Enthroning the Interpreter: Dangerous Trends in Law and Theology - Part I

The disciplines of law and theology have much in common. Perhaps the most significant similarity between the two entails the relentless quest for authorial intent through the vehicle of a literal method of interpretation. In other words, a literal hermeneutical procedure is the key toward understanding the author's intended meaning when interpreting either legal documents or Scripture. This series of articles will demonstrate that the use of a literal method of interpretation in order to pursue the author's meaning is a time-honored practice in both fields. In addition, these articles will also draw attention to disturbing interpretive trends well under way in both disciplines that have introduced a gradual shift in authority from the text to the interpreter. This article (part one) will focus on how literal interpretation is a foundational interpretive method within the American legal system.

Literal Interpretation and the Legal System

Using Literal Hermeneutics when Interpreting Simple Legal Documents

Using the author's plain expression in order to arrive at his intended meaning is one of the bedrock principles of American jurisprudence. Such a hermeneutic is traditionally employed in order to arrive at the author's intended meaning when interpreting simple legal documents. Take as an example the area of contract law. How is the original intent of a contract to be understood by the courts when a dispute over the meaning of the contract later arises between the contracting parties? One member of the judiciary succinctly articulated the time-honored principle of contractual interpretation:

> It is well established that the intent of the parties to a written contract is to be regarded as being embodied in the writing itself, and when the words are clear

> and unambiguous the intent is to be discovered only from the express language from the agreement…the rationale for interpreting contractual terms in accord with the plain meaning of language expressed is multifarious, resting in part upon what is viewed as the appropriate role of the courts in the interpretive process: This court long ago emphasized that the parties have the right to make their own contract, and it is not the function of the court to re-write it, or to give it a construction in conflict with…the accepted and plain meaning of the language used…In addition to the justifications focusing upon the appropriate role of the courts in the interpretive process, the plain meaning approach to construction has been supported as generally best serving the ascertainment of the contracting parties mutual intent…In determining what the parties determined by their contract, the law must look to what they clearly expressed. Courts in interpreting a contract do not assume that its language was chosen carelessly. Neither can it be assumed that the parties were ignorant of the meaning of the language that they employed…[1]

Two significant interpretive principles are emphasized in this excerpt. First, the ambition of the courts in the interpretive process is not to remake the contract according to their own liking but is rather to seek to understand it as the original parties intended. By following this principle rather than substituting their own preferences in lieu of authorial intent, courts honor the right of the parties to enter into contractual terms of their own choosing. Second, the primary vehicle for understanding the original intent of the parties is through the plain meaning of the contract language.

Using literal interpretation as a means of uncovering authorial intent is not only found in the area of contractual interpretation, but it is also utilized in the realm of testamentary construction.

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[1] Justice Flaherty; Quoted by E. Allan Farnsworth and William F. Young, *Cases and Materials on Contracts*, 5th ed. (Westbury, NY: The Foundation Press, Inc., 1995), 603-4.

The underlying goal of interpreting testamentary documents, such as will and trusts, is discovering the intent of the testator. Those who are stated as beneficiaries under such documents expect nothing less than for the court to derive the intent of the testator by first and foremost observing the plain meaning of his language as employed in the document itself. Literal interpretation is also employed in the area of statutory construction.

Similarly, when courts interpret statutes they have traditionally sought out the intent of the legislative making bodies by first observing how these bodies have plainly expressed themselves in any given law. The underlying policy rationale for following such a procedure involves the judiciary's function as interpreter of the law rather than its maker. When courts rewrite a statute instead of interpreting it, they substitute their own personal ideologies and worldviews for that of the elected representatives. This issue will be more vigorously explored in part three. For now it is enough to say that adhering to a literal hermeneutic when interpreting statutes prevents courts from transforming themselves into "super legislatures" and thus violating the constitution's separation of powers doctrine. In sum, seeking authorial intent through literal interpretation is the primary method used within the legal community when attempting to discover the meaning of contracts, testamentary documents, and statutes.

