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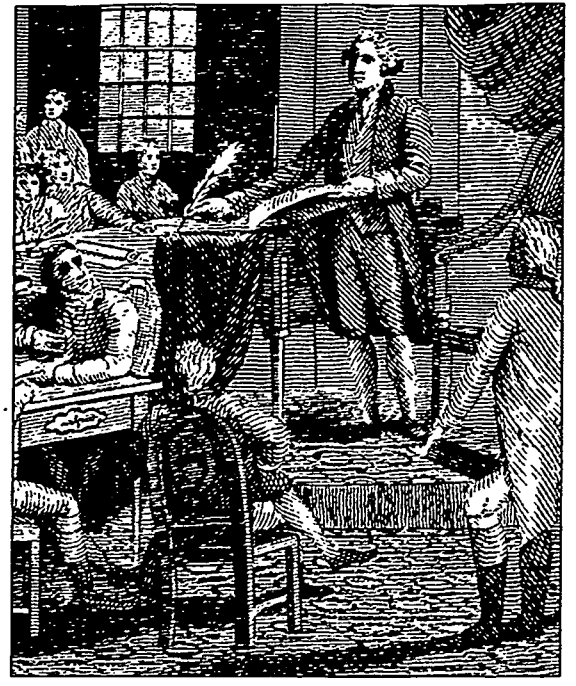


Making Ourselves Understood

by Robert A. Destro

Editor's Note: As part of our two-year series marking the bicentennial of the Bill of Rights, Catholic University's Robert A. Destro examines how we can reach a consensus on the meaning of the Bill of Rights despite speaking different "dialects."

"It has been frequently remarked," wrote Alexander Hamilton in *Federalist* No. 1, "that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[1] The alternatives are as stark today as they were in 1787: reflection and choice versus accident and force. When the issue is one of organic principles, there is no middle ground.

This was the dilemma that the States faced when they conditioned ratification of the Constitution on the addition of a Bill of Rights. Unlike Hamilton and Madison, the States were not convinced that a federal government of limited powers could be trusted to respect important individual rights. The freedoms guaranteed by the Bill of Rights were simply too important to take the chance that a distant federal government *might* view protection of basic freedoms as a priority. Only the most thorough process of reflection and choice—the process of constitutional amendment—would suffice. The result was a Bill of Rights that took into account the political, cultural and religious diversity of a nation and its people.

We would do well to keep Hamilton's admonition firmly in mind as we reflect on the meaning of the Bill of Rights and the other amendments that guarantee individual liberty and political participation. The last decade of the twentieth century promises to be one of great change in the world's political and demographic landscape. If our conduct and example is to model how a nation of reasonable people can agree upon a vision of the common good that seeks, in the words of the Constitution's Preamble "to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," then we must begin by reflecting upon the ideal, the Bill of Rights itself, and how it operates in practice. In short, before we can reflect and choose, we must understand the choices.

The Skin of Living Thoughts

"A word," wrote Holmes, "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[2] This observation is particularly true as applied to current legal and political controversies involving the Bill of Rights. Though the language the participants and litigants use to describe their particularized vision of the common good is that of the Bill of Rights, there are critical differences in the meanings attributed to its words. Especially when applied to specific cases such as religious liberty or privacy, the meanings of words depends not only upon the circumstances and the time in which they are used, but also upon the background and experience of those using them.[3] While the participants in such discussions are using the same words—"liberty," "equal protection," "cruel and unusual punishment," and "respecting an establishment of religion," to mention only a few—they are not really speaking the same language. They are speaking a dialect.

But this is neither surprising nor particularly lamentable. America has been a pluralistic society for as long as there have been Americans. Our native diversity guarantees the existence of important differences in concept and vision. The Hamiltonian challenge to those who would engage in discourse about the Bill of Rights is, first, to understand one another. Then, and only then, can we reflect upon and choose from among the available alternatives.

Transcending the Dialects

But how do we go about fostering such understanding and civil discourse? Do we first need to develop a common moral language? Is it even possible to do so? So much has been said and written over the years about this topic that I shall not even attempt it here.[4] My view is that we already have a basis for understanding—the language of the Bill of Rights itself. All that is left is for us to learn to speak it with one another as we debate, in specific terms, the vision of the common good embodied in the Bill of Rights and Civil War Amendments.

But that is a tall order; for a language is not merely a collection of

visual or audible symbols having a set meaning, but a means by which people convey a wide range of ideas, from the mundane to the profound. Our respective cultural, religious and political backgrounds and experience condition us both to speak and to understand a familiar dialect. It is our own; we are comfortable with it. We respond favorably to its sound, and are frustrated, if not insulted, when it becomes clear that what we thought we said was not what was heard.[5]

In an important article entitled *Nomos and Narrative*[6], the late Professor Robert M. Cover of the Yale Law School wrote:

> To live in a legal world requires that one know not only the precepts, but also their connection to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'[7]

Since law may thus "be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative,"[8] the language of the cases, the treatises, the learned commentary and the politics speaks volumes about the law's (and lawyers') vision of what is and what ought to be.

