

INTERPRETING THE QUR'AN AND THE CONSTITUTION: SIMILARITIES IN THE USE OF TEXT, TRADITION, AND REASON IN ISLAMIC AND AMERICAN JURISPRUDENCE

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INTRODUCTION

Can interpreting the Qur'an be anything like interpreting the Constitution? These documents are usually seen to represent overwhelming opposites in our global legal and cultural landscapes. How, after all, can there be any room for comparison between a legal system founded on revelation and one based on a man-made document? What this premise overlooks, however, is that the nature of the founding legal text tells only the beginning of the story. With some comparative study of the legal cultures that formed around the Qur'an and the Constitution, a few common themes start to emerge, and ultimately it turns out that there may be as much the same as is different between the jurisprudence of Islam and the United States.

Though set against very different cultures and legal institutions, jurists within Islamic law have engaged in debates over legal interpretation that bear a striking resemblance to debates in the world of American constitutional theory.¹ We will here set these debates next to

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¹ Positing my two fields as "Islamic" and "American" invokes a host of potential misunderstandings. First, these are obviously not mutually exclusive categories, most vividly illustrated by the significant population of American Muslims, to which I myself belong. I use "Islamic" here in the context of "Islamic law," the established body of jurisprudential literature produced by Muslim scholars for the past fourteen centuries. The vastness of this literature brings up another challenge to my positing "Islamic law" against "American law": the former has evolved and been applied in many different locales, presenting an uneven comparison to American law, which has more or less operated over a single geographical space. Nevertheless, the two are possible comparative subjects because Islamic law exists as a body of legal literature independent of its application in a particular location. That is, Islamic scholars located in India, when writing as legal scholars, are part of the same scholarly legal community as scholars of Islamic law located in Spain or Turkey. It is this body of literature to which I refer in the present study.

each other, illustrating some important similarities between the two legal cultures clearly visible despite their differences. In both legal cultures, a founding text² has continued across generations to hold supreme authority over all other law, and in both cultures the authoritative meaning of this founding text is in the hands of independent human legal scholars, themselves vulnerable to charges of subjective bias or whim by those who disagree with their interpretations, potentially casting shades of illegitimacy over the law thus articulated. As we will see, this interaction between supreme text and human agency puts very similar pressures on the job of legal interpretation for jurists in each system. This article will identify several types of interpretive methods which appear prominently in both Islamic³ and American jurisprudence, and will then follow the legal debates between them within each system, noting the significant parallels along the way. Specifically, we will study: (1) plain meaning literalism, (2) historical understanding "originalism," and (3) reference to underlying purpose and spirit.⁴

What is striking about putting Islamic and American legal discourses side by side, is that many presumptions inherent in the different interpretive methods translate across cultures quite easily, as do the corresponding attacks against those using an opposing method. In other words, when it comes to ways of thinking about textual interpretation, Muslim and American jurists following a given method often will have more in common with each other than with those of an opposite methodology in their own society. But these commonalities have gone unnoticed thus far, largely because the greater Muslim and American legal communities have themselves been talking past each other for so long.

² These texts are the United States Constitution and the Qur'an, respectively. The Prophet's life example, the *sunna*, is also considered a supreme "text" by Muslims, although how to determine exactly what that text is turns out to be a matter of some debate among Muslim jurists as we will soon see. It should also be noted that the Qur'an is, of course, much more than a founding legal text. For Muslims, it is the divine word of God, offering spiritual and moral guidance as well as legal directives. Here, I focus only on the legal aspects of the Qur'an, acknowledging that this is only a small feature of that text.

³ In deriving these categories from Islamic law, I emphasize the classical and pre-modern world of Islamic legal thought. Obviously, this corresponds to a huge chronological and geographic expanse of thought and history; my selections are generalizations meant to be illustrative, not exhaustive, of the comparative points made herein.

⁴ It should be emphasized that the categories do not match up exactly as having exact counterparts in each culture. These categories of interpretive method are types of thinking, not types of people. A given jurist or school of thought in both systems may, and often did, exhibit aspects of one or more of these methods. The point of separating them here is to see more clearly that, within the complex tapestries of legal arguments in American and Islamic jurisprudence, we can nevertheless discern distinctly-colored threads that appear in both places, even if they are ultimately woven into different patterns appropriate to each culture.

I. AN INTRODUCTION TO THE BASIC STRUCTURES OF ISLAMIC LAW

This article is written to an audience of American lawyers and legal scholars.⁵ It aims to introduce an appreciation of the theoretical discourses in Islamic law to Americans familiar with parallel phenomena in the jurisprudence of the United States.⁶ Thus, while the reader is expected to have some exposure to basic concepts in American constitutional law, no such background in Islamic law is assumed. Therefore, before we can engage the discourses in legal theory, a very basic summary of Islamic law and legal systems is in order.⁷

The fundamental text in Islam is the Qur'an, believed by Muslims to be the word of God revealed to the Prophet Muhammad in the seventh century A.D. Because the Qur'an commands Muslims to follow the way of the Prophet himself, and therefore his life example, the *sunna*, is also normative "text" for Muslims. A documented record of his life was not compiled, however, until well after his death. The enterprise involved the complicated task of sifting through fabricated stories and corroborating chains of narration. It ultimately gave rise to a distinct field of scholarship dedicated to the verification and preservation of "*hadith*," the textual record of the Prophet's *sunna*.

Parallel to *hadith* scholarship grew the scholarly community of jurists who answered legal questions presented by the growing Muslim community. This happened primarily in the realm of private scholarship, with individual scholars contemplating the source texts and teaching their understandings to students and laypeople seeking legal advice. Over time, the legal methods and conclusions of the most influential scholars evolved into distinct schools of thought. Because Muslims never created a formal church, Islamic legal orthodoxy formed around those private scholars who distinguished themselves by education, dialectical skill, and popularity with students and the public who consulted them. Over the years, many schools of law emerged as students collected the lectures and legal opinions of influential jurists and eventually wrote commentaries upon them. With a sufficient number of disciples preserving and expanding the work of a particular jurist (and especially when accompanied by popular and other external support), that jurist's corpus of opinions and accompanying legal methodology became known as a "*madhhab*" (literally, "path," or "road

⁵ This American lawyer may be a Muslim or non-Muslim. What I assume here is simply no background education in Islamic law and legal theory, but an American legal education which includes a basic exposure to American constitutional law and interpretation.

⁶ The reader will notice that my references are from secondary materials in English, enabling the typical American reader access to all cited sources.

⁷ This summary should be read with the caveat that it necessarily contains broad generalizations. It is meant merely to orient the reader to the subject.

to go")—a school of Islamic law. These *madhhabs* (which eventually shrunk in number from hundreds to just a few major schools surviving to today) were the means by which the *fiqh* was produced, preserved and transmitted in Muslim societies. The body of Islamic legal doctrine, simply put, is these *madhhabs*. Moreover, and especially relevant to our present study, each *madhhab* has a characteristic legal methodology, reflecting its particular preferences for how to use text, tradition and reason in the search for God's Law. It is the interpretive methods of these developed *madhhabs* that form much of the material for the present comparative study.

In undertaking the job of interpreting God's Law from the source texts, Muslim jurists operated with an awareness of their own human fallibility. Their work of legal interpretation is called *ijtihad*, a word derived from the root "*jahada*," meaning "to strive" or "struggle." The product of *ijtihad* is an exhaustive effort to understand God's Law, but ultimately constitutes only a probable articulation of that Law and thus cannot be treated as a certainty.⁸ This epistemological foundation is reflected in the terminology used in classical Islamic legal literature. Muslim jurists referred to the collective body of their *ijtihad* conclusions as "*fiqh*," derived from the Arabic word "*faqaha*," meaning "to understand." The word "*shari'a*," on the other hand (which is today often translated into English as "Islamic law") denotes the ultimate Law of God which the jurists' *fiqh* understanding always strives to achieve, but which remains ultimately unknowable in this world.⁹

Significantly, though there is no way for a Muslim jurist to be sure in this lifetime if her¹⁰ *ijtihad* opinions have successfully articulated the

⁸ See KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 39 (2001) ("Islamic legal methodologies rarely spoke in terms of legal certainties (*yaqin* and *qat'*). The linguistic practice of the juristic culture spoke in terms of probabilities or the preponderance of evidence . . . Muslim jurists asserted that only God possesses perfect knowledge—human knowledge is tentative . . .").

⁹ The body of *fiqh* as a whole is the physical collection of rules and principles developed by Muslim legal scholars seeking to articulate God's Law (*shari'a*) in concrete terms. Some of the contents of the *fiqh* and *usul-ul-fiqh* (the "roots" of *fiqh*, or rules and principles for deriving *fiqh*) command virtual consensus among the body of scholars, while other parts—a great many, in fact—remain subjects of great disagreement between the jurists. Thus, for a Muslim, there is one Law of God (*shari'a*), but there are many versions of Islamic law (*fiqh*) articulating God's Law for the people.

Because both "*fiqh*" and "*shari'a*" might be translated into English as "Islamic law," I will symbolically render the difference between these two terms with capitalization. The capitalized phrase "God's Law" corresponds to "*shari'a*," denoting the absolute Law of God—that ultimate truth and justice of which God is the Lawgiver. The *fiqh*, the legal conclusions crafted by Muslim jurists, is denoted with a lowercase "i," reflecting the "law of God" as an approximation, not the Law of God known for certain.

¹⁰ Lest the reader think the female gender reference is anachronistic, there were indeed women jurists in Islamic history, although they were not in the majority, nor are they well represented in the dominant literature. For some references, see WIEBKE WALTHER, WOMEN IN ISLAM: FROM MEDIEVAL TO MODERN TIMES 109-10 (1995). Nevertheless, in support of them,

true Law of God, this nevertheless does not detract from the legal authority of those opinions. As a reported saying (“*hadith*”) of the Prophet Muhammad puts it: “The one who performs *ijtihad* and reaches the right answer will receive two rewards [from God], and the one who performs *ijtihad* and reaches the wrong answer will receive one reward [from God].”¹¹ Thus, the promise of heavenly reward for even wrong *ijtihad* conclusions means that there is nevertheless some value in an *ijtihad* conclusion separate from its ultimate rightness or wrongness: a jurist has fulfilled her duty to God simply by performing the *ijtihad* effort itself. Ultimate success in hitting the target is an added bonus. Moreover, what becomes immediately relevant to the inter-relationship of jurists to each other is the reality that there is no way to know in this lifetime which *ijtihad* conclusions are deserving of one reward and which of two. Therefore, Muslim jurists must all operate on the assumption that an opposing legal conclusion might in fact turn out to be correct. That reality leads to the practical result that any *ijtihad* conclusion carries legitimacy as a potentially true articulation of God’s Law. The overall result is a built-in acceptance of uncertainty as part of the Islamic lawmaking enterprise,¹² as well as significant Islamic legal pluralism. Because all *ijtihad*-generated legal opinions are equally probable, there quickly grew a great diversity of conclusions about the meaning of the source texts, disagreeing with each other both in interpretive approach and specific legal conclusions, yet all existing simultaneously as valid Islamic law.

But before we can explore how these interpretive methods parallel those in American jurisprudence, we must first acknowledge the significantly different institutional structure of law and government in Muslim societies as compared with that familiar to American lawyers.¹³ The first important feature of classical Muslim legal systems is that legal authority was not located exclusively in the sovereign state power (such as the *caliph*, *sultan*, or king). Rather, the articulation of the Law

as well as today’s literary conventions, I choose to use female pronouns in this work.

¹¹ MUSLIM, 18 SAHIH MUSLIM (Hadith No. 4261).

¹² This idea is aptly memorialized in nearly every classical Muslim jurisprudential text, with the closing remark “*Allahu a’lam*,” meaning “God knows best.” As contemporary scholar Khaled Abou El Fadl points out, this invocation was much more than a rhetorical device—it was an articulation of the very epistemological foundation of Islamic law. ABOU EL FADL, *supra* note 8. Because *ijtihad* conclusions are less than certain and because many *hadith* cannot be verified with absolute certainty, Muslim legal scholars built the structure of their legal thinking to accommodate shades of probability, rather than always demanding hard lines of legal truths.

¹³ In this, as with our description of Islamic legal methodologies, it is dangerous to draw too precisely, because Islamic history spans fourteen centuries and geographically involves Europe, Africa, the Middle and Near East, and Central, South and East Asia. Nevertheless, for our preliminary purposes, it is important to make some general observations in order keep in mind the overall structural context within which Muslim jurisprudential discourses have operated, a context which is in many ways quite distinct from that which forms the background of American constitutional debates.

of God through *fiqh* was virtually the exclusive domain of private jurist scholars. It is for this reason that the above description of the evolution of the *madhhabs* does not mention any particular role for state authority, for it was not a necessary part of this enterprise. Nevertheless, state authority did exist in classical Muslim societies. *Caliphs* and *sultans* did issue orders, collected taxes, and prosecuted crimes, all with a real life impact upon the people. Under what authority they did so, and with what relationship to the jurist-scholars who crafted Islamic *fiqh* doctrine based on their varying interpretations of divine texts is a complex topic beyond the scope of this article.

One way to explain the relationship between the two realms of ruler and scholar is to emphasize the notion of separate but complementary aspects to Muslim legal authority, both applying God's Law (*shari'a*), but manifested in two distinct forms: *fiqh* and *siyasa* (literally, "administration, policy, management").¹⁴ The *fiqh* realm is, as we have just described, that of the private jurists undertaking the job of interpreting the divine texts to provide doctrinal legal answers for society. *Siyasa*, on the other hand, covers all those laws and ordinances and innumerable other legal actions promulgated by the ruler, who has the responsibility to keep public order and administer justice. This responsibility is a Qur'anically-recognized function,¹⁵ and thus is part of the *shari'a*,¹⁶ the Law of God. In carrying out this responsibility, various Muslim rulers created a host of different institutions and appointed a variety of officials throughout history. Included in these institutions were courts responsible for adjudicating cases based on the *fiqh*. The judges appointed to these courts—*qadis*—were therefore drawn from the *fiqh* community of legal scholars, creating the first of many instances of the overlapping and interconnection of the two

¹⁴ See FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA (2000) (Chapter 5: "King's Law as Complement and Competitor to Fiqh").

¹⁵ See, e.g., QUR'AN 27:23-44 (describing the Queen of Sheba), 4:58-59 ("Pay heed unto God, and pay heed unto the Messenger and unto those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it unto God and the Messenger, if you (truly) believe in God and the Last Day. . .") (emphasis added). It should be noted that the meaning of "those in authority among you" is highly contested in Islamic legal and political writings. One of many interpretations concludes that it refers to the temporal sovereign power. Other Qur'anic verses referring to the legitimacy of sovereign decision-making over the Muslim public include QUR'AN 4:83: "When there comes to them some matter touching (public) safety or fear, they divulge it. If they had only referred it to the Messenger, or to those charged with authority among them, the proper investigators would have tested it from them (directly) . . ." (emphasis added). *Hadith* reports of the Prophet also confirm rewards to just rulers. For example, "[t]he dearest of people to God on the Day of Judgment, and seated the closest to Him, is a just ruler; and the most hateful of people to God and seated the furthest from him, is an unjust ruler." VOGEL, *supra* note 14, at 182 (citing Al-Tirmidhi, *Ahkam* 1329) and noting this *hadith* as of relatively good ("*hasan gharib*") authenticity); see also references and summary *id.* at 179-84.

¹⁶ Vogel notes that the duality he calls "*fiqh*" and "*siyasa*" is usually described as "*shari'a*" and "*siyasa*", but this obscures the extent to which *siyasa* is, he argues, part of *shari'a*, God's Law. *Id.* at 171-72.

realms of *fiqh* and *siyasa*. Nevertheless, these two worlds maintained distinct identities with characteristic features that help to explain the complicated interactions between their members throughout Islamic history.¹⁷

To further understand the difference in types of Islamic legal authority represented by *fiqh* and *siyasa*, consider that *siyasa* rules need not be derived directly from divine texts through scholarly interpretive effort, but rather could be ostensibly justified in terms of service of the public welfare.¹⁸ It was enforced with real-life consequences by sovereign rulers, whom the people must obey, but not because it was necessarily a manifestation of God's ultimate truth. *Fiqh*, not *siyasa*, had that sort of prestige and permanence over the long term. *Siyasa* was temporal, based only on the particular needs of a given society; its only necessary connection to revelation was its fulfillment of a general principle of maintaining justice and public good and avoiding basic conflict with *shari'a*. *Fiqh*, on the other hand, was a complicated elaboration of specific divine directives and—even though it was made up of many different interpretations of those directives—wore a mantle of permanence and long-term authority in every Muslim society.¹⁹

In sum, Islamic legal systems as a whole were comprised of two separate but generally complementary spheres: (1) the *fiqh*, consisting of various interpretations of divine texts (eventually collected into schools of law, the *madhhabs*) that lasted over time, and (2) the *siyasa*, composed of the particular governing rules of a given Muslim society, issued by a temporal ruler. Where enforcement was necessary, both types of laws relied upon the sovereign power, and thus some creative choices could be made by the ruler to affect legal outcomes without

¹⁷ These details are beyond the scope of this article.

¹⁸ See *id.* at 173-75 (the ruler can "take any acts . . . that are needed for the public good (*maslaha 'amma*), provided that the *shari'a* is not infringed thereby," thus creating rules "directly inspired by the public good, with no concern for texts except as a limit"); Mohammad Fadel, *Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law* 99-104 (1995) (unpublished Ph.D. Dissertation, University of Chicago, Department of Near Eastern Languages and Civilizations) (on file with author) (describing juristic distinction between "political judgments" and "legal judgments", the "political" ones being within the discretionary powers of the state, which were "a means to an end of either preventing harm or obtaining a benefit," and not derived "directly from God's revelation, but rather was based upon a discretionary judgment of what course of action would result in the maximum welfare of the community," adding that "because of the fact that *siyasa* was regulated by a consideration of public interests, it is very close to a notion of public law"); IMRAN AHSAN KHAN NYAZEE, *THEORIES OF ISLAMIC LAW: THE METHODOLOGY OF IJTIHAD* 122 (1996) (in describing "fixed" and "flexible" spheres, corresponding to the domains of the jurist and that of the *imam*/state, and further defining *siyasa* as "the rights of the state (*saltanah*) or to the rights of the individuals collectively where . . . it depends on the ruler to determine them in accordance with the requirements of his times"); Zafar Ishaq Ansari, *Introduction* to NYAZEE, *supra*, at vii (describing the two spheres).

¹⁹ It is this permanence which allows us today to study "Islamic law" as a single body of literature, despite the variety of its manifestations in disparate societies and eras.

controlling the substantive law, for example, through judicial appointments favoring or disfavoring a particular *madhhab*. But the doctrinal substance of the *fiqh* remained within the control of the private jurist class.

This separation of laws and lawmaking powers illustrates a unique aspect of the constitutional structure of classical Muslim governments. The articulation of the Law of God (*fiqh*) is found not in the legislative enactments of rulers, but rather in the work of private legal scholars, and ruler *siyasa* takes a secondary role in substantive prestige, but a primary role in terms of temporal obedience. It is important to note that this is not a “religious-secular” divide, as many western observers have understood the picture. Better understood, *siyasa* is the realm of mutable law, and *fiqh* is the immutable.²⁰ The separation is a constructive concept representing the realization that the rules governing a Muslim state—all ultimately beholden to God’s Law (*shari’a*)—will be a combination of immutable, divinely-derived legal standards and mutable decisions whose validity needs to rest on political judgments of what constitutes the best rule given a particular set of temporal circumstances.²¹

The reader is now likely wondering if there is any equivalent of “judicial review” in Islamic legal systems, and/or some sort of “separation of powers” as contemplated in the United States Constitution. More specifically, one might wonder whether there was any mechanism to check the temporal rulers by God’s Law, so that if a given *siyasa* law violated the *shari’a*, there was a way to stop it. This question demands too complicated an answer for this short survey, given the vast diversity of governmental structures implemented over Islamic history. The closest short answer is “it depends.” That is, it depends upon the relative power of the *siyasa* authorities *vis a vis* the *fiqh* authorities at a given time and place. Generally speaking, in Islamic history, where *fiqh* scholars²² had a significant amount of social and political influence, they could operate in this “checking” fashion. But where the *siyasa* authority was paramount, there was very little checking of sovereign power, at least not in the name of *shari’a* wielded

²⁰ FADEL, *supra* note 18, at 19-22, 54.

