thesis that these passages unwittingly reveal much about the ways in which originalists in Canada conceive of their interpretive projects or are otherwise motivated to develop those projects, to wit, as fundamentally matters of belief and of engagement with the sacred. They are trying to shore up the legitimacy of the Canadian constitutional order in the face of enduring doubts about the Court's ability to do so under conditions of diminished belief in popular democratic sovereignty; and in so doing, I will

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[145] *Ibid*.
[146] *Supra* note 22.
[147] *Supra* note 25.
[148] Oliphant & Sirota, *supra* note 127 at 109.
[149] *Ibid*.

suggest, they inscribe a kind of transcendent presence into the constitutional text, what I will later refer to in a political-theological register as their own sovereign self.

After all, the proverbial "so what?" question looms large over the originalist undertaking. Originalism might, indeed, be "already there" in Supreme Court of Canada jurisprudence: But why should anyone care? My own purpose, in this project, is to explore the stakes for Canada's new originalists in arguing for originalism as the correct label for the interpretive theory and method with which the Supreme Court puzzles through questions of constitutional law. And to do that, it will be helpful here to introduce Kerri Froc as another originalist interlocutor.

C. Originalism's Feminist Permutations

In a series of articles published over the last decade-and-a-half, Froc has endeavored to reclaim originalism for legal feminism.

"What would a Canadian originalism look like?," Froc thus asks in one paper.[150] Her answer: A Canadian originalism would embrace the revisions to originalist theory that have obtained with the shift in interpretive emphasis from framers' intentions to the original public meaning of constitutional texts. This new-originalist "methodology seeks…the semantic meaning of the words; how framers, ratifiers, or anyone else thought the text would be applied in favour of particular outcomes is not authoritative."[151] And because, under the new originalism, the goal is to exhaust constitutional interpretation before engaging in constitutional construction by first ascertaining the original public meaning of the constitutional text and only then to build out the applications of that meaning to truly novel situations, "the raison d'être of original

[150] Kerri Froc, "Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment"" (2015) 19:2 Review of Constitutional Studies 237–279 at 266–273.

[151] *Ibid* at 271.

meaning is no longer constraint per se; rather, it is to channel judicial discretion in a way that conforms to society's legislative and constitutional commitments, as democratically expressed."[152] In other words: Where something within constitutional law discourse is absent—chiefly the body of the sovereign, conceived here in democratic terms as the Canadian people—originalism effects its presence through practices of textual interpretation, a belief common to all the originalists surveyed here to which I shall return in detail later in this thesis.

More provocatively, perhaps, Froc diverges from the likes of Miller, Sirota, and Oliphant by going on to ask, "What would a progressive, feminist originalism look like"?[153] Originalism poses its own "risk" of conservative judicial interpretation, Froc acknowledges.[154] But the relationship between originalism and judicial conservatism is a contingent one; it need not obtain and, indeed, might not obtain at all.

Froc lays out four arguments for why feminists, in particular, ought to embrace originalism with respect to at least some of the *Charter*'s provisions, in particular section 28, which guarantees the equal application of the *Charter* to men and women.[155]

The first is that, when it comes to section 28 of the *Charter* at least, it is possible to "ascertain the original meaning of [the section's] terms as an empirical matter with reliable evidence;" and that original meaning supports a feminist interpretation of the passage.[156] Feminist actors were influential in pressing for the inclusion of this section in the *Charter*'s final

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[152] *Ibid* at 273.
[153] *Ibid*.
[154] *Ibid*.
[155] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) ["the *Charter*"] at s. 28.
[156] Froc, "Is Originalism Bad for Women?," *supra* note 150 at 274–275.

wording, and publicly articulated their "semantic intention" for section 28 "to strengthen the *Charter* for women."[157]

The second reason is that an originalist reading of section 28 would largely avoid conflict with existing judicial precedent, given the dearth of case law pertaining to the passage relative to the abundance of case law interpreting other of the *Charter*'s provisions.[158] Prior to 2015, when Froc laid out this argument, the section had been applied but largely not interpreted by the courts. Given the Supreme Court's documented desire to give effect to the intention of the parties who negotiated the *Charter*'s provisions, for instance, in the 1985 *Reference re Bill 30*,[159] it would in fact be consistent with that Court's decision-making to focus on the public intentions of the feminist framers of section 28.

Third, the documented intention of those framers was for the courts to handle section 28 in an originalist fashion. Froc notes, in this regard, that "there was no evident intent to leave the interpretation of gender equality to the caprices of 'judicial originality' – quite the opposite. The purpose behind the creation of section 28 was to channel judicial discretion in a particular way: to prevent judges from going back to narrow (patriarchal) conceptions of rights under the *Canadian Bill of Rights*, thus perpetuating women's continued disparate access."[160]

Fourth and finally, giving effect to those originalist intentions operationalizes the democratic process that underlay the *Charter*'s formulation, and, more specifically, the drafting of section 28. There was significant and well-documented public involvement in the section's drafting, and a judicial opinion overturning the public's intentions for section 28 would represent

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[157] *Ibid* at 275.
[158] *Ibid*.
[159] *Ibid*, citing *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] 1 SCR 1148 at 1173-74.
[160] *Ibid* at 276.

a profound instance of judicial "nullification" of a democratically enacted constitutional instrument.[161]

In a subsequent article, Froc has continued to develop her feminist case for adopting originalist interpretive methods with respect to the *Charter*. The original public meaning of section 15 ought to determine judicial interpretations of this passage, too, Froc insists. In crafting this argument, Froc outlines what she dubs "hybrid originalism" or "new purposivism," a theory of constitutional meaning-making that "permits both fidelity to the original constitutional plan, created through and with the extraordinary contributions of Canadians and with which Canadians continue to identify, and also permits the *Charter* to be effective to combat oppression into the future."[162]

Methodologically, hybrid originalism begins with the original semantic meaning of the constitutional passage under analysis, and then proceeds to derive "underlying principles consistent with this meaning."[163] The goal of this analysis is to give originalist life to the purposivism that the Supreme Court has consistently endorsed with respect to *Charter* interpretation. And Froc's stated goal in implementing "hybrid originalism" is to refute the idea that originalist interpretations of the *Charter* necessarily result in "frozen rights."[164]

Froc's case study here is section 15, which evidences two "underlying principles."

The first is a "structural" one dictating that "equality rights are not subject to internal limitations."[165] By this Froc means that the constitutional text does not, itself, apply any

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[161] *Ibid* at 276–277.

[162] Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 National Journal of Constitutional Law 35–88 at 45. The inspiration for Froc's theory is Balkin, *supra* note 5.

[163] Froc, "A Prayer for Original Meaning", *supra* note 162 at 46.

[164] *Ibid*.

[165] *Ibid* at 73.

limitations to its guarantee of equality, unlike the way it permits infringements of the section 7 right to "life, liberty and security of the person," say, when those infringements are in "accordance with the principles of fundamental justice."[166] The absence of an internal limitation clause in the final wording of section 15 is in contrast to earlier drafts of this passage that permitted a "distinction or restriction provided by law that is fair and reasonable having regard to the object of the law."[167] It is notable, as well, given the public pressure certain groups, such as the National Association of Women and the Law, placed on the *Charter*'s Parliamentary framers to adopt such an internal limitation; the fact that those framers did not do so can be persuasively read as a conscious rejection of structural limitations on the *Charter*'s main equality provision.[168] The upshot is that when the Supreme Court tries to "read in" structural limitations on that provision, as it did in setting out the test for determining whether a piece of legislation violates a claimant's human dignity in *Law v Canada*,[169] its interpretation flies in the face of the very principles that underlie section 15 as a result of its drafting.[170]

The second principle Froc identifies is that section 15's twin guarantees of "equality before and under the law" and the "equal protection and equal benefit of the law" were included "to ensure equality rights guaranteed 'equality in the substance of the law' and went beyond notions of equal treatment in administration of the law and the distribution of penalties."[171] This fell short of including substantive equality, as presently understood, within the scope of the *Charter*'s protections; but it certainly, in Froc's view, meant affording section 15 a broad reading

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[166] So *Charter*, *supra* note 155 at s 7.
[167] Documented in Froc, "A Prayer for Original Meaning," *supra* note 162 at 73.
[168] Froc, "A Prayer for Original Meaning", *supra* note 162 at 74–75.
[169] *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497.
[170] Froc, "A Prayer for Original Meaning", *supra* note 162 at 76–77.
[171] *Ibid* at 78.

that goes beyond narrow, legalistic, and judicially imposed interpretations of equality that run contrary to public perceptions of what is fair.[172]

Applying these two principles to the interpretation of section 15, Froc finds that the historical record supports the view that "anti-subordination or equality of power" is "the *Charter*'s underlying principle, one which includes dignity injuries but is not limited to them."[173] Thus, the doctrine surrounding section 15 ought to reject membership in an historically disadvantaged group as a necessary precondition for successfully obtaining the benefit of the provision's equality guarantee.[174] Section 15 doctrine ought, indeed, to take aim at with an eye to destabilizing the ways in which the law itself perpetuates hierarchy of all kinds, including within and in relation to the members of historically dominant groups.[175]

For Froc, as for Miller in his own way, originalism has a decidedly utilitarian attraction: it is desirable because it is capable of advancing her feminist political project. Thus her arguments in favour of adopting what she calls "new purposivism" hinge substantively on the perceived degree to which originalist methods and sensibilities can incline judges towards interpretations of *Charter* sections 15 and 28 that promote gender equality. Originalism carries no substantive attraction in its own right: were it not suited to Froc's feminist cause, it would seem to have no independent appeal. It is rather because originalist interpretative practices facilitate a connection between the disputes of Froc's present and the political projects of the pre-*Charter* feminists whose interests Froc surveys that originalism is attractive to her.

In this last respect, Froc's analysis affords us substantial insight into the larger originalist undertaking described here: her work makes evident what is largely (but, as we shall see shortly,

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[172] *Ibid* at 78–79.
[173] *Ibid* at 82.
[174] *Ibid* at 84–88.
[175] See, e.g., *ibid* at 88.

not entirely) implicit in the scholarship of Miller, Sirota, and Oliphant, namely, that originalism is desirable because it allows present constitutional interpreters to access a kind of legal presence that is figured as existing at the synchronic intersection of past and present. For all these scholars, the presence in question is that of the interpreter's own self, figured as the constitutional sovereign—or so I will argue in the remainder of this thesis.

D. "The Gravitational Force of Originalism"

I have already hinted at the structure of desire that I see animating the contemporary Canadian originalists just surveyed. It remains, however, to elaborate upon that structure more fully in order to set the stage for the turn to the more overtly theological literatures in the next chapter of this thesis.

American legal scholar Randy Barnett, in 2013, wrote of the "gravitational force" originalism seemed to exert on the decision-making of the Supreme Court of the United States: originalism, on his reading, factored into even those then-recent judgments that made no explicit reference to originalist premises or methods.[176] In the Canadian context, originalism exerts a gravitational force in a rather different way: it has its own attraction to legal commentators trying to make sense of the avowed living-tree purposivism of this country's Supreme Court. The pressing question, to which I have been gesturing throughout, is, why?

The pragmatic and even the conservative-political appeal of originalism are not quite enough to explain its attractiveness to the scholars discussed here. After all, the Supreme Court's constitutional jurisprudence is more easily explained as an evolving effort to develop and apply living-tree purposivism than as the Court's inadvertent effort to smuggle originalist interpretive

[176] Randy E Barnett, "The Gravitational Force of Originalism" (2013) 82:2 Fordham Law Review 411–432.

principles into this country's common law. As already noted, the Supreme Court has maintained a stated commitment to the purposivist approach, perhaps since the *Persons* case and certainly since the inauguration of the *Charter* era. It would be simpler (though by no means less intellectually rigorous) to take that commitment at face value than to argue that originalist commitments lurk beneath its surface, hidden in the plain text of constitutional judgments and ready to be discovered by the discerning commentator. It would be simpler, too, as a means of advancing conservative political projects to work within the Court's purposivist framework and language rather than trying to overhaul purposivism along originalist lines, as the scholars surveyed here (with exception of Froc) are attempting to do for conservative interpretive ends.

A more satisfying answer to the question, why originalism?, is to be found, I suspect, by looking at the work originalism does for Miller, Sirota, Oliphant, and Froc with respect to other questions pertaining to the Court's and the Constitution's legitimacy in the Canadian democratic system.

Miller explicitly conceives of his revisionist doctrinal project as generative of theoretical insights within the constitutional law space. Bemoaning a certain "complacency" on the part of Canada's courts and legal commentators with respect to constitutional theory, he suggests at the outset of his project in "Beguiled by Metaphors" that "a fresh encounter with a rival tradition could provoke proponents of 'living tree' interpretation to develop a more robust version of that doctrine, either because it provokes fresh questions that require new answers, or because the challenger provides resources that can be severed and incorporated into the dominant tradition."[177] And although Miller can only gesture towards the full terms of that encounter, his

[177] Miller, "Beguiled by Metaphors", *supra* note 85 at 332.

effort to clear ground for the same has, indeed, been highly generative of scholarship both for and against the compatibility of originalism with Canadian constitutional law.