Literal Interpretation and Constitutional Law

Using a literal hermeneutic as a means of arriving at authorial intent is not only utilized in order to interpret contracts, testamentary documents, and statutes, but it has also been traditionally employed when interpreting the Unites States Constitution. Perhaps one of the greatest debates raging in contemporary American society revolves around the issue of how the United States Constitution is to be read and understood. On one side of the debate are those who insist that that the authorial intent of the framers be followed when the Constitution is applied by the courts. On the other side of the spectrum are those who insist that the Constitution is a "living and breathing document" that automatically evolves with a changing society. Therefore, the

original intent of the founding fathers is somewhat irrelevant in modern Constitutional application. Despite its ferocity, this debate is a relatively new one in American history. Going back to our nation's founding and for most of our country's existence it was naturally assumed that members of the judiciary would simply follow the authorial intent of the framers when applying the Constitution to legal disputes. Influential founding father, Thomas Jefferson, reflected this philosophy when he declared that we must:

> Carry ourselves back to the time when the Constitution was adopted, recollect the spirit in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.[2]

It was equally well understood that the intent of the framers could be derived from the plain meaning of the Constitution itself as well as from other relevant documents from the founding era. This historical interpretation is sustainable through the observation of several salient facts.

Note, first of all, the words of Jefferson. He said, "The Constitution on which our Union rests, shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States, at the time of its adoption."[3] In addition, Joseph Story, who was Professor of Law at Harvard Law School, Associate Justice of the United States Supreme Court, and the leading constitutional scholar of the nineteenth century, later

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[2] Thomas Jefferson, *Writings of Thomas Jefferson*, Albert Bergh, ed. (Washington D.C.: Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 449, in a letter from Jefferson to Justice William Johnson on June 12, 1823.

[3] Thomas Jefferson; quoted in John Eidesmoe, *Christianity and the Constitution* (Grand Rapids: Baker Book House, 1987), 392.

echoed similar sentiments. In his influential *Commentaries on the Constitution* (1833), he called for interpreting the constitution according to the intent of its authors as revealed in the plain meaning of their language. He noted, "The first and fundamental rule in the interpretation of all instruments, is to construe them according to the sense of the terms, and the intention of the parties."[4] Upon informing his readers of his own approach to constitutional analysis, he indicated:

> The reader must not expect to find in these pages any novel views and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers, by ingenious subtleties and learned doubts…Upon subjects of government, it has always appeared to me that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people, and never was designed for trials of logical skill, or visionary speculation.[5]

In a speech to the American Bar Association in 1985, then Attorney General Edwin Meese called for a return to the jurisprudence of original intention. In his speech, Meese quoted the following from Justice Story and pleaded that his words be taken seriously:

> In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation…Where the words admit of two senses, each of which is

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[4] Joseph Story, *Commentaries on the Constitution of the United Sates*, 3rd ed. (Boston, 1858), 1:283, 400.

[5] Ibid., viii.

> conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.[6]

Of course, advocates of original intention do not naively suggest that in a changing world the Constitution would never need to be updated from time to time. Rather, original intent advocates simply point out that such changes are to come about through the amendment process rather than the judiciary. According to the constitution itself, the amendment process is the proper mechanism to be used when the Constitution was in need of updating. This process, spelled out in Article V of the Constitution, specifies the method that is to be employed when society deems it necessary to alter or change the text of the Constitution. By calling for a two thirds super majority approval in both houses or a two thirds approval of the state legislatures in order to simply propose a constitutional amendment, and by calling for a three fourths approval of the state legislatures or state ratifying conventions in order to ratify a constitutional amendment, Article V makes the amendment process deliberately cumbersome by placing the power to change the Constitution in the hands of the elected representatives of the people. The following quotations make it apparent that the founders understood that the amendment process was the appropriate methodology to be employed when alteration of the constitutional text was contemplated. According to George Washington:

> If, in the opinion of the people, the distribution or modification of the Constitutional powers be at any particular wrong, let it be corrected by an amendment the way the Constitution designates. But let there be no change by

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[6] Joseph Story; quoted in Edwin Meese, III, Address to American Bar Association, 1985; adapted in "Toward a Jurisprudence of Original Intention," *Benchmark* Vol. II, no. 1, (January-February 1986): 10.

> usurpation; though this may in one instance be the instrument of good, it is the customary weapon by which free governments are destroyed.[7]

Samuel Adams similarly explained:

> …that people alone have an incontestable, unalienable, and indefensible right to institute government and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it. And the federal Constitution, according to the mode prescribed therein, has already undergone such amendments in several parts of it as from *experience* has been judged necessary.[8]

These quotations illustrate how much the principle of seeking authorial intent through literal hermeneutics was the foundation of American constitutional interpretation. The framers simply expected the judiciary to follow the ordinary language of the Constitution when adjudicating matters. They never expected the courts to depart from the principles of literal interpretation by taking upon themselves the awesome power of amending the Constitution from the bench, thereby circumventing the process outlined in Article V of the Constitution. Modern examples of the judiciary legislating from the bench by departing from the principles of literal interpretation include the notions that the death penalty violates the cruel and unusual punishment clause of the Eighth Amendment, that the First Amendment mandates a strict separation between church and state, and that the Fourteenth Amendment contains a constitutional right to have an abortion. These issues will be explored in part three.

