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Base Constitutional Communities: Lessons from Liberation Theology for Democratic Constitutionalism

ABSTRACT. While legal scholars have written extensively about the methods and values of scriptural and constitutional interpretation, they have written relatively little comparing liberation theology with progressive modes of interpreting the Constitution. Existing legal scholarship that does examine liberation theology focuses on its *substance*, not the *processes* for interpreting the Bible championed by liberation theologians.

This Note argues that liberation theology offers a process-based mechanism for making a more democratically responsive constitutional interpretation. Though the moral and interpretive commitments of liberation theology and progressive constitutional scholarship rhyme, it is premature to expound a substantively liberationist constitutionalism. Instead, this Note draws on scholarship about popular constitutionalism to explain how and why progressives should adapt the model of interpreting the Bible in base *ecclesial* communities to the constitutional context. By participating in base *constitutional* communities, Americans can play a direct role in constitutional interpretation, thereby improving the democratic legitimacy of constitutional law.

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“Lawyers are . . . the High Priests of America. We alone know the words that made America. Out of thin air. We alone know how to use The Words. The Law”

— Roy Cohn in Tony Kushner’s *Angels in America*¹

INTRODUCTION

The United States Supreme Court is facing a crisis of legitimacy.² A majority of Americans disapprove of the Court,³ and less than a third of registered voters view the Court positively.⁴ The President,⁵ members of Congress,⁶ and leading

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1. TONY KUSHNER, *ANGELS IN AMERICA: A GAY FANTASIA ON NATIONAL THEMES* 215 (rev. ed. 2013).
 2. See, e.g., Editorial Board, *The Supreme Court Isn’t Listening, and It’s No Secret Why*, N.Y. TIMES (Oct. 1, 2022), <https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html> [<https://perma.cc/F5SU-YRUY>] (“[F]ewer Americans have confidence in the court than ever before recorded This widespread lack of confidence and trust in the nation’s highest court is a crisis, and rebuilding it is more important than the outcome of any single ruling.”).
 3. *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/LAL7-DMK4>] (showing that fifty-eight percent of Americans disapprove of the Court and forty percent of Americans approve, as of late 2022). FiveThirtyEight, which recently published an average of all national polls of the Court’s approval rating, also shows that more Americans disapprove than approve of the Court, though it shows a more modest divide between the percentage who disapprove and approve of the Court. Cooper Burton, *The Supreme Court Is Getting Less Unpopular*, FIVETHIRTYEIGHT (June 13, 2023, 6:00 AM), <https://fivethirtyeight.com/features/supreme-court-approval-rating-polls> [<https://perma.cc/Z4LB-TBJC>].
 4. Charlene Richards, *Less Than a Third of Voters View the Supreme Court Positively, A New Low*, NBC NEWS (June 27, 2023, 12:59 PM EDT), <https://www.nbcnews.com/meet-the-press/meetthepressblog/less-third-voters-view-supreme-court-positively-new-low-rcna91378> [<https://perma.cc/5GPR-Q2TU>].
 5. See, e.g., Michelle Adams et al., *Final Report*, PRESIDENTIAL COMM’N ON SUP. CT. U.S. (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/D2NF-36NN>]; Charlie Savage, *Experts Debate Reducing the Supreme Court’s Power to Strike Down Laws*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/us/politics/supreme-court-commission.html> [<https://perma.cc/ZDY2-QMS6>].
 6. See, e.g., Judiciary Act, H.R. 3422, 118th Cong. (2023); Supreme Court Ethics, Recusal, and Transparency Act, H.R. 7647, 117th Cong. (2022); Supreme Court Term Limits and Regular Appointments Act, H.R. 5140, 117th Cong. (2021); Supreme Court Ethics Act, H.R. 4766, 117th Cong. (2021).

constitutional experts⁷ openly and urgently debate the merits of Court reform. Many commentators who favor reform blame the Court itself for the public's crisis of faith by pointing out that the Court has begun to ignore the will of the people.⁸ *Substantively*, the Court's most high-profile opinions do not align with the views of the public. While the opinions of the Court tracked the views of the public on major issues until recently,⁹ a major longitudinal study published in 2022 offers evidence that the Court's opinions are now "much more conservative" than the views of most Americans.¹⁰ The Court's recent constitutional opinions related to abortion and the Second Amendment – which strayed particularly far from the views of the public – have provoked especially strong backlash.¹¹ *Methodologically*, the mode of constitutional interpretation deployed by the Court deviates from the mode favored by a majority of Americans. Perhaps unsurprisingly, a Court captured by originalism¹² grounded its constitutional reasoning in

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7. See, e.g., Opinion, *How to Fix the Supreme Court*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html> [<https://perma.cc/Q36M-DA6L>].
 8. Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CTR. FOR JUST. (Sept. 15, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making> [<https://perma.cc/F5C2-7C35>]; Editorial Board, *supra* note 2.
 9. James F. Smith, *U.S. Supreme Court v. American Public Opinion: The Verdict Is In*, HARV. KENNEDY SCH. (July 13, 2020), <https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/us-supreme-court-v-american-public-opinion> [<https://perma.cc/37TV-QNVL>].
 10. Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows That the Supreme Court Is Now Much More Conservative Than the Public*, 119 PROC. NAT'L ACAD. SCIENCES 1, 1 (2022), <https://www.pnas.org/doi/full/10.1073/pnas.2102841119> [<https://perma.cc/3NL4-B2PE>]; see also Stephen Jessee, Neil Malhotra & Maya Sen, *Opinion, The Supreme Court Is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022, 4:30 AM EDT), <https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-analysis-public-opinion-00046445> [<https://perma.cc/3KLF-GANT>] (providing further explanation of their research findings to a public policy audience); Matt Grossmann, *Will Supreme Court Opinions Provoke Public Backlash?*, NISKANEN CTR. (July 12, 2023), <https://www.niskanencenter.org/will-supreme-court-opinions-provoke-public-backlash> [<https://perma.cc/L2FQ-QJJW>] (predicting the level of public backlash to Supreme Court opinions in 2023).
 11. Michael Scherer, *Supreme Court Goes Against Public Opinion in Rulings on Abortion, Guns*, WASH. POST (June 24, 2022, 6:45 PM EDT), <https://www.washingtonpost.com/politics/2022/06/24/supreme-court-goes-against-public-opinion-rulings-abortion-guns> [<https://perma.cc/S3WN-P3VF>]; Charlotte Klein, *The Supreme Court Is Out of Step with America on Abortion*, VANITY FAIR (June 27, 2022), <https://www.vanityfair.com/news/2022/06/the-supreme-court-is-out-of-step-with-america-on-abortion> [<https://perma.cc/BDD6-Q3WQ>].
 12. See, e.g., Ilan Wurman, *What Is Originalism? Debunking the Myths*, CONVERSATION (Oct. 24, 2020, 12:03 PM EDT), <https://theconversation.com/what-is-originalism-debunking-the->

Dobbs and *Bruen* in appeals to history and tradition;¹³ a majority of Americans, on the other hand, believe that the Supreme Court should “base its rulings on its understanding of what the Constitution ‘means in current times’” — as opposed to “what it meant when originally written.”¹⁴

It should come as no surprise, then, that progressives have lambasted the Court on substantive and methodological grounds. Substantively, of course, Americans on the political left criticize Court opinions that increasingly seem to favor right-leaning policy priorities.¹⁵ For example, Democrats favor reproductive rights and gun control,¹⁶ and progressive critics predictably denounce the holdings of *Dobbs* and *Bruen* for limiting reproductive rights¹⁷ and striking down

myths-148488 [https://perma.cc/4ADP-ZKZ5]; see also GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 30 (2010) (describing how conservatives have rallied around originalism and strict constructionism). Justice Kagan famously quipped that “we’re all originalists” now. See, e.g., *What We’ve Learned About Elena Kagan*, NAT’L PUB. RADIO (June 30, 2010, 1:00 PM ET), https://www.npr.org/templates/story/story.php?storyId=128218102 [https://perma.cc/8QAP-NWXF].

13. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . [The Due Process Clause of the Fourteenth Amendment] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128–29 (2022) (describing its interpretive method as rooted in text, history, and tradition); see also *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (instructing that the Establishment Clause should be interpreted according to “original meaning and history”). But see *Kennedy v. Bremerton Sch. Dist.*, *supra*, at 2434 (Sotomayor, J., dissenting) (describing the majority opinion as replacing longstanding Establishment Clause jurisprudence with a “‘history and tradition’ test”).
14. See Kristen Bialik, *Growing Share of Americans Say Supreme Court Should Base its Rulings on What Constitution Means Today*, PEW RSCH. CTR. (May 11, 2018), https://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today [https://perma.cc/MS5W-7A93].
15. See Keith, *supra* note 8.
16. See, e.g., Lydia Saad, *Broader Support for Abortion Rights Continues Post-Dobbs*, GALLUP (June 14, 2023), https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs.aspx [https://perma.cc/2Z57-P9HF]; Megan Brennan, *Dissatisfaction with U.S. Gun Laws Hits New High*, GALLUP (Feb. 15, 2023), https://news.gallup.com/poll/470588/dissatisfaction-gun-laws-hits-new-high.aspx [https://perma.cc/7CFV-TET6].
17. Maggie Jo Buchanan, *In Dobbs, By Overturning Roe and Denying the Right to an Abortion, the Supreme Court Has Attacked Freedom*, CTR. FOR AM. PROGRESS (June 24, 2022), https://www.americanprogress.org/article/in-dobbs-by-overturning-roe-and-denying-the-right-to-an-abortion-the-supreme-court-has-attacked-freedom [https://perma.cc/WL5V-B3SC].

gun-control measures.¹⁸ Methodologically, progressives have argued that the Constitution is a “living charter”¹⁹ that must be conceptualized and interpreted as “responsive to evolving social needs and to ideals of fundamental justice.”²⁰

In this Note, I build on progressives’ methodological critique in the interest of identifying and implementing a more democratically responsive – and thus more democratically legitimate – procedure for interpreting the Constitution. For inspiration, I turn to a potentially unexpected source: Roman Catholic, Latin American liberation theology.

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Some progressive legal scholars have made admirable efforts to offer a vision of a progressive, principled method of constitutional interpretation that rivals conservative interpretive methods like originalism and strict constructionism.²¹ Though progressive scholars acknowledge that any such moral constitutional vision must be democratically responsive,²² their proposals lack a robust assessment of the concrete, direct mechanisms by which to make constitutional interpretation rooted in the moral vision of the people. In response, I explore the extent to which liberation theology – a theological tradition animated by and responding to the social, political, and economic concerns of the marginalized²³ – offers a model for constitutional advocates dedicated to a democratic method of constitutional interpretation. I am especially inspired by the base ecclesial communities of Latin America: small groups of Catholics, led by laypeople, who gather to read and interpret the Bible, raise consciousness about their social conditions, practice leadership, and engage in activism.²⁴ I describe how the biblical interpretation taking place in base ecclesial communities feeds into the professional theology of the institutional Church,²⁵ and I suggest that advocates of

18. *SCOTUS Bruen Ruling a “Death Sentence for Innocent Americans,”* PEOPLE FOR AM. WAY (June 23, 2022), <https://www.pfaw.org/press-releases/people-for-scotus-bruen-ruling-a-death-sentence-for-innocent-americans> [<https://perma.cc/9A9V-Y4G9>].

19. See Michael H. v. Gerald D., 491 U.S. 110, 141 (Brennan, J., dissenting). Robert C. Post and Reva B. Siegel elaborate on the characterization of the Constitution as a “living charter” in *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 25 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter Post & Siegel, *Democratic Constitutionalism*].

20. Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 25.

21. See, e.g., LIU, KARLAN & SCHROEDER, *supra* note 12, at 26–30 (describing a progressive constitutional approach referred to as “constitutional fidelity”).

22. See *infra* Section III.B.

23. See *infra* Part II.

24. See *infra* Section II.B.

25. See *infra* Section II.C. “The Church” has multiple meanings in Roman Catholic doctrine and in common parlance. See, e.g., CATECHISM OF THE CATHOLIC CHURCH 206–12 (2d ed. 2000)

democratic constitutionalism should adapt the base-community model to the constitutional context.²⁶

While I point out parallels between the substantive commitments of liberation theology and progressive legal scholarship – including, for example, a common commitment between liberation theologians and progressives within critical legal studies, poverty law, and family law to privileging the perspectives of those on the bottom of the social, political, and economic hierarchy²⁷ – I contend that it is too early to adopt substantive, liberationist interpretive commitments. Instead, I explain why legal scholars should find inspiration in the procedural interpretive commitments of liberation theology in order to make constitutional jurisprudence more democratically responsive. In short, I argue that base communities can serve as a concrete mechanism through which constitutional interpretation by the people could shape constitutional interpretation by the judiciary.

In Part I, I will review existing literature to show that legal scholars have previously generated insights by comparing the methods and values of constitutional and scriptural interpretation.²⁸ However, little has been written comparing progressive forms of constitutional interpretation with liberation theology.²⁹ Less still has been written comparing constitutional and scriptural processes and procedures of interpretation that attempt to make interpretation more inclusive. My work seeks to revive the most important insights of the relatively scant scholarship tracing a relationship between liberation theology and law, and based on recent progressive legal scholarship, I will contribute new insights about the ways liberation theology might help jurisprudence become more democratically responsive.

In Part II, I will describe and define liberation theology, focusing especially on key aspects of its substance and process. This Part will explain what liberation theologians mean by liberation (and, conversely, oppression) and how they conceive of human flourishing. I will describe how these theologians' conception of

(describing the Church as the “People of God,” the “Body of Christ,” and the “Temple of the Holy Spirit”); *Church*, MERRIAM-WEBSTER 222 (11th ed. 2003) (defining “church” as, among other things, “a building for public and esp. Christian worship,” “the clergy or officialdom of a religious body,” and “a body or organization of religious believers”). In this Note, I use “the Church” primarily to refer to either the Roman Catholic Church as an official, clergy-led *institution*, or to the fellowship or communion of believers – that is, the whole *community* of Catholics – who make up the membership of the institutional Church. I have tried to clarify the sense in which I am using “the Church” where relevant.

26. See *infra* Section III.C.

27. See *infra* Section III.A.

28. See *infra* notes 35-77 and accompanying text.

29. See *infra* notes 65-78 and accompanying text.

liberation commits them to specific substantive and procedural interpretive orientations. In particular, I will describe how liberation theologians approach interpretation “from the underside of history”³⁰ (starting with a “preferential option for the poor”³¹) and read the Bible within base ecclesial communities.³²

Part III explores whether liberation theology offers a useful tool for progressive constitutional scholars seeking to identify and describe a method of constitutional interpretation that democratically gives expression to progressive principles and values. On the one hand, liberation theology provides a vocabulary and substantive assessment of human flourishing that resonates with some progressive legal scholarship, including in the fields of poverty law³³ and family law.³⁴ Some progressive legal scholars committed to such constitutional visions might find it useful to borrow from liberation theology to flesh out legal notions of liberation.

However, progressive legal scholars should first ask whether a method of constitutional interpretation that gives expression to a specifically liberationist conception of human flourishing is democratically legitimate or desirable. To answer this question, it is necessary to proceed in steps. First, I acknowledge that constitutional interpretation by necessity gives expression to a moral vision. Next, I build on scholarship in popular constitutionalism and democratic constitutionalism to suggest that the moral vision applied by interpreters should be democratically responsive. Consequently, I contend that it is premature to settle on a *liberationist* constitutional interpretation without first excavating the moral vision that animates popular constitutional movements.

As such, while other progressive scholars might mine liberation theology for its substantive moral vision, I choose to set aside the substantive insights of liberation theologians. Instead, I argue that liberation theology is useful because of its insights about the interpretive *process*. Liberation theologians explore the imperative and limit of responsive interpretation – navigating between a commitment to an “elite” class (i.e., clergy) and the benefits of opening the interpretive process to base communities (i.e., the laity). I argue that the practice of interpreting the Bible within base communities can serve as a model for new, more democratically responsive processes for interpreting the Constitution.

30. See *infra* notes 140-143 and accompanying text.

31. See *infra* notes 134-139 and accompanying text.

32. See *infra* notes 144-164 and accompanying text.

33. See *infra* notes 196-200 and accompanying text.

34. See *infra* notes 202-207 and accompanying text.

I. COMPARING SCRIPTURAL AND CONSTITUTIONAL INTERPRETIVE METHODS

Scholars of law, religious studies, and theology have written extensively about the relationship between the Bible and the Constitution. Scholarly works comparing the two have adopted a variety of lenses for their analysis. Some have included a sort of genre analysis that compares both the Bible and the Constitution as sacred, divinely inspired texts³⁵ (or, more specifically, rulebooks).³⁶ Some works have applied a philosophical or sociological lens to describe how both texts constitute (here meaning “create”) communities.³⁷ And some works trace similarities between the substance and political function of constitutional and scriptural texts.³⁸ These examples are not exhaustive, and of course many scholarly works utilize multiple lenses to compare and contrast the two texts. In this Part, however, I focus on scholarship describing the relationship between scriptural and constitutional interpretive methods.³⁹

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35. Michael Sink, Comment, *Restoring Our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921, 927-29 (2004) (citing James Madison and textbooks to offer evidence that Americans have viewed the Constitution as divinely inspired).
 36. Joshua Neoh, *Text, Doctrine and Tradition in Law and Religion*, 2 OXFORD J.L. & RELIGION 175, 188 (2013) (“Normative texts, whether biblical or constitutional, often have dual functions: they function both as a sacred totem and as a rulebook for the conduct of daily affairs.”); cf. Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 39 (1985) (“In the field of constitutional law, judges seek guidance in the constitutional text and case law. These texts are thought to have the power to teach important lessons concerning the just ordering of democratic institutions Citizens, finally, may study the constitutional materials as a source for civic ideals, duties, or rights. These practices of Constitution-reading, whether or not all of them deserve the name ‘constitutional law,’ support my claim that normative hermeneutics is a pervasive activity undertaken with reference to serious objects.”).
 37. Neoh, *supra* note 36, at 177 (“The Constitution transforms disparate individuals into citizens, a sovereign people in a sovereign state or commonwealth. The Bible transforms mere mortals into a people of God, a people set apart. In that transformation, the individual achieves a sense of ‘fullness’ by becoming a part of a larger whole, of something greater than themselves.”); see also Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 22 (1984) (applying Durkheim’s conception of religion to find “a religion of the Constitution”).
 38. See, e.g., Liaquat Ali Khan, *The Immutability of Divine Texts*, 2008 BYU L. REV. 807, 852-56.
 39. Though this Part includes some scholarship that analyzes the relationship between methods of interpreting the Constitution and scripture generally, much of the scholarship about scriptural interpretation discussed here focuses on interpreting the Bible – and specifically Christian approaches to interpreting the Bible. This focus is intentional. The literature on the topic of scriptural and constitutional interpretive methods is vast, and I have chosen to focus on scholarship that provides context for my later discussion of Roman Catholic liberation theology. However, I acknowledge that there is an extensive body of scholarship comparing “biblical interpretation in Jewish law and American constitutional interpretation.” 1 SAMUEL J.

Scholars compare biblical and constitutional interpretive methods for different reasons. Some want to enrich legal scholars' understanding of law by using the comparison to reveal un- or under-explored assumptions or structures in constitutional interpretive methods. For example, Joshua Neoh justifies his comparison of biblical and constitutional interpretation as follows: "[T]he purpose of comparing law and religion, and drawing analogies between them, is *not* for law to learn from religion, or vice versa. Rather, the purpose of comparing them, by putting them side-by-side . . . is to point out and illuminate the common discursive structure underlying both legal and religious discourses."⁴⁰ By contrast, other scholars compare biblical and constitutional interpretive methods to support normative claims about what biblical – or, more often, constitutional – interpretation should try to achieve. For example, some scholars study biblical hermeneutics⁴¹ to establish the basis for a "Christian jurisprudence,"⁴² and others seek at the very least to determine what religion and law might learn from one another.⁴³

In this Note, I adopt a normative approach to the comparative study of law and religion. I suggest that legal scholars can and should learn from liberation theologians. Unlike some scholars who have focused on adapting the substantive insights of Christian theology and hermeneutics to create a thoroughly Christian jurisprudence, I contend that even legal scholars committed to a "secular" jurisprudence might learn from specific procedural methods of interpretation deployed by liberation theologians. In particular, I am inspired by base ecclesial communities, which offer lay Catholics a space in which to interpret the Bible and a mechanism through which those interpretations might influence official doctrine of the institutional Church. In response to the ascendancy of judges-cum-high-priests in our constitutional order,⁴⁴ I argue that a constitutional

LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 178-79 & n.4 (2018). There is also an academic literature about the relationship between scriptural and *statutory* interpretive methods, but such work lies outside the scope of this Note as well. See, e.g., Note, *Looking to Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation*, 115 HARV. L. REV. 1456, 1456 (2002).

40. Neoh, *supra* note 36, at 176.

41. By "biblical hermeneutics," I mean "the general principles for the proper interpretation of the Bible." See Theodore George, *Hermeneutics*, STAN. ENCYC. PHIL. (Dec. 9, 2020), <https://plato.stanford.edu/entries/hermeneutics> [<https://perma.cc/4MYX-8453>].

42. See, e.g., *infra* notes 66-77 and accompanying text; see also Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 NOTRE DAME L. REV. 737, 740-41 (1998) (describing aspects of the "Christian jurisprudence" of Robert E. Rodes, Jr.).

43. See, e.g., John Witte, Jr., *Law and Religion: The Challenges of Christian Jurisprudence*, 2 U. ST. THOMAS L.J. 439, 445 (2005) (making a case for the "[i]nterdisciplinary [s]tudy of [l]aw and [r]eligion").

44. Cf. *supra* text accompanying note 1 ("Lawyers are . . . the High Priests of America.").

analog to base ecclesial communities would make constitutional interpretation more democratically responsive – and therefore more democratically legitimate. In the remainder of this Part, I briefly review the most relevant literature written by legal scholars comparing scriptural and constitutional interpretive methods to clarify how this Note draws on and departs from existing scholarship.

