

## Review Essay

### What Doth It Profit? Pelikan's Parallels

*Interpreting the Bible and the Constitution.* By Jaroslav Pelikan, Yale University Press, 2004.

#### Reviewed by Steven D. Smith<sup>†</sup>

We have all read—or perhaps, alas, written—the kind of book that serves up provocative or even extravagant claims but offers little or no supporting evidence. But is the opposite also possible? Might someone write a book that carefully and methodically marshals impressive evidence in support of . . . almost nothing? And if so, how should we evaluate such a book? As useless, or worse—as a waste of the author's valuable time, and ours? Or as admirable—as the near perfect achievement of an academic ideal of agenda-free scholarship? Or maybe on some sort of evidence-to-claim-ratio criterion in which something close to zero in the second term will assure a very high ratio indeed?

These are odd questions, probably, but they are provoked by Jaroslav Pelikan's book comparing biblical and constitutional interpretation.<sup>1</sup> Such comparisons have been profitably undertaken before by constitutional scholars,<sup>2</sup> but it is safe to say that no one with Pelikan's formidable erudition in Christian doctrine and hermeneutics has ever attempted the task. It is safe to say this because in all likelihood there is no one else

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1. JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004).

2. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9–53 (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 *S. CAL. L. REV.* 551 (1985); Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 *J. CONTEMP. LEGAL ISSUES* 447 (1996).

with Pelikan's erudition in these fields. Over a period of decades he has established himself as a proven and superb scholar, and his unrivaled expertise fosters high hopes for this book. So, what of interest or value emerges from his scholarly comparisons?

It's hard to say. To be sure, Pelikan cautions us at the outset against false expectations. He concludes the first chapter by noting that the book "is not intended as a direct intervention in the fray of the current exegetical debates, whether biblical or constitutional."<sup>3</sup> But he also expresses the hope that the book "may be of some help and illumination also to those who stand in the tradition of the two centuries of interpreting American Scripture [i.e., the Constitution]."<sup>4</sup> By the end of this learned but puzzling and deeply frustrating book, though, it remains far from clear just what "help and illumination" Pelikan has provided. This review reflects on that question.

#### I. PELIKAN'S RICHLY IMPOVERISHED PRESENTATION

Pelikan's book is composed of four chapters. The first chapter explains that both the Bible and the Constitution have served as a "Great Code" or "Scripture" for a community—the Christian community,<sup>5</sup> the American Republic—that has treated the text as normative and authoritative. The chapter goes on to note a number of further parallels between biblical and constitutional interpretation. Chapter two presents still more parallels by discussing an array of common problems that interpreters in each tradition have faced: ambiguities, apparently conflicting textual provisions, clashing absolutes, the challenge of reconciling interpretations of an ancient text with evolving views in the community, and the founding text's silence about who should have final interpretive authority. Chapter three takes note of the conspicuous effort in each tradition to discover and return to the text's original meaning, and of the obstacles that have confronted such efforts. The final chapter, noting the fact of evolving interpretations in both the biblical and constitutional traditions, discusses some of the criteria to

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3. PELIKAN, *supra* note 1, at 37.

4. *Id.*

5. Pelikan notes the possible relevance of comparisons to scriptural interpretation in the other major religions "of the book," specifically Judaism and Islam, but largely limits his presentation to the area of his own expertise in Christian interpretation. *Id.* at 15–18.

which interpreters and critics have appealed in order to distinguish “between benign and malignant growth”<sup>6</sup> in doctrine.

In sum: Both the Bible and the Constitution have been regarded as authoritative texts; they have thus been subjected over the decades and centuries to interpretation. Interpretation (including efforts to ascertain original meaning) has encountered difficulties and has produced disagreements. Consequently, people in the biblical and constitutional traditions have had to try to figure out how to distinguish between valid and invalid interpretations.

Described in this way, Pelikan’s book may seem to be a deployment of massive learning for the purpose of informing us of what we all knew before we picked up the book in the first place. And in a sense that is what it does. So it is as if you went to hear the world’s most celebrated astronomer and were blessed with a lecture devoted to explaining that the stars are a long, long way away, that they are most readily visible to the naked eye in the nighttime, and that they are typically grouped together in patterns known as “constellations.”

To be sure, this description fails to convey the richness of the supporting material with which Pelikan develops and illustrates the book’s radically unprovocative claims. The observations about Christian hermeneutics are supported with citations to and illustrations from a multitude of sources and examples: the Bible itself, the Church fathers, and a host of creeds and confessions and pronouncements from the Orthodox, Catholic, and Protestant traditions and from the remotest reaches of Christian history up to the present. In case anyone doubted Pelikan’s mastery of the Christian corpus, even this small book should dispel any such doubts. The learning on the constitutional side of the comparison is less awe-inspiring, not surprisingly, but still respectable.

