

## Antonin Scalia's Textualism in philosophy, theology, and judicial interpretation of the Constitution\*

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### 1. Introduction

In his forceful and beautifully written essay 'A Matter of Interpretation', Justice Antonin Scalia proposed two interrelated theses, a minor and a major one.<sup>1</sup> The minor thesis is a causal or historical conjecture and it says that the great liberty taken by judges of the Supreme Court in interpreting statutes and the Constitution is largely due to the influence of the common-law tradition upon legal training in American law schools.<sup>2</sup> According to the major thesis, which is normative, this liberty of interpretation is undesirable, because it infringes upon the separation of powers in a modern democracy. If, under the pretext of interpreting laws, judges of the Supreme Court in fact revise the Constitution and promulgate new laws, they are usurping the legislative power that is exclusively assigned to the legislature. For this reason, the Supreme Court, and indeed all courts, should adopt a method of interpretation called 'Textualism' or 'Originalism', according to which the aim of judicial interpretation is to establish the *original* meaning of a statutory *text*.<sup>3</sup>

As Justice Scalia urges, the question of whether 'life-tenured judges are free to revise statutes and constitutions adopted by the people and their representatives' is 'a question utterly central to the existence of democratic government' (p. 133). However, both in the United States and in Europe the vast majority of judges reject Justice's Scalia's methodology of Textualism, so that the issue of Textualism is a central controversy in the philosophy of law. Similar contro-

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\* A first draft of this paper was written for a colloquium on interpretation at the occasion of a visit by Justice Antonin Scalia to Leiden University, the Netherlands, on September 10, 2004. Justice Scalia's own address at this colloquium was devoted to an attempted refutation of my first draft, and I am very grateful for his generous criticisms. I also profited from comments, first of all by Justice Floris Bakels (Hoge Raad (Supreme Court), the Netherlands), and also by Professor Paul Cliteur (Leiden University), Professor John Cottingham (University of Reading), Professor Willem Drees (Leiden University), Professor Hanjo Glock (University of Reading, now Zürich), Professor Dirk-Martin Grube (Utrecht University), Dr Peter Hacker (St. John's College, Oxford), the late Professor Oswald Hanfling (emeritus, Open University, GB), Dr John Hyman (Queen's College, Oxford), Professor Hans Nieuwenhuis (Leiden University), Professor Hans Oberdiek (Swarthmore College, PA), Professor John Oberdiek (Rutgers University), Professor Joseph Raz (Balliol College, Oxford), and by the doctorate students of my seminar on analytic philosophy.

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1 Antonin Scalia, *A Matter of Interpretation. Federal Courts and the Law*, 1997. An essay by Antonin Scalia with commentary by Amy Gutmann, editor, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin. All page references in the text will be to this book, which remains of great actual interest, for example because Scalia's Textualism is endorsed by conservative judges such as Judge Alito. Cf. Ronald Dworkin, 'The Strange Case of Judge Alito', 2006 *New York Review of Books*, no. 3, pp. 14-16.

2 I shall not dwell in this essay on the differences between the judicial interpretation of statutes and of the Constitution, focusing mainly on the latter. Cf. Paul I. Weizer, *The Opinions of Justice Scalia. The Caustic Conservative*, 2004.

3 Scalia uses the terms 'Textualism' and 'Originalism' as equivalents. Usually, however, Textualism is considered to be one type of Originalism only, the other type being Intentionalism. I shall say more about this distinction below.

versies rage in other disciplines, such as theology and philosophy, and it is instructive to compare them with each other.<sup>4</sup>

Whereas historians of philosophy usually apply the methodology of Textualism, philosophers tend to allow themselves great liberties in interpreting the writings of their predecessors, often making them say what they desire them to say. This practice results in widely divergent and incompatible interpretations of one and the same philosopher, such as Martin Heidegger or Ludwig Wittgenstein, to mention the two most notable twentieth-century examples only.<sup>5</sup> But in interpreting the writings of their philosophical predecessors or colleagues, philosophers should carefully apply the methodology of Textualism or Originalism as well. If one wants to engage fruitfully with another philosopher, one should first make sure that one interprets his words in the sense he meant, instead of projecting one's own preconceptions on to the texts.<sup>6</sup>

The situation in theology is even more complex. Usually, historical scholars of religion apply the methodology of Textualism in interpreting religious texts. But believers often reject Textualism. With regard to many passages of their holy books they cannot adopt the view that the original meaning expresses a report of a divine revelation. Since the human authors of such books were immersed in world views that are now clearly outdated on many points, believers often resort to 'interpretation' in order to distil a modernized religious message or 'revelation' from an ancient text. But is there a defensible methodology for this craft of distillation? Or is Textualism the only valid methodology of interpretation in theology that we have?

The objective of this paper is to investigate how Antonin Scalia's doctrine of Textualism fares in these three disciplines: philosophy, theology, and the judicial interpretation of statute law and, especially, of the Constitution. With regard to philosophy, I shall explain briefly what is wrong with the main rival to Textualism, the doctrine of interpretation that Heidegger's pupil Hans-Georg Gadamer expounded in his confused classic *Wahrheit und Methode* of 1960. This doctrine of *Horizontverschmelzung* (fusion of cultural horizons) is the philosophical counterpart to the conception of the 'living' or 'evolving' Constitution criticized by Justice Scalia, and it is still popular among philosophers and literary scholars. Had Gadamer's views been correct, they could have been used as a philosophical foundation for the doctrine of The Living Constitution. Concerning theology, I shall spell out briefly the reasons that religious believers might adduce for and against Textualism. I argue that Textualism places the religious believer in an embarrassing dilemma from which he cannot easily escape. But if a faithful religious believer such as Justice Scalia rejects Textualism in theology, can he have reasons for being a textualist concerning the interpretation of statutes and the Constitution that are clearly better than the reasons a Christian might have for being a textualist concerning his holy book? This is questionable, since the argument for Textualism is *much* stronger in theology than in the domain of judicial interpretation.

Finally, with regard to the interpretation of statute law and of the Constitution, my main concern is with the *kind* of Textualism that is defensible as a methodology for interpretation by judges. I shall argue that we have to substitute a sophisticated 'applicative' version of Textualism

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4 For a comparison between the interpretation of the Bible and the construction of the American Constitution, cf. Jaroslav Pelikan, *Interpreting the Bible and the Constitution*, 2004.

5 Whereas for many American interpreters of Heidegger, such as Hubert Dreyfus (Berkeley), Heidegger is something like an American pragmatist or a follower of Wittgenstein, the late ex-Marxist French sociologist Pierre Bourdieu once argued that all Heidegger's texts carry a reactionary political message. Cf. Hubert L. Dreyfus, *Being-in-the-World. A Commentary on Heidegger's 'Being and Time', Division I*, 1991; Pierre Bourdieu, *L'Ontologie politique de Martin Heidegger*, 1988. For an analysis of Bourdieu's interpretation, cf. Herman Philipse, 'Questions of Method: Heidegger and Bourdieu', 2002 *Revue internationale de philosophie* 56, pp. 275-298.

6 Cf. Herman Philipse, *Heidegger's Philosophy of Being. A Critical Interpretation*, 1998, pp. 45-66, and 'How Are We to Interpret Heidegger's *Oeuvre*? A Methodological Manifesto', 2001 *Philosophy and Phenomenological Research*, no. 3, pp. 573-586.

for Justice Scalia's simple version, and that even this sophisticated version cannot be a self-sufficient philosophy of interpretation, because there are many other rules that judges must pay heed to in interpreting statutes, apart from the rules of Textualism or Originalism. If so, Justice Scalia's conservatism with regard to the interpretation of the Constitution cannot be justified by the methodological doctrine of Textualism, and the difference between a viable version of Textualism and the doctrine of the Living Constitution is at most a gradual one.<sup>7</sup>

## **2. The common-law tradition**

Before broaching the major issue of Textualism in philosophy, theology, and statutory interpretation, I want to comment briefly on Justice Scalia's minor thesis. This is the causal conjecture that the great liberty taken by judges of the Supreme Court in interpreting the U. S. Constitution is largely due to the influence of the common-law tradition upon legal training in American law schools. It is certainly surprising for students coming from Europe to what extent the practice of teaching statutory courses mainly through reading and discussing court decisions prevails in the United States. But is this practice really the cause, or at least an important cause, of the phenomenon of free or modernizing interpretations that is castigated by Scalia?

Like all complex social phenomena, the phenomenon of modernizing the interpretation of the Constitution by American judges will have many causes. What is more, the common-law tradition *cannot* be the only causal factor, because this factor was already present in American law in 1787, when the Constitution was established. Yet it was only from the time of the New Deal onwards, and particularly after the 1960s, that judges started to interpret the Constitution more freely, and to read into it a number of human rights that the Founding Fathers never considered when they drafted the Constitution. To mention the most notorious example only, in 1973 the Supreme Court decided that a woman has a constitutional right to an abortion before the foetus attains viability at roughly six months of pregnancy.<sup>8</sup> If the common-law tradition is an important causal factor that helped to bring about such decisions at all, we have to explain why this factor remained inoperative for such a long time. In other words, we have to discover 'triggering causes' of interpretative freedom, which were operative precisely at the time that this freedom set in. When *Roe. v. Wade* was decided in 1973, one of these triggering causes was the impact of the organized women's movement upon the moral consciousness in the Western world.

Of course a causal *explanation* of a social phenomenon such as an increasing practice of interpretative freedom concerning the U. S. Constitution does not provide a *justification* of this phenomenon. Yet some causes consist in the actual and prevalent use of (good) reasons for justifying the phenomenon, whereas other causes do not, so that we may distinguish between justifying and non-justifying causes. Justice Scalia merely mentions the alleged influence of the common-law tradition. This clearly is a non-justifying cause, for the craft of interpreting statutes and the Constitution is very different from the craft of common-law decision making. If the influence of the common-law tradition would be the only or the main cause that explains the phenomenon of interpretative freedom with regard to the Constitution, that freedom would not be justified. However, we saw that this factor cannot be the only cause. There must be other

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<sup>7</sup> I shall not investigate here to what extent Justice Scalia really practices his official doctrine of Textualism in his Supreme Court opinions. Cf. on this issue for example: Richard A. Brisbin, *Justice Antonin Scalia and the Conservative Revival*, 1998, and Michael Koby, 'The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique', 1999 *Harv. J. on Legis.* 2, pp. 369-396.

