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SCRIPTURAL INTERPRETATION AND CONSTITUTIONAL INTERPRETATION: AN INTRODUCTION

*Christopher C. Lund**

2009 MICH. ST. L. REV. 273

Because I do not believe we are born with a taste for jury trials or the Australian ballot, I must assume that our institutions play some role in establishing our aesthetic principles in these matters. The Constitution is first among such institutions. And yet we must apply to it, in its construction, the very standards it teaches us, knowing that even as we do so we are creating a changed institution which will, in turn, change us.¹

Every human society is an enterprise of world-building. Religion occupies a distinctive place in this enterprise. . . . Society is a product of man. It has no other being except that which is bestowed upon it by human activity and consciousness. There can be no social reality apart from man. Yet it may also be stated that man is a product of society. . . . The two statements, that society is the product of man and that man is the product of society, are not contradictory. They rather reflect the inherently dialectic character of the societal phenomenon.²

Religious communities and constitutional ones have long wrestled with a similar task—remaining faithful to an authoritative text created to embody principles that would give guidance to a developing community. Both communities are built on the texts they hold dear. And the interpretation of both texts develops over time, mirroring changes in the societies that revere them.

Understandably then, for both our religious traditions and our constitutional tradition, issues of hermeneutics and the solving of various exegetical problems lie at the heart of the interpretative enterprise. And over the years, a substantial body of literature has developed exploring methodological similarities and differences between constitutional and scriptural interpretation.³ This area of study has long interested academics, although recent

* Assistant Professor, Mississippi College School of Law. The papers in this symposium were organized around the theme, *Scriptural Interpretation and Constitutional Interpretation*. They were solicited for, and presented at, the Section on Law and Religion Panel Event at the AALS Annual Conference in San Diego in January 2009, for which I served as Programming Chair and Moderator. I am thankful to Mark Modak-Truran, Sam Levine, and Kathleen Brady for all their help.

1. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 185 (1982).
2. PETER L. BERGER, *THE SACRED CANOPY* 3 (1967).
3. Sam Levine collects some of the most influential work in a footnote in his paper. See Samuel J. Levine, *Of Inkblots and Omnisignificance: Conceptualizing Secondary and Symbolic Functions of the Ninth Amendment, in a Comparative Hermeneutic Framework*, 2009 MICH. STATE L. REV. 277, 277 n.1 (2009).

works (such as the late Jaroslav Pelikan's book, *Interpreting the Bible and the Constitution*) have given it renewed prominence.⁴

The papers in this collection approach the topic from a variety of vantage points, and they take us in a variety of directions. Ronald Garet explains how the Biblical narratives of creation, redemption, and revelation are at play throughout American constitutional history, drawing on the work of scholars like Franz Rosenzweig, and placing special importance on how this last narrative—revelation—has been a hidden but important theme throughout our constitutional history.⁵ Sam Levine focuses on the presumption against superfluity, a technique common to interpretation of both the Torah and the Constitution. Levine explains how scholars have seen deep meaning in the Torah's text, even in passages that they claim lack any direct application. Turning then to the Ninth Amendment, Levine suggests an alternative understanding of that often-ignored constitutional provision—one where the Ninth Amendment does not itself create any individual rights, but nevertheless provides certain normative guidance for the interpretation of other constitutional provisions.⁶

Patrick Brennan opens with a discussion of natural law theory, and in particular, the issue of whether judges are empowered to implement the natural law directly, without any legislative authorization. Brennan turns to the Supreme Court's decision in *United States v. Mead Corp.*,⁷ understanding it as requiring that administrative agencies act with a certain measure of deliberation and fairness in order to be entitled to deference by courts. Taking the two together, Brennan offers insights on the nature of the judicial role.⁸ Asifa Quraishi considers the ways in which an understanding of Islamic law—and, in particular, an understanding of the institutional role of the *qadi*—can offer insight into American constitutional law. Beginning with an exploration of the different ways in which the two systems approach concepts like fallibility and finality, her paper in due time thoughtfully touches upon the most recent and pressing issues in our constitutional socie-

4. See JAROLSAV PELIKAN, *INTERPRETING THE BIBLE & THE CONSTITUTION* (2004). Pelikan's work has inspired numerous reviews in the legal community. See, e.g., Francis J. Mootz III, *Belief and Interpretation: Meditations on Pelikan's "Interpreting the Bible and the Constitution,"* 21 J.L. & RELIGION 385 (2005-2006) (review); Steven D. Smith, *What Doth It Profit? Pelikan's Parallels,* 90 MINN. L. REV. 727 (2006) (review); Gregory A. Kalscheur, S.J., *Christian Scripture and American Scripture: An Instructive Analogy?*, 21 J.L. & RELIGION 101 (2005-2006).

5. See Ronald R. Garet, *With Radiant Countenance: Creation, Redemption, and Revelation*, 2009 MICH. STATE L. REV. 289 (2009).

6. See Levine, *supra* note 1, at 287-88.

7. 533 U.S. 218 (2001).

8. See Patrick McKinley Brennan, *Delivering the Goods: Herein of Mead, Delegations, and Authority*, 2009 MICH. STATE L. REV. 307 (2009).

ty—from originalism to legal realism to the counter-majoritarian difficulty.⁹ Finally, Jay Mootz considers the overlap between legal and religious hermeneutics—not in the sense of how they relate to each other, but rather in the sense of how both exemplify the common elements of interpretation. The first part of Mootz’s paper focuses on how the faithful do hermeneutics, using the work of Hans-Georg Gadamer to show how, in a sense, hermeneutics can only be done by the faithful. The second part incorporates these insights to ponder what it means for hermeneutics to be done faithfully, paying special attention to the work of Gianni Vattimo and then-Cardinal Joseph Ratzinger.¹⁰

9. See Asifa Quraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 MICH. STATE L. REV. 339 (2009).

10. See Francis J. Mootz III, *Faithful Hermeneutics*, 2009 MICH. STATE L. REV. 361 (2009).

