BIBLICAL AND CONSTITUTIONAL INTERPRETATION AND THE ROLE OF ORIGINALISM IN SIXTEENTH AND TWENTIETH-CENTURY SOCIETIES

Word (wurd) n. Abbr. Wd. 1. A sound or a combination of sounds, or its representation in writing or printing, that symbolizes and communicates a meaning. ... (American Heritage Dictionary)

Words are symbols, symbols that only represent meaning. They are, in and of themselves, of no value except to the extent that they communicate to their reader or hearer some associated understanding. But like other, nonverbal symbols, the meanings associated with words vary widely across cultures, classes, and times. The meanings given by one group may be quite at odds with those provided by another.

The significance of this variety increases with the importance of the symbol being interpreted. When it comes to words, no symbols are more important to Americans than the foundational canons of their religious and civic societies. In religion, the foundational source for most Americans is the Bible, of course. In a country founded by Puritans, but populated by peoples of a wide array of doctrines and beliefs, the variations on what the Bible means to Americans are nearly as broad and vast as the country's terrain. Equally divergent are the interpretations Americans give to their civic manifesto, the U.S. Constitution. Debates about the terms, conditions, and understandings of that document have provided backdrops against which much of American history has been played. From the Civil War to the War Powers Act, the interpretation of the Constitution has provided Americans with a key focal point regarding the structuring of society.

Many groups vie for recognition for having paramount interpretations of the Bible and the Constitution. Within and between different religious traditions, proponents of various biblical interpretations compete for an indication that their understanding is ultimately authoritative. Similarly, in legal and political circles, lawyers, historians, and political scientists promote their interpretative analyses of the Constitution in hopes that society will in some way acknowledge the validity of their claims.

The interpretation of either source, however, requires the application of hermeneutical principles. These principles, whether recognized or assumed, are shared in a number of ways between the Bible and the Constitution. Of interest here are the ways in which the methods used to interpret the two sources compare on the question of "originalism." By originalism, I refer to the hermeneutical approach used by both biblical and constitutional scholars (and followed by millions of lay persons) that accords binding authority to the strict text of the source document or to the intentions of its authors or adopters (Brest).
The claim that the original text of the Constitution, or the intentions of its framers and ratifiers, has authoritative value surfaced most recently in the 1980s during the Reagan Administration, and culminated in the events surrounding the nomination of Robert Bork to the U.S. Supreme Court. This, however, was not the first time that originalism had surfaced on the American political scene. On numerous occasions, originalism has been promoted as the defining mode for resolution of public crisis, from the chartering of a national bank in McCulloch v. Maryland, to the extension of the Bill of Rights through the fourteenth amendment in Brown v. Board of Education, to the definition of "high crimes and misdemeanors" employed in the Nixon and Clinton impeachment processes (Rakove). In this light, the assertions provided by originalists come not as new theories or understandings, but as part of a quasi-cyclical fluctuation in political rhetoric.

So, too, are the promotions of biblical originalism that emerged from the sixteenth-century reformation in the Western church. From the writings of Puritan reformers such as Thomas Cartwright and Walter Travers, to the orations of William Jennings Bryan at the Scopes "monkey trial," to present religious sentiments expressed by such bumper stickers as "God wrote it, I believe it, end of discussion," biblical originalism has cycled regularly through religious societies.

**The Constitution**

The most recent resurgence of constitutional originalism dates to a 1985 speech given by then-Attorney General Edwin Meese to the American Bar Association (Meese). The brief address outlines a political, as well as legal, theory on how the Constitution should be read in light of the original intentions of the framers and ratifiers of that document. Meese's stated hermeneutic principles are based in the text and in the historic record:

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed as well. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself (p. 17).

Meese relies heavily on two facts or assumptions: (1) that the Constitution is a written document, and (2) that the intentions of the framers/ ratifiers are reasonably ascertainable through historical analysis.

The fact that the Constitution was memorialized in writing distinguished it from England's oral tradition. From this, Meese concludes that the framers intended "to write a document not just for their times, but for posterity" (p. 14). Meese does not, however, explain how this fact determines the method by which the Constitution should be interpreted. It may very well be that the framers intended the document to be read expansively over the centuries, and not as narrowly as Meese ultimately promoted during his tenure as Attorney General.

Moreover, the writing of the Constitution did not entirely wipe away the centuries of common law developed under English jurisprudence. Even some of those doctrines that were quasi-constitutional in nature still play a significant role in modern American case law. An example of this latter category is the common law doctrine of jus publicum, under which property was held by the sovereign for the benefit of the public. This principle, now known as the public trust doctrine, forms the basis by which U.S. judges have found a near-constitutional obligation of the legislative and executive branches of government to hold common resources in trust for the public, in particular the shores and beds of the nation's navigable waterways (Cook).