A. *Identified Analogs: Scriptural and Constitutional Interpretive Methods and Values*

Some scholars have offered general, relatively abstract comparisons between scriptural and constitutional interpretive methods,⁴⁵ while other scholars dive deep to compare the meaning and social and personal significance of specific interpretive approaches deployed by those who read the Bible and the Constitution.⁴⁶ For example, in a recent article drawing broad comparisons between biblical and constitutional interpretation, Robert J. Pushaw, Jr. describes textualism, contextualism, and the “hermeneutic circle” as three basic forms of literary and biblical hermeneutics⁴⁷ before suggesting three analogs to those forms in constitutional interpretation: textualism, originalism, and “living Constitutionalism,”

45. See, e.g., Arie-Jan Kwak, *Introduction*, in *HOLY WRIT: INTERPRETATION IN LAW AND RELIGION* 1, 1 (Arie-Jan Kwak ed., 2009) (describing a book comprised of eight essays about scriptural and constitutional interpretation as follows: “This book focuses on *methods* of interpretation. In this volume are assembled essays on interpretation in the field of law and religion. Roughly, one may distinguish between two pairs of approaches. The first pair is about what should count as our point of departure: contemporary meaning or historical meaning? Contemporary meaning is about: What does the text say to us now? Historical meaning (or original meaning) is about: What did the text mean at the moment it was made or first issued? The second pair of approaches is about whether we should stick to the meaning of the text or rely on something outside of the text that may still be relevant for the text, e.g., the intention of those who framed or issued the text.”).

46. See *infra* notes 57–78 and accompanying text.

47. Robert J. Pushaw, Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretation*, 47 *PEPP. L. REV.* 463, 466–73 (2020) (describing *textualism* as an attempt to determine a text’s “perceived ordinary meaning”; *contextualism* as an attempt “to discover that original ‘grammatical’ understanding, as well as the author’s intent . . . and then close the historical and cultural gaps through translations or commentaries” given that “the meaning of words depends on generally understood language-related conventions in the particular historical and cultural environment of the writer and reader”; and the *hermeneutic circle* as “the ongoing dynamic interplay between text and interpreters” that exists because “[e]very person has historically and culturally conditioned preconceptions, perspectives, prejudices, interests, traditions, purposes, and projects – as well as interactions with other readers – that profoundly affect one’s understanding”).

which includes “living originalism.”⁴⁸ Nearly forty years earlier, Thomas C. Grey offered a similar three-part typology of constitutional interpretive methods⁴⁹ – whose proponents he called “textualists,” “supplementers,” and “rejectionists”⁵⁰ – and compared and contrasted these with their scriptural interpretive analogues.⁵¹ Jaroslav Pelikan has offered perhaps the most in-depth analysis of the similarities and differences between constitutional and biblical interpretation in his book *Interpreting the Bible and the Constitution*, which offers historical descriptions (as opposed to normative assessments) of topics as varied as the status of the texts as normative scriptures,⁵² the communities that interpret said scriptures,⁵³ the “cruxes of interpretation in the Bible and the Constitution,”⁵⁴ the

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48. *Id.* at 475-87 (describing *textualism* as an attempt to interpret the Constitution by “determining the ordinary meaning of its word”; *originalism* as an attempt to interpret the Constitution based on historical evidence about either the original meaning, original intent, or original understanding of the Constitution’s readers, Framers, or ratifiers; and *living originalism* as an attempt to interpret the Constitution according to “all relevant evidence” by “treating the Constitution’s historical meaning not as fixed law, but rather as an initial framework that is fleshed out through constitutional construction by all Americans (not only judges), thereby ensuring democratic legitimacy”). Pushaw also discusses analogs in statutory interpretation, *id.* at 487-90, but those comparisons are beyond the scope of this Note.
49. Note that Grey also discussed the analogy drawn by some scholars between literary and constitutional interpretation, but he rejected the analogy as “intriguing” but “strained” because “[l]egal and literary texts play very different roles in our society.” Grey, *supra* note 37, at 2.
50. *Id.* at 1 (using the terms “‘textualists’ and ‘supplement[er]s’ for, respectively, those who consider the text the sole legitimate source of operative norms in constitutional adjudication, and those who accept supplementary sources of constitutional law”); *id.* at 1-2 (using the word “rejectionists” to describe those “who reject the very question (‘text alone, or text plus supplement?’) because “judges are always interpreting the constitutional text” and suggesting instead that “the text, if read with an appropriately generous notion of context, provides as lively a Constitution as the most activist judge might need”); *id.* at 2 & n.3 (claiming that rejectionists rely on, *inter alia*, Hans-Georg Gadamer’s work on the nature of interpretation to support their position). See generally HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2011) (arguing that people are embedded in their own social and historical contexts, that this embeddedness shapes the consciousness of the interpreter, and that therefore interpretation involves a “fusion of horizons” between the text and the interpreter).
51. Grey, *supra* note 37, at 7-14; see *id.* at 12 (describing “contemporary theologians” as those who interpret the Bible in a “literary” and even “modernist mode”); *id.* at 13-14 (noting that contemporary theologians and rejectionists construe fundamentally different texts because, whereas scripture may be figurative or symbolic, “[t]o identify a text as a legal instrument is to place it in a genre whose interpretive conventions presumptively require literal interpretation – not in some impossible sense that excludes reference to context or purpose in interpretation, but rather in a sense that excludes taking the text as primarily figurative or symbolic”).
52. JAROSLAV PELIKAN, INTERPRETING THE BIBLE & THE CONSTITUTION 1-22 (2004).
53. *Id.* at 22-33.
54. *Id.* at 38-75.

development over time of doctrine,⁵⁵ and the similarities between originalism and literalism.⁵⁶

In their comparison of scriptural and constitutional interpretation, Vincent Crapanzano, Peter J. Smith, and Robert W. Tuttle have focused in particular on that final point covered by Pelikan: the similarities and differences between biblical literalism and constitutional originalism.⁵⁷ Smith and Tuttle, for example, recognize that there are “obvious similarities” between the two approaches, including the “presuppositions that the relevant texts have a timeless, fixed meaning that is readily ascertainable” and that constrains the interpreter.⁵⁸ Furthermore, both approaches arose as “projects of restoration,” developed in response to modernist alternatives, and seek to “restore” a particular method and set of values.⁵⁹ Literalists and originalists alike conceive of themselves as populist and anti-elitist, because in theory anyone can access and interpret the relevant texts.⁶⁰ And according to Smith and Tuttle, both literalists and originalists project “an air of absolute certainty about their approach’s legitimacy and correctness.”⁶¹

Despite the similarities between originalism and literalism, Smith, Tuttle, and Crapanzano urge their readers not to ignore the salient differences between

55. *Id.* at 115-49.

56. *Id.* at 76-114.

57. See VINCENT CRAPANZANO, *SERVING THE WORD: LITERALISM IN AMERICA FROM THE PULPIT TO THE BENCH* 1-25 (2001); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 694-96 (2011). Crapanzano even explores the psychological similarities between interpreters who deploy literalist and originalist methods of interpretation, and he suggests that their shared psychology may be seen to effect similarities in other areas of life – including, for example, their sense of fashion and their dispositions toward democracy. See, e.g., CRAPANZANO, *supra*, at 18-19, 334-39.

58. Smith & Tuttle, *supra* note 57, at 694-95. But see CRAPANZANO, *supra* note 57, at 2-3 (listing ten features shared by literalism, whether biblical or constitutional); *id.* at 3-4 (“For the Fundamentalists, the originalists, and other literalists, it is the written word, the text, that gives them at least the illusion of a secure reference point. Though they may argue over the niceties of meaning, and they may recognize at some level the problematic of literalist interpretation, they cling to their literalism if only because it gives constancy to the texts they privilege. Indeed, interpretation can be dangerous if it gives way to irresponsibly figurative understanding, to self-interest, to personal desire, to uncontrolled flights of the imagination, and to the allure of power.”).

59. Smith & Tuttle, *supra* note 57, at 695, 735, 755-56; see also CRAPANZANO, *supra* note 57, at 22-23 (discussing the “restorative turn” in literalist interpretation); *id.* at 339 (claiming that Fundamentalists and originalists offer a “nativist [vision], a re-assertion of traditional values”).

60. Smith & Tuttle, *supra* note 57, at 695.

61. *Id.* But see CRAPANZANO, *supra* note 57, at 342 (“Legal literalists do not in most circumstances have the same total and consuming commitment to their hermeneutics. Their literalism tends, as I have observed, to the instrumental. However, many appear to be morally committed to it – at least if we take them at their word. . . . We must also recognize the moral outrage – or pretended outrage – that the rhetorical manipulation of this commitment produces.”).

the two interpretive approaches. Most importantly, the literalist views the Bible as “inerrantly truthful and inherently good,” whereas the originalist is a “paradigmatic . . . legal positivist” in that the originalist believes a person has a legal duty to obey the Constitution not because it is good or true but because it is “an authoritative legal text.”⁶² As such, Smith and Tuttle argue that literalists ought to be wary of originalism given that originalist judges should, in theory, enforce the Constitution’s text even if they believe enforcement of the text does not produce a normatively good result.⁶³ Crapanzano, for his part, argues that advocates for “literalist approaches to the law” are, unlike proponents of “Christian Fundamentalism,” at least superficially open to arguments about their approach—even if, in reality, they repeat the same arguments in different disguises in response to the critiques of challengers.⁶⁴

In contrast to the relatively large number of scholars who have compared specific conservative methods of scriptural and constitutional interpretation, there are a limited number who have compared *specific* methods of progressive scriptural and constitutional interpretation. In particular, very few scholars have either described parallels between liberation theology and progressive constitutional interpretation or proposed that constitutional scholars adopt or adapt the substantive or procedural interpretive commitments of liberation theologians.⁶⁵ The late Robert E. Rodes, Jr., a professor at Notre Dame Law School, produced the most extensive comparison to date of liberation theology and legal

62. Smith & Tuttle, *supra* note 57, at 695. Compare *id.* (describing literalists’ adherence to the Bible as stemming from a belief in the document’s inherent truthfulness and goodness as opposed to originalists’ sense of duty to the Constitution, which grounded in the document’s authoritative legal status), with CRAPANZANO, *supra* note 57, at 333 (“In the law, the situation is at once simpler and more complex. It is simpler because the immediate stakes (for the judges and the lawyers, not necessarily for the clients) are not as great. Though the law can affect most aspects of one’s life, it does not demand the same life commitment as biblical commandment does for the Fundamentalists. One’s personal salvation is not in question—at least, it isn’t the direct concern of the law. Interpretation carries a burden, but certainly not the same burden. It must insulate the law from moral and political interests and concerns from which, as we all know, it cannot in fact be separated . . .”). But see Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 30-31 (“What has powered originalism all along has been the attraction of its substantive constitutional vision, its *nomos*. The constitutional vision conservatives embrace as ‘original’ expresses fundamental ideals that conservatives believe should define America. Conservative originalists do not merely believe that the Constitution is law; they believe it is *good* law.”).

63. Smith & Tuttle, *supra* note 57, at 696-97.

64. CRAPANZANO, *supra* note 57, at xxiii-xxiv, 2.

65. For background on liberation theology, including the specific substantive and procedural interpretive commitments of liberation theologians, see *infra* Part II.

interpretation. In two important books, *Law and Liberation*⁶⁶ and *Pilgrim Law*,⁶⁷ Rodes suggests that there should be a constitutional analog to liberation theology,⁶⁸ but he focuses on liberation theology's substantive interpretive commitments more than its procedural commitments. For example, in *Law and Liberation*, Rodes divides his discussion into substantive issues, including "Poverty," "Trivialization," "Powerlessness," "Rootlessness," "Sex," and "Violence."⁶⁹ Within each chapter, Rodes discusses the "legal dispositions" that have been offered to address the relevant issue, and he "propose[s] [his] own legal agenda for a liberating approach to the problem as it presently appears."⁷⁰ But the agenda he offers does not explore the procedural role the marginalized might have in a more liberative jurisprudence.⁷¹ This is even more apparent in *Pilgrim Law*, which has a narrow focus on implementing the substantive values of liberation theology in a "Christian jurisprudence"⁷² rather than on integrating marginalized people into the jurisprudential process.⁷³ In addition, Rodes's insistence on propounding an unapologetically Christian jurisprudence might alarm some progressive constitutional scholars who fear eroding the perceived wall between religion and the state.

Russell Powell, a professor at Seattle University School of Law, has also written about liberation theology and legal discourse, but his project is more limited than Rodes's. Powell has focused on a specific substantive commitment in liberation theology—the preferential option for the poor.⁷⁴ He argues that the

66. ROBERT E. RODES, JR., *LAW AND LIBERATION* (1986).

67. ROBERT E. RODES, JR., *PILGRIM LAW* (1998).

68. See Robert E. Rodes, Jr., *Pilgrim Law*, 11 J.L. & RELIGION 255, 265 (1994) ("I see pilgrim law, accordingly, as the fundamental jurisprudential manifestation of the theology of liberation."); see also RODES, *supra* note 67, at 175 ("I regard pilgrim law as the jurisprudential manifestation of liberation theology.").

69. RODES, *supra* note 66, at vii.

70. *Id.* at 20.

71. When Rodes does address the role specific communities might play in jurisprudence, it is to focus on the Church-as-institution rather than on the marginalized. See, e.g., RODES, *supra* note 67, at 140-73. Notably, the indexes of both books do not contain the term "base community" or any of its variants.

72. See Rodes, *supra* note 68, at 264-65.

73. RODES, *supra* note 67, at 3-10 (discussing "values and their implementation"); *id.* at 112-32 (discussing how to turn "values into jurisprudence," and organizing each section in the first two parts of the chapter according to a different set of values).

74. See Russell Powell, *Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor*, 15 WASH. & LEE J.C.R. & SOC. JUST. 327, 329-33 (2009); RODES, *supra* note 66, at 22-55, 214; RODES, *supra* note 67, at 91-111. By "preferential option for the poor," Powell is referring to a concept that is central to liberation theology—namely, the idea that the

preferential option for the poor is relevant to legal discourse, and he explores the benefits of blurring the distinction, as he understands it, between religion and the secular state.⁷⁵ Powell also attempts to use a specific “outsider methodology,” which he describes as an attempt to effect change by “empowering the subordinated” by “raising consciousness among oppressed groups.”⁷⁶ He puts forth this methodology to “effect substantive legal and social changes implied by a deeper understanding of the preferential option.”⁷⁷ While Powell’s project might appeal to some progressive scholars – especially those writing and working in the field of poverty law⁷⁸ – his narrow focus on translating the substantive values of liberation theology into law is a limited and potentially problematic approach, as will be discussed in Section III.A.

B. A Missing Analog?: Inclusive Scriptural and Constitutional Interpretive Procedures

Legal scholars might value comparative work that contrasts scriptural and constitutional interpretive methods and values because such work often reveals un- or underexplored assumptions about interpretation. And progressive legal scholars might appreciate normative work that calls for constitutional interpretation to adapt the substantive principles of liberation theology. However, by focusing on similarities and differences in broad methods and values of constitutional and scriptural interpretation, legal scholars have missed a generative site of comparison: the mechanisms by which different stakeholders contribute to or are excluded from the process of scriptural and constitutional interpretation. Procedures of interpretation – that is, the nuts-and-bolts mechanisms by which specific individuals or communities go about the business of interpreting a text – have a profound impact on the substance of interpretation.

In this Note, I argue that jurists committed to democratic constitutionalism should adapt the interpretive procedures of liberation theology. As explained at length in Section III.B, proponents of democratic constitutionalism

Church (both the institution, and the community of believers) should serve and stand in solidarity with the poor, including through systemic reforms that liberate the body and spirit of the oppressed. See Olivia Singer, *Liberation Theology in Latin America*, MODERN LATIN AM. WEB SUPPLEMENT, <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-15-culture-and-society/essays-on-culture-and-society/liberation-theology-in-latin-america> [<https://perma.cc/DXD5-PQ24>]; see also *infra* notes 131-143 and accompanying text for an extensive explanation of the “preferential option for the poor.”

75. Powell, *supra* note 74, at 329.

76. *Id.* at 390, 394.

77. *Id.* at 333, 390-94.

78. See *infra* notes 195-200.

make a compelling normative argument that constitutional interpretation must be democratically responsive – that is, responsive to the moral vision of the people – in order to be democratically legitimate. However, scholarship on democratic constitutionalism fails to provide concrete proposals for how the people might participate in constitutional interpretation. In Section III.C, I advocate for a constitutional analog to a model for communal interpretation developed within liberation theology: the base ecclesial community. I suggest that creating such an analog – which I call the *base constitutional community* – will improve the democratic responsiveness and therefore legitimacy of constitutional interpretation. I describe three possible versions of a constitutional analog to the base ecclesial community, and I discuss their strengths and weaknesses.

Before proceeding, however, I wish to address one obvious argument that critics might level against this proposal: namely, that the bonds Americans feel with one another and with the Constitution are too different from, and weaker than, the bonds Christians feel with one another and with the Bible, and therefore it is inapposite to suggest a constitutional analog to a procedure for interpreting the Bible. In proposing a constitutional analog to base ecclesial communities, I do not mean to suggest that the Constitution and the Bible serve identical functions for Americans and Christians, respectively, or that religious and political identities are interchangeable. Nor do I contend that the bond between coreligionists, on the one hand, and conationals, on the other, is identical. But coreligionists and conationals are alike – if only at the highest degree of abstraction – in that membership in a religious or national community involves membership in an imagined community of shared narratives and values.⁷⁹

Furthermore, while the majority of Americans disapprove of the Court’s interpretation of the Constitution in important recent decisions, Americans *do* feel a strong bond with the Constitution itself.⁸⁰ Reading the Constitution in a base

79. Cf. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (rev. ed. 2006) (“[The nation] is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.”); Robert N. Bellah, *Civil Religion in America*, 96 *DAEDALUS* 1, 1, 8 (1967) (arguing that the United States has a civil religion, which includes “a collection of beliefs, symbols, and rituals with respect to sacred things and institutionalized in a collectivity”).

80. See, e.g., Aziz Rana, *Why Americans Worship the Constitution*, PUB. SEMINAR (Oct. 11, 2021), <https://publicseminar.org/essays/why-americans-worship-the-constitution> [<https://perma.cc/UB59-GKPG>]. As evidence, consider the fact that social movements continue to frame claims discursively according to the Constitution; see, for example, Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 *MICH. L. REV.* 877, 892 (2013), which argues that the Constitution “offers resonant frames for social movement actors;” and see *Daily Survey: The U.S. Constitution and Bill of Rights*, *YOU GOV* 27 (Aug. 11-15, 2022), https://docs.cdn.yougov.com/8onnmobwl3/tabs_The_US_Constitution_and_Bill

community—a formal practice akin to a ritual⁸¹—might *strengthen* the bond between conationals, and it might also strengthen the bond between participants in base communities and the Constitution itself. Scholars of religion have long recognized the power of shared rituals in generating the “collective effervescence” necessary for creating and upholding common beliefs and community solidarity.⁸² In particular, the ritual reading of a text—a common practice among religious communities⁸³—not only reflects the sacrality of a text; it can

_of_Rights_20220811.pdf [https://perma.cc/5UEZ-CLD8], which finds that a majority of Americans think the ideas in the Constitution are very or somewhat reliable “for solving today’s political problems.” Some commentators even think that Americans’ “veneration” of the Constitution is unhealthy. See, e.g., Joshua Keating, *Are Americans Too Constitution Obsessed?*, FOREIGN POL’Y (Sept. 24, 2010, 3:59 PM), https://foreignpolicy.com/2010/09/24/are-americans-too-constitution-obsessed [https://perma.cc/ZQ9S-XZFN]; *The Perils of Constitution-Worship*, ECONOMIST (Sept. 23, 2010), https://www.economist.com/united-states/2010/09/23/the-perils-of-constitution-worship [https://perma.cc/Q2X3-M57X]. For a discussion on how such veneration might explain why it is so hard to amend the Constitution, see Jill Lepore, *The United States’ Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution [https://perma.cc/7HHB-U93Z]. In this Section, I merely mean to suggest that a proposal for a constitutional analog to base ecclesial communities should not fail based on the erroneous argument that Americans lack—or cannot develop—a sufficiently strong bond with the Constitution such that a constitutional analog to base ecclesial communities would be inapt.

81. Gordon Lynch, *Emile Durkheim: Religion—The Very Idea, Part 3: Ritual, Ancient and Modern*, GUARDIAN (Dec. 24, 2012, 14:00 GMT), https://www.theguardian.com/commentisfree/2012/dec/24/emile-durkheim-religion-ritual-ancient-modern [https://perma.cc/ZNK7-WVHA] (explaining that Émile Durkheim identified a “common structure” of a ritual: “A select group of people (usually excluding women and children) goes to a special (sometimes secret) place, to perform a defined set of actions in relation to a sacred object.”). As I will describe in Sections II.B and III.C, base communities (whether ecclesial or constitutional) similarly involve a select group of people, gathering in a particular place, who read and interpret a sacred text (i.e., the Bible or the Constitution) in a formalized way.
82. See Von Daniel B. Lee, *Ritual and the Social Meaning and Meaninglessness of Religion*, 56 SOZIALE WELT 5, 5 (2005) (“Durkheim suggested that rituals are the enactments of collectively held beliefs, but that rituals create the shared ecstasy required for the formulation and ‘unanimous’ affirmation of those beliefs . . . [T]he power of collective effervescence is . . . essential in the production of social solidarity”); Lynch, *supra* note 81 (“The collective experience generated by such rituals is so powerful that it gives the participants a profound sense of connectedness to each other and a deep moral vitality that transforms the way in which they feel about themselves and their world.”). See generally ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Carol Cosman trans., 2001) (discussing collective effervescence and the role of ritual in creating and maintaining solidarity among members of a religious community).
83. Cynthia Cheshire, *Meaning Making, Sacred Reading, and Political Engagement in the Harry Potter and the Sacred Text Podcast*, 31 TRANSFORMATIVE WORKS & CULTURES (2019), https://doi.org/10.3983/twc.2019.1791 [https://perma.cc/694U-QCKU] (listing various

strengthen the bond between readers and text, thereby *making* the text sacred.⁸⁴ In other words, to the extent that base constitutional community participants lack a common bond with one another or with the Constitution before engaging in formal communal reading, formal communal reading of that text might compensate for such a lack by establishing these bonds.

Beyond the realm of religious studies, scholarship in the fields of political science, literary theory, and education further suggest that reading the Constitution in base communities might strengthen the bond between participants themselves and between participants and the text—and therefore further justify the establishment of a constitutional analog to the inclusive procedures for reading the Bible deployed by liberation theologians. Just as scholars find a positive relationship between public participation in constitution-making (and political processes generally) and democratic legitimacy,⁸⁵ public participation in constitutional *interpretation* might increase public perceptions of the legitimacy of the Constitution and constitutional law. Furthermore, reading is a transactional event—that is, a transaction between the reader and text, which generates an affective response in the reader⁸⁶—and being asked to interpret a text critically

Jewish and Christian “sacred textual reading practices”); *see also* *Sacred Practice How-Tos*, HARRY POTTER & THE SACRED TEXT, <https://www.harrypottersacredtext.com/resources/how-tos> [<https://perma.cc/7RN8-RLBA>] (describing Jewish, Christian, and Buddhist sacred reading practices); Emily K. Ronald, *More Than “Alone with the Bible”*: *Reconceptualizing Religious Reading*, 73 SOCIO. OF RELIGION 323, 323 (2012) (questioning the description of the “archetypal religious reader” as one who reads “in seclusion.”).