For some readers, this display of erudition may be enough to make the book rewarding: who cares whether any interesting or important insights emerge from the exercise? This same quality may strike other readers as tiresome or pedantic. And these more disgruntled readers might complain that the book promises—or at least hints at—a larger payoff. I have already noted Pelikan’s tentative proffer of “help and illumination.”<sup>7</sup> In addition, Pelikan suggests at the outset that he will be con-

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6. *Id.* at 135.

7. *See supra* notes 3–4 and accompanying text.

cerned with “the *proper* methods for interpreting” biblical and constitutional texts.<sup>8</sup> The remark might lead us to anticipate more reflection or analysis regarding what sort of interpretive methods are or are not “proper” or legitimate.

But by the end of the first chapter, the “proper” has already dropped out, and the book’s purpose has been framed in purely descriptive terms. “In one sense, therefore, the question of this book is very narrow: What are the means and methods by which official interpreters read their normative texts?”<sup>9</sup> The remainder of the book hews to that more modest agenda. It is for the most part descriptive, nonevaluative, and nonjudgmental. Pelikan hints at some of his own hermeneutical judgments, but he does not really declare them, much less explain and defend them.<sup>10</sup>

Even the final chapter on development of doctrine offers little to those who might actually be interested in the question of whether particular developments in doctrine are permissible interpretations of, as opposed to impositions on, the text. Here Pelikan reviews the seven criteria proposed by John Henry Newman for assessing such developments, but these criteria are more in the nature of highly conclusory statements of *what to think about* (or to argue about)<sup>11</sup> than of rules or guidelines that could help *resolve* such arguments. For example, Newman’s second criterion (continuity of principles) will already be entirely familiar to constitutional interpreters—who will also

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8. PELIKAN, *supra* note 1, at 2 (emphasis added).

9. *Id.* at 36.

10. Pelikan does show that the quest for original meaning encounters obstacles. But he does not explicitly conclude that these obstacles invalidate or discredit the idea that original meaning should be the touchstone for interpretation, and he does not infer from the difficulties that the object of interpretation should be something more like contemporary meaning (whatever that is). Nor should he. Such reasoning, though common enough, would be a non sequitur: if there are good reasons for treating original meaning as authoritative (a contested point, obviously), the difficulty of ascertaining that meaning should not be a sufficient reason for adopting an essentially different approach to interpretation. Imagine the police detective who announces, “I started out with the intention to discover and arrest the person *who actually committed the crime*, but since the evidence has turned out to be inadequate and inconclusive, I have had to alter my objective: my goal now is to arrest the person that *the public today would most like to see in jail.*”

11. Newman’s criteria for assessing interpretations include “preservation of its type; continuity of its principles; its power of assimilation; its logical sequence; anticipation of its future; conservative action upon its past; [and] its chronic vigor.” PELIKAN, *supra* note 1, at 124 (discussing Newman’s tests and the revision of those tests in his later work).

understand what asserting this criterion can and, more importantly, cannot do. That is, they will understand that for any live constitutional dispute—affirmative action, same-sex marriage, federalism—it is of little help to declare that we should adopt an interpretation that is continuous with principles discernible in the text and in past decisions. We already knew that—took it for granted, probably—and the dispute will be about which among the clashing interpretations best succeeds in maintaining such continuity.

At times Pelikan comes close to acknowledging that the development criteria are of little use on the level of actual application. Thus, he observes that although Newman initially held out his seven criteria as “tests,” he later and more modestly redescribed them as “notes” or “tokens.”<sup>12</sup> And Pelikan points out instances in Christian history—debates over the use of icons and images that divided Eastern Christians in the eighth and ninth centuries and later split Catholics and Protestants<sup>13</sup> and the Filioque debate<sup>14</sup> that was central to the rupture between Western and Eastern Orthodox Christianity—in which the same criteria later articulated by Newman were claimed and cited by contending parties on both sides of the issues (just as they are routinely enlisted by opposing sides in American constitutional debates).

In sum, it seems that Pelikan has provided us with a wealth of data, expertly retrieved and organized, but precious little “illumination.” So the margins in my copy of his work are filled with “And so . . . ?” and “Where is this going?” The learning is impressive. But what’s the point?

Perhaps this reaction is unfair. After all, what sort of illumination might we reasonably expect to issue from this sort of comparison? Are there interesting questions on which we might reasonably expect Pelikan’s undertaking to shed some light?

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12. *Id.* (citing to JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 206 (2d ed. 1989) (1878)).

13. *Id.* at 139. For more detailed accounts of these controversies, see CARLOS M.N. EIRE, WAR AGAINST THE IDOLS: THE REFORMATION OF WORSHIP FROM ERASMUS TO CALVIN (1986); 2 JAROSLAV PELIKAN, THE CHRISTIAN TRADITION: A HISTORY OF THE DEVELOPMENT OF DOCTRINE 91–145 (1974).

