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The Constitution as Poetry

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The Constitution as Poetry

*Samuel J. Levine**

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I. INTRODUCTION

Building upon a body of scholarship¹ that compares constitutional

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¹ See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (rev. ed. 2011); JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004); Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 *TULSA L. REV.* 553 (2003); Robert M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983); David R. Dow, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 *HOUS. L. REV.* 543 (1992); Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 *S. CAL. L. REV.* 35 (1985); Ronald R. Garet, *Gnostic Due Process*, 7 *YALE J.L. & HUMAN.* 97 (1995); Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984); Bernhard Grossfeld, *Religion and Law: Comparative Legal Semiotics*, 18 *L. & BUS. REV. AM.* 3, 26 (2012); Gregory A. Kalscheur S.J., *Christian Scripture and American Scripture: An Instructive Analogy?*, 21 *J.L. & RELIGION* 101 (2006); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 *SUP. CT. REV.* 123 (1979); Francis J. Mootz III, *Belief and Interpretation: Meditations on Pelikan's "Interpreting the Bible and the Constitution"*, 21 *J.L. & RELIGION* 385 (2006); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 *S. CAL. L. REV.* 551 (1985); Shlomo C. Pill, *Valuing Our Discordant Constitutional Discourse: Autonomous-Text Constitutionalism and the Jewish Legal Tradition*, 64 *BUFF. L. REV.* 349, 349 (2016); Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 *J.L. & RELIGION* 97 (2007); Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 *J. CONTEMP. LEGAL ISSUES* 447 (1996); David A. Skeel, Jr., *What Were Jesus and the Pharisees Talking About when They Talked About Law?*, 23 *J.L. & RELIGION* 141 (2007); Peter J. Smith

interpretation to biblical and literary interpretation,² and relying on an insight from a prominent nineteenth century rabbinic scholar, this Article briefly explores similarities in the interpretation of the Torah—the text of the Five Books of Moses—and the United States Constitution. Specifically, this

& Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693 (2011); Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999); Symposium, *Scriptural Interpretation and Constitutional Interpretation*, 2009 MICH. ST. L. REV. 273 (2009); Symposium, *Text, Tradition, and Reason in Comparative Perspective*, 28 CARDOZO L. REV. 1 (2006); Steven D. Smith, Review Essay, *What Doth It Profit? Pelikan's Parallels*, 90 MINN. L. REV. 727 (2006) (reviewing JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004)); Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121 (2000); Jeanne C. Fromer, Note, *Looking to Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation*, 115 HARV. L. REV. 1456, 1479 (2002); Michael Sink, Comment, *Restoring Our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921 (2004); Harold Anthony Lloyd, *Gorsuch and Originalism: Some Critiques from Logic, Scripture, and Art* (Mar. 5, 2017) (unpublished essay), <https://ssrn.com/abstract=2927810>. See generally SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* (2018); see also Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999) [hereinafter Levine, *Legislation in Jewish Law*]; Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465 (1998) [hereinafter Levine, *Halacha and Aggada*]; Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997) [hereinafter Levine, *Jewish Legal Theory and American Constitutional Theory*]; Samuel J. Levine, *Miranda, Dickerson, and Jewish Legal Theory: The Constitutional Rule in a Comparative Analytical Framework*, 69 MD. L. REV. 78 (2009) [hereinafter Levine, *Miranda, Dickerson, and Jewish Legal Theory*]; Samuel J. Levine, *Of Inkblots and Omnisignificance: Conceptualizing Secondary and Symbolic Functions of the Ninth Amendment, in a Comparative Hermeneutic Framework*, 2009 MICH. ST. L. REV. 277 (2009) [hereinafter Levine, *Of Inkblots and Omnisignificance*]; Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003); Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998) [hereinafter Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations*]. Cf. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) (“A Talmudic maxim instructs with respect to the Scripture: ‘Turn it over, and turn it over, for all is therein.’ Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not.”) (citing 8 THE BABYLONIAN TALMUD: SEDER NEZIKIN, TRACTATE ABOH, Ch. V, Mishnah 22, 75–77 (I. Epstein trans., 1935)).

² In addition to many of the works cited *supra* note 1, some of the groundbreaking scholarship in this field includes, for example, INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* (1986); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Richard H. Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939 (1986).

Article draws upon Rabbi Naftali Zvi Yehudah Berlin's ("Netziv") intriguing suggestion that the interpretation of the text of the Torah parallels the interpretation of poetry.³ According to Netziv, this parallel accounts for the practice of interpreting the Torah expansively in ways that derive substantive legal rules and principles far beyond those found in the relatively narrow wording of the text.⁴ Moreover, Netziv explains that deriving these interpretations, which, at times, seem far removed from the literal reading of the text, requires a level of technical expertise similar to the skilled literary analysis necessary for thorough, thoughtful, and meaningful interpretation of poetry.⁵

Based on Netziv's insight, this Article focuses on two methods of interpreting the Torah⁶ and the Constitution⁷ that may otherwise appear to

³ See NAFTALI ZVI YEHUDAH BERLIN, KIDMAS HAAMEK, INTRODUCTION TO HAAMEK DAVAR.

