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A COMMENT ON TEXT, TIME AND AUDIENCE UNDERSTANDING IN CONSTITUTIONAL LAW

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Professor Cunningham, in a provocative memorandum, asks how the legal landscape might change if courts interpreted statutes to reflect average citizens' understanding of statutory language.¹ This is an intriguing thought experiment and perhaps even a wise proposal. Rather than address Professor Cunningham's experiment directly, however, I would like to consider a variant of it that nicely highlights important issues in my own field, constitutional law. Substituting "the Constitution" for "statutes," we have the following question: What if the audience understanding of rules of, say, contract law, applied to the interpretation of the Constitution?

When we switch our focus from statutes to the Constitution, a somewhat latent ambiguity in Professor Cunningham's question comes to the fore. Should judges interpret constitutional language in accordance with the common understanding of the words at the time the relevant provision was ratified, or at the time the case comes before the court? The ambiguity is not obvious in the statutory context because statutes are modified with much greater frequency than the federal Constitution, so that in a typical case of statutory interpretation, not much time will have elapsed between enactment and interpretation. There are, of course, exceptions, and in many ways statutory and constitutional interpretation are quite similar—as Professor Eskridge has so brilliantly illustrated²—so that much of what I say will apply to statutory interpretation as well. But for present purposes I shall confine my remarks to constitutional interpretation.

During a recent oral argument before the Supreme Court, Solicitor General Drew Days was making a quite conventional claim about the original intent of the Framers of the 1787 Constitution, as reported by James Madison, when Justice Scalia interrupted him to ask if the people who ratified the Constitution shared, or were even aware of, Madison's

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1. Clark D. Cunningham, *What if the Meaning of Law Was a Matter of Common Sense? A Thought Experiment* (May 17, 1995, on file with author).

2. See WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994).

views.³ Implicit in Justice Scalia's question, I think, is one version of the audience understanding view. It goes like this: What makes the Constitution binding law is the fact that the People approved its terms, so in interpreting the Constitution, judges should be bound by the understanding of the People, rather than the possibly idiosyncratic understanding of some other set of actors.

Although the distinction between the intent of the authors of the Constitution and the intent of its ratifiers is often ignored by lawyers and judges, I would guess that most lawyers, judges, law professors, and yes, even laypersons, who gave the question any serious thought would agree that the ratifiers' understanding is to be preferred in a case of conflict. There may be doubts about whether to prefer the intent of the average citizens of the time or the intent of the state legislators who voted for or against ratification, but these will be extremely theoretical. As a practical matter, it will be impossible to discern a distinction between, on the one hand, the common meaning of the terms at the time, and on the other, the more or less shared understanding of all the representatives in the (originally thirteen and later more) state legislatures. Thus, the more or less conventionally accepted view of original intent in constitutional law is already Cunninghamian.

Of course, most modern judges and commentators do not accept the proposition that the original understanding (of the People, the Framers, the Anybody) is dispositive in constitutional law. This is true for a variety of quite familiar but nonetheless noteworthy reasons having to do with changing circumstances, nicely illustrated as a general matter by the symposium participants' discussion of the "soupmeat" example.⁴ But there are also *political*, as opposed to *linguistic*, reasons for rejecting a strong form of originalism as a guide to constitutional interpretation.

In the soupmeat discussion, the symposium participants initially took for granted the primacy of Georgia's intent. Kent's various departures from a literal interpretation of Georgia's orders were deemed laudable precisely because a creative interpretation better approximated what Georgia would have asked Kent to do had she been aware of the changed circumstances. Yet the question whether Kent's efforts count as interpretation strikes me as largely semantic. As Professor Greenawalt (the actual one, not the hypothetical soupmeat-purchaser Kent) pointed out during the symposium,

3. 63 U.S.L.W. 3453, 3454 (Dec. 13, 1994) (reporting arguments in *United States Term Limits, Inc. v. Thornton*, No. 93-1456).

4. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 941 (1995).

the line between carrying out Georgia's instructions, however loosely, and making them up as one goes along, is arbitrary. From a practical standpoint, the important question raised by the example is whether Kent's efforts to figure out what Georgia would have wanted him to do had she known of the changed circumstances are directed at the appropriate goal.

In the hypothetical example, the answer may be easy. Let us suppose that either an explicit contractual arrangement or the background norms of the housekeeping trade prescribe a clear rule that, when in doubt, a housekeeper should construe his or her orders according to his or her best guess as to what the head of the household would have wished under the circumstances. I am, to be sure, ignoring ambiguities in the meta-rule, but none seem to present themselves in the stated example.

Is there an analogous meta-rule in constitutional interpretation? Certainly. It's the fairly strong version of original intent described above: Construe the Constitution according to your best guess as to what the Founding Generation would say if faced with the problem. There are practical problems with this approach, not the least of which will be its indeterminacy in a significant number of cases. Nonetheless, this method will sometimes strongly suggest a particular outcome. The question then, is whether it ought to be adopted. This is a political (in the sense of political theory) question.

Strong originalists have a familiar and powerful justification for looking to the extrapolated intent of the Founding Generation. For the strong originalist, the Constitution is binding law because the People consented to be governed by it over 200 years ago (or in the case of amendments, more recently). The Constitution is a social contract, and, like any contract, should be interpreted to effectuate the intent of the original parties to it.

Interestingly, even most non-originalists accept substantial portions of this political theory. Non-originalists typically accept that judicial legitimacy ultimately derives from some form of consent of the People, and that the understandings of the People bear on interpretation. The major difference between originalists and non-originalists is that the latter take a broader view of the parties to the social contract. For the non-originalist, the parties include some combination of the present citizenry, the Founding Generation, and the citizens who have lived in between. The non-originalist will speak of evolving or organic principles, but typically she too will claim legitimacy on the basis of some conception of consent, albeit an inter-generational conception. Interpretation for the non-originalist involves

what Bruce Ackerman calls inter-generational synthesis.⁵

For better or worse, many cases requiring inter-generational synthesis cannot be resolved by the kind of reasoning that Kent uses to infer Georgia's intent. Consider, for example, the question whether the Constitution permits the federal government to engage in blatant sex discrimination. For concreteness, let us suppose that a federal statute prohibits women from appearing as attorneys in federal court.

The Equal Protection Clause of the Constitution applies only to the states, not the federal government. In the companion case to *Brown v. Board of Education*⁶ in 1954, however, the Supreme Court held that the Fifth Amendment's Due Process Clause, which applies to the federal government, contains within it a principle of equal protection.⁷ The Fifth Amendment was ratified in 1791, at a time when de jure discrimination against women was legion. Neither the *men* who ratified the Fifth Amendment nor the *men* who voted for them would think that the phrase "nor shall any person . . . be deprived of life, liberty, or property, without due process of law" prohibited discrimination against female lawyers.

The Fourteenth Amendment, including the Equal Protection Clause, was ratified in 1868. Section Two of the Fourteenth Amendment, concerning Congressional apportionment, formally condones discrimination against women in voting, and while it is possible that in 1868 some supporters of gender equality believed that Section One's Equal Protection Clause afforded women equal rights on questions other than voting, that was not the view of the Supreme Court just four years later. The Court held in *Bradwell v. Illinois*⁸ that a state could prohibit women from practicing law consistent with the Equal Protection Clause.

Contemporary attitudes point in a different direction. Although many forms of sex discrimination persist, it is probably fair to say that most United States citizens would at least understand their Constitution to prohibit governmental sex discrimination in the form of a categorical ban on the practice of law by women in the federal courts.

Here we have an example of inter-generational disagreement. One could, I suppose, devise some rules for mediating the conflict. Perhaps we weigh the intensity of support for a given understanding and discount a certain degree for remoteness in time. Whatever the explanation, it will be apparent

5. See generally BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

6. 347 U.S. 483 (1954).

7. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

8. 83 U.S. 130 (1873).

that in a case such as my sex discrimination example, the goal of the contemporary court will be not so much to interpret the intent of earlier generations of Americans as to *overcome* it.

Does this mean that interpretation is a sham? I don't think so. But I do believe that the numerous examples one can construct in which the best interpretation of a constitutional provision conflicts with long-held understandings illustrate that audience understanding, however defined, provides only one piece of the interpretive puzzle.

Is original understanding therefore irrelevant to constitutional law? I would like to say it is not, but its relevance is not what judges and scholars typically understand it to be. Most non-originalists claim to care about the original understanding as one of a multiplicity of factors to be considered in divining constitutional meaning. What they normally mean by this is that if the original understanding of some provision was that it meant X, that fact makes it at least a little bit more likely that the provision ought to be interpreted to mean X today.

I want to suggest that the fact that the original understanding was X should not necessarily count as a reason for concluding X. Indeed, sometimes it should count as a reason for concluding not-X. Consider sex discrimination. Why did the 1791 or 1868 understanding of the Constitution permit sex discrimination? The reason, no doubt, was that women did not vote and were subject to numerous other legal and social disabilities. In other words, a history of sex discrimination accounted for the popular acceptability of sex discrimination. Yet one of the hallmarks of invidious discrimination is the fact of its deep historical roots. Thus, the history of discrimination ought to count as a reason to treat sex discrimination as invidious rather than as a reason to condone it.

Original intent is relevant to constitutional interpretation because it is part of our nation's history, but not because the constitutional text acts as a mere place-holder for the views of the Founding Generation — or, for that matter, of any subsequent generation. The task for the judge, when considering historical arguments about the meaning of text, is to learn the lessons of history. Sometimes, perhaps most times, those lessons will be positive. The Burkean insight that our culture rests on the accomplishments of our predecessors no doubt accounts for much of our attachment to precedent.⁹ Nonetheless, some of history's lessons will be negative.

9. See, e.g., Edmund Burke, *Reflections on the Revolution in France*, in TWO CLASSICS OF THE FRENCH REVOLUTION (Anchor Books 1989) (1790). For a discussion of "Burkeanism," see ACKERMAN, *supra* note 4, at 17-24.

The danger of an interpretive method that focuses on the understanding of any group of persons who read a text—whether they are the signers of the Constitution, the average citizens at the time of the ratification, the people who lived in between, the contemporary citizenry, or any combination—is that the judge may ascribe importance to the others' understanding without questioning why they have that understanding.

Consider one final example. If asked whether any provision of the Constitution prohibits a state from recognizing heterosexual but not homosexual marriages, I very much doubt that a majority of Americans at any time in our history, including the present, would say yes. On any version of the audience understanding theory of interpretation, this would seem to be dispositive of the question. Yet such a conclusion would confuse a legal question with a linguistic question and in the process deny a central feature of the Anglo-American legal system: Legal principles take on a life of their own. If the public's strongly felt prejudice alone leads them to believe that discrimination on the basis of sexual orientation is permissible, surely that fact ought to permit the judge to discount the public's view to some degree.

Persons who disagree over whether prohibiting same-sex marriages denies equal protection of the laws do not disagree over the meaning of the word "equal." This is not because words have eternally fixed meanings independent of a community of speakers. Meaning is a function of common usage and thus is dynamic. But here there appears to be a linguistic consensus within the relevant community. Both legally trained and untrained late twentieth century American speakers of English will generally agree that the concept of equal protection requires that similarly situated persons be treated similarly. There will be disagreement over whether heterosexual and homosexual couples are similarly situated. In short, people will disagree as to what the concept of equal protection should entail.

The disagreement over what such terms as equal protection require is primarily normative, not linguistic. There may be legitimate reasons to locate norms in the shared understandings of some set of historical and/or contemporary actors. In constitutional law, for example, where the exercise of judicial power typically invalidates legislation, principles of majority rule suggest that judges should hesitate to find in the Constitution norms not widely held by the public. But such a policy of deference is much more a product of a theory of politics than a theory of language.