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INTERPRETING SCRIPTURE/INTERPRETING LAW

*Frank S. Ravitch**

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TABLE OF CONTENTS

INTRODUCTION.....	377
I. DRIFTING UNREFLECTIVELY THROUGH LANGUAGE AND TIME: THE JOYS OF DOGMATISM	378
II. TAKING THE HERMENEUTIC TURN	381
III. CONCLUDING THOUGHTS: THE FAILURE OF DOGMATIC METHODOLOGIES IN CONSTITUTIONAL AND SCRIPTURAL INTERPRETATION	383

INTRODUCTION

Scholars have frequently noted the similarities between interpreting scripture and interpreting law, especially interpreting a constitution.¹ There are, of course, significant differences as well. The field of “biblical” hermeneutics—theories of interpretation—has a long history, as does the field of legal hermeneutics. Moreover, much has been written on the relationship between religious interpretation and legal interpretation.²

This Essay is not meant to provide even a basic overview of these rich and diverse fields of inquiry. Rather, the focus is on some of the vexing problems facing those who utilize what this Essay refers to as “dogmatic” approaches to interpreting religion or law.³ The focus here will be on biblical interpretation and constitutional interpretation. Specifically, I will compare biblical literalism with textualism and originalism. As will be seen,

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1. Some examples of excellent articles addressing this include, Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Howard Lesnick, *The Consciousness of Religion and the Consciousness of Law, With Some Implications for Dialogue*, 8 U. PA. J. CONST. L. 335 (2006); 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); see also SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (comparing religious and constitutional interpretation in the context of a broader discussion—“civil religion”).

2. See *supra* note 1 and accompanying text; *infra* Parts I and III.

3. See *infra* Part I.

these approaches suffer from problems of translation both figuratively and literally (in the case of biblical literalism in the United States).

I. DRIFTING UNREFLECTIVELY THROUGH LANGUAGE AND TIME: THE JOYS OF DOGMATISM

Biblical literalism is highly problematic unless one reads ancient Hebrew (old testament), Greek, and/or Aramaic (new testament). Claiming to take the words of the bible literally without being fluent in these languages is like claiming to take every word of a work of complex Greek philosophy literally without understanding Greek. Translations are not perfect even when translators use their best efforts. Some translations, such as the King James Bible, are even more problematic because they also served a political function.⁴

Even if one could literally translate from one language into another without losing, changing, or augmenting meaning, the problems of cultural and historical shifts remain.⁵ When one claims to take the words of the bible literally, one not only ignores the problem of translation from language to language, but also the problem of *dasein* (being in the world).⁶ We are the products of our traditions and cultural embeddedness.⁷ When we try to understand historical texts we tend to bring them forward to our time and/or attempt to put ourselves back into the period when they were written.⁸ Yet, we did not live in that time or culture, and it is hard to escape our horizon (view of the world) when we engage with the text.⁹ Therefore, we may fail to consider accurately what the words meant in the culture and time when they were written.¹⁰

Of course, many theologians have long recognized this and many faiths are not literalist in the sense of taking every word of holy texts to be literally true without the need for interpretation.¹¹ These theologians understand that even literalists are interpreting. Literalists sometimes don't realize or acknowledge that they are doing so, but they cannot escape interpret-

4. See BENSON BOBRICK, *WIDE AS THE WATERS: THE STORY OF THE ENGLISH BIBLE AND THE REVOLUTION IT INSPIRED* (2001).

5. See *infra* Part II.

6. HANS-GEORG GADAMER, *TRUTH AND METHOD* 257-64 (Joel Weinsheimer & Donald G. Marshall trans., Continuum 2d rev. ed. 1999) (2003) [hereinafter GADAMER, *TRUTH AND METHOD*].

7. *Id.*

8. FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* 2-6, 9-11, 81-82 (2007).

9. *Id.* at 9-11, 81-82.

10. *Id.* at 2-6, 9-11, 81-82.

11. In fact, the number of faiths and denominations that acknowledge interpretation occurs in understanding and applying religious texts far outnumber those that do not.

ing holy texts (or interpreting generally).¹² One way to address this is the recognition by some Protestant theologians that if one is sufficiently connected to Jesus one can understand the teaching in the bible despite these linguistic, cultural and historical voids.¹³ The problem here is that many who claim to be sufficiently connected to Jesus and to interpret the text literally disagree with each other as to its meaning. There is no Archimedean point from which we can say, from outside a given tradition, that person X has the real Jesus in her heart and therefore her understanding is the correct one.¹⁴

