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Reviewing Holy Writ: Interpretation In Law and Religion

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HOLY WRIT: INTERPRETATION IN LAW AND RELIGION. Edited by Arie-Jan Kwak. Ashgate 2009. Pp. 204. \$99.95. ISBN: 0-754-67896-2.

Holy Writ: Interpretation in Law and Religion is precisely what its title suggests. The book consists of “assembled essays on interpretation in the field of law and religion” (1) written by Justice Antonin Scalia and professors of law and philosophy from the University of Leiden and the University of Utrecht. The genesis of the book was “a conference in the honour of Justice Antonin Scalia, who visited the Leiden law department to celebrate the opening of the new faculty building.” (Preface, ix) The structure of the book makes it particularly enjoyable. The collection is aptly likened to a chain novel in the book’s preface. After an introduction by the book’s editor, Justice Scalia is given the first substantive word with his essay. As the first author in the chain, Justice Scalia has little, if anything, to say about the essays that follow his. However, the authors who follow Justice Scalia engage him and each other. The result is a book laden with robust and informative discussions about many aspects of the interpretation of religious and legal texts.

It should be made clear that Justice Scalia’s views are more of a point of departure for the authors rather than the focus of their comments. Some of the essays discuss—in varying depth—Justice Scalia’s originalist views and some discuss—also in varying depth—how Justice Scalia’s views apply to the United States and other democracies. However, the book is less about Scalia’s originalism than it is about broader issues involving the interpretation of religious and legal texts. Given that the authors of the essays are scholars based at European universities, it is not surprising that the authors do not discuss narrow points of American constitutional law particularly deeply. Those who want an extended and close analysis of Justice Scalia’s interpretative views and their application to the U.S. Constitution may wish to look elsewhere.¹ Similarly, those who want a book that explores the intricacies of Justice Scalia’s views regarding the interpretation of religious texts may be disappointed, though for a different reason. In

1. Some essayists attempt to engage the U.S. Constitution, with mixed results. For example, Tom Zwart addresses unenumerated rights in the U.S. Constitution, but does so incompletely. (113-29).

one of the most illuminating and interesting sentences in the book, Herman Philipse noted in his essay: “In fact, Justice Scalia told me that he himself had never thought about the pros and cons of Textualism in theology.” (38)

The collection of essays begins with Justice Scalia’s lecture he presented at the conference. In the lecture, he spoke generally about the United States as a federation, comparing it to the European Union. In addition, Justice Scalia discussed the United States Constitution as a legal document that provides legally enforceable rights. He noted that a legal document should—by its very nature—be interpreted based on its meaning at the time of its creation, i.e., its original meaning. It is important to note that he did not suggest that the Constitution should be read as a hortatory document that provides Americans with a way of living.² Indeed, the essay says little about interpreting transcendent legal or religious documents. What Justice Scalia wrote could have been written about any important, but not particularly special, legal document. However, he did indicate that the U.S. Constitution ought to be interpreted fairly sparsely so that the judiciary does not usurp the power of the legislature. Of course, that idea could stem as much from the U.S. Constitution’s structure of separation of powers as from any general principle of interpreting legal statutes or constitutions. The breadth of ideas expressed in Justice Scalia’s essay provides a sensible starting point for much broader interpretative issues examined in the book’s remaining essays.

Two broad overlapping issues, with numerous lesser issues, dominate the collection.³ The first issue involves the different ways religious and legal texts can be interpreted. The second issue involves how those texts should be interpreted if they are to be used to resolve current problems. The essays explore these issues in significant depth. However, the essays did not address a few issues that one might assume a collection of essays on the topic might mention.

How texts can be interpreted is an issue of primary concern in this book. The essays indicate that different methods of interpretation may be appropriate depending on the text to be interpreted. These points are made quite carefully and thoroughly. For example, the distinction between being a text-based interpreter and being a textualist is explained and debated. Most interpreters would claim to be text-based. However,

2. Justice Scalia distinguishes the U.S. Constitution’s Bill of Rights’ enforceable legal rights with the Declaration of Independence’s discussion of principles. (12).

3. Hans Nieuwenhuis’s essay contribution tracks these two issues quite closely. (131).

there is a difference between asserting that text matters and focusing almost solely on text to reveal its meaning.⁴ The contributors discuss that difference, as well as issues of originalism, intentionalism, literalism and other methods of interpretation in great depth and quality. For example, in the context of considering whether the Bible ought to be taken more or less literally Paul Cliteur asks provocatively: “Is the Bible for the serious believer more like a poem or more like a penal code?” (77)

The discussions regarding methods of interpretation occur in the context of analyzing both legal and religious texts. The authors fairly evaluate Justice Scalia’s ideas, noting that his version of originalism or textualism focuses on original meaning. That approach requires that a text’s interpreter determine what an average person would have understood the text to mean at the time the text was adopted.⁵

The essayists’ precision is important and is a hallmark of the book. Precision allows the essayists to make important distinctions. For example, proponents of original meaning are not necessarily proponents of intentionalism. The intention of the Founders or draftsmen of any text may be relevant only as a piece of evidence to support what is the document’s original meaning. Of course, this issue has particular salience for the U.S. Constitution, as it had to be ratified by those who may have read its terms somewhat differently than those who drafted it. The discussions of the different ways that texts can be interpreted are quite rich and could alone make for a nice primer for law students and quite a few law professors.