84. *See, e.g.*, Vanessa Zoltan, *Reading Jane Eyre as a Sacred Text*, PARIS REV. (July 12, 2021), <https://www.theparisreview.org/blog/2021/07/12/reading-jane-eyre-as-a-sacred-text> [<https://perma.cc/7J7T-MRH3>] (“The ritual, the engagement with the thing, is what makes the thing sacred. Objects are sacred only because they are loved. The text did not determine the sacredness; the actions and actors did, the questions you asked of the text and the way you returned to it.”).
85. *See* Cheryl Saunders, *Constitution Making in the 21st Century*, 4 INT’L REV. L. 1, 3, 5 (2012) (describing the relationship between public ownership of constitutions and public participation in constitution-making); *see also* Hannah Werner & Sofie Marien, *Process vs. Outcome? How to Evaluate the Effects of Participatory Processes on Legitimacy Perceptions*, 52 BRITISH J. POL. SCI. 429, 429 (2022) (collecting research on the relationship between increasing citizen participation in democratic decision making and the perceived legitimacy of institutions, regardless of outcome, and describing the evidence as producing “an ambiguous picture,” but finding that participatory processes produce higher perceptions of fairness than representative decision making).
86. *See* Wallace Douglas, *Rosenblatt’s Theory of the Literary Transaction*, 41 CEA CRITIC 34, 36–37 (1979) (reviewing LOUISE M. ROSENBLATT, *THE READER, THE TEXT, THE POEM: THE TRANSACTIONAL THEORY OF THE LITERARY WORK* (1978)).

might “elicit a reader response that promotes the alignment” of reader and text.⁸⁷ And when individuals read *as a group* and inquire together about a text, those individuals might engage with the text more deeply than they would have had they read alone, in part because they build on one another’s ideas,⁸⁸ thereby constructing textual meaning together.⁸⁹ When considered as a whole, research in these various fields suggests that base constitutional communities might strengthen the bond between participants, and between participants and the Constitution, by empowering base-community members to participate in the process of constitutional interpretation and by motivating members to cocreate constitutional meaning. By bonding Americans more strongly to the Constitution, and by doing so through a more inclusive process of constitutional interpretation, base constitutional communities might simultaneously make constitutional law more democratically responsive and more democratically legitimate.

Before I go into further detail of why and how jurists should adapt Christian base communities from liberation theology, however, I must first explain what liberation theology is and how Christian base communities fit within that paradigm. That is the focus of the next Part.

II. LIBERATION THEOLOGY: AN INTRODUCTION TO ONE INTERPRETIVE METHOD AND PROCEDURE

The term “liberation theology” applies to a diverse set of responsive theologies that draw inspiration from and respond to the social, political, and economic concerns of marginalized communities.⁹⁰ Liberation theologians consciously ground their theological analysis and scriptural interpretive method in the lived

87. See Terry Tomasek, *Critical Reading: Using Reading Prompts to Promote Active Engagement with Text*, 21 INT’L J. TEACHING & LEARNING HIGHER EDUC. 127, 128 (2009). I do not intend to suggest that being asked to interpret a text critically always makes the reader feel positively about the text. Instead, I mean that critical readers might identify a “personal connection” with the text. *Id.* Personal connections, of course, need not always be marked by feelings of affinity.

88. Gay Su Pinnell & Irene C. Fountas, *Comprehension Clubs: Research Paper*, SCHOLASTIC 3 (July 2012), https://teacher.scholastic.com/products/comprehension-clubs/pdf/Comprehension_Clubs_research_final.pdf [<https://perma.cc/84PR-QJR6>].

89. Lois Bridges, *The Joy and Power of Reading: A Summary of Research and Expert Opinion*, SCHOLASTIC 123 (2014), <https://www.scholastic.com/worldofpossible/assets/readingresearch.pdf> [<https://perma.cc/366U-KQMN>].

90. See Anthony B. Bradley, *Liberation Theology*, OXFORD BIBLIOGRAPHIES (June 28, 2016), <https://www.oxfordbibliographies.com/view/document/obo-9780190280024/obo-9780190280024-0019.xml> [<https://perma.cc/2BEG-3PSZ>].

experience of the oppressed.⁹¹ In fact, for some Christian liberation theologians, theology may not be properly called “Christian” if it does not (a) find its origin in marginalized communities and (b) understand its end to be liberation of the oppressed.⁹² To achieve its end, liberation theologians insist on liberationist praxis: communities must implement and embody the insights of liberation theology, thereby generating new theological insights and interpretive methods among marginalized people.⁹³

In the 1960s, liberation theologians began developing a robust, formal literature for two distinct strands of liberation theology. The first strand emerged in the United States among Black Protestant theologians like James Cone.⁹⁴ At its inception, Black liberation theology responded to the horrors of Jim Crow and offered insights for the civil rights and Black Power movements.⁹⁵ Over time, Black (and primarily Black Protestant) women like Katie Cannon developed their own liberationist theological tradition – often called womanist theology – as a response to the intersection of racism and sexism.⁹⁶

The second strand emerged in Latin America among Catholic theologians like Gustavo Gutiérrez, Leonardo Boff, Clodovis Boff, Juan Luis Segundo, Jon Sobrino, and Alvaro Barreiro. As political liberation movements swept across Central and South America in the 1950s and 1960s, revolutionaries began to critique the institutional Church’s role in perpetuating violence, oppression, and poverty.⁹⁷ Starting with the Catholic Action movement and continuing with the

91. See, e.g., JAMES H. CONE, A BLACK THEOLOGY OF LIBERATION 46 (Twentieth Anniversary ed., 2008) (“There can be no black theology which does not take seriously the black experience – a life of humiliation and suffering. This must be the point of departure of all God-talk which seeks to be black-talk. This means that black theology realizes that it is human beings who speak of God, and when those human beings are black, they speak of God only in the light of the black experience.”).

92. See Bradley, *supra* note 90.

93. *Id.*

94. See CONE, *supra* note 91.

95. See Bradley, *supra* note 90.

96. See, e.g., KATIE G. CANNON, BLACK WOMANIST ETHICS (1988); see also Emilie M. Townes, *Womanist Theology*, in 3 ENCYCLOPEDIA OF WOMEN AND RELIGION IN NORTH AMERICA 1165, 1165 (Rosemary Skinner Keller, Rosemary Radford Ruether & Marie Cantlon eds., 2006) (“To date, most womanist theology has been Protestant Christian, although Roman Catholic voices have been strong from its inception. This is changing as the influence of Santería, Yoruba, Vodou, and other African, Afro-Caribbean [sic], and Afro-Brazilian religions begin to make an impact on womanist theological discourse.”).

97. See Bradley, *supra* note 90. For a history of the institutional Church’s role in Latin America, including its alignment with the upper classes throughout the nineteenth century and its gradual shift toward a focus on the poor, see Singer, *supra* note 74.

work of the Consejo Episcopal Latinoamericano y Caribeño (CELAM),⁹⁸ a council of Roman Catholic bishops in Latin America, members of the clergy and laity from marginalized communities banded together to reimagine the role of the Church in society – both its relationship with the state and its relationship with the people.⁹⁹ Gustavo Gutiérrez – a Peruvian, part-Quechuan theologian, priest, and participant in the Catholic Action movement – first used the term “liberation theology” in a paper delivered at a 1968 CELAM meeting, which had been organized to support base ecclesial communities and the reformation of the Church.¹⁰⁰ Gutiérrez would later go on to expand on the concept in the seminal 1971 book, *A Theology of Liberation*.¹⁰¹

From Black liberation theology and Latin American liberation theology, a plethora of liberation theologies emerged in marginalized communities. These new liberation theologies developed out of, *inter alia*, queer communities,¹⁰² communities of Hispanic/Latina women,¹⁰³ communities of Asian women,¹⁰⁴ and communities of those who are disabled.¹⁰⁵ Many theologians in these traditions interpret the Bible from the perspective of those on the margins, explore communitarian conceptions of human flourishing, and demand theologically

98. An official Catholic institution and a global lay movement, Catholic Action was designed to inspire Catholic laity to participate in the life of the institutional Church, to evangelize, and to conform the world to Christian principles. See Ulf Borelius, *Catholic Action*, in *ENCYCLOPEDIA OF LATIN AMERICAN RELIGIONS* 281-84 (2015). Catholic Action was introduced to Latin America in the 1930s and 1940s, where it was known for, among other things, its “social commitment.” *Id.* The Catholic Student Movement – a movement within Catholic Action – is credited with begetting liberation theology. *Id.* Consejo Episcopal Latinoamericano y Caribeño (CELAM) is often translated in English as the Latin American Episcopal Conference. English-language texts often use CELAM to refer to the conference. CELAM represents twenty-two different national Roman Catholic bishops’ conferences in the region. For a helpful introduction to CELAM’s role after Vatican II in affirming key aspects of liberation theology in the Latin American Church – including the preferential option for the poor and the role of CEBs – see Alejandro Crosthwaite, *CELAM*, in *ENCYCLOPEDIA OF LATIN AMERICAN RELIGIONS* 290-95 (2015).

99. See Singer, *supra* note 74.

100. *Id.*

101. *Id.*

102. See, e.g., PATRICK S. CHENG, *RADICAL LOVE: AN INTRODUCTION TO QUEER THEOLOGY* 30-32 (2011) (gathering works in queer liberation theology).

103. See, e.g., ADA MARÍA ISASI-DÍAZ, *LA LUCHA CONTINUES: MUJERISTA THEOLOGY* 60-83 (2004).

104. See, e.g., CHUNG HYUN KYUNG, *STRUGGLE TO BE THE SUN AGAIN: INTRODUCING ASIAN WOMEN’S THEOLOGY* 5 (1990) (discussing “Asian women’s liberation theology”).

105. See, e.g., NANCY L. EIESLAND, *THE DISABLED GOD: TOWARD A LIBERATORY THEOLOGY OF DISABILITY* (1994).

informed social advocacy for oppressed peoples.¹⁰⁶ Furthermore, intellectuals and theologians in other religious traditions—including Judaism,¹⁰⁷ Islam,¹⁰⁸ and Hinduism¹⁰⁹—began developing their own theologies of liberation.¹¹⁰

This Note limits its description and analysis of liberation theology to the Roman Catholic, Latin American strand of liberation theology. As a Catholic theological tradition, proponents of Latin American liberation theology develop a responsive theology in the context of an (sometimes hostile)¹¹¹ institutional Church that retains final, authoritative control over the articulation of doctrine and scriptural interpretation. In that sense, the institutional dynamics that delimited the development of Latin American liberation theology have important parallels with constitutional interpretation in the United States. In a constitutional order shaped by judicial review, responsive forms of constitutional interpretation exist within a system that gives the Supreme Court final control over constitutional interpretation. I therefore compare constitutional interpretation with scriptural interpretation in Catholic liberation theology (as opposed to theologies of liberation from other religious traditions) because the interpretive process in the legal and Catholic contexts takes place within similar institutional frameworks: in both, an authoritative, elitist institution retains final control over textual interpretation.¹¹² By drawing on Catholic liberation theology, I suggest

106. See Bradley, *supra* note 90.

107. See, e.g., MARC H. ELLIS, TOWARD A JEWISH THEOLOGY OF LIBERATION: THE CHALLENGE OF THE 21ST CENTURY, at xi-xviii (3d ed. 2004) (including forewords by Anglican theologian Desmond Tutu and Roman Catholic theologian Gustavo Gutiérrez).

108. See, e.g., HAMID DABASHI, ISLAMIC LIBERATION THEOLOGY: RESISTING THE EMPIRE (2008) (including an epigraph by Roman Catholic theologian Gustavo Gutiérrez).

109. See, e.g., *Hindu Liberation Theology Reading Group*, SADHANA, <https://www.sadhana.org/liberation-theology-reading-group> [<https://perma.cc/X2B5-P8E4>] (beginning with the topic “What Is Liberation Theology,” and assigning as the first reading a chapter by Miguel A. De La Torre, which traces liberation theology to, *inter alia*, Vatican II, the 1968 CELAM meeting in Medellín, and the publication of *Teología de la Liberación* by Gustavo Gutiérrez). See Miguel A. De La Torre, *Introduction*, in THE HOPE OF LIBERATION IN WORLD RELIGIONS 6-7 (Miguel A. De La Torre ed. 2008).

110. See generally THE HOPE OF LIBERATION IN WORLD RELIGIONS, *supra* note 109 (containing chapters analyzing—and sometimes challenging—the relationship between liberation theology and concepts in, *inter alia*, Humanism, Buddhism, Confucianism, Daoism, Orisha traditions in the West, and American Indian religious traditions).

111. See *infra* notes 179-185 and accompanying text.

112. Protestant liberation theologians—and liberation theologians writing within other religious traditions—do not operate within institutions that are as formalized, hierarchical, and robust as the Roman Catholic Church, nor do those institutions have the same degree or mechanisms of institutional control over scriptural interpretation. See Francis Christopher Oakley, Martin E. Marty & Michael David Knowles, *Roman Catholicism*, ENCYC. BRITANNICA (Sept. 7, 2023),

that it might be possible to imagine more inclusive processes of constitutional interpretation that generate and value interpretive insights by those on the margins – even in a system that values judicial supremacy.

A. *Liberation Theology's Robust Conception of Human Flourishing*

Liberation theologians understand sin theologically and socially: “To Sin – not to love, not to know, Yahweh – is to create relationships of injustice, to make an option for oppression and against liberation.”¹¹³ In order to strive toward liberation from oppression in the present, liberation theologians look first to the conditions of the oppressed. As Leonardo and Clodovis Boff put it, “liberation theology has to begin by informing itself about the actual conditions in which the oppressed live, the various forms of oppression they may suffer.”¹¹⁴ In mid- to late-twentieth-century Latin America, liberation theologians identified many different oppressed communities, all characterized by poverty, and all on the social peripheries of society, whether urban or rural.¹¹⁵ The condition of poverty is one of “dependence, debt, exposure, anonymity, contempt, and humiliation.”¹¹⁶

<https://www.britannica.com/topic/Roman-Catholicism> [https://perma.cc/B432-QQQT] (see especially the entry entitled “The magisterium”); *An Introduction to Christian Theology*, BOISI CTR. FOR RELIGION & AM. PUB. LIFE 11-12 (2007), https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-Christianity.pdf [https://perma.cc/UJ55-XE5T]. As such, these theologians do not operate under the same institutional constraints or with the same institutional concerns as Latin American, Roman Catholic liberation theologians, making the comparison drawn by this Note to the federal judiciary less apt for Protestant and non-Christian liberation theologians than for Latin American, Roman Catholic liberation theologians. Furthermore, while I recognize the richness of theologies of liberation offered by theologians in non-Christian religious traditions, the literatures in those traditions are not as extensive or established, making it more difficult to identify, synthesize, and analyze material from within those traditions that might speak to methods of constitutional interpretation.

113. GUSTAVO GUTIÉRREZ, *THE POWER OF THE POOR IN HISTORY* 9 (Robert R. Barr trans., Wipf & Stock 2004) (1983) [hereinafter GUTIÉRREZ, *THE POWER OF THE POOR IN HISTORY*].
114. LEONARDO BOFF & CLODOVIS BOFF, *INTRODUCING LIBERATION THEOLOGY* 24 (Paul Burns trans., Orbis Books 2001) (1987).
115. *Id.* at 25 (“The oppressed are to be found in many strata of society. Puebla lists them: young children, juveniles, indigenous peoples, campesinos, laborers, the underemployed and unemployed, the marginalized, persons living in overcrowded urban slums, the elderly . . .”).
116. *Id.* at 31; see also GUSTAVO GUTIÉRREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION* 49 (Sister Caridad Inda & John Eagleson eds. & trans., Orbis Books rev. ed. 1988) (1971) [hereinafter GUTIÉRREZ, *A THEOLOGY OF LIBERATION*] (“*Dependence and liberation* are correlative terms. An analysis of the situation of dependence leads one to attempt to escape from it. But at the same time participation in the process of liberation allows one to acquire a more concrete living awareness of this situation of domination, to perceive its intensity, and to want to understand better its mechanisms.”).

In order to break free from poverty as oppression, it is necessary to “work[] out a strategy better able to change social conditions: the strategy of liberation.”¹¹⁷

As a consequence, liberation theologians conceive of liberation as a total (or “integral”) process that includes social, political, economic, and theological dimensions.¹¹⁸ Gustavo Gutiérrez describes three dimensions of liberation in particular: (1) liberation from “oppressive socio-economic structures”; (2) “personal transformation” toward a “profound inner freedom”; and (3) “liberation from sin,” which is the “source of social injustice and other forms of human oppression.”¹¹⁹ In other words, liberation is not reserved for the eschaton; it takes place in history:

[Jesus] is proclaiming a kingdom of justice and liberation, to be established in favor of the poor, the oppressed, and the marginalized in history The only justice is the definitive justice that builds, starting right now, in our conflict-filled history, a kingdom in which God’s love will be present and exploitation abolished¹²⁰

Liberation theologians therefore conceive of human flourishing as liberation. Liberation, however, is not synonymous with a hyper-individualism in which humans are freed from all relationships with others. It is true that liberation theologians speak of society in which man “will be free from all servitude” and free of “economic, social, and political dependence” so that each may become “the artisan of his own destiny.”¹²¹ But liberation theologians also speak of liberation as oriented toward “the permanent creation of a new humanity in a different society characterized by solidarity.”¹²² Liberation of the individual to pursue their “own destiny” therefore requires a reconceptualization of the individual’s relationship with the self and with the other. Indeed, liberation theologians

117. BOFF & BOFF, *supra* note 114, at 5.

118. See GUTIÉRREZ, THE POWER OF THE POOR IN HISTORY, *supra* note 113, at 144 (“This theology conceives total liberation as a single process, within which it is necessary to distinguish different dimensions or levels: economic liberation, social liberation, political liberation, liberation of the human being from all manner of servitude, liberation from sin, and communion with God as the ultimate basis of a human community of brothers and sisters.”).

119. See GUTIÉRREZ, A THEOLOGY OF LIBERATION, *supra* note 116, at xxxviii; *id.* at 24-25.

120. GUTIÉRREZ, THE POWER OF THE POOR IN HISTORY, *supra* note 113, at 14.

121. GUTIÉRREZ, A THEOLOGY OF LIBERATION, *supra* note 116, at 43, 56; *see also id.* at 64-65 (“Both the term [liberation] and the idea express the aspirations to be free from a situation of dependence The deeper meaning of these expressions is the insistence on the need for the oppressed peoples of Latin America to control their own destiny.”).

122. *Id.* at 139.

ultimately conceive of liberation – of human flourishing itself – as communion with God and with others.¹²³

Importantly, however, the scope and meaning of liberation cannot be determined by those in the ruling class, and the conditions of liberation cannot be bestowed by an act of their beneficence. Instead, an “authentic and complete” liberation “has to be undertaken by the oppressed people themselves and so must stem from the values proper to these people.”¹²⁴ According to Gustavo Gutiérrez, the oppressed will come to recognize the conditions of their oppression, articulate their own values, embrace new ideas about the “real causes” of society’s ills, and commit to the creation of a new society through a process called “conscientization” – a term popularized by Paulo Freire.¹²⁵ The process of conscientization requires “an unalienating and liberating ‘cultural action,’ which links theory with praxis.”¹²⁶ In other words, theory and praxis are in a dialectical relationship¹²⁷ (also known as a “hermeneutic circle”¹²⁸): liberative action changes the conditions of society, thereby necessitating a reassessment of the conditions of oppression and a rearticulation of values. As such, “[a]wareness is . . . relative to each historical stage of a people and of humankind in general.”¹²⁹ Conscientization is therefore not a final state to be attained once and for all but rather an ongoing process. By extension, liberation *theology* – which is given substance by the

123. *Id.* at 149.

124. *Id.* at 56–57.

125. *Id.* (referencing PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., Bloomsbury 2018) (1970)).

126. *Id.* at 57.

127. BOFF & BOFF, *supra* note 114, at 22–23 (“The essential point is this: links with specific practice are *at the root* of liberation theology. It operates within the great dialectic of theory (faith) and practice (love). In fact, it is *only* this effective connection with liberating practice that can give theologians a ‘new spirit,’ a new style, or a new way of doing theology. . . . Theology (not the theologian) comes afterward; liberating practice comes first. So first we need to have direct knowledge of the reality of oppression/liberation through objective engagement in solidarity with the poor.”).

128. See JUAN LUIS SEGUNDO, *LIBERATION OF THEOLOGY* 8 (John Drury trans., Orbis Books 1985) (1976) (“Here is a preliminary definition of the hermeneutic circle: it is the continuing change in our interpretation of the Bible which is dictated by the continuing changes in our present-day reality, both individual and societal. ‘Hermeneutic’ means ‘having to do with interpretation.’ And the circular nature of this interpretation stems from the fact that each new reality obliges us to interpret the word of God afresh, to change reality accordingly, and then to go back and reinterpret the word of God again, and so on.”).

129. GUTIÉRREZ, *A THEOLOGY OF LIBERATION*, *supra* note 116, at 57.

oppressed who participate in conscientization—arises out of and responds to specific times and places, thus making liberation theology contextual, too.¹³⁰

B. From Liberation-as-Flourishing to Specific Substantive Orientations and Interpretive Procedures

Responding to their specific social, cultural, economic, and political contexts, liberation theologians commit to specific substantive and procedural interpretive orientations that inform their interpretation of the Bible. Substantively, liberation theologians read the Bible from the underside of history.¹³¹ That is, liberation theologians must interpret the Bible from the margins, because the lived experience of the marginalized provides the hermeneutic key for understanding the meaning of God's revelation.¹³² Critically, this means that scriptural interpretation necessarily follows and is informed by participation in the process of liberation and an appreciation for the lives of the oppressed.¹³³

Liberation theologians often apply a “preferential option for the poor” as part of their commitment to interpret from the margins.¹³⁴ By giving preference to

130. See, e.g., Gustavo Gutiérrez, *The Option for the Poor Arises from Faith in Christ*, in *IN THE COMPANY OF THE POOR: CONVERSATIONS WITH DR. PAUL FARMER AND FR. GUSTAVO GUTIÉRREZ* 147, 152 (Michael Griffin & Jennie Weiss Block eds., 2013) [hereinafter Gutiérrez, *The Option for the Poor*] (“Every discourse on faith is born at a precise time and place and tries to respond to historical situations and questions amid which Christians live and proclaim the gospel. For that reason it is tautological, strictly speaking, to say that a theology is contextual for all theology is contextual in one way or another. Some theologies, however, take their context seriously and recognize it; others do not.”).