²¹ *Id.* at 104. Though not always in exactly these terms, Muslim jurists “were aware of a clear distinction between rules that were ‘legal’ in the sense that God’s revelation made them necessary and immutable, and rules that were ‘political,’ meaning they were contingent and changed whenever circumstances changed.” *Id.*

²² Why the *fiqh* scholars? As the established class of people expert at studying and interpreting the meaning of the Qur’an and *sunna* on all legal matters, they asserted that they were logically the most qualified to analyze what those source texts allow the political power to do. Not unlike United States Chief Justice John Marshall asserting in *Marbury v. Madison*, 5 U.S. at 177 (1803), that it is the judiciary’s duty to “say what the law is,” many *fiqh* scholars likewise asserted themselves as more qualified than the *caliph* or *sultan* to define the bounds of legitimate politics according to the Law of God.

by the *fiqh* scholars.²³ Some Muslim governments have experimented with institutionalization of *fiqh* authorities in the *siyasa* apparatus, operating as somewhat of an internal check built into the overall *siyasa* system, or vice versa, as a *siyasa*-generated check on the *fiqh* authorities.²⁴ But these experiments each have their own unique characteristics and historical paradigms, and do not provide a sufficiently relevant template for governmental institutions across all Muslim societies in all generations. They are therefore not useful for the present comparative study.

II. LITERALISM: THE TEXT AND NOTHING BUT THE TEXT

With this background, we are now ready to explore some specific methods of textual interpretation in Islamic and American jurisprudence. We will take the most extreme first. In both Islamic and American law, some prominent jurists have advocated a methodology which insists on the “literal,” “most apparent” or “plain” meaning of the text, resisting the temptation to use external, non-textual means to find meaning that is not obvious on the face of the text. We will explore this approach in American law as expressed in the work of abolitionist, activist-scholar Frederick Douglass and Supreme Court Justice Hugo Black. In Islamic law, the literalist method is virtually the slogan of the *Zahiri madhhab*, most aggressively articulated by the famous jurist Ibn Hazm of Andalusia.

²³ The genre of literature where *fiqh* scholars articulated and asserted this authority was called “*siyasa shar’iyya*.” Some of the more prominent theorists in this field were: al-Mawardi, al-Juwayni, al-Ghazali, al-Jawziyya, Ibn Taymiyya, Ibn Jama’a, and Tarabulusi, to name a few. Each theory involves a varying level of involvement by *fiqh* authorities. In practice, there has been minimal implementation of these ideas at the realm of Islamic constitutional structure, but there is much room and interest in future evolution of these ideas. Indeed, the topic is one of much interest and commentary today, fueled also by issues raised by the reconfiguration of Muslim governments on the nation-state model in the post-colonial period, and most recently by new Constitution redrafting efforts in Muslim-majority countries.

²⁴ The Ottoman Empire’s *Shaikh al-Islam* is one example. See VOGEL, *supra* note 14, at 206, 323-24; COLIN IMBER, *EBU’S-SU’UD: THE ISLAMIC LEGAL TRADITION* (1997). Another is the installment of four Chief *Qadis* in Egypt; see also SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI* (1996); Yossef Rapoport, *Legal Diversity in the Age of Taqlid: The Four Chief Qadis Under the Mamluks*, 10 *ISLAMIC L. & SOC’Y* 210, 213-24 (2003); Adel Allouche, *The Establishment of Four Chief Judgeships in Fatimid Egypt*, 105 *J. AM. ORIENTAL SOC’Y.* 317 (1985).

A. *The "Plain Meaning" of the Constitution*

Americans who insist that the United States Constitution should be interpreted according to the meaning that is clear upon the face of its text are often described as advocates of "plain meaning," "textualist," or "literalist" interpretation.²⁵ A powerful example was Frederick Douglass (1818-1895 AD), the famous abolitionist who described himself as a constitutional "strict constructionist."²⁶ Douglass crafted a purely textual argument that the original 1787 Constitution prohibited slavery. Pointing to the fact that the Constitution itself never explicitly used the word "slave" or "slavery," and calling on the logical implications of other constitutional provisions such as the prohibition of bills of attainder (imposing upon a child the hardships of a parent), Douglass creatively concluded that all state slavery laws should be repealed as unconstitutional.²⁷ Said Douglass, "the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself; . . . by assuming that the Constitution does not mean what it says, and that it says what it does not mean; by disregarding the written Constitution, and interpreting it in light of a secret understanding."²⁸ His argument did not succeed, of course, in convincing the American public of his time, who had yet to undergo the painful Civil War and then the Reconstruction amendments to the Constitution before slavery was constitutionally abolished. Nevertheless, the creative power of the literal textualist to advocate meanings contrary to historical understandings,²⁹ is exemplified in Douglass' work.

A more contemporary example of constitutional literalism, and another prominent American public figure, is United States Supreme Court Justice Hugo Black. Known as a "literalist,"³⁰ Justice Black

²⁵ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205-06, 237 (1980), (using "textualist" and "plain meaning"). Accord PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 25, 26 (1982) (describing modality of "textual argument," listing Justices Hugo Black, Joseph Story as adherents); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (1997) (describing his philosophy of interpretation as "textualism"); see also JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 9 (2002) (describing the Court's turn towards "ahistorical literalism").

²⁶ Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850-1860* (International Publishers 1950) ("In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction.").

²⁷ *Id.* at 477-78.

²⁸ *Id.* at 477.

²⁹ See *infra* Part III.

³⁰ *CBS News Special: Justice Black and the Bill of Rights* (CBS television broadcast Dec. 3, 1968); 9 SW. L. REV. 937, 938; cited in BOBBITT, *supra* note 25, at 32 (Black distinguishing

famously insisted that when the Constitution states “Congress shall make no law,” that means “no law.”³¹ This led him to maintain a very distinctive view of the First Amendment, finding unconstitutional many restraints on speech that others considered reasonable.³² His reading of the Fourth Amendment’s prohibition of “unreasonable searches and seizures” was just as strict, finding wiretapping not to be within the plain meaning of “search” and thus not a constitutional violation.³³ Justice Black famously dissented in the landmark birth control case, *Griswold v. Connecticut* opposing the Court’s finding of a right of privacy in the “penumbras” of the Constitution rather than its express or implied text.³⁴

In defending his refusal to extend constitutional protections beyond the literal meaning, Justice Black ridiculed the interpretive approach of some of his colleagues that involved inventing constitutional “penumbras” surrounding the text, trumping what Black saw as its clear meaning. Such searches for “penumbras” untethered by text was something Justice Black steadfastly refused to do, no matter how eloquent and “rhapsodical” were his colleagues’ appeals to “keep the Constitution in tune with the times.”³⁵ He specifically feared “the rewriting of the Constitution by judges under the guise of interpreting

himself from those who “just didn’t know the meaning of the [constitutional] words. That’s what they mean to me. Certainly they mean that literally.”)

³¹ *Id.* Justice Black asserted that “there are ‘absolutes’ in our Bill of Rights and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be ‘absolutes.’” *Id.* Following this premise, Black famously dissented in the landmark birth control case, *Griswold v. Connecticut*, 381 U.S. 479, 484, 508-510 (1965), opposing the Court’s finding of a right of privacy in the “penumbras” of the Constitution rather than its express or implied text; see also ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 558 (1997) (quoting Justice in Black in 1970 explaining that the third of three reasons that he dissented in *Griswold* was “the literalness of the constitution. What they wanted wasn’t in there.”).

³² In his *Griswold* dissent, Justice Black stated: “I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.” *Griswold*, 381 U.S. at 509 (citing his concurrence in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and his dissent in *City of El Paso v. Simmons*, 379 U.S. 497 (1965)).

³³ See, e.g., *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting); *Berger v. New York*, 388 U.S. 41, 70 (1967) (Black, J., dissenting); Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 710-11 (1980) (“Black’s consistent dissents from the Court’s efforts to include wiretaps within the fourth amendment . . . [illustrates] the stultifying rigidity of textual arguments.”); see also TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS 210-55 (1988).

³⁴ 381 U.S. 479.

³⁵ *Id.* at 522 (Black, J., dissenting):

I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. . . . And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down [laws].

it.”³⁶

Justice Black’s approach had significant substantive consequences in constitutional case law. First, he insisted that the Constitution’s prohibitions, when phrased without qualification, bar any extension of governmental power into the constitutionally prohibited areas, resulting in some rather rigid results. But this did not mean that his literalist jurisprudence corresponded to a politically conservative ideology. To the contrary, Black’s insistence on constitutional absolutes dictated by a literal reading of the Bill of Rights, meant, for example, that he believed it was the duty of the judiciary to guarantee the protections of these absolutes, thus carving out a very strong judicial role where he believed the constitutional text to be clear.³⁷ His First Amendment jurisprudence was an example of this. This is how he became the “intellectual leader” of the “judicial activist” wing of the Warren Court.³⁸ So, while he strictly read the Fourth Amendment to not cover wiretapping, he read the First Amendment just as strictly, becoming one of the Court’s most aggressive voices for freedom of speech.³⁹

B. *The Zahiri School*

In Islamic law, a similar interpretive approach is illustrated in the “Zahiri” school,⁴⁰ which advocated adherence to the literal or apparent meaning of divine words. Zahiri scholars took this position in order to protect the law from juristic straying into speculative human opinion which they believed to be the very nature of *ijtihad*, an admittedly fallible and uncertain process and therefore, Zahiris believed,

³⁶ HUGO L. BLACK, A CONSTITUTIONAL FAITH 14 (1968).

³⁷ See MELVIN UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON 1941-1953 17 (1997) (“[Black] offered . . . the imposition of absolutes through a literal reading of the Constitution. This narrowed the scope for judicial discretion, but it also helped to make the judiciary the prime vehicle for guaranteeing the values of those absolutes.”).

³⁸ BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 268 (1993).

³⁹ YARBROUGH, *supra* note 33, at 126-58. It is interesting to note that, true to his textualist mind, Black’s strong First Amendment position nevertheless included a distinction between “speech” and “conduct,” a distinction most First Amendment proponents reject. See, e.g., *Street v. New York*, 394 U.S. 576, 609-10 (1969) (Black, J., dissenting from First Amendment decision protecting flag-burning as expression); see also H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 158 n.359 (1993) (commenting on Black’s First Amendment jurisprudence).

⁴⁰ “Zahir” means “apparent, patent, manifest, obvious.” The *Zahiri madhhab* emerges out of the work of jurist Da’ud b. Ali b. Khalaf al-Isfahani (816-883 A.D.), dubbed “Da’ud the Literalist” (*Da’ud al-Zahiri*). Soon the school essentially disappeared, but was revived later by Abu Muhammad Ibn Hazm (994-1064 A.D.), the famous Andalusian judge, poet, and scholar in Muslim Spain, who is credited with virtually singlehandedly re-establishing the school as a viable *madhhab*. Ultimately, even Ibn Hazm’s skill was not enough to preserve the school for long, and by the thirteenth century A.D. it had finally died out.

illegitimate as articulations of God's Law.⁴¹ In contrast to the other major *madhhabs*, all built on *ijtihad* reasoning, the *Zahiri* methodology emphasized that each word in the divine source texts exists for a reason, and therefore any investigation beyond or behind them would irretrievably insert personal subjectivity and whim into the law. They therefore rejected all the jurisprudential tools developed by the other *madhhabs*, such as analogical reasoning,⁴² consensus, and various mechanisms of juristic discretion.⁴³ The *Zahiri* position was well summed up by the famous Andalusian *Zahiri* scholar Ibn Hazm: "whoever gives a legal decision on the basis of his personal opinion will be making decisions without knowledge, for there is no knowledge about religious matters outside the knowledge of the Qur'an and the Traditions [of the Prophet Muhammad]."⁴⁴ Applying only the apparent meaning of those texts, *Zahiris* believed, will protect the Law of God from corruption by human whim. In the words of Da'ud's son, "[w]hen God's ruling on something has itself been removed from our intellects, we may not perform *ijtihad* and adopt our own arbitrary opinions"⁴⁵

Doctrinally, just as American textualism can yield both rigid and liberal results, the same is true of *Zahirism*. Despite literalism's reputation for rigidity and inflexibility, the *Zahiri* methodology yielded

⁴¹ Christopher Melchert, *The Formation of the Sunni Schools of Law, Ninth-Tenth Centuries C.E.* 74, 317 (Ph.D. dissertation, University of Pennsylvania 1992); (quoting Ibn al-Nadim describing Da'ud as "the first to employ advocacy of the literal meaning"); see also A.G. CHEJNE, *IBN HAZM* 113-14 (1982) (describing Ibn Hazm's position that:

the Qur'an and the authenticated Traditions [*hadith*: stories of the Prophet Muhammad] are self-contained and perfect and embody the infallible truth and the perfection of religion Anything beyond them is sophistry, charlatanry, and lies. They are the sole foundation of the religious law (*shari'ah*), which should be understood as it is and in its literal meaning with no interpretation, personal opinion, analogical reasoning, or any other human criterion.)

⁴² For more on analogical reasoning in Islamic law, see *infra* Part IV.

⁴³ NYAZEE, *supra* note 18, at 185 (describing the *Zahiri* school as "a new theory in itself; a theory that works without analogy" opting instead to "confine all interpretation to the apparent (*zahir*) meaning of the textual evidences"); MELCHERT, *supra* note 41, at 317 (describing Da'ud as "holding to the Book and the Sunnah and nullifying all else by way of *ra'y* (reasoned opinion) and *qiyas* (analogical reasoning)"); CHEJNE, *supra* note 41, at 44

Essentially, *Zahirism* advocated that each Muslim rely solely on the Qur'an and traditions and derive legal decisions independently of any established school of law The literal meaning of the holy texts will lead to the actual rather than an implied meaning, thereby putting an end to speculation and to the intervention of human criteria such as imitation, analogical reasoning, personal opinion, interpretation and the like, which are no more and no less than innovations . . . and an affront to the spirit and letter of the religious law (*shari'a*)

Id.; Devin Stewart, *Muhammad b. Dāwūd al-Zāhirī's Manual of Jurisprudence: Al-Wusūl ilā ma'rifat al-usūl*, in *STUDIES IN ISLAMIC LEGAL THEORY* 138-58 (Bernard G. Weiss ed. 2002) (translating work by Da'ud al-Zahiri's son explaining the *Zahiri* position against consensus (*ijma'*) analogical reasoning (*qiyas*), equitable discretion (*istihsan*), and inference (*istidlal*).

⁴⁴ CHEJNE, *supra* note 41, at 125.

⁴⁵ Stewart, *supra* note 43, at 158 (translation of Ibn Da'ud's *Ikhtilaf Usul al-Madhhahib* at 205-06).

results both more and less lenient than those of other *madhhabs*. For example, Zahiris insisted on written documentation of every loan, based on the obvious meaning of the following Qur'anic text: "Whenever you enter a contract of sale, let it be witnessed and let neither the scribe nor the witness suffer harm."⁴⁶ Yet their equally-literal reading of the Qur'anic text regarding contracts for the emancipation of slaves leads to a Zahiri position that we today would likely consider more "liberal" than that of their colleagues. That is, they felt strictly constrained by the Qur'anic verse that states, "[a]nd such of your slaves as seek a writing (of emancipation), write it out for them if you are aware of any good in them"⁴⁷ to mean that whenever a slave wishes to contract to buy his or her freedom, the owner must comply.⁴⁸ Most scholars of other *madhhabs* read this verse, on the contrary, as merely a recommendation, holding that no one can be forced to emancipate their slave property.⁴⁹ Another example of a "flexible" result flowing from Zahiri literalism was their view on who may serve as a witness in criminal cases. In direct contradiction to the *madhhab* majority, Zahiris refused to exclude slaves and women from giving such testimony or from serving as judges,⁵⁰ based on the general nature of the terms used in the relevant Qur'anic texts.

C. Debating Literalism

Many have countered this literalist premise with the argument that even textual literalism is not immune to the influence of personal bias in understanding the text, no matter how fervent the assertions about "clear meaning." After all, not everyone agrees on the same "clear meaning" of a given text. In the United States, especially in the wake of postmodernism and critiques of the idea of "objectivity" itself, this argument against all text-focused methods, most especially literalism,

⁴⁶ QUR'AN 2:282. See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (1991) (describing *Zahiri* reading of Quran 2:282).

⁴⁷ QUR'AN 24:33.

⁴⁸ 2 IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER (*BIDAYAT AL-MUJTAHID WA NIHAYAT AL-MUQTASID*) 453-55 (Imran Ahsan Khan Nyazee transl., Garnet Publishing Ltd. 1996) (Chapter 53, titled The Book of *Kitaba* (Manumission by Contract)).

⁴⁹ *Id.*

⁵⁰ IBN RUSHD, *supra* note 48, at 557-60 ("The majority of the jurists of the regions inclined toward stipulating freedom for the acceptance of testimony, while the Zahirites said that the testimony of a slave is valid as the fundamental condition is '*adala* [credibility]); and bondage is not effective in the rejection of testimony, unless this can be established from the Book of Allah or from *sunna* or consensus"; summarizing also the majority view excluding women's testimony and explaining the *Zahiri* admission of women's testimony based on the apparent meaning of verse 2:282).

has gained much force in American legal and political discourses.⁵¹ Indeed, many scholars and laypersons alike have become greatly disillusioned with the enterprise of judicial interpretation altogether, on the unsettling ground that what is plain and apparent to one person may be vague and ambiguous to another.⁵²

Justice Hugo Black was certainly not unaware of these criticisms. In fact, his firmness of method often set him up in direct opposition to them, and his juristic skill ultimately served to assuage the doubts of many. Justice Black's method was especially significant given the historical moment in which he served on the United States Supreme Court. Prior to serving on the bench, he had been *Senator* Hugo Black during Congress' consideration of the "court-packing plan," the famous New Deal legislation that had threatened to restructure the membership of the Court. The Court's configuration was saved by the "switch in time" of Justice Owen Roberts, and Black was shortly thereafter appointed Associate Justice. All this coincided with the Legal Realist revolution in American legal theory, bringing significant strain on the legitimacy of the Court as an objective arbiter maintaining the rule of law.⁵³ Hugo Black apparently took this challenge very seriously, and his confident constitutional interpretation based on the plain and literal meaning of the text proved to be theoretically satisfying to much of the American public. His juristic skill brought renewed power and popular support to strict textualism as a methodology of constitutional interpretation,⁵⁴ restoring to many the faith that "judges take their charter from a text and do not have to rely on themselves to make up a rule."⁵⁵ This is why he has been credited with "lead[ing] constitutional argument out of the wilderness of legal realism,"⁵⁶ restoring significant legitimacy to judicial review that the New Deal Crisis had threatened. He did this with a faith that the language of the Constitution—that "infallible guide"⁵⁷—would show the way.⁵⁸

⁵¹ For some examples of this discourse, see INTERPRETING LAW AND LITERATURE 155 (Sanford Levinson & Steven Mailloux, eds. 1988) [hereinafter LEVINSON & MAILLOUX]

⁵² See Sanford Levinson, *Law as Literature*, in LEVINSON & MAILLOUX, *supra* note 51, at 158 ("the plain-meaning approach inevitably breaks down in the face of the reality of disagreement among equally competent speakers of the native language").

⁵³ See Bobbitt, *supra* note 25, at 709 ("The real constitutional crisis of the 1930s . . . consisted principally in the tension between legal realism . . . and the democratic faith in law . . . in the disillusionment which followed the realization that law was made by the Court . . . It was this crisis that Senator Black had done his share to bring about and to whose resolution he devoted his judicial life.").

⁵⁴ BOBBITT, *supra* note 25, at 27-32 ("Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they had never before had.").

⁵⁵ *Id.* at 34.

⁵⁶ Bobbitt, *supra* note 25, at 708.

⁵⁷ See UROFSKY, *supra* note 37, at 17 ("At the heart of Black's philosophy lay a populist belief in the Constitution as an infallible guide.").