<sup>8</sup> *Roe. v. Wade*, 410 U.S. 113.

causes, and some of them may consist in the actual use of reasons that justify the phenomenon to some extent.

It is not difficult to sketch the global form of such a justifying explanation of judicial interpretative freedom with regard to the American Constitution. The Founding Fathers were living at the very end of what one might call an essentially static world. Since the time of the Roman Empire, the average income per head of the population had not risen significantly, and changes in social relations could only occur within narrow margins. Naturally, then, the Founding Fathers conceived of the Constitution as a bulwark against change, and made it extremely difficult to amend the text. According to article V, amending the Constitution not only requires a majority of two thirds in both Houses of Congress, but also ratification by three fourths of the States. No wonder, then, that only 27 amendments have been adopted since 1787, two of which cancel each other out.<sup>9</sup>

In the nineteenth and twentieth centuries, however, the Industrial Revolution and the development of ever new technologies produced economic and social changes that were completely beyond the imagination of the Founding Fathers. These changes created new social and political problems and often provided the wealth needed for solving them. Slavery was abolished and the sacrosanct status of property was relativized by the need for social justice and environmental protection. The decrease in child mortality enabled women to emancipate themselves from their subordinate roles, because population levels could be sustained by fewer children per woman. The severe restrictions upon Federal powers and the relative moral and legal autonomy of the States as laid down in the Constitution became anachronistic because of modern means of transport and communication.

Many of these social transformations are perceived as moral progress, but only some of them are expressed in amendments to the Constitution, such as the abolition of slavery (Amendment XIII). Most American judges will feel that, given the near impossibility of amending the Constitution and given the vast economic and social changes since 1787, it is perfectly legitimate to interpret the text of the Constitution freely in order to adapt it to our present moral convictions, at least if these convictions are widely shared within the population. As Chief Justice John Marshall once observed, precisely because the Constitution was ‘intended to endure for ages to come’, it has ‘to be adapted to the various *crises* of human affairs’.<sup>10</sup> I suppose that this is the general form of an argument in favour of the doctrine of The Living Constitution, and the widespread adherence to this type of argument is a causal factor that explains the practice of modernizing interpretations of the Constitution. According to this argument, the American Constitution is not merely the text of a historical document agreed upon in 1787. Rather it includes the living and evolving practice of interpreting this text in order to apply it to ever new situations, which the founding fathers could not foresee.<sup>11</sup>

I am neither endorsing nor rejecting such an argument at this point. What I want to stress here is merely that Justice Scalia’s device of opening his essay with an elaborate description of the ‘sort of intellectual rebirth’ experienced by students during their first year of law school, when they are immersed in the common-law tradition, is a misleading rhetorical gimmick. By focusing on one possible cause of the interpretative freedom practised by judges with regard to the Constitution, a cause the reference to which in no way can be a *justification* of this freedom,

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9 Amendment XVIII, prohibiting the manufacture etc. of intoxicating liquors, was repealed by Amendment XXI.

10 Quoted by Pelikan (2004), *supra* note 4, p. 8, italics in the original.

11 The very title of Akhil Reed Amar’s excellent book *America’s Constitution: A Biography*, 2005, suggests that the Constitution is a living document, not one with a fixed textual meaning at birth.

Justice Scalia diverts our attention from a great many other factors that may be adduced in order to justify it.

### **3. What is Textualism? Historical and applicative interpretations**

Having discussed the tradition of common law in his essay, and having argued that the mind-set of the common-law judge is 'a sure recipe for incompetence and usurpation' in the field of statutory interpretation, Justice Scalia observes that 'American judges have no intelligible theory' of what they do most, that is, interpreting statutes. Even worse, he says, 'the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory' (p. 14). I take him to be claiming, then, that the methodology of Textualism or Originalism, which he proposes himself, fills this gap and purports to be an 'intelligible theory' of statutory interpretation, in particular of interpreting the Constitution. But is it? What, exactly, is its content?

A satisfactory doctrine of interpretation for a definite domain, such as statutory interpretation, will specify both the *objectives* of interpretation in that domain and the *methods* by which these objectives can best be attained. Justice Scalia wisely focuses on the issue of objectives, because statutory interpretation is 'such a broad subject that the substance of it cannot be discussed comprehensively' in an essay (p. 16). According to Scalia's Textualism or Originalism, the objective of statutory interpretation is to establish the '*original meaning of the text*' of statutes or the Constitution (p. 38, my italics), and this meaning should be construed *reasonably*, and not *strictly* (p. 23). Justice Scalia tries to clarify this formula by contrasting it with what a judge should *not* look for, or use, in interpreting texts, namely (a) the intent(ion) of the legislature (pp. 16-23), (b) presumptions and rules of construction that load the dice for or against a particular result (pp. 25-29), (c) legislative history (pp. 29-37), and (d) what the text 'ought to mean in terms of the needs and goals of our present day society' (pp. 22 and 38-47).

Whereas Scalia uses the terms 'Textualism' and 'Originalism' as equivalents, legal philosophers usually distinguish between two types of Originalism, namely Textualism and Intentionalism, as two different methodologies for establishing the original meaning of texts. Whereas Textualism focuses on texts, their contexts, and the ordinary meaning of words at the time the text was produced, Intentionalism also allows other evidence to be used for establishing the original meaning of a text, such as legislative history as an indication of the intent of the legislature. As I shall argue below, the distinction between Textualism and Intentionalism is spurious in the case of individual speakers or authors, provided that one adopts a philosophically sound view of what the 'intention of an author' consists of.

But in the case of texts produced by institutions such as legislatures, the notion of an 'intention' is more problematic, since the final text is typically a product of compromises between many players, who may have very different intentions. Moreover, in the case of statutes, most members of the legislature will not have read the bills, let alone the committee reports on these bills, when a vote is being taken, so that very often there is simply no such thing as, for example, 'the intention of the majority of both houses of Congress'. Clearly, it should be the law that governs, and not these divergent or non-existing intentions of individual members of Congress (pp. 29-37). This is why Scalia's Textualism is decidedly anti-intentionalist.<sup>12</sup> If 'the

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<sup>12</sup> Cf. p. 31 of his essay: 'I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law'; and p. 38: 'What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended'.

intent of the law' has a legitimate role in the interpretation of statutes at all, it cannot be the subjective intention of legislators but only the objectified intent, that is: 'the intent that a reasonable person would gather from the text of the law, placed along the remainder of the *corpus juris*' (p. 17).

I find the doctrine of Textualism, so construed, unsatisfactory in at least two respects (*cf.* also §7-iii, below). First, its positive statement about the objective of statutory interpretation is incomplete. Justice Scalia often writes as if it is the *sole* objective of statutory interpretation to establish the original meaning of the text. But whereas this may be true for a legal historian, who has purely scholarly or epistemic objectives, it cannot be true for a judge, who has to decide a case, as Justice Scalia stresses in his discussion with Professor Tribe (p. 137). The legal historian might come to the conclusion that statutory texts, taken in their original meaning, are full of gaps in the sense that they do not contain solutions for many cases, which the legislature did not foresee. But the judge is not permitted, as Justice Scalia says, 'to render a candid and humble judgment of "Undecided"' (p. 137). Because the judge has to decide upon a particular case, he has to fill in the gaps, and typically, 'interpretation' is needed in those cases where the original meaning of the text is not at all plain or does not imply a decision for the case at issue.

It follows that we must distinguish between two very different types of interpretation, defined by different types of objectives, which I shall call 'scholarly' (or 'historical') interpretations and 'applicative' interpretations, respectively. Whereas applicative interpretations are used in order to apply a text – mostly a normative text invested with some kind of authority – to a particular case or situation and, typically, to reach some kind of decision, legal, moral, or otherwise, a scholarly or historical interpretation merely aims at acquiring knowledge about the meaning of unclear passages in a text.<sup>13</sup> Textualism, as formulated by Justice Scalia, is the proper doctrine of interpretation in scholarly domains, such as the history of science or the history of philosophy. But in the applicative domain of the judicial interpretation of statutes and the Constitution, Textualism can be an adequate methodology only if one adds at least one other objective apart from establishing the original meaning of texts: the objective of reaching a satisfactory decision in the particular case at issue. So let us revise the definition of Textualism for statutory interpretation by judges. According to Applicative Textualism, statutory interpretation has *two* objectives: (1) to establish the original meaning of the legal text and (2) to enable the judge to take a decision in the particular case at issue. Since he stresses *one* objective (1) only, Textualism as defined by Justice Scalia may be called *simple* Textualism.

It is precisely if and when there is a tension between these two objectives, that is, if the original meaning of the legal text does *not* permit us to reach a decision in the case at issue, that 'interpretation' is needed most. Clearly, it is in these situations that judges feel inclined to invoke other factors than 'the original meaning of the text', such as (a) legislative intention, (b) rules of construction, (c) legislative history, or (d) considerations about the 'ratio legis' or what the law ought to mean. But according to Justice Scalia's Simple Textualism, judges are not allowed *at all* to use these other factors. With regard to legislative intentions, for example, Justice Scalia quotes approvingly the remark by Justice Holmes as quoted approvingly by Justice Jackson: 'We do not inquire what the legislature meant; we ask only what the statute means' (p. 23). And

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13 Of course, more sophisticated distinctions between types of interpretation can be made, but that is not necessary for my argument. For example, one might define 'performative interpretations' as interpretations of plays aiming at staging old plays for a present-day audience, and one might distinguish between scholarly interpretations of unclear passages and scholarly interpretations of the point of a text as a whole, etc.

concerning the appeal to legislative history, he says 'We did not use to do it, and we should do it no more' (p. 37).