Many religions and religious individuals understand this and eschew biblical literalism in favor of more complex biblical hermeneutics (theories of interpretation). These religions generally take holy texts quite seriously, but they understand that interpretation is part of understanding any text. Moreover, some of these faiths are especially wary of human claims to take the words of holy texts literally, given that these texts are generally considered to have been authored by, or inspired by, the divine. This raises obvious problems with assuming, or even understanding, what we might call the intent of the framer. These faiths take the task of interpretation seriously, and methodically try to understand holy texts.¹⁵ Whether they are correct in their interpretations is irrelevant to the present discussion. The key is that they understand that texts often need to be interpreted and that to do so one may need linguistic skills and an awareness of the problems of translating across time and cultures.¹⁶

Interestingly, in the realm of constitutional interpretation, strict textualists and hard originalists have a lot in common with biblical literalists. A number of scholars and judges have noted the problems inherent in strict textualism. Except in the easiest cases—cases where the constitutional text is not subject to more than one interpretation *and* where the text can be easily applied to the facts of the case in dispute—strict textualism is impossible. Some would say it is impossible even then, but I am unwilling to go that far. Of course there are few such cases, and many judges and scholars would agree that in these cases looking only to the text is the best approach. In the bulk of cases this approach is unavailable because either constitutional text is not clear and/or because the text can not be mechanically applied to the case at hand.

12. See GADAMER, TRUTH AND METHOD, *supra* note 6, at 307-11.

13. Grey, *supra* note 1, at 5-6.

14. Cf. GADAMER, TRUTH AND METHOD, *supra* note 6, at 257-64, 307-11 (implying one must already be influenced by, or be part of, the tradition in order to reach meaning based on that tradition. Those outside the tradition may have very different preconceptions); RAVITCH, *supra* note 8, at 6-11 (addressing the problems with accepting any universal principle or concept without interpretation and the effect of preconceptions in that interpretation).

15. Grey, *supra* note 1, at 5-9.

16. See *infra* Part II.

As a result many judges and scholars look to the intent of the framers to help interpret the Constitution.¹⁷ The notion is that the intent of the framers helps an interpreter to understand the text and that it provides an objective restraint on judicial interpretation.¹⁸ As I have argued elsewhere, at least in highly contested interpretive scenarios, neither of these assumptions is accurate.¹⁹ In fact, at least as to the latter assumption about objectivity, quite the opposite might be true; reliance on original intent may simply mask judicial predispositions because the intent of the framers may be unknowable or divided.²⁰ Moreover, as H. Jefferson Powell has suggested, it is possible that the intent of the framers was not to follow the strict intent of the framers.²¹

This is particularly interesting in the context of biblical literalism. If G-d is the author of the bible, either directly or through inspiration, how does one know his intent? In fact, how does one know whether the text was intended as metaphor, simply to teach lessons, or to be literally read? Is G-d's intent not to expect humans to guess at his intent, but rather to use our G-d given capacities to apply biblical teachings to everyday life? How can this be done without interpretation? These are ancient theological questions that certainly cannot be answered in this brief Essay. They demonstrate, however, the hubris that seems to drive much dogmatic literalist interpretation, whether biblical or constitutional. Biblical literalists believe they know what the biblical text means even if they do not speak or understand the language it was written in, and even if based on the text alone there are alternative interpretations.²² Strict constitutional textualists and hard originalists share similar beliefs. They too often believe their interpretation of the text is the correct one, even where other textual interpretations exist.²³ Hard originalists believe that they can know the intent of the framers even where that intent is not clear,²⁴ may have varied among the framers,²⁵ or may have varied even within the hearts and minds of individual framers.²⁶ Moreover, the modern interpreters did not live in the time of the framers and may have significantly different preconceptions.²⁷

17. ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

18. *Id.*

19. RAVITCH, *supra* note 8, at 8-11.

20. *Id.* at 2-6, 81-82.

21. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887-88 (1985).

22. See John Bartkowski, *Beyond Biblical Literalism and Inerrancy: Conservative Protestants and the Hermeneutic Interpretation of Scripture*, 57 SOC. OF RELIGION 259, 260-61 (1996).

23. RAVITCH, *supra* note 8, at *passim*.

24. *Id.*

25. *Id.* at 2-6.

26. *Id.*

27. *Id.* at 2-6, 9-11, 81-82.

In the end interpretation is inescapable. Perhaps this is the biggest stumbling block for those who wish to engage in dogmatic textual exegesis. Many eschew interpretation and hold tightly to notions of objectivity and clarity, yet the best they can hope for in this regard is the production of an illusion of clarity and objectivity.²⁸ Underneath this illusion the same interpretive questions, and the attendant metaphysical questions, remain.²⁹

II. TAKING THE HERMENEUTIC TURN

It seems interpretation is necessary to apply core texts to real world situations, whether those core texts be religious or a nation's core text such as a constitution. Hermeneutics are an inescapable part of everyday life. We are always interpreting,³⁰ whether we know it or not. This is even more true when one attempts to apply a text written in a different time and culture to situations arising today.³¹ There are many approaches to interpretation, and many of these overlap on salient points. As I have written elsewhere, however, philosophical hermeneutics seems especially useful in the context of constitutional interpretation because of the time lag and cultural shifts between the drafting of the Constitution and the present.³² For similar reasons, this approach—which was clearly influenced in part by biblical hermeneutics³³—is helpful in analyzing the interpretation of religious texts.