⁵⁸ Justice Felix Frankfurter, a frequent opponent of Black's (usually on "judicial restraint"

Skepticism about the ability to objectively ascertain truth existed early in Islamic thought, illustrated most vividly in the philosophical-theological debates in which *Ash'aris* ridiculed the *Mu'tazili* faith in the potential of human reason to determine the absolute and essential meanings of things.⁵⁹ As these ideas played out, the world of Islamic jurisprudence became dominated by the idea that human reason is not infallible, and there thus emerged an accommodation for *fiqh* conclusions about God's Law to be grounded on levels of probability. This premise of law-as-probability ultimately became the engine driving virtually every Islamic school of law.⁶⁰ Virtually, that is, except the *Zahiris*. They held firm against the very idea of articulating God's Law on the basis of speculation and probability. Instead, they insisted, a jurist should apply the Law whenever certainty is possible—that is, where it is based on the apparent meaning of the texts. Beyond that, humans have no business extrapolating possible further applications of that law.

The legacy of Hugo Black and the *Zahiris* stand together as powerful evidence that literalism as a methodology of textual interpretation is neither unthinking nor mechanical, as its opponents in both American and Islamic jurisprudence have often tried to stereotype it.⁶¹ In the hands of Hugo Black and the *Zahiris*, literalism exhibited real potential for activist, reformist and revivalist jurisprudence, seeking better answers to the legal questions of their day and striving to free the texts of the legalistic layers of interpretation and human subjectivity.⁶² Importantly, these giants of American and Islamic legal thought⁶³ did

grounds), challenged Justice Black's faith in the plain meaning of text. In Frankfurter's words, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). This nicely echoes the anti-Zahiri position in Islamic jurisprudence.

⁵⁹ See MAJID FAKHRY, *A HISTORY OF ISLAMIC PHILOSOPHY* 42-64 (2d ed. 1983); MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 39-105 (1984); M. SAEED SHEIKH, *ISLAMIC PHILOSOPHY* (1982).

⁶⁰ Even Imami Shi'is ultimately accepted this idea for post-Imamic jurisprudence.

⁶¹ See, e.g., SCALIA, *supra* note, 25 at 23 (responding to those who condemn textualism as "simpleminded," "wooden," "unimaginative," and "pedestrian").

⁶² See CHEJNE, *supra* note 41, at 16, 45, 55 (describing Ibn Hazm's "aversion to the rigidity of the Malikite legal school and to the apparent neglect of the study of the Qur'an and Traditions" and desire "to reform and rejuvenate religious beliefs and practices"; describing Ibn Hazm's *Zahirism* as "[e]ssentially a revisionist school" and that Ibn Hazm "hoped . . . to rescue his society from its predicament" with his methodology "if only the religious scholars would discard the shackles of traditionalism and look again at the Holy Scriptures"); 2 MARSHALL G. S. HODGSON, *THE VENTURE OF ISLAM, CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION II: THE EXPANSION OF ISLAM IN THE MIDDLE PERIODS* 31 (1974) ("part of the appeal of the Zahiri position for Ibn Hazm lay in its allowing wide scope to individual choice, placing actions on which no sound *hadith* report could be found in to the neutral 'permissible' category").

⁶³ Both Hugo Black and Ibn Hazm were famous in their own time, becoming the focus of much public discourse and controversy. See, e.g., *CBS News Special: Justice Black and the Bill of Rights*, *supra* note 30, (describing prominent television interview with Justice Black); CHEJNE, *supra* note 41, at 7 (quoting historian al-Marrakushi describing Ibn Hazm as "the most famous

not oppose intellectual inquiry nor the use of reason in legal analysis.⁶⁴ Rather, they despised the use of legal analysis to hide what they saw to be personal opinion,⁶⁵ and they believed that adherence to the plain meaning of text would reveal these hidden subjectivities built into the legal corpus.

The Zahiris' strictness, unsurprisingly, generated significant criticism from other *madhhabs*. Many viewed the Zahiri school as a fundamentally impractical approach to lawmaking.⁶⁶ They complained that its focus on only the literal meaning of texts, rejecting analogical reasoning and other *ijtihad* tools, left jurists insufficient means by which to answer the many real life cases not directly covered in the text, yet demanding and deserving of judgment. Some went so far as to assert that Zahiris were unfit to be judges. As it turned out, this literalist methodology did garner enough support to be counted among the major schools of law for some years,⁶⁷ but Zahirism as a school eventually died out. The power of its methodology, however, remained visibly present in the minds of Muslim jurists long after its actual extinction, in the form of counterpoints to positions taken by scholars of the surviving *madhhabs*, and recorded in their voluminous literature.⁶⁸ In the end, it is significant that neither Ibn Hazm and the Zahiris, nor Frederick Douglass and Hugo Black, were unaware of the powerful counter arguments to the literalist method. Yet they stood firm in their confidence and advocacy of their preferred interpretive method. Perhaps it came down to a belief that literalism, however flawed, will always be less tainted by personal subjectivity than other methods founded on much more shape-shifting tools such as historical understandings, analogical reasoning, and appeal to fundamental values, methodologies to which we now turn.

scholar of al-Andalus and the most talked-about man in the assemblies . . . of leaders and scholars . . . [N]o one before him had ever attained such a fame among us.”)

⁶⁴ See, e.g., CHEJNE, *supra* note 41, at 45 (“Zahirism allows ample room for individual inquiry (*ijtihad*) whereby the researcher (*mujtahid*) will determine on the strength of the holy text and logic the validity or invalidity of any question at hand.”).

⁶⁵ See *id.* at 131 (describing Ibn Hazm’s position that the law should not “espouse the scholars’ personal opinions, or advocate their particular points of view” and explaining that “*Ijtihad* should not give license to anyone to legislate beyond what is in the Qur’an and the Traditions. *Ijtihad* means only the search for the reality of things which are in consonance with the Scriptures.”).

⁶⁶ See, e.g., 3 IBN KHALDUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY (Franz Rosenthal, transl. 1986), 5-6 (describing students of Zahirism as “worthless persons” who will “get nowhere and encounter the opposition and disapproval of the great mass of Muslims”).

⁶⁷ See MELCHERT, *supra* note 41, at 315-32 (citing references to adherents to the school through the mid-1000s A.D./400s A.H.).

⁶⁸ Ibn Rushd’s *Bidayat al-Mujtahid* is a characteristic example: woven among his summaries of Maliki, Hanafi and Shafi’i positions on substantive legal issues are notations describing the “concurring” and “dissenting” positions taken by Zahiri scholars. IBN RUSHD, *supra* note 48.

III. ORIGINAL UNDERSTANDING: HISTORY MATTERS

Contemporary philosophers, literary critics and legal scholars have for some time been engaging the question of whether or not one must find the meaning of a text by searching for the intent of its author. The subject involves compelling hermeneutics regarding the inter-relationship of reader, author and text, some of which have already been hinted at in this study as we have considered the role of human agents responsible for interpreting a binding legal text for a society.⁶⁹ In the realm of jurisprudence generally, finding the author's intent has long been associated with the idea of faithful interpretation of legal texts. In America, for example, the idea of the "rule of law" often carries a strong emphasis upon authorial intent as crucial to maintaining judicial objectivity in applying the law.⁷⁰ In constitutional interpretation specifically, "understand[ing] the Constitution according to the intention of those who conceived it"⁷¹ is often presented as part of the obligation of fidelity to the Constitution.

How can a jurist discern an author's intent when that author is not available for consultation? Beyond studying the text itself for clues, one might look to any available record of the author(s) thoughts on any relevant issues. This record might be in the form of the author(s) statements or writings, or documented observations by others. For an

⁶⁹ An example of the debate and its core points of dispute, can be found in in LEVINSON & MAILLOUX, *supra* note 51.

⁷⁰ See Sanford Levinson & Steven Mailloux, *Introduction*, LEVINSON & MAILLOUX, *supra* note 51, at 42 (commenting on E.D. Hirsch's position that "the author's meaning, as represented by his text, is unchanging and reproducible" and noting that "the paradox that objectivity in textual interpretation requires explicit reference to the speaker's subjectivity"); Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 781-82 (1987)

[Authorial intent theories] avoid[] the uncertainty and arbitrariness that would follow if all interpretations were equally valid. It creates the possibility of a single, knowable interpretation of legal materials, which can be applied in a non-arbitrary fashion to all citizens Thus, at first glance, the Rule of Law appears to reject the idea of the free play of text and to embrace instead the simple theory of interpretation: The meaning of a legal text is the meaning of its author, which does not change as the text is introduced into new factual situations or contexts.

Id. Balkin goes on to argue that the "grounding of the Rule of Law on the privileging of the author's intent can be deconstructed, and then we see that the relation of the Rule of Law to the author's intent is not so unambiguous." *Id.* at 782.

⁷¹ Charles Fried, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756 (1987); see also Brest, *supra* note 25, at 204 ("the most widely accepted justification for originalism is simply that the Constitution is the supreme law of the land . . . manifest[ing] the will of the sovereign citizens of the United States . . . The interpreter's task is to ascertain their will."); William J. Brennan, Jr., *Constitution of the United States: Contemporary Ratification*, in LEVINSON & MAILLOUX, *supra* note 51, at 16 (describing an originalist as one who "upholds constitutional claims only if they were within the specific contemplation of the Framers"). Charles Fried sums this up with the pithy phrase, "the text is the intention of the authors" Fried, *supra*, at 759.

authorial record of the Framers of the Constitution, we have, for example, James Madison's notes of the Constitutional Convention, and the Federalist Papers. These are not, however, complete records of the Framers' intent.⁷² Nevertheless, imperfect though they may be, many constitutionalists believe that documents like these must be the first place one looks for constitutional meaning.

In the Islamic context, authorial record is also a tricky business. First, Muslims do not believe the Prophet "authored" the Qur'an, so records about the Prophet Muhammad cannot be an "authorial record" of the Qur'an, which has a divine author. However, the Qur'an does command the following of the Prophet's example, and therefore his statements and actions (of which he is the author) are themselves binding norms for Muslims, and the record of his life offers some clues as to the meaning of his various actions and statements. He is also considered the first and best interpreter of the Qur'an, and thus any record of his thoughts may provide clues as to the meaning of Qur'anic texts. But, of course, obtaining a complete and authentic record of exactly what he said and did presented a daunting logistical challenge undertaken by those in the scholarly discipline of *hadith* (narrative reports) devoted to reconstructing a reliable historical record of the Prophet's *sunna* (life example) out of the numerous anecdotes unsystematically passed down from person-to-person over a few

⁷² First, James Madison's notes present a quite truncated version of complicated debates, potentially leaving out crucial information. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986) (commenting that Madison's notes cover only about ten percent of the proceedings). Moreover, they are filtered through Madison's mind, memory, and note-taking abilities, yet he was only one of many authors of the Constitution. The Federalist Papers present different authenticity challenges. First, though all the authors are considered Founding Fathers, not all of them were authors of the Constitution. Moreover, the Federalist Papers are advocacy pieces, written to convince fellow Americans to vote for ratification of the Constitution, and thus present its attributes in the most positive light possible, significantly blurring important differences of opinion, for example, between Madison and Hamilton on the nature of the national government. After ratification, it did not take long for these latent disagreements to grow into the most heated political wars of the first presidential terms. Briefly, Alexander Hamilton advocated a strong central government, in opposition to the positions of James Madison and Thomas Jefferson insisting on limited national power and preservation of state sovereignty. The heat between the two camps became so extreme as to include intense smear campaigns and political plots in the first years of the nation. This submerged division in the Founding Fathers' ideologies—states rights versus strong central government—has played a central role in constitutional law and jurisprudence throughout American history, from the Civil War to the civil rights movement, and most recently, the Rehnquist Court's Federalism. Further, the Federalist Papers shed little light on the meaning of the Bill of Rights, for the original draft of the Constitution did not include the first ten amendments, known today as the "Bill of Rights." Indeed, Madison and Hamilton both argued in the Federalist Papers that a constitutional Bill of Rights was not necessary. See Federalist 84 (Hamilton stating that the bill is "not only unnecessary in the proposed constitution but would even be dangerous"). An appreciation of authorial intent on the meaning of the Bill of Rights, then, cannot be found in the Federalist Papers.

generations.⁷³ In the world of jurisprudence, Muslim scholars took different views about how much weight to give which *hadith* in determining a legal question. Though all sincerely sought to give life to the true meaning of the Prophet's *sunna*, they disagreed over whether this historical record of the Prophet's words and actions was always determinative. One school in particular, the Maliki, insisted that there was a more authoritative source for understanding the *sunna*, namely, the understandings of those who lived in Medina during and just after the Prophet's life. In the following section, we will investigate the debates between the Malikis on the one hand and the Shafi'i's on the other over this question of using the best evidence of the Prophet's example.

The debate evokes parallels in the arguments of American "originalists" who have asserted that to determine constitutional meaning one should look to what eighteenth century Americans understood its words to mean, since these Americans represent the community and background ideas of the Framers. In this section, we will compare this impulse to look to early America with the Maliki focus on Medina.⁷⁴ Critics of these historically-focused methodologies,

⁷³ Their chosen method of *hadith* verification and collection generally focused on the reliability of the people transmitting each narration—the "chain of transmission" (*isnad*). Briefly, the *muhaddith* scholars (the scholars specializing in *hadith*) cross-checked the links between each narrator beginning with the one who heard or observed it directly from the Prophet. Where there was a missing link in the chain, or other reasons to question the veracity of a transmitter, the *hadith* was ranked at a lower level of authority than others with solid, unbroken chains of transmission. Secondly, a *hadith* with multiple chains of narration carried more weight than one coming from only one original narrator. Generally, those with unbroken, multiple chains of transmission gained the highest rankings of authority, whereas broken and singular chains, tended to rank lowest in the *hadith* hierarchy, leaving room for many shades of grey in between these extremes. For more details on the science of *hadith* collection and classification, see KAMALI, *supra* note 46, at 58-116. Ultimately, because not every chain of narration could be firmly verified beyond question, and yet neither could these *hadith* be categorically rejected as fabricated, the *hadith* scholars classified each *hadith* according to varying degrees of reliability, based on the quality, continuity, and quantity of the narrative chain. *See id.*

⁷⁴ It should be noted here that originalists have often used historical understandings of eighteenth century Americans *in addition to* information drawn from the Framers' actual authorial record, such as the Constitutional Convention notes and the Federalist Papers. *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (listing secondary materials manifesting original understanding as "debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like"). This is a significant merging in America of two positions that were kept starkly separate in the Muslim context. That is, the authorial record of the Prophet—the *hadith*—was not considered a primary source of meaning for Malikis, who looked to the historical understandings of Medina first, even in opposition to information in the *hadith* record. It was Shafi'i, as we will see, who insisted on adherence to the *hadith*, for some of the same reasons that an American originalist would look to Madison's Convention notes, namely, they were the actual record of the author(s)' own statements.

This combining of authorial record and historical understanding on the one hand, and separation of the two on the other, represents a significant difference between American and Islamic "originalist" thinking (represented here by the Maliki school), which should be kept in

in both legal communities, pointed not only to the logistical difficulties of accurately unearthing past understandings of these texts, but also the pitfalls of human subjectivity embedded in this process. It is not uncommon, for example, to find historically-focused methods attacked for being merely a false cover for subjective preferences. That is, just as in plain meaning literalism, no matter how objective one attempts to be in searching for historical meaning, individual predilections about meaning will inevitably influence, if not direct, the result. As we will see, the originalist defense has been equally aggressive, staking a claim for being inherently superior in ability to maintain fidelity to the supreme law.

A. American Originalism

In contemporary American jurisprudence, jurists who look to historical understandings of the constitutional text at the time it was written have described the responsibility of their job as applying the “original meaning” of the text.⁷⁵ For them, the historical understanding of those people contemporaneous with the Founding Fathers is the best indication of the text’s meaning, and thus the only legitimate way to go about constitutional interpretation.⁷⁶ Leading proponents of this view

mind as we proceed. The present comparison highlights just that part of originalism which insists on the relevance of historical understandings of *non*-authors, because they lived with, or just after, the author(s) themselves. That bit of originalist thinking is very similar to the fundamental premise of the Maliki *madhhab* which insisted that the understandings of the first few generations of Medinan citizens were conclusive normative information about the meaning of God’s Law, because of the Prophet’s long time presence there. In the jurisprudential debates over whether such non-authorial information should be determinative of meaning, the originalist arguments parallel those of the Malikis (and the arguments of nonoriginalists parallel those of Shafi’i), even though in other aspects of their respective ideologies, these jurists would stand at opposite sides of a different methodological debate. See, e.g., *infra* Part V on the role of underlying purpose. As we will see later, this serves to remind us that, although parallels in types of methodological approaches exist in both systems, the bundles in which these methods were combined can differ drastically in the hands of different jurists and legal communities.

⁷⁵ See BOBBITT, *supra* note 25, at 9-24 (on “historical argument”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004) (defining originalism as “regard[ing] the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present”).

⁷⁶ Judge Bork’s words reflect the attitude of many: “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.” BORK, *supra* note 74, at 143. Reflected in Bork’s argument is an institutional justification for originalism that is specific to the particular structure of government and role of judicial review in the United States. See also Robert Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decisionmaking*, 26 JUDGE’S J. 12 (Summer 1987). Other prominent voices of this argument include Justices William Rehnquist and Antonin Scalia. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (observation); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 862 (1989) (“[O]riginalism seems to me more compatible with the nature and purpose of a

have included state and federal judges, some currently on the Supreme Court,⁷⁷ prominent scholars of constitutional law, as well as influential political figures.⁷⁸ Judge Robert Bork, for example, has stated that “[a]ll that counts is how the words used in the Constitution would have been understood at the time [it was ratified].”⁷⁹ This approach involves a significant amount of immersion in the details of eighteenth century America to understand the text as that society understood it. United States Supreme Court Justice Antonin Scalia has done this by

Constitution in a democratic system.”).

We will here set aside this aspect of originalism, however, because a full comparison of this part of originalist thinking with Islamic jurisprudence would require much more laying out of information about Islamic institutional structures than we have space to cover here. The present study illustrates that there is nevertheless plenty of comparative material even without the institutional backgrounds, as more and more originalist literature is separated from the question of judicial review. Significantly, as originalist arguments move beyond an emphasis on “judicial restraint” crafted in response to the Warren Court’s “judicial activism,” contemporary originalist jurisprudence is exploring more internal reasons for the methodology, separate from the institutional role of the Supreme Court, and it is these aspects of originalism which parallel the originalist impulse of Malikism, as we will soon examine here. See Whittington, *supra* note 75, at 609:

The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less. Together, these two features of the new originalism open up space for originalists to reconsider the meaning of such rights-oriented aspects of the Constitution as the Ninth Amendment or the Fourteenth Amendment’s privileges or immunities and due process clauses. The primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.

Id.; Jack M. Balkin, “*Wrong the Day It Was Decided: Lochner and Constitutional Historicism*,” 85 B.U. L. REV. 677, 690 (2005) (“The old originalism was designed to promote judicial restraint and criticize the judicial innovations of liberal judges in the 1950’s, 1960’s, and 1970’s. The new originalism was employed to defend the innovations of an empowered conservative judiciary.”), Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 650 (1999) (describing the growth in originalist scholarship a “boon tide”); see also EARL M. MALTZ, *RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW* (1994); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

⁷⁷ Federal judges include Frank Easterbrook and Robert Bork, and, on the United States Supreme Court, Antonin Scalia and Clarence Thomas, who has been described as “the Court’s most thoroughgoing originalist.” See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1813 (1997).

⁷⁸ President Reagan’s Attorney General, Edwin Meese, for example, considered the judicial oath of office to be “a promise to enforce only the original meaning of the founding document.” See Sanford Levinson & Steven Mailloux, *Introduction*, in LEVINSON & MAILLOUX, *supra* note 51, at 5. Judicial adherence to the original meaning would, according to Meese, counter the tendency of courts becoming “more policy planners than interpreters of the law.” Edwin Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 5 (Jan.-Feb. 1986), quoted in LEVINSON & MAILLOUX, *supra*.