The 'What Might Be'

Does anyone familiar with the First Amendment doubt the importance of the metaphorical "wall of separation" between church and state as a verbal bridge between what is and what might be? Justice Wiley Rutledge, dissenting in *Everson v. Board of Education*, stated that "the object [of the first amendment] was broader than separating church and state in [the] narrow sense [of prohibiting an official church]. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[9] Notably, however, Justice Rutledge did not rely on the language of the Bill of Rights itself: he spoke in dialect—of his vision of the demands of liberty. It goes without saying that there are other ways to envision both "separation" and religious liberty. Hamilton's challenge is to consider and choose among them.

More recently, Justice Blackmun, writing for a plurality of the Court in *County of Allegheny v. American Civil Liberties Union*, wrote of the "'"logic of secular liberty"' it is the purpose of the Establishment Clause to protect."[10] I, on the other hand, have always believed that the purpose of the Religion Clause was to protect religious liberty. Do we disagree, or are we simply speaking in dialect about different things?

Professor Gerard Bradley of the University of Illinois School of Law has raised similar questions concerning what Professor Laurence Tribe describes as "rights of religious autonomy." Is freedom of religion, as Tribe seems to suggest, nothing more than the secular autonomy of individuals in matters of conscience which depends for its protection on a "still imperfect [judicial] vision of a 'more perfect union,'"[11] or is it, as Bradley argues, something more: "immunity from state interference on matters spiritual."[12]

Thus, if there is to be meaningful discussion of the "proper" balance of rights, duties and the common good that is the Bill of Rights, it is incumbent on all who would take part in the discussion to heed both Cover and Hamilton. Our ability to make ourselves understood rests first on our willingness to understand not only our own concept of the "is" and the "ought" but also the "is" and the "ought" of our partners in discussion. Then, and only then, will it be possible to reflect and to choose some mutually agreeable vision, imperfect though it might be, on the "what might be." ■

Endnotes

[1] A. Hamilton, J. Madison, J. Jay, *The Federalist Papers* (1788).

[2] *Towne v. Eisner*, 245 U.S. 418, 425, 38 S. Ct. 158, 159, 62 L.Ed. 372 (1918).

[3] Compare, e.g., the remarks of Justice William J. Brennan, Jr. to the Text and Teaching Symposium, Georgetown University, Washington, DC, October 12, 1985 (arguing that "the ultimate question must be what do the words of the text [of the Constitution] mean in our own time'), to the remarks of Judge Robert H. Bork, to the University of San Diego Law School, San Diego, CA, November 18, 1985 (arguing that the current meaning should be derived from an examination of the "core value[s]" that the framers intended to protect).

[4] A number of recent legal symposia highlight both the practical and theoretical importance of the problem for the law, *see, e.g.* Symposium: Law, Community and Moral Reasoning, 77 Calif. L.Rev. 475-594 (1989); Symposium on Law and Philosophy, 12 Harv. J. Law & Pub. Pol. 612-1008 (1989), and the debate continues unabated in the field of education. *See, e.g.* E. Beverly & R.W. Fox, "Liberals Must Confront the Conservative Argument: Teaching Humanities Means Teaching About Values," *The Chronicle of Higher Education*, November 1, 1989 at A52, col. 1; Office of Educational Research and Improvement, U.S. Dept. of Education, "Reflections on Moral Education" (October, 1989) Doc. No. IS 89-935rib. Professor Tom Shaffer addresses this issue of a "common language" in the context of ethics in his review of Jeffrey Stout's *Ethics After Babel* and Alasdair MacIntyre's *After Virtue*. [See "From the Bookshelf"]

[5] In a paper entitled "Achieving Disagreement: From Indifference to Pluralism" and presented at the National Symposium on the First Amendment Religious Liberty Clauses and American Public Life held in Charlottesville, Virginia, April 11-13, 1988, George Weigel used a Latin axiom from Thomistic epistemology to illustrate the importance of perspective, language and understanding: *Quidquid recipitur ad modum recipientis recipitur* ("What is received is received according to the mode of the receiver").

[6] R.M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 Harv.L.Rev. 4 (1983) [hereafter *Nomos and Narrative*].

[7] *Id.* at 10.

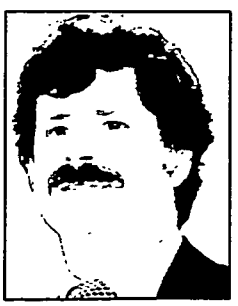
[8] *Id.* at 9.

[9] 330 U.S. 131, 67 S.Ct. 504, 519 (1948) (Rutledge, Frankfurter, Burton and Jackson, J.J. dissenting).

[10] 109 S.Ct. 3086, 3110 (1989).

[11] L.H. Tribe, *Bicentennial Blues: To Praise the Constitution or to Bury It*, 37 Amer. Univ. L.Rev. 13 (1987).

[12] G.V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State*, 49 La. L.Rev. 1057, 1086 (1989).



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