The philosopher Hans-Georg Gadamer explained that there is no absolute method of interpretation.³⁴ Each interpreter brings his or her own preconceptions into the act of interpreting a text (text can refer to more than just a written text).³⁵ These preconceptions are influenced by the tradition, including social context, in which the interpreter exists.³⁶ The interpreter's tradition(s) provides her with a horizon that includes her interpretive predispositions.³⁷ This horizon is the range of what the interpreter can see when engaging with a text.³⁸ The concept of *dasein*, or being in the world, cap-

28. See generally *id.*

29. *Id.*

30. GADAMER, TRUTH AND METHOD, *supra* note 6, at *passim*.

31. RAVITCH, *supra* note 8, at 2-6, 81-82.

32. *Id.* at 9-11.

33. JEAN GRONDIN, INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS 46-47 (Joel Weinsheimer trans., Yale Univ. Press 1994) (1991).

34. This is a primary point in GADAMER, TRUTH AND METHOD, *supra* note 6; see also HANS-GEORG GADAMER, REASON IN THE AGE OF SCIENCE 98-107 (Frederick G. Lawrence trans., The MIT Press 1981) (1976) [hereinafter GADAMER, AGE OF SCIENCE].

35. GADAMER, TRUTH AND METHOD, *supra* note 6, at 265-71.

36. See *id.*; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 621-22 (1990).

37. GADAMER, TRUTH AND METHOD, *supra* note 6, at 257-64, 358-362.

38. *Id.* at 302-07, 374-75.

tures this dynamic.³⁹ We exist in the world around us and that world influences how we view things.⁴⁰ Thus, our traditions and context are a part of our being.⁴¹ The anthropologist Clifford Geertz observed this while studying other cultures.⁴²

Still, the text has its own horizon of meaning.⁴³ That horizon is influenced by the context (or tradition) in which it was written, those influencing or interpreting it over the passage of time, the words used, and the context of the original author or authors.⁴⁴ Philosophical hermeneutics suggests that to understand a text, a give and take must occur between text and interpreter—a dialogue between one's being and the object that one seeks to understand.⁴⁵ This conversation transforms both the text and interpreter as they engage in the give and take.⁴⁶

The interpreter necessarily projects his or her horizon into the interpretive process, but should also reflect upon it and the horizon of the text.⁴⁷ The horizon of the text has a binding quality in that if the interpreter openly enters into dialogue with the text, the horizon of the text will limit the range of preconceptions the interpreter can project consistently with the horizon of the text.⁴⁸ Since the text and interpreter are engaged in a dialogue to reach a common truth, neither text nor interpreter is the sole source of meaning.

Gadamer saw the quest for interpretive methodologies as interfering with the process of interpretation by obfuscating what is really going on. It is not that interpretive methodology is useless, but rather that it does not do what it purports to do—reach an objective and unquestionable meaning. The process of reaching meaning requires a constant dialogue between text and interpreter. This dialogue is mediated, however, by tradition (I prefer the term “context”).⁴⁹

Significantly, Gadamer does not believe that the lack of a clear interpretive method prevents one from reaching truth (understanding). It simply demonstrates that truth can be variable when different texts and interpreters engage in the hermeneutic dialogue, or when that dialogue is engaged in

39. *Id.* at 257-64.

40. *Id.*

41. *See generally id.*

42. *See generally* CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973).

43. GADAMER, *TRUTH AND METHOD*, *supra* note 6, at 302-07.

44. *Id.* at 370, 374-75; GADAMER, *AGE OF SCIENCE*, *supra* note 34, at 98. This may actually be an under-inclusive list.

45. This dialogue is central to Gadamer's theory of interpretation in GADAMER, *TRUTH AND METHOD*, *supra* note 6.

46. *Id.* at 307.

47. *Id.* at 267-269.

48. *See id.*; Eskridge, *supra* note 36, at 627.

49. GADAMER, *TRUTH AND METHOD*, *supra* note 6, at 266-67, 276-77.

over time by the same interpreter. This is not a form of relativism as some critics have suggested.⁵⁰ Through a dialogue between text and interpreter one can reach a better understanding of the text than one who does not engage in such dialogue and simply assigns a reflexive meaning to the text. Thus, while there is no methodological approach to interpretation in Gadamerian hermeneutics, there is a way for text and interpreter to interact to reach a meaning that is both consistent with the text and cognizant of the role the interpreter plays in reaching that meaning.