We may conclude that Simple Textualism as defined by Justice Scalia is a splendid doctrine of interpretation when interpretation and application are relatively easy, because the original meaning of the statutory text implies a decision for the case at issue. But when interpretation is needed most, because the original meaning of the text is unclear and/or does not enable us to reach a decision, this form of Textualism is not of much help.<sup>14</sup> One would have expected that Justice Scalia would focus on such critical cases in order to show the merits of Textualism, but, instead, he plays down their importance (p. 45).<sup>15</sup>

This brings me to the second unsatisfactory aspect of Justice Scalia's Simple Textualism. His argument to the effect that in interpreting statutes judges should not use *at all* extra-textual factors such as (a) legislative intention or (c) legislative history is obviously fallacious. For he argues from the premise that in *some* cases such use is illegitimate, namely in cases in which legislative intention or history is invoked *to set aside* a *clear* legal text, that using legislative intention or history is *always* illegitimate, even if it is merely used as evidence for establishing what a text means and what it implies for a particular case.

I agree with Justice Scalia that in 1892 the Supreme Court transgressed the boundaries of its legitimate powers when in *Church of the Holy Trinity v. United States* it invoked 'the intention of the legislature' in order to render inapplicable a very clear legal text. And I also agree with Justice Scalia that, in principle, an appeal to legislative history should never prevail over the authority of the statutory text, as is illustrated by the joke that 'One should consult the text of the statute only when the legislative history is ambiguous' (p. 31).<sup>16</sup> But it simply does not follow from the premise that, generally speaking, legislative intention or history should not be used *contra legem*, that they should not be used at all. On the contrary, recourse to factors (a) – (d) may be indispensable when the original meaning of the statutory text is unclear, or when it does not enable us to reach a decision in the case at issue.

It is a major and interesting challenge for Applicative Textualism to distinguish between legitimate and illegitimate uses of factors (a) – (d), a challenge that is beyond the intellectual horizon of Justice Scalia's Simple Textualism. In order to meet this challenge, one would have to analyze a great many court decisions, but this is not within my competence (*cf.*, however, §7-iii for implications of the present point). Let me therefore turn to my own field and discuss briefly how Textualism fares in philosophy. Its main opponent is still Gadamer's theory of

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14 In order to be somewhat more precise, we should distinguish between two different situations: (a) the legal text, as interpreted textually, does not imply any decision for the case at issue. Here, Textualism falls short of being a satisfactory doctrine of legal interpretation. (b) The text, as interpreted textually, does indeed imply a decision, but that decision is considered to be unjust and counterproductive according to a broad consensus in present-day society. In the latter case, Textualism might be considered as a sufficient doctrine of interpretation, for it now says: let us accept that 'summa ius, summa iniuria' and leave it to the legislature to do something about it. And if, as happens very often, especially in the multi-party states of the European Continent, the legislature fails to produce the relevant legislation because of political stalemates within coalitions, the Textualist will conclude self-righteously that the legislature is at fault, and not the judiciary. But this option results in great costs for the system as a whole, and in most European countries there is a consensus that in such cases the judiciary should try modestly and cautiously to develop new rules that are required by society.

15 According to Justice Scalia (p. 45), it is only *sometimes* that 'there will be disagreement as to how that original meaning applies to new and unforeseen phenomena'. This is true relatively to the total number of cases brought before courts. But it is not true relatively to the number of cases in which substantial statutory interpretation is needed, that is, in which we need a methodology of interpretation at all.

16 Yet there are exceptions to this rule, which Justice Scalia does not discuss. For example, an analysis of legal history may show that there is an obvious printing mistake in the text of a statute, *e.g.* because the word 'not' has been omitted, whereby the impact of the statute, if textually applied, would be the opposite of what is clearly intended. Hence, one cannot argue, as Justice Scalia does, that an appeal to legal history is *never* permitted.

interpretation.<sup>17</sup> It is illuminating to dissect this theory because it is the paradigmatic philosophical counterpart of Justice Scalia's main scapegoat, the doctrine of The Living Constitution.

#### 4. Defending Textualism in philosophy against Gadamer's hermeneutics

According to the central thesis of Gadamer's classic book *Wahrheit und Methode (Truth and Method)* of 1960, there can be no 'scientific' or scholarly (*wissenschaftliche*) methodology of textual interpretation. The reason is that interpretation cannot be a 'scientific' or scholarly endeavour (*Wissenschaft*), the aim of which is objective and permanent knowledge. If Gadamer is right, Justice Scalia's ambition of developing a 'science of statutory interpretation' involves a naive illusion, and the doctrine of The Living Constitution is the philosophically correct view. What are Gadamer's arguments for his sceptical thesis and what is the philosophy of interpretation that he puts forward?<sup>18</sup>

Gadamer takes as his paradigmatic examples interpretations of texts that have been written a long time ago, works of art in particular. He then develops his philosophy of interpretation on the basis of three premises. First, it is, as he claims, a deep and important insight of his teacher Martin Heidegger that human beings are historically situated. The naivety of the German historical school would consist in the fact that it forgot about this 'historicity' of human beings.<sup>19</sup> Because we are historically situated, our understanding is largely determined by the cultural horizon of our own times, from which Gadamer infers that it is impossible to retrieve what the author of a text meant to say, if he lived in the (distant?) past. In other words, the original meaning of a text is beyond our reach.

To this first premise of historical scepticism Gadamer adds a second and a third one, which may seem natural to people of the law. He claims that 'in understanding a text, there is always something like an application (*Anwendung*) of the text (...) to the present situation of the interpreter'.<sup>20</sup> Furthermore, he thinks that the objective of interpreting a text is not, and should not be, to retrieve the original meaning of the text, which is impossible, but rather to come to an agreement with the author about the topic (*Sache*) of the text.<sup>21</sup>

From these three premises, Gadamer draws a number of radical conclusions. First, it follows that interpreting a text is 'essentially historical' in the sense that 'a text can be understood only if it is understood *differently* each time'. After all, the historical situation of the interpreter, and perhaps his views about the topic of the text, will be different on each occasion.<sup>22</sup> Since Gadamer apparently assumes that our time is not finite, it follows, secondly, that the endeavour to establish 'the true meaning' of a text is an 'infinite process', because there are 'ever new

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17 As the citation records of Gadamer's main book (see the next footnote) shows, the popularity of his hermeneutical theory has not decreased over the last few decades.

18 Hans-Georg Gadamer, *Wahrheit und Methode*, 1960. Page references are to the fourth edition of 1975.

19 Gadamer (1975), *supra* note 18, p. 283: 'Die Naivität des sogenannten Historismus besteht darin, daß er sich einer solchen Reflexion entzieht und im Vertrauen auf die Methodik seines Verfahrens seine eigene Geschichtlichkeit vergißt'.

20 *Ibid.*, p. 291: 'Nun haben uns unsere Überlegungen zu der Einsicht geführt, daß im Verstehen immer so etwas wie eine Anwendung des zu verstehenden Textes auf die gegenwärtige Situation des Interpreten stattfindet'.

21 *Ibid.*, p. 276: 'Das Ziel aller Verständigung und alles Verstehen ist das Einverständnis in der Sache'. Cf. p. 253: '*Die hermeneutische Aufgabe geht von selbst in eine sachliche Fragestellung über und ist von dieser immer schon mitbestimmt*' (Gadamer's italics). I do not dwell here on parallels between Gadamer and American philosophers such as Donald Davidson, whose 'Principle of Charity' resembles Gadamer's third premise. But my criticisms of Gadamer in part apply to Davidson as well.

22 *Ibid.*, p. 292: 'daß auch dort ein Text nur verstanden wird, wenn er jeweils anders verstanden wird'. Cf. p. 280: 'Es genügt zu sagen, daß man *anders versteht, wenn man überhaupt versteht*' (Gadamer's italics).

sources of understanding', so that the meaning of a text is inexhaustible.<sup>23</sup> But if this is the case, we have to re-evaluate the function of temporal distance. Because interpretation is a productive and not a reproductive activity, temporal distance is not an impediment to textual interpretation, which has to be surmounted, but 'a positive and productive possibility of understanding'.<sup>24</sup> Indeed, according to this third conclusion, the temporal distance is spaced out by the tradition of interpreting the relevant text, in which it is applied to ever new situations, and this history of interpretations or *Wirkungsgeschichte* always informs our own understanding of a text.<sup>25</sup> Gadamer claims, then, that texts are 'living entities' in the sense that their meaning changes with time, and he intends this claim not only as a descriptive but also as a normative one (although it is typical for his ruminations on interpretation that no clear distinction between the descriptive and the normative is made). If the normative claim is correct, Gadamer's analysis of interpretation might serve as a philosophical underpinning of the doctrine of The Living Constitution, and this is a reason for discussing his views here.

It is perhaps not surprising that Gadamer's hermeneutics had a liberating effect upon academics in dusty departments of the humanities, who were fed up with feeling constrained by the strict methodology of historical scholarship and wanted to give free rein to their imagination. But it is somewhat disconcerting that so many philosophers went along with Gadamer, for it is not difficult to see that his hermeneutical theory is full of inconsistencies and confusions, and that the premises of his argument are unacceptable.<sup>26</sup> Let me point out briefly some of the inconsistencies first.

If bringing to light 'the true meaning' of a text is an 'infinite process', no particular interpretation could even aim at establishing the meaning of a text, since the meaning of a text is now defined as an infinite set of possible meanings, and no particular meaning is identical to an infinite set of possible meanings. It follows that, according to Gadamer's hermeneutics, interpretation is impossible, since texts have no determinate meaning whatsoever. Yet Gadamer usually assumes, like all of us, that interpreting (an unclear passage in) a text aims at assigning a definite meaning to it. One might avoid this awkward inconsistency by saying that the meaning of a text is determinate at any given moment, but changes over time. By introducing such a concept of a historically changing meaning, one might try to preserve both the idea that (usually) texts have definite meanings and Gadamer's thesis of the infinite productivity of interpretation. But now another difficulty arises. Suppose that two readers assign conflicting interpretations to a textual passage *at the very same moment*. Could there be any possible reason for saying that one of them is right and the other is wrong, if meanings may change from moment to moment? Obviously, what the text meant the moment before cannot have any authority if what a text means is not constant over time, and what else could count as a reason? Again, Gadamer's hermeneutics turns out to undermine the idea of a more or less determinate meaning of texts, which is presupposed by the very notion of an interpretation, and to abolish the distinction

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23 *Ibid.*, p. 282: 'Die Ausschöpfung des wahren Sinnes aber, der in einem Text oder in einer künstlerischen Schöpfung gelegen ist, kommt nicht irgendwo zum Abschluß, sondern ist in Wahrheit ein unendlicher Prozeß. Es... entspringen stets neue Quellen des Verständnisses, die ungeahnte Sinnbezüge offenbaren'.

