Chapter Seven

TEXTUAL INTERPRETATION

> It is the task of the historian of culture to explain why there has been in the last four decades a heavy and largely victorious assault on the sensible belief that a text means what its author meant.
>
> E. D. Hirsh

SOUNDS, SHAPES, GESTURES, AND DASHES AND DOTS

My generation grew up with two things that have largely been spared to most of you. Radios, newspapers, TV, novels and movies all told us that the world would end in nuclear war. And probably as a result of movies depicting World War II, we all had an idea of the telegraph and Morse code. All of this played into a wonderful, if creepy, movie classic, ***On the Beach***. An accidental nuclear war has wiped out most of the world, and only Australia has survivors, but they have less than a year to live. A U.S. Navy ship decides to return to the west coast, partly because they want to die at home, and partly because the Australian base has been receiving gibberish in Morse code from a location in San Diego. What should we make of those seemingly random dashes and dots?

> e_1. The base has been receiving gibberish on its telegraph from a source in San Diego.

How should we explain this? Is it a cry for help? A survivor simply desiring long distance companionship? Or is there some other explanation?

You're driving on the Interstate, come up quickly on a car ahead, change lanes and pass. As you pass, the driver's left hand comes up along the side of his head. Did he just give you an obscene hand gesture? Or was he simply scratching his ear? I get an e-mail telling me I have exceeded my mailbox quota and I need to send my password back so that the problem can be fixed. Is this the system administer communicating with me? Or is it just a scam to hack into my computer? Just as though we must explain identical exams, the car outside Joe's bar, morphological similarities in mammalian forelimbs, we often find ourselves in communicative contexts where we must explain gibberish Morse code, potential hand gestures, and mysterious e-mails. It should surprise none of you that I believe inference to the best explanation will be helpful to you in these latter situations.

INFERENCE TO THE BEST EXPLANATION AND TEXTUAL INTEPRETATION

Historians are concerned with texts, so are legal scholars, and indeed all of us rely on the spoken and printed word as evidence for all sorts of hypotheses. We might well turn to other interpretive disciplines like biblical hermeneutics and literary criticism for methodological insights. Rather than begin with a tricky legal statute, or a puzzling short story, however, it will be clearer, and more amusing, to illustrate the explanatory nature of textual interpretation with an example that does not require the background of an academic specialization. Stanley Fish provides a good one.

> I have in mind a sign that is affixed in this unpunctuated form to the door of the Johns Hopkins University Club:
>
> PRIVATE MEMBERS ONLY
>
> I have had occasion to ask several classes what that sign means, and I have received a variety of answers,

> the least interesting of which is, "Only those who are secretly and not publicly members of this club may enter it." Other answers fall within a predictable narrow range: "Only the genitalia of members may enter" (this seems redundant), or "You may bring in your own genitalia," or (and this is the most popular reading perhaps because of its Disney-like anthropomorphism) "Only genitalia may enter." In every class, however, some Dr. Johnson-like positivist rises to say, "But you're just playing games; everybody knows that the sign really means, 'Only those persons who belong to this club may enter it.'" He is of course right.[1]

Interpreting the sign involves making an inference about what it means. We have a collection of data that is in need of explanation.

e_1. The "text" is on a sign.

e_2. The sign is on a door.

e_3. The door is to the Johns Hopkins University Club.

e_4. The "text" reads, "PRIVATE MEMBERS ONLY".

Such a characterization of the data implies that we have already done a certain amount of interpretation. We have explained the shapes "PRIVATE MEMBERS ONLY" as an attempt at linguistic communication; they did not accidentally appear when the building was being painted, nor are they modern art. Our explanatory question focuses on what these words are intended to communicate. We have a number of explanatory hypotheses:

t_0. Only those persons who belong to this club may enter it.

t_1. Only those who are secretly and not publicly members of this club may enter it.

t_2. Only the genitalia of members may enter.

t_3. You may bring in your own genitalia.

t_4. Only genitalia may enter.

t_5. The sign was intentionally designed with the double meaning by witty intellectuals.