But there is a normative element to Miller's embrace of originalism, too. This is evident in a subsequent article, published in 2011, in which he elaborates more fully on his reasons for urging the courts to explicitly adopt the new originalism as a set of interpretive practices. While it does not matter, in his view, whether the judiciary labels its interpretations as originalist or as living-tree purposivist,[178] they would benefit from a more direct engagement with originalist theory in two principal ways. In the first place, they would gain "a commitment to fixed meanings;" and, in the second, "to clearly separating the two tasks of interpretation and construction."[179] Both would, in Miller's view, allow the Supreme Court, especially, to respond to the "demands currently placed on it to embrace 'interpretations' (really, constructions) of the *Charter* that are antithetical to the settlement reached under the *Charter* (specifically with respect to economic and social rights)."[180] The upshot of this would be to heighten the Court's accountability to the political processes that gave rise to the *Charter* in the first place; or, put differently, to more clearly subordinate the Court's activities subsequent to the enactment of the *Charter* to the will of the *Charter*'s prime mover, namely, the figure of the popular sovereign.

There is, for Miller, a gulf separating the Court's actual decision making on questions of constitutional interpretation from the interpretive decisions the Canadian people actually empowered the Court to make. It is necessary, he argues, for the judiciary "to confront the question of whether they have proper warrant in the Canadian constitutional order to undertake

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[178] Bradley W Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge: Cambridge University Press, 2011) at 145.

[179] *Ibid* at 145–146.

[180] *Ibid* at 146.

the constructions that they have been urged to make" in cases that ask them to go beyond the original meaning of constitutional passages.[181] Constitutional meaning ought to be fixed to the original meanings that those passages had when they were first enacted, in Miller's mind, in order to keep the Court accountable to the popular democratic sovereignty expressed in the enactment of the *Charter* and constitutional documents.[182]

So, too, for Sirota and Oliphant, the ostensible purpose in re-narrating the conventional constitutional-law story along originalist lines is nothing other than to help assuage their anxieties about the normative force and legitimacy of Supreme Court jurisprudence within the Canadian constitutional order. Sirota, for example, frames his 2021 engagement with the so-called purposivist trilogy as an effort to elucidate "ongoing disagreements" hiding beneath the surface of the apparent triumph of living-tree interpretive methods.[183] Both he and Oliphant, like Miller, share a certain "fear" as to "what degree of constitutional 'change' ushered in through a majority vote of nine jurists, however eminent, is consistent with a meaningful commitment to democratic self-governance."[184] This anxiety, expressed "on our collective behalf" as members of the Canadian democratic public, is one that originalists are "preoccupied with," they note.[185] Thus, it is one that looking to originalist scholarship can potentially resolve; "and to date, the Supreme Court of Canada has given us no reason not to."[186] As we will see in chapter three, especially, this anxiety is existential in nature and reflects deeper doubts about the legitimate role of the Court under conditions of democratic sovereignty.

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[181] *Ibid*.
[182] *Ibid*.
[183] See Sirota, *supra* note 127 at 80.
[184] Oliphant & Sirota, *supra* note 127 at 162.
[185] *Ibid* at 163.
[186] *Ibid* at 164.

Froc shares this anxiety, as already noted, albeit for feminist reasons oriented around a concern for social justice. She, too, is concerned with the judiciary's accountability to democratic processes, as these processes are reflected in the drafting and enactment of the *Charter* in particular amongst Canada's constitutional documents. That is why Froc spends so much time in her scholarship excavating the otherwise too-easily ignored contributions of feminist activists to the formulation of sections 15 and 28 of the *Charter*: those contributions matter, in her analysis, because they are the actions of the democratic prime mover that set these portions of Canada's Constitution in motion and gave those passages their political and social force. In the end, present-day adherence to the fixed meanings of the past is necessary to avoid "judicial distortion and subsequent nullification of a constitutional provision [like sections 15 and 28 of the *Charter* that were] created through extraordinary public involvement in constitution-making" and to "*enhance* the democratic legitimacy of judicial review."[187] I will explore the concern, expressed here, along with Froc's efforts to resolve it more fully in chapter three.

From the foregoing observations, however, it is possible to discern the rough contours of what makes originalism desirable to its Canadian theorists: the interpretive practices that originalism represents allow these theorists to inscribe into the constitutional text the presence of the democratic sovereignty at the heart of the Canadian constitutional order and thereby to shore up the legitimacy of constitutional decision making by the Canadian Court. Another way to put this is to say that originalism appeals because it is capable of making present what would otherwise be absent, in particular, because that absent object is figured as existing temporally in the past. As we will come to see through subsequent chapters of this thesis, all this is just a different way of asserting the theology-like character of originalism's Canadian instantiations.

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[187] Froc, "Is Originalism Bad for Women?", *supra* note 150 at 276–277.

Chapter Two:
Evangelicals' Theological Interpretation of Scripture

This chapter has the particularity of evangelical practices of interpreting the Protestant scriptures in view. It is not enough to describe theological interpretation in general, although I will gesture in this direction in places. In order to effectively analogize between constitutional originalism and evangelicalism—as opposed to, say, Christianity at large—it is necessary to draw out what makes evangelical reading practices unique, different, and tradition-specific. The burden of this chapter is to do so.

For evangelicals, I will argue, theological interpretation is both a method and a motivational structure. As a method, it looks for the correspondence between a reader's socioreligious context and the contexts described in the biblical text, collapsing the distance between past and present and thereby giving rise to what scholars have identified as evangelicalism's "primitivist" bent. As a motivational structure, theological interpretation is predicated on the belief that God is accessible in the here and now of the interpretive moment. In this latter respect, evangelical readers treat the Bible as a kind of talisman of the divine presence; summoning God, conceived as the text's ultimate author and ultimate speaking voice, through practices of reading designed to overcome the temporal gulf that separates the Bible from its present-day readers.

These two aspects of theological interpretation—as a method and as a motivational structure—centre around two foci: presence and telos. The point of reading the Bible theologically is to make God present to the reader so that that reader can participate in God's redemptive purposes. That, in the end, is a project with deep resonances in the one constitutional originalists are engaged in, as we will see in the next chapter.

This chapter proceeds as follows. In an effort to lay the groundwork for my subsequent discussion of evangelicals' theological engagement with the Protestant Bible, the first section describes scripture as a general term of reference within the Christian, and especially Protestant, tradition. Every scripture is a canon but not every canon is a scripture; and this matters because scriptural texts give rise to theological interpretations of themselves, such as I will describe in subsequent sections. As a case study on which to base subsequent analysis, I turn, in the chapter's second section, to a particular kind of theological engagement with a scripture, namely, what scholars of evangelicalism refer to as its adherents' "biblicism." This is a doctrinal commitment that gives rise, in practice, to what is known amongst scholars of evangelicalism as the tradition's "primitivism." From the doctrine and the practice, we can begin to see the method and motivational structure of evangelical theological interpretation to which I have already referred. The contours of my case study sketched out, I turn, in the third substantive section, to the question, what is theological about evangelical biblicism? In asking and beginning to answer this question, the section attempts to shed light on the larger question of what makes something theological in the first place such that, for example, legal practices might also be described as "theological."

A. Of Scripture

There is something "quasi-scriptural" about the language of "canon," as literary theorist John Guillory observes: "The concept of the canon names the traditional curriculum of literary texts by analogy to that body of writing historically characterized by an inherent logic of *closure*—the scriptural canon. The scriptural analogy is continuously present, if usually tacit, whenever

canonical revision is expressed as 'opening the canon.'"[188] This analogy operates on an historical register, asserting as a matter of fact that the literary canon came to be in a manner similar to the final form of the Christian Bible;[189] and it also operates on a discursive level, asserting "a homology between the process of *exclusion*, by which socially defined minorities are excluded from the exercise of power or from political representation, and the process of *selection*, by which certain works are designated canonical, others non canonical."[190] Thus, to invoke "the canon," in English literary studies for example, is to draw a conceptual parallel between what used to be known as "the classics" or "the standard authors" and a particular, definable, and authoritative textual corpus: the Christian Bible.

After all, the Christian Bible is a paradigmatic—indeed, perhaps the paradigmatic—instance of a canon.[191] It stands, in that religion's traditions of thought, as the ultimate expression of divine revelation,[192] this such that every other Christian theological work must necessarily accord in some way or another with its contents to be legitimate. The evangelical-Anglican theologian John Webster thus remarks, in a restatement of what I have just described, that "[a]s an act of confession and submission, the act of canonisation has a backward reference. Through

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[188] John Guillory, *Cultural Capital: The Problem of Literary Canon Formation* (Chicago: University of Chicago Press, 2023) at 6.

[189] *Ibid*.

[190] *Ibid*.

[191] Although perhaps not a canon of classic literature. See, for example, Kathryn Tanner, "Scripture as Popular Text" (1998) 14:2 Modern Theology 279–298.

[192] So, for example, C Stephen Evans, "Canonicity, Apostolicity, and Biblical Authority: Some Kierkegaardian Reflections" in Craig G Bartholomew et al, eds, *Canon and Biblical Interpretation* Scripture and Hermeneutics Series (Grand Rapids: Zondervan, 2006) 146 at 157: "In much the same way that the church's recognition of certain writings provides reason to think that God authorized those writings, the church's failure to recognize certain writings, for whatever reasons, including reasons that appear to be historically 'accidental,' provides reason to think that God did not desire those writings to be included in the authorized revelation."

it, the church affirms that all truthful speech in the church can proceed only from the prior apostolic testimony."[193]

Webster himself means his account of canonization to fit within a larger theological explication of the Bible as "Holy Scripture," of course, and that raises an important corollary issue. For Christians, the Bible is not merely one canon amongst others, akin to a *Norton Anthology* of literature, say, or to a syllabus of readings for an undergraduate course on the "Great Works." Its contents have been canonized, to be sure; but they have also been scripturalized. And the difference between the two outcomes warrants analysis and reflection.

Definitions of scripture and the scriptural abound within religious studies and, especially, the subfield of comparative religions, typically framing the two terms in relation to canon and canonization. "Scripture" describes, in one such construal of the term, a set of "texts regarded as sacred…, having authority and often collected into an accepted canon."[194] Or it is simply "the holy writings of a religion."[195] Catherine Bell describes a process of scripturalization common to Christianity, Judaism, and Islam in which

> a group that is struggling to be a community, large enough to preclude convenient ritual gatherings, produces a revelatory text; eventually the multiple versions of the text must be addressed, and a particular enclave empowered, by fixing one version as canonical. Immediately there ensue all the problems one might expect of a fixed text in fluid and historically evolving communities. The need for an interpretive apparatus was solved in different ways in these three traditions.[196]

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[193] John Webster, *Holy Scripture: A Dogmatic Sketch* (Cambridge: Cambridge University Press, 2003) Current Issues in Theology at 64.

[194] John Bowker, "Scripture" in *The Concise Oxford Dictionary of World Religions* (Oxford: Oxford University Press, 2003).

[195] "scripture" (16 July 2025), online: *Cambridge Dictionary* <https://dictionary.cambridge.org/dictionary/english/scripture>.

[196] Catherine Bell, "Scriptures--Text and Then Some" in Vincent Wimbush, ed, *Theorizing Scriptures: New Critical Orientations to a Cultural Phenomenon* (New Brunswick, NJ: Rutgers University Press, 2008) 23 at 24–25.

While Oyeronke Olajubu notes, in order to problematize with reference to, *inter alia*, Yoruba religion, the traditional scholarly definition of scripture as a "text linked to a sacred being or sacredness. It is usually written and fixed."[197]

For Webster, a scripture is a "human writing generated and used by religious communities;" while a "Holy Scripture" is "the human text which God sanctifies for the service of his communicative presence."[198] He means the latter definition to be dogmatic in character, which is to say, to be a part of a larger theoretical explication of the foundational tenets of Christian theology. Thus, Webster further intends the term "Holy Scripture" to refer "primarily to a set of texts, but importantly and secondarily to its divine origin and its use by the church;"[199] the term denotes more, but never less, than the 66 books that make up the Protestant biblical canon. As he goes on to explain, using "Holy Scripture" in a dogmatic fashion is

> on the one hand, to depict these texts in the light of their origin, function and end in divine self-communication, and, on the other hand, to make recommendations about the kinds of responses to these texts which are fitting in view of their origin, function and end. "Holy Scripture" is a shorthand term for the nature and function of the biblical writings in a set of communicative acts which stretch from God's merciful self-manifestation to the obedient hearing of the community of faith.[200]

Scripturalization, then, can be understood, in Webster's framing, as a kind of recognition by a particular Christian public of a particular text's relationship to divinity, with all that implies as to

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[197] Oyeronke Olajubu, "Signifying Scriptures from an African Perspective" in Vincent Wimbush, ed, *Theorizing Scriptures: New Critical Orientations to a Cultural Phenomenon* (New Brunswick, NJ: Rutgers University Press, 2008) 88 at 89.

[198] Webster, *supra* note 193 at 1–2.

[199] *Ibid* at 5.

[200] *Ibid* at 5. See, similarly, Brad East's account of the Christian scripture's "sacramental" function: "It is among the chief mysteries of the church's life of worship and mission. As such, Scripture is the sacrament of revelation. Its character, in turn, is more specific than its generic definition as a means of grace or a vehicle of divine presence. It bears to believers the grace *of the Word*; it is the medium, not of a mute deity, but of the *communicative* presence of the Son:" Brad East, "Is Scripture a Gift? Reflections on the Divine-Ecclesial Provision of the Canon" (2022) 13:10 religions 1–24 at 4 (emphasis original).

how the members of that public ought therefore to relate themselves to the text's contents. God speaks and the church listens, with both acts centering around a defined textual corpus.