24 *Ibid.*, p. 281: 'In Wahrheit kommt es darauf an, den Abstand der Zeit als eine positive und produktive Möglichkeit des Verstehens zu erkennen'.

25 *Ibid.*, p. 284: 'Wenn wir aus der für unsere hermeneutische Situation im ganzen bestimmenden historischen Distanz eine historische Erscheinung zu verstehen suchen, unterliegen wir immer bereits den Wirkungen der Wirkungsgeschichte'.

26 Today, the essentials of Gadamer's hermeneutics survive in the doctrines of Derrida and many other 'post-modernists'. For an early and incisive critique of Gadamer's views, see E.D. Hirsch, Jr., *Validity in Interpretation*, 1967, appendix II, to whom I am indebted in what follows.

between correct and incorrect interpretations. But Gadamer emphatically wants to uphold this distinction, as he stresses many times in his book.

Two central concepts in *Wahrheit und Methode* are supposed to block the embarrassing implication that *anything goes* in interpretation: the notion of an interpretative tradition (*Wirkungsgeschichte*) and the notion of the fusion of cultural horizons (*Horizontverschmelzung*). However, it is easy to see that these notions are of no avail to Gadamer and his followers. Gadamer seems to suggest that we might distinguish between correct and incorrect interpretations at one moment of time by arguing that one of them is more in line with the interpretative tradition than its rivals.<sup>27</sup> But why should the interpretative tradition have such an authority? Apart from legal contexts in which we accept the rule of *stare decisis*, the notion of an interpretative tradition is not normative but descriptive, so that a radically new interpretation cannot be ruled out: it would simply change the tradition. Furthermore, a normative appeal to the interpretative tradition is inconsistent with Gadamer's premise that the original meaning of a text cannot be retrieved, for the interpretative tradition also consists of texts, the meanings of which will change over time, if we may believe Gadamer's hermeneutics. Instead of solving the problem of how we might distinguish between correct and incorrect interpretations, the notion of *Wirkungsgeschichte* raises this problem again, at least if we accept the premises of Gadamer's argument.

The same holds true for the concept of a fusion of horizons (*Horizontverschmelzung*), which is central to Gadamer's hermeneutics. According to Gadamer, our historicity implies that we always start to read texts of the past from a perspective that is determined by our present cultural horizon. One might think that, in principle, initial interpretive hypotheses informed by this present cultural background can be refuted if we discover that the past cultural horizon is very different from our present one. However, this possibility seems to be excluded by Gadamer's first premise of historical scepticism, whereas his second and third premise imply that our present cultural horizon and situation not only co-determine in fact, but also *should* co-determine the meaning of old texts.<sup>28</sup> Since it would be absurd to suppose that the meaning of a text is *not at all* determined by the cultural horizon within which it was written, including the rules of the language used at that time, Gadamer concludes that 'in the process of textual understanding, a real fusion of horizons occurs, by which the historical horizon is both outlined and cancelled out at the same time'.<sup>29</sup>

Again, an inconsistency arises between Gadamer's first premise of historical scepticism and the methodological requirement that one should study the cultural horizon of the past in order to understand an ancient text, a requirement which Gadamer emphatically endorses.<sup>30</sup> Furthermore, it remains unclear, as it so often does in Gadamer's work, whether he is merely *describing* what mostly happens when we are interpreting texts, or whether he intends to put forward a *normative* view of what *should* happen when we are interpreting a text. This is a crucial point, for even if, studying the history of interpretation of a text such as Sophocles's *Antigone*, we discover that at each time interpretations were influenced by the cultural horizon of the interpret-

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27 Cf. Gadamer (1975), *supra* note 18, p. 277: 'Die Antizipation von Sinn, die unser Verständnis eines Textes leitet, ist nicht eine Handlung der Subjektivität, sondern bestimmt sich aus der Gemeinsamkeit, die uns mit der Überlieferung verbindet'.

28 Cf. Gadamer (1975), *supra* note 18, p. 277: 'Demgegenüber beschreibt Heidegger den Zirkel so, daß das Verständnis des Textes von der vorgehenden Bewegung des Vorverständnisses dauerhaft bestimmt bleibt... Der Zirkel ist also nicht formaler Natur, er ist weder subjektiv noch objektiv, sondern beschreibt das Verstehen als das Ineinanderspiel der Bewegung der Überlieferung und der Bewegung des Interpretieren'. This quote is descriptive, but Gadamer suggests that it cannot be otherwise.

29 *Ibid.*, p. 290: 'Im Vollzug des Verstehens geschieht eine wirkliche Horizontverschmelzung, die mit dem Entwurf des historischen Horizontes zugleich dessen Aufhebung vollbringt'.

30 *Ibid.*, p. 290: 'Aus diesem Grunde gehört notwendig zum hermeneutischen Verhalten der Entwurf eines historischen Horizontes, der sich von dem Gegenwartshorizont unterscheidet. Das historische Bewußtsein ist sich seiner eigenen Andersheit bewußt und hebt daher den Horizont der Überlieferung von dem eigenen Horizont ab'.

ers, it does not follow at all that this *should* be the case, or that it is perfectly all right if it is the case. Whether it should be the case depends upon the aims of the interpretation. If the aim is to bring up to date the moral conflicts in the play in order to perform it for a present audience, a 'fusion of horizons' may be necessary, for the moral conflicts Sophocles intended to illustrate may be profoundly alien to a modern public and irrelevant to present-day preoccupations. In this case, the interpretation is an applicative one. But if the aim is to establish the original meaning of the text and to discern the point of its plot for the Greek community in which the play was originally produced, the discovery that very often later interpretations were influenced by the cultural horizon of the interpreters will merely serve as a warning against the dangers of historical naivety.

### **5. Gadamer's flawed procedure. How are we to construct a philosophy of interpretation?**

These inconsistencies and confusions in Gadamer's book, which exclude a coherent interpretation of his hermeneutical doctrine, are an inevitable effect of his flawed procedure and of inadequacies in the premises of his argument. Gadamer's procedure is unsound because he develops his hermeneutics on the basis of examples of *interpretanda* that are atypical and exceptional, namely very old written texts, preferably from the domain of the performative arts, and then extrapolates from these examples to a doctrine of interpretation in general.<sup>31</sup> It may be that in the case of poetry or plays written in Ancient Greece, we often cannot retrieve what the author wanted to say, especially when only fragments of the texts survive, as is the case with Sappho's poetry. But is this also true when we talk about the weather with our next-door neighbour? A theory of interpretation should rather start from the most basic examples of communication by language, that is, literal oral speech about factual matters, and then analyze more exotic cases (fiction, poetry, old texts, texts produced by institutions) against this background.<sup>32</sup>

If one discusses factual things orally with a speaker of the same language, most of the time no 'interpretation' is needed, for the partners in the discussion are competent speakers, and they share what Wittgenstein called a 'form of life'.<sup>33</sup> Indeed, one might define a *competent speaker of a language* as someone who generally is able to say clearly in that language what he wants to say. What his words mean is determined by the rules of the language, the context, the situation of utterance, etc., and he means to say what his words mean, since he has mastered the language. In exceptional cases, the need for an interpretation of his words may arise, and we will ask him what he meant to say. This question is not aiming at some kind of empathy with the speaker, as romantic theorists of interpretation assumed. The appropriate answer to a question concerning the speaker's intention is simply a clarifying paraphrase or a more elaborate explanation by the

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31 American philosophers such as Quine and Davidson make a similar mistake when they develop their doctrine of interpretation on the basis of the thought-experiment of radical translation, that is, of the extraordinary situation of a linguist-anthropologist who tries to translate a language of a tribe of which he is completely ignorant. As a result, they underestimate the abundance of clues we have when we learn our first language – for we learn our first language within the framework of a shared form of life – and they come to sceptical conclusions akin to those of Gadamer.

32 Cf. for this criticism G. Nuchelmans, 'Pleidooi voor een ingetogen hermeneutiek', in G. Nuchelmans *et al.*, *Tekstinterpretatie*, 1990 (Mededelingen van de Afdeling Letterkunde van de Koninklijke Nederlandse Akademie van Wetenschappen, Nieuwe Reeks, Deel 53, no. 6). Gadamer uses the term 'interpretation' so broadly that it even includes the 'interpretation' of written music by performers. However, no intelligible theory of interpretation will cover such a broad domain. In developing a theory for *textual* interpretation, we should not draw inspiration from cases of musical interpretation.

33 In ordinary language, we speak of the need for 'interpretation' mostly with regard to unclear passages in texts. Philosophers such as Donald Davidson use the term in a much more general and technical sense: for each case of understanding what someone says or writes. Here, I am using the everyday notion of 'interpretation'.

speaker, preceded by the words ‘I meant...’. Consequently, asking the question what a speaker meant is not seeking for some private mental event that is essentially inaccessible to others, as Gadamer sometimes suggests. It is asking the speaker either for an elucidation of an unclear statement, or for an elaboration of a clear statement by specifying its implications.

Taking, as a starting point, basic cases of communication by oral language between competent speakers who share a language and a form of life, the theorist of interpretation will see no grounds whatsoever to endorse Gadamer’s first premise that it is *essentially* impossible to retrieve what an author or speaker wants to say. In these basic cases, one can simply ask the speaker for an elucidation if what he said is unclear. Nor should the theorist distinguish in general between what a speaker’s words mean and what a speaker means by his words, since in most cases these terms amount to the same thing. It is only in exceptional and essentially parasitic uses of language that the speaker’s meaning and linguistic meaning may come apart. In the kind of irony called litotes, for example, the speaker says the very opposite of what he means. Hence, an accurate interpretation of such an ironic passage in a text should do two things: it should explain what the passage means according to the rules of the language, and it should explain that the speaker or author meant the very opposite of what his words literally mean.