⁷⁹ BORK, *supra* note 74, at 144. More specifically, he insists that the words of the Constitution mean “what the public of that time would have understood the words to mean” and that this is discoverable from the historical record. *Id.* (sharply distinguishing this approach from that which “search[es] for a subjective intention”).

consulting the writings of “intelligent and informed people of the time [who] display how the text of the Constitution was originally understood,”⁸⁰ as reflected in period newspapers and magazines, dictionaries, and influential literature.⁸¹

An example of this methodology in action is Justice Scalia’s analysis of whether the death penalty falls within the Eighth Amendment’s prohibition of “cruel and unusual punishment.”⁸² Justice Scalia has said that this clause refers to what American society then considered to be cruel and unusual. He has concluded that capital punishment cannot be considered per se unconstitutional because we know that executions were practiced at the time that the Framers drafted the Eighth Amendment.⁸³ Elaborating, Justice Scalia commented that the language chosen by the Framers (“cruel and unusual”) represents an abstract principle (as his opponents argue), but “[w]hat it abstracts . . . is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather, the existing society’s assessment of what is cruel.”⁸⁴ This view decisively rejects a popular alternative approach, namely, that the words “cruel and unusual” should be read as abstract terms whose meaning can change with time, such that the meaning today is “what we consider cruel and unusual today.” The originalist position, in other words, has been that the only way to avoid judicial bias and corruption of the words over time is to insist that the Constitution’s meaning be found in the public understanding of the American Eighteenth Century, namely, the concept of cruelty as it existed in 1790.⁸⁵

⁸⁰ SCALIA, *supra* note 25, at 38.

⁸¹ Important to Scalia, therefore, are not only the notes and writings of Constitutional Convention delegates such as Alexander Hamilton and James Madison, but also those of Thomas Jefferson and John Jay, who did not attend the Constitutional Convention but were important indicators of public understanding, as well as newspaper articles and dictionaries of the era. *Id.* at 38. It should be noted here that, in addition to historical analysis, Scalia has said he takes the text itself very seriously. He has spent much effort not only on reconstructing historical understanding, but also on constructing textual meanings through reference to rules of construction. See, e.g., *id.* at 16-18 (illustrating Scalia’s repeated reference to rules of construction).

⁸² U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁸³ See Scalia, *supra* note 76 at 863 (“The death penalty . . . was not cruel and unusual punishment because it is referred to in the Constitution itself”); *Callins v. Collins*, 510 U.S. 1141, 1141 (1994) (Scalia, J., concurring) (“The Fifth Amendment provides that ‘no person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, . . . without due process of law.’ This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the ‘cruel and unusual punishments’ prohibited by the Eighth Amendment.”).

⁸⁴ SCALIA, *supra* note 25, at 145.

⁸⁵ In this originalist reading of the Eighth Amendment, Scalia has not been alone on the Supreme Court. Over the past several years, similar views have been adopted by Justices Black, Powell, Rehnquist and Burger. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 420 (1972) (Powell, J., with Burger, J., Blackmun, J., Rehnquist, J., dissenting) (“Both the language of the Fifth and Fourteenth Amendments and the history of the Eighth Amendment confirm beyond doubt that the

B. *The Medinan School*

Most Muslim jurists have shared the idea that the historical understandings of people contemporary with the Prophet should be determinative of the meaning of the Qur'an and *sunna*. They have disagreed, however, over who exactly to consider when looking at that historical community and how far their impressions should govern when faced with conflicting evidence. Among all the approaches to this question, the Maliki *madhhab* has provided the most thorough-going historically-based methodology in Islamic jurisprudence because it has given absolute primacy to the practice of the community of Medina, the city that was the center of Muhammad's Prophetic life and rule. The Malikis debated jurists from other *madhhabs*, and most especially the Shafi'is, over how historical meaning interpretation should operate in Islamic jurisprudence.

The eponym of the Maliki *madhhab*, Malik ibn Anas (712 -795 A.D.), a respected scholar of *hadith* and *fiqh*, lived in Medina three generations after the Prophet.⁸⁶ Surrounded by this still-thriving center of Islamic life, Malik firmly believed that the practices and collective opinions of the people of Medina were the best normative indicators of an Islamic society.⁸⁷ In his view, Medina offered the closest connection to the Law of God, because it was there that people daily witnessed divine revelation as well as the implementation of that revelation by the Prophet and the first of the pious *caliphs* after his death, who also ruled from Medina as the capital of the Muslim world in those early years.⁸⁸ Malik maintained that, due to the Prophet's ten years of residence there,

death penalty was considered to be a constitutionally permissible punishment."); *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring) ("The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment."). They all agreed that, when reading this constitutional text, the interpretive analysis should be grounded on "the moral perception of the time." SCALIA, *supra* note 25, at 145 (emphasis in original).

⁸⁶ MUHAMMAD ABU ZAHRA, *THE FOUR IMAMS: THEIR LIVES, WORKS AND THEIR SCHOOLS OF THOUGHT 3* (Aisha Bewley, trans. 2001) ("His grandfather, Malik ibn Abi 'Amir, was one of the great men of knowledge of the *Tab'iun* [successor generation after the Prophet].").

⁸⁷ See ABU ZAHRA, *supra* note 86, at 101 (noting that Malik's listing of Medinan practice, "the way of doing things generally agreed-on among us," as a source of law); YASIN DUTTON, *THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWATTA' AND MADINAN 'AMAL 437* (1999) ("Madinan '*amal* [practices] from the standpoint of Maliki legal theory represents the ideal standard for the normative behavior of an Islamic society.").

⁸⁸ *Id.* at 32 ("Malik emphasizes the fact that in the time of the Prophet the Madinans were the direct recipients of his message and his specific injunctions; they witnessed the circumstances and conditions within which the message was first delivered."); DUTTON, *supra* note 87, at 14. Indeed, most of the law-related verses of the *Qur'an* were revealed in Medina, not Mecca (where the Prophet had lived before emigrating to Medina).

the practices of Medina were either implicitly or expressly approved by the Prophet, and furthermore that this community in subsequent generations had faithfully maintained these practices intact.⁸⁹ For Malik and the scholars who followed him, the jurisprudential task of concretizing the meaning of the Qur'an and *sunna* was simple: look to the practices (*'amal*) of Medina. Early Maliki jurisprudence therefore centered on reports of Medinan custom, the rulings and legal opinions of the first four *caliphs* (who were also respected Companions of the Prophet),⁹⁰ as well as the consensus of prominent Medinan jurist-scholars.⁹¹

Malik's book, *al-Muwatta*, one of the primary texts of the Maliki *madhhab*, is thus a collection not only of *hadith* of the Prophet (which at the time were still in the early stages of compilation⁹²) but also of the practices and opinions of the people of Medina, including some of Malik's own personal *ijtihad* opinions drawing from this material.⁹³

Even further, the Maliki emphasis on Medina had a direct impact upon the very Prophetic *hadith* which Maliki jurists have used in their legal analyses. Not only is Medinan practice an important resource filling in "gaps" in the documented *hadith* record, but more crucially, Malik evaluated all Prophetic *hadith* reports against the practice of Medina. That is, a *hadith* report of the statement or action of the Prophet, regardless of the authenticity of its chain of transmission, is

⁸⁹ See DUTTON, *supra* note 87, at 320 ("According to Malik, the excellence of the people of Madinah and their '*amal* [customs] comes as a consequence of their obedience to the Prophet and their careful adherence to the *sunna* which he had laid down for them.").

⁹⁰ See ABU ZAHRA, *supra* note 86, at 81 ("Malik does not confine himself to [Prophetic] *hadiths* but also mentions the judgments made by the Companions, choosing what he believes to be most appropriate and beneficial in the particular case in hand. He mentions the action agreed upon in Madina and the judgments in cases there. When there is no previous ruling he makes an analogy from what he knows of the cases decided by the Companions.").

⁹¹ *Id.* at 379 ("The '*amal* of Madinah was of fundamental importance to the legal reasoning of Malik ibn 'Anas. He relied upon it so extensively that it constituted for him a conclusive, non-textual source of Islamic law in terms of which he would interpret, reject, or elaborate upon the textual sources of law to which he subscribed.").

⁹² Malik's *Muwatta* is important as one of these early *hadith* compilations, but it is known also as the first Islamic "law book" because in it Malik selected out the legally-relevant *hadith* and arranged them by subject, rather than by transmitter as preceding collections had done. See MALIK IBN ANAS, *AL-MUWATTA OF IMAM MALIK IBN ANAS: THE FIRST FORMULATION OF ISLAMIC LAW* (A. A. Bewley, trans. 1989); ABU ZAHRA, *supra* note 86, at 70-71; DUTTON, *supra* note 87, at 22.

⁹³ Umar Faruq Abd-Allah, *Malik's Concept of 'Amal in the Light of Maliki Legal Theory* 379 (1978) (unpublished Ph.D. Dissertation, University of Chicago, Department of Near Eastern Languages and Civilizations) ("The *Muwatta* is essentially a source book of the precepts of Medinan '*amal*."); see also DUTTON, *supra* note 87, at 32 ("The *Muwatta* is one of the earliest—if not the earliest—formulation of Islamic law that we possess, as well as being one of the earliest major collections of *hadith*. But, although it contains both *hadiths* and legal judgements, the *Muwatta* is neither simply a book of *hadith* nor a book of *fiqh*. It is, rather, a book of '*amal*, that is, a record of the accepted principles, precepts and precedents which had become established as the '*amal* of Madina.").

given normative authority in the Maliki *madhhab* only if it is consistent with Medinan *'amal*.⁹⁴ This is because, according to the Malikis, the words or actions of the Prophet cannot be understood in isolation without also taking into account the context in which they occurred, and that context is imbedded in Medinan practice. In the words of Ibn al-Qasim, one of Malik's disciples, if a *hadith* is "accompanied by [Medinan] *'amal* [practice] . . . it would indeed be correct to follow it. But [one need not follow a *hadith* that is] only like other *hadith* that have not been accompanied by *'amal*."⁹⁵ It is important to note that Ibn al-Qasim's assertion does not necessarily question the authenticity of those *hadith* texts, but rather, sets forth the methodological principle that "whatever the reason for the discrepancy between the legal implications of such texts and the content of *'amal*, it is not valid to institute such legal implications into *'amal* if the first generation of Muslims did not do so."⁹⁶ In other words, as later Maliki jurist Shatibi expounded because it can be assumed that the Companions and first generation of Muslims understood the practical implications of the Qur'anic and *hadith*, if a text seems to carry a particular implication but the first generations did not put that implication into practice, one can then conclude that such implication was probably not actually intended.⁹⁷

Shatibi's statement, and the Maliki premise generally, parallels the philosophy behind American originalist thinking that, for example, although the words "cruel and unusual punishment" in isolation might potentially include capital punishment, those words cannot be understood without the context of the understanding of the founding generation. Because that generation clearly did not put that implication into practice, it is inappropriate for us to do so now. For Malikis, as for American originalists, the collective understanding of the people closest to the creation of the text is conclusive evidence setting the meaning of those texts, overriding all other interpretations.⁹⁸ And this is where they

⁹⁴ ABD-ALLAH, *supra* note 93, at 155-94. Contemporary scholar Umar Faruq Abd-Allah describes Malik's preference, for example, of a *fatwa* of Umar on the practice of the pilgrimage rites, over a *hadith* on the same subject reported by Sa'd ibn Abi Waqqas, on the ground that Umar's *fatwa* better established the *sunnah* of the Prophet. *Id.* at 165; see also ABU ZAHRA, *supra* note 86, at 102 (quoting Malik: "The learned men among the Followers [the generation after the Companions of the Prophet] quoted *hadiths* which had been conveyed to them from others and they said, 'We are not ignorant of this, but the common practice is different.'").

⁹⁵ See ABD-ALLAH, *supra* note 93, at 180-81 (quoting Sahnun ibn Sa'id, *al-Mudawwanah al-Kubra*). The *Mudawwanah* is the second foundational Maliki text, after the *Muwatta*.

⁹⁶ *Id.* at 680.

⁹⁷ *Id.* at 680-81 (describing Shatibi's position, developed in his *Muwafaqat*, that the *'amal* of the first generation takes precedent over the contrary implications of the texts, noting that "the contradictions may turn out to be apparent but not real").

⁹⁸ See ABD-ALLAH, *supra* note 93, at 165 ("[S]ince Malik regarded both *hadith* and the *athar* [stories] and *fatwas* of the Companions to be sources of *sunnah*, Malik does not necessarily give priority to a *hadith* over an *athar* or *fatwa* of a Companion when they conflict with the *hadith*.").

both have come into direct and heated debate with their fellow jurists who do not take Medina or the founding American generation, respectively, as the final word on textual meaning.

C. Engaging the Critics

Opposition to these two historically-specific methodologies has tended to emphasize the authority of the text over the incidental understandings of people contemporaneous with it.⁹⁹ These legal scholars have argued that it is the law that binds, not whatever a particular public understood that law to mean. In other words, historical understandings might be interesting, but should not be the final determinative factor in discerning meaning. In Islamic history, we can see this position most clearly in the legal methodology of Muhammad ibn Idris al-Shafi'i (767-819 A.D.), the well-known jurist and eponym of the Shafi'i *madhhab*. His arguments against the Maliki focus on Medinan practice are well-preserved in Islamic legal literature, offering an interesting comparison to similar arguments made by a variety of "anti-originalists" in American legal scholarship.

1. Shafi'i Textualism

Shafi'i insisted that there is a qualitative difference between the *hadith* of the Prophet and the daily practices of the descendants of his Companions in Medina. Simply put, the former was divinely-inspired and the latter was not. Shafi'i, therefore, insisted on the absolutely binding quality of any report of the Prophet's life that could be traced to him. By demoting the importance of the opinions of the Companions and other Medinan practices, Shafi'i directly opposed the fundamental Maliki premise that the practices of Medina should be the determinative indicator of the meaning of the divine law.¹⁰⁰ Instead, Shafi'i emphasized the idea of the comprehensiveness of the revealed texts,¹⁰¹

⁹⁹ Another forceful counter-argument, sometimes employed in tandem with this one, has emphasized the underlying values and purposes of the text. That perspective, which has counterparts in both Islamic and American jurisprudence, will be taken up in detail later. See *infra* Part V.

¹⁰⁰ NYAZEE, *supra* note 18, at 47 n.17 (stating that Shafi'i "was the first jurist to emphasize the principle that God "has left out nothing for which a *hukm* [legal ruling] has not been laid down").

¹⁰¹ QUR'AN 6:38; see also AL-IMAM MUHAMMAD IBN IDRIS AL-SHAFI'I, AL-RISALA: FI USUL AL-FIQH: TREATISE ON THE FOUNDATIONS OF ISLAMIC JURISPRUDENCE 66 (Majid Khadduri trans., Islamic Texts Soc'y 2d ed. 1987) (quoting several Qur'anic verses in support of this point, including 14:1, 16:46, 91, 42:52); NYAZEE, *supra* note 18, at 47 n.17 (stating that Shafi'i "was the first jurist to emphasize" the principle that God "has left out nothing for which a *hukm* [legal ruling] has not been laid down").

for, as the Qur'an says, "We have neglected nothing in the book."¹⁰²

Shafi'i and Malik both agreed that the opinions and statements of the Prophet were crucially important in elaborating the meaning and implications of the divine revelation. But unlike Malik, Shafi'i stopped at the textual sources—the Qur'an and authenticated *hadith*. Nothing more, he said, is necessary. For something to be a legitimate interpretation of God's Law, said Shafi'i, it must be connected to something in the *Qur'an* or some verified *hadith*.¹⁰³ That is, if God has indeed left nothing out, there is no need to turn to the understandings of mere human beings, no matter how closely they were connected to the Prophet in time, geography, or friendship.¹⁰⁴ Even worse, argued Shafi'i, their fallibility as human beings might affect readings of divine text and thus corrupt the study and articulation of the Law of God. Making human understandings part of the source texts, as the Malikis had done, was clear jurisprudential error in Shafi'i's eyes.

2. Debating Historical Understanding

Shafi'i's critique of the Maliki emphasis on historical Medina bears some significant resemblance to American criticisms of "original meaning" approaches to the U.S. Constitution. Just as Shafi'i appealed

¹⁰² QUR'AN 6:38; see also AL-IMAM MUHAMMAD IBN IDRIS AL-SHAFI'I, AL-RISALA: FI USUL AL-FIQH: TREATISE ON THE FOUNDATIONS OF ISLAMIC JURISPRUDENCE 66 (Majid Khadduri trans., Islamic Texts Soc'y 2d ed. 1987) (quoting several Qur'anic verses in support of this point, including 14:1, 16:46, 91, 42:52); NYAZEE, *supra* note 18, at 47 n.17 (stating that Shafi'i "was the first jurist to emphasize" the principle that God "has left out nothing for which a *hukm* [legal ruling] has not been laid down").

¹⁰³ ABD-ALLAH, *supra* note 93, at 501 (summarizing Shafi'i's statement that "explicit legal texts (*al-khabar 'an rasul-Allah* [reports about the Messenger]) are the only legitimate means by which to determine the content of the *sunnah*"). Other Shafi'i statements illustrating the primacy he gives to *hadith* texts include: "If a *hadith* is authentic, then it is my *madhhab*" and "If a *hadith* is authentic, then take my *madhhab* and dash it against the wall." See *id.* at 641 (quoting al-Qarafi's *adh-Dhakirah*, quoting Shafi'i).

¹⁰⁴ Shafi'i's attitude towards the use of non-Qur'anic sources centered on a simple principle: only the Prophet was divinely inspired, so the Prophetic *hadith*, once authenticated, must always take priority over the historical record of the Companions' opinions, and certainly over those of later Medinan scholars and citizens. They were, after all, only human. In this position, Shafi'i did not completely eliminate the relevance of the statements and rulings of the Prophet's Companions, but he did seriously demote them in relative importance. Because they were not directly divinely connected, he rejected them as a source of God's Law, so that if there was any revealed text on the same subject, that text should control the case. But he did consider the opinions of the close Companions to be some of the best examples of *ijtihad* available, and thus would defer to their opinion if there was no relevant text. Malikis (and Hanafis, for that matter), on the other hand, have treated these Companion opinions as potential sources of information about the *sunna* of the Prophet, and therefore have given them great attention. These different treatments of Companion opinions, can obviously have a direct and significant impact upon the substantive *fiqh* conclusions of the Shafi'i *madhhab* as compared to the Maliki when Companions' understandings conflicted with the apparent meaning of a Prophetic *hadith*.

to the supremacy of the *hadith* text, many in the United States have similarly opposed fixing constitutional meaning in eighteenth century understandings, because only the enacted text is binding on Americans. It was with this spirit that Frederick Douglass could so easily disregard the Founders' particular beliefs about slavery. The Constitution, Douglass insisted, was *not* the Founding Fathers: "only the text . . . was adopted as the Constitution of the United States."¹⁰⁵ This attitude evokes the same principle as that advocated by Shafi'i in separating out Medinan practice from the authenticated *hadith* of the Prophet. Shafi'i insisted that the latter, and only the latter, are binding because only they were divinely-promulgated. In other words, for text-focused critics of historical method in both American and Islamic jurisprudence, there is something uniquely important in the action of a sovereign (whether a founding legislative body or God and a Prophet) disseminating a supreme text such that the text itself carries paramount importance that must be respected in the interpretive process.¹⁰⁶ In this sentiment there has been agreement from both literalist and not-so-literalist scholars, together rejecting historical readings that reduce the meaning of the text to incidental understandings of a discrete population at a discrete time.

American originalists have not tolerated these criticisms any more than the Medina-focused Malikis did. Some originalists have insist on a strong epistemological reason for relying upon historical evidence to decode ambiguous, cryptic, and abstract language. In the words of Gary Lawson, "[early] actors, especially those who operate[d] near the time of the Constitution's promulgation, are a likely source of wisdom concerning the meaning of ambiguous constitutional terms . . . and their views are accordingly entitled to weight in the interpretative process."¹⁰⁷ Others have returned to an emphasis on authorial intent, asserting that interpretation is about ascertaining the intent of the authors, and historical understandings are the most reliable way to do that. Judge Robert Bork, for example, has insisted that the Framers' intentions are the "the sole legitimate premise from which constitutional analysis may

¹⁰⁵ DOUGLASS, *supra* note 26, at 469.