131. See GUTIÉRREZ, *THE POWER OF THE POOR IN HISTORY*, *supra* note 113, at 211 (“[I]f the church wishes to be faithful to the God of Jesus Christ, it must become aware of itself from underneath, from among the poor of this world, the exploited classes, despised ethnic groups, and marginalized cultures. It must descend into the hell of this world, into communion with the misery, injustice, struggle, and hopes of the wretched of the earth—for ‘of such is the kingdom of heaven.’ At bottom it is a matter of living, as church, what the majority of its own members live every day.”).

132. *Id.* at 200; see also BOFF & BOFF, *supra* note 114, at 32 (“The liberation theologian goes to the scriptures bearing the whole weight of the problems, sorrows, and hopes of the poor, seeking light and inspiration from the divine word. This is a new way of reading the Bible: the hermeneutics of liberation.”).

133. See GUTIÉRREZ, *THE POWER OF THE POOR IN HISTORY*, *supra* note 113, at 200; BOFF & BOFF, *supra* note 114, at 32 (“Once they have understood the real situation of the oppressed, theologians have to ask: What has the word of God to say about this? This is the second stage in the theological construct—a specific stage, in which discourse is *formally* theological.”).

134. See, e.g., Gutiérrez, *The Option for the Poor*, *supra* note 130, at 148. Gustavo Gutiérrez turns to the Bible to locate the meaning of “poverty,” and he identifies three senses in which the word is used: (1) “real poverty”—that is, economic poverty—which “God does not want”; (2)

the poor, liberation theologians seek to indicate that the poor are “those who are the first—though not the only ones—with whom we should be in solidarity.”¹³⁵ Liberation theologians bestow special attention on the poor because “the God of the Bible,” who “orientates [history] in the direction of establishment of justice and right,” does so: “He is a God who takes sides with the poor and liberates them from slavery and oppression.”¹³⁶ In attempting to follow God’s example, liberation theologians commit to reorienting their lives, their theology, and the ways they proclaim the gospel.¹³⁷ Gustavo Gutiérrez writes of the necessity of “leaving the road one is on . . . and entering the world of the other, of the ‘insignificant’ person, of the one excluded from the dominant social sectors, communities, viewpoints, and ideas.”¹³⁸ By serving the poor and living in solidarity with them, the institutional Church and its members will undergo a sort of conversion; following such a path will lead to “a true irruption of God into our lives.”¹³⁹

But liberation theologians do not focus only on classism and the plight of the socioeconomically poor. Instead, reading from the underside of history requires an attention to various vectors of oppression, including racism, ethnocentrism and anti-indigeneity, sexism, and ageism.¹⁴⁰ The starting point of liberation

“spiritual poverty, in the sense of a readiness to do God’s will”; and (3) “solidarity with the poor, along with protest against the conditions under which they suffer.” See GUTIÉRREZ, A THEOLOGY OF LIBERATION, *supra* note 116, at xxv.

135. See GUTIÉRREZ, A THEOLOGY OF LIBERATION, *supra* note 116, at xxv-xxvi; *cf. id.* at xxvi (“[F]rom the very beginning of liberation theology, as many of my writings show, I insisted that the great challenge was to maintain both the universality of God’s love and God’s predilection for those on the lowest rung of the ladder of history. To focus exclusively on the one or the other is to mutilate the Christian message. Therefore every attempt at such an exclusive emphasis must be rejected.”).
136. GUTIÉRREZ, THE POWER OF THE POOR IN HISTORY, *supra* note 113, at 7.
137. Gutiérrez, *The Option for the Poor*, *supra* note 130, at 148.
138. *Id.*
139. *Id.* at 149; see also CHRISTIAN SMITH, THE EMERGENCE OF LIBERATION THEOLOGY: RADICAL RELIGION AND SOCIAL MOVEMENT THEORY 44 (1991) (“Today the Church is being summoned to undergo a *conversion to the poor* of the land. It is being called upon to let itself be ‘domesticated’ by the poor. . . . This means that the church must thoroughly revise its structures, its viewpoints, its practices, and the concrete life of its members. . . . The aim of all this is to ensure that the poor will be able to find in the church *their own true home* as an oppressed, believing people, *the expression of their own faith* and hope, and the anticipation of their own yearnings for liberty, community, and participation.” (quoting Ronaldo Muñoz, *Ecclesiology in Latin America*, in THE CHALLENGE OF BASIC CHRISTIAN COMMUNITIES 154 (Sergio Torres & John Eagleson eds., 1981))).
140. BOFF & BOFF, *supra* note 114, at 28-29. To be clear, some liberation theologians conceive of poverty broadly as the experience of social insignificance that may be due to “ethnic, cultural, gender, and/or economic factors.” See Gutiérrez, *The Option for the Poor*, *supra* note 130, at 152. As such, the line between the “preferential option for the poor” and reading from the underside of history more generally is quite blurry.

theology is the experience of the “nonperson,’ the human being who is not considered human by the present social order – the exploited classes, marginalized ethnic groups, and despised cultures. Our question is how to tell the nonperson, the nonhuman, that God is love, and that this love makes us all brothers and sisters.”¹⁴¹ In other words, liberation theologians orient themselves substantively to particular communities experiencing particular forms of discrimination at particular times and places.¹⁴² Liberation theology, therefore, is done at a particular moment in history, and it is from the experience of the marginalized at this moment in history – this “*locus theologicus*” – that theologians must interpret the Bible.¹⁴³

Because liberation theologians commit to a substantive interpretive orientation that favors reading the Bible with a special preference for the poor and those on the underside of history, liberation theologians also developed specific procedural interpretive mechanisms that allowed the poor and oppressed themselves to participate in scriptural interpretation.¹⁴⁴ “Base Ecclesial Communities” – also referred to as “Christian Base Communities” or CEBs (an acronym from the Spanish *Comunidades Eclesiales de Base*)¹⁴⁵ – became sites of inspiration for much of liberation theology and the mechanism by which it spread throughout Latin America.¹⁴⁶ Base communities are small groups of ten to seventy members, led

141. See GUTIÉRREZ, *THE POWER OF THE POOR IN HISTORY*, *supra* note 113, at 193.

142. That said, Leonardo and Clodovis Boff suggest that classism is an “infrastructural expression of the process of oppression,” whereas other forms of discrimination are “super-structural’ expressions of oppression” conditioned by classism. See BOFF & BOFF, *supra* note 114, at 28-29.

143. See GUTIÉRREZ, *THE POWER OF THE POOR IN HISTORY*, *supra* note 113, at 36-37 (“Theology is an expression of the awareness that a Christian community has of its faith at a given moment in history. . . . For theology is an attempt to do a reading of the faith from a point of departure in a determined situation, from an insertion and involvement in history, from a particular manner of living our encounter with the Lord in our encounter with others. Theology is a reading of the faith from the cultural universe that corresponds to this involvement in history and this religious experience.”).

144. Cf. SMITH, *supra* note 139, at 44 (“A church that fails to evangelize the poor, and that is not evangelized by the poor . . . would not be the Church of Jesus Christ.” (quoting ALVARO BARREIRO, *BASIC ECCLESIAL COMMUNITIES: THE EVANGELIZATION OF THE POOR* 68 (Barbara Campbell trans., 1982))).

145. See Singer, *supra* note 74.

146. SMITH, *supra* note 139, at 106-07; Singer, *supra* note 74; see also BOFF & BOFF, *supra* note 114, at 7 (“The Christian base communities, Bible societies, groups for popular evangelization . . . and the like, have all shown themselves to have more than a purely religious and ecclesial significance, and to be powerful factors for mobilization and dynamos of liberating action, particularly when they have joined forces with the other popular movements.”). For a history of CEBs, see generally Andrew Dawson, *The Origins and Character of the Base Ecclesial*

by Catholic laypeople, that meet in homes or community centers.¹⁴⁷ As sites of conscientization and theological production,¹⁴⁸ members learn to read and write; study the Bible; raise consciousness about their social, political, and economic situation; practice leadership; and engage in activism.¹⁴⁹ As the locus for these various activities relates to conscientization and action, CEBs nurture the feedback between theology and praxis.

In addition, base communities create a space for a different kind of relationship between the clergy and the poor, including a different set of roles for the two vis-à-vis scriptural interpretation. Liberation theologians certainly approve of base communities as spaces where the clergy can evangelize and mobilize the poor—that is, where the institutional Church operates within traditional Church-lay power dynamics to spread its message to the poor.¹⁵⁰ But liberation theologians also recognize that, through base communities, the poor are not only evangelized; they themselves evangelize.¹⁵¹ The conscientized, mobilized poor bring the gospel to others who are oppressed (including non-Christians),¹⁵² to

Community: A Brazilian Perspective, in THE CAMBRIDGE COMPANION TO LIBERATION THEOLOGY 139 (Christopher Rowland ed., 2d ed. 2007), which offers a periodization of Base Ecclesial Communities in the years prior to 1962, from 1962-1968, from 1969-1974, and from 1975 to the present. For somewhat dated assessments of the long-term impact of liberation theology in Latin America, including in matters of politics and leadership, see, for example, Daniel H. Levine, *Assessing the Impacts of Liberation Theology in Latin America*, 50 REV. POL. 241, 260 (1988), which notes that “[e]ven if CEB’s become less visible in explicitly political matters, they still can play a long-term role by eliciting and promoting new sources and styles of leadership, making them normal and legitimate. The groups as such may leave center stage, but the leaders they develop should diffuse throughout society”; and Valerie Ann MacNabb & Martha W. Rees, *Liberation or Theology? Ecclesial Base Communities in Oaxaca, Mexico*, 35 J. CHURCH & STATE 723, 747-49 (1993), which discusses the political, social, and economic impact of base communities in Oaxaca.

147. SMITH, *supra* note 139, at 106; Singer, *supra* note 74.

148. See SMITH, *supra* note 139, at 107 (“BECs offered not only a solution to the lack of clergy but also, for the liberation theology movement, a means of educating the masses at the grass roots. Pastoral workers, utilizing Paulo Freire’s method of conscientization, taught community members how to do critical social analysis. This had a powerful effect on the social awareness of BEC members.” (citation omitted)).

149. SMITH, *supra* note 139, at 106; Singer, *supra* note 74. Similar to base communities, the Theological Reflection Workshops (*Jornadas de Reflexión* in Spanish) organized by Gustavo Gutiérrez allowed activists, theologians, and others to dialogue about liberation theology and explain specific concepts in more depth. Singer, *supra* note 74.

150. See, e.g., BARREIRO, *supra* note 144, at 64-65 (describing the benefits of the “evangelization of the poor” from the perspective of a pastor).

151. See GUTIÉRREZ, A THEOLOGY OF LIBERATION, *supra* note 116, at xli-xlii.

152. *Id.*; BARREIRO, *supra* note 144, at 67.

those who oppress them,¹⁵³ and to the institutional Church itself.¹⁵⁴ In fact, Alvaro Barreiro goes so far as to say that “[a] Church that fails to evangelize the poor, and that is not evangelized by the poor might be respected by the middle and upper classes and ‘become established’ and have ‘prestige’ and ‘influence’ in society, but it would not be the Church of Jesus Christ.”¹⁵⁵ As such, liberation theologians recognize the necessity of “listen[ing] to the oppressed themselves.”¹⁵⁶ Indeed, the poor bring new insights about poverty, oppression, and liberation that provide fresh ways of understanding the gospel¹⁵⁷—and as the next Section describes, these new insights feed into the theology of the institutional Church and the Church’s professional theologians.

Andrew Dawson’s description of a typical CEB gathering illustrates how base communities offer the poor an opportunity to interpret scripture through the lens of their own experiences.¹⁵⁸ Dawson explains that at a typical CEB gathering, participants will read a scriptural passage, after which each participant will share comments “relevant to both text and context of the gathering.”¹⁵⁹ Then a member of the community (i.e., a layperson) synthesizes the scriptural text and the shared comments into an oral reflection.¹⁶⁰ After the reflection, participants

153. BARREIRO, *supra* note 144, at 64–65, 67.

154. *Id.* at 67–68.

155. *Id.* at 68.

156. BOFF & BOFF, *supra* note 114, at 30 (“We need to listen to the oppressed themselves. The poor, in their popular wisdom, in fact ‘know’ much more about poverty than does any economist. Or rather, they know in another way, in much greater depth.”).

157. BARREIRO, *supra* note 144, at 68 (“Involved in reality, [the poor of the CEBs] point to new paths for their Church, removing it from its ruts, and leading it to a better harmony with the logic of the gospel.”).

158. Dawson, *supra* note 146, at 147.

159. *Id.* (In CEBs, “the past week’s life experiences provide the tool by which the biblical text is interrogated and made relevant to the life setting of the group.”).

160. *Id.* at 147–48. Dawson contextualizes this period of reflection in a broader See-Judge-Act framework. The framework, often attributed—at least in the context of liberation theology—to Leonardo and Clodovis Boff, involves *seeing* the everyday experiences of members of the CEB, *judging* those experiences in the light of scripture and finding hope in scripture for what is to come, and *acting* within communities by addressing “traditionally secular neighborhood (*bairro*) concerns.” *Id.* Dawson explains that this oral reflection, which takes place during the “judging” stage, can last for an hour or more, though he does not offer a detailed description of its standard format, if one exists. *Id.*

For a more detailed discussion of the See-Judge-Act framework, see Justin Sands, *Introducing Cardinal Cardijn’s See-Judge-Act as an Interdisciplinary Method to Move Theory into Practice*, 9 Religions 129 (2018), which explains the See-Judge-Act method, explains Cardinal Cardijn’s role in developing the method, and attributes to Leonardo and Clodovis Boff its popularity in the context of liberation theology; and see also Boff & Boff, *supra* note 114, at 24–42, which

engage in further discussion, during which “the scriptural passage is questioned in the light of present preoccupations and events, in the hope that it might shed light upon the situation at hand.”¹⁶¹ In other words, through this process, lay Catholics have the opportunity to read scripture, question its meaning, and interpret it from within their own social and historical context—and, in doing so, deepen their relationship with God and the gospel.¹⁶² The laity become “active subjects, increasingly responsible for the construction of their own history.”¹⁶³

In sum, base communities allow the poor to “redefine their own fate and their own relationship with the Church” by inviting them to participate in scriptural interpretation and evangelization, thus threatening the traditional authority of the institutional Church.¹⁶⁴ CEBs therefore serve as the manifestation of a commitment to a particular procedural interpretive orientation within liberation theology—an orientation that recognizes a role in scriptural interpretation for both the Church-as-institution, which speaks authoritatively about matters of doctrine and interpretation, and the Church-as-communion-of-believers, which offers fresh insights about the gospel through CEBs.

describes “three mediations” (corresponding to See-Judge-Act), which are called a “[s]ocio-analytical (or historico-analytical) mediation,” a “[h]ermeneutical mediation,” and a “[p]ractical mediation.”

161. Dawson, *supra* note 146, at 147-48.

162. SMITH, *supra* note 139, at 130 (“Through participatory, inductive studies of certain biblical passages—typically from Exodus, the Prophets, the Gospels, and selected Epistles—poor Catholics came to see and believe for themselves that the Bible taught that God was on the side of the poor and wanted their liberation.”).

163. Dawson, *supra* note 146, at 148.

164. Singer, *supra* note 74. Even though the institutional Church retains final control over doctrine, CEBs threaten the traditional authority of the institutional Church by creating a space for the poor and otherwise marginalized to recognize and exercise the power they have over their own lives, and to analyze and reimagine the relationship they have with the institutional Church. Put differently, conscientization is in and of itself a threat to institutional power, because it enables those without power to envision worlds in which their reality of marginalization might be otherwise. *See also id.* (“The sense of power and autonomy that the CEBs and the Theological Reflection Workshops created within the lower classes was exactly what the Vatican had feared. The ability of the poor to work to redefine their own fate and their own relationship with the Church exemplified the kind of loss of traditional authority of which [Cardinal Joseph] Ratzinger [later Pope Benedict XVI] spoke.”); *id.* (“Opposing the notion of class struggle, supporters of traditional theology felt that the movement’s promotion of a ‘people’s church’ could undermine Catholic institutions by departing from classic doctrine and weakening the authority of Catholic teachings” (citing MILAGROS PEÑA, *THEOLOGIES AND LIBERATION IN PERU: THE ROLE OF IDEAS IN SOCIAL MOVEMENTS* (1995))).

C. *The Impact of Base Ecclesial Communities on the Institutional Church*

Base ecclesial communities provide more than just an opportunity for laypeople to feel *as if* they have an important role in scriptural interpretation; CEBs offer a mechanism through which the laity can impact the institutional Church *in fact*. CEBs are not merely a way of “cooling out the mark”¹⁶⁵ – that is, CEBs are not merely inconsequential venting venues meant to defuse the anger of laypeople chafing against institutional power and control. This Section describes how CEBs can and have effected change despite a history of hostility by some Vatican leaders.

As discussed in the previous Section, liberation theologians insist that laypeople can and must influence the institutional Church. Leonardo and Clodovis Boff describe the “popular theology” of laypeople, the “pastoral theology” of ministers, and the “professional theology” of theologians, professors, and teachers as analogous to the roots, trunk, and branches of a tree, respectively.¹⁶⁶ The nourishment of theological insight is passed back and forth between roots and branches, often thanks to the mediation of ministers at the trunk.¹⁶⁷ Though the theological production of laypeople, ministers, and professional theologians might sometimes – though not always – be separated by time or space,¹⁶⁸ these three groups constantly inform and influence one another. The creation of theology is a “dialectical process of mutual ingression” where the “traditional

165. Base ecclesial communities are not a mechanism for “cooling the mark out.” Erving Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 *PSYCHIATRY* 451, 451-52 (1952) (describing the process by which con men stay with an aggrieved “mark” – the “victim or prospective victim of certain forms of planned illegal exploitation” – in “an effort to keep the anger of the mark within manageable and sensible proportions,” often by trying “to define the situation for the mark in a way that makes it easy for him to accept the inevitable and quietly go home”).

166. See BOFF & BOFF, *supra* note 114, at 12-21 (discussing the differences between the discourse, logic, method, locus, media of promotion, and spoken and written works produced by the “three levels of liberation theology” – professional, pastoral, and popular); see also Clodovis Boff, *Methodology of the Theology of Liberation*, in *SYSTEMATIC THEOLOGY: PERSPECTIVES FROM LIBERATION THEOLOGY* 1, 8-9 (Jon Sobrino & Ignacio Ellacuría eds., 1996) (describing the relationship between professional, pastoral, and popular liberation theology).

167. Ministers include “bishops, priests, nuns, and other pastoral workers.” BOFF & BOFF, *supra* note 114, at 11. See also Boff, *supra* note 166, at 8 (“This level is like a bridge, spanning the gap between the more elaborate theology of liberation and our Christian grassroots.”).

168. BOFF & BOFF, *supra* note 114, at 15 (describing, for example, “church conferences, where you can find pastoral ministers . . . telling of their problems, Christians from base communities recounting their experiences, and theologians contributing their insights, deepening the meaning of the events under discussion and drawing conclusions from them”).

distinctions between the religious and the mundane are overcome.”¹⁶⁹ The roots, trunk, and branches make up a living, “[i]ntegrated and [i]ntegrating” whole.¹⁷⁰

CEBs offer a space in which this integration can occur. During CEB meetings, at which ministers and theologians might be present as “advisor[s],”¹⁷¹ lay participants expose the institutional Church to the “struggles and aspirations of those at the socio-economic base of society.”¹⁷² Ministers and theologians thereby learn from the laity:

They hear the problems brought by the people, listen to the theology being done by and in the community – that is, the basic reflection that is the theology of *the people* reflecting on its life and progress. . . . [T]he experiences gathered at the base and the work done by pastoral ministers are critically examined, reflected on in depth, and worked into concepts – that is, dealt with according to the scientific criteria of theology. From here, theologians go out not only to do pastoral work and take part in meetings and discussions, but also to give lectures, to attend theological congresses, sometimes overseas, to speak in the centers of power and productivity. In this they are doing theology *from* the people.¹⁷³

In other words, ministers and professional theologians attend individual CEBs or conferences of CEBs – the roots – and make note of the scriptural insights generated by laypeople. Professional theologians can then carry those insights to the rarified branches of the institutional Church. By writing and speaking about laypeople’s insights, and by occupying positions of power and privilege where they can influence others, professional theologians can impact official Church theology and doctrine.¹⁷⁴

History shows that this process is not merely notional; liberation theologians have put it into practice. For example, “pastoral agents and bishops” in Brazil organized the first of a series of national CEB gatherings in Vitória, which met for three days in January 1975.¹⁷⁵ Attendees included “ordinary” members of

169. Dawson, *supra* note 146, at 148.

170. BOFF & BOFF, *supra* note 114, at 15.

171. *Id.* at 20.

172. Dawson, *supra* note 146, at 148.

173. BOFF & BOFF, *supra* note 114, at 20.

174. Ramesh Lakshmanan points out how CEBs influence not only the theology and doctrine of the institutional Church but also the Church’s institutional form, especially vis-à-vis the role of lay leadership. See RAMESH LAKSHMANAN, BASIC ECCLESIAL COMMUNITIES AND PARISH PASTORAL CARE: AN EMPIRICAL STUDY IN PASTORAL THEOLOGY 169-73, 206, 316-21 (2015).

175. Dawson, *supra* note 146, at 150.

CEBs (i.e., laypeople), bishops, and prominent theologians like Leonardo Boff, Carlos Mesters, and, in later years, Gustavo Gutiérrez.¹⁷⁶ These conferences offered “an environment in which theologians could begin to learn from and take stock of the voiced experiences of those living day in and day out at the socio-economic base.”¹⁷⁷ Indeed, the second national gathering of CEBs inspired a number of influential theological works, including a paper by Leonardo Boff that would form the “blueprint” for his important book, *Ecclesiology: The Base Communities Reinvent the Church*.¹⁷⁸

Professional theologians who are present at these gatherings bring insights gathered from and inspired by laypeople to the institutional Church not only through their theological publications but also through their relationships with influential figures within the Church hierarchy. The Vatican under the papacies of John Paul II and Benedict XVI disciplined some specific liberation theologians and scrutinized some specific tenets and practices of liberation theology, including CEBs, in an effort to root out any traces of Marxism from the Church.¹⁷⁹ But liberation theologians have strengthened their relationships with Vatican leaders, and liberation theology has found its way into Church doctrine.¹⁸⁰ For example, even though Gustavo Gutiérrez’s pioneering work on liberation theology attracted intense Vatican scrutiny in the 1980s by the future Pope Benedict

176. *Id.* at 150-51.