At times, the broad issue of how to interpret texts becomes the issue of how and whether to use original meaning when applying a text to today’s problems. Some of the essayists note that while the concept of original meaning is easy to understand, the meaning of terms ought to be contextualized, based both on the context of the text and on greater societal context. For example, Hendrik Kaptein discusses the original meaning of “arms” in the context of the Second Amendment right to

4. Why the text is being interpreted matters. Accordingly, Willem B. Drees notes in his essay:

The historians are not textualists. They are text-oriented, but not textualists in the sense given to the term above. If archaeological excavations or Hellenistic sources reveal facts relevant to the interpretation of passages of the Sermon on the Mount, it would be against the professional ethic to disregard such text-external evidence on the basis of a textualist preference. (51).

5. Tom Zwart notes: “Others, like Justice Scalia, who is the most prominent advocate of Originalism, will try to establish what the words meant to those living at the time that the Constitution was drafted.” (115).

bear arms. Kaptein suggests that what arms means, for purposes of applying the term today, has to include the fact that the arms that the Founders referenced were not the type that, like modern weapons, could turn a single citizen-soldier into the equivalent of a small private militia. (161) Issues like these are fascinating and raise the issue squarely: Does original meaning make sense as a method of interpretation for purposes of applying religious and legal texts to contemporary problems?

The essays make clear that the reason a text is to be interpreted must matter to how it should be interpreted. Justice Scalia considers interpreting texts in the fairly narrow context of enforcing legal rights. (12) Some of the essayists quarrel with using original meaning in that context; others do not. The essayists also critique using original meaning in other contexts. Some suggest that interpreting a religious text in order to apply it to a contemporary problem may be different than interpreting a legal text to apply it to a contemporary social, political or ethical problem. Almost all of the essayists touch on whether the original meaning of a religious or legal text ought to be used to resolve problems. They reach varied conclusions. For example, Paul Cliteur notes, "I defend that liberal interpretation is more appropriate in religion and theology (perhaps even inevitable) and textualism and originalism are more suitable for law." (67) However, Arie-Jan Kwak notes in the final essay that any authoritative text may lose its authority if it is interpreted merely to determine what it says rather than to determine how it ought to apply. (189) The breadth of the analyses and conclusions of the authors makes the book fascinating.

The issues that the essayists raise are thoroughly analyzed. However, the essayists do not address some issues that could have and arguably should have been addressed. Certainly, declining to address the narrowest implications of Justice Scalia's views about the U.S. Constitution is sensible. However, additional pages could have been spent discussing differences between interpreting statutes and interpreting constitutions. In his essay, Justice Scalia does not make a distinction between interpreting statutes and interpreting constitutions. However, given the essayists' discussions of the import of the authoritative nature of the legal and religious texts at issue, it would seem reasonable to expect some significant analysis of possible differences between the authority of statutes and the authority of constitutions and how that might affect their interpretation. Similarly, in the context of religious texts, noting and discussing a possible distinction between interpreting fundamental religious texts and interpreting canon law could have been fruitful. Criticizing what was

left out of the book can easily devolve into a description of the book the reviewer might have written rather than a review of the book that was written. However, there is one additional issue with respect to original meaning on which commentary from the essayists almost certainly would have been illuminating. Original meaning is the meaning an average person would give to a text at the time the text was written or adopted. This makes sense given that the people who chose to live under the relevant document made that choice at a certain time. However, a question arises: When is a document deemed adopted for purposes of its application to those who will live under it? That question is important both for the U.S. Constitution and the Holy Bible.⁶

The adoption of the Reconstruction Amendments—the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution—arguably re-ratified the Constitution. The nature of the Constitution was so radically changed by the adoption of those Amendments that one has to ask whether the original meaning of many parts of it—for purposes of applying it today—ought to be determined by what an average person in 1787 thought the Constitution meant in 1787, or by what an average person in the immediate post-Civil War years thought the Constitution meant in 1787, or by what the average person in the immediate post-Civil War years thought the Constitution meant in those years. If the Constitution was thought to have been re-ratified in essence, original meaning arguably ought to focus on what the ratifiers in the immediate post-Civil War years thought they were re-ratifying. This is not a variation on the theme of a Living Constitution; it is about determining the Constitution's relevant original meaning. Nonetheless, if the meaning of the Constitution during the immediate post-Civil War years becomes the original meaning, Justice Scalia's vision of original meaning can merge somewhat with a vision of a Living Constitution.

With respect to the Bible, the era of original meaning is important for determining how the Bible applies because the authority provided by the Bible for any group of adherents may depend on what they thought they were adopting. That is, regardless of the original meaning of any particular book of the Bible, the question arguably is what the meaning of the Bible or any particular book of the Bible was at the time the group that determined which books were to go into the Bible made the decision to deem those books authoritative. If a group of Christians who adopted the New Testament as an authoritative text thought it meant something

6. See Henry L. Chambers, Jr. *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92 (2009).

different at the time they adopted it than its original meaning, presumably the group's understanding of what the New Testament meant at the time they adopted it is what counts as original meaning for the purpose of interpreting the New Testament in the context of solving a contemporary problem from that group's perspective. This is not a semantic issue; it goes to the substance of what rules adherents agreed would bind them. This issue went unexplored or, at least, underexplored. The issue is arguably analyzed somewhat when the essayists consider whether original meaning is a legitimate method of interpretation when applying a text. However, it was not analyzed from the perspective of how precisely to determine what original meaning is.

In short, the book is very strong on many issues relating to the interpretation of legal and religious texts. It is of value to law professors and law students. Indeed, it is a wonderful read for anyone who wants a deep discussion of interpretative methods. However, those who expect to read about how interpretative methods ought to be applied to the U.S. Constitution, given the book's genesis with Justice Scalia's work, may be disappointed. This book only scratches the surface with respect to those issues.

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