14. PELIKAN, *supra* note 1, at 143. The disagreement was over a question that, although perhaps alien to most modern sensibilities, was fiercely disputed in centuries past: should the Holy Spirit be said to proceed from the Father alone or from the Father and the Son? For a more detailed account, see PELIKAN, *supra* note 13, at 183–98.

## II. VITAL QUESTIONS

Well, . . . yes. Of course, no book would be able to address *all* of the questions it touches on; we are satisfied if a book advances our understanding of *some* of the issues it raises. Nonetheless, there are questions that Pelikan's discussion might naturally lead us to ask—and to expect from him some notice and comment.

For example, there are what we might call *explanatory* questions. The recognition of similarities—in persons, practices, cultures—often provokes such questions. Suppose we observe, say, similar religious practices in ancient Greece and ancient Crete, or in ancient Egypt and pre-Columbian America. Or we notice similar ideas and phrases in, say, a European poet and an American playwright. Such observations will immediately provoke a desire for an explanation. Are the similarities mere coincidence? Or is there a causal connection—some sort of historical influence, for example?<sup>15</sup> If so, which way did it run? Who influenced whom? And how did this influence occur? Perhaps the similarities are neither coincidental nor the result of actual historical influence; maybe they reflect the common logical outcome of some feature or function common to both of the things being compared, or the natural and hence parallel response to some common question or challenge. Or maybe humans are just hard-wired to behave in this way?

Perceived similarities typically and naturally prompt us to wonder about such questions.<sup>16</sup> In short, in a world in which much is random, unexpected similarities call out for some sort of explanation.

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15. Legal historians, for example, routinely debate such questions. *Cf.* S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 1 (2003) (noting that “the influence of Roman law upon English law . . . has been a perennial topic among English legal historians”).

16. Both Christian and constitutional scholarship is filled with such discussions. Scholars of Christianity debate, for example, what influences affected the writing of the various early Gospels and what influence they had on each other. Was the Gospel of Mark written first, and did the authors of the other Gospels draw on it as a source? And so forth. *See, e.g.*, GRAHAM N. STANTON, THE GOSPELS AND JESUS 34–138 (1989) (offering an in-depth examination of the Four Gospels). Scholars of the early American Republic debate the influence of various thinkers and sources—such as Locke, Montesquieu, the Bible, early writers in the classical republican tradition, and Greek and Roman authors—on the Founders and the Constitution. *See, e.g.*, VITAL REMNANTS: AMERICA'S FOUNDING AND THE WESTERN TRADITION (Gary L. Gregg II ed., 1999). These debates by now virtually could fill libraries.

A different kind of question frequently provoked by the observation of similarities—and a question that may be underscored by proffered explanations of such similarities—concerns what we might call *efficacy*, or perhaps *justification*. Suppose we observe that legal systems in the High Middle Ages employed some of the same techniques of legal reasoning that had been used centuries earlier in Roman law. And suppose further that we plausibly explain these similarities by identifying historical influences: legal scholars in Bologna rediscovered some older Roman texts, for example.<sup>17</sup> The observation and explanation may well prompt us to ask whether these techniques, native to the Roman world, were equally compatible with medieval needs and assumptions. Was this a fruitful importation or an incongruous and perhaps unsettling one?<sup>18</sup>

These are questions that one might expect Pelikan's study to lead him to address. How do we explain the similarities between Christian and constitutional interpretation? Have constitutional interpreters consciously or unconsciously copied the hermeneutical techniques that Christian exegetes had been developing in previous centuries? Or have interpreters in the different traditions independently arrived at the same kinds of questions and techniques? If so, how do we explain such parallels? And are interpretive techniques that grow out of Christian assumptions about scripture and the world equally efficacious or justified in the ostensibly more secular enterprise of constitutional interpretation?

The mass of hermeneutical similarities that Pelikan surveys virtually thrust such questions upon us. And yet, somehow, Pelikan deftly avoids noticing them. Nor does he dwell on the subtler questions that we might think of as existential.<sup>19</sup> What sort of creatures are we, such that we evidently are

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17. See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

18. Christians have long debated such questions in considering, for example, the relations between the earliest Christian teachings, growing out of the Jewish world, and the Greek thought into which Christian ideas were soon translated and from which Christian doctrines and formulations were borrowed. Did Greek philosophy corrupt Christianity or, conversely, allow for the happy, faithful development of truths that had merely been implicit in the earliest Christian thought? See, e.g., 1 JAROSLAV PELIKAN, *THE CHRISTIAN TRADITION: A HISTORY OF THE DEVELOPMENT OF DOCTRINE* 11–55 (1971); WILLIAM C. PLACHER, *A HISTORY OF CHRISTIAN THEOLOGY: AN INTRODUCTION* 55–67 (1983).