177. *Id.* at 150.

178. *Id.* at 151 (citing LEONARDO BOFF, *ECCLESIOGENESIS: THE BASE COMMUNITIES REINVENT THE CHURCH* (Robert R. Barr trans., Orbis 1986)). As Dawson notes, though the theological works inspired by CEB gatherings “represented the impetus towards the later formulation of ecclesiological themes which subsequently formed an integral part of the theoretical bedrock upon which a more mature theology of liberation came to rest[,] [s]uch ecclesiological themes also led to Vatican disapprobation and the subsequent censure and silencing of Leonardo Boff.” *Id.*

179. See Ole Jakob Løland, *The Solved Conflict: Pope Francis and Liberation Theology*, 5 INT’L J. LATIN AM. RELIGIONS 287, 293-97 (2021); Eduardo Campos Lima, *As COVID-19 Crisis Grows, Latin America’s Basic Ecclesial Communities Step Up to Help*, AM. MAG. (May 4, 2020), <https://www.americamagazine.org/politics-society/2020/05/04/covid-19-crisis-grows-latin-americas-basic-ecclesial-communities-step> [https://perma.cc/3F3R-LBDW] (“Throughout Latin America, members of C.E.B.s complain about the decades-long opposition of their countries’ bishops to their efforts. According to Mr. [Leonardo] Boff, Pope John Paul II feared ‘the C.E.B.s functioned as a Trojan horse for Marxism to step into Latin America.’”).

180. See, e.g., Stephanie Kirchgaessner & Jonathan Watts, *Catholic Church Warms to Liberation Theology as Founder Heads to Vatican*, GUARDIAN (May 11, 2015, 11:50 EDT), <https://www.theguardian.com/world/2015/may/11/vatican-new-chapter-liberation-theology-founder-gustavo-gutierrez> [https://perma.cc/8N95-CXJJ] (discussing Gutiérrez’s visit to the Vatican, on the invitation of Pope Francis).

XVI,¹⁸¹ Gutiérrez wrote a book on liberation theology in 2004 with the powerful then-Bishop Gerhard Ludwig Müller, entitled *An der Seite der Armen*.¹⁸² By the time their book was translated and republished in English in 2015 as *On the Side of the Poor: The Theology of Liberation*,¹⁸³ Müller had become a cardinal and the head of the Congregation for the Doctrine of the Faith, “the global church’s lead guardian of orthodoxy.”¹⁸⁴ Müller and Gutiérrez even celebrated Mass with Pope Francis, symbolizing a new, more conciliatory relationship between the institutional Church and liberation theology.¹⁸⁵ And while Pope Francis is not a liberation theologian himself,¹⁸⁶ he has reached out to liberation theologians for support while crafting some of the most important theological statements of the Church. For example, Pope Francis asked Leonardo Boff for material that might inform *Laudato Si’*, a landmark papal encyclical about care for the Earth, and the

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181. See Jeffrey L. Klaiber, *Prophets and Populists: Liberation Theology, 1968-1988*, 46 *AMS*. 1, 10-12 (1989). Pope Benedict XVI – then Cardinal Joseph Ratzinger – was at the time the head of the Congregation for the Doctrine of the Faith, the Church body responsible for protecting and promoting official doctrine. *Id.* at 10.
182. See generally GUSTAVO GUTIÉRREZ & GERHARD LUDWIG MÜLLER, *AN DER SEITE DER ARMEN* (2004) (providing a concise introduction to the theology of liberation in German).
183. See generally GUSTAVO GUTIÉRREZ & GERHARD LUDWIG MÜLLER, *ON THE SIDE OF THE POOR: THE THEOLOGY OF LIBERATION* (Robert A. Krieg & James B. Nickoloff trans., Orbis 2015) (introducing the theology of liberation in the English translation of *AN DER SEITE DER ARMEN*, *supra* note 182).
184. Carl E. Olson, *Bishop Gerhard Ludwig Müller Named New Head of CDF*, *CATH. WORLD REP.* (July 2, 2012), <https://www.catholicworldreport.com/2012/07/02/bishop-gerhard-ludwig-muller-named-new-head-of-cdf> [<https://perma.cc/5A62-ZFRX>].
185. See Dean Dettloff, *Is Pope Francis a Liberation Theologian?*, *SOJOURNERS* (Oct. 26, 2021), <https://sojo.net/articles/pope-francis-liberation-theologian> [<https://perma.cc/D8L6-GYCB>] (“[Pope] Francis has clearly put the Vatican on a different path with respect to liberation theology.”); Cindy Wooden, *Pope Reflects on Changed Attitudes Toward Liberation Theology*, *CRUX* (Feb. 14, 2019), <https://cruxnow.com/vatican/2019/02/pope-reflects-on-changed-attitudes-toward-liberation-theology> [<https://perma.cc/9VQV-R86U>] (“Gustavo Gutierrez, a Peruvian, concelebrated Mass with me and the then-prefect of the Congregation for the Doctrine of the Faith, Cardinal (Gerhard) Muller. And it happened because Muller himself brought him to me as his friend.” (quoting a statement Pope Francis reportedly made to a Jesuit gathering in Panama during 2019 World Youth Day)).
186. See Dettloff, *supra* note 185 (“In brief, Francis could have been a liberation theologian. He chose not to be.”); Løland, *supra* note 179, at 289 (“This article argues that Pope Francis is still at odds with liberation theology, although he shares some of its main theological concerns as a pontiff. The pope is not ‘one of them’ (Boff) in this sense, but he has nonetheless in a certain way solved the conflict between the Vatican and the ecclesial movement.” (quoting Leonardo Boff’s claim that Pope Francis is “one of us [liberation theologians],” made during an interview in the German daily *Kölnner Stadt-Anzeiger*, as reported in Christa Pongratz-Lippitt, *Brazil May Soon Have Married Priests*, *Says Leonardo Boff*, *NAT’L CATH. REP.* (Dec. 30, 2016), <https://www.ncronline.org/brazil-may-soon-have-married-priests-says-leonardo-boff> [<https://perma.cc/RVT3-QBS5>])).

encyclical clearly alludes to Boff's book *Cry of the Earth, Cry of the Poor*.¹⁸⁷ Boff himself claims that the "forma mentis" of *Laudato Si'* draws on the "pastoral and theological experience of Latin American churches"¹⁸⁸ – a pastoral and theological experience directly shaped by the insights of base communities.

III. WHAT PROGRESSIVE CONSTITUTIONAL SCHOLARS MIGHT LEARN FROM LIBERATION THEOLOGY

Liberation theology may appeal to progressive constitutional scholars on multiple levels. Substantively, progressive constitutional scholars might draw on the work of liberation theologians like Gustavo Gutiérrez, Leonardo Boff, and Clodovis Boff to articulate a robust assessment of human flourishing that grounds their constitutional vision. In fact, scholarship in various fields – including critical legal studies, poverty law, and family law – already share some substantive commitments with liberation theologians, including a focus on (and even preference for) the experiences of the poor and marginalized. Section III.A describes some of these parallels.

Procedurally, progressive constitutional scholars might turn to liberation theology – and especially to the example of base ecclesial communities – in order to inform their efforts to create mechanisms that make constitutional law more democratically responsive. Indeed, Section III.B argues that it would be democratically illegitimate for scholars and judges to adopt and adapt liberation theology's substantive commitments without first ensuring that those commitments correspond to the will of the people. While *all* constitutional interpretation gives expression, implicitly or explicitly, to specific substantive commitments and a moral vision, Section III.B draws on scholarship in popular constitutionalism and democratic constitutionalism to explain that a *democratically legitimate* constitutional interpretation will ground its moral vision in the national ethos.

Section III.C asserts that base ecclesial communities – as described by Gutiérrez, the Boffs, Alvaro Barreiro, Christian Smith, Andrew Dawson, and

187. Løland, *supra* note 179, at 288, 309–10. See LEONARDO BOFF, *CRY OF THE EARTH, CRY OF THE POOR* (Phillip Berryman trans., 1997); Pope Francis, *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home*, VATICAN PRESS 35 (May 24, 2015), https://www.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf [<https://perma.cc/5RXJ-S277>] (“Today, however, we have to realize that a true ecological approach *always* becomes a social approach; it must integrate questions of justice in debates on the environment, so as to hear *both the cry of the earth and the cry of the poor.*” (quoting indirectly the title of Boff’s book)).

188. Leonardo Boff, *The Magna Carta of Integral Ecology: Cry of the Earth, Cry of the Poor*, EARTH CHARTER (June 18, 2015), <https://earthcharter.org/article-by-leonardo-boff-on-the-popes-encyclical> [<https://perma.cc/3RS2-GCVW>].

others – offer a model mechanism for identifying the moral vision of the people by empowering Americans to participate formally in constitutional interpretation. Though scholars committed to popular and democratic constitutionalism have previously explained how the people do or should contribute to constitutional-meaning-making, existing and proposed mechanisms for democratic feedback in constitutional interpretation are insufficiently direct or concrete. Furthermore, the most direct, concrete proposals focus on shaping constitutional meaning through constitutional reform rather than through constitutional interpretation. In this Section, I explain how base constitutional communities (BCCs) – my proposed constitutional parallel to base ecclesial communities – could offer a concrete, direct way for all Americans to shape formal constitutional interpretation. By taking seriously the insights of BCCs, constitutional jurisprudence would become more democratically responsive – and therefore more democratically legitimate. I conclude by describing the pros and cons of three models that advocates might use to implement BCCs: an entirely private model, a public-private partnership, and an entirely public model.

A. *A Liberationist Constitutional Interpretation? Not Yet*

Progressive constitutional scholars – particularly those who accept that constitutional interpretation is always already a moral enterprise that reflects specific social values at specific moments in history¹⁸⁹ – might be tempted to draw on liberation theology to articulate a robust conception of human flourishing and a concomitant substantive moral vision for constitutional interpretation. Indeed, some Catholic constitutional scholars have advocated for a liberationist constitutional interpretation or mode of legal analysis that draws explicitly on the work of Latin American liberation theologians – especially the preferential option for the poor.¹⁹⁰ There are obvious parallels between liberation theology and some existing work in progressive legal scholarship, and it may be fruitful to consider whether theological descriptions of liberation as a “total” or “integral” process shed light on the strengths and lacunae of progressive constitutional advocacy.¹⁹¹

189. See, e.g., Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 29 (“Social values shape constitutional interpretation, even the interpretation of those who profess to read the Constitution in ways that claim to separate law from politics.”); cf. RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION 2* (1996) (“[This book] illustrates a particular way of reading and enforcing a political constitution, which I call the *moral reading* The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”).

190. See *supra* notes 65–78 and accompanying text.

191. See *supra* notes 118–120 and accompanying text.

Even a cursory review of progressive legal scholarship in different areas of law indicates that some progressive legal scholars share substantive interpretive commitments with liberation theologians. Mari J. Matsuda, a leading scholar in the field of critical legal studies, suggests that legal scholars should privilege the perspective of those at “the bottom” who “have experienced discrimination.”¹⁹² More recently, Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson have called upon scholars to “ground their work in movement organizing and ideation as an initial matter” – that is, to “take seriously the epistemological universe of today’s left social movements” that seek to transform the state in order to solve systems of social, economic, and political oppression.¹⁹³ Still others suggest drawing a wider boundary than those who have experienced discrimination or those participating in left social movements by focusing, for instance, on “constitutionalizing the power of those who do not rule.”¹⁹⁴ Despite their differences, these scholars all suggest, like liberation theologians, that constitutional interpretation should take place, in a way, from the bottom – in other words, from the underside of history.

Consider also scholarship in a specific field – poverty law – which resonates with some of the substantive interpretive commitments of liberation theologians. Many poverty law scholars adopt a set of substantive interpretive commitments that might be described as analogous to liberation theologians’ preferential option for the poor. By focusing on the poor, poverty law – like liberation theology – seeks to reveal the “deprivation of powerlessness” that results from poverty.¹⁹⁵ Just as liberation theologians insist on reading the Bible from the underside of history and especially from the perspective of the poor, poverty law scholars argue that the Constitution should be read to have a solicitude for certain claims made by those living in poverty,¹⁹⁶ and they insist on grounding their

192. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987); see also William N. Eskridge, Jr. *Public Law from the Bottom Up*, 97 W. VA. L. REV. 141, 150 (1994) (discussing legal interpretation from the bottom up).

193. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825, 843 (2021).

194. CAMILA VERGARA, SYSTEMIC CORRUPTION: CONSTITUTIONAL IDEAS FOR AN ANTI-OLIGARCHIC REPUBLIC 241 (2020) (capitalization altered).

195. See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 661 (1987-1988).

196. See, e.g., Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1286 (1993); *id.* at 1287 (“[T]he Court has a constitutional duty to control, if not the concentration of wealth, then at least the concentration of power that wealth affords.”); cf. Kenneth L. Karst, *Poverty and Rights: A Pre-Millennial Triptych*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 399, 400-01 (2002) (“[N]ot since the end of the Warren era has the Supreme Court shown any generalized interest in interpreting the Constitution to oblige government to

work “concretely in the daily cultural experiences of the poor.”¹⁹⁷ Like liberation theologians, poverty-law scholars view their project as bound up with human flourishing—that is, the “struggle [of the poor] to assert control over their lives and communities” in the face of systems of oppression¹⁹⁸ by rooting out the underlying causes of oppression.¹⁹⁹ And like liberation theologians, some poverty-law scholars advocate for empowering the poor through consciousness-raising communities.²⁰⁰

Consider one other example: family law.²⁰¹ Progressive family law scholarship also has significant substantive parallels with liberation theology. Family-law scholarship is replete with work describing how neoliberal economic policies have informed constitutional interpretation, thereby stunting the flourishing of American families and limiting the freedom of children to grow into adults who can actualize their professional and moral potential.²⁰² Moreover, family-law

provide remedies for poverty.”); Karst, *supra*, at 415 (“Surely the Supreme Court will never adopt an open-ended constitutional principle of affirmative governmental responsibility for ending poverty. What might be expected, however, is a modest extension of existing law. The Court might adopt a principle that identifies a violation of the equal protection clause when the government itself has defined a basic necessity, but has adopted a selective response to that need, rejecting coverage for one group without offering substantial justification for that exclusion.”).

197. Alfieri, *supra* note 195, at 695.

198. *Id.* at 664–65.

199. See JULIET M. BRODIE, CLARE PASTORE, EZRA ROSSER & JEFFREY SELBIN, *POVERTY LAW, POLICY, AND PRACTICE*, at xxvi (2d ed. 2021) (“[W]e hope [this book] will encourage [students] to participate in ongoing efforts to combat the causes, conditions, and devastating effects of poverty.”); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIA. L. REV. 999, 1007 (1994) (“The scope/specificity theme [of this Essay] reveals one of the enduring dilemmas of poverty lawyering: how to design one’s advocacy to bring about social change that is both meaningful, in the sense that it may change the lives of some poor people, and significant, in that it may also bring about changes in the social institutions that create and reproduce poverty.”).

200. Alfieri, *supra* note 195, at 665, 702–03, 711 n.307.

201. I am indebted to Douglas NeJaime, Ralph Richard Banks, Joanna L. Grossman, and Suzanne A. Kim for pointing me to much of the material in this paragraph. See DOUGLAS NEJAIME, RALPH RICHARD BANKS, JOANNA L. GROSSMAN & SUZANNE A. KIM, *FAMILY LAW IN A CHANGING AMERICA* 977–83 (2021).

202. See Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 25 (2014) (“[N]eoliberalism dominates U.S. family law in . . . federal constitutional law, where the Supreme Court has adopted a thoroughly neoliberal vision of the family. According to the Court, the Federal Constitution grants individuals wide latitude to assert negative liberty—that is, freedom from state intervention—in family life. But individuals have no constitutional right to claim any distribution of resources other than that produced by the marketplace. So strong is the Court’s ideal of negative liberty, and so extreme is its skepticism about state power, that it has insulated the

scholarship is dense with explanations for why it is important to design family-focused constitutional interpretive orientations that give special attention to the poor and otherwise marginalized.²⁰³ Compare this with liberation theologians' insistence on reading the Bible from the underside of history, including those who are made marginal by predatory capitalism.²⁰⁴ Importantly, family-law scholars' focus on the perspective of the economically marginalized might explain why so many family-law scholars focus on the need for developing a constitutional interpretive commitment to positive rights—that is, rights to some goods or services which are justifiable as rights because they are a precondition

state from any responsibility to protect children—even against vicious and foreseeable parental attacks.”); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 274 (2010) (“The state is constituted for the general and ‘common benefit,’ not for a select few. Under a vulnerability analysis, the state has an obligation not to tolerate a system that unduly privileges any group of citizens over others. It has a responsibility to structure conditions in which individuals can aspire to meaningfully realize their individual capabilities as fully as possible.” (footnote omitted)); MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)*, at xii–xviii, 20 (2019). Eichner, for example, writes at length about how market-driven family policies “are strangling the life out of” families instead of giving children “the economic support and caretaking they need to fulfill their potential.” See EICHNER, *supra*, at xii; EICHNER, *supra*, at xiii (“If the stress on American families interferes with their ability to raise their children well, as this book will show that it does on a daily basis, those children won’t be able to develop the full potential that the Dream promises them. And if economic forces keep adults from fulfilling relationships, compel them to spend the bulk of their lives at work, and make combining work and family increasingly overwhelming, they, too, will be denied the Dream.”). In response, she proposes “pro-family policy” designed to help families flourish—so that children can grow into adults who are free to set and follow through on their “life plans and moral commitments.” EICHNER, *supra*, at xii, xxvi; see also EICHNER, *supra*, at xviii (“[I]nstead of helping families get the things they need to thrive, policymakers just keep cheering the market on, telling families that, if they only work a little harder, they can achieve their dreams.”).

203. See EICHNER, *supra* note 202, at xiii (“These pressures, to be sure, create problems that look very different for families of different classes. Low-income families, and particularly poor families, clearly have it worst of all.”); *id.* at 20 (describing policies that “reduce market inequality and insecurity”); Alstott, *supra* note 202, at 28 (“In federal constitutional parlance, welfare, taxation, and other distributive policies face only ‘rational basis’ review, meaning that they are essentially beyond constitutional challenge. . . . The Supreme Court’s rejection of a positive right to state support reflects the second neoliberal ideal that dominates U.S. family law: the primacy of resource allocations produced by laissez-faire markets.” (footnote omitted)).
204. See *supra* notes 140–141 and accompanying text; see also BOFF & BOFF, *supra* note 114, at 3 (“By ‘poor’ we do not really mean the poor individual who knocks on the door asking for alms. We mean a collective poor; the ‘popular classes’ . . . : the poor are also the workers exploited by the capitalist system; the underemployed, those pushed aside by the production process . . .”).

for individual autonomy.²⁰⁵ In the context of family law, such rights might include rights to resources that are necessary to marry, divorce, engage in sexual activity, rear children, attain an education, or even remain alive.²⁰⁶ By establishing such rights, family-law scholars seek to establish a “more collective and institutionally shared . . . approach to dependency,” whereby responsibility for care is shared by individuals *and* public institutions.²⁰⁷ Compare, for example, family-law scholars’ attention to positive rights and dependency with liberation theologians’ emphasis on dependence and solidarity²⁰⁸ and on reallocating the means of production and the political process to ensure that the marginalized have what they need to be free.²⁰⁹

However, as enticing as it may be to describe in detail the substantive parallels between progressive constitutional scholarship and liberation theology, and despite the intuitive appeal of making a normative argument for an intentional, wholesale adoption by constitutional scholars of at least some of the substantive

205. See, e.g., Alstott, *supra* note 202, at 25 (“The law protects negative liberty in family life but denies positive rights to the resources that make family life possible. The law endorses laissez-faire market outcomes and portrays the state as overbearing and incompetent.”); *id.* at 27 (describing how major constitutional rights in family law only sound in negative liberty); NEJAIME ET AL., *supra* note 201, at 983-84 (exploring how market-driven policies harm family life and family autonomy, with disparate impacts felt according to race and class, and asking, “What ‘positive rights’ might we develop to support communities in conducting family life?”); EICHNER, *supra* note 202, at 20 (“[The pro-family model] might mean, for example, passing publicly subsidized leave programs to ensure that parents with newborns can take generous paid leaves from work. Under pro-family policy, programs to help families are generally available to all families regardless of income.”); cf. Leif Wenar, *Rights*, STAN. ENCYC. PHIL. § 2.1.8 (July 2, 2011), <https://plato.stanford.edu/archives/fall2011/entries/rights> [<https://perma.cc/F96D-DGT6>] (defining positive rights and explaining some justifications for such rights). For an example of a decision by the U.S. Supreme Court confirming Alstott’s claim that current jurisprudence only recognizes constitutional claims in family law that sound in negative liberty, see *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989), which states, “The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, and property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.” For scholarship connecting poverty law, family law, reproductive rights, and positive rights, see, for example, Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 8-16 (2018). Emily Zackin identifies a positive-rights tradition at the state level in the context of education, workers’ rights, and environmental protection. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 67-196 (2013).

206. See Alstott, *supra* note 202, at 29-30.

207. Fineman, *supra* note 202, at 265.

208. See *supra* notes 121-122 and accompanying text.

209. See GUTIÉRREZ, *supra* note 116, at 139.

interpretive commitments of liberation theologians, this Note proceeds along a different path. In the following Sections, I explain why it is premature to adopt substantive, liberationist interpretive commitments. Instead, I advocate for finding inspiration in the procedural interpretive commitments of liberation theology, and I suggest that doing so can help constitutional scholarship – and constitutional jurisprudence – become more democratically responsive, and therefore more legitimate.

B. Democratic Legitimacy and Constitutional Interpretation

“Who among us . . . ought to be able to declare ‘law’ that ought to be obeyed?”²¹⁰ In this Section, I argue that a substantive commitment to a liberationist constitutional interpretation is illegitimate if it is adopted and imposed by judges without regard for the will of the people. Drawing on previous scholarship in constitutional law and theory, I contend that a sound constitutional interpretation depends on the people recognizing the Constitution as theirs and the process of constitutional interpretation as a process in which the people can engage.²¹¹ If a substantively liberationist constitutional interpretive *method* is to emerge, it must emerge from a progressive moral *vision*; and if a liberationist moral *vision* is to be the basis for the progressive constitutional project, then that vision must be responsive to a liberationist “national ethos.”²¹² But how can jurists determine what the national ethos is? And if the national ethos is not liberationist, how might progressive legal advocates nurture a national, liberationist constitutional culture – if they should make establishing a liberationist culture a goal at all?