In all cases of individual speakers or writers, the authorial intent (what the author meant by his words) is the ultimate touchstone for the correctness of an interpretation, whereas in the case of competent language users there typically is no difference between authorial intent and linguistic meaning. Hence, what has been called the ‘intentional fallacy’ is not a fallacy at all: it is the correct basic methodology of interpretation in a nutshell.<sup>34</sup> As a consequence, at this elementary level there is no reason to distinguish between Textualism and Intentionalism as two different forms of Originalism. What the text originally means is determined by the rules of the language, by the context, and by the linguistic intention of the speaker or writer.

Against the background of unproblematic cases of oral communication about factual matters, we can analyze problems of interpretation in more difficult domains. In the case of written texts that were produced a long time ago, the author may not remember what he wanted to say by some unclear passage, or he may be dead, so that asking him what he intended to say is of no avail. Interpretation becomes even more difficult if the author wrote in a language we do not know, or in a language that nobody speaks any more today, such as ancient Greek, so that we cannot learn the language by participating in a living linguistic community. Finally, there are cases such as the pre-Socratics, in which only tiny fragments of the original texts survive. In such cases, it may be very difficult, or *de facto* impossible to establish what the author wanted to say, *but it does not follow that this should not be the objective of our interpretive activity*. If it is impossible to establish what an author wanted to say, and if our aim is scholarly interpretation, we should simply admit that we cannot assign a warranted interpretation to the text, instead of concluding, as Gadamer does, that the objective of interpretation should not be to establish original meaning at all.

Indeed, without this objective, there is no distinction between correct and incorrect interpretations in the field of historical scholarship. In all cases of unclear utterances or texts, rival hypotheses about textual meaning and the author’s intention can be compared, and, as in science, we may look for evidence that refutes some of them or favours one over the others.

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34 Cf. William K. Wimsatt, Jr., ‘The Intentional Fallacy’, in William K. Wimsatt, Jr., *Verbal Icon: Studies in the Meaning of Poetry I*, 1954. Wimsatt argued that even if the original intent of the poet can be retrieved by historical research, the critic or judge or exegete should not invoke its authority in interpreting the text. This maxim may be fruitful for the interpretation of modern poetry, especially if the poet wants his work of art to be open to many different interpretations. However, the interpretation of poetry is a special case, which should not be taken as paradigmatic for interpretation in general.

Hence, if we are engaged in scholarly or historical interpretation, we should adopt a method of hypothetico-deductive research, which is analogous to scientific method. Instead of endorsing Gadamer's verdict that a scientific methodology of interpretation is impossible, we come to the conclusion that the methodology of Textualism or Originalism is imperative in the domain of scholarly interpretation.

After this lengthy refutation of Gadamer's first premise of historical scepticism, I can be brief about the other two premises of his argument. Why does Gadamer think that there is, and should be, an applicative element in each and every interpretation? Taking as paradigm cases statutory interpretations by judges, biblical interpretations by ministers or priests, and interpretations of plays and music by performing artists, Gadamer argues that one cannot draw a sharp line between interpretation and application.<sup>35</sup> He concludes that application to the present situation is essential to each and every interpretation, and that in the activity of interpreting texts one cannot clearly distinguish between the *subtilitas explicandi* and the *subtilitas applicandi*, contrary to what traditional theorists of interpretation supposed. As a consequence, Gadamer urges that we should construct a new hermeneutical theory of the humanities (*Geisteswissenschaften*) on the model of legal and theological hermeneutics.<sup>36</sup>

Once again, Gadamer's argument generalizes hastily from examples that are not representative for all cases of interpretation. Of course a judge, in interpreting statutes, has to apply them to a particular case. And it may be that in interpreting biblical passages a minister or priest modifies the original meaning of the texts in order to make them more pertinent to the actual situation of his audience. But the aims of the judge or the cleric are very different from those of the intellectual historian who simply wants to reconstruct the original meaning of obscure passages in old treatises on astronomy, for example. In such purely historical or scholarly interpretations, the interpreter should try to eliminate all anachronisms, and it is not even clear what it would mean to 'apply' those passages 'to present situations'. The same holds true for the philosopher who interprets the works of his predecessors. In all these cases, endorsing Gadamer's credo that 'if one understands a text at all, one understands it differently' would be as perverse as intentionally misinterpreting the words of one's opponent in an oral discussion.

Apart from a fallacy of hasty generalization, a conceptual confusion may have led Gadamer to propose his second premise. One should distinguish between the concepts of textual *meaning*, on the one hand, and the *significance* of a text for someone on the other hand.<sup>37</sup> Textual meaning is determined by the rules of the language, the genre of a text, the linguistic context, the intentions of the author, and the situation in which the problematic utterance was produced. The significance of a text for a person is the bearing of the text on that person's life and thought. It has to do with the relevance of the text to problems this person is addressing, with his reasons for reading or studying it, etc. Precisely because texts usually have determined meanings, their significance for different readers in different situations may be very different. Because Gadamer uses his key-term *Sinn* in a nebulous manner, he commits the fallacy of ambiguity that consists in concluding from a variation of *Sinn* (= significance) of a text for different persons to a variation of *Sinn* (= textual meaning). And since giving a specific significance to a text might be called an 'application' in some vague sense, Gadamer fallaciously concludes that each interpretation is applicative.

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35 Gadamer (1975), *supra* note 18, pp. 292-293.

36 *Ibid.*, p. 294: 'Wenn das richtig ist, so stellt sich die Aufgabe, die geisteswissenschaftliche Hermeneutik von der juristischen und theologischen her neu zu bestimmen' (Gadamer's italics).

37 Cf. Hirsch (1967), *supra* note 26, pp. 254-256.

Gadamer's third premise, that the aim of interpretation is to reach an agreement about the topic (*Sache*) of the text, is even more difficult to trace. Although one cannot understand a text, especially in science or some other technical field, without having sufficient knowledge about its topic, the objective of interpretation is understanding its meaning and not agreement with the author about the topic. If it were otherwise, how could we ever disagree with anyone? The fact that Gadamer puts forward this third premise cannot be explained as a product of a hasty generalization from cases of judicial interpretation. Although a judge has to apply texts of statutes to particular cases, this does not require that the judge agrees personally with what the statute says. For example, a judge of the Supreme Court may hold that capital punishment is constitutional, although he himself is an ardent opponent of the death penalty.<sup>38</sup> As Justice Scalia argues, the task of a judge is to apply the law as it is, and not to project his purely personal preferences into the statutes he applies. What, then, explains Gadamer's third premise?

I suggest that the answer is to be found in the deep influence of Christian theology on Gadamer's hermeneutics. There is only one genre of hermeneutics in which the interpreter should always agree with what the texts says, and that is the genre of Biblical interpretation by a believing Christian (or interpretation of the Qur'an by a believing Muslim, etc.). Having vindicated Textualism in the field of scholarly or historical interpretations, I now turn to the topic of theological interpretation and argue that a believing Christian (or Muslim, etc.) cannot be a textualist in theology, even though in theology, as in philosophy, Textualism or Originalism is the only valid methodology of interpretation that we have.

## 6. Textualism in theology

In studying the holy books of religions, such as the Vedic scriptures, the Bible, or the Qur'an, the honest historical scholar will consistently apply the method of Textualism or Originalism, including the techniques developed by philology. With meticulous care he will investigate the history of textual preservation and transcription in order to reconstitute the original texts, and he will carefully study the language and the cultural horizon of the authors and their contemporary public in order to establish the original meaning of their writings, or, what amounts to the same thing in the case of individual authors, to retrieve what these authors wanted to say. Furthermore, in order to understand the views expressed by the authors, he will study the cultural history of the relevant peoples and periods.

From the eighteenth century onwards, there has been great progress in tracing back the world views expressed in the Old and the New Testaments to earlier sources of other cultures. As A.D. White wrote in his classic history of the 'warfare of science with theology' in 1896, 'It has now become perfectly clear that from the same sources which inspired the accounts of the creation of the universe among the Chaldeo-Babylonian, the Assyrian, the Phoenician, and other ancient civilizations came the ideas which hold so prominent a place in the sacred books of the Hebrews'.<sup>39</sup> Of course, this point applies also to other topics of the Bible. Even someone who believes that all or some biblical texts express some kind of divine revelation will have to admit

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38 It is another matter whether such a judge should be willing to sit on the bench of the Supreme Court, for this Court is, as Justice Scalia says elsewhere, 'part of the machinery of death'. Scalia does not have to face this moral dilemma, because he defends the view that states have a moral right to inflict the death penalty. Cf. Antonin Scalia, 'God's Justice and Ours' (address to the Pew Forum on Religion and Public Life at the University of Chicago Divinity School on January 2002), 2002 *First Things*, the *Journal of Religion and Public Life*, May.

39 A.D. White, *A History of the Warfare of Science with Theology in Christendom*, 1960, vol. I, p. 2. White's 'warfare metaphor' and many details of his work have been criticized by present-day historians of science. Cf., for example, David C. Lindberg and Ronald L. Numbers, *God & Nature. Historical Essays on the Encounter between Christianity and Science*, 1986.

that the content of this revelation is more or less continuous with older sources, which, according to Jews or Christians or Muslims, do not express a divine revelation at all.