19. Perhaps the seminal modern reflection on such questions is HANS-GEORG GADAMER, *TRUTH AND METHOD* (2d rev. ed. 1999).

driven by some sort of need to be always “interpreting”? After all, it is conceivable that we could live our lives in a more forward-looking and pragmatic way, making decisions mostly on the basis of calculations about what choices will produce favorable consequences. There are those who point out the obvious good sense in this pragmatic approach.<sup>20</sup> And yet it seems that whether as religious believers or as citizens of a constitutional republic, on many of the most crucial matters we do something entirely different and arguably quite bizarre: we purport to make our most momentous decisions based on what some ancient text is thought obscurely to command. Why do we do this? How does this practice—this obsessive deference to a sometimes virtually inscrutable past—make sense?

And then there are what we might call *presuppositional* questions. How, or on what presuppositions, is “interpretation” even possible? We say of some nebulous passage in an old text, such as Jesus’ more esoteric parables or the Fourteenth Amendment: “The people who wrote these words never consciously imagined that they meant X, and the unacculturated reader today probably would be surprised to learn that they mean X; nonetheless, through careful and conscientious ‘interpretation,’ we now affirm that the passage means X. We’re not just imposing our ideas on the text: like it or not, *that’s what it really means*.”<sup>21</sup> We say these sorts of things all the time in religion and in law: Christians say such things with respect to Trinitarian, Christological, and eschatological doctrines; and constitutionalists say them with respect to the right to abortion and the doctrine against sex discrimination. But how is this exercise possible and on what presuppositions? What could it even mean to say that the text actually means X even if the authors did not intend this and the average reader would never guess it?

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20. See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); see also RICHARD A. POSNER, *OVERCOMING LAW* (1995).

21. Describing classical practices of interpreting Hebrew scripture, James Kugel observes that interpreters treated the text as “fundamentally cryptic or esoteric.” JAMES L. KUGEL, *THE BIBLE AS IT WAS* 18 (1997). Thus, “all interpreters are fond of maintaining that although Scripture may appear to be saying X, what it really means is Y, or that while Y is not openly said by Scripture, it is somehow implied or hinted at in X.” *Id.* But Kugel notices the oddity of this practice: “it is hardly a natural thing . . . . Whether we are reading a history book or a newspaper editorial or a rousing hymn, we generally assume that what the words seem to say is what they mean to say.” *Id.*



It might well be that Christian interpreters could give different answers to these questions than constitutional interpreters could—and more plausible answers, at least on their own premises. If you believe that in some sense the real author of a sacred text was not the human scribe who penned the words but rather God, then it is not so odd to suppose that the text might contain deeper meanings not apparent to the casually uninspired reader or even to the historical and human “author.”<sup>22</sup> This has indeed been the assumption underlying much Christian biblical interpretation. Pelikan notes this point in passing but declines to explore its implications.<sup>23</sup> Conversely, without the assumption of more than human authorship, the search for hidden, unanticipated meanings seems much more curious.<sup>24</sup>

It is natural to raise such questions—natural and potentially profitable. Reflecting on them may help us achieve a deeper understanding of the similarities we initially noticed. And reflection may lift those similarities above the level of raw data and help to deepen our understanding not only of the specific subject we set out to study, but sometimes even of the human situation, or the cosmos, or whatever it is that drives scholars and students to want to spend their lives studying things like history or hermeneutics in the first place.

In sum, the pervasiveness of interpretation provides material for extensive reflection<sup>25</sup>—the more so, one might think, when we see the same interpretive patterns emerging in apparently independent enterprises with different goals and presuppositions. Indeed, Pelikan starts off his comparisons with a nicely crafted statement that not only serves to introduce the similarities between Christian and constitutional interpretation, but that also seems well calculated to provoke the very

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22. Indeed, you might believe, as Aquinas explained, that God is the “author” not only of the words contained in scripture but of the events themselves narrated in those words; that assumption would provide a further basis for finding deeper meanings in the text. See WERNER G. JEANROND, *THEOLOGICAL HERMENEUTICS: DEVELOPMENT AND SIGNIFICANCE* 28–29 (1991).

23. *E.g.*, PELIKAN, *supra* note 1, at 105.

24. I have discussed this incongruity at length elsewhere. See Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583 (1993); Steven D. Smith, *Law as a Religious Enterprise: Legal Interpretation and Scriptural Interpretation*, in 4 *LAW AND RELIGION: CURRENT LEGAL ISSUES* 2001, at 83 (Richard O’Dair & Andrew Lewis eds., 2001).

25. For an outstanding example that focuses on law, see JOSEPH VINING, *FROM NEWTON’S SLEEP* (1995).

kinds of existential and presuppositional questions that I have just noticed—the questions of “What are we?” and “What for?” and “How is this possible?”