¹⁰⁶ The Zahiris and American plain meaning jurists, as we have seen, took this principle literally: not only is the text the only binding authority, but only the meaning apparent on the face of the text can be taken as its meaning. See *supra* Part II.

¹⁰⁷ Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1834 (1997). Continuing, Lawson clarified his position: "such views deserve consideration because they are good evidence of the right answers, not because they are constitutive of the Constitution's meaning. In other words, they are generally entitled only to epistemological deference, not legal deference." *Id.* at 1834-35. Malikis would likely have accepted this as part of their emphasis on Medina. That is, even if Medinan practice is not accepted as the best indication of the meaning of the Prophetic *hadith*, it still deserves serious attention because it was the best indicator of the "right way" of doing things, inspired by the legacy of the Prophet's life and work in Medina. Keeping this in mind gives us another way of understanding the emphasis by the Maliki school on *maslaha* (public welfare), to be addressed in detail later. See *infra* Part V.C.

proceed.”¹⁰⁸ These ideas are so intertwined that many use the terms “originalism” and “original meaning” synonymously with “original intent.” President Ronald Reagan’s Attorney General, Edwin Meese, for example, publicly advocated a “jurisprudence of original intention” which required judges to ascertain the intentions of the initial authors of the relevant constitutional text.¹⁰⁹

In Islamic jurisprudence, debates over determining authorial intent—in this case Prophetic intent—have been just as aggressive. The Shafi’i opposition to Medinan historical understanding analysis in favor of exclusive reliance on only the authenticated *hadith* texts was viewed as a serious methodological error by the Malikis. Malikis have insisted that not only is there crucial information missing from the recorded *hadith*—information which was embedded in the practices of Medina—but also, even for information that *is* in the *hadith* collections, its proper meaning cannot be conclusively ascertained by only reading the face of those texts. Medinan traditions provided the necessary context and background for the *hadith* reports to be applied properly by *ijtihad*-lawmaking scholars. Opposite to Shafi’i, who began with the presumption that all valid *hadith* about the Prophet are normative,¹¹⁰ Malik strongly insisted that the text on its own is ambiguous. He insisted that “the quality and meaning of an act does not consist merely in the outward form (*zahir*) of the act but rather in how that outward form was intended to relate to the context of circumstances in which it was performed.”¹¹¹ After all, how could one give legal effect to a

¹⁰⁸ ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW: THE FRANCIS BOYER LECTURES ON PUBLIC POLICY 10 (1984); *see also* BORK, *supra* note 74, at 81 (“once a court abandons the intention of those who made the law, the court is necessarily thrust into a legislative posture. It must write the law.”), 143 (“[Only the original understanding] that a judge is to apply the Constitution according to the principles intended by those who ratified the document . . . meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”).

¹⁰⁹ Edwin Meese III, *Address before the D.C. Chapter of the Federalist Society Lawyers Division*, in LEVINSON & MAILLOUX, *supra* note 51, at 29.

¹¹⁰ ABD-ALLAH, *supra* note 93, at 353 (“Shafi’i regards all legal texts [*hadith*] . . . to be normative, regardless of whether they report statements, directives, habitual or isolated actions, or individual legal rulings, and he recognizes no qualitative differences between them.”). In Shafi’i’s own words, “you ought to regard things that the Prophet has done as preferable in all cases.” MUHAMAD IBN ‘IDRIS ASH-SHAFI’I, *KITAB IKHTILAF MALIK AS SH-SHAFI’I* 205(1961), *cited in* ABD-ALLAH, *supra* note 93, at 351.

¹¹¹ ABD-ALLAH, *supra* note 93, at 468. Elaborating the point, the twelfth century A.D. (sixth century A.H.) Maliki jurist Ibn al-Hajib asserted that “until one has determined by reference to other sources of law what the Prophet’s intent behind the act was . . . one cannot actually claim to be imitating the Prophet merely by virtue of doing the same act.” *Id.* at 467 (paraphrasing Ibn al-Hajib). The point will be familiar to contemporary Americans who have encountered the same question in the context of understanding our own authoritative texts. Western commentators from Monty Python to Lawrence Lessig would likely agree with Umar Faruq Abd-Allah’s following elaboration of the Maliki premise: “performance of the outward form of the act in a context or manner contrary to what was originally intended by the act would not constitute imitation but could even amount under certain circumstances to being a parody or caricature of the original

reported action of the Prophet without knowing whether he meant it to be normative for all Muslims? When, for example, he remained in the mosque after the congregational prayer, mediated a marital conflict, brushed his teeth with the roots of a wooden stick, divided up the spoils of war—did he mean to set an example for Islamic behavior, or did he just act as a human being characteristic of his time and place? The Malikis had a simple answer: a *hadith* report could not have normative power unless it had been understood as such by the Prophet's immediate Companions or the people of Medina.

The Maliki-Shafi'i divide over the authority of Medinan practices reflects deeper epistemological differences over the nature of knowledge of the text's meaning, and in particular, of the legitimate sources available to determine that meaning. Shafi'i's rejection of the undocumented memories of Medina reflected his presumption about the comprehensiveness of the existing Islamic textual record. That is, Shafi'i presumed that "the authentic legal texts upon which he relied constituted a sufficiently clear and comprehensive representation of the content, scope, and purpose of all Prophetic legislation."¹¹² Shafi'i operated on the premise that the textual materials at hand provided jurists with a full package of the original precepts of the supreme Law. But the early Malikis rejected this text-comprehensivist paradigm. Malikis have insisted on using non-textual evidence in the interpretive enterprise. Not only was there important information in the non-textual Medinan *'amal* that was not included in the *hadith* compilations, but, they argued, those Medinan practices were also crucially important in giving the proper meaning to the recorded *hadith* that were in the record.¹¹³ The Maliki epistemological paradigm became this: a *hadith*

act." *Id.* at 468. See also MONTY PYTHON'S LIFE OF BRIAN (Handmade Films Ltd., Python (Monty) Pictures Ltd. 1979) (satirizing religious imitation of Jesus' every move); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 462 (1995) (arguing difference between imitation and fidelity to Constitution).

¹¹² ABD-ALLAH, *supra* note 93, at 501 ("The most central assumption . . . in ash-Shafi'i's reasoning is the assumption that the authentic, legal texts upon which he relies constitute a sufficiently clear and comprehensive representation of the content, scope, and purpose of all Prophetic legislation."). Even though the process of collecting the complete record of Prophetic *hadith* was still ongoing in Shafi'i's lifetime, and he did acknowledge that no single scholar had complete knowledge of the *sunna* by means of the *hadith* they transmitted, nevertheless, Shafi'i believed that no parts of the *sunna* had escaped documentation in the *hadith* entirely. *Id.* at 502-03.

¹¹³ Let us take an example. An authentic *hadith* reports that the Prophet issued a judgment based only on an oath and a single witness' testimony (contrary to the otherwise-established norm that two witnesses are generally required for legal proof). Malik accepted this *hadith* as valid, but believed that it was ambiguous, namely, that it was not clear whether this was meant to apply to all types of cases, or was particular to the circumstances of the case at hand. Malik therefore looked to the customs of Medina to clarify the rule. He concluded that this *hadith* meant first that an oath is required from the plaintiff, and witness testimony is offered as secondary support for that oath. More importantly, Malik added that Medinan *'amal* established that the single-oath-single-testimony rule applied only to property cases, and specifically excluded its use in criminal

report cannot have normative power unless it was understood as such by the Prophet's Companions or the people of Medina.¹¹⁴ American originalists have followed much the same paradigm: without knowing the understandings of those texts by eighteenth century Americans, we run the grave risk of attributing false meaning to our supreme Law.

Malikis criticized Shafi'i textualism for failing to distinguish the normative from the non-normative in the *hadith* record. Shafi'i treated all valid *hadith*¹¹⁵ as normative and binding, no matter how unusual their content nor how thin their connection to the Prophet.¹¹⁶ Malikis saw this as an unsophisticated methodology for its inability to make appropriate qualitative distinctions between what was meant to be a directive and what was not.¹¹⁷ To a Maliki, this represented a serious methodological defect: neglect of the *context* of the Prophetic example,

cases, matters of marriage and divorce, emancipation of slaves, theft, or slander. MALIK, *supra* note 92; *see also* ABD-ALLAH, *supra* note 93, at 141-42. With this elaboration, Malik implicitly made the point that, by themselves, the *hadith* texts are ambiguous and incomplete. *See id.* at 165, 176 (describing rule in Maliki legal theory that reports of Prophetic actions are ambiguous; noting Shatibi's position that "authentic statements that have been isolated from their contexts are ambiguous by nature"). Information from Medinan *'amal* was necessary in order to determine the text's original meaning, and most importantly to prevent jurists from applying it in such a way that would seriously distort the rule, for example, applying it in non-property cases. *Id.* at 142 ("This is a clear example of an instance where failure to elaborate the precept only partially reflected in textual sources by reference to non-textual sources might lead to serious distortion of the original precepts."); *see also id.* at 178 (noting Maliki position on isolated *hadith*: "one of the surest criteria against which to remove the ambiguity of isolated legal statements is to place them in their proper context).

¹¹⁴ In other words, "the quality and meaning of an act do not consist merely in the outward form (*az-zahir*) of the act but, rather, in how that outward form was intended to relate to the context of circumstances in which it was performed." ABD-ALLAH, *supra* note 93, at 468.

¹¹⁵ He defines "valid" quite specifically, classifying a *hadith* according to how well its chain of narration from the Prophet to his time, could be authenticated. Only those with a fully authenticated chain are considered binding for Shafi'i. *See* Kamali, *supra* note 46, at 58-116 for more on the science of *isnad* in *hadith* compilation.

¹¹⁶ A "thin" connection would exist, for example, where a *hadith* is traceable back to only one individual narrator, rather than from multiple transmitters who heard the same or similar statements. Treatment of these "isolated" (*ahad*) *hadith* turns out to be one of the most significant methodological divisions between the Shafi'i school on the one hand, and the Maliki (and Hanafi) on the other. Bernard G. Weiss, *Usul-Related Madhhab Differences Reflected in Amidi's Ikham*, in *STUDIES IN ISLAMIC LEGAL THEORY*, *supra* note 43, at 302; ABD-ALLAH, *supra* note 93, at 122, 155-56.

¹¹⁷ Moreover, Malikis asserted that giving normative status to the latter could even be harmful as a legal matter, and therefore classified some of these actions as "discouraged" (*makruh*). ABD-ALLAH, *supra* note 93, at 351-52, 470. This was shocking to the Shafi'is, who took the position that every Prophetic action should be presumptively considered good. Thus, the Maliki classification of some authenticated *hadith* of the Prophet as anything but recommended (*mandub*)—and most egregiously, categorizing some as actually discouraged—was the focus of some of the most severe Shafi'i attacks against the Maliki *madhhab*. *Id.* at 470. Shafi'i was incredulous that anyone would consider any action of the Prophet to be anything less than laudable, and pointed to this as one of the major weaknesses of the Maliki *madhhab*. *See id.* The Maliki classifications proved to Shafi'i that the Maliki interpretive method was too riddled with whim and arbitrariness, and as a consequence he even asserted that Malikis should not be permitted to give *fatwas*. *See id.* at 470-71.

which is discoverable only with attention to the customs of Medina. The *Maliki madhhab* has stood for the idea that the authenticated textual record is insufficient in itself for establishing the full scope of the Law.

Opponents of historically-based methods have retorted that such history-focused interpretation could only serve to corrupt the text with subjective opinions of the past that are irrelevant to interpreting the text itself.¹¹⁸ Frederick Douglass thus found great strength in the fact that the text of the Constitution itself did not exhibit the same sort of overt emphatic support for slavery as existed in the minds of the Framers and early Americans themselves,¹¹⁹ to the Framers' great credit. The Framers' own beliefs, in other words, were subjective and fallible, and should not be binding on the people. Similarly, Shafi'is have held that the meaning of a *hadith* is not limited to the particular understanding of that *hadith* by its narrator.¹²⁰ Malikis, on the other hand, have displayed a profound ambivalence to the ultimate usefulness of the *hadith* corpus, viewing their own collection of Medinan traditions to be far more important.¹²¹ In the helpful shorthand of a contemporary scholar, "Malik studie[d] *hadith* against the background of Medinan '*amal* [custom] and [Shafi'i studie[d] Medinan '*amal* against the background of *hadith*."¹²²

Significantly, the dispute between Malik and Shafi'i was not over whether the Prophet's *sunna* (life example) is authoritative in the first place, for both believed that, as he was the last Prophet of God, it most certainly is. Rather, Malik and Shafi'i disagreed over the *means* by which one should determine the *content* of that *sunna*. This was not a situation of human reason operating against blind adherence to tradition, for both schools of law exerted impressive feats of human reasoning to bolster their positions. Rather, this is an example of different choices made by reason in light of limited text.

Comparing the two methodologies against each other, it becomes apparent that Malikis and Shafi'is, despite their opposition, do share a common impulse: both are concerned about the best way to avoid human subjectivity and arbitrary whim in the elaboration of the

¹¹⁸ Shafi'i essentially rejected Malik's premise that the practice of Medina has remained intact and uncorrupted since the Prophet's time. What check, after all, is there that idiosyncratic human preferences had not crept into the practices of Medina? For Shafi'i, the only reliable way to apply God's Law, and not human whim, when looking at the '*amal* of Medina was to give normative power only to that which could be corroborated by the authenticated *hadith* reports. See ABD-ALLAH, *supra* note 93, at 334 (describing Shafi'i's emphasis that '*amal* be verified by *hadith* texts).

¹¹⁹ See *supra* note 26 and accompanying text.

¹²⁰ Weiss, *supra* note 116, at 293, 302 (noting Abu Hanifa disagreed and held that the transmitter's interpretation should be accepted); see also ABD-ALLAH, *supra* note 93, at 334.

¹²¹ See ABD-ALLAH, *supra* note 93, at 140 (describing Malik's assumptions about the legal implications of the *hadith* texts as "essentially the opposite of Shafi'is").

¹²² *Id.* at 300.

Prophetic *sunna*. Although they began from starkly different presumptions in how to go about this goal, Malikis have rejected *hadith* that contradict Medinan *'amal* for the very same reason that Shafi'is have rejected Medinan *'amal* in favor of sound *hadith*.¹²³ Yet, it appears, neither method has served to immunize its jurists from some amount of human subjectivity. Indeed, in the mutual accusations of arbitrariness, Shafi'is were not alone in arguing that Maliki selection of historical evidence was inconsistent and arbitrary.¹²⁴ The same charge

¹²³ For Shafi'i, abiding by the sound *hadith* texts is an undeniable religious duty for all Muslims, and even when a sound *hadith* carries less authoritative weight (as in the case of isolated *hadith*), it is better to use that than no text at all. *Id.* at 218-19 ("Shafi'i is aware of the conjecture implicit in reasoning on the basis of isolated *hadith* . . . [d]espite the conjecture implicit in following isolated *hadith* it is a matter of religious duty that one follow them in the absence of stronger and more explicit legal texts. It is part of man's duty to obey God, Who has not left him at liberty to follow his personal whim, and, as it were, a matter of worship . . . to reach a legal decision on the basis of something other than an explicit legal text . . . is much closer to sinfulness than erring on the basis of following conjectural texts.").

In response, Malikis did not dispute the superiority of the Prophet, but defended their approach on the ground that Medinan practice and scholarly consensus was a readily available indication of the meaning Prophet's *sunna*, and a better one than the conjectural indications of isolated, ambiguous *hadith*. *See id.* at 189 (quoting Shatibi's defense of controversial Maliki judgments), 337, 498-500 (summarizing Maliki response to Hanafi attack that following Medinan *'amal* was tantamount to following conjecture, asserting instead the integrity of Medinan tradition); *see also, id.* at 510-11 (summarizing internal Maliki debate between Qadi Iyad and Shatibi over what to do when there is no *'amal* but there is a *hadith* on an issue). Shafi'i remained unconvinced, and maintained that there is a fundamental flaw in any *madhhab* that could reject a *hadith* while simultaneously acknowledging its *isnad* authenticity. *See* FAZLUR RAHMAN, ISLAMIC METHODOLOGY IN HISTORY 34 (1965) (noting that Shafi'i issued these criticisms against the Malikis, but was equally addressing the Iraqis, namely, the Hanafis). In fact, in his famous anti-Maliki polemics, Shafi'i ridiculed Malikis on this basis, wondering aloud why Medinan scholars have bothered to transmit *hadith* in the first place since, from his perspective, they followed them so arbitrarily. *Id.* at 354. Malikis, in turn, ridiculed the Shafi'i methodology as short-sighted and naïve, since it did not acknowledge the inherent ambiguity of a *hadith* text standing alone without any historical context, and the overall incompleteness of the *hadith* as a sufficient source of lawmaking. Much like American originalists regarding the proper understandings of the Constitution, Malikis insisted that, to show real fidelity to the Prophetic *sunna*, a Muslim jurist must understand the *hadith* against the background of Medina. *Id.* at 34 (describing use of *'amal* in Maliki school to resolve textual ambiguities); ABD-ALLAH, *supra* note 93, at 488 ("When there is true contradiction between the legal implications of a *hadith* of accepted authenticity and the *'amal* of *Madinah*, that contradiction is generally taken to be an indication that the legal content of the *hadith* had been abrogated and that the corresponding abrogating precept is that which is embodied in *'amal*").

¹²⁴ *See* ABD-ALLAH, *supra* note 93, at 342 (noting Shafi'i's distrust of Maliki *'amal*, questioning its reliability and accusing Malikis of being arbitrary and inconsistent in their following of it). Primary scholars of the Hanafi *madhhab* have made similar attacks on Malik's attitude toward Medina. *See id.* at 337 (summarizing Shaybani's arguments that Medinans were arbitrary in holding opinions for which they had no support in the textual sources, and by not basing their opinions on the textual sources to which they do subscribe, also questioning the continuity of Medinan *'amal* and refusing to give Medinan practices priority over those of other Muslim cities); *id.* at 343 ("[Shafi'i] accuses [the Malikis] of being the most culpable of all people in both in failing to follow Prophetic *hadith* and in failing to follow their own Madinan traditions consistently.").

has been made against American originalists.¹²⁵

IV. GIVING LIFE TO PURPOSE: THE SPIRIT OF THE LAW

Legal interpretations according to literal and historical readings of the text have also generated a different complaint: that there is insufficient attention to the law's deeper justice, its spirit. This sentiment has been central to the thinking of many eminent jurists in both Islamic and American jurisprudence whose methodologies contribute to complex discourses on whether and how to define the Law's greater purposes and how this should impact jurisprudential work.

A. *God's Purposes: The Maqasid of Islamic Law*

The question of whether *shari'a*, God's Law, has underlying humanly-detectable purposes has had a complex history in Islamic theology, philosophy, and jurisprudence, the details of which are beyond the scope of the present study.¹²⁶ Eventually, the world of Islamic law benefitted from this history with the emergence of purpose-oriented theories of interpretation, premising themselves on the idea that God's Law does indeed have ultimate purposes—the "*maqasid al-shari'a*"—and even the overarching concept that all of these purposes together constitute "*maslaha*," the common good.

Of the scholars working in this area,¹²⁷ one of the most impressive

¹²⁵ See, e.g., Jack M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1623 (1990) (deconstructing Justice Scalia's analysis of the Michael H. case).