It is not difficult to see the appeal of having such a relationship to text and deity. Not only does scripturalization accord the objects of one's literary reflection a special status amongst textual entities within the world; it also accords special status to the interpreting subjects themselves. Because those subjects uniquely recognize the divinity that inheres in the objects of their hermeneutical inquiries (i.e., they know that theirs is not simply a scripture but is, in fact, a "Holy Scripture"), they can claim a particular in-group identity as interpreters of sacred revelation. This claim gives rise, within the secular context of modern literary studies, to an analogous attempt to assert membership in similarly privileged interpretive communities predicated on a special relationship to the genius or similar quality that is understood to be present in classic texts. The point of preserving the Western canonical tradition, and of passing it on to future generations through acts of teaching, is to keep the spirit of that tradition alive.

Nonetheless, there is something special about the ways in which religionists relate to their scriptural canons. In general, and certainly within the Abrahamic traditions, scripturalization implies canonization; it is predicated on the demarcation of certain texts as vehicles of divine disclosure to the exclusion of others. But scripturalization also implies theologization: scriptural texts give rise to theological interpretations of themselves in a way that non-scriptural canons simply do not. It is helpful to know if and when a given community accords a textual corpus canonical or even scriptural status, but this is so because that knowledge allows us to draw certain inferences about how they are likely to interpret that corpus. In the Christian context, the theological interpretations I have in mind here are those that presuppose what evangelical theologian Brad East has identified as the four elements of that tradition's "bibliology," namely,

(1) the presence of divinity within the textual objects of reflection themselves; (2) the need for divine inspiration to guide interpreters' engagement with the scriptural corpus; (3) the church, in particular its worship, as the ultimate context for that corpus; and, (4) the "divinely ordered purposes" within it.[201]

I will elaborate upon these four aspects of Christian theological interpretation, and their implications for understanding the nature of theological argumentation more generally, shortly. Before I do so, however, it remains to introduce my primary case study of religious engagement with a scriptural text: evangelicalism and, in particular, its American instantiations. As I will show in what follows, adherents of this Christian tradition do more than assert the preeminence of a particular body of literature; they found their religious convictions on that body of literature in way that well exemplifies what it looks like, in practice, to do theology in sustained relation to the Bible.

B. Evangelicalism, Biblicism, and Primitivism

Evangelicalism exerts an outsize influence on North American political and social life. In the United States, it was long the case that historians reduced that country's religious diversity to a story of evangelical revivals (or "great awakenings"), missionary efforts, and enduring puritanism; although it must be noted that this reductionist trend has given way to more nuanced and textured accounts of the varieties of American religious experience in recent decades.[202] In Canada, the enduring purchase of evangelical modes of thought is evident in the persistence of

[201] Brad East, "The Hermeneutics of Theological Interpretation: Holy Scripture, Biblical Scholarship and Historical Criticism" (2017) 19:1 IJST 30–52 at 32–37.

[202] See, here, Jon Butler's landmark reinterpretation of American religious history in *Awash in a Sea of Faith: Christianizing the American People* (Cambridge: Harvard University Press, 1990). Other notable reinterpretations include, e.g., Linford Fisher, *The Indian Great Awakening: Religion and the Shaping of Native Cultures in Early America* (Oxford: Oxford University Press, 2012).

conservative populism in the prairie provinces and elsewhere;[203] as well as in the alliance between Canadian evangelical churches and the federal Conservative Party, solidified during Stephen Harper's premiership.[204] These and other relationships, historical and contemporary, have been subject to a spate of scholarship in recent years.[205] Indeed, it is far from the case, today, that as evangelical historian Mark Noll claimed in 1992, the connection between evangelicalism and Canadian political development is "the most important understudied story in the religious history of twentieth-century North America."[206] Yet it remains the case, as Jonathan Malloy noted in a 2010 paper on evangelical beliefs amongst Canadian Members of Parliament, that the public influence of evangelicalism, including via the contributions evangelical members of the political elite make to Canada's national life, remains largely caricatured and understudied.[207]

Invoking evangelicalism—be it in a historical or a sociological register—raises immediate problems of definition, of course. In its North American varieties, evangelical Christianity has variously been described as an "imagined community, organized by community networks;"[208] and as a socio-religious force with "dual status as both a 'cognitive minority' and a 'sociocultural majority'" in United States society.[209] Historian George Marsden characterizes it as

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[203] See, especially, Clark Banack, *God's Province: Evangelical Christianity, Political Thought, and Conservatism in Alberta* (Montreal & Kingston: McGill-Queen's University Press, 2016).

[204] Jonathan Malloy, "Bush/Harper? Canadian and American Evangelical Politics Compared" (2009) 39:4 American Review of Canadian Studies 352–363 at 359–360.

[205] See, e.g., Sam Reimer & Michael Wilkinson, *A Culture of Faith: Evangelical Congregations in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2015); Kevin N Flatt, "Canadian Evangelicalism" in Jonathan Yeager, ed, *The Oxford Handbook of Early Evangelicalism* (Oxford: Oxford University Press, 2022) 237.

[206] Mark A Noll, "The End of Canadian History?" (1992) 22 First Things 29–36 at 33.

[207] Jonathan Malloy, The Private Faith and Public Lives of Evangelical MPs (2010), online: <https://cpsa-acsp.ca/papers-2010/Malloy.pdf> at 2.

[208] Daniel Silliman, "An Evangelical is Anyone Who Likes Billy Graham: Defining Evangelicalism with Carl Henry and Networks of Trust" (2021) 90 Church History 621–643 at 643 and passim.

[209] Steven P Miller, *The Age of Evangelicalism: America's Born-Again Years* (Oxford: Oxford University Press, 2014) at 7.

a movement of Christians that transcends denominational boundaries, at times self-consciously; and comprising those who hold to

(1) "the Reformation doctrine of the final authority of the Bible,

(2) "the real historical character of God's saving work recorded in Scripture,

(3) "salvation to eternal life based on the redemptive work of Christ,

(4) "the importance of evangelism and missions, and

(5) "the importance of a spiritually transformed life."[210]

Historian Matthew Avery Sutton proffers a similar definition in his study of evangelicalism's apocalyptic orientation, deploying the term "'evangelical' to refer to Christians situated broadly in the Reformed and Wesleyan traditions who over the last few centuries have emphasized the centrality of the Bible, the death and resurrection of Jesus, the necessity of individual conversion, and spreading the faith through missions."[211]

These definitions mirror those offered by evangelicals themselves. Evangelical theologian Bruce Ware says, for example, that evangelicalism constitutes a people for whom what "is central is gospel, cross, salvation, conversion, life of faith, and good works, and the Bible that reliably and sufficiently reveals the truths we believe and by which we live."[212] While the National Association of Evangelicals ("the NAE"), which counts among its members "40 denominations and thousands of churches, schools and nonprofit organizations,"[213] likewise

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[210] George M Marsden, *Understanding Fundamentalism and Evangelicalism* (Grand Rapids: Eerdmans, 1991) at 4–5.

[211] Matthery Avery Sutton, *American Apocalypse: A History of Modern Evangelicalism* (Cambridge: Belknap, 2014) at x.

[212] Bruce A Ware, "Defining Evangelicalism's Boundaries Theologically: Is Open Theism Evangelical" (2002) 45:2 Journal of the Evangelical Theological Society 193–212 at 210.

[213] "About Us", online: *National Association of Evangelicals* <https://www.nae.org/about-us/>.

encourages researchers to identify as evangelicals those who agree with the following statements:

(1) "The Bible is the highest authority for what I believe;"

(2) "It is very important for me personally to encourage non-Christians to trust Jesus Christ as their Savior;"

(3) "Jesus Christ's death on the cross is the only sacrifice that could remove the penalty of my sin;" and

(4) "Only those who trust in Jesus Christ alone as their Savior receive God's free gift of eternal salvation."[214]

But perhaps the most influential and lasting definition of evangelicalism, indeed the one that shapes the NAE's, is the one British historian David Bebbington offered in his 1989 monograph *Evangelicalism in Modern Britain*.[215] Popularly known as the "Bebbington Quadrilateral" on account of its quadripartite structure, this definition characterizes evangelicalism as a religion with the four characteristics of "conversionism," "activism," "biblicism," and "crucicentrism."[216] By the first of these qualities, Bebbington means that evangelicals share a "belief that lives need to be changed;" by the second, an "expression of the gospel in effort;" by the third, "a particular regard for the Bible;" and by the fourth, "a stress on

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[214] See "NAE LifeWay Research Evangelical Beliefs Research Definition," online: *National Association of Evangelicals* <https://research.lifeway.com/wp-content/uploads/2015/11/NAE-LifeWay-Research-Evangelical-Beliefs-Research-Definition-Methodology-and-Use.pdf>. Evangelical historian Mark Noll helpfully elaborates upon this definition in his article "Evangelical: What's in a Name?" (23 January 2018), online: *Evangelicals Magazine* <https://www.nae.org/evangelical-whats-name/>. There, he observes that the NAE's definition of evangelicals and evangelicalism "positions the terms against the background of a shared history and fleshes them out in specific affirmations about the Bible, Christ's saving work, Christian activity, and the converting power of the Holy Spirit. It shows that the NAE, together with the tradition it represents, is not a tool of political partisanship, but a set of believers with a definite Christian stance."

[215] *Evangelicalism in Modern Britain: A History from the 1730s to the 1980s* (London: Routledge, 1989).

[216] *Ibid* at 2–3.

the sacrifice of Christ on the cross."[217] Bebbington is aware, of course, that at different times and in different places, different evangelicals have tended to frame and stress different of these characteristics in different ways;[218] but the four, together, have remained constant features of evangelical religion, or so he argues.

Historian Linford Fisher helpfully complicates Bebbington's picture of evangelicalism, and the way it has been taken up in the scholarly literature, in his 2016 article "Evangelicals and Unevangelicals."[219] The term "'evangelical' has always been a contested and elastic term in western Christian history," Fisher argues there; and it is historians themselves, among them Bebbington, who have given rise to the popular attribution of a single, stable meaning to evangelicalism from the 1970's onwards.[220] That meaning—adopted by political commentators and, indeed, many evangelicals themselves—is doctrinal and essentialist, Fisher insists.[221] In an "an attempt to create uninterrupted continuity with the past in service of the present," it papers over the diversity, variance, and internal fault lines of a movement that has existed, in some form, since the Protestant Reformation.[222] Doctrinal distinctions are important, of course, not least to a great many evangelicals themselves; but evangelicalism is perhaps more helpfully described in terms of the movement's opposition to Roman Catholicism, its members' historical "primitivism," and the term's contested group-internal meaning.[223]

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[217] *Ibid*.

[218] *Ibid* at 3–4.

[219] See Linford D Fisher, "Evangelicals and Unevangelicals: The Contested History of a Word, 1500-1950" (2016) 26:2 Religion and American Culture 184–226.

[220] *Ibid* at 185.

[221] *Ibid*.

[222] *Ibid* at 185–186. See also Fisher's comment, at 207, that "to equate what it has meant to be 'evangelical' across time and space with four or five or nine or even twenty beliefs misses the rich and diverse ways the word has been used between the sixteenth century and the present."

[223] *Ibid* at 187.

The second of these historical emphases productively orients scholars towards the manner in which evangelicals have understood themselves in relation to the Christian scriptures, in particular, the Greek or New Testament. As Fisher notes in relation to the polemical, anti-Catholic meaning of evangelicalism over the term's history, "[a]nother common (and related) usage of 'evangelical' over the past five hundred years has been simply to denote practices, feelings, and beliefs as more authentic, biblical, and true-Christian than other possible ways of enacting Christianity."[224] Thus, the term was often deployed as an adjective to describe the relationship between a particular Christian practice—prophecy, law, medicine, missions, and so forth—and the early Christian church. "To be 'evangelical' was to lay claim to the closest possible approximation of New Testament Christianity,"[225] Fisher remarks. Evangelical Christianity, on this usage, is simply a form of Christianity that aspires to the religious practices described in, especially, the four gospel accounts of Jesus' life[226]—the so-called "primitive" church, hence the term Fisher and others have used for this aspiration, "primitivism."

Although Fisher means his descriptive account of evangelicalism to dispute Bebbington's doctrinal characterization of the movement, it is perhaps more helpful to marry the two approaches. Without wanting to obscure the lived diversity of evangelical forms of Christianity, the primitivist orientation Fisher describes is usefully understood in relation to biblicism; what the former captures by way of practices, the latter captures by way of doctrine.

Bebbington saw evangelical regard for the Protestant scriptures as a function of evangelicals' "belief that all spiritual truth is to be found in its pages."[227] And, indeed, that

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[224] *Ibid* at 192. See, further, Matthew Bowman's definition of primitivism as "the effort to correct faults in a religion through a reconstruction of its presumed ancient, original order." So "Primitivism in America" in John Corrigan, ed, *The Oxford Encyclopedia of Religion in America* (Oxford: Oxford University Press, 2018).

[225] Fisher, "Evangelicals and Unevangelicals", *supra* note 219 at 192.

[226] So, e.g., *ibid* at 197.