There is a familiar and venerable text, centuries old by now, which is the product of multiple authorship (although even after generations of historical research and literary analysis we are not always in a position to determine with absolute precision just who wrote, or rewrote, which parts of it). The text was originally composed under very specific circumstances, which modern historical scholarship has done much to illumine. But far transcending the history of its original composition is its official standing ever since, for it has been adopted by a community as its normative Great Code, and therefore as occupying a position that in some profound sense stands beyond its own history: in Ralph Waldo Emerson’s fighting words of 1838, “not spake but speaketh!” That normative status is based on the assumption that it can be applied to any and all of the radically changed situations of later times, many of which the writers who originally framed it could not themselves conceivably have foreseen. Every official action of the community thus has had the obligation of conforming to it, or any rate of not violating it, and of demonstrating that conformity when challenged to do so; and members of the community are under the strictest possible obligation to obey it. Therefore its words and phrases have for centuries called forth meticulous and sophisticated—and sometimes painfully convoluted—interpretation, as well as continual reinterpretation. By now, this interpretation has grown into a massive corpus of authoritative, if often controversial, commentary. Yet the text does not itself prescribe the method of such interpretation; nor does it specifically identify the authoritative agency that bears the ultimate responsibility for determining the binding interpretation, much less for revising it.<sup>26</sup>

Pelikan observes, plausibly enough, that both the Bible and the Constitution fit this description of a “familiar and venerable text,”<sup>27</sup> and he proceeds with his presentation of the similarities between biblical and constitutional interpretation. He does not remark on the evident strangeness of what he has just described. Yet, the passage sketches a practice that, except to those so immersed in it that the deeper questions disappear from view, cries out for some sort of explanatory or justifying account. In this respect, it seems like descriptions of, say, older forms of trial by fire or water (convicting or acquitting someone of a crime by seeing whether they float when thrown into the pond) or augury (deciding whether to go to war by purporting to read the entrails of birds).<sup>28</sup> “What sort of people were these?”

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26. PELIKAN, *supra* note 1, at 4–5.

27. *Id.* at 6–7.

28. See, e.g., J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 4–7 (3d ed. 1990) (explaining the procedure and methods of proof associated

we inevitably ask. “What could they have been thinking? On what assumptions could these practices have made sense?”

Pelikan has surely reflected on such questions, but he seems coy about sharing his reflections with us. There is irony here. “What does this *mean*?” (or perhaps “What does this mean *for us*?”) is the hermeneutical question, but while Pelikan diligently describes the ways in which other people have pursued that question in their own fields, he seems unwilling to pose the question for his own materials and project. One who did not know better might almost suppose that he is afflicted with a severe lack of curiosity, like a diligent but dull student who can dutifully line up the columns in response to a “compare and contrast” question on an exam without ever wondering why the comparison might be worth making.

And yet, this analogy cannot be apt. A lack of curiosity does not lead someone to devote decades of his life to acquiring a vast knowledge of a subject that carries no obvious or immediate practical payoff. Far from being a dull student, Pelikan is a scholarly paragon, and in other work on Christian doctrine that does not cross disciplinary lines, Pelikan does pay more attention to some of the presuppositional questions noted here.<sup>29</sup>

So it seems there must be some other explanation for his reticence in this book. What might it be? I have already noted, more than once, that Pelikan is an exemplary scholar. Might his very scholarly excellence help account for what comes across as a disappointing lack of curiosity? The question calls for some observations about the academic environment in which Pelikan has lived his scholarly life.

### III. THE CONTAINMENT STRATEGY

We understand in particular social settings, if we have been properly raised, that there are certain questions that irresistibly flit through our minds but that we must refrain from voicing. (“How much weight have you gained since I saw you last year?” “How long did you say you’d been married, Aunt Prudence, when you had your first baby?”) The same is true of scholarly settings; the ethos or etiquette of various disciplines may frown on particular inquiries that the uninitiated might

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with trial by ordeal, as well as its intellectual presuppositions).

29. See, e.g., JAROSLAV PELIKAN, *CREDO: HISTORICAL AND THEOLOGICAL GUIDE TO CREEDS AND CONFESSIONS OF FAITH IN THE CHRISTIAN TRADITION* 142–57 (2003).

regard as obvious and important. Indeed, in an era of unparalleled academic freedom, modern scholarship often exhibits a remarkable timidity with respect to fundamental and obvious questions.

Suppose, for example, that you are a professional historian writing about some controversial religious figure, like Mohammed or Joseph Smith, or about a controversial religion, such as Islam or Mormonism. The layperson might naturally think that the most urgent questions to address, and if possible to answer, would be questions of truth. Did these figures, accepted by some as prophets, in fact experience the revelations they claimed to have received? And are the religions they founded actually true? At one remove, the layperson might be interested in questions of coherence or integrity. Are the belief systems associated with these religions harmonious and internally consistent? Or about value: do these religions promote a good way of life? Aren't these the obvious questions and the questions that prompt human beings to care about such subjects in the first place?