⁴ See *id.*

⁵ See *id.*

⁶ Netziv's discussion is premised on the biblical depiction of the Torah as a "poem" or "song." See *Deuteronomy* 31:19; MAIMONIDES, *Laws of Tefillin u-Mezuzah ve-Sefer Torah* 7:1, in MISHNEH TORAH; LEVI BEN GERSHON (RALBAG), *Commentary on Deuteronomy* 31:19; Yissocher Frand, *Beethoven's Fifth Symphony*, TORAH.ORG (June 7, 2002), <https://torah.org/torah-portion/ravfrand-5760-haazinu/>; Dov Freis, *HaTorah Keshera*, DA'AT, <http://www.daat.ac.il/mishpat-ivri/skirot/225-2.htm> (last visited Jan. 22, 2019); Michael Hattin, *The Commandment to Write a Torah Scroll*, VBM, <https://www.etzion.org.il/en/commandment-write-torah-scroll> (last visited Oct. 16, 2018); Jay Kelman, *Vayelech: Poetic License*, TORAH IN MOTION (Aug. 11, 2014), <https://www.torahinmotion.org/discussions-and-blogs/vayelech-poetic-license>; Jonathan Sacks, *Nitzavim-Vayelech (5769)—The Torah as G-d's Song*, RABBI SACKS: COVENANT & CONVERSATION (Sept. 12, 2009), <http://rabbisacks.org/covenant-conversation-5769-nitzavim-vayelech-the-torah-as-g-ds-song/>; Jonathan Sacks, *Torah as Song (Vayelech 5775)*, RABBI SACKS: COVENANT & CONVERSATION (Sept. 16, 2015), <http://rabbisacks.org/torah-as-song-vayelech-5775/>; Aviad Stollman, "Your Laws are Songs for Me" (*Ps. 119:54*), BAR-ILAN U. PARASHAT HASHAVUA STUDY CTR., <https://www.biu.ac.il/JH/Parasha/eng/haazinu/sto.html> (last visited Oct. 16, 2018); see also Mishnah, *Yadayim* 3:5; Avraham ben HaRambam, *Ma'amar al Odos Derashos Chazal*, in MILCHAMOS HASHEM 91; Avraham Rivlin, *The Parable of Shir Hashirim*, YESHIVAT KEREM B'YAVNEH, <http://www.kby.org.il/english/torat-yavneh/view.asp?id=3980> (last visited Oct. 6, 2018); Joseph B. Soloveitchik, *Ubikashtem Misham*, in ISH HA-HALACHA—GALUY V'NISTAR 119–21 n.1 (1978) (analyzing layers of meaning in biblical poetry); Moshe Taragin, *Shir Ha-shirim—The Elegy of Jewish History*, VBM, <https://www.etzion.org.il/en/shir-ha-shirim-elegy-jewish-history> (last visited Oct. 16, 2018). Cf. Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 539 (1998) ("[T]he Torah, the Written Law, is poetry, and the Talmud, the Oral Law, is its prose counterpart . . ."); Steven Shaw, *Orthodox Reactions to the Challenge of Biblical Criticism*, 10 TRADITION 61, 75 (1969) ("[W]hile the Bible may not be 'just poetry[']', it is at least poetry.") (emphasis in original).

⁷ Notably, American legal scholars of differing interpretive views have observed the poetic style of the United States Constitution, suggesting that the analogy of the Constitution to poetry may appeal to a wide range of legal philosophies. See, e.g., Albert P. Blaustein, *Constitution Drafting: The Good, the Bad, and the Beautiful*, 2 SCRIBES J. LEGAL WRITING 49, 49 (1991) ("The language of a constitution must satisfy not only the requirements of accuracy, brevity, and clarity, but also the test of beauty and inspiration. It is enough for most

legal documents to contain good prose; a constitution must aspire to poetry.”); Garrett Epps, *Poetry of the Preamble*, OUPBLOG (Sept. 17, 2013), <https://blog.oup.com/2013/09/poetry-preamble-us-constitution-day/>; Rob Natelson, *From the Heartland: The Constitution’s Poetic Preamble*, AM. SPECTATOR (Feb. 13, 2018), <https://spectator.org/the-constitutions-poetic-preamble/>; see also Valéry Giscard d’Estaing, *The Calligraphy of History*, in DESPERATELY SEEKING EUROPE 259 (Susan Stern & Elisabeth Seligmann eds., 2003), cited in Elizabeth F. DeFeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT’L & COMP. L.J. 351, 382 n.252 (2005) (“The poetry of a constitution is in some ways the calligraphy of history.”); William E. Forbath, *Lincoln, the Declaration, and the “Grisly, Undying Corpse of States’ Rights”: History, Memory, and Imagination in the Constitution of a Southern Liberal*, 92 GEO. L.J. 709, 718 (2004) (overserving that Charles Black’s “method of interpreting the Constitution was very much like the method of reading poetry”); Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 758 (1987); Jeremy Webber, *Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform*, 21 SYDNEY L. REV. 260 (1999). Likewise, scholars of differing political views have questioned the analogy between the Constitution and poetry. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 142 (Amy Guttmann ed., 1997); J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews”*, 20 CARDOZO L. REV. 1513, 1530 (1999) (“[W]e think that the analogy [of law] to the performing arts is superior to the analogy to poetry or novels.”); Randy E. Barnett, Book Review & Reply, *Why You Should Read My Book Anyhow: A Reply to Trevor Morrison*, 90 CORNELL L. REV. 873, 883 (2005) (contrasting interpretation of the Constitution and poetry); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1129 (2003) (“One may, we suppose, apply a different interpretive hermeneutic if reading the Constitution as literature, or poetry, or aspiration, or as some kind of eighteenth-century political novel. But that is not, or at least should not be, our enterprise as constitutional lawyers.”); Trevor W. Morrison, Book Review & Reply, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 849 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)). For other discussions of the relationship between law and poetry, across a broad range of contexts, see, for example, SOLON OF ATHENS: NEW HISTORICAL AND PHILOLOGICAL APPROACHES (Josine H. Blok & Andre P.M.H. Lardinois eds., 2006); EMILY KATZ ANHALT, SOLON THE SINGER: POLITICS AND POETICS (1993); RYAN K. BALOT, GREED AND INJUSTICE IN CLASSICAL ATHENS (2001); Bernhard Grossfeld, *Poetry, Language and Law*, in RECHT UND SPRACHE 25 (Thomas Lundmark & Astrid Wallow eds., 2006); Dennis Kurzon, *Poetic Language and Court Opinions*, in LAW AND AESTHETICS 240 (Roberta Kevelson ed., 1992); Sidney W. DeLong, *The Poetry of Law*, 58 J. LEGAL EDUC. 141 (2008); Edward J. Eberle & Bernhard Grossfeld, *Law and Poetry*, 11 ROGER WILLIAMS U. L. REV. 353 (2006); Bernhard Grossfeld & Josef Hoeltzenbein, *Poetic Legal Dreams: Cross-Cultural Pioneers*, 55 AM. J. COMP. L. 47 (2007); John C. Kleefeld, *From Brouhahas to Brehon Laws: Poetic Impulse in the Law*, 4 L. & HUMAN. 21 (2010); Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. U. L. REV. 311 (1999); Alexandra J. Roberts, Book Review, *Constructing A Canon of Law-Related Poetry*, 90 TEX. L. REV. 1507 (2012) (reviewing POETRY OF THE LAW: FROM CHAUCER TO THE PRESENT (David Kader & Michael Stanford eds., 2010)); Richard K. Sherwin, *Law and the Poetic Imagination*, 61 N.Y.L. SCH. L. REV. 347 (2016); David A. Skeel, Jr., Book Review, *Practicing Poetry, Teaching Law*, 92 MICH. L. REV. 1754 (1994) (reviewing LAWRENCE JOSEPH, BEFORE OUR EYES (1993)); Stephen J. Toope, *Cultural Diversity and Human Rights*, 42 MCGILL L.J. 169 (1997); Adam J. White, *Roberts’s Frost*, WEEKLY STD. (Jan. 8, 2015), <https://www.weeklystandard.com/adam-j-white/robertss-frost/>; *Law and Literature Symposium*, 77 U. CIN. L. REV. 783 (2009).