[227] Bebbington, *supra* note 215 at 12.

observation bears out nearly forty years later. The first tenet in the NAE's "Statement of Faith" asserts that "We believe the Bible to be the inspired, the only infallible, authoritative Word of God;" claims about Godself,[228] including about the trinity and, in particular, Jesus' divinity, follow this initial assertion.[229] A more elaborate example of evangelical biblicism can be found in the Confessional Statement of the churches that founded popular evangelical website *The Gospel Coalition*. After asserting their belief in "The Tri-une God," those churches affirmed

> that God has inspired the words preserved in the Scriptures, the sixty-six books of the Old and New Testaments, which are both record and means of his saving work in the world. These writings alone constitute the verbally inspired Word of God, which is utterly authoritative and without error in the original writings, complete in its revelation of his will for salvation, sufficient for all that God requires us to believe and do, and final in its authority over every domain of knowledge to which it speaks.[230]

Belief in the Bible itself founds modern evangelical doctrine, these two examples suggest, such that to be an evangelical today is, to a large extent, to be theologically oriented around a particular scripture.

It is possible to break down evangelical biblicism into further sub-tenets of evangelical theology, notably, inspiration, inerrancy, infallibility, literalism, and authority.[231] The Bible, belief in inspiration asserts, was written with God's aid such that every word within it is exactly what God wants it to be. It is without error or mistake on the factual matters about which the Bible

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[228] I use "Godself" here and elsewhere to refer to the Christian deity over and against gendered pronouns like "himself" to avoid ascribing a particular gender to that deity and thereby to limit as much as possible the privileging of some or other sex within the cosmic hierarchy. This is in keeping with contemporary theological discourse on the divine.

[229] See the "Statement of Faith" (National Association of Evangelicals), accessed January 11, 2025, https://www.nae.org/statement-of-faith/.

[230] See "Foundation Documents" (The Gospel Coalition, April 12, 2011), https://media.thegospelcoalition.org/wp-content/uploads/2020/05/20161257/TGC-Foundation-Documents-2020-Final-5-20.pdf?_gl=1*x5h7ku*_gcl_au*MTI3MDA2NzIxNi4xNzM2NjEyMzQ3*_ga*MTc2MTg4NzExNS4xNzM2NjEyMzQ3*_ga_R61P3F5MSN*MTczNjYxMjM0Ny4xLjEuMTczNjYxMjQwMS42LjAuMA..*_ga_3FT6QZ0XX1*MTczNjYxMjM0Ny4xLjEuMTczNjYxMjQwMS42LjAuMA.., 6

[231] Robert Rezetko, Mark Elliot & Kenneth Atkinson, "Introducing Misusing Scripture: What are Evangelicals Doing with the Bible?" in Robert Rezetko, Mark Elliot & Kenneth Atkinson, eds, *Misuing Scripture: What Are Evangelicals Doing with the Bible* (London: Routledge, 2023) 3 at 16.

speaks (inerrancy), as well as on spiritual matters of faith and practice (infallibility). What the Bible says it means literally; thus, for example, when it refers to "days" in the Genesis creation account, the Bible means 24-hour periods and not, say, epochs. Finally, the Bible is the ultimate authority on the Christian life, this such that the correct response to reading it is to submit oneself to its teachings. [232]

These sub-tenets were most influentially articulated in "The Chicago Statement on Biblical Inerrancy."[233] Formulated in 1978 and signed onto by approximately 200 evangelical leaders, the Statement was a written response to the perceived growth of liberal modes of interpreting the Bible, including by historical-critical scholarly means; acceptance of the Statement's provisions continues to be a prerequisite for membership in, for example, the Evangelical Theological Society.[234] The Statement asserts that

1) "God, who is Himself Truth and speaks truth only, has inspired Holy Scripture in order thereby to reveal Himself to lost mankind through Jesus Christ as Creator and Lord, Redeemer and Judge. Holy Scripture is God's witness to Himself.

2) "Holy Scripture, being God's own Word, written by men prepared and superintended by His Spirit, is of infallible divine authority in all matters upon which it touches: it is to be believed, as God's instruction, in all that it affirms; obeyed, as God's command, in all that it requires; embraced, as God's pledge, in all that it promises.

3) "The Holy Spirit, Scripture's divine Author, both authenticates it to us by His inward witness and opens our minds to understand its meaning.

4) "Being wholly and verbally God-given, Scripture is without error or fault in all its teaching, no less in what it states about God's acts in creation, about the events of world history, and about its own literary origins under God, than in its witness to God's saving grace in individual lives.

5) "The authority of Scripture is inescapably impaired if this total divine inerrancy is in any way limited or disregarded, or made relative to a view of truth contrary to the

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[232] These five sub-tenets are described, with references throughout to evangelical writings, in *Ibid* at 16–18.

[233] *The Chicago Statement on Biblical Inerrancy* (1978), online: <https://library.dts.edu/Pages/TL/Special/ICBI_1.pdf>.

[234] See *Membership Application and Levels*, online: <https://etsjets.org/membership-account-2/membership-levels/>.

> Bible's own; and such lapses bring serious loss to both the individual and the Church."[235]

The motivations underlying evangelical theological engagement with the Protestant scriptural corpus are evident in these stated affirmations, in particular, the final one concerning scriptural authority. There is a felt anxiety, on the part of the Statement's drafters, that to cede ground with respect to what I would call plenary biblicism (i.e., biblicism with the five sub-tenets noted above) is to undermine God's redemptive purposes, which the Protestant scripture articulates and effects. It is not just that the Bible contains factual truths, like some kind of divinely ordained textbook, that facilitate knowledge; although it is certainly not the case that the Bible contains less than that. It is, moreover, incumbent on the Bible's readers to believe those truths and operationalize them in their lives in order thereby to access "all that [the Bible] promises." Right knowledge, here, leads to right belief, which leads to right action, which leads, ultimately, to salvation. In this, evangelicalism attempts to solve for a problem that is inherent, perhaps, to every religious tradition as such,[236] namely, that there is a gulf between religionists and whatever they believe to be sacred that must be overcome in some way by means of methods and objects available to those religionists in the world. And the solution evangelicalism posits, like every religious tradition in its own way,[237] is that the sacred is, or can be made to be, immediately present in adherents' here and now.

Primitivism (or what is sometimes called, with a narrower scope of reference perhaps, "restorationism"[238]) well describes what it is evangelicals have historically understood

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[235] See The Chicago Statement on Biblical Inerrancy, supra note 233.
[236] See, e.g., Birgit Meyer, "Medium" (2011) 7:1 Material Religion 58–64 at 59.
[237] An insight I draw from the anthropological work of Birgit Meyer in, especially, *ibid* at 62 and *passim*.
[238] But cf. the explicit use of primitivism and restorationism as interchangeable terms in Richard T Hughes & C Leonard Allen, *Illusions of Innocence: Protestant Primitivism in America, 1630-1875* (Chicago: University of Chicago Press, 1988) at 4 and *passim*.

themselves to be doing with their scripture; it describes the end towards which evangelical interpretations have tended to move. On the one hand, the primitivist impulse can be said to reflect a desire on the part of evangelical religionists for "a normative, jurisdictional guide to proper attitudes, behavior, or doctrine."[239] On the other, it can be said to reflect a kind of mythic consciousness of the past such that "believers are not so much following a primal guide as if first times constitute a kind of sacred constitution, as they are actually living through or reenacting the strong events of first times with which they now fully identify."[240] In either case, primitivism manifests as an attempt to instantiate the past in the present: through the reconstitution of Christianity as a network of "house churches," for example; or through efforts to manifest the miraculous power of the Christian Holy Spirit in healing ministries. Primitivism, although its specific characteristics are variable between religious contexts (including within evangelicalism), encompasses all such efforts to collapse, by theological means, the distance between then and now, and there and here, in order to bring the past into contact with the present. Those include, as I will describe more fully below, originalists' legal efforts to surmount temporal distance with respect to the Constitution.

The point of effecting a kind of synchronic relationship between the present day and the earliest days of the Christian church, for evangelicals working in the tradition of the Chicago Statement, is to achieve a particular kind of correspondence between the biblical text and the Word of God. As the Chicago Statement concludes, "We affirm that what Scripture says, God says."[241] The guiding drive, in other words, is to instantiate God's presence in and for the present moment in which biblical interpretation takes place through theologically grounded practices of

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[239] Richard T Hughes, "Introduction: On Recovering the Theme of Recovery" in Richard T Hughes, ed, *The American Quest for the Primitive Church* (Champaign, IL: University of Illinois Press, 1988) 1 at 6.

[240] *Ibid* at 6.

[241] See the Chicago Statement on Biblical Inerrancy, supra note 233 at 11.

reading. If God spoke directly to the early Christians, chiefly through the person of Jesus of Nazareth figured as the second member of the Christian trinity (that is, as the son of God), it stands to reason that if evangelicals can position themselves in the place of those early Christians then they, too, can hear from God directly. This is akin to what Noll describes as "read[ing] experience from the divine angle of vision," an approach that attempts "to understand the contemporary world as the divinely inspired authors of Scripture had understood their experience."[242] Historically a development with roots in the rise of premillennial dispensational apocalypticism,[243] which posited an imminent end of the world via a rapture of true Christian believers and which rose to popularity amongst evangelicals in the late nineteenth and early twentieth centuries,[244] this synchronic perspective to scriptural interpretation is motivated by nothing other than a strong desire to commune with transcendence (in the form of the Christian deity) via the written corpus through which that deity is believed to speak.

Attempts to operationalize that desire amongst evangelicals constellate around practices of textual interpretation, as applied, in particular, to the Protestant scriptures and, even more particularly, to the Greek or New Testament. This is the link between evangelical statements of faith, which as noted begin in at least several prominent cases with assertions of belief in the Bible, and evangelical practices that aim to manifest features of the biblical narratives in believers' lives. For although it is a distinguishing feature of evangelicalism, primitivism is not evangelicals' exclusive domain. As Richard Hughes & C. Leonard Allen remarked in their 1988 monograph on the history of this orientation towards the past, "the restoration perspective has been a central feature of American life and thought from the earliest Puritan settlements, and now

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[242] Mark A Noll, *The Scandal of the Evangelical Mind* (Grand Rapids: Eerdmans, 2022) at 132.
[243] *Ibid* at 132–133.
[244] See Sutton, *supra* note 211 at chap 1.

continues to exercise a profound influence on the thinking and behavior of the American people."[245] It manifests everywhere from Mormonism to the writings of the United States Founding Fathers to the "Jesus Movement" of the latter half of the twentieth century to the contemporary house church movement in North America and worldwide. Indeed, as this last example suggests, primitivism is by no means exclusive even to the United States, although it has had a particular impact on that country's culture. But there is a particularity to evangelical primitivism, nonetheless, inasmuch as it hangs nearly all of its theological conclusions on prior assertions of a particular text's particular authority and legitimacy; it is the high degree to which evangelicalism does so that makes its engagement with scripture unique.

In the end, evangelical primitivism amounts to more than merely a longing for the past as such, comparable to nostalgia or wistfulness. Rather, primitivism is the solution evangelicals posit to a particular problem of presence and legitimacy. The early church figures a point in time in which Christians could hear the voice of God directly, clearly, and authentically; the present day does not. Accordingly, the move to overcome the temporal distance separating past from present via the biblical text is a move to try to bring evangelicals into direct contact with God as speaker.

I will be suggesting in this thesis that the Canadian manifestations of constitutional originalism in view here are aptly described as primitivist in character, too, by analogy to evangelical primitivism. To see the degree to which this is the case, however, it remains to query the theological character of biblicism and primitivism with reference to my earlier discussion of scripture and scriptural interpretation. What does it mean for something—a project or an approach, for example—to be theological in nature? And to what extent do evangelical practices

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[245] Hughes & Allen, *supra* note 238 at 24.

of scriptural interpretation exhibit such theological qualities? It is to such questions that I now turn.

C. The Theological Character of Evangelical Biblicism and Primitivism

If and when the term is defined, Christian "theology" is almost invariably qualified by one or more adjectives. It is "systematic," and thus describes an enterprise "especially interested in the scope, unity, and coherence of Christian teaching;" systematic theology being, as well, the "preferred term for those accounts of Christian teaching which are especially concerned to coordinate their subject matter with what is held to be true outside the sphere of Christian faith."[246] It is "public," and thus concerned with the "explication of, witness to, and agency toward the vision that God intends for social life within the parameters of the Christian tradition."[247] Or it is "political," in that it represents an "explicit attempt to relate discourse about God to the organization of bodies in space and time."[248] Or it is any number of other variations—negative, historical, natural, and so forth—that describe in their own way some variation on the theological project.

Theology is more difficult to define in its own right. It may be, as Kathryn Tanner suggests, that theology is simply a matter of figuring out for oneself "what Christianity is all about, what Christianity stands for in the world."[249] Or perhaps it is the case, as the postliberal

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[246] John Webster, "Introduction: Systematic Theology" in Kathryn Tanner, John Webster & Iain Torrance, eds, *The Oxford Handbook of Systematic Theology* (Oxford: Oxford University Press, 2007) 1 at 1.

[247] Ian S Markham, "Public Theology: Toward a Christian Definition" (2020) 102:2 Anglican Theological Review 179–191 at 187.

[248] William T Cavanaugh & Peter Manley Scott, "Introduction to the Second Edition" in William T Cavanaugh & Peter Manley Scott, eds, *The Wiley Blackwell Companion to Political Theology*, 2nd ed (Hoboken, NJ: Wiley-Blackwell, 2019) at 4. We shall return, in some depth, to the notion of political theology in chapter three of this thesis.