¹²⁶ The overlapping issue between law, philosophy and theology was the question of God's intentions. Are God's rules purposive? And if so, can we know (or at least effectively speculate about) that purpose? The nature of one's analogical reasoning (*qiyas*) was influenced by this question, for one view would posit that the whole idea of a rule having an '*illa* (*ratio legis*) that can be applied to other similar cases presupposes the idea that divine rules are themselves not atomistic coincidences but part of a broader scheme of justice. Indeed, some say that "to accept *qiyas* necessitates the acceptance of the purposefulness of the Law." BAGBY, UTILITY IN CLASSICAL ISLAMIC LAW: THE CONCEPT OF MASLAHAH IN USUL AL-FIQH 37 (1986) (Ph.D. Dissertation, U. Michigan, Dept. of Near Eastern Studies). Another view would posit that the '*illas* are deliberately deposited signs of the divine legal rulings, thus directing *qiyas* analysis in a much more text-focused direction. Consider the different views of Mu'tazilis, Ash'aris and Maturidis on whether the '*illa* is a "cause"/"motive" of the laws or a mere "sign"/"indication" of their existence. See ARON ZYSOW, THE ECONOMY OF CERTAINTY: AN INTRODUCTION TO THE TYPOLOGY OF ISLAMIC LEGAL THEORY (Ph.D. Dissertation, Harvard University 1984) 394-99; RIDWAN A. YUSUF, THE THEORY OF ISTIHSAN (JURISTIC PREFERENCE) IN ISLAMIC LAW 1 (Ph.D. Dissertation, Dept. Islamic Studies, McGill University) 16-17; BAGBY, *supra*, at 38.

¹²⁷ Ghazali was certainly not the first to write on the subject, (see, e.g., AHMAD AL-RAYSUNI, IMAM AL-SHATIBI'S THEORY OF THE HIGHER OBJECTIVES AND INTENTS OF ISLAMIC LAW 3-37 (2005) (citing also al-Maturidi, al-Shashi, al-Abhari, al-Baqillani, al-Juwayni, al-Razi, al-Amidi,

was Abu Hamid al-Ghazali (1058-1111 A.D.), a Shafi'i jurist whose articulation of the *maqasid-al-shari'a* ultimately gained near universal consensus in the world of Islamic jurisprudence. Ghazali counted five necessary divine purposes, and asserted moreover that every divine rule can be connected to the preservation of at least one of these five: religion, life, mind, family, or property.¹²⁸ For example, the Qur'anic prohibition of *khamr* (winedrinking) promotes the purpose of preservation of intellect, and the prohibition of *zina* (extramarital sex) promotes the preservation of family. For Ghazali, the purposes of the Law constituted the ultimate tool for guiding and controlling the derivation of proper legal rules.¹²⁹ Ghazali's method centered on the idea of "suitability" (*munasaba*): whatever is in conformity with the purposes of the law is suitable and thus legitimate law, and whatever does not conform to these purposes lies outside the pale of acceptable Islamic legal rulings.

More specifically, Ghazali applied the *maqasid* purposes to the practice of *qiyas* (analogical reasoning). As in American law, the fundamental challenge to analogical reasoning in Islamic law is how far beyond the existing textual cases a rule can extend before it becomes merely arbitrary decisionmaking. Consistent with its textualist premises, a fundamental part of *qiyas* as accepted by the Shafi'i *maddhab* is that any '*illa* (*ratio legis*) that cannot not be explicitly traced to an authenticated divine text is invalid as a basis for analogy. This proposition was resisted by the less textualist *madhhabs*, the Malikis for example, who have had no problem basing their legal reasoning on non-textual grounds, exemplified by their reliance on Medinan practice.¹³⁰ Despite the great amounts of jurisprudential ink

Ibn al-Hajib, al-Baydawi, al-Isnawi, al-Subki, 'Izz al-Din ibn 'Abd al-Salam, and Ibn Taymiyya), but he is frequently cited as one of the primary scholars credited with articulating a jurisprudentially sophisticated theory on the subject. *Id.* at 291-94 (mentioning Shatibi's frequent citation of Ghazali as an inspiration for his *maqasid*-based work).

¹²⁸ In Ghazali's words: "The purpose of the Law in regard to humanity has five [aspects], namely that the law should preserve for humanity their religion, life, rationality, kinship, and property. All that the preservation of these five principles includes is *maslahah* [public good]." BAGBY, *supra* note 126, at 29 (quoting al-Ghazali, *al-Mustasfa*); see also NYAZEE, *supra* note 18, at 213-16.

¹²⁹ For example, he took the Qur'anic prohibition of *khamr* (winedrinking), asserting that its '*illa* is its intoxicating effect (*wasf*) because the text states that it leads to "disputes, enmity and hatred." Yet, said Ghazali, even if this had not been stated in the text, we could still have derived this '*illa* through recourse to the *maqasid*, since drinking wine attacks and damages the intellect, the second of the five necessary purposes of the Law. In other words, the attribute of intoxication is *munasib* (suitable) as the '*illa*, in contrast to its other attributes (color, smell, or liquidity, for example) because it is easily acceptable to human reason that a rule based on this '*illa* directly preserves one of the Purposes of the Law. NYAZEE, *supra* note 18, at 201 (citing Al-Ghazali, *Shifa al-Ghalil*).

¹³⁰ They believed these nontextual practices to themselves be part of the divine Law. It was the Shafi'i insistence on having a textual record of all divine law to which they objected, not the following of the Law itself. See *supra* Part III.

spent by Shafi'i attacking the use of *qiyas* separated from revealed text, they had only limited effect outside their own school. Then Ghazali—himself a Shafi'i—presented an attractive proposal: *ijtihad* based upon the purposes of Islamic Law can allow analogical legal reasoning directly from a general principle untraceable to any specific text, as long as it supports one or more purposes of the Law.¹³¹

Ghazali's methodology of legal interpretation, proceeding methodically from text-to-purpose-to-rule, purported to bring order to what appeared to many to be an ambling encrustation of atomistic, formalistic rules. In this way, Ghazali impressively amended the Shafi'i position that rejected all reliance on non-textual principles in *ijtihad*, to instead establish a simple methodology purporting to walk jurists through the use of non-textual sources so as not to risk too much subjectivity. In Ghazali's mind, the law was derived through an interplay between revealed text, its embedded legal precepts, and the higher purposes of the Law.

Ghazali's specific *qiyas*-focused proposal for using the *maqasid al-shari'ah* ultimately had less impact on Islamic jurisprudence than his elaboration of the *maqasid* themselves, which became enormously popular and a mainstay of later literature.¹³² But purpose-oriented jurisprudence in Islam did not stop at the five *maqasid*. The overwhelming majority of Muslim jurists after Ghazali agreed that all the *maqasid* together accomplish one ultimate, all-encompassing divine purpose: the *maslaha* (public good) of society.¹³³ In this way,

¹³¹ Here is his proposal in a nutshell. First, he noted that where an '*illa* is explicitly listed in a divine text, it is by definition "suitable" (*munasib*) and thus yields legitimate legal conclusions. These text-grounded (or consensus-grounded) '*illas* he termed "effective causes" ('*illa mu'aththir*). NYAZEE, *supra* note 18, at 201 (citing Al-Ghazali, *Shifa al-Ghalil*). Ghazali pointed out that most of the '*illas* found in the texts already seek to protect one of the fundamental purposes. *Id.* at 209. As for an '*illa* derived from reason alone, Ghazali posited two conditions upon which such an '*illa* which would qualify as a basis for a legal ruling: (1) it must "establish, preserve or protect one of the five primary purposes of the Law" and (2) it must be consistent with the revealed text and established precepts, the *qawa'id*, of the Law. *Id.* at 208, 222, 285 (citing Al-Ghazali, *Shifa al-Ghalil*). Ghazali did posit a hierarchy to be used when there exist competing purposes. For example, "the stronger interest shall prevail," and "the public interest is prior to the private," and "the definitive interest prevails over the probable." See *id.* at 245-47 (describing workings of these rules). Failure to meet either of these conditions, said Ghazali, meant that the '*illa* was incurably speculative and thus an illegitimate basis upon which to extend the textual rule to a new case.

¹³² Many of his views were embraced and discussed by theorists for centuries, but the full scope of his methodology of interpretation was not actually practiced on any significant scale. NYAZEE, *supra* note 18, at 190, 231.

¹³³ In *al-Mustasfa*, Ghazali wrote:

In its essential meaning, *al-maslaha* is a term which means to seek something beneficial [*manfaa*] or avoid something harmful [*madarra*]. But this is not what we mean, because to seek the beneficial and avoid what is bad are the objectives [*maqasid*] intended by creation, and good [*sahah*] in the creation of humanity consists in the attaining of these objectives [*maqasid*]. What we mean by *maslaha* is the preservation of the objective [*maqasid*] of the Law [*shar*], which consists in five

mainstream Islamic legal theory came to embrace the idea not only that God's Law is purposeful, but also "that the purposes of the Law are fulfilled through *maslaha*."¹³⁴ The idea that the fundamental objective of God's Law is public welfare naturally presented some tantalizing questions about the effective use of *maslaha* as a legal tool. If *maslaha* really is the ultimate purpose of God's Law, can jurists deduce the *maslaha* in a given situation, and if so, does it have legal power? In these jurisprudential exchanges, the various schools eventually found common ground where a *maslaha* could be tied to a text. The more heated debates occurred over what to do with *maslaha* "*mursala*"—a *maslaha* that has no grounding in a divine text (literally, a *maslaha* that is not "tied down"¹³⁵). To reason based on *maslaha mursala* is to draw legal conclusions not based on existing divine rules, but rather out of juristic consideration of the best interests and welfare of society.

Maslaha reasoning is something for which the Malikis are famous—and infamous—in Islamic jurisprudence.¹³⁶ Malik himself insisted that when an approved *maslaha* is not upheld, the likely result is the infliction of hardship on the people, which is contrary to the purposes of God's Law.¹³⁷ In this light, Malikis believe *maslaha* to be itself a norm of the *shari'a*, not extraneous to it.¹³⁸ From here, it is not a

things: the protection of religion, life, intellect, lineage, and property. Whatever ensures the protection of these five principles [*usul*] is *maslaha*; whatever goes against their protection is *mafsada*, and to avoid it is *maslaha*.

TARIQ RAMADAN, WESTERN MUSLIMS AND THE FUTURE OF ISLAM 39 (2005) (quoting Ghazali, *al-Mustasfa*). All the *madhhabs* except the *Zahiris* ultimately agreed that the *shari'a* is based ultimately upon *maslaha* for the people. BAGBY, *supra* note 126, at 36 (quoting al-Amidi, a Shafi'i: "it is now established that the legal rulings were only legislated for the *maslahah* of humanity.").

¹³⁴ BAGBY, *supra* note 126, at 34. Though there is no specific statement to this effect in the divine texts, jurists found several supporting textual references. *See id.* at 35 (listing examples, such as: "We have sent you [Muhammad] only as a mercy to the worlds," (QUR'AN 21:107), and "God does not wish to place on you any hardship, He wishes only to purify you and complete His blessing on you" (QUR'AN 5:6), and the *hadith* "*la darar wa la dirar fi al-Islam*" (which translates to: "In Islam there should be no injury/harm and no retaliatory injury/harm").

¹³⁵ *See* ABD-ALLAH, *supra* note 93, at 268 n.1 (referencing different classical definitions of *maslaha mursala*); BAGBY, *supra* note 126, at 83 (referencing various definitions of "*maslaha mursala*"). Note that this does not mean that the *maslaha* is not mentioned in the sources at all, but that if it is, it is not the basis for the rule, much like *obiter dicta* in the common law tradition. *Id.*

¹³⁶ *See* ABD-ALLAH, *supra* note 93 at 440; ABU ZAHRA, *supra* note 86, at 105-07.

It will be recalled that the Malikis, who look to the life practices of Medina as the closest living approximation of the Prophet's example, premised their methodology on the idea that these Median customs reflect the best of Islamic practice. *See supra* Part III.B. Median practice is itself believed to represent the perfect *maslaha*. *See* ABD-ALLAH, *supra* note 93, at 22, 440. Moreover, Malikis understood many of the actions of early Companions and Caliphs in Medina as themselves constituting examples of *maslaha*-motivated actions, thus further validating this as a basis of future action. *See id.* at 273 (listing examples of actions by Caliphs Abu Bakr and 'Umar ibn al-Khattab).

¹³⁷ *See* KAMALI, *supra* note 46, at 355.

¹³⁸ Here it is important to note that, although Malikis may share with American originalists the

leap for Malikis to incorporate *maslahas* that have no textual source into their jurisprudence.¹³⁹ The idea is that anything that is in the public good can be legally determinative, since *maslaha* is the ultimate purpose of the Law in the first place.¹⁴⁰

Early Shafi'is disagreed: the divine texts have already contemplated every possible *maslaha*.¹⁴¹ Shafi'is, because they insist that only the textual record of God's Law—the Qur'an and *hadith*—can have effective legal force, believe that legal rulings based upon anything other than divine text is a quintessential violation of the rule of law. Thus, when early Malikis asserted a *maslaha* that has no textual support, this just proved to the Shafi'is that it must be a false *maslaha*, and therefore invalid as a ground for *fiqh*.¹⁴² From the Shafi'i perspective, what else can such a methodology do but open a Pandora's box of human speculation on the good, raising to *fiqh* status that which is nothing more than personal whim?¹⁴³

methodology of looking to historical understandings for textual meaning, the similarity ends there. In their espousal of *maslaha* as a central tool of jurisprudence, Malikism more closely resembles the “fundamental values” theorists to whom we turn in the next section.

¹³⁹ See ABD-ALLAH, *supra* note 93, at 268-70 (describing the view that considerations of *maslaha mursala* represent “the high point of Maliki theory”).

¹⁴⁰ The significant caveat to this Maliki philosophy is that the harms (*mafsada*) of such actions should not outweigh their benefits (*maslaha*). See *id.* at 268. *Maslaha*-supporters also imposed rather detailed rules to control what constitutes a *maslaha* in the first place, such as insisting that it benefit the general public rather than one small group of people, and so on. See KAMALI, *supra* note 46, at 358-60 (summarizing that legitimate *maslaha mursalah* is required to be: (1) genuine, not merely plausible, (2) general, to people as a whole, not to a particular person or group, (3) not in conflict with a principle or value that is upheld by a text or consensus).

¹⁴¹ KAMALI, *supra* note 46, at 362.

¹⁴² *Id.* (“When the *Shari'ah* is totally silent on a matter, this is a sure sign that the *maslahah* in question is no more than a specious *maslahah (maslahah wahmiyyah)* that is not a valid ground for legislation.”).

¹⁴³ This is consistent with Shafi'i's general philosophy of the comprehensiveness of the texts, corresponding well with basic Ash'ari theology, which most Shafi'is have espoused. See ABD-ALLAH, *supra* note 93, at 270 (noting Dawalibi's point that Shafi'i's position is “strikingly parallel to the later 'Ash'ari theological doctrine, which became widely accepted among the Shafi'is, that good and evil are not to be perceived by reason and can only be discerned by means of revealed law”). If God and His Prophet have completed and perfected Islam, then the Law never ignores *maslaha*. Thus, all the principles of the public good are by definition already contained in the divine texts, so there is no need for any separate jurisprudential tool of *maslaha*. Thus, all true *maslaha* can be found in the authoritative sources, and anything not in those sources must be rejected. See also ABD-ALLAH, *supra* note 93, at 270 (“Shafi'i . . . differs fundamentally with the Maliki concept of *al-masalih al-mursalah* . . . by virtue of the premise that all *masalih* are set forth in the textual sources of Islamic law.”). This is all a necessary result of the Shafi'i concept of the rule of law, which was built upon the premise of textual connectedness of all legitimate legal rules. If *maslaha* as a self-starting moral-utilitarian principle were admitted as a primary tool of law, then the law would cease to be source-based. See BAGBY, *supra* note 126, at 92-98 (summarizing main arguments against *maslaha mursala*). That would change the fundamental building block of the Shafi'i legal paradigm that the textual pedigree of a legal ruling is its only test of validity. To allow *fiqh* law to be built upon the *maslaha* as defined by contemporary jurists would do too much damage to the rule of law principles of the Shafi'i theory. See *id.* at 15 (“[I]f *maslahah* and its moral and utilitarian principles are admitted into the sanctum of the Law, the Law ceases to be totally source-based, and the content of the Law must be subject to the

Ghazali's *maqasid* theory offered a compromise position between these poles. By filtering *maslaha mursala* through the same five purposes, Ghazali pursued an analysis of *maslaha mursala* that went beyond the simple question of textual pedigree. He proposed that if a *maslaha mursala* falls within one of the identified divine purposes, it is not in fact outside of the Law, because the *maqasid* themselves are derived from the divine texts,¹⁴⁴ Ghazali thus concluded that not all *maslaha mursala* is doomed as mere human speculation.¹⁴⁵ Rather, where a *maslaha mursala* (1) belongs to one of the five necessary *maqasid* and (2) is compatible with existing texts of the Law, Ghazali insisted it is a legitimate basis for a legal ruling.¹⁴⁶

evaluation of the principles of *maslahah*. Consequently the pedigree of a legal ruling becomes insufficient as a test for validity, because the content of the ruling must also be considered in the light of *maslahah* Support of *maslaha* means a relaxing of the positivistic posture of the legal theory").

¹⁴⁴ See BAGBY, *supra* note 126, at 105-13 (summarizing Ghazali's theory of *maslaha mursala* and *munasaba*).

¹⁴⁵ Wherever there is no *maqasid* connection, Ghazali was as firm as the classical Shafi'is were in rejecting a *maslaha mursala*, condemning it as a "rejected falsehood." *Id.* at 105 (quoting Ghazali). This position is consistent with the Shafi'i ideology. Early Shafi'i opposition to *maslaha* was not, after all, so concerned with the "general question of what is *maslaha*," but rather (like their text-focused colleagues in the United States) with the more specific question of "what the law concretely defines as *maslaha*." *Id.* at 75. Legal argumentation for the Shafi'i is inextricably tied to the authoritative sources. *Id.* at 98 ("[T]he rejecters of *maslahah mursalah* are not categorically against *maslahah*. Their purpose instead is to limit the use of *maslahah* by tying it closely to the established cases in the authoritative sources. *Maslahah* can, therefore, be a basis for *qiyas*, but only on the condition that there must be a precedent for its use in an established case, and that any analogy must be based on its concrete manifestation in the established case."). A *maslaha* that has some clear connection to established textual reference would satisfy this just fine.

¹⁴⁶ With this proposal, Ghazali modified the early Shafi'i rule of law premise that all valid *fiqh* law must be tied to identifiable divine texts (either directly or through *qiyas*). By showing that a *maslaha mursala* can represent one of the primary purposes (*maqasid*) of the Law, Ghazali was able to give *maslaha mursala* its own logic and legitimacy not dependent upon a tangible link with established textual cases. *Id.* at 106-08, 121. Ghazali went so far as to say that a *maslaha mursala* which represents one of the five primary *maqasid* can stand on its own as a basis for a legal ruling, separate from any *qiyas* analysis. Ghazali limited this stand-alone status only to *maslahas* linked to the five imperative (*daruri*) *maqasid*. *See id.* at 111, 114-21 (expounding on Ghazali's apparent further stipulations that a *daruri maslaha* must also be definitive and universal, exploring these factors in the famous hypothetical case of an army of disbelievers who shield their attack by placing Muslim prisoners of war in front of them). This is because the five imperative *maqasid* are established by proofs in the authoritative sources, and therefore constitute definitive proof (*qat'i*), and thus are a very strong basis for any new ruling. *Id.* at 106-07. *Maslahas* of embellishments and those connected to other lesser *maqasid* cannot be used alone as a justification for a ruling. These *maslahas* of lesser *maqasids* must first have been considered in an established case (which essentially means that the use of such a *maslaha* is a question of *qiyas*, and not *maslaha mursala*). Without such a textual connection, Ghazali insisted that using such *maslahas* alone as the basis for a legal ruling is tantamount to legislating from personal whim, which he likened to *istihsan* (juristic preference), a jurisprudential tool disfavored by Shafi'is. *Id.* In this way, Ghazali opened not merely a back door for *maslaha mursala* to enter mainstream Islamic jurisprudence as second class citizen, but rather, offered it a space to stand on its own as a respected method of rulemaking. In Ghazali's words:

Every *maslaha* that springs from the preservation of the purpose of the Law is known

Later *maslaha*-based theories of Islamic law proceeded in many different directions. Two examples that offer interesting comparisons to American purpose-oriented theories which we will address presently are those of Abu Ishaq Ibrahim ibn Musa al Shatibi (d.1388 A.D.), and Sulayman Najm al-Din al-Tufi (d. 1316 A.D.). Proceeding from the premise that the ultimate purpose of God's Law is *maslaha*,¹⁴⁷ Shatibi asserted that, because in every divine rule God has *maslaha* as the ultimate purpose, the primary job of the jurist is to understand the relevant *maslaha* for each case.¹⁴⁸ Shatibi's view was that without a proper appreciation of *maslaha*, legal decisions are ill-founded and even arbitrary. For him, seeking the *maslaha* in every case will lead jurists to the Islamically correct answer.¹⁴⁹

Shatibi's notable contribution to Islamic jurisprudence was the method by which he insisted human reason can discover *maslaha*: through inductive analysis of the *shari'a* sources.¹⁵⁰ He surveyed the texts and the history of Islamic law up to his time and concluded that the morally good customs of the people are approved by the *shari'a* as fundamentals of Islamic law. Because the divine Laws are always consistent with what is the *maslaha* for the people,¹⁵¹ proper *ijtihad* is the interaction of revelation and reason, operating to discover a *maslaha* and apply it to a given case, together providing a dynamism to Islamic

to be a purpose by virtue of the Book [Qur'an], *sunnah* and *ijma'* [consensus], so that it is not outside of these sources. . . . If we explain *maslahah* as the preservation of the purpose of the Law there is no cause for objecting to following it: indeed it must be considered definitive by its being a definitive proof.