present an anomalous approach to understanding a legal text,⁸ but which are standard and important methods of literary analysis when applied to poetry: first, the expansive interpretation of a provision, a brief phrase or, at times, a single word, to establish a wide-ranging set of principles and ideas; and second, somewhat conversely, the interpretation of a provision, seemingly stated in categorical terms, but understood to incorporate qualifications, limitations, and exceptions. In either case, both the Jewish legal system and the American legal system accept the authority, if not the competency, of judicial experts to understand, interpret, and apply the text in ways that may not be apparent, and that may be difficult to accept outside the technical practices of biblical and constitutional exegeses. Finally, and perhaps as a further justification for these methods of interpretation, this Article concludes with the observation that, beyond their literary forms, the Torah and the Constitution share poetry's design to function as a timeless text, susceptible to meaningful application and containing important lessons for the foreseeable—and unforeseeable—future.

II. THE COMPARATIVE FRAMEWORK

The analysis in this Article is premised on the following basic elements of a comparative framework between the written Torah and the Constitution. First, the Torah and the Constitution serve as the foundational documents and supreme law within their respective legal systems, setting the parameters for the subsequent development of the legal systems.⁹ Second, both the Torah and the Constitution are relatively concise, and are written in stylized literary forms, thus requiring extensive interpretation and application to continue to function as the supreme law within working, living, and evolving legal systems.¹⁰

⁸ See, e.g., Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016):

[W]e show that constitutional law is in fact subject to special interpretive methods as compared to other sources of law, such as statutes and common-law precedents. . . . Textual interpretation likewise looks markedly different in the constitutional setting. . . . [O]ur basic point is . . . that the practice of interpreting constitutional language is distinct from interpreting other sources of law.

Id. at 702–03.

⁹ See, e.g., 2 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 479 (A. Philip and Muriel Berman ed., Bernard Auerbach & Melvin J. Sykes trans., 1994) (referring to the written Torah as the "written 'constitution' of Jewish law"). See generally *supra* note 1.

¹⁰ See generally Levine, *Jewish Legal Theory and American Constitutional Theory*, *supra* note 1.

Scholars have identified a number of literary forms and techniques present in the Constitution's text that lend themselves to methods of interpretation that are arguably unique within American law.¹¹ For example, in a recent article, Samuel Bray has identified the use of hendiadys—"two terms separated by a conjunction [that] work together as a single complex expression"—within the Constitution.¹² According to Bray, understanding the function of hendiadys can, in turn, "help us understand the Necessary and Proper Clause and the Cruel and Unusual Punishments Clause."¹³ Elsewhere, Bray has explored the implications of the constitutional structure for the interpretation of the text, noting a "famous example" of inner-textual interpretation in Chief Justice John Marshall's interpretation of "necessary" in the Necessary and Proper Clause "in light of its usage elsewhere in the Constitution."¹⁴

Similarly, as André LeDuc has observed, interpreting the First Amendment's protection of the freedom of the press, Justice Antonin Scalia "has suggested that the courts have read the term *press* as a 'sort of synecdoche.'"¹⁵ For his part, LeDuc has argued that "[a] much more direct approach [would be] to recognize the pragmatics of implicature[.]" which would "capture[] the way context can be analyzed to highlight our rule-like conventions or practices that enrich the semantic meanings of utterances and texts."¹⁶

¹¹ See, e.g., Serkin & Tebbe, *supra* note 8. Cf. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1693 (2004) ("[A]n important intellectual tradition suggests that the Court should approach constitutional provisions with greater flexibility than it does with statutes."); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1327–28 (2018) ("Through technical meanings and distinctive rules of interpretation, the language of the law can affix a more precise meaning to constitutional provisions than ordinary language can. . . . Several pieces of evidence strongly support the conclusion that the Constitution is written in the language of the law.")

¹² Samuel L. Bray, "Necessary and Proper" and "Cruel and Unusual": *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016).

¹³ *Id.* at 689. Bray suggests that:

There may be other instances of hendiadys in the U.S. Constitution, and phrases worth considering including "Piracies and Felonies," U.S. CONST. art. I, § 8, cl. 10; "Powers and Duties," U.S. CONST. art. II, § 1, cl. 6; "Advice and Consent," U.S. CONST. art. II, § 2, cl. 2; "necessary and expedient," U.S. CONST. art. II, § 3; "keep and bear," U.S. CONST. amend. II; and "searches and seizures," U.S. CONST. amend. IV.