After briefly reviewing scholarship about popular constitutionalism²¹³ – which explores, *inter alia*, the different roles judges, the various branches of government, and the people might play in interpreting the Constitution – I suggest that existing scholarship fails to offer a robust set of proposals for concrete mechanisms by which the people can contribute to constitutional interpretation and thereby ensure its democratic responsiveness. In response, I argue in the final Section that liberation theology – and, in particular, base communities – offers a useful model for creating a process that produces a democratically responsive, popular constitutionalism.²¹⁴

210. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233.

211. See *infra* notes 215-229 and accompanying text.

212. Robert Post, *Theories of Constitutional Interpretation*, 1990 REPRESENTATIONS 13, 32.

213. See *infra* notes 240-259 and accompanying text.

214. Whether that moral vision will be progressive or liberationist is an open question. See *infra* Conclusion.

First, it is necessary to support the claim – propounded cogently by scholars like Robert Post, Reva Siegel, Philippe Nonet, and Philip Selznick – that constitutional interpretation *should* be democratically responsive.²¹⁵ But what is responsive interpretation, and how is it different from other forms of interpretation? As Post explains, if judges are to evaluate the constitutional validity of state actions, they must have the proper authority to do so.²¹⁶ That authority might come from three sources: law (linked with a doctrinal theory of interpretation), consent (linked with a historical theory of interpretation), or the national ethos (linked with a responsive theory of interpretation).²¹⁷ These sources are simultaneously “interdependent” and “potentially divergent and incompatible.”²¹⁸ They diverge, in part, because they assume different relationships between the interpreter and the Constitution.²¹⁹ Under a theory of responsive interpretation, a court’s authority to adjudicate constitutional claims rests on its ability to “speak with the authority of our deepest national identity and commitments.”²²⁰ In other words, the more that a court – or, by extension, any interpretive body – can claim to identify, describe, and analyze the Constitution through the lens of the national ethos, the more authority and legitimacy it can claim. By contrast, when the Court strays too far from the will of the people – as it has done in the past few years – it undermines its own legitimacy.²²¹ As such, unlike other theories of interpretation, which “purport to submit to a Constitution whose authority is independent and fixed,” responsive interpretation “disavows this illusion,

215. Michael Serota points out that scholarship about popular constitutionalism might be categorized in two ways: a “positive strand” of scholarship, which explains how popular interpretations of the Constitution *do* influence constitutional meaning; and a “normative strand” of scholarship, which argues that popular interpretations of the Constitution *should* influence constitutional meaning. See Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1641-42 nn.15-18 (2012). I focus in this Section especially on scholarship in the normative strand. For examples of the positive strand, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); and Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

216. See Post, *supra* note 212, at 18-19 (“The purpose of constitutional adjudication is to assess the constitutional validity of state actions, like the hiring of legislative chaplains. But courts can achieve this purpose only to the extent they have the authority to evaluate, in the name of the Constitution, the validity of otherwise perfectly legal state actions.”).

217. *Id.*; see also *id.* at 19-21 (explaining the authority of law); *id.* at 21-23 (explaining the authority of consent); *id.* at 23-26 (explaining the authority of ethos).

218. *Id.* at 26.

219. *Id.* at 27 (“[C]onstitutional interpretation is not merely about the Constitution but about the more radical and profound question of how we stand in connection to the Constitution.”).

220. *Id.* at 28.

221. See *supra* notes 2-20 and accompanying text.

and frankly locates constitutional authority in the relationship between the Constitution and its interpreters.”²²²

But why should constitutional interpretation be democratically responsive? Why favor democratically responsive interpretation over other modes of interpretation? As Post and Siegel explain,

If courts were to impose the Constitution’s meaning in matters about which citizens care deeply, the American people would soon become alienated and estranged. We would no longer be able to recognize the Constitution as “ours,” as the expression of “We, the People.” The legitimacy of the Constitution depends on this relation of recognition.²²³

In other words, “the people” must see the Constitution as theirs, as reflective of the moral vision they “have mobilized to realize.”²²⁴ By embracing “social pressures as sources of knowledge and opportunities for self-correction” without deferring excessively to the moral vision of majorities or abandoning “authoritative principles such as concepts of fairness or democracy” which are “essential to [their] integrity,” institutions interpreting the Constitution strengthen their legitimacy and authority.²²⁵ Simultaneously, they demonstrate their continuity

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222. Post, *supra* note 212, at 30. Compare *id.* (characterizing constitutional authority in the responsive interpretive tradition as relational and mutable), with *supra* notes 124-130 and accompanying text (describing similar claims by liberation theologians).
223. Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 27. Compare *id.* (emphasizing the importance of collective self-recognition in constitutional traditions), with *supra* notes 161-163 (describing similar claims by liberation theologians).
224. Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 26; see also *id.* at 33 (“The recent conservative mobilization teaches that authority flows to those who can relate the Constitution’s fundamental commitments to the beliefs and concerns that animate the American people and who can identify the modes of argument that give this vision its most powerful legal form.”); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) [hereinafter Post & Siegel, *Roe Rage*] (“The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as *their* Constitution.”); Post & Siegel, *Roe Rage*, *supra*, at 380 (“Americans have thus found it important that courts articulate a vision of the Constitution that reflects their own ideals. The legitimacy of the American constitutional system has come to depend on the many practices Americans have developed to ensure the democratic accountability of their constitutional law.”); Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 581 (2009) (explaining the idea that “law gains its legitimacy through democratic responsiveness” (discussing Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15-16 (2008))).
225. PHILIPPE NONET & PHILIP SELZNICK, *LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 102 (2001) (“As institutions are opened to their constituencies, they become (1)

with tradition *and* their openness to the evolving moral vision of the people.²²⁶ Put a different way, a responsive constitutional interpretation draws strength from social conflict by translating “dissent” and “social protests” into a “negotiated” constitutional order about which diverse, sometimes adverse communities have had a say.²²⁷ Indeed, constructive contestation about constitutional meaning engages the people in constitutional-meaning-making, thereby transforming the people from passive objects on which the constitutional meaning is imposed to active subjects invested in constitutional interpretation.²²⁸ As a result,

more vulnerable to the imbalances of power in society and (2) more readily focused on a narrow range of special concerns. They become, in effect, less accountable to the larger polity, more tenuously informed by its problems and aspirations.”); *id.* at 77, 80–81; *see also* Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 26 (“We argue that these responsive features of the law help sustain the Constitution’s authority in history.”); Post & Siegel, *Democratic Constitutionalism*, *supra* note 19, at 27 (“We have elsewhere used the term ‘democratic constitutionalism’ to express the paradox that constitutional authority depends on *both* its democratic responsiveness *and* its legitimacy as law.”); Post & Siegel, *Roe Rage*, *supra* note 224, at 384 (“The very practices that ensure the democratic accountability of the American constitutional system thus seem also to endanger the integrity of American constitutional law. It is no simple matter for courts to find ways of incorporating popular beliefs into the domain of legality while at the same time maintaining fidelity to the demands of professional legal reason.”); Guinier, *supra* note 224, 115 (2008) (quoting Jane Mansbridge, *The Fallacy of Tightening the Reins*, 34 ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 233 (2005) (“I argue that much of the authority for the Court as a constitutional institution lies in just such ‘deliberative accountability’; that is, transparent communication with, and responsiveness to, the people.”).

226. NONET & SELZNICK, *supra* note 225, at 80–81.

227. *Id.* at 93–94; *see also* Post & Siegel, *Roe Rage*, *supra* note 224, at 375, 379 (discussing the “constructive effects of backlash” on the legitimacy of judicial constitutional interpretation); *see also* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (describing how “small communities of mutually committed individuals who care[] about the text, about what each ma[kes] of the text, and about one another and the common life they share[]” generate law, and further explaining the fraught relationship between jurigenerative communities and the jurispatic courts of the state, which, in a diverse country containing different nomic communities, “need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy”). Roberto Mangabeira Unger also struggled with the possibility of adjudication within a system of political liberalism. *See* ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* 97 (1984) (“[A] coherent theory of adjudication or of legal justice is not possible on the premises of liberal thought.”).

228. *See* Post & Siegel, *Roe Rage*, *supra* note 224, at 390–91 (“Democratic constitutionalism suggests, moreover, that controversy provoked by judicial decisionmaking might even have positive benefits for the American constitutional order. Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other Americans to embrace their constitutional understandings. These forms of engagement lead citizens to identify with the Constitution and with one another. Popular debate about the Constitution infuses the memories and principles of our

the people might feel a stronger connection with the Constitution (which reflects their values) and with the institutions that interpret them (which listen to the people and respond to their critiques).²²⁹

Recent public backlash to the Court's current constitutional jurisprudence²³⁰ – which is grounded thoroughly in an originalism focused on history and tradition²³¹ – demonstrates the danger of a constitutional methodology that is responsive neither to the will of the people today nor to the will of the people in history. The Court is not responsive to the will of the people *today*, given that important constitutional decisions diverge from contemporary public opinion polls, and given that the Court's preferred methodology finds favor with only a minority of Americans.²³² And evidence shows that originalist courts are not responsive to the will of the people in *history*, because judges and Justices who appeal to originalism and to history and tradition selectively cite sources that confirm their prior commitments.²³³ Even judges and Justices who intend to apply

constitutional tradition with meanings that command popular allegiance and that would never develop if a normatively estranged citizenry were passively to submit to judicial judgments.”).

229. The impulse to identify and act on the will of the people even drives some initiatives by legal and other scholars to improve political – as opposed to constitutional – deliberation. For example, Bruce Ackerman and James Fishkin have advocated for “Deliberation Day,” a national holiday two weeks before “major national elections” during which all citizens will have the opportunity to meet in smaller groups of fifteen people and larger groups of five hundred people to “spend the day in a civic discussion on the issues raised by the forthcoming election.” BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 3, 17 (2004). While Congress has not yet created a national Deliberation Day, some organizations have already implemented smaller initiatives to demonstrate the utility of allowing groups of laypeople to deliberate about important civic issues. The Deliberative Democracy Lab at Stanford University, directed by Fishkin, uses “Deliberative Polling.” See Deliberative Democracy Lab, *What Is Deliberative Polling*^{®?}, STAN. U., <https://deliberation.stanford.edu/what-deliberative-pollingr> [<https://perma.cc/86GP-UEF7>]. The Program for Public Consultation at the University of Maryland also gathers groups of citizens, albeit online, for a process called a “policymaking simulation,” which is meant to identify the public’s attitude about important issues and communicate those attitudes to policymakers. See *Try a Policymaking Simulation*, VOICE PEOPLE (2023), <https://vop.org/policymaking-simulations> [<https://perma.cc/6C3R-EJFK>].
230. See *supra* notes 2-20 and accompanying text.
231. See R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 2-9 (2022) (describing the use of history and tradition in recent cases involving substantive due process, the Second Amendment, the Establishment Clause, and free speech).
232. See *supra* notes 10-11 and accompanying text.
233. See, e.g., Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 908-09, 911-18 (1993) (describing how the Court’s use of history is “often selective and biased” and how “[t]he Court picks and chooses from its reading of history and selects those practices that confirm the conclusion that it wants to reach”); see also

a history-and-tradition originalist methodology faithfully²³⁴ often find it difficult to do so as a practical matter.²³⁵ In fact, judges and Justices often rely on a small group of “friends and allies for historical sources” because they “don’t have the time, resources, or expertise” to find or fact-check historical sources themselves.²³⁶ As a result, originalism and a rhetorical commitment to history and tradition wrest interpretive control from the people instead of acting as guardrails to ensure fidelity to the original meaning of the text as it was understood by Americans in the past.

Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 29 (2014) (describing the longtime “practice of recasting constitutional history to conform to one’s own predilections”); Reva Siegel, *The Trump Court Limited Women’s Rights Using 19th-Century Standards*, WASH. POST (June 25, 2022, 3:12 PM EDT), <https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards> [https://perma.cc/5E4P-RS6R] (“Far from setting aside politics in favor of a neutral interpretation of law, Alito’s decision reveals how conservative judges encode movement goals and values under cover of highly selective historical claims.”).

234. Whether or not the Justices or judges (or their clerks) generally are competent to undertake rigorous historical research and make claims based on that research is a different matter. See Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1734–53 (2006) (discussing examples of bad history in the Court’s Establishment Clause jurisprudence); Steven Lubet, *The Supreme Court’s Bad History*, HILL (Nov. 16, 2022, 8:00 AM EST), <https://thehill.com/opinion/judiciary/3737503-the-supreme-courts-bad-history> [https://perma.cc/TY6X-HC45].
235. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting) (“The Court’s near-exclusive reliance on history is not only unnecessary, it is deeply impractical. It imposes a task on the lower courts that judges cannot easily accomplish.”); *United States v. Bullock*, No. 18-CR-165, 2023 WL 4232309, at *4 (S.D. Miss. June 28, 2023) (“After reviewing the briefs and *Bruen*, this Court grew concerned. Judges are not historians. We were not trained as historians. We practiced law, not history. And we do not have historians on staff. Yet the standard articulated in *Bruen* expects us ‘to play historian in the name of constitutional adjudication.’” (emphasis omitted) (quoting *United States v. Bullock*, No. 18-CR-165, 2022 WL 16649175, at *1 (S.D. Miss. Oct. 27, 2022))); Jacob Hammond, *The Conservative Agenda Depends on Judges Being Terrible Historians*, BALLS & STRIKES (July 25, 2022), <https://ballsandstrikes.org/legal-culture/judges-are-terrible-historians> [https://perma.cc/QTT3-MNH6] (“Courts do not have the education, time, or resources to conduct these historical surveys adequately.”). If highly educated judges and Justices find it difficult to apply history-and-tradition originalism, imagine how much more difficult the average American might find it to engage in a form of constitutional interpretation that courts might take seriously. Put differently, history-and-tradition originalism belies claims that originalism is a populist or anti-elitist methodology, see notes 58–60 and accompanying text (describing originalists’ claim to use a popular and anti-elitist interpretive methodology), because the average American does not have the training or resources to undertake the type of analysis required by history-and-tradition originalism.
236. See Allison Orr Larsen, *The Supreme Court Decisions on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022, 4:30 AM EDT), <https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249> [https://perma.cc/HC9A-KDSN].

And what is the result of the ascendance of originalism—a doubly non-responsive interpretive methodology? The Court’s current crisis of legitimacy.²³⁷ As the opinions of judges and Justices stray further from the will of the people—and as they rely more heavily on biased historical evidence from the eighteenth and nineteenth centuries provided by a cadre of elite historians, interest groups, and lawyers²³⁸—they will appear increasingly as the edicts of “High Priests” who seem to think that they “alone know the words that made America.”²³⁹ This will, in turn, exacerbate the Court’s legitimacy crisis.

Assuming that one accepts the need for democratically responsive constitutional interpretation and recognizes the responsive deficiencies of originalism, one must still describe or develop concrete mechanisms by which the people engage in or feed into the process of constitutional interpretation.²⁴⁰ Scholars of popular constitutionalism are helpful here, because they have described or proposed various ways by which the people should play a role in constitutional interpretation. Their proposals can roughly be separated into two camps: proposals (which are often vague) for giving the people a direct role in interpreting the Constitution, and proposals (which are sometimes more concrete) that would give the people an indirect mechanism for controlling constitutional interpretation.²⁴¹

237. See *supra* note 2 and accompanying text.

238. See *supra* note 236 and accompanying text.

239. See *supra* note 1 and accompanying text.

240. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2054-58 (2010).

241. Of course, this is not the only way to categorize their proposals. David E. Pozen, for example, roughly divides popular constitutionalism proposals into three models: (1) “modest popular constitutionalism” (preserving a role for courts to “occasionally strike down statutes or contravene majority preferences” while “insist[ing] that extrajudicial actors play an active, self-conscious role in the articulation, contestation, and codification of constitutional norms”); (2) “robust popular constitutionalism” (elevating the interpretive authority of the people over the judiciary any time the people exercise their interpretive authority); and (3) “departmentalism” (suggesting that “the coordinate branches of government possess independent authority to interpret the Constitution”). *Id.* at 2060-64; see also Larry Alexander & Lawrence B. Solum, Book Review, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1619-26 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (describing five varieties of popular constitutionalism: one form of “noninterpretive popular constitutionalism,” which “render[s] ‘constitutional interpretation’ more or less synonymous with ‘constitutional decisionmaking,’” and four forms of “interpretive popular constitutionalism”: (1) “robust popular constitutionalism,” in which the people take the place of the Supreme Court in interpreting and enforcing the Constitution; (2) “modest popular constitutionalism,” in which the people may nullify “blatant usurpations” by government officials on clear yes-or-no constitutional questions; (3) “trivial popular constitutionalism,” in which “popular acceptance of the existing constitutional order constitutes ‘tacit

Some scholars have suggested that the people should play a direct role in constitutional interpretation. However, their proposals are often criticized for their vagueness.²⁴² Perhaps the most well-known proponent of direct popular control of constitutional interpretation is Larry D. Kramer.²⁴³ In his foreword to the *Harvard Law Review*, he argues that the Constitution is not ordinary law, which the courts might have the authority to interpret; instead, the Constitution is (and was viewed by the Founders as) a “special form of popular law,” which the people themselves should interpret.²⁴⁴ Kramer begins with history: he turns to historical practice in the seventeenth and eighteenth centuries to support the proposition that judges had “no role interpreting or enforcing fundamental law” because “[r]esponsibility for its interpretation and enforcement lay with the people themselves” through mechanisms like the right to vote, the right to petition, resistance by local law enforcement and local juries to enforce the law, and mob action.²⁴⁵ However, Kramer does not concretely describe the mechanisms by which the people would serve as an “authoritative ‘tribunal’” for deciding constitutional questions; instead, he explains rather abstractly that the legislature and judiciary must serve the people and their interpretation of the Constitution, and the people retain the right to remedy any departure by the legislature or judiciary by enforcing the law themselves.²⁴⁶ Mark Tushnet, another proponent of popular constitutionalism, fares no better in his earlier work in explaining exactly how “ordinary citizens” might directly take control of constitutional interpretation through civil disobedience.²⁴⁷ Lani Guinier and Gerald Torres have, for their part, focused on the ways that social movements by the people can directly influence constitutional interpretation: in their view, social

endorsement’ of existing constitutional practices”; and (4) “expressive popular constitutionalism,” in which “public opinion can, does, and should play a role in a complex, interactive process of determining constitutional meaning”).

242. See, e.g., Serota, *supra* note 215, at 1647-48; Pozen, *supra* note 240, at 2053-54; Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675-76.

243. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004); Larry D. Kramer, *The Supreme Court 2000 Term – Foreword: We the Court*, 115 HARV. L. REV. 5, 9-12 (2001) [hereinafter Kramer, *Foreword*]; see also Serota, *supra* note 215, at 1644 (arguing that no one has been more influential in the popular constitutionalism debate than Larry Kramer).

244. Kramer, *Foreword*, *supra* note 243, at 9-12, 40.

245. *Id.* at 26-29.

246. *Id.* at 40-41; see also Alexander & Solum, *supra* note 241, at 1626-27, 1635-36 (criticizing Kramer for being vague in explaining how to operationalize popular constitutionalism).

247. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 30 (1999) (“The citizen is disobeying the Supreme Court, but in the service of the law as the citizen sees it.”).

movements can change societal background norms about constitutional meaning—background norms against which judicial interpreters make sense of the text.²⁴⁸ In sum, some scholars have proposed that the people do and should play a direct role in interpreting, enforcing, or rejecting interpretations of the Constitution, but their proposals lack specific prescriptions for mechanisms that render popular constitutional interpretations into authoritative, binding ones.

In addition to relatively abstract proposals for direct popular participation in interpretation of the Constitution, some scholars have offered more concrete proposals that give the people a relatively indirect role in constitutional interpretation. In fact, there is some overlap between the scholars who advocate for direct and indirect popular participation. Tushnet, for example, suggests that the people might indirectly control constitutional interpretation through their elected officials in the legislative and executive branches.²⁴⁹ In a somewhat similar vein, David E. Pozen writes about indirect control of constitutional interpretation through judicial elections.²⁵⁰ He points out that states around the country already provide for the popular election of state judges, and he argues that elected judiciaries are an effective, powerful tool for the people to have a role, albeit indirect, in interpreting the Constitution.²⁵¹ While these proposals are admirably clear in laying out the mechanisms by which the people might affect constitutional law, they offer a relatively anemic, impersonal role to the people themselves.

These indirect mechanisms are anemic because they allow the people to signal broad agreement or disagreement with the general direction of constitutional interpretation, but they do not allow the people to register their opinions about specific constitutional interpretations announced by officials, nor do they enable

248. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2758–60 (2014); Guinier, *supra* note 225, at 115 (comparing demosprudence and popular constitutionalism); see also Lynette J. Chua, *Constitutional Interpretation and Legal Consciousness: Out of the Courts and onto the Ground*, 20 INT’L J. CONST. L. 1937, 1945, 1948 (2023) (“Ordinary citizens’ willingness and ability to make constitutional claims of their own, whether in or away from the courtroom, may compel formal legal actors to grapple with divergent readings of, and aspirations for, the constitution, reconsider and possibly adjust or reinforce their own understandings, and, consequently, influence the state’s implementation of constitutional law.”).

249. TUSHNET, *supra* note 247, at 24–30, 67–70.

250. See, e.g., Pozen, *supra* note 240, at 2050–52.

251. *Id.* at 2050 (“By subjecting their judges to periodic elections, more than three quarters of the states give citizens a powerful tool with which to check the judges’ interpretive outputs, as well as a recurring focal point with which to stimulate and structure constitutional deliberation. Without disturbing the finality of courts’ judgments or the conditions of their work, elections can cement a link to the demos.”).

the people to make known their own interpretations in an affirmative way.²⁵² By not giving the people an opportunity to contribute directly to constitutional interpretation in an affirmative way, constitutional interpretation is less likely to be directly and comprehensively democratically responsive, and therefore less likely to be democratically legitimate. Furthermore, these indirect mechanisms are impersonal because they do not give the people a direct role in constitutional interpretation, and therefore the people do not have the opportunity to engage with the text in a way that might strengthen their bond with the Constitution and with one another.²⁵³ By not offering the people a venue to engage deeply with the text of the Constitution itself, these proposals are less likely to help Americans recognize the Constitution and specific constitutional interpretations as their own, which has a further deleterious effect on the perceived responsiveness and legitimacy of constitutional interpretation.