As Fish's no-nonsense student insists, it is perfectly obvious what the best explanation of the words on the door is. Clearly t_0 is the simplest, most complete, least ad hoc, and most plausible account. Linguistic communication and interpretation is an inherently explanatory process. From casual conversations and fun signs on doors, to the interpretation of literary, constitutional and biblical texts, the role of the reader (or listener) is always the same. There are printed shapes and noises that need to be explained. Given the first order explanation that they are attempts at linguistic communication, the question now becomes what hypothesis best accounts for the meaning in the present context?

AUTHORIAL INTENTION

Virtually every one of the explanations we have alluded to so far share a common feature. The gibberish was perhaps a cry for help (or sad attempt to find companionship). The gesture might well have expressed his displeasure at your driving. The e-mail's author desired to help me (or to scam me). The sign was saying who (or what) could or could not come in through the door. The following picture is so natural that we hardly think about it, and that indeed is the magic of linguistic (or symbolic) communication. Authors desire to communicate. They use a medium -- spoken or

written words, Morse code, hand gestures, or motion pictures -- as their means for communicating. In the ideal case, when we are unsure of what they were communicating we simply ask them -- what did you mean? If that proves impossible, as in all of the cases above, we must infer what they meant. As Hirsh put it in this chapter's epigraph, "a text means what its author meant." How many of you have typed, or texted, "huh?" or just "???" when you were unsure what person on the other end was trying to say to you. Here is a beautifully simple model of communication.

e_1. There is a text.

e_2. The text has an author.

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t_0. The text means what its author intended it to mean.

CONSTITUTIONAL TEXTS

The United States Constitution is justly heralded as a ***written*** document. The rules of the game of national government, and the rights of the citizens are laid out in a beautiful legal text. Scholars, editorial writers, and Supreme Court Justices often find themselves debating what this text means, and usually what it means in a specific and controversial context. In these cases, the simple model above immediately encounters predictable problems. Yes there is a written text, but this text is maddeningly vague, ambiguous, and unclear, at precisely those places where the scholarly, political, or legal debates are occurring in the first place. What does it mean to talk of "due process of law," "equal protection of the law," "cruel and unusual punishments," or "respecting an establishment of religion"? And yes this text had an author, but in this case that author

was a collective comprised of the "founders," including, but not limited to, those at the Constitutional Convention (surely Jefferson counts), as well as those who authored its Amendments. And what of those responsible for voting each time ratification was required? So what do we do about cases where the authors disagreed? Their words were at times (to say the least) unclear, they are all dead now, we're not really sure who to count, or not, in the collective, and there must have been cases where they disagreed with one another (think of slavery).

This doesn't, at least in my mind, mean that the model of textual interpretation must be abandoned for the Constitution. But it does mean the model is far from simple, and will likely result in many controversial interpretations for even the most fair and conscientious user.

CONCRETE AND ABSTRACT INTENTIONS

Here's another complication about constitutional interpretation that might actually help, rather than hurt, with the above problems. You have been elected as the student representative to the Faculty Personnel Committee. This is a huge tribute, but also a huge responsibility. Your vote will help to determine who is promoted, granted tenure, and in some sad cases, fired. You do me the great honor of scheduling a meeting with me and asking my advice about how these personnel decisions should be made. I ask you to give me the weekend to collect my thoughts, and we can discuss it the beginning of the week. Bright and early next Monday you show up at my office door, and it's time for me to put up or shut up. Suppose my advice goes as follows.

> *Personnel decisions should always be made in the best interest of the university and its students. Since Eastern is primarily a teaching institution, being a first rate classroom*

> *instructor is an absolute precondition for tenure or promotion. We also value scholarship, so being engaged in active and productive research is also required.*

Here's the problem. My little speech is a text, and I am its author. According to Hirsch's simple model the words mean what I meant. We both know that Professor Green is up for tenure. Being indiscrete and more than a tad unprofessional I have let my students know that I think Green should not be granted tenure. I believe he enjoys a great reputation as a teacher because he is showy and an easy grader. I don't believe the students learn much in his classes at all. I also think his research is a joke. He's published several articles, that's true, but mainly in clubby journals edited by like-minded colleagues. So, since you ask my advice about tenure, and you know my thoughts about the concrete case of Green, if you respect my advice, you should vote against Professor Green. Right?