Id. at 689 n.12.

¹⁴ Samuel Bray, *Translating Genesis: Concluding Thoughts on Legal Interpretation and Biblical Translation*, REASON: VOLOKH CONSPIRACY (Aug. 11, 2017), <https://reason.com/volokh/2017/08/11/translating-genesis-concluding> (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹⁵ André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111, 170 (2016) (emphasis in original).

¹⁶ *Id.* at 170; see also Brian G. Slocum, *Conversational Implicatures and Legal Texts*,

Likewise, for thousands of years, the interpretation of the Torah has been premised upon the careful examination of the literary forms of the text. The Talmud¹⁷ cites numerous hermeneutic principles that rely on exegesis of both specific words and phrases, as well as broader structural properties of the text of the Torah,¹⁸ ranging from the intertextual use of the same terms,¹⁹ to the proximity of words or phrases to one another,²⁰ to the number of times a rule is enumerated in the text.²¹ Indeed, under one prevailing account, the text of the Torah is interpreted through thirteen distinct hermeneutic devices,²² while on a broader level, much of the legal discussion and debate in the Talmud centers around competing interpretations of the text.²³

Of the various literary approaches to interpreting the Constitution and the Torah, two are particularly evocative of the literary form and interpretation of poetry: expansive interpretation of a word or phrase, and interpretation of a seemingly categorical term to incorporate qualifications, limitations, and exceptions.²⁴

III. EXPANSIVE INTERPRETATION

Although differing interpretive approaches entail different—and often diametrically opposed—attitudes toward both the means and ends of constitutional interpretation, by nearly all accounts, fidelity to the Constitution requires a method of interpretation and application that takes the constitutional text seriously.²⁵ In addition, even under narrow

29 RATIO JURIS 23 (2016).

¹⁷ The Talmud is the “written, authoritative compilation of the oral traditions and interpretations” of the text of the Torah. Levine, *Jewish Legal Theory and American Constitutional Theory*, *supra* note 1, at 445 n.17. See generally ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* (Chaya Galai trans., 1976).

¹⁸ See, e.g., Bernard Rosensweig, *The Hermeneutic Principles and Their Application*, 13 TRADITION 49 (1972); 1 ELON, *supra* note 9, at 281–399.

¹⁹ See Rosensweig, *supra* note 18, at 55–58.

²⁰ See *id.* at 71–72.

²¹ See *id.* at 58–65.

²² See *id.* at 50.

²³ See Levine, *Jewish Legal Theory and American Constitutional Theory*, *supra* note 1, at 444–68.

²⁴ Notably, some scholars who observe, as a descriptive matter, the unique methods of constitutional interpretation, still question the justifications for this approach. See Serkin & Tebbe, *supra* note 8, at 703 (“Does this observed constitutional exceptionalism make sense? In fact, and this is our second main argument, there are few compelling reasons to interpret the Constitution differently from statutes, regulations, common law precedents, and other sources of law.”). Conceptualizing the Constitution as poetry might provide a response to their challenge.

²⁵ But see, e.g., LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (Geoffrey R. Stone ed., 2012).

interpretive methodologies, ascertaining the correct meaning of the Constitution requires going beyond the literal contours of the textual language.²⁶ Indeed, one of the most striking elements of American constitutional interpretation involves close and careful attention to the text of the Constitution, including, at times, an expansive analysis, interpretation, and application of the Constitution, to derive rules and rights that are understood as self-evident within the scope of the larger constitutional scheme.

As far back as the landmark case of *Marbury v. Madison*, the United States Supreme Court has recognized a presumption against superfluity,²⁷ under which the Court has, at least in theory, accorded legal significance to every textual provision in the Constitution.²⁸ Taking this principle several steps further, particularly in the interpretation of the Bill of Rights, the Court has employed an interpretive methodology that sometimes relies upon a remarkably expansive reading of the constitutional text to derive broadly articulated and understood—albeit often unenumerated—constitutional

²⁶ Although the term “textualism” has been adopted by proponents of narrow methods of interpretation, proponents of broader forms of interpretation may claim, conversely, that their approach entails greater fidelity to the text, taking seriously both literal meaning and textual implications. Indeed, the emergence of “living originalism” suggests that divergent approaches to constitutional interpretation may present competing claims to a particular label. See JACK M. BALKIN, *LIVING ORIGINALISM* (2011). In any event, proponents of various positions might accept or reject the notion of viewing the Constitution as poetry. See generally *supra* note 7.

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”). Cf. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 475 (2012); Eugene Volokh, *The Nonredundant Free Press Clause*, REASON: VOLOKH CONSPIRACY (Apr. 26, 2018), <https://reason.com/volokh/2018/04/26/the-nonredundant-free-press-clause>.

²⁸ The Court’s approach to the interpretation of the Ninth Amendment arguably undermines the practical application of this theory. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 236–37 (2004) (“[T]o this day courts have rarely been willing to rely upon [the Ninth Amendment] when assessing the constitutionality of statutes”); Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875, 875 (2008) (stating that courts are “reluctant to rely on the Ninth Amendment at all” and that “the modern Supreme Court has studiously avoided the Ninth Amendment despite being prodded by parties before the court to rely on it”); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 89–90 (2000) (“[N]o Supreme Court decision, and few federal appellate decisions, have relied on the Ninth Amendment for support. Indeed, federal courts that have discussed the Ninth Amendment have almost exclusively held that it does not confer any substantive rights.”). Alternatively, though, perhaps the Ninth Amendment can be understood to have legal meaning, in the form of secondary and symbolic functions. See Levine, *Of Inkblots and Omnisignificance*, *supra* note 1.