The most helpful attempt to offer concrete tools that allow the people to interpret the Constitution for themselves comes from a recent book, *Power to the People: Constitutionalism in the Age of Populism*, written by Tushnet and Bojan Bugarič. Tushnet and Bugarič point to tools like referenda, deliberative polling, and citizens' assemblies, all of which are admittedly more concrete mechanisms for providing the people with a greater role in policymaking and even constitutional reform.²⁵⁴ In the process known as deliberative polling, a small and representative group of citizens are polled on an issue before being brought together in person for a period of time to engage in dialogue about the issue with one another, with experts and expert-prepared material, and with political leaders.²⁵⁵ Deliberations are sometimes broadcast to the public on television or online. Participants are then polled after their meeting in an attempt to determine what the public would think about the issue if given an opportunity to engage in informed deliberation.²⁵⁶ A version of deliberative polling has been deployed in the constitutional context through citizens' assemblies, which are official bodies created by a government to generate constitutional reform proposals and revise constitutions.²⁵⁷ Canada, Ireland, Iceland, and Chile have all used citizens' assemblies

252. Cf. Post & Siegel, *Roe Rage*, *supra* note 224, at 381 (“Presidential politics and Supreme Court nominations, however, are blunt and infrequent methods of affecting the content of constitutional law. A more democratically dispersed and continuous pathway is the practice of norm contestation, which seeks to transform the values that underlie judicial interpretations of the Constitution.”).

253. See *supra* notes 80–89 and accompanying text.

254. See MARK TUSHNET & BOJAN BUGARIČ, *POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM* 249–70 (2021).

255. *Id.* at 260–61.

256. *Id.*; Deliberative Democracy Lab, *supra* note 229.

257. TUSHNET & BUGARIČ, *supra* note 254, at 261, 265–68.

in the process of constitutional reform and revision,²⁵⁸ and the state of Oregon has used a citizen-assembly program to “inform[] the voting population about ballot measures” – including ballot measures proposing changes to the state constitution – “through a citizen-driven deliberative process.”²⁵⁹

These examples point to exciting possibilities for proponents of democratic constitutionalism, and they offer case studies for the successful implementation of government-supported initiatives to gather representative groups of citizens to engage deeply with their constitutions. However, the tools discussed by Tushnet and Bugarič, and those implemented by Oregon and foreign legal systems, are not specifically designed to empower the people to engage in constitutional *interpretation*. In the following Section, I propose a direct, concrete mechanism for the people to interpret the U.S. Constitution. Instead of encouraging people to engage with the Constitution for the purpose of proposing or voting on *revisions* or *additions* to the constitutional text, the mechanism I describe empowers participants to *interpret* the constitutional text itself in light of their own experience. In other words, the proposal offered here focuses on making meaning of text (what might be thought of, in the legal context, as a judicial function), not creating text (a legislative function). Furthermore, the mechanism I describe could be used to interpret the constitutional text both in and beyond the context of specific cases or controversies. This mechanism has the potential to improve the actual and perceived democratic responsiveness of constitutional law.

C. *A Democratically Responsive Interpretive Mechanism: Base Constitutional Communities*

Though many constitutional-law scholars recognize the vital link between constitutional legitimacy and the democratic responsiveness of constitutional interpretation, they do not explore fully how to involve the people in the process

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258. *Id.*; María Paz Raveau, Juan Pablo Couyoumdjian, Claudio Fuentes-Bravo, Carlos Rodríguez-Sickert & Cristian Candia, *Citizens at the Forefront of the Constitutional Debate: Voluntary Citizen Participation Determinants and Emergent Content in Chile*, PLOS ONE 1, 2-3 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9170096/pdf/pone.0267443.pdf> [<https://perma.cc/77L5-AD2X>]; *see also infra* note 312 (discussing citizens’ assemblies in the constitutional context further); Gabriele Abels, Alberto Alemanno, Ben Crum, Andrey Demidov, Dominik Hierlemann, Anna Renkamp & Alexander Trechsel, *Next Level Citizen Participation in the EU: Institutionalising European Citizens’ Assemblies*, BERTELSMANN STIFTUNG 7 (June 2022), https://cor.europa.eu/en/events/Documents/Future-of-Europe/Next_Level_Citizens_Participation_in_the_EU.pdf [<https://perma.cc/EUK6-HPV2>] (describing the role citizens’ assemblies could play at “any phase of the EU policy cycle”).
259. *See* Andy Puthenpurayil, *What Is the Citizens Initiative Review Commission?*, MCCOURTNEY INST. FOR DEMOCRACY 1-2 (2017), <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/CommitteeMeetingDocument/173979> [<https://perma.cc/6LAE-NQZE>].

of constitutional interpretation. As discussed in the previous Section, many scholars either offer specific proposals for involving the people indirectly (through the election of judges or through the existing process of amending the Constitution, for example),²⁶⁰ or scholars issue vague calls for the people to play a greater role in interpreting the Constitution directly without specifying the practical mechanisms that would make direct participation in the production of authoritative, binding constitutional interpretations possible.²⁶¹ When scholars have offered more promising tools for creating a democratic feedback mechanism between the Constitution and the people, such as citizens' assemblies, those tools have been used primarily to make constitutions, not interpret them. While I recognize that such models might be adapted to empower the people to participate in or contribute to authoritative constitutional interpretation, I suggest in this Section that liberation theology offers a compelling alternative. Progressive constitutional scholars and judges can borrow and adapt a model from liberation theology to create a process for producing a democratically responsive, popular constitutional interpretation with a specific moral vision. What is that model? The base community.

As discussed in Section II.B, base ecclesial communities (CEBs) are small groups of Christians—led by laypeople and sometimes attended by ministers and theologians—in which lay participants interpret scripture through the lens of their own experiences.²⁶² Through CEBs, the marginalized have the opportunity to evangelize the Church—both the Church-as-institution and Church-as-fellowship-of-believers—by bringing insights about poverty, oppression, and liberation that offer new ways of understanding the gospel.²⁶³ Even though the institutional Church retains ultimate authority over matters of doctrine, liberation theologians recognize that it is important to include the marginalized in the process of interpretation to strengthen the bonds the marginalized feel with God and the gospel.²⁶⁴

Advocates of popular constitutionalism should adapt the base *ecclesial* community and create the base *constitutional* community. Just as the Bible “transforms mere mortals into a people of God,” the Constitution—and Americans’ belief in and interpretation of the Constitution—helps create and strengthen the imagined national community.²⁶⁵ Just as laypeople in CEBs gather to read the Bible, question its meaning, and interpret it from within their own social and

260. See *supra* notes 249–251 and accompanying text.

261. See *supra* notes 242–248 and accompanying text.

262. See *supra* notes 147–164 and accompanying text.

263. See *supra* notes 150–157 and accompanying text.

264. See *supra* notes 162–163 and accompanying text.

265. See Neoh, *supra* note 36, at 176–77; *supra* note 79 and accompanying text.

historical context,²⁶⁶ laypeople²⁶⁷ in base constitutional communities (BCCs) would be invited to read the Constitution (either methodically, section-by-section, or more preferably in the context of specific cases or controversies), question its meaning, and interpret it based on their own experiences. Just as lay-led CEBs often include ministers and theologians as advisors or observers,²⁶⁸ BCC organizers should invite judges (and potentially constitutional law scholars) to observe and learn from the interpretive insights of BCC participants. And just as lay interpretation of the Bible in CEBs strengthens the relationship between the laity and the gospels,²⁶⁹ lay participation in constitutional-meaning-making might inculcate a sense of public ownership of the Constitution.²⁷⁰

BCCs would empower those who are not trained formally in law or constitutional interpretation, and who are therefore at the bottom of the traditional interpretive hierarchy imposed by our judicial system, to make constitutional meaning. Instead of entrusting only state and federal judges with constitutional interpretation, as our current constitutional order does, a system that values the input of BCCs would recognize that laypeople are competent not only to find facts²⁷¹ but also to interpret the fundamental charter of “We the People.”²⁷² Making space for lay participation might reduce the growing gap between the Court’s decisions and public opinions about the most important issues in American public life.²⁷³ BCCs would thus foster a stronger bond between participants and the Constitution²⁷⁴ while simultaneously exposing judges to methods of interpretation and substantive insights about the text that might inform judicial decisions. This organic process, analogous to the popular-pastoral-professional model described by liberation theologians,²⁷⁵ would thereby increase the democratic

266. See *supra* note 162 and accompanying text.

267. I use “laypeople” in the constitutional context to mean Americans who are not trained formally in law or constitutional interpretation.

268. See *supra* note 171 and accompanying text.

269. See *supra* note 162-163 and accompanying text.

270. See *supra* notes 81-89 and accompanying text.

271. U.S. CONST. amends. VI & VII (safeguarding the role of juries in federal criminal and civil trials).

272. U.S. CONST. pmb1.

273. See *supra* notes 2-14 and accompanying text.

274. Cf. Saunders, *supra* note 85, at 5-7 (discussing stakeholder involvement in constitutional formation as an element of legitimacy); Werner & Marien, *supra* note 85, at 429 (noting that even though there is an “ambiguous picture” regarding the connection between perceived legitimacy and democratic decision making, participatory processes produce higher perceptions of fairness than representative decision making).

275. See *supra* notes 166-188 and accompanying text.

legitimacy²⁷⁶ of the courts' constitutional interpretation²⁷⁷ – especially if it lifts up the voices of those who have been historically marginalized by judicial opinions²⁷⁸ and underrepresented in the federal judiciary (and even law schools).²⁷⁹ And in contrast to formal (and especially judicial) constitutional interpretation – which seeks to prohibit, efface, or deny the influence of an interpreter's personal commitments in the interpretive process – BCC-based interpretation would invite participants to read the Constitution “in the light of present preoccupations and events, in the hope that it might shed light upon the situation at hand.”²⁸⁰

Advocates for BCCs would obviously have to make many decisions about how to implement these communities in the context of our judicial system. In Sections III.C.1-3, I describe three models for implementing BCCs: entirely

276. Cf. Alicia Bannon & Douglas Keith, *What Research Shows About the Importance of Supreme Court Diversity*, BRENNAN CTR. FOR JUST. (Feb. 1, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/what-research-shows-about-importance-supreme-court-diversity> [<https://perma.cc/7B8H-NCR2>] (discussing research showing that “a diverse judiciary helps instill trust in the justice system among underrepresented communities”).

277. Indeed, the extent to which BCCs increase the democratic legitimacy of the courts will depend in part on the percentage of Americans who participate, the extent to which those participants represent the country demographically, and the percentage (and diversity) of federal judicial districts that have active BCCs.

278. See, e.g., DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 8-17 (6th ed. 2008); Chase Strangio, *The Supreme Court Has Long Been a Tool of Oppression*, TEEN VOGUE (July 3, 2018), <https://www.teenvogue.com/story/the-supreme-court-has-long-been-a-tool-of-oppression> [<https://perma.cc/QP5N-CHHD>]; Charles M. Blow, *The Supreme Court as an Instrument of Oppression*, N.Y. TIMES (May 8, 2022), <https://www.nytimes.com/2022/05/08/opinion/supreme-court-oppression.html> [<https://perma.cc/R85S-MX52>].

279. See Robert Kuehn, *Shifting Law School Faculty Demographics*, BEST PRACS. FOR LEGAL EDUC. (Jan. 5, 2022), <https://bestpracticeslegaled.com/2022/01/05/clinical-legal-education-by-the-numbers> [<https://perma.cc/NR6Q-TWRX>] (providing data showing that law-school faculties are less diverse than law-school student bodies); Karen Sloan, *Biden's Judicial Appointees by Far the Most Diverse, ABA Says*, REUTERS (July 28, 2022, 5:15 AM EDT), <https://www.reuters.com/legal/government/bidens-judicial-appointees-by-far-most-diverse-aba-says-2022-07-28> [<https://perma.cc/4K6U-T47R>] (providing data showing that the federal judiciary is “far less diverse than the U.S. population”).

280. Dawson, *supra* note 146, at 147; see also *supra* note 161 and accompanying text (discussing this same quotation). To ensure that BCCs create generative spaces for constitutional interpretation in which all participants feel welcome to contribute their insights, BCC leaders might turn to the lessons of CEBs. They might also draw on the best practices of a range of civic organizations in the United States dedicated to dialogue and deliberation. For a list of such organizations, see *List of Organizations Engaged in Transforming Polarization & Division by Sector: US Focused*, MORTON DEUTSCH INT'L CTR. FOR COOP. & CONFLICT RESOL. (Nov. 2020) [hereinafter *List of Organizations*], <https://iccr.tc.columbia.edu/media/media-library-2018/centers-amp-labs/iccr/Organizations-Bridging-Divides-Nov-2020.pdf> [<https://perma.cc/44FJ-CXMM>].

private, a public-private partnership, and entirely public. While I ultimately favor an entirely public model in the long term, each option has theoretical and logistical benefits and drawbacks. I sketch out ideas to consider in response to particularly large, vexing questions, as it is not possible in this Note to articulate and resolve every decision point related to implementation.

Additionally, while reading Sections III.C.1-3, keep in mind that the strength of Americans' motivation to join and participate rigorously in BCCs will depend on a number of factors. BCC members might join voluntarily (as in the entirely private model) or, at least in part, because they are required to do so (as in an entirely public model supported by a constitutional amendment to create BCCs). Participants might engage more vigorously in the process if they have reason to believe that judges will take their insights seriously and that BCCs are not merely mechanisms for cooling out the mark. Some participants might be more interested in joining if BCC organizers clearly explain how BCCs allow for direct, strong input into constitutional interpretation on specific issues, in contrast to the indirect and weaker mechanisms for control over constitutional interpretation provided by executive, legislative, or judicial elections; civil disobedience; and participation in social movements.²⁸¹ All would-be participants will weigh the benefits of joining and participating against the opportunity costs, including lost income or lost leisure time. But the fact that Americans have not already organically formed BCCs does not suggest that advocating for their creation is a fool's errand or that Americans do not feel strongly about constitutional-meaning-making. By providing Americans with an infrastructure to connect and

281. It may be the case that some would-be BCC participants who have access to relatively strong, indirect mechanisms for controlling constitutional interpretation – such as the direct election of state judges – might not be as motivated to join BCCs. One might imagine, for example, that some potential BCC participants would forgo the chance to participate in a BCC after weighing the relative amount of control provided over constitutional interpretation by state-judge elections and BCC participation, with the amount of time it takes to cast a vote versus participate in a BCC. However, some Americans will want more control over constitutional interpretation, no matter the time commitment. And no Americans have the opportunity to elect federal judges directly. Furthermore, BCC participation might be more attractive than other indirect mechanisms of control. Compare BCC participation to civil disobedience and participation in social movements: BCC participation would more directly lead to control over constitutional interpretation than either civil disobedience or participation in social movements; BCC participation might require a more modest investment of time compared to both; and unlike acts of civil disobedience, participation in BCCs would carry no legal risk. Compare BCC participation to legislative and executive elections: while BCC participation might take more time than voting for executive or legislative officials, votes cast for these officials signal only weakly an individual voter's opinion about the direction of constitutional law manifested by judicial opinions, and they offer a weaker signal still for a voter's opinion about specific constitutional questions; and BCC participation would allow for a greater degree of direct control over constitutional interpretation related to specific constitutional issues.

organize around constitutional interpretation,²⁸² financial compensation (and even social capital) for their time and participation, a motivation for interpreting the Constitution (i.e., the promise that their interpretations might affect judicial decisions), and assurance that they have the knowledge and skills to do so – despite a culture that suggests that only lawyers and judges “know how to use The Words”²⁸³ – BCCs might remove obstacles that have heretofore prevented Americans from gathering to share their interpretations of the Constitution.

Finally, while the following discussion explains options for implementing BCCs at the national level, I recognize that state judges might also benefit from the constitutional insights of the people. I also acknowledge that it might be more politically and logistically straightforward to introduce BCCs in states, given that some states already give their residents more power over amending – if not interpreting – their constitutions.²⁸⁴ Indeed, as mentioned above, Oregon already has a citizen-assembly program that could be adapted to create BCCs.²⁸⁵ However, the federal judiciary has fewer mechanisms for democratic feedback than state judiciaries.²⁸⁶ The people cannot elect federal judges, and federal judges “hold their Offices during good Behaviour.”²⁸⁷ As such, I focus on implementing BCCs at the national level with the intent of providing the people with a mechanism to ensure that federal courts become more democratically responsive.

282. Note that no infrastructure analogous to the Catholic parish or its various outreach mechanisms currently exists for each judicial district that might be used to connect with and organize meetings for those committed to interpreting the Constitution. In addition, even those Americans who are already interested in constitutional interpretation do not meet regularly to interpret the Constitution – or to hear others interpret the Constitution – in the way that many Catholics already meet regularly at Mass. By creating such an infrastructure, and by regularizing meetings, BCCs might make it easier for Americans already invested in constitutional interpretation to meet, to build a habit of interpreting the Constitution, and to strengthen a culture of doing so. Such an infrastructure might also make it easier to recruit Americans who might not otherwise join.

283. See *supra* note 1 and accompanying text.

284. See *Initiative and Referendum Processes*, NAT’L CONF. STATE LEGS. (Jan. 4, 2022), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/WLW7-JHFT>].

285. See *supra* note 259 and accompanying text.

286. See, e.g., *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Apr. 14, 2023), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/HM74-TBRA>] (explaining that most states use an election process to select judges at some level).

287. See U.S. CONST. art. III, § 1.

1. *Model 1: Entirely Private*

Base constitutional communities might start organically as privately funded, privately organized groups of laypeople. Foundations and civil-society organizations would be able to move much more quickly than government actors to procure funding, organize administrative support, and mobilize institutional will to support BCCs. Furthermore, if BCCs were *privately* rather than publicly funded and organized, they could prefer the participation of those who are marginalized.²⁸⁸ In doing so, BCCs could respond to the call of scholars, including scholars in critical legal studies, for a bottom-up constitutional interpretation.²⁸⁹ In creating a space for the marginalized to interpret the Constitution, BCCs might surface new (and perhaps more liberationist) interpretations by people who are often excluded from the halls of power where constitutional interpretation traditionally takes place. In the spirit of CEBs, private BCCs could also become sites of mobilization, where members not only interpret the Constitution but also practice leadership and engage in activism related to the constitutional visions generated by and expressed in their discussions.²⁹⁰ By keeping participation voluntary, private BCCs would likely include only committed members who are willing to dedicate time and energy to the community, thereby strengthening the bond between members and increasing the probability that participants offer interpretive insights about which they care deeply.

However, privately funding and organizing BCCs that prefer the marginalized would raise a host of issues. First, while committing to a preferential option for the marginalized might answer the call to take bottom-up constitutional interpretation seriously, failing to insist that BCC members represent a broad cross section of society would limit their democratic legitimacy. If BCCs only represent *some* social groups, they cannot legitimately claim to represent the *national* ethos.²⁹¹ To address this concern, BCC organizers could forgo a preferential option for the marginalized while ensuring that the voices of all participants, including marginalized participants, are heard and valued. In the alternative,

288. After *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, it appears that publicly funded BCCs would struggle mightily to make a successful affirmative-action-style argument to justify a preferential option for those who have been historically underrepresented in and marginalized by the federal judiciary—at least with regard to race, ethnicity, and national origin. 143 S. Ct. 2141, 2166-70 (2023). Even if publicly funded BCCs could legally exercise a preferential option based on socioeconomic status, *cf. id.* at 2215 (Thomas, J., concurring) (suggesting that an institution like Harvard could prefer some students based on their socioeconomic status), it might be exceedingly difficult to muster the political will to fund poor-preferencing BCCs with public funds.

289. See *supra* note 192 and accompanying text.

290. See *supra* notes 148-149 and accompanying text.

291. See *supra* Section III.B.

progressive BCC organizers might believe that base constitutional communities that center the marginalized would, through dissemination of their interpretations and through activism, *create* a national ethos committed to those on the underside of history, thereby producing a liberationist national culture that could serve as the basis for a liberationist constitutionalism.

Second, if people are not required to participate, entire groups of citizens might not join BCCs. Some might not be able to join because they need to spend their time trying to accrue financial capital at work, while others might not want to join without the promise of accruing social or political capital. Organizers might need to consider whether they are able to offer incentives, including compensation or the promise of publicity. Over the long term, organizers must build a civic-social movement that creates both an internal desire and an external pressure on citizens to participate in base communities. Fortunately, CEBs suggest that BCCs might be able to create a virtuous cycle: base communities would empower participants to generate constitutional interpretive insights while simultaneously mobilizing participants to bring their insights to other members of their communities.²⁹² Members of their communities might, in turn, become inspired by those insights and by the opportunity to join base communities themselves.

Third, judges and constitutional law scholars might be less likely to join BCCs as observers or to listen attentively to the interpretive insights about the Constitution generated by base community members if BCCs are an entirely private initiative. Some judges, if given the choice, might reject the project altogether as an inappropriate intrusion by nonexperts in the rarified interpretive community of the state or federal courts.²⁹³ Other judges and scholars might be more sympathetic to the project. However, civil-society programs and organizations dedicated to strengthening the social fabric, increasing civic engagement, and improving legal literacy abound²⁹⁴—including at least one organization

292. See *supra* notes 151-154 and accompanying text.

293. See, e.g., William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 641-43 (2001); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38 (1981) (“What judges know, what judges are expert at, is, not surprisingly, the law. My thesis holds that the law is a distinct subject, a branch neither of economics nor of moral philosophy, and that it is in that subject that ju[d]ges and lawyers are expert; it is that subject which law professors should expound and law students study.”).

294. See *List of Organizations*, *supra* note 280; see also *Who We Are: The Coalition*, CIVXNOW, <https://civxnow.org/who-we-are/coalition> [<https://perma.cc/L8FG-8Q6K>] (listing dozens of organizational members of “the nation’s largest cross-partisan [c]oalition to fuel our constitutional democracy through K-12 civic education”).

founded by a retired Justice²⁹⁵ – and busy judges and scholars cannot participate in all of them. An entirely private BCC initiative would need to distinguish itself by making clear its distinctive mission and vision for a new relationship between the judiciary and the laity, and it would have to encourage respected jurists and scholars to participate early on in order to lend the program a special cachet among members of the legal community. Buy-in from even a few well-placed judges and scholars could make a big impact on our courts. In Latin America, the popular theology of CEB members made its way into pastoral and professional theology through the participation of key ministers and theologians in local CEB gatherings and national CEB convenings.²⁹⁶ In the United States, even a small group of dedicated constitutional law scholars and judges could feed the constitutional insights of people at our country's roots into the branches of the judiciary.