As a respectable scholar with a university job, though, you may feel constrained to steer around these kinds of vital questions, if indeed it even occurred to you to ask them at all. Such constraints may arise from a variety of rationales or concerns. Some are basically, or at least initially, epistemic. History is not a hard science, perhaps, but it has absorbed some of the scientific aspiration to stick to what is knowable or verifiable with the use of largely empirical methods. These epistemic constraints may harden into more fundamental philosophical commitments—into the naturalistic assumption, for example, that what cannot be observed empirically is not real. So the misguided historian who innocently tries to decide whether the prophet really saw angels has not merely passed beyond what is knowable; he has lapsed into silliness, into “metaphysical nonsense.”

Even scholars who do not hold this reductionist worldview, however, may refrain from pressing hard questions for reasons that are diplomatic or political or perhaps ethical. After all, in writing about Mohammed or Joseph Smith, or Islam or Mormonism, you could hardly take a stand on questions of religious truth or value without alienating a large section of your audience. And if questions of truth or integrity or value are raised and treated as real questions, then there is the possibility that the answer might turn out to be in the negative. Some people—

and not just the adherents of the belief systems in questions—might find that sort of conclusion to be insufficiently respectful.

And yet controversial claims of truth or value may be absolutely central to the subject that the scholar has set out to study. So how to avoid passing judgment on such claims? A familiar response, common in history and the social sciences, employs what we can call the self-contained subject strategy or, for short, the containment strategy. A scholar may thus stake out what the subject of study is and then limit his or her investigations to questions that seem “internal” to the subject. The scholar conscientiously declines to pursue other questions that are regarded as more “external” to the subject, and questions of ultimate truth or value can be shunted into this external category.

Using this strategy, you, as a professional historian, might simply describe what some person or movement of persons said or believed. Or perhaps you explore some of the connections among and the implications of such beliefs, while delicately omitting to speak to the question of whether the beliefs are true or justified in any more ultimate sense. Those are questions of theology, you might say, or perhaps, of philosophy; at any rate, they are outside your jurisdiction. Joseph Smith said an angel appeared to him and showed him some gold plates, and his followers believed this. These things you might say with confidence, and so there is no need for you, as a historian, to pass judgment on whether these beliefs were true. Using this deferential approach, you might limit your study to questions subject to empirical inquiry, and you might respectfully address both believers and nonbelievers without insulting or offending them.<sup>30</sup>

The self-contained subject approach is hardly confined to history or anthropology. In more theoretical disciplines such as

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30. My tentative view is that although this approach is both common and appealing, and indeed may seem to be the only alternative open to the secular historian, it ultimately does not work. Even the secular historian uninterested in deeper questions of religious truth will still need to try to understand the character of the figures she studies. Was the self-proclaimed prophet honest, cleverly fraudulent, or delusional? But these questions of character cannot be neatly separated from the truth of the claims made. In addition, the historian will eventually try not merely to report what happened but to offer explanations of what happened. However, religious explanations (“It happened because God so ordained” or “He did it because God told him to”) and secular explanations (economic, political, and so forth) are likely to diverge, and the plausibility of these explanations cannot be divorced from the question of the truth of the religious claims.

ethics, religion, and legal theory, variations on the same strategy are subtly or conspicuously adopted for some of the same reasons, and perhaps for a deeper reason as well—one that we might describe as “fear of nihilism.”

Thus, in these disciplines, there is the same science-inspired desire to stay within the realm of what humans can confidently know. Hence the aversion of many philosophers to old-style metaphysical speculation, in favor of the close scrutinizing of language and the detailed analysis of carefully delimited concepts. There may be the same censoriously naturalistic worldview lurking in the background and shaping what the academy regards as acceptable and unacceptable scholarship. Scholars may also be driven by the same desire to treat their subject matter—and their scholarly interlocutors and audience—with respect, and thus not to challenge or undermine anyone’s most cherished or constitutive beliefs.

But beyond these concerns, scholars may be afflicted by the premonition that if they press too hard, if they ask the larger questions about ultimate truth or justification or value, they are likely to discover that the practices we are interested in—and also, more importantly, personally engaged in and committed to—are grounded in . . . nothing. One way to avoid this risk is to banish the deeper questions. We might do this by treating some discursive practice, such as religion, ethics, or law, as self-contained and elemental—as itself the proper and sufficient object of study and reflection—without bluntly asking whether its assumptions are correct representations of anything outside the practice or discourse.