rights.²⁹

This method of expansive interpretation, though surely controversial and subject to criticism,³⁰ remains widespread, and may be understood through a comparison to poetry, in which each word is carefully weighed and measured, such that a single phrase—even a single word—is recognized as representative of wide-ranging feelings or ideas, well beyond its literal or limited meaning. Indeed, the literary form of poetry requires that the reader engage in a close and careful analysis and interpretation of each word, as necessary, to gain a full understanding of the broader meaning the poem conveys. Likewise, a proper understanding of the United States Constitution may be possible only through a close and careful analysis of each phrase and word in the text.³¹

Thus, for example, in a number of landmark cases addressing some of the most vital and dynamic areas of American law, the United States Supreme Court has relied on an expansive interpretation of a single word in the Fourteenth Amendment—“liberty”—as the textual basis for an entire realm of rights jurisprudence.³² As Justice Harlan put it in *Poe v. Ullman*,

²⁹ See, e.g., Symposium, *The Future of Unenumerated Rights*, U. PA. J. CONST. L. 1 (2006). See generally Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations*, *supra* note 1.

³⁰ See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 472 (1972) (Burger, C.J., dissenting) (characterizing *Griswold v. Connecticut*, 381 U.S. 479 (1965), as relying on “tenuous moorings to the text of the Constitution” and criticizing the majority in *Eisenstadt* for “pass[ing] beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections”); *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting) (“The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.”).

³¹ Cf. David Post, *Ah, the Poetry of the Law!*, WASH. POST: VOLOKH CONSPIRACY (Oct. 21, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/21/ah-the-poetry-of-the-law/?utm_term=.646ac256d869 (“I often used to tell the law students in my classes that they should read more poetry, because nothing hones one’s skill at extracting meaning from text better than reading poetry, and extracting meaning from texts is one of the things lawyers have to do, all the time.”).

³² As far back as *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court employed a method of expansive interpretation to identify and articulate a broad range of unenumerated rights. The Court emphasized that the Fourteenth Amendment protects

[w]ithout doubt . . . not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. On this basis, the Court found that a teacher’s “right . . . to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the amendment.” *Id.* at 400. According to the Court, the Constitution recognizes “the calling of modern language teachers, . . . the opportunities of pupils to acquire knowledge, and . . . the

the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints³³

Likewise, the Court has interpreted constitutional provisions to recognize the freedom of association and a right to privacy, both of which have emerged as basic elements of the American legal system, but neither of which is found in the text of the Constitution.³⁴ As the Court further found in *Griswold v. Connecticut*, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”³⁵ For example, the Court explained, “while [association] is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.”³⁶ Similarly, according to the Court, “[v]arious [constitutional] guarantees create zones of privacy[,]”³⁷ recognizing “the sacred precincts of marital bedrooms” as “lying within the zone of privacy created by several fundamental constitutional guarantees.”³⁸ The interpretive method of identifying and

power of parents to control the education of their own.” *Id.* at 401; *see also* *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (Powell, J.) (noting that “[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment,” thus including the right of a grandmother to live with her grandchildren) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

³³ *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), *cited in Moore*, 431 U.S. at 502 (Powell, J.).

³⁴ The recognition and broad application of an unenumerated “right to privacy” remains an area of contention, prompting Justice Thomas’s recent comment that “[t]he word ‘privacy’ does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter).” *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting).

³⁵ *Griswold*, 381 U.S. at 484.

³⁶ *Id.* at 483.

³⁷ *Id.* at 484.

³⁸ *Id.* at 485; *see also id.* at 484 (finding that the Third Amendment’s protection against the quartering of soldiers in a house during peacetime without the owner’s consent represents “another facet of that privacy”); *id.* (observing that the Fourth and Fifth Amendments’ protections of criminal defendants’ rights recognized “the sanctity of a man’s home and the privacies of life”) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *id.* at 485 (stating that the Fourth Amendment’s prohibition against unreasonable searches and seizures created a “right to privacy, no less important than any other right carefully and particularly reserved to the people”) (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)); *id.* at 484 (finding

applying penumbras—which remains highly controversial³⁹—might be understood and justified as a literary technique necessary for interpreting and understanding a poetic constitutional text.⁴⁰

While the Supreme Court has thus applied a presumption against superfluity to the text of the Constitution, resulting in careful and often expansive interpretation of the provisions and words of the constitutional text, Jewish legal tradition has gone further in finding meaning and significance in the text of the Torah, according “omnificance” to each and every word—even to the form of the letters that comprise the words.⁴¹

that the Fifth Amendment’s protection against self-incrimination “enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment”). On a similar note, one scholar has recently suggested that “few concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution,” observing that “[t]he Supreme Court has invoked the term in connection with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments.” Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172–73 (2011).

³⁹ See, e.g., Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2177 (2014) (“To characterize Justice Douglas’s ‘penumbras’ and ‘emanations’ reasoning as unsuccessful would be an understatement. . . . Douglas’s reasoning has struck many observers as so far beyond the pale of conventional constitutional reasoning as to defy explanation.”); see also Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1485 (2008) (characterizing *Griswold*’s reference to penumbras as “one of the most ridiculed sentences in the annals of the Supreme Court”); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 28 (1999) (stating that “[t]his passage, with its penumbras and emanations, is a strange one, and I can attest from personal experience that it attracts a great deal of ridicule in law school faculty lounges[,]” but also “attempt[ing] to explain this passage and then to defend it”).

⁴⁰ Indeed, Pierre Schlag has offered the pejorative observation that “Justice Douglas’s opinion for the Court reads more like an amateur exercise in metaphysical poetry than law.” Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1111 (2002).