[249] Kathryn Tanner, *Jesus, Humanity and the Trinity: A Brief Systematic Theology* (Minneapolis: Fortress, 2001) at xiii.

theologian George Lindbeck taught us, that theology is "the scholarly activity of second-order reflection on the data of religion (including doctrinal data) and of formulating arguments for or against material positions (including doctrinal ones);"[250] and is thus, as this definition implies, to be contrasted with doctrine, the base grammar of a religious system. Such definitions helpfully point us towards an account of theology, in and for the Christian context, as discourse that relates whatever subject it is discussing to prior statements or presumptions about that tradition's deity. Thus, for example, when the discourse concerns Godself, theology is self-referential; while when the discourse concerns the body politic, theology is a kind of elaboration of what can be known about that subject in the light of presupposed knowledge about who God is and what God is doing in the world.

With respect to scripture, theology that is undertaken in the evangelical tradition has two centering foci: presence and telos. On the one hand, it looks to instantiate God within the biblical text and, through it, the believer's life (presence); on the other, to effect God's purposes in the world (telos). In both cases, evangelical theology aims to do so in and through its interpretive acts, primarily with respect to the Protestant scriptures. The underlying assumption about language at work here is that speech is capable of making present that which is past; hence the idea, to which I shall return in some detail below, that God is always speaking in a reader's present moment, that is, the moment of biblical interpretation. For evangelical theological interpreters, I will suggest, there is no substantive sense of historical diachrony in the reading act. They understand themselves to be occupying the same temporal plane as the biblical text itself, such that they can assert a direct correspondence between what that text describes and what those

[250] George A Lindbeck, *The Nature of Doctrine: Religion and Theology in a Postliberal Age* (Philadelphia: Westminster John Knox, 1984) at 10.

readers are experiencing; and, perhaps more importantly, they can claim to be hearing God's speaking voice with the directness of the first Christians described in the New Testament.

I gestured earlier towards Brad East's account of the theological interpretation of the Christian Bible, itself influenced strongly by Webster's thinking about "Holy Scripture".[251] It is at this juncture that I wish to return in detail to that account in order to explain what makes it along with the evangelical practices of reading and interpretation described in the interim theological in character in the ways I just outlined.

For East, "theological interpretation names an approach to Christians' reading of the Bible as Holy Scripture that explicitly foregrounds theological interests, relativizes the role of historical-critical methods, and assumes some kind of communicative relation, mediated by the text, between the triune God and the church."[252] East means this definition to function polemically. There is disagreement, he observes, between theologians and biblical scholars over how Christians ought to read and interpret their sacred texts; his argument is thus intended, in part, to be a "direct attack against historical criticism" such as is practiced in mainstream biblical scholarship.[253] Christian bibliology diverges from such practices in its descriptive and normative presumptions, that is to say, it offers an alternative account of how Christians have historically read the Bible and of how they ought to read the Bible.[254] With respect to the latter, normative claims, East intends his outline of the four tenets of Christian theological interpretation, to which I gestured above and to which I shall turn presently, to outline the "basic convictions that not

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[251] Acknowledged in East, "The Hermeneutics of Theological Interpretation", *supra* note 201 at 33n4.

[252] *Ibid* at 31.

[253] So *ibid* at 31–32. On historical criticism as the dominant interpretive practice amongst biblical scholars, see, e.g., Stephen D Moore & Yvonne Sherwood, *The Invention of the Biblical Scholar: A Critical Manifesto* (Minneapolis: Fortress, 2011).

[254] East, "The Hermeneutics of Theological Interpretation", *supra* note 201 at 32–33.

only theological interpreters tend to have, but that anyone wanting to engage in theological interpretation of any sort must have."[255]

The first of these convictions is "properly theological" in nature, which is to say, it is "rooted in the doctrine of God:"[256] "Theological interpretation presupposes, first, the role of divine action in the production and transmission of the biblical texts, action that is anterior, not posterior, to our reception and reading of them."[257] East is clear, in elaborating on this presupposition, that it need not manifest as an explicit treatment of God or of God's relationship with a given biblical passage in each and every case of theological interpretation. Rather, it can be an implicit "working assumption" that underlies the interpretive task; however, "judgements about the text that would deny or exclude antecedent divine action in relation to the biblical text are themselves precluded."[258]

The second conviction asserts "the role of divine action in the right reading of Scripture, that is, of the need for the Holy Spirit's illumination."[259] Connected to this presumption is a denial that Holy Scripture is a "self-interpreting" text. Theological interpretation presupposes that God guides its reading practices. Thus, while readers must still engage in the "hard labor of exegesis," they are only "good readers" to the extent that God enables them to be.[260] God guides theological interpretation, in other words.

The third conviction has to do with the Bible's proper interpretive context: "theological interpretation presupposes the biblical texts' social and religious location in the life and worship

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[255] *Ibid* at 33.
[256] *Ibid*.
[257] *Ibid* at 33.
[258] *Ibid*.
[259] *Ibid* at 34.
[260] *Ibid*.

of the church."[261] This means, in short, that the concerns and doctrinal commitments of the church ought to determine the kinds of questions theological readers ask of biblical passages and the kinds of answers they expect of them. The church "put it [i.e., the Bible] together in the first place," East thus writes; which means nothing less than that this particular corpus "is the church's book—which is to say, that this or that text found in the Bible has, as a matter of ongoing relevance, a role as part of the canon of the Christian church's sacred Scripture. And, as such, the sense it makes as part of that book within that community is, in principle, distinct from the sense it makes considered otherwise, elsewhere."[262]

These first three convictions have to do with matters of divine and readerly co-presence. In the moment of interpretive illumination, God is present to the Bible's readers, directing them towards right readings of the text. And those readers are, at all times, present to the Bible itself insofar as they are also members of the Christian church; this in turn allows the Bible to make sense in and for its evangelical readers' own socioreligious context. Importantly, however, God and reader are present to one another only insofar as the latter is engaged in the task of theological interpretation. God does not guide readers in general towards theological interpretations, but, rather, does so in the particular moment at which they turn their attention to the content of their church's scriptures. Theological interpretation is a kind of talismanic undertaking that puts the reader in contact with their community's sacred textual corpus, thereby summoning the divine to the reader's point in time and putting the reader in direct contact with what is sacred about that corpus.[263]

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[261] *Ibid* at 35.

[262] *Ibid* at 36.

[263] In this way, we can say that the Bible functions as a "medium" in the evangelical-Christian tradition, in Birgit Meyer's use of the term: "Authorized as suitable conveyers of the divine within a religious regime (as for instance the medieval Christian Church), media make the religious imagination materialize in the world through things, bodies, texts, sounds, and pictures." See Birgit Meyer, "Mediating Absence - Effecting Spiritual Presence: Pictures and the Christian Imagination" (2011) 78:4 Social Research 1029–1056 at 1036.

East's fourth conviction arises from the preceding three; it is a teleological assertion "that Scripture has divinely ordered purposes, with especial reference to the church in its mission, message, knowledge, life together, sanctification, graces and worship."[264] East intends this final assertion to rebut sociologically driven hermeneutical accounts that emphasize "communal use as the locus" of interpretive concern. Theological interpretation goes beyond that to assert that the Bible is properly interpreted, not only within the context of the church, but more expansively also within the context of God's larger project of bringing this corpus into being in order to communicate God's saving ends to human readers.[265] Biblical passages are, consequently, to be understood in the light of how they advance this larger interpretive whole.

The thrust of East's account of Christian theological bibliology is that "Christians read Christian Scripture best when they read it as the Christians they are; the book of faith should be read in faith."[266] Thus Christian readers need not apply a "naturalist metaphysics" when interpreting a biblical passage; prioritize a passage's "original" historical meaning over and against God's intentions for that passage (more on this shortly); reject figural interpretations (for example, those that equate the binding of Isaac in Genesis with the crucifixion of Jesus in the gospels); or refuse to allow their doctrinal commitments to influence their interpretive moves.[267]

What makes theological interpretation, as East describes it, theological in character, then, is that it presumes not only the existence and relevance, but more substantially the priority, of divinity for the hermeneutical task. This much is clear from East's elaboration of the role original human intentions ought to play within that enterprise. Theological interpretation does not privilege these intentions, he explains, because "if God the Holy Spirit is the principal author of

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[264] East, "The Hermeneutics of Theological Interpretation", *supra* note 201 at 36.
[265] *Ibid* at 37.
[266] *Ibid* at 38.
[267] *Ibid* at 38–39.

Holy Scripture, … then what we are ultimately after is what God is saying in and through scriptural texts, not simply their human authors."[268] Scripture being unique amongst the world's texts on account of its divine origins and purposes, it may mean something God intended it to even if that meaning is not something intended by its human composers.[269] The text "means more, never less, than its human author intended" because God's intention for the biblical corpus "deepens, enriches and expands the possible meanings of the text."[270] This helpfully allows the church to ascertain, with reference to God's purposes, the meaning of those biblical passages whose human intentions are lost to history; and it allows Christians, today, to affirm the church's historic interpretations that predate the advent of the tools of modern historical-critical scholarship.[271] Finally, where a given human author intended ill by way of their contribution to the biblical corpus, for example, because they were antisemitic, "God's authorship … trumps, subverts and redeems these original authorial intentions with divine irony," turning the meaning from evil to good.[272]

In other words, theologically driven modalities of interpretation, such as East describes and represents by way of his scholarship, allow evangelicals to get at the Bible's ultimate authorial voice, namely, God's. Now, this is true of all interpretation that endeavours to read the Bible theologically; progressive interpreters will enact it in their own way. But the means by which evangelicals achieve this theological link between themselves and the sacred is to collapse time: their reading practices are meant to create a bridge between God and the evangelical reader in which the biblical text is allowed to mediate the former's presence to the latter and vice versa.

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[268] *Ibid* at 39.
[269] *Ibid* at 39–40.
[270] *Ibid* at 40.
[271] *Ibid* at 40.
[272] *Ibid*.

That is to say: God is not only presumed to exist in relation to the scriptural corpus, as East's first conviction asserts; more strongly, God is believed to be substantively present to readers of that corpus insofar as they undertake their interpretive task from within the context of their evangelical-Christian community.

As we saw in my earlier discussion of biblicism and primitivism, moreover, this belief that God is ultimately present in the moment of interpretation allows evangelicals to advance strong claims about the degree of correspondence between their own socioreligious context and that of the biblical texts. Because God is speaking via the Protestant scriptures, not in the abstract or to people at large, but to evangelical readers in particular, those readers can derive the answers to their own religious and other questions directly from what the Bible says without any mediating object other than the words of the biblical text itself. Thus, for example, if the pressing question is how Christian churches ought to be organized or what proper missionary outreach looks like, readers today can properly look to narrative accounts of early Chirstian church polity and evangelism for solutions. This, in short, is how evangelicals end up as primitivists on the basis of their biblicism: the former follows from the latter to the degree that evangelical biblicism is founded on a belief that the transcendent (i.e., God) not just "is" immanent, but more accurately "becomes" immanent, in and through interpretive acts that create the relationship of synchrony between the past of the text and the present of the interpreter's own moment that I have described here.

D. Conclusion

I have argued in this chapter for a particular understanding of evangelicals' theological engagement with the Protestant scriptures. In an effort to explain how evangelicals derive

"primitivism" from their "biblicism," I delved into the meaning of both terms in and for the members of this religious tradition; I showed that evangelicals instantiate the divine presence in the interpretive moment through their practices of reading the biblical text; and I suggested that that, in turn, allows them to draw a strong correspondence between the socioreligious context of the biblical corpus and their own such that they can claim to be hearing God's voice directly and clearly in their own modern setting.

The point of this analysis has been to set the stage for an extended analogy between constitutional originalism, as practiced in the Canadian legal context, and American evangelicals' engagement with their scriptures. It remains to be seen the degree to which theological practices of textual interpretation are evident amongst legal reading communities that do not explicitly espouse religious convictions. It is to that subject that I now turn.

Chapter Three:
Originalism as a Theological Undertaking

This chapter puzzles through the analogy between Canadian constitutional originalism and American evangelicalism with respect to how the two approach the interpretation of their communities' foundational texts. In so doing, it seeks to answer the questions to which I gestured in earlier sections of this thesis: Why do originalists in this country argue for the compatibility of their approach with living-tree purposivism? To what degree can we productively characterize originalism as a theological project given that its practitioners have no stated interest in finding God within the Constitution?

My analysis is broken up into two major sections. In the first, I introduce Paul Kahn's work on political theology, democratic sovereignty, and legal authorship. This body of literature provides me with the conceptual apparatus I then bring to bear on the analogy between originalism and evangelicalism in the chapter's second major section. There, I track the points of contact between these two interpretive approaches at the level of method and of motive in relation to the two centering foci I identified in chapter two's discussion of evangelical theology and practice, namely, presence and telos.

Originalism is more like evangelicalism than scholars have yet imagined; this chapter shows the degree to which that is the case.

A. Political Theology and the Sovereign People

Our companion and guide in working out the analogy between originalism and evangelicalism is legal theorist and political theologian Paul Kahn. In introducing Kahn's work here, my goal is not to explicate his writings or even to review their contents in detail. My approach is far more utilitarian. Kahn's assessment of the theological dimensions of contemporary constitutionalism,

although framed in reference to the political experience of the United States, has much to contribute to a discussion about constitutional originalism in Canada. My goal is to draw that assessment out in this section before exploring its contributions to my argument in what follows.