If one asks the historian whether he would be able to accept as true the views expressed by the authors of Biblical or Vedantic texts, or of the Qur'an, he will not only point out the many inconsistencies within and between these views, but also explain that they were part and parcel of a *Weltanschauung* that is now completely outdated. It will not be necessary to repeat here the complex history of the antagonisms between the Christian religion and the progress of the sciences, such as heliocentrism, geology, the theory of evolution, or medicine, although the details of this history are sometimes amusing. When new parts of the world were discovered from the fifteenth century onwards, theologians had to solve the problem of how animals so sluggish as the sloths in South America could have got away from Mount Ararat completely and have travelled so far over sea. Similarly, after the discovery of Australia, theologians had to answer the question of how the kangaroo could have been in the Ark and now be found in Australia only. Admittedly, his saltatory powers are great, but could the kangaroo really have leaped over the intervening mountains, plains, and oceans, to that remote continent?<sup>40</sup> No properly educated person will doubt today, I hope, that the biblical story of Noah and the Ark is simply false, or, to put it more kindly, a myth, and that the geographical distribution of animals has to be explained within the framework of evolutionary theory.<sup>41</sup>

Christians may object that all such cases of conflict between empirical discoveries and Biblical texts are taken from the Old Testament, but this is not true, as is clear from the following example. In many passages of the New Testament, such as Mark ix, 17-29, John x, 20, Matthew viii, 28 and Luke x, 17, we find the doctrine, common in ancient cultures, that epilepsy is caused by spirits that have to be driven out by prayer, and that madness is caused by demons. This doctrine has caused unspeakable suffering, not only because the Church, which profited financially in the past from the idea that priests could treat mental illnesses, tried to block medical advances, but also because exorcism was sometimes practised with great cruelty for the mentally afflicted. Nor can it be said that only the factual doctrines contained in the Bible may be obsolete, since moral norms can be outdated as well. For instance, the norm proclaimed by the God of Genesis I:28: 'Be fruitful and multiply' may be a wise imperative for tribes in the desert, which are threatened with extinction. But to uphold this norm for present-day humanity is wicked, since yet another multiplication of humanity in our times will ruin the ecosystem of the Earth. We may conclude, then, that a textualist interpretation of holy books such as the Bible, the Qur'an, or the Vedic scriptures will compel us to admit that these books are partly filled with doctrines, both factual and moral, that no decent modern human being can honestly endorse.<sup>42</sup>

I now come to the question of whether a believing Christian can be a textualist with regard to the Bible (or a believing Muslim with regard to the Qur'an, etc.). I take it that for a believing Christian the Bible is *special* in that this book provides him with reasons to think that the religious beliefs he cherishes are true, special in a way that other old books, such as Plato's dialogues, are not. The reason the believing Christian will have to adduce for thinking that the

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40 I partially quote these sentences from White (1960), *supra* note 39, vol. I, p. 48.

41 It should be stressed, however, that according to a Gallup Poll of June 1-3, 2007, 66% of the Americans endorsed as definitely true (39%) or as probably true (27%) the creationist doctrine that 'God created human beings pretty much in their present form at one time within the last 10,000 years' ([www.galluppoll.com/content/default.aspx?ci=21814](http://www.galluppoll.com/content/default.aspx?ci=21814)).

42 Of course, *Textualism* is not the same as *Literalism*, the idea that we must take all texts of the Bible literally. The textualist will distinguish between different genres in the Bible, and if he comes to the conclusion that a passage is meant metaphorically, or poetically, he will not interpret it literally. However, the honest historical textualist will certainly not agree with the fashionable idea that no passage of the Bible that seems to come into conflict with modern empirical discoveries *can* be meant literally. On the contrary, many such passages were clearly intended by their authors to be taken literally.

Bible, the New Testament in particular, is *special* in this sense, is that it has been written by authors who reliably relied upon witnesses of a divine revelation. Many modern protestant Christians in Europe are somewhat embarrassed about this point and refuse to proclaim that the New Testament is somehow based upon a divine revelation. However, if they do not hold this, one might wonder in what sense they can still call themselves a Christian.

It follows that we may formulate the question of whether we can be justified in attributing this special revelatory status to the Bible as a problem concerning the reliability of witnesses. The authors of the New Testament, such as Paul, Matthew, Mark, Luke, or John, tell us in fact that they rely on ‘those who from the beginning were eyewitnesses and ministers of the word’, the ‘word’ being God’s revelation in Christ.<sup>43</sup> Suppose we are textualists with regard to the Bible, do we then have good reasons for believing that these ‘eyewitnesses’ are *reliable* witnesses? I think that we have two compelling arguments to conclude that they are not reliable (which is not the same thing as saying that they lied).

First, many of the things they tell us as if they were directly revealed by God are in fact ingredients of a cultural heritage common to many ancient cultures from the Middle East, cultures which did not believe in the Christian god. Hence, it is more plausible to assume that the self-stylized eyewitnesses in fact took their tales partly from hearsay instead of from their own perceptions. Second, we now know that many of the things these alleged eyewitnesses tell us cannot be true. For example, in the story of the epileptic boy related in Mark ix, 14-29, Jesus told the father of the boy that ‘All things are possible to him who believes’. When the father, seduced by this promise of empowerment, cries out ‘I believe; help my unbelief’, Jesus exhorts the ‘dumb and deaf spirit’ to come out of the boy, and, if we may believe Mark, the spirit in fact came out of the boy. But, having discovered more about the true causes of epileptic attacks, we do not think today that there are spirits who cause these attacks and who will come out if they are insulted by a holy man.

Summarizing these two reasons we may conclude that a discerning judge will not be inclined to give much credence to alleged eyewitnesses who tell us many things that are either taken from hearsay or are simply false. It follows that the honest textualist with regard to the Bible will not be able to take that book as a report of a divine revelation, unless he admits that this divine revelation itself contains many falsehoods. But if that is the case, that is, if He who allegedly speaks through the revelation tells us falsehoods, what good reasons can we have to believe that He is a good god, if He exists at all? Let me formulate this difficulty for the believing textualist in the form of a dilemma. Either the believing textualist bites the bullet and claims that the Bible, as a report of an authoritative revelation by a veracious god, contains ‘the truth, the whole truth, and nothing but the truth’. But then the believing textualist has to reject most intellectual progress that humanity has made since the first centuries of the common era. Or, alternatively, the textualist admits that the Bible contains many falsehoods. But then it cannot be taken as a book with a special authoritative status, and the believer lacks justification for his belief.

The first horn of this dilemma may seem to be utterly unattractive. Yet there is for the believer an overwhelming argument that pleads in its favour, the Argument from Divine Authority. Surely, the Christian believer may say, if the Bible really contains God’s Word, readers do not have any *authority* to interpret this Word otherwise than by using the methodology of Textualism or Originalism. The reason is that God’s authority is absolute and that, God being

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43 Luke i, 2-3.

eternal, omniscient and perfectly good, He will have formulated his final revelation in the New Testament precisely as he meant it, so that it is valid for eternity. This argument from authority was often used in the Christian tradition and it is still dominant among Catholics and (*mutatis mutandis*) among Muslims. Take, for example, Augustine, who said in his *Commentary on the Book of Genesis* that 'Nothing is to be accepted save on the authority of the Scripture, since that authority is greater than all the powers of the human mind'. Perhaps this quote is even more impressive in Latin: 'Major est Scripturae auctoritas quam omnis humani ingenii capacitas'.

Similarly, Luther rejected all allegorical and mystical interpretations by earlier theologians if they were concerned with texts such as the creation stories in Genesis, which clearly were intended as literally true by their authors. 'Why,' asked Luther, 'should Moses use allegory when he is not speaking of allegorical creatures or of an allegorical world, but of real creatures and of a visible world, which can be seen, felt, and grasped?' Similarly, Calvin warned readers of the Bible that by departing from a textualist interpretation, they would 'basely insult the Creator', and would have 'to expect a judge who will annihilate them'.<sup>44</sup> The clearest quote in this genre comes from the United States, and is to be found in a book on astronomy published in 1873 at the publishing house of the Lutheran Synod of Missouri, in which the author squarely rejects all the astronomical discoveries made in modern times that conflict with Biblical texts: 'Let no one understand me as inquiring first where truth is to be found – in the Bible or with the astronomers. No; I know that beforehand – that my God never lies, never makes a mistake; out of his mouth comes only truth, when he speaks of the structure of the universe, of the earth, sun, moon, and stars...'.<sup>45</sup>

This author realized that a textualist, by admitting that the Bible contains falsehoods, would have to give up the idea that the Scripture is a divine revelation and, consequently, would have to abandon Christian faith. So he bites the bullet and rejects modern science. One might ask a religious textualist such as Justice Scalia whether he wants to bite the bullet as well. Or does he prefer the other horn of the dilemma for the textualist, namely to admit that the Bible contains many stories from hearsay and many falsehoods? The first horn condemns him to being an irrational fundamentalist who rejects scientific progress, whereas the second horn makes it impossible to have good biblical reasons for being a believing Christian.

It is no wonder, then, that most modern Christians avoid this dilemma by rejecting the textualist approach to the Bible. They embrace what one might call the doctrine of The Living Scripture, according to which it is perfectly all right if each new generation of readers – and, according to many Protestants, each individual reader – reinterprets Biblical texts in a more or less radical way. This reinterpretation has a double objective: first, to ensure that we can agree with everything the Bible says, so that God is not a liar after all, and, secondly, to make sure that the so-called salvific effect of reading the Scripture is maximized.<sup>46</sup> We now see the true origin of Gadamer's doctrine of interpretation, according to which 'a text can only be understood if it is understood *differently* each time'. In particular, Gadamer's second and third premises, according to which 'in understanding a text, there is always something like an application (*Anwendung*) of the text... to the present situation of the interpreter', and the aim of interpreting

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44 The quotes are taken from White (1960), *supra* note 39, vol. I, pp. 25-26, although White's quotes cannot always be trusted. Cf., for example, Edward Rosen, 'Calvin's Attitude toward Copernicus', 1960 *Journal of the History of Ideas* 21, pp. 431-441.

45 *Astronomische Unterredung zwischen einem Liebhaber der Astronomie und mehreren berühmten Astronomern der Neuzeit*, by 'J.C.W.L.' (St. Louis, 1873), quoted by White (1960), *supra* note 39, vol. I, p. 151.

46 I shall not discuss here the diversity of modernizing tactics in Biblical interpretation, such as attempts to dissociate the salvific core of the Biblical message from an outdated world view, or to distill an 'existential understanding' (*Existenzverständnis*) à la Bultmann from the text that is valid in our times. All these tactics are problematic and arbitrary to a great extent.

a text is to come to an agreement with the author about the topic (*Sache*) of the text, are essential to a believing Christian who reads the Bible in a non-textualist manner.