⁴¹ See Yaakov Elman, “*It Is No Empty Thing*”: *Nahmanides and the Search for Omnificance*, 4 TORAH U-MADDA J. 1, 1 (1993) (quoting JAMES KUGEL, *THE IDEA OF BIBLICAL POETRY: PARALLELISM AND ITS HISTORY* 103–04 (1981))

[T]he basic assumption underlying all of “rabbinic exegesis” [is] that the slightest details of the biblical text have a meaning that is both comprehensible and significant. Nothing in the Bible ought to be explained as the product of chance, or, for that matter, as an emphatic or rhetorical form, or anything similar, nor ought its reasons to be assigned to the realm of Divine unknowables. Every detail is put there to reach something new and important, and it is capable of being discovered by careful analysis.

Id.; see also TALMUD BAVLI, *Menachoth* 29b; ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* 143 (1979) (“[E]ven the most seemingly trivial passages and variations in the Torah can teach many lessons to the person who is willing to explore its depths.”); JOSEPH B. SOLOVEITCHIK, *HALAKHIC MAN* 100 (Lawrence Kaplan trans., 1983) (originally published in Hebrew as *Ish ha-halakhah*, in 1 TALPIOT 3–4 (1944)) (“Our Torah does not contain even one superfluous word or phrase. Each letter alludes to basic principles of Torah law, each word to ‘well-fastened,’ authoritative, everlasting [laws]. From the beginning to end it is replete with statutes and judgments, commandments and laws.”); ADIN STEINSALTZ, *IN THE BEGINNING: DISCOURSES ON CHASIDIC THOUGHT* 45 (Yehudah Hanegbi trans., 1995) (“[T]he

Fittingly, then, the Torah is expressly characterized as a poem,⁴² drawing a direct parallel to a literary form in which each word must be examined and pondered in an effort to fully ascertain the various meanings of the text. Accordingly, for thousands of years, Jewish legal authorities have applied an expansive method of interpretation to uncover and understand the lessons of the Torah.

A helpful illustration of applying omnisignificance in the interpretation of the text of the Torah may be found in the prohibition against having meat and milk together.⁴³ In three separate places, the text of the Torah prohibits cooking a kid—a young goat—in its mother’s milk.⁴⁴ Operating under the presumption that each articulation of the prohibition must teach an independent legal principle, the Talmud engages in expansive interpretation of these verses, such that the prohibition includes not only cooking meat and milk together, but also a second prohibition, against eating meat and milk that are cooked together, and a third prohibition, against deriving benefit from meat and milk that are cooked together.⁴⁵

As another example, the Torah instructs not to engage in *melacha* on the Sabbath.⁴⁶ Although *melacha* is sometimes translated as “work,” a more accurate legal definition of this term denotes a variety of ritually prohibited activities.⁴⁷ However, the written text of the Torah enumerates few examples of activities that are prohibited on the Sabbath.⁴⁸ Through textual exegesis, the Talmud delineates thirty-nine principal categories of *melacha*, which are

Written Torah needs endless amplification, study, and clarification. There are infinite layers of meaning, depthless beauty, and new modes of experientially living that which was revealed.”); see, e.g., Yaakov Elman, *The Rebirth of Omnisignificant Biblical Exegesis in the Nineteenth and Twentieth Centuries*, 2 JEWISH STUD. INTERNET J. 199, 199 (2003); Richard C. Steiner, *Meaninglessness, Meaningfulness, and Super-Meaningfulness in Scripture: An Analysis of the Controversy Surrounding Dan 2:12 in the Middle Ages*, 82 JEWISH Q. REV. 431, 431 (1992). See generally Levine, *Of Inkblots and Omnisignificance*, *supra* note 1. For discussions of omnisignificance in biblical narrative, see Levine, *Halacha and Aggada*, *supra* note 1, at 485–92; see also SAMUEL J. LEVINE, WAS YOSEF ON THE SPECTRUM? UNDERSTANDING JOSEPH THROUGH TORAH, MIDRASH, AND CLASSICAL JEWISH SOURCES (2018).

⁴² See *supra* text accompanying note 6.

⁴³ See Levine, *Legislation in Jewish Law*, *supra* note 1, at 922.

⁴⁴ See Exodus 23:19, 34:26; Deuteronomy 14:21.

⁴⁵ See TALMUD BAVLI, *Chullin* 115b.

⁴⁶ See, e.g., Exodus 20:10; see also Levine, *Jewish Legal Theory and American Constitutional Theory*, *supra* note 1, at 445–46, 456; Levine, *Legislation in Jewish Law*, *supra* note 1, at 922–23; Levine, *Miranda, Dickerson, and Jewish Legal Theory*, *supra* note 1, at 85–87.

⁴⁷ See TALMUD BAVLI, *Shabbath* 73a; 2 ARYEH KAPLAN, *Sabbath: Day of Eternity*, in THE ARYEH KAPLAN ANTHOLOGY 107, 128 (1991) (“[T]he prohibition is not against actual labor as much as against ritual work.”).

⁴⁸ See, e.g., Exodus 16:29; Exodus 35:3; Numbers 15:32–36.

in turn divided into further sub-categories.⁴⁹ In fact, the Talmud dedicates an entire tractate—one of sixty-three sections of the Talmud—to a complex analysis of the laws of the Sabbath.⁵⁰ Just as the United States Supreme Court has developed an entire area of constitutional rights jurisprudence based on the interpretation and application of a single word in the constitutional text—“liberty”—the Talmud established a central area of jurisprudence based almost entirely on the biblical word *melacha*.⁵¹

IV. CATEGORICAL TERMS SUBJECT TO QUALIFICATION, LIMITATION, AND EXCEPTION

Another area of shared interpretive methodology between the Torah and the Constitution further illustrates the necessity to interpret and apply both of these foundational texts in ways that would otherwise defy ordinary methods of textual—even legal—interpretation. Both the Torah and the Constitution include provisions that, although stated in seemingly categorical terms, are subject to various qualifications, limitations and exceptions.⁵² Here too, the interpretation of poetry may provide a helpful parallel to the notion that a text, albeit absolute on its face, should be understood as using a literary form that requires interpretation, refinement, and modification.