Thus, Norman Malcolm proposes just this strategy for protecting religion against skeptical assaults. Religion is a “language-game” and “a form of life; it is language embedded in action.”<sup>31</sup> Hence, it does not depend on the existence of any independent being who is God.<sup>32</sup> The same strategy is apparent in a good deal of modern metaethical writing. A recurring concern, sometimes described as Nietzschean, worries that by denying the existence of transcendence or of any built-in purpose in the cosmos, modern naturalistic worldviews have cut the

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31. Norman Malcolm, *The Groundlessness of Belief*, in FAITH 193, 203 (Terence Penelhum ed., 1989).

32. *Id.* (calling the “notion of belief in the existence of God which is thought to be distinct from belief in God . . . an artificial construction of philosophy”).

ground out from under our ethical beliefs and commitments.<sup>33</sup> In some thinkers, this diagnosis can lead to a kind of dark desperation.<sup>34</sup> One tempting response to this concern is simply to conflate morality with moral discourse and practice. It can hardly be denied, after all, that we talk about ethical questions and announce ethical judgments. Whatever doubts some may have about ethics, ethical discourse is certainly real. So philosophers can occupy themselves in studying the intricate workings of this discourse, considering questions internal to the discourse and treating more external questions as inadmissible, thereby deflecting fears of ethical nihilism. To the old-fashioned (or perhaps the hard-headed) this strategy may seem like a kind of evasion,<sup>35</sup> but its appeal is readily understandable.

In law, besieged in modern times by varieties of skepticism, “legal realism,” and critical subversion, this strategic response may be inviting. Thus, the self-contained subject approach is boldly embraced and advocated in the theorizing of Dennis Patterson<sup>36</sup> and Philip Bobbitt,<sup>37</sup> for whom legal discourse is its own world with its own internal truth, so to speak, and is not representative of anything outside itself. “[L]egal propositions are not propositions about the world,” Patterson declares.<sup>38</sup> “[L]aw is a practice of argument.”<sup>39</sup> “There is only the practice and nothing more.”<sup>40</sup>

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33. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984) (offering a powerful and much-discussed argument to this effect); see also RICHARD JOYCE, *THE MYTH OF MORALITY* (2001).

34. For two expressions of this attitude, one from a philosopher and the other from a law professor, see W.T. STACE, *MAN AGAINST DARKNESS AND OTHER ESSAYS* 10 (1967) and Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979).

35. See JOHN M. RIST, *REAL ETHICS: RECONSIDERING THE FOUNDATIONS OF MORALITY* (2002). Rist contends that in fact there are only two coherent metaethical positions—a metaphysical moral realism that most modern theorists eschew, and nihilism. *Id.* at 38–44. “[A]ll other possibilities [are] good-natured muddles to be collapsed by the clear-headed into Thrasymacheanism.” *Id.* at 44. Positions that purport to be neither objectivist nor nihilist are maintained only through “deception and self-deception (including outright lying).” *Id.* at 37; see also ERNEST GELLNER, *POSTMODERNISM, REASON AND RELIGION* 49–50 (1992).

36. See, e.g., DENNIS PATTERSON, *LAW AND TRUTH* (1996).

37. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

38. PATTERSON, *supra* note 36, at 135 (explaining Bobbitt’s view).

39. *Id.* at 181.

40. *Id.* at 142. I discuss and criticize this view in STEVEN D. SMITH, *LAW’S QUANDARY* 70–74 (2004).

A more central and influential instance in law, although a complicated one that I cannot elaborate on here, is found in H.L.A. Hart's self-enclosing explanation of legal authority. It asserts, basically, that the "rule of recognition" on which a system of law depends is authoritative if and because legal officials regard it as authoritative.<sup>41</sup> A similar containment strategy is discernible, arguably, in the efforts of Hart's long-time academic antagonist, Ronald Dworkin, to defeat skeptical challenges to law and morality. In essence, Dworkin divides skeptical claims into "internal" and "external" varieties; he then tries to deflect or deconstruct the "external" claims, so that the important or viable challenges are necessarily "internal" in nature.<sup>42</sup> But it is the nature of internal claims that they assume or accept the very legal or moral discourse that they seemed to challenge, so that discourse becomes insulated against the most serious and sweeping challenges by being elevated into a self-contained system.

