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'Clear Text' vs Historical Practice

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[Navtej Singh Khandpur](#) · a month ago 🌐

Came across this article some may find interesting. It discusses the interpretation of the 'clear text' of the Constitution, and has some good examples as well.

Does 'clear text' trump historical practice? And what is 'clear text' any way?

<http://balkin.blogspot.com/2014/02/recess-appointments-and-clarity-of.html>

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[Michael Blanco](#) · a month ago 🌐

In theory, I don't believe anything is "clear text." How many times have we all been completely surprised by a misunderstanding that arose when we thought everything was completely clear? Further, even simple language can be confounding. What's the difference between "He loaded hay onto the wagon" and "He loaded the wagon with hay"? Many native speakers don't realize that only the second sentence implies the wagon was full of hay until they're told. Why can we use "take" without an adverbial locator ("I took the ball") but we can't do the same thing with "put" ("I put the ball" is grammatical but not acceptable - we must say something like "I put the ball *on the table*")? That said, communication exists. When two individuals communicate, their understanding of what is said back and forth does not overlap completely, but enough common area exists between them in the Venn diagram that they can both speak and act consistently with that communication ("Come over at 5:00 p.m." "OK, see you then" - and that actually happens and both are satisfied with the communication).

The problem is, the potential for error is greater than we think. One person thought it was 5:00 p.m. today whereas the other person thought it was tomorrow. That happens because we're always seeking shortcuts in our communication. In theory, the fewer the words used to communicate an explicit idea, the better. But, eliminating words can create confusion. Another problem is polysemy - words with different meanings or words with inherently ambiguous meaning, like "cruel and unusual."

My own view is that there is always a dialect between "text" and "practice." Article III has no explicit text regarding judicial review, yet that's the way it works. And, that's the way it works because it works well. Some legal scholars think John Marshall created judicial review out of thin air, but even if that's the case

(obviously, a hotly debated topic), we follow the practice because it has served us well. Obviously, some think it's gone too far and urge a more departmentalistic approach, and American history illustrates the ebb and flow between these two impulses, where Presidents have refused to enforce statutes even if confirmed by Supreme Court decisions. Usually and preferably, this practice is rare.

My point on the dialectic between "text" and "practice" is, I think, an example of what is happening all the time in legal interpretation across many domains. Legal interpreters constantly bounce among text, history, political winds, and most of all, their own prejudices. However, most of the time we want to deny how much our prejudices have to do with our interpretations. If we like guns, we go through all manner of hermeneutical gyrations to demonstrate that the militia proviso there was only explanatory and not causal. If we hate guns, we do the opposite. How many times have you heard someone say, "Well, I love guns, but when I analyze the meaning of the 2nd Amendment, I really don't find a personal right to gun ownership there" or visa versa? Atheists and agnostics are far more certain of the high wall theory of the Establishment Clause whereas religionists are sure accommodationism is in view here.

My own view is that to the degree that we can become aware of the complex dynamics of interpretation as opposed to advocating normative theories, we become better interpreters. H. G. Gadamer calls this concept an "effective historical consciousness." When we understand that we stand in a stream of interpretation such that it is impossible to read the Constitution like they did in 1789 or even how the person next to us is reading it, we can become more open the possibilities of understanding that it confers and use these possibilities the way all the framers, all Americans, and all people of good will would have us interpret it, to best support the democratic institutions the Constitution was meant to frame. I can hear people screaming "living Constitution" right now, but I reject that label for myself. The ideas and principles of the framers are the bedrock, and the Constitution proscribes specific ways of attaining those ends that are as good today as they were in 1789. However, the history of the Constitution (e.g., selective incorporation) demonstrates that we always have to translate those principles anew for each generation.

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