What should we think of this anti-textualist escape route for the believing Christian (or Muslim, or Jew), who embraces the doctrine of The Living Scripture? Justice Scalia heaps much scorn upon the defenders of its legal counterpart, the doctrine of The Living Constitution. I shall postpone, for a moment, the question as to whether he is right with regard to judicial interpretation, but I endorse his verdict if applied to the doctrine of The Living Scripture. For two reasons this doctrine is not a viable methodological alternative to Textualism, however desirable it may be from other points of view, such as the need for modernizing Muslim cultures and political systems. First, the doctrine of the Living Scripture does not provide us with any positive methodology for interpreting texts of holy books, apart from the dogmatic rule that what the scripture says should be saved at all cost against empirical or moral objections. If we accept the doctrine, we end up with the absurdities that the scripture ‘means what it ought to mean’, that we should ‘never mind the text that we are supposedly construing’, and that ‘what the scripture meant yesterday it does not necessarily mean today’ (*cf.* pp. 39-40). As Justice Scalia says:

‘Perhaps the most glaring defect of Living Constitutionalism... is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* is not a sufficiently informative principle of constitutional interpretation. What is it that the judge must consult to determine when, and in what direction, evolution has occurred?... As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy’ (p. 45).

This Scalian criticism applies, *mutatis mutandis*, to the doctrine of The Living Scripture, apart from one minor point. In the case of theological reinterpretation concerned with factual claims, there is a clear external authority that decides upon what is to be the guiding principle of the evolution: the authority of scientific and scholarly progress. For example, Muslims or Hindus sometimes claim that central theories of modern science such as quantum mechanics or the big bang theory can be found in the Qur’an or in the Veda’s, if interpreted correctly, although of course such interpretations are absurdly far-fetched and were never advanced before these scientific doctrines became widely known. And after Darwin’s refutation of Paley, many Christians concluded that the text of Genesis must be interpreted metaphorically. But this fact of an authority external to the text of a divine revelation makes things even worse for the believer. For it means that the authority of science and scholarship prevails over the alleged authority of divinely revealed scripture itself.<sup>47</sup>

Second, because of the interpretive chaos created by the doctrine of the Living Scripture, the normative authority of a revealed text is seriously undermined. Indeed, why should such a text have any moral or religious authority at all, if individual readers are allowed to project their own preferences into the text by what they call an ‘interpretation’? The Church of Rome tried to limit the havoc caused by the doctrine of the Living Scripture, claiming that the Pope and

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47 Many theologians, such as Rudolph Bultmann, and religious philosophers, such as Richard Swinburne, have tried to distinguish non-arbitrarily between, on the one hand, the outdated *Weltanschauung* of the Old and New Testament and, on the other, the essential contents of the divine revelation. Unfortunately, however, they make this distinction in very different ways. *Cf.*, for example, Richard Swinburne, *Revelation. From Metaphor to Analogy*, 1992, pp. 75-84.

Councils have an institutional monopoly of deciding upon the true interpretation of the Bible. But this solution was rejected by Luther in 1521, who substituted the individual conscience of the believer for the rule of the church as a criterion of truth in biblical interpretation. As a result, the interpretive chaos is complete within Protestantism, whereas the Catholic claims to institutional monopoly in biblical interpretation cannot be justified convincingly by the text of the Bible.<sup>48</sup> I conclude that Textualism is the only valid methodology for interpreting so-called holy books. A non-believer will have no difficulty in defending Textualism in this domain. However, we have seen that a religious believer such as Justice Scalia has only three options with regard to the interpretation of his holy book, each of which is unattractive:

1. be a Textualist and conclude that one should reject scientific progress to the extent that it conflicts with the relevant holy book;
2. be a Textualist and accept that the relevant holy book contains many stories from hearsay and many falsehoods;
3. be a non-Textualist, so that you have to admit that you do not have at your disposal a sound methodology for interpreting your holy book.

Most modern believers opt for the third alternative, since they rarely reflect upon the methodology of textual interpretation in theology. In fact, Justice Scalia told me that he himself had never thought about the pros and cons of Textualism in theology.

## **7. Judicial interpretation**

Having argued for Scalian Textualism in philosophy and theology, I now come to the topic of the judicial interpretation of statutes and constitutions. As we have seen, Justice Scalia's Simple Textualism will not suffice in this domain, since here the genre of interpretations is applicative, so that Simple Textualism should be replaced by Applicative Textualism. However, can Applicative Textualism be vindicated as the optimal methodology for statutory interpretation? To what extent does a defensible version of Applicative Textualism differ from its official rival, the doctrine of the Living Constitution? As we have seen, this latter doctrine cannot be justified by a general philosophical hermeneutics à la Gadamer, according to which all texts are Living Texts, since this philosophy of interpretation turned out to be confused and defective. Yet there are good specific arguments for the doctrine, derived from the nature of the American Constitution and of the political system as a whole. In this section, I take issue with Justice Scalia on three points, two of which are concerned with his argument for Textualism in judicial interpretation. The third point is whether Textualism can be a comprehensive theory of interpretation in this domain, as Justice Scalia claims.

(i) The central argument for Applicative Textualism in the judicial interpretation of statutes and constitutions that Justice Scalia puts forward is the *Argument from Authority*. In modern democracies, which pay heed to the principle of the separation of powers, judges simply do not have the authority to promulgate new laws. If, under the guise of an 'interpretation', the courts in fact create new statutes, they are usurping the legislative powers that are uniquely assigned to 'the people and their representatives' (p. 133).

Undeniably, this democratic Argument from Authority (more precisely: from a lack of authority) has some power, although one should admit that there is no sharp distinction between 'applying a statute' and 'creating a new statute under the guise of an interpretation'. In order to

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<sup>48</sup> Cf. for an analysis of this 'Pyrrhonian Crisis' caused by the Reformation: Richard H. Popkin, *The History of Scepticism from Erasmus to Spinoza*, 1979, chapter 1.

assess its argumentative weight, however, one should balance this argument against other arguments to the opposite effect, such as the argument that the American Constitution is very old and in practice nearly unamendable (*cf.* §2, above). But Justice Scalia never engages in the type of nuanced weighing of opposite arguments that is required here.<sup>49</sup>

My first, more specific, challenge to Justice Scalia is somewhat *ad hominem*, for it is concerned with the (in)consistency between his religious convictions and his defence of Textualism in the judicial interpretation of statutes and the Constitution. We saw that Textualism in theology leads to an embarrassing dilemma for the religious believer. Either he has to reject incontestable empirical discoveries and modern scientific theories, or he must admit that the Bible contains too many falsehoods to be a reliable testimony of a divine revelation. We may assume that, being a good Catholic, Justice Scalia does not endorse Textualism in Theology. It follows, however, that he has a problem of consistency concerning his *argument* for Textualism in judicial interpretation, since the arguments for Textualism are very similar in both domains: they are both Arguments from Authority. What is more, the Argument from Authority is *much* more convincing in theology than it is with regard to judicial interpretation, so that, if a religious believer such as Justice Scalia rejects it with regard to biblical interpretation, he should repudiate it in the legal domain as well. All believers adhering to a ‘religion of the book’ who are also textualists with regard to the interpretation of statutes and the Constitution will be confronted by this same problem of consistency.

As we saw above (§6), many theologians argued that the reader of the Bible does not have the authority to change the meaning of the divine revelation by an ‘interpretation’. Similarly, textualists such as Justice Scalia argue in the legal domain that judges do not have the authority to reinterpret the meaning of texts of statutes or of the Constitution. Because of four reasons this Argument from (a lack of) Authority is more compelling in theology than it is in law. First, if the Christian God exists, His authority is absolute and super-human, whereas human laws can have a relative authority only. Second, since the Christian God is omniscient, He can anticipate all moral dilemmas that humanity will have to face in the future, so that we may assume that the moral rules He issued will be eternally valid and do not stand in need of (re)interpretation.

Third, the Catholic Church and other Christians, with the exception of the Mormons, hold that the divine revelation in Christ is the very last, final, and definitive revelation by God to humans on Earth, so that God will not rectify non-originalist interpretations of his Word during our life on Earth. For example, Christians do not accept the Islamic view that the Qur’an is such a correction, in which the divinity of Christ and the doctrine of the Holy Trinity are rejected.<sup>50</sup> In the legal domain, on the contrary, the legislature is able to rectify judicial interpretations of laws by promulgating new statutes, or, in principle, by amending the Constitution. In other words, non-textualist interpretations of laws do not fatally infringe upon the principle of the separation of powers in a democracy, whereas non-textualist interpretations of God’s Word do fatally betray His divine authority.

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49 Obviously, Scalia’s defence of Textualism with regard to the interpretation of the American Constitution has strong ideological motives, which would be frustrated by an impartial weighing of arguments. In the two-party system of the United States, where the powers of the winning Republican Party are restricted mainly by a liberal judiciary, the defence of Textualism serves as a conservative instrument to limit the influence of the courts. Similarly, the French revolutionaries of 1789 argued that judges are nothing but ‘la bouche de la loi’ (the mouthpiece of statute law), because they wanted to curb the influence of a conservative ‘noblesse de robe’ (judiciary). But of course, judges cannot but develop statutes by interpretation, because the legislature is not able to anticipate all possible legal problems. In the multi-party systems of Continental Western Europe, the courts are much less politicized, and it is generally accepted that the judiciary is allowed to develop indispensable new rules, especially when the legislature fails to enact statutes because of persistent stalemates within coalitions.

50 *Cf.* the declaration *Dominus Iesus*, published by the Congregation for the Doctrine of Faith, the Vatican, in September 2000, sections 5-8.