Meese's second point—that the history of the constitutional debate is well documented—leads him to conclude that "the meaning of the Constitution can be known" (p. 15). But to whose meaning does he refer? Using historical analysis to determine a single individual's internal motivation concerning a certain act committed more than 200 years ago is fraught with difficulties and limitations. First is the obvious problem of being able to review only whatever was left in writing, which may or may not reflect the person's real intentions. Second, there is always the danger of transposing one's own cultural expectations to the matters that have been committed to writing. As noted by Quentin Skinner: "It will never in fact be possible simply to study what any given classic writer has said ... without bringing to bear some of one's own expectations about what he must have been saying. ..." Multiply these difficulties several hundred times to include all the persons involved in the writing, adoption, and ratification of the Constitution, and the faith that Meese exhibits in being able to discern original intent with such certainty seems questionable.

It is precisely on this difficulty that Meese's primary foil, Justice William Brennan, jumps. Noting that the Constitution's "majestic generalities and ennobling pronouncements are both luminous and obscure," Brennan attacks Meese's position as one that "feigns self-effacing deference" to the actions and intents of the framers and ratifiers, but in truth is "little more than arrogance cloaked as humility" (Brennan, pp. 23, 25). Originalistic approaches are arrogant, according to Brennan, because of the inconclusive and uneven record of evidence as to what was intended, and because of the impossibility of melding hundreds of individual intentions into a single "intent."
In outlining his own hermeneutical principles, Brennan begins with the observation that the Constitution, in particular the Bill of Rights, defines certain values as being transcendent above the rights of the majority. These values, such as those providing for the Writ of Habeas Corpus, prohibiting Bills of Attainder and cruel and unusual punishment, and ensuring the freedoms of speech, association, and religion, protect individuals and minorities from potential "tyranny" by the legislative branches of government. It is the recognition of these value choices that must guide interpretation of the Constitution:

To remain faithful to the content of the Constitution, ... an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. ... [O]ur acceptance of the [Constitution's] fundamental principles has not and should not bind us to those precise, at times anachronistic contours. ...

We ... read the Constitution in the only way that we can: as Twentieth-Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? (p. 27).

Brennan's interpretive principles are criticized by Meese and others as confusing the legislative function of government for the judicial. Rather than keeping interpretation of the Constitution current with the changes of the times, Meese contends that jurists such as Brennan are seeking to make policy choices that only the legislative branch is empowered to make (p. 18). But it is precisely the tension between the individual and the majority, as highlighted by Brennan, that much of the Constitution was designed to adjudicate, and it is only the judicial branch that is fully capable of safeguarding the rights of the individual.

Moreover, as Brennan states, the purpose of the Constitution "was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." In discerning the shape of this constantly evolving society, the task, according to Brennan, is to "account for the transformative purpose" of the Constitution's text (p. 9,8).

The Puritan principles on scripture to which Hooker was responding held that all things must be ordered according to the strict dictates of scripture (I.16.5, II.1.3), even to the extent of governing the "taking up of a rush or straw" (II.1.2 & n.1). In this sense, Hooker's opponents purport to adhere to the most extreme form of originalism: literalism, where the understanding of a text comes exclusively from the words of the text without regard to their social, historic, or linguistic contexts (Brest, p. 241). Determining the hermeneutical principles of literalists is difficult because few explicitly present their rules of interpretation. Many, in fact, refuse to acknowledge that they are interpreting at all; they are purportedly just reading the "plain meaning" of the text--it means what it says, and it says what it means, according to the way that a "normal speaker" of the language would understand it under the circumstances (Brest, p. 229).

Even when, as in the case of the Constitution, the source document was originally written in the same language in which it is being read, the idea that there is an objective plain meaning is problematic, especially when dealing with a historic text. One can never completely shed one's culture and time and fully adopt the worldview of a different period and place; one will always bring to the text prejudices and perspectives that are shaped by a specific environment (Brest). Add to this tendency the interpretative complications attendant to the translation of a text from one language to another, and the illusions promised by a plain meaning literalist rule evaporate quickly.

Moreover, the fact is that while Hooker's Puritan rivals purport to be literalists, they in fact are not. As Hooker is eager to highlight, many facets of the Puritan discipline are not to be found directly in scripture, but can only at best be inferred, deduced, or inspired from scripture (II.7.9, III.2.1). To the extent that Puritan discipline is derived from scripture only indirectly, some form of interpretation is occurring. But because the Puritan authors refuse to acknowledge that they are engaging in interpretation, it is, as has already been noted, difficult to determine how they make the connection between scripture and their understanding of it (III.8.1-2).