Well, maybe not. My text didn't talk about Green at all. It appealed to abstract notions like "best interest of the interests of the institution and its students," "being a first rate classroom instructor," and "being engaged in active and productive research." You've looked at Green's record. You think the teaching evaluations are very impressive, and he really has more publications than I do. You think it's definitely in the best interest of the institution to tenure one of its brightest young stars.

According to the American legal scholar, Ronald Dworkin, my words have both an ***abstract intention*** and a ***concrete intention***.[2] You might honor my advice to you by voting along the lines of my concrete intention regarding Green. But Dworkin argues, and I certainly agree, that you do more honor to my advice when you focus on the abstract considerations like best interest, first rate teacher, and

active and productive research. Of course to do that honestly, it becomes your responsibility to assess Green against these abstract standards.

This is important because in the constitutional cases it is almost always abstract language that is at the center of the controversy. It is helpful because it articulates a principled argument for why it is legitimate for the Justices to ignore the concrete beliefs of the framers of the Fourteenth Amendment (the 1866 Congress who also set up segregated public education in the District of Columbia) and make their own determination abstract requirements of Equal Protection (of the law) with respect to segregated public education.[3] And it also mitigates the problem of who the authors were. We need not worry about their concrete thoughts about the issues of the day, but their (collective) intention that we respect their abstract concerns.

PRECEDENT

It's easy enough to imagine a system where every time an issue comes before a judge, she would simply exercise her professional knowledge, and render the opinion that she believed is correct. We are lucky, though, that that is not our system. Consider what it would be like to never really have an idea about how a tricky case in torts or contracts would be decided. How could you conduct business, or decide on what kind of insurance to have? After all, in our imagined system, each case would be decided afresh, and depend on that judge's view of the law and justice.

The English and American common law system puts a high premium on previous decisions by other courts and judges. The doctrine of ***precedent*** says the earlier decisions help to define what the current state of the law is. There are many complications with this simple model. For one thing, there is a hierarchy of courts in our state and

federal system. And precedent is only binding on lower courts following the decisions of higher courts. In addition, precedent only makes sense for "similar" kinds of cases, for which the same articulated "principles" apply. Obviously, there's a good deal of room for disagreement about all of this. Finally, courts, at least at the same or higher level, can ***overturn*** precedent on the grounds that the earlier court made mistake, or that circumstances had so radically changed that the earlier principles no make sense.

Now there is no higher court than our Supreme Court, but they do make it a practice to honor earlier Supreme Court precedent. This usually happens when they choose not even to hear a case because it is ***settled*** constitutional law. But even in those cases they do decide to hear, there is, and I believe there should be, great deference to earlier rulings. There are occasions, however, where the Court will, and again I believe should, explicitly overturn an earlier decision.

INFERENCE TO THE BEST CONSTITUTIONAL INTERPRETATION

The constitutional text, and what we know of its authors, provides a good deal of data that needs to be explained.

e_1. The United States Constitution says ..."

e_2. This text has many authors.

e_3. We know, or can infer, many things about the concrete attitudes and beliefs of these authors.

e_4. We know many things about the abstract meanings of many important constitutional principles that are articulated in the text.

e_5. There is often relevant constitutional precedent for the case at hand.

The Supreme Court does not have the luxury of sitting around and asking themselves what does the Constitution mean. Their business is mainly deciding whether a particular happening -- a decision in a lower court, an action on the part of a legal official, or generally what they call a ***state action*** -- offends a specific part of the Constitution. So, in addition to all the textual data, there is also data about the occurrence that is claimed to be unconstitutional.

e_6. It has been alleged that a particular state action violates the guarantees to citizens within the Constitution.

So, what's the best explanation of all of this? Those of you who know anything about our Supreme Court no doubt are well aware of this, but it should be acknowledged up front. The best interpretation will usually be very controversial, for everyday citizens, for scholars and pundits, but also for the Justices themselves. Furthermore, there seems to be a pretty clear correlation between how many of the Justices interpret the Constitution, and who that Justice is as a person -- his or her politics and legal philosophy. Some become very cynical about all of this and see constitutional law as simply one more political game. I prefer the view that constitutional issues are incredibly difficult, and that it is inevitable that they be, not only intrinsically controversial, but that equally smart and dedicated professionals, as virtually every Justice is and has been, can hardly avoid bringing their backgrounds and beliefs into the process.