Fourth and finally, most constitutions explicitly assign the power to apply and interpret the constitution, laws, and treaties valid in a country to the judiciary. For example, Article III, section 2, of the Constitution of the United States assigns to the courts judicial power regarding 'all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority', etc. Of course, the framers of constitutions realize that this craft of interpretation will include the filling of gaps in statutes and in the constitution itself, and the type of stretched interpretation (by analogy, for example) that is often needed in order to apply articles to cases of which the legislature had never thought. In theology, however, it is rarely the case that a text of an alleged revelation explicitly assigns the power to apply and interpret this revelation to a person or institution. Indeed, the biblical passage by reference to which the Catholic Church justifies its claim to an interpretive monopoly, does not say anything about textual interpretation.<sup>51</sup>

I conclude that a Christian believer such as Justice Scalia, who uses the Argument from Authority in order to vindicate Textualism in *judicial* interpretation, must *a fortiori* endorse the Argument from Authority in order to vindicate Textualism in *Biblical* interpretation. Inversely, if a religious believer rejects the Argument from Authority for Textualism in theology, since it places him in the dilemma I described above, he *a fortiori* cannot use the Argument from Authority for Textualism in judicial interpretation, where its force is indeed much weaker.

(ii) My second challenge to Justice Scalia is equally concerned with his argument for Textualism, and it is less of an 'academic' issue than the first. The question is: can one use Scalia's *democratic* Argument from Authority for defending a textualist interpretation of the Constitution in cases of a judicial review of statutes? If the issue is whether the Supreme Court should declare a law passed by a state legislature or by Congress unconstitutional and therefore void, one cannot say that the Court should interpret the Constitution textually because otherwise 'it would usurp legislative powers uniquely assigned to the people and their representatives'. For in cases of a judicial review of statutes, a textualist interpretation of the Constitution may imply precisely that statutes promulgated by 'the people and their representatives' will be annulled by the judiciary, whereas they might not be annulled on the basis of a non-textualist interpretation of the Constitution. Too often, a defence of Textualism in the domain of judicial interpretation is merely a pretext for promoting a conservative or even reactionary stance on issues of judicial review.

Some of the well-known examples of the judicial annulment of statutes illustrate what I mean. In 1923 the Supreme Court decided in *Adkins v. Children's Hospital* that a minimum-wage law for women enacted by Congress for the District of Columbia violated the right of freedom to contract on the part of the employer and the employee. Some years later, in *Coppage v. Kansas*, the Supreme Court held unconstitutional on similar grounds a Kansas law forbidding an employer to require an employee to enter into a so-called 'yellow-dog' contract, that is, a contract that required as a condition of employment that the employee would promise not to join a labour union during the period of his employment. As William Rehnquist wrote in his book *The Supreme Court*, 'the laws the Court was thus setting aside were the response of legislators in countless states to keenly perceived and prominently publicized problems of the day'.<sup>52</sup> It was only after President Roosevelt had threatened to 'pack' the court, that the Supreme Court discontinued invalidating New Deal legislation.

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51 Matthew 16:18-19: 'And I tell you, you are Peter, and on this rock I will build my church, and the powers of death shall not prevail against it'.

52 William H. Rehnquist, *The Supreme Court*, 2001, p. 115. I quoted the examples from pp. 112-114.

Another area where Textualism can be used for promoting a reactionary stance in cases of judicial review is environmental legislation. According to the so-called ‘Takings Clause’ of the Fifth Amendment, no ‘private property shall be taken for public use, without just compensation’. In September 2002, Judge Douglas H. Ginsburg delivered a notorious speech to the Cato Institute, a conservative libertarian club. He bemoaned what he called an absence of fidelity to the text of the Constitution, urging that the courts should return to their pre-New Deal interpretations. With regard to the Takings Clause, this would mean that property owners should be completely compensated by States or the Federal government when environmental and other regulations reduce the value of their property. Clearly, if this type of textualist interpretation of the Takings Clause were applied as Ginsburg urges it should, no state or local government would dare to adopt any environmental regulations, since the costs would be staggering.<sup>53</sup>

Of course such cases do not refute the doctrine of Textualism with regard to judicial interpretation of the Constitution. The textualist might answer simply that judges do not have the authority to change the Constitution and therefore should be textualists, the legislative power to amend the Constitution being assigned uniquely to Congress. However, what I am arguing is merely that the democratic Argument from Authority falls short of vindicating Textualism with regard to the Constitution in cases of judicial review, since in these cases the textualist interpretation of the Constitution is typically used in order to annul laws that have been adopted by democratically elected legislatures. We may conclude from points (i) and (ii), that a religious judge such as Antonin Scalia cannot consistently defend Textualism with regard to judicial interpretation by the Argument from Authority, and that this argument is invalid in itself with regard to a great many cases of judicial review.

(iii) I now come to my main issue, the issue of whether Applicative Textualism can be a comprehensive methodology for the judicial interpretation of statutes and of the Constitution. Contrary to what Justice Scalia claims, I do not think it can, since there are rules of judicial interpretation that any court must apply even though, in principle, they cannot be incorporated in a textualist or originalist methodology. One example of such a rule is discussed by Justice Scalia, and he admits that it is external to Textualism: the rule of *stare decisis* (pp. 139-140). One might reply, of course, that this rule is external to any doctrine of interpretation, because it is not a rule of interpretation at all. If one decides to apply the rule of *stare decisis*, one does not interpret the relevant statute or constitutional provision – so one might argue – but rather decides not to interpret it anew. But this reply oversimplifies the complexity of judicial decision making. In order to decide whether the rule of *stare decisis* applies with regard to a specific case, one must investigate whether this case sufficiently resembles an earlier case that involved a particular interpretation of a statute. And in order to establish that the resemblance is legally relevant, one has to use the statute in question as a criterion of relevance. In other words, the interpretation of the statute and the decision to apply the rule of *stare decisis* are intertwined, because what one decides is that the earlier interpretation of the statute also covers this new case.

Another example of a rule that cannot be incorporated into Applicative Textualism or Originalism is the maxim that the totality of laws and treaties of a country at a given time must be interpreted as a consistent system. This Maxim of Holism, as one might call it, implies that *later* amendments to the Constitution might influence the interpretation of *earlier* articles or

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53 For this example, see Herman Schwarz, *Right Wing Justice. The Conservative Campaign to take over the Courts*, 2004, pp. 2-3. Justice Douglas Ginsburg (not to be confused with Ruth Bader Ginsburg, a Clinton appointee to the Supreme Court) is a Reagan appointee to the federal court of appeals in Washington, D.C. Reagan nominated him for the Supreme Court after the Senate rejected Robert Bork, but was forced to withdraw the nomination because Ginsburg had smoked marijuana with students at Harvard. See Schwarz (2004), p. 2.

amendments, and that *later* statutes might change the proper meaning of *earlier* statutes, so that it is incompatible with Textualism or Originalism.

It is striking that Justice Scalia merely mentions a weakened version of this maxim, which is consistent with his Originalism. He says that ‘ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute... compatible with previously enacted laws’ (p. 16). But clearly, the Maxim of Holism also implies that ambiguities in *previously* enacted laws should be resolved in such a fashion that they are consistent with *newly* promulgated laws. Indeed, a newly enacted law has preference over an older law at the same level if the two are incompatible. Otherwise it would be impossible to repeal an older law by a new law, or an older amendment to the Constitution by a newer amendment, as happened in the case of Amendment XVIII concerning intoxicating liquors, which was repealed by Amendment XXI. Clearly, then, the Maxim of Holism is incompatible with Textualism or Originalism.

Concerning the judicial interpretation of statutes and of the Constitution we must conclude that even Applicative Textualism cannot be a comprehensive philosophy of interpretation. Rather, Textualism is but one methodological *topos* among others, and a comprehensive philosophy of interpretation has to list all relevant *topoi*, such as *stare decisis*, the maxim of holism, and many others (*cf.* §3, above). Typically, in deciding which of several possible interpretations one should prefer in a specific case, we use a trade-off between these *topoi*, assigning a different weight to each of them. This situation resembles theory choice in the empirical sciences, where we use a number of different criteria for theoretical excellence, such as explanatory depth, simplicity, empirical adequacy, fertility for further research, consistency, coherence with established theories, and so on. As in the philosophy of science, a simplistic ‘once and for all’ methodology for the choice between rival views in judicial interpretation is impossible.

What we come down to now is a methodology of Super-Sophisticated Applicative Textualism. This philosophy may still differ somewhat from the doctrine of The Living Constitution in that it assigns *more weight* to the *topos* of Textualism, but that is a difference of degree only. For example, one might hold that in the United States, it is not up to the Supreme Court to declare capital punishment unconstitutional by subsuming it under the ‘Cruelty’ clause in the Eighth Amendment, because it is clear from the text of the Fifth and the Fourteenth Amendments that the use of the death penalty is explicitly contemplated in the Constitution (*cf.* p. 46).<sup>54</sup> Accordingly, the decision to change the Constitution on this point is reserved to Congress, and a two-thirds majority of both houses is required (etc.). The specific weight that the Super-Sophisticated Applicative Textualist attributes to the *topos* of Textualism will differ from case to case, and between different legal domains. In penal law, for example, the *topos* has a greater weight than in civil law, because *nulla poena, nullum crimen, sine previa lege poenali*.

As against Gadamer, we may conclude that a ‘scientific’ methodology of statutory interpretation by judges is possible. Yet this ‘science of interpretation’ is complex and allows for flexibility and diversity of opinion, because there is no algorithm for determining the specific weights that have to be assigned to the different *topoi* of interpretation in particular trade-offs. And as against Antonin Scalia, we should conclude that if the only defensible version of

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54 The Eighth Amendment reads: ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted’. A plausible argument in this example would not be Scalia’s originalist argument (p. 145), that ‘cruel’ in this Amendment *means* ‘what we consider cruel today’, that is, at the time the Amendment was promulgated. For ‘cruel’ just means ‘cruel’, and I agree with Professor Dworkin (pp. 120-123) that the *extension* of the predicate ‘cruel’ might shift over time because of changing moral sensibilities. One should rather apply the maxim of holism and rely on an interpretation of the Constitution *as a whole*, that is, on the impact of the Fifth and the Fourteenth Amendments upon the interpretation of the Eighth Amendment. However, Scalia’s Naive Textualism cannot allow that later Amendments (such as XIV) influence the interpretation of earlier Amendments (such as VIII).

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Textualism in the judicial interpretation of the American Constitution is Super-Sophisticated Applicative Textualism, the difference with the doctrine of the Living Constitution is at most a minor and gradual one, concerning the relative weight that one assigns to the textualist *topos* among many other *topoi* of interpretation.