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[7] George Washington; quoted in Eidesmoe, 392-93.

[8] Samuel Adams, *The Writings of Samuel Adams*, Harry Alonzo Cushing, ed. (NY: G.P. Putnam's Sons, 1904), Vol. IV: 388.

Because of this presumption that the justices would simply follow the intent of the constitution's authors through an application of a literal method of Constitutional interpretation, the framers saw the judiciary as a rather impotent body that never had the potential of posing any real threat to democracy. For example, Article III of the Constitution, which enumerates the power of the judiciary, "is the shortest and least specific of the constitutional provisions establishing the three branches of government."[9] The framers obviously spent far less time and debate when enumerating the powers of the judiciary than when deciding upon the powers of the executive and legislative branches of government.[10] Historian David Barton explains:

> As in many documents, the Constitution lists the most important aspects first, progressing to those of lesser consequence; following the preamble, Article I describes the Congress, Article II the Presidency, and Article III the Judiciary. Not only does the order of listing reveal their relative position of importance, the amount of detail provided by each branch also reflects its relative importance. The Legislature (Article I) received 255 lines of print while the Presidency (Article II) required only 114 lines. The judiciary (Article III) merited a mere 44 lines.[11]

The framers were so non-threatened by the judicial branch of government that they had no problem assigning members of the federal judiciary a life term to be terminated only by impeachment. Such life tenure stands in stark contrast to the limited terms that could only be fulfilled after voter approval given to members of the legislative and executive branches of government. The framers were obviously far more fearful of the threat that the executive and

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[9] Linda R. Monk, *The Words We Live By* (NY: Stonesong Press, 2001), 90.

[10] Ibid.

[11] David Barton, *The Myth of Separation*, 5th ed. (Aledo, TX: Wallbuilder Press, 1992), 221.

legislative branches posed to democracy than they were of the threat posed by the judiciary. It is for reasons such as these that Alexander Hamilton depicted the judiciary as the branch of government that posed the least dangerous threat to democracy in *Federalist 78*.[12]

Even the founders themselves who served as members of the first Supreme Court recognized that the court was designed to inhibit it from wielding great power in the affairs of the nation. For example, John Jay became the court's first chief justice after being appointed by George Washington. However, he refused a second nomination as chief justice in 1801. In so doing, "…he told President Adams that he had no faith that the court could acquire enough 'energy, weight, and dignity' to play an integral role in the nation's affairs."[13] This perceived impotency of the judiciary is also evidenced by the fact that up until 1935, the Supreme Court was never even housed in its own building independent of the building that housed Congress. From 1800 to 1935, the Supreme Court met in either the committee room of the capitol building, the Senate's former chambers,[14] and in a humble apartment in the basement beneath the Senate Chamber.[15] Historians Marshall and Manuel comment that during these years:

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[12] The *Federalist Papers* were written by John Jay, Alexander Hamilton, and James Madison for the purpose of explaining the intent of the Constitution to the state of New York in the hope that New York would vote to ratify the Constitution.

[13] Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), 31.

[14] Fred Friendly and Martha J. H. Elliot, *The Constitution: That Delicate Balance* (NY: Random House, 1984), 11, 12.

[15] Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin, 1929), Vol. III, 121.

> An idle passerby might wander in and find two or three onlookers and a court clerk and several men who had given up trying to find work and felt grateful for a warm place to sit on a cold day…One could not tell that he had entered the highest courtroom in the land.[16]

In sum, the founders lack of concern regarding the power of the judiciary as well as the perceived impotency of the court from its inception furnishample historical proof that the framers expected members of the judiciary to simply seek authorial intent through employing literal hermeneutics in handling cases. Deviation from this method was never contemplated nor anticipated. Thus, literal interpretation is at the very heart of American constitutional interpretation.

Conclusion

Discovering authorial intent through literal hermeneutics plays a significant role in the field of law. A literal approach is the key toward discovering authorial intent when interpreting various legal documents such as contracts, testamentary devices, and statutes. Moreover, this same hermeneutical approach was viewed as the proper method when interpreting the Constitution for most of America's judicial history. In the next article (part two), these identical hermeneutical principles will demonstrate themselves to be equally important to the field of biblical interpretation as they are in the field of legal interpretation.

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[16] Peter Marshall and David Manuel, *From Sea to Shining Sea* (NJ, Fleming H. Revell Co., 1986), 197-98.