Theology continues to exert a kind of hold on American political life and the jurisprudence of its courts, as Kahn makes clear. In his book *Political Theology*,[273] Kahn takes up Carl Schmitt's enduring remark that

> All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.[274]

"Political theology," for Kahn, describes a mode of inquiry into "the social imaginary of the political" that looks for "the persistence of forms of the sacred in a world that no longer relies upon God."[275] And although this analysis draws upon history and historical analysis, its value is found in the degree to which the theological concepts it identifies "continue to support an actual theological dimension in our political practices."[276]

Kahn finds that theological dimension in Americans' relationship to the idea of popular sovereignty and the ideal of sacrifice. As he notes, "[t]he popular sovereign is understood as a collective, transtemporal subject in which all participate. It is the mystical corpus of the state, the source of ultimate meaning for citizens."[277] This popular sovereign can demand of citizens that they kill or be killed for the state, that they sacrifice their lives or the lives of others for the

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[273] Paul W Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

[274] *Ibid* at 92; citing Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: University of Chicago Press, 2005) at 36.

[275] Kahn, *supra* note 273 at 26.

[276] *Ibid* at 3.

[277] *Ibid* at 121.

state's sovereignty.[278] As an interpretive method, then, political theology attempts to elucidate in a theoretical register the conceptions "that already inform a community's self-understanding,"[279] in the American case, that the state operates with the authority of "We the People." Historical excavation allows the political theologian to trace this self-understanding back through its earlier manifestations, which continue to imbue it, today, with "an air of majesty and mystery;"[280] analogies allow the political theologian to situate political ideas within larger conceptual structures in order to enhance our understanding of them.[281] The two approaches converge in the political theologian's construction of a narrative to argue for one or another account of the political order, its structures and its myths.[282]

It is just that narrative task that Kahn takes up in *Making the Case*,[283] simultaneously an account of the judicial opinion and a guide to how law students and legal scholars ought to read it. The opinion, Kahn notes, is concerned with "reporting, history, interpretation, deduction, and persuasion;"[284] it draws together all these modes of analysis to tell a story that "weaves fact and law into a single pattern that connects to an easily accessible normative perspective on ourselves, our community, our history, and even our destiny."[285] And it is in this manner that courts fashion their own legitimacy.[286] Unelected, their members nonetheless exercise authority within a democratic society by trying to persuade their listeners that a particular resolution to a particular case is the right one.[287]

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[278] *Ibid* at 121–122.
[279] *Ibid* at 120.
[280] *Ibid* at 105.
[281] *Ibid* at 108–109.
[282] *Ibid* at 108.
[283] Paul W Kahn, *Making the Case: The Art of the Judicial Opinion* (New Haven: Yale University Press, 2016).
[284] *Ibid* at 19.
[285] *Ibid* at 20.
[286] *Ibid* at 36–37.
[287] *Ibid* at 38.

One of the ways in which they do that is by speaking in what Kahn identifies as "the narrative voice of the opinion," which he links to the exercise of popular sovereignty.[288] In a democratic state like the United States, Kahn argues, a law is legitimate to the extent that the citizens of that state can see themselves in the law's authorship. He here distinguishes between authorship and writing/drafting. The latter describes the literal process of composing a text; the former is "a social practice of accountability" in which readers themselves participate.[289] In many cases, the author of a text is also the person who drafted it; this thesis is one such example. However, in other cases, readers attribute authorship to people who may have only indirectly contributed to a text's composition because they hold those people accountability for that text's content. The judicial opinion is an instance of authorship in this second sense: it is "itself a sort of draft that gains legitimacy when we imagine its author as the people themselves acting as the popular sovereignty" and its success in terms of its ability to "persuade[] us to hold ourselves accountable for the law that it sets forth."[290]

Kahn is here attempting to resolve for the problem of legitimacy in a constitutional democracy. It is because the people believe themselves to be self-governing, and need to do so for the state to have any legitimacy in their mind, that judges must wield the discursive power of the opinion to persuade rather than the "naked power" of judicial fiat.[291] "Lacking the legitimacy that is visibly embodied in the electoral process," Kahn thus writes, "courts must create their own legitimacy."[292] And the courts do so by eliding themselves such that the readers/hearers of

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[288] *Ibid* at 48.
[289] *Ibid* at 50.
[290] *Ibid* at 51.
[291] See, e.g., *ibid* at 5.
[292] *Ibid* at 37.

their opinions view themselves as the authors of those judgments, seeing and hearing their own voice as the democratic sovereign being reflected back to them.

One way in which the judicial opinion undertakes to do this, in the sphere of constitutional law, is by eliding the distance between itself and the Constitution it interprets. The constitutional opinion does not create law in this area; rather, it helps those persuaded by it to look with clearer eyes on the Constitution itself such that those readers can better understand themselves to be the authors, producers, or, which is the same, prime movers of this foundational textual corpus.[293] For in the end, the authorship of the Constitution, like that of the opinion, resides with the people of the democratic state: in the United States, "We the People" identified in the American Constitution's opening line. After all, Kahn writes, "the persuasive character of the opinion hinges on its ability to attribute authorship elsewhere. We are not to hear the judge's voice but only that of the lawmaking power, which is the people as popular sovereign."[294] And so, too, when reading the Constitution, the text succeeds to the degree that we its readers see it as an image of that popular sovereign. It must contain our words, our first principles, and our rhetoric.

Kahn draws an analogy here between the Constitution and the biblical canon. "A biblical interpretation has no authority in itself," he notes, "but only insofar as it makes us see better the biblical text."[295] So, too, in the field of legal interpretation, "[t]he most successful opinion is one that is completely transparent to another text," in particular, the constitutional text.[296] Neither the biblical exegete nor the judicial interpreter "makes" law, divine, human, or otherwise. To the

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[293] *Ibid* at 71–73, 75.
[294] *Ibid* at 76.
[295] *Ibid* at 69.
[296] *Ibid*.

degree that they purport to do so, their interpretive acts fail. Rather, they represent the law of another: in the first case, the law of God; in the second, the law of the democratic people.[297]

There is an undeniable particularity to Kahn's argument, framed as it is with reference to United States constitutional, statutory, and case law. Yet, as Benjamin Berger notes in a review of *Making the Case*, there is a certain universality to Kahn's analysis; "the persuasive burden at the heart of the judicial opinion is and must be common across legal orders, to the extent that they understand themselves to be engaged in a project of self-government."[298] What persuades in a given legal opinion will be particular to it and its particular legal-cultural context. But the fact that it takes persuasion as its ultimate end, and attempts to recruit its readers to assume the authorial voice, is perhaps a necessary quality of the judicial opinion as such in a democratic state premised on self-government.

Together, these two texts—*Political Theology* and *Making the Case*—point us towards a theory and a method for developing the analogy I am drawing between Canadian constitutional originalism and American evangelicalism. To the degree that law treats of religion as principally a matter of private and personal preference, as scholars studying the law-religion nexus in Canada have noted elsewhere,[299] it misses much of substance about how religion, and especially Christian theology, has persisted in the public sphere under the conditions of modernity. Political theology orients us in a different direction, reversing the explanatory burden law places on religion by asking, instead, for law to give an account of itself in theological terms. The twin methods of historical excavation and reasoning through analogy are essential to this task.

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[297] *Ibid* at 69–70.

[298] Benjamin L Berger, "Narratives of Self Government in Making the Case" (2017) 18:1 Journal of Appellate Practice and Process 89–103 at 102.

[299] See, e.g., Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

Through them, it is possible to approach the law-religion nexus along both diachronic and synchronic lines, all with an eye to explaining, in and for the present, how theology gives content and force to the constitutional order: its terms, its aspirations, and its anxieties.

This thesis takes up one corner of that larger inquiry, analogizing originalism and evangelicalism in order to show, via the enduring points of contact between the two, that the former is a kind of political theology. It is to that task that I now turn directly.

B. The Theology of Constitutional Originalism

This section develops that analogy at the level of method and of motivation. It is not just that originalism recalls evangelical interpretive tendencies; it is also that originalists want to accomplish things through their reading practices that call to mind evangelical desires.

I suggested, in chapter two, that evangelicals' theological interpretation of scripture has two foci: presence and telos. So, too, does originalists' theological interpretation of the Constitution. Accordingly, my analogical argument in this chapter is broken up into two subsections: the first looks at the ways in which originalists seek the presence of sacred sovereignty in and through the constitutional text, the latter at the ways in which they seek to further redemptive ends by interpretive means.

i. Effecting Sacred Presence

The problem originalism tries to resolve is one of constitutional legitimacy in a democracy: By what authority does the Constitution claim to govern the Canadian people? This problem shows up in the originalist literature as a persistent anxiety about the validity and stability of the Supreme Court's constitutional interpretations.

Unlike fear—which is directed at a specific, definable threat—anxiety has no object.[300] It is directed at the unknown, indeed, ultimately, at the unknowable: what the existentialist philosopher and theologian Paul Tillich identified as nonbeing, literally, nothingness itself.[301] In constitutional discourse, fear might take a specific judicial outcome as its object—a specific decision that goes against one's client, for example—but anxiety concerns itself with that which exceeds the bounds of the judicial order itself—the breakdown of constitutional governance, most of all. And the latter, anxiety rather than fear, is what animates the originalist scholarship I surveyed in chapter one. This translates, at the level of method, to a reconstructive effort to identify and operationalize the historical decisions through which the *Charter*'s drafters formulated its final wording; and, at the level of motive, to an assertive effort to identify on that basis the Canadian citizenry's sovereign self, of which the originalist interpreter is one part, as the *Charter*'s ultimate author.

One such set of historical decisions are the "constitutional bargains" that gave rise to what Bradley Miller describes as "sections of the written Constitution that are commonly understood to have been the product of historic compromise rather than high principle."[302] The Supreme Court has recognized that these sorts of decisions warrant special interpretive care. With respect to the "political compromise" that gave rise to the minority language rights enshrined in section 23 of the *Charter*,[303] for example, Beetz J thus wrote, in *Société des Acadiens v Association of Parents*,[304] that

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[300] This is an old Freudian insight. But it is particularly as it has been taken up by the Christian existentialists—Paul Tillich, especially—that the concept is used here.

[301] See Paul Tillich, *The Courage To Be*, 3rd ed (New Haven: Yale University Press, 2014) at 36–39 and passim.

[302] See Miller, "Beguiled by Metaphors", *supra* note 85 at 345.

[303] *Supra* note 155.

[304] 1986 CanLII 66 (SCC), [1986] 1 SCR 549 ["*Société*"].

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.

As recently as 2009, in its decision in *Nguyen v Quebec (Education, Recreation and Sports)*,[305] the Court recalled the distinction Beetz J drew here between language rights, based on political compromise, and legal rights, rooted in principle, to found the conclusion that "it is necessary to take a purposive approach aimed at identifying the framers' objective at the time of its enactment" when interpreting an instance of the former.[306] From this and other like cases, Benjamin Oliphant and Léonid Sirota note as a matter of wide recognition that "the Supreme Court of Canada will use originalism when it comes to cases seen to encapsulate a constitutional bargain."[307]

As a method, excavating a constitutional bargain in an originalist fashion entails (1) identifying the actors responsible for that compromise, (2) identifying the terms of the bargain those actors reached, and (3) deriving some or other claim as to what from that compromise is binding on judicial interpreters of the Constitution today.

Kerri Froc's scholarship on section 28 of the *Charter*,[308] which provides an interpretive guarantee of gender equality with respect to other of the *Charter*'s provisions, exemplifies this

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[305] 2009 SCC 47.
[306] See *ibid* at para 26.
[307] Oliphant & Sirota, *supra* note 127 at 159.
[308] *Supra* note 155.

three-movement methodology.[309] Her starting assertion is that a larger group of people ought to be included when scholars discuss the "framers" of this section, in particular, the feminist activists outside of the formal Parliamentary law-making process (that is, the group known as "the Ad Hockers") who mobilized to get an "equal rights" provision into the patriated Constitution.[310] These activists worked, in particular, against political efforts by provincial premiers to subordinate section 28 to section 33 of the *Charter*,[311] the latter being the constitutional "Notwithstanding Clause."[312] With reference to the collective intentions of these feminists and the political outcome they effected, Froc thus writes that

> Ad Hockers viewed section 28 not simply as an interpretive mechanism, but also as a powerful influence over other rights. They had an understanding of section 28 as an overarching fundamental principle of gender equality for the entire *Charter*. It was meant to ensure rights were viewed through a gendered lens and to be used as a means to conduct a gender-based analysis of constitutional provisions.[313]

The question, for Froc, then becomes what principle the judiciary ought to derive, today, from the historical story she tells of the Ad Hockers' activism. It is not a vague and general appreciation of the necessity of judicial restraint, she argues; rather, it comes down to "preserving the constitutional choices that have been deliberately made by specified and democratic procedures."[314] As Froc goes on to explain, the latter is a matter of "preventing judicial distortion and subsequent nullification of a constitutional provision created through extraordinary public involvement in constitution-making."[315] Thus, far from subjecting present-day rights to the "dead-hand" of past decision-makers, Froc insists, "originalism would *enhance*

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[309] See Froc, "Is Originalism Bad for Women?", *supra* note 150.
[310] See *ibid* at 240–250.
[311] *Supra* note 155.
[312] See Froc, "Is Originalism Bad for Women?", *supra* note 150 at 248–249.
[313] *Ibid* at 249–250.
[314] *Ibid* at 276 quoting; Keith E Whittington, "Originalism: A Critical Introduction" (2013) 82 Fordham Law Review 375.
[315] Froc, "Is Originalism Bad for Women?", *supra* note 150 at 276–277.

the democratic legitimacy of judicial review" with respect to the application of section 28 by calling today's judges back to an appreciation of past workings of democratic political processes.[316]

It is in this final move, from history to binding principle, that originalists inscribe into the Constitution the presence of what might otherwise be absent: that which I am calling the sovereign self.