With all that then, we can simplify the explanatory candidates to two.

t_c. The state action does not violate the Constitution -- it is ***constitutional***.

t_{uc}. The state action does violate the Constitution -- it is ***unconstitutional***.

A CASE STUDY

Bear with me please. It is dangerous business to introduce deeply controversial issues into a book like this. The risk is that readers who disagree with the author will be so put off that they will tune out the discussion altogether. I want to run that risk, nevertheless, and tell you a bit about a constitutional issue for which I have a good deal of passion. As long as I have been able to really think about moral, political, and now legal issues, I have been an opponent of the death penalty. A majority of my fellow citizens disagree with me, of course. And as things stand right now, capital punishment is recognized as constitutional by our Supreme Court. In spite of all of that, however, I think a persuasive argument can be made that the death penalty, at least as it is currently administered, is patently unconstitutional. A major part of my argument depends on interpreting the constitutional text, and so is a fitting end to this chapter.

Let me remind you of some interesting things that our Constitution says.

e_1. From the Fifth & Fourteenth Amendments: "[No person shall be] ***deprived of life***, liberty, or property, without ***due process of law***."

e_2. From the Eighth Amendment: "[C]ruel and unusual punishment [shall not be] inflicted."

e_3. From the Fourteenth Amendment: "[No State shall] deny to any person within its jurisdiction the ***equal protection of the laws***.

Just the words used here tell us a couple of things, things that historical analysis backs up, about the intentions of the authors.

e_4. The authors of the Fifth, Eighth, and Fourteen amendments concretely intended that capital punishment did not violate the Constitution. [Two amendments say that a state, or Congress, may deny a person his (or rarely her) life.]

e_5. The authors of the Fifth, Eighth, and Fourteen amendments abstractly intended that the entire criminal justice system, including capital punishment adhere to the abstract standards of avoiding cruel and unusual punishments, and administering them with due process of law, and equal protection of the law.

The past forty years are replete with important constitutional precedent on the death penalty. In these four decades we have gone from a period in our history where, though constitutional and with defendants being sentenced to death, virtually no one was being executed (1968-72); where capital punishment as it was then administered was ruled to be unconstitutional (1972-76), where newer laws for the administration of capital punishment were deemed to be constitutional (1976); where there was a pretty steady ascendance in executions (1981-1999); to a recent decline in executions (2000-2008). Here are some of the highlights of this tumultuous constitutional history.

e_6. *McGautha v. California* 402 U.S. 183 (1971)

The constitutional issues are succinctly stated in the case syllabus.

> Petitioner in No. 203 was convicted of first-degree murder in California, and was sentenced to death. The penalty was left to the jury's absolute discretion, and punishment was determined in a separate proceeding following the trial on the issue of guilt. Petitioner in No. 204 was convicted of first-degree murder, and was sentenced to death in Ohio, where the jury, which also had absolute penalty discretion, determined guilt and penalty after a single trial and in a single verdict. Certiorari was granted to consider whether petitioners' rights were infringed by permitting the death penalty without standards to govern its imposition, and in No. 204, to consider the constitutionality of a single guilt and punishment proceeding.

The defendants' attorneys argued that such systems inevitably resulted in ***arbitrary and capricious*** administration of the death penalty. Justice Brennan in an unchallenged characterization of the then common standards for capital sentences characterized the situation as follows.

> [C]apital sentencing procedures ... are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice. [Justice Brennan, dissenting

In spite of this, however, Justice Harlan writing for the Court ruled that:

> petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless, and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due

> process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it

e_7. *Furman v. Georgia* 408 U.S. 238 (1972)

The case of *Furman v. Georgia* was unusual in many respects. It initiated the one and only time in our nation's history when the death penalty was determined to be unconstitutional. It was an exceedingly close, 5 to 4, ruling, with the five Justice majority so at odds about why capital punishment was **cruel and unusual punishment** that the Court issued a rare ***pur curium*** (by the court), instead of the standard opinion of the Court authored by one or more of the Justices. Still, most legal analysts see the case as raising the same issues as *McGautha*, only phrased as an Eight Amendment concern, rather than the Fourteenth Amendment Due Process Clause. Mr. Justice Stewart's reasoning is the most often seen as the relevant precedent.