Fourth, private funders might impose obligations or their own biases on BCCs by manipulating the selection of BCC participants or by threatening to withdraw support should BCCs not produce interpretations that satisfy donors' interests. This challenge, while serious, is not entirely unique to private organizations. Public institutions – including universities, for example²⁹⁷ – constantly face pressure to conform to the interests of politicians. BCC advocates might balance or mitigate external pressures on BCCs from donors by seeking out a coalition of funders across the political spectrum. Other external pressures – from news media, social media, or various political lobbies – may be harder for private BCCs to manage.²⁹⁸

On the one hand, BCC organizers want to avoid allowing BCCs to become stages from which participants merely rehearse lobbyists' talking points. On the other hand, BCC organizers must remember that BCC members will and should contribute perspectives about the Constitution that are mediated by their personal experiences and the experiences of members within their various communities. To strike a careful balance between inviting BCC members to share their individually- and communally-mediated constitutional interpretations and avoiding undue influence by media personalities and political lobbies, BCC organizers might borrow techniques used by dialogue theorists to create

295. See *Who We Are*, ICIVICS, <https://www.icivics.org/who-we-are> [https://perma.cc/LC4U-NJEF] (explaining that iCivics was founded by Justice O'Connor in 2009).

296. See *supra* Section II.C.

297. See, e.g., Fabiola Cineas, *Ron DeSantis's War on "Woke" in Florida Schools, Explained*, VOX (Apr. 20, 2023, 2:23 PM EDT), <https://www.vox.com/policy-and-politics/23593369/ron-desantis-florida-schools-higher-education-woke> [https://perma.cc/NFG7-R9TP].

298. Publicly funded BCCs will also likely face these external pressures. In addition, publicly funded BCCs might face different kinds of pressures from politicians. See *infra* note 304 and accompanying text through the end of Section III.C.2.

“containers” in which productive dialogue about constitutional interpretation might occur.²⁹⁹ In addition to adopting norms that would facilitate respectful, honest communication among participants, BCC organizers might insist on creating a communications barrier between BCC participants and the public at large, thereby reducing the risk that BCC members will succumb to pressure, while gathered in a BCC, from outside forces.³⁰⁰

2. *Model 2: A Public-Private Partnership*

Advocates for base constitutional communities might instead choose to pursue a public-private partnership model. The federal government could provide financial support to civil-society organizations – such as schools and universities, religious communities, unions, and professional associations³⁰¹ – to facilitate BCC gatherings. Governments frequently use a public-private model to support socially beneficial initiatives.³⁰² By leveraging the convening and funding power of the government to incentivize civil-society organizations to facilitate – and citizens, judges, and scholars to participate in – BCCs, a public-private partnership could weaken some of the barriers raised by an entirely private model. All stakeholders might take a government-funded initiative more seriously than an initiative supported solely by private donors, and the constitutional insights generated by BCC members might have a greater likelihood of reaching judges. To state the point plainly, a high-level public-private partnership, backed and celebrated by the U.S. government, could elevate the status of BCCs and those who participate in them. Increasing the visibility and prestige of BCCs would, in turn, help distinguish BCCs from other law-focused civil-society initiatives, and it might encourage judges to participate – or, if not participate, at least take notice.³⁰³ Government officials might also insist on transparency and accessibility

299. See, e.g., WILLIAM ISAACS, *DIALOGUE AND THE ART OF THINKING TOGETHER: A PIONEERING APPROACH TO COMMUNICATING IN BUSINESS AND IN LIFE* 239–51 (1999).

300. Assuming that the legitimacy of BCC interpretations derives at least in part from the transparency of BCCs to the public, BCC organizers must achieve a delicate balance between combatting undue influence from external pressures and ensuring that the public has access to BCC proceedings. Perhaps this might be achieved through some combination of sequestration of BCC meetings and simulcasting of BCC conversations.

301. I am grateful to Jack M. Balkin for speaking with me about the promises and pitfalls of leveraging existing civil organizations as sites for BCCs.

302. See H.E. Amel Karboul, Emily Gustafsson-Wright & Max McCabe, *Partnerships for Public Purpose: The New PPPs for Fighting the Biggest Crises of Our Time*, BROOKINGS INST. (May 27, 2021), <https://www.brookings.edu/blog/education-plus-development/2021/05/27/partnerships-for-public-purpose-the-new-ppps-for-fighting-the-biggest-crises-of-our-time> [https://perma.cc/2M36-49UQ].

303. See *supra* notes 294–296 and accompanying text.

measures as conditions for BCC funding, thereby simultaneously flushing out any undue financial or social influence by political lobbies that might dog entirely private BCCs while making it more likely that all who want to participate in BCCs may do so. Furthermore, government officials might use their bully pulpits to share the interpretive insights of BCCs with the public, and they could make the case for why judges should respond to those insights.

However, BCC advocates might find it difficult to secure or maintain public funding for BCCs in our current political climate. Some politicians might balk at the cost of administering BCCs, and other politicians might oppose BCCs because of their roots in liberation theology.³⁰⁴ Advocates for BCCs would likely need to convince politicians that creating a venue for citizens to interpret the Constitution not only serves the best interests of the country; advocates would also need to convince politicians that providing such a venue also serves the interests of politicians, who could point to some interpretations that accord with their political priors as an expression of popular will. Of course, appealing to politicians' self-interest might endanger the independence of BCCs. If politicians see BCCs as a fount of rhetorical support, then politicians might try to control base communities' membership to produce favored constitutional interpretations, and they might threaten funding for BCCs generally if they consistently produce unfavorable results. On the other hand, if BCCs can maintain their independence—financial and otherwise—then it would be normatively good for politicians to cite BCC interpretations, even if only out of political self-interest, because doing so would feed a constitutional culture that values popular constitutional interpretation as a source of democratic authority.

3. *Model 3: Entirely Public*

If a public-private partnership model is challenging, an entirely public model—especially one that empowered BCCs to the fullest, such that judges were *required* to account for the insights of BCCs—would be even more so.³⁰⁵ If it were possible to create entirely public BCCs, progressive advocates still might lament limitations imposed by current Fourteenth Amendment case law on the

304. See Eduardo Campos Lima, *To Understand Our Battles Over Critical Race Theory and Liberation Theology, Look to Brazil's Fight Over Paulo Freire's Legacy*, AM.: JESUIT REV. (Nov. 22, 2021), <https://www.americamagazine.org/politics-society/2021/11/22/paulo-freire-brazil-pedagogy-oppressed-241593> [<https://perma.cc/3H7A-36HS>].

305. As discussed in the remainder of this Section, I describe options for integrating BCCs into the judiciary, with the intent of making judges more responsive to BCCs. I do not explore the possibility of creating a new, coequal branch of government composed of BCCs. For an interesting discussion of what a “plebeian branch” of government might look like and do, see VERGARA, *supra* note 194, at 250–64.

ability to prefer the participation of those who are marginalized. Some might choose to pursue the creation of private BCCs instead should that be the only way to replicate CEBs' preferential option for the poor. Nevertheless, it might be worth confronting the challenges and accepting the limitations of entirely public BCCs if it makes constitutional interpretation more democratically responsive, and if it strengthens the relationship between the people and the Constitution.

Imagine if, instead of relying on civil-society organizations to nurture and support BCCs, the government organized BCCs within each federal judicial district, within each federal judicial circuit, and for the U.S. Supreme Court.³⁰⁶ Like grand juries, public BCCs would include randomly selected groups of laypeople from the jurisdiction covered by a court, and federal judges would be assigned to observe the BCC associated with their jurisdiction.³⁰⁷ For a federal district court, it might be appropriate to include sixteen to twenty-three laypeople in a BCC to mirror the size of a federal grand jury.³⁰⁸ For federal circuit courts, it might be appropriate to multiply the number of participants that would constitute a BCC at a federal district court by the number of district courts in the circuit. At the U.S. Supreme Court, a specified number of laypeople might be selected from each federal circuit to constitute a national BCC.

306. Suggesting that a jury-like body should sit at or with the U.S. Supreme Court might shock readers today. This Note considers a range of possibilities as a thought experiment, inspired by liberation theology. I do not limit the thought experiment by considering only those possibilities that are politically feasible. That said, suggesting that a jury-like body sit at the Court is not without some precedent. See *infra* note 312 and accompanying text; see also *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 511 & n.7 (1971) (Douglas, J., dissenting) (citing *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794)) (explaining how the Court used to sit with a jury in original jurisdiction cases to decide questions of fact). Nevertheless, I admit that this proposal clearly departs from historical practice.

307. Of course, the random selection of lay participants would not exactly mirror the focus of CEBs on including and centering the voices of the marginalized. Without limiting BCC participation to those on the margins, or without prioritizing the insights of those on the margins, it might be less likely that a majority of participants in BCCs would agree with interpretive insights that respond to the needs of the oppressed. BCCs therefore might not be effective vehicles for producing a set of substantively *liberationist* constitutional interpretive commitments. See *infra* Conclusion. However, if BCCs are meant to represent the people generally in order to make constitutional interpretation more *democratically* responsive—and not just responsive to those on the margins—then it is harder to justify limiting participation to those on the margins or prioritizing their perspectives. To do so, one would need to make an argument that democracy *per se* requires some sort of preferential option for the marginalized. It is beyond the scope of this Note to make such an argument. Furthermore, if the deliberation process of BCCs is fully transparent, and if the public is made aware of and has access to the interpretive insights of minoritized members of BCCs, see *infra* notes 309–310, 314 and accompanying text, then BCCs might still play an important role in allowing members of marginalized communities to have a public, visible mechanism for interpreting the Constitution.

308. See *Types of Juries*, ADMIN. OFF. U.S. COURTS, <https://www.uscourts.gov/services-forms/jury-service/types-juries> [<https://perma.cc/8KZ2-UKEP>].

As government-sponsored, government-organized bodies, BCCs would change the relationship – real and perceived – between the people and constitutional interpretation. Even if judges chose not to participate as observers, and even if judges were not bound by the insights of the BCC, the process *itself* – regardless of outcome – might increase the perceived legitimacy of the courts.³⁰⁹ By offering the people an official role to engage in constitutional interpretation, BCCs would shift, at the very least, the symbolic balance of power between the unelected judiciary and the people. Furthermore, just as lay interpretation of the Bible in CEBs strengthens the relationship between the laity and the gospels, public participation in constitutional-meaning-making by a representative set of citizens might inculcate a sense of public ownership of the Constitution.³¹⁰

Now, imagine if BCCs were empowered to their fullest, functioning as constitutionally required bodies. Of course, the barriers to creating a constitutional requirement are legion and obvious. Jurists might oppose lay constitutional interpretation as an encroachment on the judicial prerogative or as an exercise in dangerous dilettantism.³¹¹ Politicians might be unable to muster the political will to ratify an appropriate amendment. But if those legal and political barriers were overcome, BCCs could radically transform the democratic responsiveness of our judiciary and constitutional law.

In one scenario, BCCs could be asked to participate fully in the adjudication of specific cases or controversies brought before the jurisdiction associated with the BCC. They might serve as a sort of constitutional jury that reflects on and renders judgment on constitutional issues, with judges bound by the decision of the constitutional jury according to some accepted standard of review (e.g., reasonableness).³¹² In an alternative, BCCs could be asked to deliberate on specific

309. See Saunders, *supra* note 85, at 5; Werner & Marien, *supra* note 85, at 429.

310. See *supra* notes 81–89 and accompanying text.

311. But see David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 6–10 (1992) (critiquing the perspective of legal conventionalists who argue “that practices and understandings shared within the legal profession limit the law’s interpretive potential by providing sufficiently clear and stable criteria to facilitate objective analysis of legal problems”).

312. I admit that allowing juries to interpret the Constitution might sound extreme today. As discussed *supra* in note 306, I do not limit this Note’s thought experiment to the currently feasible. Furthermore, there is some evidence that juries in the United States have in the past played a greater role in interpreting law – if not the Constitution. See Kramer, *Foreword, supra* note 243, at 29–32 (describing the role of juries in interpreting the fundamental law); Marcus Alexander Gadson, *State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound*, 93 ST. JOHN’S L. REV. 1, 1 (2019) (discussing precedent for allowing juries to interpret the law in criminal cases). Furthermore, laypeople in other countries today play important roles in constitution-making, and it is not clear why it would be entirely absurd to consider whether lay participation should be extended into the adjudication context.

cases or controversies before a court, but the insights they generate (or, if they arrive at consensus, the decision they reach) may not be binding on the relevant court. In that case, the function of BCCs would be to express popular³¹³ opinions about the meaning of the Constitution, which the relevant court would have to respond to (or publicly ignore) in its decisions.³¹⁴ The latter approach would

See, e.g., Silvia Suteu, *Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland*, 38 B.C. INT'L & COMPAR. L. REV. 251, 258-68 (2015) (describing popular participation in constitutional conventions in Canada, the Netherlands, Iceland, and Ireland); Julie C. Suk, *Opening the Paths of Constitutional Change*, DEMOCRACY (2021), <https://democracyjournal.org/magazine/61/opening-the-paths-of-constitutional-change> [<https://perma.cc/FE3U-E2UK>] (proposing a new amendment to the U.S. Constitution that would, *inter alia*, trigger a citizen assembly procedure for constitutional amendments passed by Congress).

Critics might further express concern about the localism of BCCs formed at the district and circuit levels. *See supra* notes 306-308 and accompanying text. More precisely, critics might suggest that constitutional law must be interpreted with the *national* ethos in mind rather than with the moral vision of a subnational group of Americans. But scholars and the Supreme Court have previously argued that it is permissible to allow for some local variation in the scope of constitutional rights. *See, e.g.,* *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that, under the First Amendment, the test for obscenity must take into account community standards); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005) (“Tailoring refers to the possibility, though not the requirement, that a constitutional principle may apply differently to different levels of government.”); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1813 (2004) (“In exploring the implications of a constitutional commitment to religious freedom in a nation of towns, [this Article] argues that the predominantly local character of Religion Clause disputes should have theoretical and doctrinal significance. It seeks to conceptualize the role of the local in the doctrine and discourse of religious liberty.”); LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 143 (6th ed. 2022). I am indebted to Lynn A. Baker, Clayton P. Gillette, and David Schleicher for pointing me to the material in this paragraph.

313. “Popular” here does not mean “suitable to the majority” but rather “of or relating to the general public.” *See Popular*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/popular> [<https://perma.cc/4CQ9-CCYR>].
314. This function is not so different from the function of social movements vis-à-vis constitutional interpretation, as described by Torres, Guinier, and Chua. *See supra* note 248 and accompanying text. If BCCs are meant to ameliorate the antidemocratic deficiencies of federal courts, then making BCCs both constitutionally required without making BCC interpretations binding might only heighten public criticism of judicial decisions that do not align with the interpretive insights of BCCs. For that reason, opponents of BCCs might argue that creating nonbinding BCCs could threaten an already fragile judicial system. Proponents of BCCs might offer two (albeit somewhat contradictory) responses. First, it is not necessarily undesirable for courts to lose legitimacy for failing to align their opinions with the public’s understanding of constitutional meaning. Second, it might be the case that visible public participation in constitutional interpretation might strengthen the legitimacy of judicial decisions even if courts reject BCC interpretations because the inclusion of the public in the interpretive process is *itself* sufficient to improve public perception about the legitimacy of judicial decision-

echo the reality of CEBs, where lay participants generate insights about the gospel, but the institutional Church retains final control over official doctrine. In yet a third alternative, BCCs might reflect not on a specific section of the Constitution in the context of a live case or controversy but rather on each section of the Constitution – considered generally (i.e., outside the context of a case or controversy) – in light of participants’ own experiences. In this alternative, courts might be required to treat the interpretive insights of BCCs about particular provisions of the Constitution as at least part of the range of reasonable meanings of those provisions.

I refrain from expressing a preference between these three options. Each has its own merits. But I do wish to conclude by emphasizing the reasons why I generally favor a constitutional amendment to require BCC-like bodies. First, politicians would not have the power to undermine constitutionally required BCCs by threatening to disestablish them or by completely eliminating federal funding. This would provide BCCs with a measure of independence, just as federal juries today enjoy a measure of independence. Second, amending the Constitution to create BCCs would make it possible to require Americans to participate, thereby ensuring that BCCs include a representative cross section of society, which would in turn increase the democratic legitimacy of interpretive insights offered by BCCs. Third, on a practical level, authorizing BCCs under the Constitution and formally structuring the relationship between BCCs and federal judges would ensure that judges respond to BCC interpretations in judicial decisions, whether or not judges personally recognize the value in taking popular constitutional interpretations into consideration. Fourth, constitutionalizing BCCs would have an enormous symbolic impact: the constitutionalization of BCCs would place the people themselves on par with the judiciary as a codeterminer of constitutional meaning. Doing so would reconfigure the way Americans conceive of the checks and balances in our constitutional order by putting lay Americans back into the equation. And finally, by ensuring that all Americans have a role in making constitutional meaning, those who wish to shape the direction of constitutional jurisprudence would no longer be able to target their lobbying efforts on judicial confirmation battles for nine Justices or less than one thousand federal judges, nor could activists focus on influencing judges through personal appeals or gifts. Instead, those who wished to change constitutional law would need to appeal to the hundreds of millions of Americans who might sit on a BCC.

making. *Cf.* Werner & Marien, *supra* note 85, at 429 (tentatively concluding that participatory processes are perceived as more fair than representative ones).

CONCLUSION

While progressive legal scholars might be understandably impatient to offer a vision of a method of constitutional interpretation that rivals conservative interpretive methods like originalism—and while progressive scholars may wish to ground such a vision in a robust, secular moral vision that rhymes with liberation theology—it is premature to settle on a particular interpretive method or a particular substantive moral vision. Because constitutional interpretation must be democratically responsive, the first priority of progressive legal scholars must be to describe or develop concrete mechanisms by which judicial constitutional interpretation might become more responsive to the national ethos. In this Note, I have argued for adapting the base ecclesial community model—a model drawn from liberation theology—to empower the people to engage directly with judges in constitutional interpretation. By inviting the people, scholars, and judges into constitutional communion, base constitutional communities nurture a space in which judges and scholars can listen to and hopefully learn from the normative moral visions that the people read into and out of the Constitution. Just as liberation theologians have found that participants in base ecclesial communities have offered fresh insights about the gospel,³¹⁵ judges and scholars might find that members of base constitutional communities offer new moral perspectives on and interpretations of the Constitution—moral perspectives and interpretations which are grounded in members' lived experiences.

While base constitutional communities might make constitutional interpretation more democratically responsive, creating base constitutional communities might not necessarily nurture *progressive*—much less *liberationist*—moral visions that form the basis for future constitutional interpretation. This Note therefore leaves at least three questions open, one or all of which might serve as a starting point for future scholarship.

First, should advocates instrumentalize base constitutional communities to nurture a specific moral vision among the people, or should advocates wait for a cohesive moral vision to emerge organically from base constitutional communities? If constitutional interpretation is supposed to be democratically *responsive*, then some scholars might say that any attempts by progressive legal scholars to *create* a specific moral vision—as opposed to excavating an extant moral vision—is an act of elitism. Providing a justification for using base constitutional communities intentionally to cultivate a specific moral vision is beyond the scope of this Note. Whether or not scholars are able to provide a compelling justification (and I intuit they can), I will reiterate the following: progressives who believe in our constitutional order should support such communities because they have the

315. See *supra* notes 151-157 and accompanying text.

potential to make constitutional interpretation more democratically responsive, which is an outcome which would strengthen our constitutional system generally.³¹⁶

The second and third questions follow from the first. Question two asks: if progressives decide that the moral vision undergirding future constitutional interpretation should arise organically from base constitutional communities, will that moral vision be *progressive*? Even if it is not, there are strong reasons for progressives to advocate for the creation of base constitutional communities. Base constitutional communities would empower, *inter alia*, those who are on the underside of history—people who are often excluded from powerful positions in legal academia and the bench³¹⁷—to share their moral visions regarding and interpretations of the Constitution with both judges and their fellow citizens. To borrow the words of Andrew Dawson in the context of base ecclesial communities, participation in base constitutional communities might transform marginalized Americans into “active subjects, increasingly responsible for the construction of their own history.”³¹⁸

And then there is the third (and perhaps most obvious) question: if base constitutional communities might be used to nurture a specific moral vision among the people, should that moral vision be *liberationist*? As previously discussed, there are already significant similarities between the substantive commitments of liberation theologians and progressive constitutional scholars.³¹⁹ However, it is not immediately clear whether progressive constitutional scholars should intentionally recast the progressive constitutional project as liberationist. It might not be normatively desirable to do so, not least because progressives might have Establishment Clause concerns about basing a constitutional vision on a specific theological tradition. I imagine there are many cogent responses to these concerns,³²⁰ but it is not possible to cover them in this Note.

316. See *supra* Section III.B.

317. See *supra* note 279.

318. Dawson, *supra* note 146, at 148; see *supra* note 163 and accompanying text.

319. See *supra* Section III.A.

320. For example, one might reply that progressive constitutional scholars have already begun articulating a robust conception of human flourishing that overlaps with liberation theologians' conception of liberation, and they have done so without consciously basing their vision on liberation theology. That the normative presuppositions of progressive constitutionalism might coincide with liberation theology does not render progressive constitutionalism suspect under the Establishment Clause. Cf. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (“Although neither a State nor the Federal Government can constitutionally ‘pass laws which aid one religion, aid all religions, or prefer one religion over another,’ it does not follow that a statute violates the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’” (first quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)); then

So, while I leave important questions unanswered about liberation theology's relevance to the normative substrate of progressive constitutionalism, I have argued in this Note that liberation theology offers helpful insights for progressive constitutional scholars who seek to make constitutional interpretation more democratically responsive. It is my hope that this Note generates future scholarship teasing out other lessons that might be learned by placing liberation theology and constitutional interpretation in conversation.

quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). It is not clear why it would violate the First Amendment for progressive constitutional scholars to study liberation theology to identify the blind spots in their own preexisting, secular quasi-liberationist moral vision. However, answering the constitutional question (i.e., does it violate the First Amendment for progressive constitutional scholars to learn from liberation theology?) does not answer the political question (i.e., is it politically expedient for progressive constitutional scholars to borrow from liberation theology, given sensitivities about the Roman Catholic Church in general among progressives and about liberation theology in particular among conservatives?).