III. CONCLUDING THOUGHTS: THE FAILURE OF DOGMATIC METHODOLOGIES IN CONSTITUTIONAL AND SCRIPTURAL INTERPRETATION

If we are embedded creatures—embedded in our traditions and context—as the concept of *dasein* suggests, there is no Archimedean point from which we can say that a given methodology is objective, at least in contested interpretive contexts.⁵¹ This does not mean nihilism must reign. After all, as Gadamer points out, the dialogue between text and interpreter can lead to meaning, and because the interpreter must throw out preconceptions that are inconsistent with the horizon of the text in order to fuse horizons and interpret, it seems obvious that the interpretive possibilities are limited to the range of what fits within both the horizon of the interpreter and the horizon of the text.⁵² Legal interpreters generally use a variety of interpretive modes from within the legal tradition when interpreting the Constitution.⁵³ The key question is whether claims that these modes provide objective methods of interpretation are anything more than illusion.⁵⁴ Similar questions arise in the context of scriptural interpretation, but there the possible modes of interpretation may vary significantly between, and even within, faiths.

This Essay is focused strictly on what I refer to as dogmatic modes of interpretation. Thus, it is not meant as a detailed discussion of constitutional or scriptural hermeneutics. For present purposes, the only question is whether biblical literalism and the combination of strict constitutional textualism and originalism have anything in common and anything useful to offer interpreters. As noted above, they do have quite a bit in common; although there are also significant differences.⁵⁵ As for the second question, the answer depends on whether one finds the solace folks might derive from

50. GRONDIN, *supra* note 33, at 141-42.

51. GADAMER, TRUTH AND METHOD, *supra* note 6, at *passim*.

52. *See generally id.*

53. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); RAVITCH, *supra* note 8, at 6-8.

54. RAVITCH, *supra* note 8.

55. *See supra* Part I.

a false sense of objectivity to be useful to interpreters. Both biblical literalism and strict textualism/originalism fail to address the problem of determining intent, in the first case from the divine (either directly or through inspiration) and in the second case from a diverse group of framers and ratifiers. Moreover, these approaches fail to account for the influence of time, culture, and tradition on the meaning of a text that must be applied in a different time, culture and at least partially different tradition.

The answer seems obvious. Strict biblical literalism—in the sense that one can derive THE meaning of biblical text from the text without any interpretation, and usually a translated text at that, is impossible.⁵⁶ Interpretation happens, whether acknowledged or not, and human preconceptions necessarily enter the fray.⁵⁷ Of course, one may take on faith that such literal interpretation is possible either because one is sufficiently imbued with the spirit of G-d to know what the text means or one simply has faith that THE interpretation is correct.⁵⁸ Such beliefs do not change the interpretive reality, however, that unless one shares that faith the intervention of human preconceptions and traditions in the interpretive process can not be ignored.⁵⁹

Constitutional interpreters can not fall back on such faith arguments, however. The job of interpreting a constitution and applying it to current cases and issues is part of the legal and legislative traditions, and these traditions create a need for justifications beyond the assertion, “I have faith I can channel the spirit of the framers.” When the text is reasonably clear and its application seems obvious, the traditions of legal interpretation will generally point toward a specific answer or smaller range of answers as the interpreter engages with the text. These are commonly called the “easy cases.” Often, however, the text or its application is not so clear. I like to call these, a bit tongue-in-cheek, “most cases.” In such cases, strict textualism simply does not have the tools to answer the question. Simply put, it can not do what it sets out to accomplish, provide objective answers to questions without relying on judicial preconceptions. As I have written elsewhere, originalism suffers the same flaw.⁶⁰ In fact, originalism is doubly problematic. Unless there is a clear, overarching, and uncontested sense of the framers and ratifiers, an interpreter must be using preconceptions to choose which intent he or she applies to a given interpretive situation.⁶¹ Even when there does seem to be clear, overarching, and uncontested agreement among the framers and ratifiers, one must be careful in applying

56. Bartkowski, *supra* note 22.

57. *See supra* Part II.

58. Grey, *supra* note 1, at 5-6.

59. *See supra* Part II.

60. RAVITCH, *supra* note 8, at 2-6.

61. *Id.* at 2-6, 9-11, 81-82.

that intent to the modern context given the different culture, time, and traditions in which that intent existed, and the need to interpret in order to bring that intent forward to the current case or situation.⁶²

Like biblical literalists, strict textualists and originalists seem to have a deep faith in the objectivity of their approaches. The ultimate question is whether this faith is grounded in greater objectivity, given that greater objectivity and reigning in the application of judicial preconceptions seem to be the bases for relying on strict textualism and originalism. This brief Essay asserts that the answer is a guarded no.

62. *Id.* at 2-6, 81-82.