For example, the First Amendment states: “Congress shall make no law . . . prohibiting the free exercise [of religion].”⁵³ Of course, however, American law prohibits murder, and no interpretation of the constitutional text would accept, as a defense, the claim that a religion requires its adherents to commit murder. In fact, under current Supreme Court jurisprudence, the Free Exercise Clause does not provide an exception to any neutral law of general applicability.⁵⁴

⁴⁹ See KAPLAN, *supra* note 47, at 133–44; TALMUD BAVLI, *supra* note 47, at 73a; see also BARUCH CHAIT, *THE 39 AVOTH MELACHA OF SHABBATH* (1992).

⁵⁰ See generally TALMUD BAVLI, *supra* note 47.

⁵¹ See generally Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations*, *supra* note 1.

⁵² See, e.g., Stephen A. Siegel, *Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89 (2013). Cf. Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

⁵³ U.S. CONST. amend. I.

⁵⁴ See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990); see also J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277 (2010)

[F]ree exercise of religion is in our national pantheon of rights. The Constitution references it in much the same absolute manner as it does freedom of speech. Yet, it too is highly qualified in practice. Few, when pressed, would deny that some limit on this right is necessary. Were the freedom to practice religion absolute, every person would be “a law unto

Likewise, the First Amendment instructs, “Congress shall make no law . . . abridging the freedom of speech.”⁵⁵ Notwithstanding Justice Black’s declaration that “no law means no law,”⁵⁶ the United States Supreme Court has long recognized the need to interpret the First Amendment in less than categorical terms,⁵⁷ permitting, for example: governmental restrictions on

himself,” and government would, for instance, be powerless to stop someone from conducting a human sacrifice for religious reasons. . . . Under the Supreme Court’s current interpretation of the First Amendment, the right to practice religion is highly qualified in practice. . . . [I]t does not exempt religious individuals from generally applicable laws that have a rational basis. . . . [F]ree exercise, like all rights, is highly qualified, whether it is protected by the Constitution or by statute.

Id. at 293–95.

⁵⁵ U.S. CONST. amend. I.

⁵⁶ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971); *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (“I read ‘no law . . . abridging’ to mean no law abridging.”) (omission in original); see also *Katz v. United States*, 389 U.S. 347, 365–66 (1967) (Black, J., dissenting) (“A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. . . . Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.”).

⁵⁷ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”); see also Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831 (2010); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087, 1100 (1993) (“[T]he apparently unequivocal command that Congress and, because of the Fourteenth Amendment, state legislatures pass ‘no law’ abridging freedom of speech has been (sensibly) interpreted to mean that speech can indeed be abridged if the state presents a ‘compelling interest’ justifying the abridgement.”); Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 59 (1989) (“Justice Black says that ‘no law’ means ‘no law,’ but no one seriously maintains that the Constitution invalidates a law forbidding incitement to mutiny on a naval vessel or falsely shouting ‘fire’ in a crowded theater.”); Wilkinson, *supra* note 54:

While frequently discussed in absolute terms, freedom of speech is more limited in practice. Indeed, the Supreme Court has explicitly “rejected an absolutist interpretation” of the right on more than one occasion. Rather than treating freedom of speech as an “unlimited license” to express oneself, the Court has narrowed the scope of the right by taking competing social interests into account. . . . [T]he First Amendment “does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” That is, freedom of speech is a far more limited right than our rhetoric suggests.

Id. at 292–93 (citations omitted); Eugene Volokh, *Which Part of “Make No Law” Don’t I Understand?*, VOLOKH CONSPIRACY (July 26, 2011), <http://volokh.com/2011/07/26/which-part-of-make-no-law-dont-i-understand/>

[I]f one is to conclude that the government . . . is so categorically restrained by the First Amendment, I think it would take some very powerful and clear historical and textual evidence that the First Amendment has indeed been understood this absolutely. . . . [T]he

defamation, child pornography, obscenity, fighting words, and “true threats”; regulations on speech through time, place, or manner limitations; and a broader degree of restrictions on commercial speech.⁵⁸ Thus, like poetry, the powerful wording of the First Amendment text may be read, at once, to carry rhetorical and expressive value, but also to require a more subtle method of interpretation for its meaning to be fully and accurately understood.⁵⁹

Similarly, the text of the Torah commands not to engage in any *melacha* on the Sabbath, but there are considerable qualifications here, as well. Notwithstanding the legal and philosophical significance and centrality of the Sabbath in Jewish thought,⁶⁰ in the face of life-threatening danger, any and all activities otherwise prohibited on the Sabbath should be performed, without hesitation or delay.⁶¹ Indeed, more generally, virtually any plausible possibility of danger to life overrides nearly every competing obligation in Jewish law, not only permitting, but mandating, violation of the dictates of the competing obligation.⁶² Thus, the facially categorical textual

history cuts against any such absolutist position, and the text—especially given the history—does not actually support that position.

Id.

⁵⁸ See, e.g., Gertrude N. Levine & Samuel J. Levine, *Internet Ethics, American Law, and Jewish Law: A Comparative Overview*, 21 J. TECH. L. & POL’Y 37, 43 (2016) (citing sources).

⁵⁹ Cf. Andrew Tutt, *The Revisability Principle*, 66 HASTINGS L.J. 1113 (2015)

First Amendment cases tend to invite a special sort of bombast and embroidery, a romanticism inconsistent with what the cases actually *do* when the chips fall. One need only recall Justice Robert H. Jackson’s line from *West Virginia v. Barnette* that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” or Justice Harlan’s comment in *Cohen v. California* that “one man’s vulgarity is another’s lyric” or Justice Hugo Black’s assertion that “no law means no law” (even when Justice Black joined Justice Blackmun’s dissent in *Cohen*)—to see that not everything that is said in a First Amendment case can be taken to mean what it says.

Id. at 1151.