Id. at 106 (quoting al-Ghazali, *al-Mustasfa*). Ultimately, considerations of *maslaha* have become accepted in various forms in Islamic jurisprudence, inspired by some version of Ghazali's premises. See BAGBY, *supra* note 126, at 103 ("[I]t seems from the available material in our possession that al-Ghazali played a key role in developing the legal theory of *maslahah*.")

¹⁴⁷ In his words, "the Shari'a was instituted for . . . the good of believers (*al-Shari'a* . . . *wudi'at li-masalih al-'ibad*)." HALLAQ, *supra* note 100, at 168.

¹⁴⁸ BAGBY, *supra* note 126, at 132-33.

¹⁴⁹ *Id.*

¹⁵⁰ MUHAMMAD KHALID MASUD, SHATIBI'S PHILOSOPHY OF ISLAMIC LAW 226-27 (1995). Shatibi argued that the inductive method can establish the premise of *maslaha* in the *shari'a*, "both as a general theme . . . and in the description of the '*illa[s]*' of various commands in detail." *Id.* at 120 (commenting that "the Qur'an explains the reasons for ablution, fasting and *jihad* as being cleanliness, piety, and eradication of oppression, respectively"); see also ABD-ALLAH, *supra* note 93, at 271:

[Shatibi] argues that . . . the attainment of *masalih* is an ultimate purpose of Islamic law on the basis of inductive study [*istiqra'*] of Islamic law. Shatibi observes that the signifying analogies and the points of wisdom [*hikmas*] that lie behind rulings of Islamic law pertaining to social and economic transactions [*mu'amalat*] are often set forth with clarity in the textual sources of the law, which he takes to be an indication that the [legal scholar] is expected to concern himself with following the purposes of those rulings when applying them and not to concern himself only with adhering to the form of the ruling.

Id.

¹⁵¹ *Id.*

law.¹⁵² Shatibi said that the jurist has hit upon a “general and definitive” *maslaha* when it is one that exists repeatedly in the cases and is not contradicted by any case.¹⁵³

The inductive method advocated by Shatibi is significant for its opposition to the prevailing deductive method associated with Shafi’i textualism which had come to dominate most of Islamic legal theory.¹⁵⁴ Deductive reasoning is appealing to text-focused scholars such as the Shafi’is (and many American constitutional textualists), for it begins with the available text and applies it to new cases that fall within its scope. But this leaves very little room for creating anything new, for articulating additional legal concepts consistent with, but not deduced from, that text. Indeed, that is the very point of a text-focused methodology: anything not traceable back to that text lacks legal legitimacy.

Shatibi found this approach to unacceptably stunt the spirit of God’s Law.¹⁵⁵ He saw the Shafi’i-dominated norm of Islamic legal reasoning to be impaired by an atomistic view of God’s Law.¹⁵⁶ By narrowing the reach of the legal texts to only those new cases that could be covered by a *qiyas* analogy, he believed that Muslim legal theorists had created a myopic and distorted view of the Law, missing the significance of *maslaha* because they failed to take into consideration the totality of the authoritative sources.¹⁵⁷ Looking at this totality, said

¹⁵² *Id.*

¹⁵³ See BAGBY, *supra* note 126, at 138-39 (citing Shatibi, *al-Muwafaqat*).

¹⁵⁴ See ABD-ALLAH, *supra* note 93, at 223-24 (describing Shatibi’s inductive method, and asserting that early scholars were all inductive thinkers, lost it over time, and that “rigorously deductive literalism” then dominated Islamic jurisprudence).

¹⁵⁵ See BAGBY, *supra* note 126, at 271.

¹⁵⁶ BAGBY, *supra* note 126, at 17 (“Shatibi criticizes the jurists’ excessive dependence on formal *qiyas* in deriving legal rulings on the basis of isolated established cases. By depending on *qiyas* the job of the jurist is reduced to hunting and finding that one clear established case from which he can derive an *illah* and then generate new rulings.”); *id.* at 138 (“In one sense al-Shatibi’s argument can be seen as an indictment of the doctrine of atomism that pervades all fields of classical Islamic thought. The atomistic characteristic of focusing on the particular as opposed to the universal has greatly influenced Islamic thought, including legal theory. Al-Shatibi’s aim is to loosen the hold of atomism on legal theory by introducing into legal reasoning a holistic approach to the law as opposed to a completely particularistic approach.”); see also MASUD, *supra* note 150, at 110-11 (Shatibi ranks alongside Shafi’i in significance, because his exposition of the goal and spirit of Islamic law made it possible for Islamic law to escape the impasse into which the strict adherence to the limits defined by Shafi’i in *usul al-fiqh* had led. . . . Shafi’i’s *usul al-fiqh* paved the way for juridical theology which defined *usul* in terms of sources and limited the method of legal reasoning to *qiyas*. This method led to an impasse in solving modern legal problems in the absence of precedents. Shatibi sought a way out of this impasse by means of his doctrine of *maqasid al-shari’a*.”).

¹⁵⁷ HALLAQ, *supra* note 100, at 195 (“Going beyond the conventional, atomic view of the Quran, Shatibi presents us with a unique theory in which the text is seen as an integral whole.”); BAGBY, *supra* note 126, at 137-38 (describing Shatibi’s criticism of the *qiyas* method for deriving new rulings because “the jurist in this process is narrowing his focus on one instance of the Law while ignoring the totality of the Law”).

Shatibi, reveals a clear pattern and purpose,¹⁵⁸ and he insisted that this purpose must be made a prominent part of legal reasoning. Rather than seeing *maslaha* as peripheral to *qiyas*, and thus taking a back seat in legal reasoning, Shatibi proposed that certain *maslahas* must come to the forefront of Islamic jurisprudence.

It is important to appreciate that Shatibi's emphasis on inductive reasoning to find *maslahas* did not mean that he called for a freewheeling exercise of human reason. Shatibi was firm that he did not advocate abstract moral reasoning on the good, and that human reason cannot, independent of the Law, determine what is *maslaha*.¹⁵⁹ That is attainable only by God's revelation.¹⁶⁰ Said Shatibi, "reason does not graze in the fields of investigation except to the extent that revelation allows."¹⁶¹ Accordingly, for Ghazali, Shatibi, and the majority of Muslim jurists, human reason cannot be an independent source of moral value, because it is inherently instrumental. But once the good is known (guided by divine Law), *maslaha* scholars imagined that practical reason can and should use *maslaha* as a mode of understanding the greater significance of that Law. Shatibi's theory of *maslaha* as a primary tool of legal reasoning represents an ambitious attempt to date at charting out how that vastly undeveloped territory might be framed, simultaneously claiming to protect against slippage into whim and personal desires.¹⁶²

But even Shatibi was not as radical as his contemporary, Najm al-

¹⁵⁸ See KAMALI, *supra* note 46, at 5 ("Shatibi . . . emphasized that the higher objectives of the law such as *maslahah* and justice, rather than technical accuracy and formal logic, must in the final analysis command higher priority in the conduct of *ijtihad*, a theme which had not received adequate attention in the early works of the *ulema* [scholars] of *usul* [jurisprudence]."); see also MASUD, *supra* note 150, at 73 ("Shatibi felt that the body of the law was without spirit, its formalism would remain devoid of reality unless the real nature of the legal theory was investigated.")

¹⁵⁹ See BAGBY, *supra* note 126, at 47 ("According to al-Shatibi the function of reason is to extract *maslahah* from the legal texts and to extrapolate its meanings, but reason cannot independently determine *maslahah*. Judgements of what is morality and utility must be based in the Law itself. There is no room for independent human judgment.")

¹⁶⁰ In Shatibi's words, "Rational proofs if they are used in this field of knowledge are only used as appendages to the revealed proofs Rational proofs cannot stand alone as proofs, because the investigation concerns matters of revealed Law, and reason is not the revealer." See *id.* at 47 (citing Shatibi, *al-Muwafaqat*).

¹⁶¹ *Id.*

¹⁶² See BAGBY, *supra* note 126, at 42-43 (summarizing Shatibi's position that "legal consideration for *maslahah* is based on its predominance in everyday life . . . not taken from the standpoint of personal desires and pleasures, but from the standpoint that the life of this world is established for the life hereafter. . . . The concept of utility is thus expanded to include not only worldly benefits but also the expected benefits of the hereafter, which will be realized by following the injunctions of God."). Modern commentator Ihsan Bagby asserts that Shatibi's goal was to "change *maslahah*'s position in classical legal theory from its traditional secondary role to a primary role, [urging that] the consideration of *maslahah* should be a necessary ingredient of legal reasoning and not a supplemental ingredient that is used only rarely." *Id.* at 132-33.

Din al-Tufi. Tufi proposed that *only* the purposes of God's Law have imperative force, mandating that *maslaha* be placed above all other sources of law.¹⁶³ His basic premise was that the fundamental principle of the Law is "no harm and no reciprocating harm," a famous *hadith* and established Islamic legal maxim.¹⁶⁴ Given this as his paramount value, he concluded that *maslaha*, not the text, must be the criterion for legitimacy of all legal rulings.¹⁶⁵ This was a bold position.¹⁶⁶ The powerful impact of Tufi's theory was that, if a divine text or consensus differs with a relevant *maslaha*, the *maslaha* is preferred. This would open the door not only to the creation of new rules based only on the jurist's determination of *maslaha*, but also apparently the adjustment and amendment of existing rules based on a determination that they violate that *maslaha*.¹⁶⁷ In other words, because *maslaha* is the Law's ultimate goal, and all legal rulings are merely the means, the ultimate test of the validity of a legal ruling is its ability to achieve *maslaha*.¹⁶⁸

Tufi asserted that his theory did not invalidate divine text in favor of uncontrolled *maslaha*. Instead, he insisted that the jurist must find ways to make the text and the *maslaha* compatible with each other.¹⁶⁹ This assertion, of course, raises some familiar questions about human subjectivity, for a strict textualist would hold that any excursion from the apparent meaning of a text in order to make it compatible with *maslaha* inherently constitutes a denial of that text. Controls for

¹⁶³ Tufi was apparently motivated by the "confusing and chaotic differences" of the competing legal schools of his time and the resulting rivalries between them. *Id.* at 171. He posited that "[i]f concern for *maslahah* as derived from [the *hadith*] 'there is no harm and no retaliatory harm,' were founded on what has been discussed, the methodology of giving legal judgments would be united and the legal differences would cease." *Id.*; see also MASUD, *supra* note 150, at 150 (noting that Tufi's preference of *maslaha* over texts and consensus was "prompted by his belief that textual sources as well as the opinions on which *ijmaa* [consensus] is claimed were diverse, inconsistent and often self-contradictory" and that the principles of *maslaha* would provide a consistent method of decision).

¹⁶⁴ See Mohammad Hashim Kamali, *Qawa'id al-Fiqh: The Legal Maxims of Islamic Law* (n.d. publication by Association of Muslim Lawyers, U.K.) (on file with author); AL-KARKHI, AL-USUL (ISLAMIC LEGAL MAXIMS) 31 (Munir Ahmad Mughal, trans. 1998); Wolfhart Heinrichs, *Qawa'id as a Genre of Legal Literature*, in STUDIES IN ISLAMIC LEGAL THEORY, *supra* note 43, at 365; Khaleel Mohammed, *The Islamic Law Maxims*, 44 ISLAMIC STUD. 191 (2005).

¹⁶⁵ See BAGBY, *supra* note 126, at 166-73. In Tufi's words, "[t]he meaning of [the *hadith* 'no harming or reciprocating harm'] . . . is that harm and *mafsada* [evil] are legally prohibited This requires the preference of the implications of this *hadith* over all the legal proofs of the Law, and their specification in regards the prohibition of harm and the attainment of *maslahah*." *Id.* at 167 (citing Tufi, *al-Risala*).

¹⁶⁶ *Id.* at 173 ("Tufi is the only theorist to take the position that *maslahah* is the ultimate criterion of the Law and not vice versa.").

¹⁶⁷ *Id.* at 168.

¹⁶⁸ *Id.* at 168, 170 ("Instead of requiring that *maslahah* be compatible with the Law, [Tufi] requires that the Law be compatible with *maslahah*. *Maslahah* does not have to prove that it involves a case of need or necessity, because all of the Law needs *maslahah*, depends upon *maslahah* in order to function properly.").

¹⁶⁹ *Id.*

arbitrariness and whim seem then to rely on how controlled is the identification of *maslaha*. In this, a strict textualist will find little comfort in Tufi's scheme. Tufi did insist that in conducting his *maslaha*-supreme method of *ijtihad*, the Muslim jurist must extract a "true *maslaha*," but his guidelines for knowing when this is "true" would likely leave a textualist quite frustrated. Tufi said that discovering a true *maslaha* depends upon considerations of custom ('*ada*) and reason ('*aql*).¹⁷⁰ That is, Tufi asked jurists to use their rational minds to look to the life of the society around them to determine what benefits society and what society itself deems to be beneficial.¹⁷¹ Significantly, his criteria for *maslaha*-discovery did not center on such things as compatibility with text and connection to the *maqasid* as laid out in the *maslaha* theories of Ghazali and Shatibi. His approach decidedly departed from the Shafi'i-influenced norm that in order for an *ijtihad* opinion to have legitimacy it must show some connection to the text, even if indirectly. As we will soon see, American purpose-oriented theorists have existed in both of these *maslaha* models.

B. *The Constitution as America's Fundamental Values*

The ideas of Shatibi and Tufi have had parallels in American constitutional scholarship that also has brought the ultimate underlying purpose of the text into the forefront of constitutional interpretation. An illustrative example is Supreme Court Justice William Brennan, who insisted that the ultimate purpose of the Constitution is to promote and protect certain fundamental values, the highest being that of human dignity.¹⁷² In his words, the Constitution "is a sublime oration on the

¹⁷⁰ *Id.* at 168 ("The ultimate judge for what is utility, according to [Tufi] is custom and reason."). Tufi limited his *maslaha* theory to social transactions, and disallows its use in the consideration of acts of worship ('*ibadat*), following an established principle of Islamic jurisprudence. *Id.* at 170.

¹⁷¹ *See id.* at 169-70.

¹⁷² Brennan, *supra* note 71, at 20 (describing the "challenge . . . to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure"); *id.* at 21 ("[O]ur adherence to the constitutional vision of human dignity is so strict that even after convicting a person according to these stringent standards, we demand that his dignity be infringed only to the extent appropriate to the crime and never by means of wanton infliction of pain or deprivation. I interpret the Constitution plainly to embody these fundamental values."); *id.* at 24 ("If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity."). Justice Brennan authored some of the Court's most famous decisions protecting individual liberties. *See* William J. Brennan, *My Life on the Court*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 18 (E. Joshua Rosenkrantz & Bernard Schwartz, eds. 1997) ("high on the list of the Court's accomplishments during my tenure were a panoply of opinions protecting and promoting individual rights and human dignity.").

dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.”¹⁷³ Like Shatibi insisting that *ijtihad* fundamentally include a search for *maslaha*, Justice Brennan insisted that it is the responsibility of all those who govern the constitutional community to continuously recognize and accept the limitations placed on their powers in order to preserve human dignity.¹⁷⁴

Returning to an example introduced earlier in our discussion of Justice Scalia’s originalism,¹⁷⁵ the debate over the constitutionality of capital punishment provides one of the most vivid expressions of Brennan’s interpretive method. In several famous Supreme Court cases in the 1970s and 1980s Justice Brennan repeatedly insisted that capital punishment in all circumstances constitutes “cruel and unusual punishment” because it is an affront to human dignity.¹⁷⁶ Specifically, Justice Brennan wrote that to be constitutional, “a punishment may not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity,” and he therefore concluded that “[t]he calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person’s humanity” and therefore must be prohibited by the Amendment.¹⁷⁷

Significantly and in direct opposition to Justice Scalia’s approach, Justice Brennan’s appeal to the fundamental value of human dignity as the guiding force in constitutional interpretation allowed him to interpret the Constitution to accommodate changing ideas of what

¹⁷³ *Id.* at 18-19 (“As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual.”). This is evident, he said, in the Constitution’s careful laying out of boundaries of official authority and individual autonomy, in the very choice of democratic self-governance (for “the supreme value of a democracy is the presumed worth of each individual”) and in the specific Bill of Rights protections of individuals against state power. *Id.* at 18-19 (“When one reflects upon the text’s preoccupation with the scope of government as well as its shape . . . one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy.”).

¹⁷⁴ *Id.* at 20 (“[T]hose who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage.”).

¹⁷⁵ See *supra* Part III.A.

¹⁷⁶ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); see also Brennan, *supra* note 71, at 23:

I view the Eighth Amendment’s prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws. . . . [I]nherent in the prohibition is the primary principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment may not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. . . . The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person’s humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity.

¹⁷⁷ *Id.*

dignity is. Indeed, Justice Brennan advocated this idea as the very point of constitutional interpretation.¹⁷⁸ In his mind, “the genius of the Constitution rests not in any static one meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”¹⁷⁹ The interpretive attitude espoused by Justice Brennan here is often called that of a “living Constitution,” evoking the words of Justice Thurgood Marshall that a Supreme Court justice’s role is to give effect to the intent of the Framers and ratifiers, “with the understanding that the Constitution was meant to be a living document.”¹⁸⁰

Originalists have taken a strong stand against the “living constitution” philosophy, attacking it for being blatantly unfaithful to the Constitution, and worse, an imposition of personal whim upon the law. In the originalist’s mind, the only “fundamental values” that may guide constitutional interpretation today are those which were present at the time the document was written.¹⁸¹ The living constitutionalist

¹⁷⁸ Brennan’s own concise summary of his record reads:

In my time, it was the ‘living Constitution, infused with a vision of human dignity, that prohibited local police from ransacking a home without a warrant (in 1961) and forbade state prosecutors to compel an accused to convict himself with his own words (in 1964). Only the freedom to reinterpret constitutional language enabled us to make the leap . . . ruling (in 1962 and 1964) that each American should have an equal vote. Only with the faith in a malleable Constitution could Ruth Ginsburg and Wendy Williams have conceived of developing the string of test cases (beginning in the 1970s) in which we ruled that laws could not treat men and women differently. The same essential vision girded our enduring ruling . . . that the press must have protection to report on matters of public concern (in 1964). It was the Constitution’s ‘suppleness’ that allowed us to conclude (in 1970) that the government may not cut a welfare recipient’s lifeline without first holding a hearing.

Brennan, *supra* note 172, at 18-19.

¹⁷⁹ *Id.* at 17-18. The Constitution, he insisted, “was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.” *Id.* at 18. Therefore, he argued, “interpretation must account for the transformative purpose of the text,” which his focus on human dignity is uniquely suited to do. He was confident that “[a]s we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution.” *Id.* at 24.