Hooker, on the other hand, goes to great lengths to lay out the principles by which he understands law, in general, and scripture, in particular. In fact, underlying the entirety of Hooker's Of the Laws of Ecclesiastical Polity is a polemic technique of displaying first principles through which the reader may come to understand, and hopefully adopt, the processes Hooker uses to reach his conclusions (II.1.3). By this fact alone, Hooker is greatly
distinguished from his colleagues, Puritan and otherwise, who tended to launch themselves into controversies with little or no explication of the principles behind their positions (Haugaard, p. 4).

As to his principles for interpreting scripture, Hooker begins in a fashion similar to Meese, noting the importance of the Bible as a collection of written documents, rather than a group of oral stories and sayings (I.14.3) (though most had their origins in oral traditions). But while Meese points to this fact as a reason for following only the text (plus a narrow definition of original intent), Hooker uses it to demonstrate that scripture is neither the exclusive nor exhaustive source of divine truth: "The benefit of nature's light be not thought excluded as unnecessary because the necessity of a diviner light is magnified" (I.14.4, II.4.7). This continuation of "nature's light," even after the composition of a holy canon, parallels closely the continued use of English common law in American courts, noted above.

Hooker continues by acknowledging, along with the Puritans, that scripture contains things necessary for salvation, and that some of these are uniquely found in scripture. However, he limits that acknowledgment to those things that cannot be known easily "by the light of natural discourse" (I.14.1). According to Hooker, the reader must already understand "certain principles," deduced by reason, to receive from scripture those things necessary for salvation. For Hooker, reason and scripture are both inseverably necessary to accomplish the objective to which religion aspires, which is "to know what the will of our God is; what [is] righteous before him; [and] in his sight what [is] holy, perfect, and good, that we may truly and faithfully do it" (I.14.5, 15.4; III.3.3, 8.10).

The pivotal role of reason is seen even more clearly in certain foundational Christian doctrines--such as the presence and structure of the Trinity—that are nowhere to be found directly in scripture. They are, rather, deduced "out of Scripture by collection" (I.14.2), a process strikingly similar to the methods used by the Warren and Burger courts to discern the existence and nature of a right of privacy from the "penumbras" of the first, fourth, fifth, and fourteenth amendments.

As important as reason is for Hooker, it does not, in and of itself, constitute an interpretive rule. Using reason as a tool for constructing such rules, however, Hooker establishes two primary hermeneutic processes for applying biblical "law" to different ages and circumstances: (1) assessing the purpose for which the law exists, and (2) determining the aptness of the means the law expresses for achieving that end (III.10.1).

According to Hooker, positive laws, whether contained in scripture or not, are changeable depending on the purpose for which they were first made (I.15.1). In cases where a law does not explicitly state the length of its duration, investigation must be made into its reason for being, and an assessment must be made as to whether that reason still exists and is still compelling. Implicit in this exercise is analysis of the historical contexts under which the law arose, and a comparison to the contexts of the present day:

The laws positive are not framed without regard as to the place and persons for which they are made. ... Almighty God in framing their laws had an eye unto the nature of that people, and to the country where they were to dwell (III.11.6).

To the extent that a law is limited to circumstances of the past, it may very well be that it no longer has compelling force (III.10.2).

Even if the purpose behind a law is still valid, the method the law uses to achieve that purpose may be outdated. Again, Hooker employs historical analysis to evaluate the aptness of a law to determine its effectiveness and to judge whether a change in the law is warranted: "[T]hat which hath been once most sufficient may wax otherwise by alteration of time and place" (III. 10.3).

Conclusion

In this way, Hooker assumes a role with respect to scripture that is strikingly similar to Justice Brennan's with respect to the Constitution. Both men are not uninterested in the original intents and purposes behind their respective documents. To the contrary, they both employ historical analysis to determine as best they can the outlines of those background principles. However, where originalists such as Meese and, to a lesser extent, Cartwright would complete their analyses with the determination of intent, Hooker and Brennan use the original intent as a launching point into a broader analysis of the roles that intent, and the process used to achieve that intent, played in the originating time and culture. Both then compare these intents and contexts to the present day and thereby come to conclusions as to the continuing validity of their respective modes of law. To paraphrase Brennan, the genius of the Bible and the Constitution rests not in any static meaning they might have had in a world that is dead and gone, but in the adaptability of their great principles to cope with current problems and current needs (p. 27).

In the end, the debate about originalism, in the Constitution and in the Bible, is not really about interpretative principles, but about outlook. On the one side is the certainty and comfort provided from a consistent vision that is
relatively stable, in that it seeks to maintain a perspective that is constant over time: times may change, but the text and interpretation of our foundational documents do not. On the other side is the role of continuing insight and new understanding--what Justice Brennan calls "contemporary ratification"--that seeks to forever renew the promises in our foundational written canons by discerning how their principles are made manifest, shaped, altered, or even overturned by the context of the present.

REFERENCES


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