In sum, for an array of reasons epistemic, political, and ethical, and sometimes as a defense against fears of nihilism or emptiness, modern scholars often adopt the strategy of treating some movement, discourse, or practice as self-grounding, self-validating, or sufficient unto itself. This strategy operates to dismiss, as pointless or inapt, questions about deeper meaning, truth, or justification. Many of the inquiries that we might naturally be tempted to make are thus ruled out of order. What is the point of wondering about the truth of a discourse that constitutes its own truth? And why ask whether there is any justification for a practice that is self-justifying? In this vein, Patterson approvingly summarizes Philip Bobbitt's view of constitutional law: "The key is to see that the practice of judicial review—or, more broadly, constitutional law—requires no justification . . . . Law is not a theory: it is a practice . . . ."<sup>43</sup> Conse-

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41. See H.L.A. HART, *THE CONCEPT OF LAW* 100–17 (2d ed. 1994). Perhaps not coincidentally, Pelikan quietly assumes a somewhat similar premise in accounting for the authority of Christian and American Scripture. He suggests that the Bible and the Constitution are authoritative because Christian and constitutional communities accept them as such. See PELIKAN, *supra* note 1, at 8, 22. Of course, the members of those religious and constitutional communities might object that this characterization gets things exactly backwards: the texts are not authoritative because they are accepted, but rather are accepted because they are authoritative.

42. See RONALD DWORKIN, *LAW'S EMPIRE* 76–85 (1986); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (1996). I thank Larry Alexander for pointing out this feature of Dworkin's theorizing.

43. PATTERSON, *supra* note 36, at 136 (referring to Philip Bobbitt's views



quently, “there simply is nothing more for ‘philosophy’ to do than describe accurately the *practice* of constitutional argument, for that practice is constitutional law.”<sup>44</sup>

This last assertion provides the perfect segue back to Pelikan’s own treatment of constitutional interpretation. In this view, my disappointment with Pelikan’s book for being merely learnedly descriptive while failing to reflect on the interesting attendant questions would be unfair and profoundly misguided. That is, if “there is nothing more for ‘philosophy’ to do than describe accurately the practice of constitutional argument,” then it may be that Pelikan has done the only thing that sensibly can be done. “This is what constitutional interpreters do,” the sage explains. “Maybe so,” the naive critic concedes, “but *why*? It all seems so strange. How does this practice *make sense*?” “Those questions are misconceived,” the sage gravely replies. “I have told you what constitutional interpreters do. That is all that need be said—all that can be said.”

Indeed, it seems that Pelikan’s approach is wholly consistent with the containment strategy evident in so much modern scholarship; his book is virtually a paradigm case. Exactly what motivates his resort to that strategy is something that I cannot—and perhaps even he could not—know with any certainty. But it seems plausible to suppose that Pelikan may have adopted that strategy for the same kinds of reasons we have noticed already. There is security in merely describing what constitutional and biblical interpreters have done. To go further and theorize about why they have done these things, or about whether their practices are justified, would be epistemically risky and there would be a real risk of giving offense. It might turn out, for example, that hermeneutical techniques that make sense on Christian assumptions—about God being the real author of scripture or about the Holy Spirit operating in a developing Christian tradition—make no sense at all on the secular assumptions that govern the constitutional enterprise.<sup>45</sup>

That conclusion might not merely offend; it might be subversive, suggesting, for example, that a good deal of what the modern Supreme Court says as it goes about striking down

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as expressed in his work, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION*, *supra* note 37).

44. *Id.* at 136 n.39.

45. For a discussion of the development and use of hermeneutical techniques in theology, see generally JEANROND, *supra* note 22.

laws, traditional institutions, and practices is a sort of irrational idolatry disguising an elitist exercise of power. But by now we take the Court's behavior for granted; in some sense, we may even depend upon it. Our world would be upset if that practice were shown to be irrational or, as we say, "illegitimate." So it is understandable that an eminent and respected scholar—a Yale man, no less—would be loathe to go down a road that just might culminate in such distressing conclusions.

### CONCLUSION

Jaroslav Pelikan has given us a characteristically erudite book. But readers may be pardoned for regretting that while surveying the hermeneutical methods that Christians and constitutionalists have adopted, Pelikan has refrained from posing the hermeneutical question—what does this *mean?*—with respect to the numerous parallels he presents.

I have suggested in this Review that what might appear to be a remarkable failure of curiosity is better explained as the application of a containment strategy familiar in much modern scholarship. Although the appeal of that strategy is understandable, the approach is also a costly one. It aims to provide a modest but epistemically secure understanding of a given practice. But since the practitioners themselves—the religious believers, the people who engage in moral discourse, and the Christian and constitutional interpreters—do not typically understand their practice as self-contained and self-sufficient, the strategy risks providing a systematically skewed account of its subject matter. The self-contained subject strategy is especially problematic with respect to the "compare and contrast" sort of study that Pelikan is engaged in here, because if the practices are actually self-contained, it becomes unclear how they can intelligibly or profitably be compared.

Perhaps most importantly, as this Review has discussed at length, the containment strategy may prevent an eminent scholar from addressing (and from sharing his wisdom concerning) some of the most important questions that likely motivated both the scholar and the readers to take an interest in the subject in the first place. So the reaction may be one that attends some of the most impressive modern scholarship: "A remarkable achievement. Oh, and by the way, . . . why should anyone care?"