Recall Kahn's distinction between the drafters and the authors of judicial opinions and, indeed, of the Constitution itself. In democratic states like Canada and the United States, the legitimacy of both is predicated on the citizenry's ability to see itself as the texts' ultimate author. Or, put differently, these texts succeed to the degree that they are ultimately accountable to the citizenry, not just (or even primarily) to those who actually composed them. "We the people," in the United States, or we the people through our Parliamentary representatives, in the Canadian democracy, are the sovereign speakers of the Constitution's or the judicial opinion's words. Indeed, we must be to the degree that these texts fit within the larger project of democratic self-government: it is to the extent that we can look upon these documents and see ourselves that they carry legitimacy and binding authority.

In the face of anxiety, Tillich and existentialists like Søren Kierkegaard teach us,[317] the self must assert its being. This is a matter of "accepting acceptance," as Tillich put it, by affirming one's self in spite of everything that threatens to evacuate the self of meaning.[318] For it is an existentially courageous act to be when doubt and nonbeing are in view.

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[316] *Ibid* at 277 [emphasis original].

[317] In, e.g., Søren Kierkegaard, *The Concept of Anxiety*, by Perkins (Macon, GA: Mercer University Press, 1985).

[318] See *Ibid* at 277 [emphasis original].

In the context of constitutional law, the prevailing anxiety of the originalists under analysis here is a product of their doubts about the legitimacy of the constitutional order itself under the conditions of interpretive purposivism. This much is evident elsewhere in Froc's work. Although favouring the purposivist approach, she argues, the Supreme Court has failed to expand any *Charter* right such that it is more gender inclusive now than it was at the moment of the *Charter*'s enactment; in fact, she notes, the "ambiguities" within purposive methodology have produced "an unstable s. 15 framework," in particular, in which women claimants are generally unable to obtain redress in cases involving gendered inequality.[319] As she goes on to explain:

> Section 15 is perhaps the most vivid example demonstrating that the Court's unprincipled approach to history fails to give due respect to the original constitutional commitment in the text and the extraordinary investment that ordinary Canadians made in the constitution-making process to improve the *Charter*. What is more, it fails to fulfil the aspirations of the *Charter* remaining effective against the harms of oppression for future generations. These criteria are most relevant to assess the legitimacy of any interpretive approach in the Canadian context.[320]

The measure of legitimacy for an interpretation of a *Charter* passage, here, is the degree to which it (1) makes known the terms of the constitutional bargain that underlay that provision, and (2) gives effect to those terms in the present. Froc understands the interpretive task, in other words, to be a matter of collapsing the temporal distance between past and present: not only through knowledge of the past, obtained through historical excavation and close reading; but also by effecting a kind of synchronic interaction between past and present in the interpretive moment.

The latter is visible in the way originalists mobilize historical data to advance their interpretive arguments. There is a felt desire to establish, not just that the constitutional text had some or other original meaning to the people who drafted and first read it, but more importantly

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[319] Froc, "A Prayer for Original Meaning", *supra* note 162 at 38–39.
[320] *Ibid* at 39.

that there is continuity between those people and Canadians today such that what it meant for them is what it still means for us.

Miller's argument for why the Court ought to explicitly adopt originalist methods is a useful example here. Those who come before the Court sometimes call upon it to "embrace 'interpretations' … of the *Charter* that are antithetical to the settlement reached under the *Charter* (specifically with respect to economic and social rights)," Miller writes.[321] It is "imperative" that judges "confront the limits of interpreting the constitutional texts" and, for that matter also, "the question of whether they have proper warrant in the Canadian constitutional order to undertake the constructions that they have been urged to make."[322] Indeed, it is necessary for the courts to "confront" both "for purposes of accountability."[323] Accountability to whom Miller leaves vague and open-ended, but given he refers in this passage to the Canadian constitutional order, I would plausibly assume that he means something like "accountability to Canadian democratic processes, in particular, those that gave rise to the *Charter*." In other words, Miller seems to be suggesting that judges ought to be accountable, in their constitutional decision making, to the citizenry—that is to say, to us as members of the Canadian legal public.

Oliphant and Sirota seem to have a similar concern in mind when they write, elsewhere, of their "fear that because so little attention has been paid to [originalist] issues in Canada, there have been few serious efforts to investigate what degree of constitutional 'change' ushered in through a majority vote of nine jurists, however eminent, is consistent with a meaningful commitment to democratic self-governance."[324] Indeed, they go on to say, purposivism itself, with its emphasis on large, liberal, and generous interpretations of constitutional guarantees,

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[321] *Ibid* at 39.
[322] Miller, *supra* note 157 at 146.
[323] *Ibid*.
[324] Oliphant & Sirota, *supra* note 127 at 162.

"risks promoting a degree of malaise regarding how and under what circumstances the judiciary may effectively amend the Constitution on our collective behalf."[325] The use of the first-person plural pronoun "our" is significant here. Oliphant and Sirota want their readers, today, to see ourselves in the Constitution's drafting and enactment: to look upon the Constitution as if into a mirror and see ourselves reflected back in its wording. And they want, as well, to caution against anything that smacks of judicial activism because that makes judges, rather than the sovereign self, the authors of judicial opinions.

It is in the synchronic interaction they and other originalists posit between constitutional interpretation then and constitutional interpretation now, in which we readers come to see ourselves as sovereign authors persisting through time but instantiated in space within the Constitution itself, that originalism makes present in the text by means of reading it something that would otherwise be absent: the interpreter's self. To be sure, this self is not the interpreter as an actual individual within the world. Rather, the self in view here is an individual participant in a collective project of self-government, which is to say, it is a kind of philosophical abstraction that transcends the lived experiences of any real-life Canadians. Mysterious, ethereal, transcendent—this self is like God, a translation of the theological into the domain of the political such as Schmitt described in the quotation from his *Political Theology* above.[326]

The originalist move to instantiate this self within the constitutional text is, ultimately, the same move that American evangelicals make with respect to the biblical text, although there it is to effect the presence of God rather than the self. In evangelicalism the question is, how ought Christians in the present moment to relate themselves to the content of a textual corpus that predates them in time by as much as two millennia? And as I showed in chapter two, one answer

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[325] Oliphant & Sirota, *supra* note 113 at 162.
[326] Schmitt, *supra* note 274 at 36.

that evangelicals, in particular, have adopted is that the present moment ought simply to be equated with the biblical narratives and present-day practices made to conform with the practices of the earliest Christians. There is, I showed too, a polemical edge to this equation in that evangelical primitivism asserts, if only implicitly, that there is a kind of illegitimacy to those practices that are not represented in the biblical text but have accrued at subsequent points in time. Both the primitivist equation and the polemic against practices that have accrued illegitimately are reflected in originalist rhetoric. There, an interpretation's legitimacy is a function of the degree to which it brings us into contact with the Constitution's original or first meanings, a kind of legal analogue to evangelicals' move to posit a direct encounter with God in the primitive church; and the temporal synchrony originalism purports to achieve between readers now and political actors then allows the former to speak to present controversies with the authoritative voice of democracy's past workings.

This is a theological project, in other words. It presumes not only that the communicative intentions of the sacred sovereign are knowable to interpreters at some temporal remove from when that sovereign spoke most clearly and authoritatively, but also that those intentions enjoy hermeneutical privilege insofar as interpreters can effect their presence within the constitutional text before them. But to advance this assertion is to raise the question, what is sacred about the sovereign self that originalists find in the constitutional text? After all, when evangelicals look to the biblical text to find their deity, they are obviously doing theology; but when originalists look to the constitutional text to find the democratic voice, this is not obviously theological at all.

It is here that political theology, such as Kahn describes, proves helpful. For the distinction between God—as the divine sovereign—and the citizenry—as the democratic

sovereign—is not so significant as might first appear. As Kahn notes with reference to the Supreme Court of the United States,

> That our Court occupies a role that has a theological dimension is an old point. At the center of our civil religion is the "priesthood" of the Court, guarding that most sacred of texts: the Constitution. While the Court likes to appeal to the rule of law to legitimate its exceptional role, political theology suggests that we look in a different direction: to the Court's capacity to speak in the voice of the popular sovereign.[327]

It is in its ability to channel the voice of the popular sovereign that the Court is permitted to declare something constitutional and something else unconstitutional, and to confer legitimacy on a government action or to withhold that same judgement.[328] For it does so in a way that is recognizable by the governed as an expression of their own democratic decision-making, embodied in the Constitution itself that the Court interprets.[329]

Scriptural interpretation, as a theological methodology, allows the person undertaking it to channel the divine speaking role in relation to some or other controversy. For example, when faced with a question such as whether same-sex marriage is permissible within the context of the Christian community, an evangelical might appeal to biblical passages that express disapproval of homosexuality and thereby invoke the voice of God to settle the dispute. In such a case, the interpretive methodology adopted is designed to render the interpreter of the text invisible whilst rendering God highly visible as the ultimate authority on matters of ethics and church law, instantiating the divine presence in the biblical text in the talismanic fashion I described in chapter two.

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[327] Kahn, *supra* note 273 at 9.

[328] *Ibid* at 9–10.

[329] It is beyond the scope of this thesis to explore, empirically, whether this is, in fact, the case in a democratic state like Canada. I accept Kahn's analysis on the level of theory, and find it at the very least empirically plausible.

So, too, does constitutional interpretation in a democratic state draw attention, not to the voice of the Court, but rather to the voice of the people instantiated in and through the constitutional text itself. Kahn again: "the ambition of the [judicial] opinion is to persuade us that we are not hearing the voice of the judge, but rather we are hearing more clearly the people as the author of the statute" or the constitutional passage.[330] Originalism is not alone in engaging in this persuasive project, of course. Rather, what makes it unique is the degree to which it insists on careful historical exegesis as the means by which interpreters can be confident that the words they are hearing the Constitution speak today are the very words of an authoritative democratic sovereign—"our" words, that is to say, to which we continue to assent to the degree that originalism helps us recognize ourselves in them. That, in short, is what I mean when I say that originalism effects the presence of what would otherwise be absent: that it summons the voice of the democratic sovereign as if summoning the voice of God through its historically driven engagement with the constitutional text.

Rights are not self-interpreting in the originalist imagination. Sirota makes this much clear in his summary definition of originalism as an approach that "holds that the meaning of constitutional provisions is fixed at the time of their enactment (the fixation thesis) and, in this fixed form, binding on courts giving effect to these provisions (the constraint principle)."[331] There are two aspects to the originalist project, this passage suggests, one epistemological and the other normative. Epistemologically, originalism asserts that there is an original meaning to a constitutional text, and this is knowable to the interpreter working today through historical exegesis; normatively, originalism asserts that that meaning ought to determine judicial decision

[330] Kahn, *supra* note 283 at 75.

[331] Kahn, *supra* note 256 at 75. Sirota is here drawing on the work of, especially, Lawrence Solum. See, for instance, Sirota, *supra* note 113 at 100.

making in the present because it represents the will of the democratic sovereign as expressed through the political processes of the state. And it is this particular conjunction of epistemological and normative commitments that makes originalism stand out as an interpretive approach.

That conjunction likewise animates the project that Brad East describes in his overview of the Christian theological interpretation of scripture. For East, theological interpretation is predicated, *inter alia*, on the assumption that there is "some kind of communicative relation, mediated by the [biblical] text, between the triune God and the church."[332] Evangelicals operate on the assumption, in other words, that they can discern the divine voice within that text; and, from this, derive the conclusion that the utterances of that voice are applicable to evangelicals' lives, ministry, and worship.[333] For evangelicals, the latter has historically led in a primitivist direction that looks for correspondences between aspects of present life and elements of early Christian life; and where those correspondences cannot easily be found, looks to create them by reorganizing the church in such a way that it would be recognizable to the first-century worshippers of Jesus of Nazareth. In so doing, evangelicals look to position themselves within the story of God's work in the world (work that is redemptive in nature; see below), as told in the Bible and as they believe to be continuing into today. And so, too, for constitutional originalists, the point of overcoming the temporal gulf that separates them from the *Charter*'s authors is to find themselves, their voice, and their place in Canada's unfolding constitutional story.

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[332] Lawrence B Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning" (2015) 91 Notre Dame Law Review 1–78; Lawrence B Solum, "The Constraint Principle: Original Meaning and Constitutional Practice" (2019), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215>.

[333] The latter is the "teleological" dimension of theological interpretation that East identifies in "The Hermeneutics of Theological Interpretation," *supra* note 201 at 36.

In the face of constitutional anxiety, then, originalism offers an existentially self-satisfying interpretive position. The Constitution can legitimately claim to govern oneself because it does not speak in general or in abstract; its voice is the self's, which is nothing other than the self that participates in the collective act of self-government that democracy represents. The constitutional order might well be under threat, from interpretive ambiguity not least. But in the face of that nebulous threat, the originalist can turn to their own self to assert its sovereignty via its speaking presence. And that, in the end, is what gives originalism its particular allure.

ii. Furthering Redemptive Ends

So much for presence. It remains to examine telos.