⁶⁰ See, e.g., TALMUD BAVLI, *Chulin 5a, Commentary of Rashi*; MAIMONIDES, *Laws of Sabbath* 30:15, in MISHNEH TORAH; RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH 312–13 (Charles B. Chavel trans., 1973); KAPLAN, *supra* note 47.

⁶¹ See MAIMONIDES, *Laws of Sabbath* 2:2–2:3, in MISHNEH TORAH.

⁶² See, e.g., Samuel J. Levine, *The Yale L. Rosenberg Memorial Lecture: Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor’s Ethical Obligation to “Seek Justice” in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1359, 1359 n.67 (2004) (citing TALMUD BAVLI, *Yoma 85a-b*; MAIMONIDES, *Laws of Sabbath* 2, in MISHNEH TORAH; 2 ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 38–49 (Abraham Sutton ed., 1992); HERSHEL SCHACHTER, B’IKVEI HATZOAN 14–18 (1997); JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 34–35 (Lawrence Kaplan trans., 1983)); see also YITZCHAK ZEEV HA-LEVI SOLOVEITCHIK, CHIDUSHEI MARAN RI’Z HA-LEVI 12–13 (1998); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 57 n.151 (2003) (“[N]early every obligation in Jewish law is suspended to

prohibition on *melacha* on the Sabbath—as well as numerous other prohibitions stated in categorical terms—are subject to qualifications, limitations, and exceptions, once again evoking a poetic form that expresses feelings and ideas in absolute terms, but which is understood to have a more nuanced meaning.

V. CONCLUSION

In addition to their poetic literary forms, the Torah and the Constitution share another property of poetry: both were designed to function as a timeless text, with meaningful application for the foreseeable—and unforeseeable—future. As Chief Justice John Marshall famously declared:

[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.⁶³

The timeless design of the Torah is even more apparent through its Divine origins, its repeated declaration of its own eternity,⁶⁴ and the historical record of its abiding survival and success, for thousands of years, amidst storms, tempests, and perils far beyond those contemplated by John Marshall.

Like timeless poetry, the Constitution and the Torah may—and, to continue to function at supreme law, must—be interpreted and applied in the face of ever-changing circumstances and unanticipated scenarios. Indeed, how do we apply the fixed text of the Constitution, a document that is more than 200 years old, to cases involving electricity, credit cards, the Internet, cell phones—scenarios that not only did not exist at the time the Constitution was ratified, but could not have been envisioned by the framers of the Constitution? The questions are complex, and the answers may at times seem elusive. In addressing these issues, American legal authorities look to the text, the principles, and the precedents of constitutional interpretation, applying the settled law to new and unanticipated cases. Over the years, for example, Fourth Amendment provisions requiring a warrant to authorize the government to conduct a search⁶⁵ have been interpreted and applied to cases

save a life.”).

⁶³ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821).

⁶⁴ *See, e.g., Exodus* 31:12–17.

⁶⁵ *See* U.S. CONST. amend. IV.

involving phone booths⁶⁶ and, more recently, cases involving cell phones;⁶⁷ in cases of thermal imaging devices that can detect activity inside a home;⁶⁸ and in cases of Global Positioning System (GPS) tracking devices placed on vehicles.⁶⁹

This phenomenon has been even more pronounced in the context of the written Torah, which has been interpreted and applied over the course of thousands of years, through scenarios unimagined by—and often unimaginable to—those who received the Torah, involving new and unanticipated geographical, societal, and technological conditions. As just one of countless examples, returning once more to the prohibition against engaging in *melacha*—various forms of activity—on the Sabbath, does the prohibition apply to the use of electricity on the Sabbath?⁷⁰ Applying the settled law—the thirty-nine categories of *melacha*—to new and emerging scenarios, some legal authorities prohibit the active use of electricity, on the grounds that causing the flow of an electric current is sufficiently similar to lighting a fire.⁷¹ Others hold that completing an electrical circuit falls under the category of “building” a vessel or of “completing” a vessel so that it can serve its function.⁷² Turning on an electric light is considered by many to constitute burning a fire on the Sabbath, through the act of burning the filament.⁷³ Alternatively, based on the Talmudic principle extending the *melacha* of cooking, to include non-food objects, turning on an electric light may thus involve “cooking” the filament.⁷⁴

And of course, as technology continues to advance almost daily, further questions continue to arise.⁷⁵ What is the status of a smartphone in Jewish Law? What will be the impact of virtual reality? Will self-driving cars be permitted for use on the Sabbath? As these questions continue, just as United States courts have applied the Constitution to new and emerging technologies, Jewish legal authorities will continue to interpret and apply ancient texts, laws, and principles to cutting-edge changes in the way we live

⁶⁶ See *Katz v. United States*, 389 U.S. 347, 352 (1967).

⁶⁷ See *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018); *Riley v. California*, 134 S. Ct. 2473, 2495 (2014).

⁶⁸ See *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

⁶⁹ See *United States v. Jones*, 565 U.S. 400, 412 (2012).

⁷⁰ See L.Y. HALPERIN, SHABBAT AND ELECTRICITY: ELECTRICAL AND ELECTRONIC DEVICES ON SHABBAT (1993); see also Michael Broyde & Howard Jachter, *The Use of Electricity on Shabbat and Yom Tov*, 21 J. HALACHA & CONTEMP. SOC'Y 4 (1991); Levine, *Jewish Legal Theory and American Constitutional Theory*, *supra* note 1, at 456–57.

⁷¹ See Broyde & Jachter, *supra* note 70, at 12.

⁷² See *id.* at 12–13.

⁷³ See *id.* at 13.

⁷⁴ See *id.*

⁷⁵ See, e.g., ZOMET, <http://www.zomet.org.il/eng/> (last visited Jan. 21, 2019) (offering products that afford purchasers modern conveniences while avoiding engaging in *melacha*).

our daily lives. As such, the Constitution and the Torah take on the qualities of a most profound form of poetry, a text that must be carefully read, studied, and understood, to serve as an ongoing source of supreme law for the legal systems they represent.