¹⁸⁰ See GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 12 (1992) (describing an exchange between Senator Sam Erwin and Thurgood Marshall during Marshall’s 1967 Senate confirmation hearings for Supreme Court Justice). Marshall’s statement was in response to Senator Erwin’s question: “Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of this Constitution and the people who ratified the Constitution.” *Id.* Justice Brandeis also used the term to the same effect: “[T]he United States Constitution is ‘a living organism.’ As such it is capable of growth—of expansion and of adaptation to new conditions. . . . Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever developing people.” Brian Walsh, *The View from a Distant Vantage Point*, in REASON AND PASSION, *supra* note 172, at 323 (quoting unpublished dissenting Brandeis opinion).

¹⁸¹ See, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 726 (1988) (“[T]he American Constitution was not designed to contain a plethora of

theory, say originalists, fails to take the Constitution seriously as law, instead treating it as “nothing more than a set of improving slogans chiseled on the walls of our public consciousness”¹⁸² Others have complained that this methodology treats the Constitution as nothing more than an old bottle into which “each generation may pour its passion and prejudice.”¹⁸³ In the end, originalists warn, if the meaning of the constitutional text is allowed to change with the times, we will cease to become a government of laws, but one of men.¹⁸⁴

For “living constitutionalists,” on the other hand, this way of thinking is fatally crippled by the dead hand of the past. Rather than limit ourselves to, for example, eighteenth century standards of cruelty to understand the meaning of the Eighth Amendment, Justice Brennan and others have advocated a form of constitutional interpretation that would account for changes in what sort of punishments are tolerated by society’s “evolving standards of decency.” Justice Brennan’s methodology of interpretation was this: “We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, “what do the words of the text mean in our time?”¹⁸⁵ An “evolving content” approach to interpreting the “cruel and unusual punishment” clause¹⁸⁶ thus opens the door to the constitutional conclusion that the death penalty is one of those punishments which our society now finds “cruel and unusual,” regardless of how it was understood by the Framers.¹⁸⁷ Moreover originalist readings of history

dynamic provisions whose meanings evolve and change over time.”). Literalist Hugo Black agreed with this proposition. See *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

¹⁸² Fried, *supra* note 71, at 754.

¹⁸³ See also Meese, *supra* note 109, at 29 (invoking *Dred Scott*’s rejection of citizenship for all blacks to illustrate the “danger in seeing the Constitution as an empty vessel into which each generation may pour its passion and prejudice”); *id.* at 32 (“an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era.”); see also Gary L. McDowell, Book Review, 51 GEO. WASH. L. REV. 624, 629 (1983) (reviewing RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* (1982)). In his review, McDowell explains: “This notion of a living constitution has encouraged the belief that the Constitution is merely an ‘old bottle’ into which the courts are able—and obligated—to ‘pour new wine.’”

¹⁸⁴ See, e.g., RICHARD EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 24 (1985) (“[T]he idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law. If the next generation can do what it wants, why bother with a constitution to begin with, when it is only an invitation for perpetual revision?”).

¹⁸⁵ Brennan, *supra* note 71, at 17.

¹⁸⁶ Supreme Court case law, in fact, has adopted this language in the oft-quoted framework for applying the Eighth Amendment: the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁸⁷ Justices Brennan and Thurgood Marshall both drew this conclusion when the question was presented to the Supreme Court. Interpreting the clause according to “evolving standards of decency,” Justice Marshall emphasized that “a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.” *Furman*, 408 U.S. at 329 (Marshall, J.,

are just as susceptible to subjectivity and bias as any interpretation based on fundamental values. With a tone as sharp as the ridicule levied against him, Justice Brennan boldly labeled originalism as nothing more than “arrogance cloaked as humility,” because it “feigns self-effacing deference to the specific judgments of those who forged our original social compact . . . [and] it is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.”¹⁸⁸

A sure trigger for this debate is an assertion of constitutional rights that have no textual reference in the Constitution—the American equivalent of “*maslaha mursala*.” The constitutional “right to privacy” is just one of many examples that have sparked the controversy over whether there are constitutionally protected “unenumerated rights.” As we saw earlier,¹⁸⁹ Justice Hugo Black ridiculed his colleagues for finding that specific guarantees in the Bill of Rights have “penumbras” that qualify for constitutional protection. For Justice Black, this was a blatant disregard of the text in favor of human desires to “keep in tune with the times.”¹⁹⁰ In Justice Goldberg’s concurrence, on the other hand, was the idea that there are fundamental personal rights (including the right to marital privacy) outside those specifically enumerated in the Bill of Rights.¹⁹¹ Thomas Grey has described these rights as our “unwritten Constitution”¹⁹² and has asserted that judges do—and should—“enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document.”¹⁹³ Similarly, Lawrence Sager has advocated a

concurring). He then reasoned that capital punishment is excessive and unnecessary because it “serves no purpose that life imprisonment could not serve equally well,” and, even if not excessive, is “morally unacceptable to the people of the United States at this time in their history.” *Id.* at 358-60. Similarly, Justice Brennan asserted that “[p]ast assumptions . . . are not sufficient to limit the scope of our examination of this punishment today.” *Id.* at 285-86. He then brought to bear his belief in the fundamental value of dignity. He specifically asserted that the Eighth Amendment means that “the State may not inflict punishments that do not comport with human dignity,” and concluded that the death penalty is always unconstitutional as an affront to human dignity. *Id.* (“It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a ‘cruel and unusual’ punishment.”). *Id.*

¹⁸⁸ Brennan, *supra* note 71, at 15.

¹⁸⁹ *Griswold v. Connecticut*, 381 U.S. 479, 507-527 (1965).

¹⁹⁰ See *supra* note 35 and accompanying text.

¹⁹¹ *Griswold*, 381 U.S. at 486-500 (Goldberg, J., concurring). Justice Goldberg cited the Ninth Amendment as textual and historical evidence that the Framers believed that there were additional fundamental rights to be constitutionally protected besides those listed in the first eight amendments, and therefore a failure to recognize the fundamental right of marital privacy merely because it is not expressly enumerated in the Constitution would violate the Ninth Amendment. *Id.* at 490-92.

¹⁹² Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

¹⁹³ *Id.* at 717 (“[T]here was an original understanding, both implicit and textually expressed,

“justice-seeking”¹⁹⁴ Constitution which calls for the “exercise [of] considerable independent moral judgment” by judges to “fill[] in the abstract liberty-bearing provisions of the Constitution”¹⁹⁵ This method of constitutional interpretation creates the potential to give real-world consequences to such things as a “right to minimum welfare,”¹⁹⁶ despite its absence in the text of the Constitution itself.

Like those who argued for recognition of *maslaha mursala* in Islamic jurisprudence,¹⁹⁷ these American jurists have argued that the textual enunciation of rights in the Constitution is not exhaustive. These and many more examples from a diverse range of scholars, share a willingness to give normative constitutional power to things not found in the text of the Constitution itself. The idea has generated plenty of controversy over the years, not only in legal academia but also in some of the most prominent Supreme Court cases. As an example, consider the consequences of one of the most famous Supreme Court cases to recognize a “non-textual” right, *Roe v. Wade*, finding a constitutional protection of abortion in the private liberty encompassed by the due process clause.¹⁹⁸ Indeed, *Roe* has energized, (some say overheated), the debate between those who advocate non-textual readings of the Constitution, and those who insist on a more limited reading.¹⁹⁹

Roe v. Wade has illustrated that judicial recognition of non-textual rights can quickly draw charges of subjectivity and human speculation. If fundamental values and public morality are the basis of constitutional rights, critics argue, then whose idea of the good and the just should prevail when there is disagreement? Moreover, as Frederick Schauer

that unwritten higher law principles had constitutional status And ever since . . . the courts have openly proclaimed and enforced unwritten constitutional principles.”)

¹⁹⁴ See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 417 (1993); see also Lawrence G. Sager, *The In corrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990).

¹⁹⁵ Christopher L. Eisgruber & Lawrence G. Sager, *Good Constitutions and Bad Choices, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 147 (William N. Eskridge, Jr. & Sanford Levinson, eds. 1998).

¹⁹⁶ Sager, *Justice in Plain Clothes*, *supra* note 194, at 420.

¹⁹⁷ See *supra* Part IV.A.

¹⁹⁸ *Roe v. Wade*, 410 U.S. 113 (1973). Jack Balkin has described *Roe* as the Court’s “most controversial” decision, one that, “more than any other Supreme Court decision . . . has defined the constitutional jurisprudence and the constitutional debates of the modern era.” Jack M. Balkin, *Roe v. Wade: An Engine of Controversy, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION* 3 (Jack M. Balkin, ed. 2005).

¹⁹⁹ In the words of John C. Jeffries:

In no other case in modern times has a declaration of constitutional law been more ostentatiously nontextual. . . . Is the Constitution a legal document, to be read and interpreted like any other, or is it a charter for judicial construction of a just society? Should the Justices try to be lawyers or statesmen? . . . Opposition to *Roe* became a kind of loyalty oath for traditional interpretation, while support for *Roe* became the flagship of a vast movement embracing nontextual rights.

JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL JR.: A BIOGRAPHY 362 (2001).

has argued, “if any good moral argument is *eo ipso* a good constitutional argument, the text becomes superfluous.”²⁰⁰ This is the same critique generated in response to Tufi in Islamic jurisprudence, whose extreme *maslaha* theory apparently amounted to simply adding the phrase “unless *maslaha* says otherwise” to every divine text. In making *maslaha* the ultimate guide in all *ijtihad* reasoning, including readings of the text, Tufi’s proposal unsurprisingly incurred significant criticism for its failure to treat the text as sufficiently controlling juristic determinations of *maslaha*.²⁰¹

The argument is by now familiar. We have seen its manifestation in both Islamic and American discourses. Like the early Shafi’i textualists, those opposed to constitutional protection of unenumerated rights begin from the premise that without a textual anchor such legal reasoning ultimately constitutes nothing more than lawmaking by personal whim – the abandonment of principled decisionmaking and the acceptance of random human subjectivity. In the words of Robert Bork, “[w]here constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other.”²⁰² And it is not just textual literalists and originalists who have made this case. Consider John Hart Ely, a legal process theorist: “A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.”²⁰³

As we have seen in both the Islamic and American contexts, such

²⁰⁰ Frederick Schauer, *An Essay on Constitutional Language*, in LEVINSON & MAILLOUX, *supra* note 51, at 141. For a critique of theories that assert congruence between constitutional law and “correct” moral theory, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

²⁰¹ See *supra* notes 163-171 and accompanying text; BAGBY, *supra* note 126, at 171 (“Most Muslim jurists condemn [Tufi’s] views as a danger to the unity and the very existence of the Law—the very result [Tufi] was trying to avoid.”); see also ABOU EL FADL, *supra* note 8, at 77 n.113 (noting criticism of Tufi by his fellow jurists for proposing that “public interest could be an independent and sufficient source of law even with the existence of text that is on point on a particular issue,” and citing further references). His proposal also generated complaints that it could cause unpredictable and wholesale changes in the Law, not to mention chaos and the ultimate destruction of the Law itself, a result Tufi claimed he was actually trying to avoid. Tufi insisted that his proposal was a revitalization of a jurisprudence that was already in decay, bringing current relevancy to the rules through an integration of *maslaha* and the legal texts. See BAGBY, *supra* note 126, at 171. He was not able to convince his fellow jurists, but the reformist power of his theory gained an audience many generations later, as did that of the less radical but still insightfully innovative *maslaha* theorist, Shatibi.

²⁰² Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8-9 (1971). Justice Rehnquist agreed that the Court should not enforce “extraconstitutional principle[s],” those not firmly grounded in text and history, and cited the famous *Lochner* dissent from Justice Holmes in support. See Rehnquist, *supra* note 76, at 703.

²⁰³ John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 949 (1973).

“justice-seeking” philosophies operating outside the four corners of the supreme text attract significant opposition for their potential to allow decision-making according to the personal predilections of the jurist. The selection of a given value as a *maslaha* to be protected is, after all, essentially a value choice. As we have seen, the biggest resistance to the use of *maslaha* as a tool of Islamic lawmaking was directed at *maslaha mursala* – the idea of giving legal power to a *maslaha* value untethered to a textual basis. Originalists have made the same argument against appeals to values such as “human dignity,” “public morality,” and “justice” controlling constitutional interpretation with no grounding in the text or historical constitutional understanding. As contemporary Islamic law scholar Wael Hallaq has put it, “[t]o speak of these concepts without a methodology that can control the premises, conclusions and the lines of reasoning these concepts require is a highly relativistic venture.”²⁰⁴

But, we have also seen that this belief is not unanimous in either legal culture. The Malikis, for example, have never limited their jurisprudential inquiries to the authenticated source texts.²⁰⁵ For them, what is not explicitly in the textual record of God’s Law can be implied from other legitimate sources, such as the practice of the community of Medina, and, by extension, scholarly determinations of the public good (*maslaha*), inspired by their knowledge of the text and that community.²⁰⁶ But faced with real challenges from the textualists over how to control subjectivity, the supporters of *maslaha mursala* were “forced to wage an uphill battle in proving that the consideration of *maslahah* is not contradictory to the Law and has a place in legal reasoning.”²⁰⁷ In the continuing discourse between the early Shafi’is on

²⁰⁴ HALLAQ, *supra* note 100 at 231.

²⁰⁵ Recall that the Malikis have always relied on the extra-textual information of Medinan customary practice. *See supra* Part III.B. In fact, the Malikis insist that the historical record itself supports the use of *maslaha mursala*. *See* ABD-ALLAH, *supra* note 93, at 273-74 (describing early actions of Caliphs, perceived by Malikis to be actions of *maslaha mursala*). Interestingly, American “living constitutionalists” and “fundamental values” theorists have made the same argument, claiming historical support for nontextual principles as a basis for constitutional decisionmaking. *See, e.g.*, Grey, *supra* note 192, at 704. Neither the Shafi’is nor American originalists have been convinced. Shafi’is, for example, have simply rejected these readings of the Companions’ actions, suggesting other textually-connected explanations for these precedents. The Zahiris are even more irreverent in their attitude toward the authority of Companion actions, as reflected in Ibn Hazm’s statement, “these reports do not bind anyone.” KAMALI, *supra* note 46, at 364 (quoting Ibn Hazm).

²⁰⁶ *See* BAGBY, *supra* note 126, at 16-17 (“Supporters of *maslahah* . . . [have the position that] *maslahah* is a part of the Law, and as such has the right and ability to justify new rulings and interpret established rules.”).

²⁰⁷ *Id.* at 14 (“The positivistic orientation dominates classical legal theory to the detriment of *maslahah*. With its concern for utility, morality, justice, and the universal principles of the Law, *maslahah* is difficult to define precisely and too easily associated with the arbitrariness of personal opinion. As a result, *maslahah* does not easily fit into a legal theory that relishes the concrete and legitimizes only what the revealed texts legitimize.”).

the one hand, and the early Malikis on the other, the power of Shafi'i textualism maintained its force and had a tangible impact on whether and how *maslaha mursala* was ultimately accepted more broadly in Islamic legal theory. With the help of the *maqasid* theorists, a *maslaha mursala* could be accepted if it could be connected to a text, even if indirectly through its established purposes. This is similar to the defense staged by proponents of unenumerated rights and the living Constitution in American law: these rights and values are supported by the Constitutional text as a whole, even if not by a specific textual provision.²⁰⁸ It is the spirit of the text, said these jurists, that is being protected, and it is no less constitutional for lack of specific textual reference. The argument falls flat, of course, in front of originalist colleagues, just as the Maliki argument for *maslaha mursala* initially could not get early Shafi'i support. It is not until virtual unanimous consensus arose on a set of *maqasid* purposes for the *shari'a*, that the debate softened, for many *maslahas* can be connected to a *maqasid*, even if not a specific text. There has been no similar unanimity of fundamental purposes of the Constitution.

CONCLUSION

Richard Bulliet has recently written about the common roots of Islam and the West, commenting that "their confrontation today arises not from essential differences, but from a long and willful determination to deny their kinship."²⁰⁹ Bulliet has in mind historical and political similarities, but would likely agree that the kinship need not stop there. This article has highlighted another area of similarity: the nature of the legal discourses within these distinct legal cultures. We have identified and explored several methods of legal interpretation that have dominated jurisprudential debates in both Islamic and American law: literalism, historical understanding, and reference to underlying purpose. We have also seen how each interpretive method has been both attacked as a vehicle for the subjective arbitrary opinions of its jurists, and also defended as the best method of achieving textual fidelity. Each method represents a different answer to the common challenge extant in these two legal societies: how can human agents faithfully interpret and apply the text without inappropriately imposing their own personal opinions upon the law?

Our observations on how Muslim and American jurists have responded to this challenge have illustrated that there is a rather

²⁰⁸ See *supra* note 173; see Brennan, *supra* note 172, at 18.

²⁰⁹ RICHARD W. BULLIET, *THE CASE FOR ISLAMO-CHRISTIAN CIVILIZATION* vii (2004).

predictable range of methodological choices available to human interpreters undertaking this task while also maintaining legal authority in their society. Although there is much more to be gained with further study of these methodologies in their institutional and sociological contexts, the present limited study has nevertheless enabled a preliminary appreciation of the similarities of methodological discourse in Islamic and American jurisprudence. More specifically, it shows how one's conclusions about how well a method (or combination of methods) can control human subjectivity in the interpretive process largely depends ultimately upon how much and what kind of human discretion one can tolerate from society's legal authorities.

Moreover, this study has highlighted the fruitfulness of the comparison itself. While Islamic law and American law are generally portrayed as opposites, the remarkable methodological similarities explored here indicate that these two legal cultures may be, as Richard Bulliet suggests, more siblings than strangers. Moreover, many of the similarities between Islamic and American jurisprudence are themselves revealed by re-thinking our oppositional assumptions about these two legal cultures. For example, when Muslims advocate the superiority of Islamic law because it is grounded in divine revelation in contrast to the American Constitution created by fallible human beings, they conspicuously minimize not only the extent to which the Constitution functions as a supreme and almost infallible document in American law and culture, but also the extent to which human interpretation is responsible for the doctrinal contours of Qur'anic divine decrees. Similarly, when Americans refer to the arbitrariness of a Muslim judge's adjudication as opposite to the rigorous legal reasoning practiced by judges in the United States (as Justice Frankfurter did in a 1949 Supreme Court opinion²¹⁰), this begs the question of judicial discretion in American case law, and opens the door to legal realist-inspired critiques that common law adjudication is not directed by neutral rules itself.

As a specialist in both Islamic law and American constitutional law, I have become familiar with the mutual hierarchical positioning of these two legal cultures against each other, and I believe this tendency not only distracts their scholars from seeing their real similarities and differences, but also from learning something about themselves in the process of understanding the other. When I look at Islamic law and American law I see an obvious place for comparative study, yet one which is rarely taken seriously. More often, Islamic law is used as pejorative shorthand for something that American law is not. For

²¹⁰ *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) ("This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.").

example, Justice Scalia has recently used the phrase “*mullas of the west*” as an epithet against Living Constitutionalists because; in his mind, this methodology amounts to giving judges’ personal opinions the status of theocratic authority.²¹¹ Justice Scalia’s choice of phrase indicates that stereotypes about Islamic law are so woven into the fabric of American legal, social, and political conversation that they have become unquestioned backdrops to today’s public debates.

Yet, as we have seen here, the the legal discourses internal to Islamic jurisprudence show that it is no more monolithic than is American jurisprudence, and moreover, that both legal cultures have similarly struggled with basic rule of law tensions presented by a supreme text being interpreted by human agents. With an appreciation of the jurisprudential languages common to both legal cultures, and the similar jurisprudential discourses surrounding them, contrasts between “Islam” and the “West” become much more complex. Moreover, if the nature of their legal discourses exhibit as many similarities as they do differences, then the popular opposition of “East” and “West” must be reconfigured. The present study hopes to contribute to the foundation of a new sort of comparative study of Islamic and American law that takes this need to heart.

²¹¹ See Justice Antonin Scalia, speech at University of Friibourg, Switzerland (Mar. 8, 2006) available at www.bafweb.com/2006/03/09/5902.