My argument, here, is that there is an analogy between the goals originalists pursue through their interpretations and those evangelicals pursue via engagement with their scripture. More particularly, it is that originalism and theological interpretation both position the interpreter as an agent of the sovereign's teleological project and frame this project as redemptive in nature.

The teleological vision of American evangelicalism is closely tied to other of the tradition's historic priorities: evangelism, for instance, along with a strong conviction that faith in Jesus Christ is a sufficient condition for individual salvation.[334] One must know God in order to believe in God and thereby be saved by God; which implies, for evangelicals, that they have a divine mandate to make their deity known to those outside the evangelical faith tradition in order that all may be saved.[335] The Bible functions within this evangelistic project, East writes, as

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[334] These correspond to "conversionism" and "crucicentrism" in the Bebbington quadrilateral.

[335] The history of evangelical missions reflects the convictions summarized here. I can only gesture in passing to the voluminous scholarship detailing that history, which includes much writing by evangelicals themselves. See, for example, the theological scholarship in the area of missiology by Christopher JH Wright, *The Mission of God's People: A Biblical Theology of the Church's Mission*, by Jonathan Lunde (Grand Rapids: Zondervan, 2010); and John Mark Terry, Ebbie Smith & Justice Anderson, eds, *Missiology: An Introduction to the Foundations, History, and Strategies of World Missions* (Nashville, TN: Broadman & Holman Publishers, 1998).

> the sign and instrument of divine revelation. Through it the living Christ imparts knowledge to his people, the church; conducts them in their mission to the nations; announces, to and through them, the good news of the gospel; governs and orders their life together; sanctifies them, collectively and individually, as disciples following his way; communicates divine grace to them in liberal abundance; and leads them, by his Spirit, into faithful worship of Israel's God, the one and undivided Holy Trinity.[336]

The point of reading the Bible in a theological light, here, is to use that light to illuminate God's saving purposes to the world at large: theological interpretation is the first step towards theological conversion.

A similar logic is on display in the way Canadian originalists speak to the judiciary via their comments about the proper role the courts play in interpreting the Constitution. Take Froc's extended treatment, with Michael Marin, of the Supreme Court's decision in *R v Comeau*,[337] a case that concerned the constitutionality of provincial tariff regimes under section 121 of the *Constitution Act, 1867*.[338] "Thoughtful engagement with history is a necessary aspect of constitutional law," Froc and Marin argue.[339] But in *Comeau*,[340] the Court subordinated historical accuracy for "doctrinal consistency."[341] This reflects, in turn, the "uncertainty and inconsistency in the Court's approach to constitutional interpretation,"[342] which is pervasive under living-tree purposivism because this approach affords the Court "excessive discretion," including "to change the meaning of the constitutional text over time as society changes" and "to employ historical evidence in an arbitrary and haphazard fashion."[343] The solution to these conditions of

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But see also the critical historical scholarship of, e.g., George E Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* (Minneapolis: Fortress, 1993).

[336] East, "The Hermeneutics of Theological Interpretation", *supra* note 201 at 36–37.

[337] 2018 SCC 15 ["*Comeau*"].

[338] 30 & 31 Vict, c 3.

[339] Kerri A Froc & Michael Marin, "The Supreme Court's Strange Brew: History, Federalism and Anti-Originalism in "Comeau"" (2019) 70:1 University of New Brunswick Law Journal 297–332 at 331.

[340] *Supra* note 337.

[341] Froc & Marin, "The Supreme Court's Strange Brew", *supra* note 339 at 331.

[342] Froc & Marin, "The Supreme Court's Strange Brew", *supra* note 305 at 331.

[343] *Ibid* at 332.

interpretive ambiguity, Froc advocates elsewhere,[344] is for courts to allow historical data to discipline their analysis, under the *Big M* purposive framework, of a constitutional passage's "proper linguistic, philosophic and historical contexts."[345]

There is a redemptive thrust to Froc's critique of the Courts and proposal for interpretive reform. Originalism is not just one approach to reading the Constitution among many; it is the approach that calls the Court to be the best version of itself. In Froc's mind, this looks like a hybridization between the American new originalism of legal theorist Jack Balkin[346] and the living-tree purposivism to which the Court has long committed itself. She declares this "new purposivism" to be "most conducive to the Canadian context" because "[i]t permits both fidelity to the original constitutional plan, created through and with the extraordinary contributions of Canadians and with which Canadians continue to identify, and also permits the *Charter* to be effective to combat oppression into the future, which … are the appropriate criteria in relation to our constitutional history."[347] In laying out her originalist analysis of, for instance, section 15 of the *Charter*,[348] Froc means to guide the Court towards the proper application of its purposivism; her analysis reveals that the Court has, to date, "misunderstood the underlying principles behind s. 15," to the detriment of its reasons.[349] The point of hybridizing originalism and purposivism, therefore, is to course correct this misunderstanding and ensure the Court gets the Constitution right in future decisions.

Oliphant and Sirota are aiming towards something similar in their argument that the Supreme Court has long been deciding cases on originalist lines, albeit without acknowledging

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[344] So *ibid* at 298.
[345] *S*ee *Big M*, *supra* note 30 at para 117.
[346] In, especially, Balkin, *supra* note 5.
[347] Balkin, *supra* note 5.
[348] *Supra* note 155.
[349] Froc, "A Prayer for Original Meaning", *supra* note 162 at 68.

it. The point of making that argument, for them, is to spur "open reflection" on originalist ideas;[350] and, especially, to learn from originalist answers to such questions of legal theory as what makes judicial reasoning with respect to the Constitution legitimate in the first place.[351] If originalism does, in fact, inform and to some extent even determine Supreme Court decision making already, there is no reason for Canadian legal actors, including members of the Canadian judiciary, to avoid looking at originalist debates or considering originalist conclusions.[352] Oliphant and Sirota prefer to argue that living-tree purposivism as actually practiced is, in fact, compatible to a high degree with originalism as currently theorized rather than that originalism ought to usurp purposivism's place as Canada's prevailing legal orthodoxy because the former argument implies that Canadian constitutional law can follow an intuitively satisfying redemptive arc: it can become what it has always aspired to be.

There are three moves at work in the originalist scholarship in view here. The first consists of the assertion that the Supreme Court has failed to live up to its stated commitment to interpretive purposivism, either by inadvertently smuggling originalist principles into its reasoning or else by failing to allow historical data to discipline its thought. The second move is to posit a solution to that failure in the form of an explicit adoption of originalist thinking in the Court's future decision making. The third move is implicit in the first two: originalists need to speak to the judiciary and other members of the Canadian legal public about the benefits and utility of originalist thinking.

This is, substantively, the missionary project of American evangelicalism, which begins with condemnation and, from there, moves to salvation by means of proclamation. In this

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[350] *Ibid* at 68.
[351] See Oliphant & Sirota, *supra* note 127 at 162–164.
[352] *Ibid* at 164.

religious tradition, the problem is sin and human fallenness, which keeps people from being the versions of themselves that God intended them to be. The solution is acceptance, by sinful people, of evangelical beliefs about God and the Bible. And in order to effect that solution, evangelicals need to spread the good news of their gospel through its proclamation to the nations.

In other words, what we have, in the redemptive project of constitutional originalism, is a further point of contact, at the level of moves and of motivation, between this interpretive approach and American evangelicalism. Originalists want to save the Canadian constitutional order just as evangelicals want to save the world; and in this they both place their faith in the right interpretation of their communities' central texts.

C. Conclusion

Thus I arrive, by way of political theology, at the conclusion I gestured towards at the outset of this thesis: constitutional originalism proceeds in a theological register understandable by analogy with evangelical engagement with the Protestant scriptures. Where the former posits a popular sovereign self, the latter posits a divine sovereign—but in each case, the sovereign in question speaks through a text that the interpreter has the tools to explicate and operationalize, as well as the evangelistic duty to do so. It is the nature of those tools along with the manner in which they are used that give originalism and evangelicalism both their particularity as theological traditions.

What do we learn about Canadian constitutional law—and, in particular, its originalist expressions—by situating it in relation to American evangelicalism in this manner? To be sure, we learn that the two have more in common than has yet been described and defined in the scholarly literature on Canadian approaches to constitutional interpretation. But more

substantively than that, perhaps, we learn also that originalism appeals to readers precisely because of its theological dimensions and the way in which it solves for a particular kind of constitutional anxiety. It is because originalism allows the interpreting self to look upon the Constitution and hear themselves speaking in and through it that this approach proves existentially self-satisfying. And it is because originalism allows its practitioners to feel that they are effecting the salvation of the constitutional order that this approach spurs those practitioners to seek consonance between their methodology and that favoured by the Supreme Court in its decision making. Originalism, in short, gives its adherents purpose.

Conclusion:
Why Originalism Now?

I have argued in this thesis for an analogy between constitutional originalism in Canada and the interpretive practices of American evangelicals. From the discussion of originalist methods and motives that featured in that analogy, a second-order interpretive question arises: Why has originalism emerged as an interpretive force within Canadian constitutional discourse at this particular point in time, that is to say, from approximately 2010 onwards?

Of course, the originalists in view here would likely be quick to say that the Supreme Court has always been originalist, at least to some degree. With respect to *Charter* interpretation, for example, the Court was calling for judicial "restraint" when construing language rights derived from historical political compromises as early as the 1986 decision in *Société*.[353] And Benjamin Oliphant and Léonid Sirota go to great lengths to show the compatibility between the Court's influential account of purposive interpretation in its 1985 decision in *R v Big M Drug Mart*[354] and the originalist project of "determining either what the framers meant in drafting and enacting certain provisions in certain terms or how those terms would have been understood at the time the *Charter* was adopted."[355] Nonetheless, it is still the case that originalist scholarship at least has only begun to flourish, within the Canadian legal academy, over the past 15 years. Why?

One answer, which I find particularly compelling, is that originalism is a natural response to the ageing of a community's foundational document(s). Put differently and in simpler terms: originalism is particularly compelling, now, because the *Charter*,[356] especially, is getting old.

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[353] *Supra* note 304.
[354] *Supra* note 30 at para 117.
[355] Oliphant & Sirota, *supra* note 127 at 157.
[356] *Supra* note 155.

The enactment of the *Charter* represents a key moment in Canada's national story. With it, the country took final ownership of its constitutional order from the United Kingdom. And for quite some time, the people interpreting the *Charter*'s provisions could reasonably claim to be part of the same generation that engaged in this national assertion of democratic self-sovereignty. The courts did not need to work nearly as hard to persuade Canadians that the *Charter* spoke in their voice, because Canadians could well remember the political processes through which this constitutional document came into being.

That is no longer the case. There might always have been some temporal gap between the *Charter* and its readers, in the way any text is temporally antecedent to its reception. But as the *Charter* has aged, that gap has increased and, with it, the amount of interpretive work required to convince Canadians that the document is theirs. Interpreters, today, have to try harder to find their sovereign self within the *Charter* text; they have to instantiate it, effecting its presence in the manner I have described here.

Originalist methods are not the only way of doing so, of course. Progressive interpretations solve for the problems of constitutional legitimacy and authorship in a democracy, too, in their own ways. But originalism appeals because of the particular way in which it purports to collapse temporal distance. For those whose starting worry is that we cannot hear the *Charter* properly because the basis for its legitimate claim to govern is located temporally in the past, originalism provides an elegant solution in that it posits a synchronic relationship between readers, now, and the objects of their interpretive efforts. As an interpretive approach, originalism thereby posits a solution to a particular anxiety that might not be shared by all. But for those who do experience this worry—perhaps because of the ongoing erosion of popular trust in public institutions and in those in positions of public expertise; perhaps because there is, indeed, a

degree of wistful longing on the part of some for days gone by in the face of broader social changes in such areas as popular morality— originalism appeals because it turns the problem that fuels their anxiety into no problem at all. The *Charter* becomes no longer an entity of the past, but rather an entity of the interpreter's present.

In this thesis, I have traced the theological dimensions of constitutional originalism through an extended analogy between this approach to constitutional meaning making and evangelicals' engagement with the Protestant scripture. I did so to solve for a particular problem within Canadian legal life, namely, that originalism seems to resonate with evangelical interpretive practices but with unclear implications for the study of law in Canada. In showing that that resonance runs deeper than originalists might have been willing to admit or their critics might have been prepared to assert, this thesis has broken ground for a larger comparative study of constitutional and religious life in Canada.

That study is where scholars ought to go from here. What I am proposing, in other words, is a broader inquiry into the theological underpinnings of constitutional interpretation. This inquiry would be one that refuses to permit the objects of its gaze to set the terms of their own analysis and critique. But so, too, would it be one that refuses to treat the religious or the theological as dirty words in Canadian legal discourse. There is nothing wrong or morally repugnant about constitutional interpreters drawing on theological presumptions or theologically analogous modes of reading to guide their approach. What is necessary, however, is to bring that relationship of theoretical dependence to the fore so that it can be evaluated and, where helpful, revised. For we are all, as subjects of law's rule, interpreters of legal texts, not least of the Constitution itself; and as hermeneuts of varying persuasions, it is useful to know on what sacred ground we find ourselves treading.

Theology is a rich domain. So, too, is law. Each contributes to the content and interpretive force of the other. What remains is to draw out the extent of this networked relationship so that we might better appreciate what law and theology are contributing, individually and together, to Canadian social life.

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