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously ... selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. ... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

e_8. *Gregg v. Georgia* 428 U.S. 153 (1976)

The *Gregg v. Georgia* case did three things, two of which were to the dismay of death penalty abolitionists like your author. Perhaps most significantly, it ruled that capital punishment was not, ***per se***, cruel and unusual punishment under the Eighth Amendment. It also ruled that new sentencing procedures initiated after *Furman* had successfully eliminated the problem of arbitrary and capricious administration of the death penalty in Georgia. But, and this is crucial to my argument, it reinforced the basic finding of *Furman* (in many respects this is unsurprising, since the opinion was written by Justice Stewart who was quoted just above). Justice Stewart quotes both himself and Justice White.

> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. MR. JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." ... Indeed, the death sentences examined by the Court in Furman were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." ...

e9. *McCleskey v. Kemp* 481 U.S. 279 (1987)

Warren McCleskey was a young black man who murdered a white police officer in the course of an armed robbery. At his appeal evidence was introduced showing that

> the Georgia capital sentencing process is administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution

Justice Powell sees the racial disparities in Georgia's death sentences (since the new law following Furman) as falling exclusively under the Equal Protection Clause. He then finds it relatively easy to dismiss the Fourteenth Amendment challenges to capital punishment.

> Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." *Whitus v. Georgia,* 385 U.S. 545, 550 (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte v. United States,* 470 U.S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decision makers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.

We shall have occasion to look at the data the Court was considering in a later chapter, but notice at this point how differently this case was decided compared to *Furman*. In *McGautha* the Court had ruled that potentially arbitrary and capricious sentences did not, in and of themselves, constitute a denial of Due Process under the Fourteenth Amendment, but in *Furman* they ruled that these same worries about procedural unfairness did constitute a kind of

cruel and unusual punishment under the Eighth Amendment. One might have thought, therefore, that even if Equal Protection precedent required purposeful and particularized discrimination, the Court could have found that discriminatory sentencing is even worse than arbitrary and capricious sentencing, and therefore counted as a very serious form of procedural cruelty under the Eighth Amendment. This was not their reasoning, though. And it's hard for this author not to concluded that the real reason had to do with Justice Powell's recognition that racial prejudice infects all of the criminal justice system.

> McCleskey's claim, taken to its logical conclusion, [p315] throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Solem v. Helm, 463 U.S. 277, 289-290 (1983); see Rummel v. Estelle, 445 U.S. 263, 293 (1980) (POWELL, J., dissenting). Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.

e_{10}. *Callins v. Collins* No. 93-7054 (1994)

I want to conclude this lengthy, and far from neutral, review of death penalty jurisprudence with one final case. Justice Blackmun, a moral opponent of capital punishment, but an early supporter of its constitutionality, finally decided at the very end of his career that no amount of procedural tinkering could ever elevate capital sentences to the high standards imposed by the Eighth Amendment.

> It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question--does the system accurately and consistently determine which defendants

> "deserve" to die?--cannot be answered in the affirmative.

His eloquent and impassioned dissent from the Court's denial of ***certiorari*** is doomed to be just a footnote in the history of capital punishment. But he does state a succinct and clear explanation of the Constitution's language, and the Court's precedent.

> t_0. The death penalty must be imposed fairly, and with reasonable consistency, or not at all.

I am claiming that t_0 is the best explanation of the abstract intentions of the authors of the Bill of Rights, the authors of the Fourteenth Amendment, and the emerging body of constitutional law developed over the past two hundred years. Those of you who disagree with me -- and I certainly realize that many of you will -- have an obligation to articulate an interpretive theory you believe better explains all of this. It is a challenge that I invite you to undertake. I remain hopeful once you have tried to find a better rival you will come to agree with me that t_0 is the most plausible. Unfortunately, we may end up disagreeing, but that is hardly surprising given the controversial nature of the constitutional text with which we have been dealing.

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[1] Fish, *Is There a Text in this Class?*
[2] Dwokin on abstract and concrete intentions
[3] *Brown v. Board of Education*