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Semantics and Context in Legal Interpretation: Validation Through Precedence Versus Clarity of Text

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Abstract. Guidelines for legislative interpretation, whether statutory or constitutional, ought, by definition, to ground subsequent legislative maneuvers. While certain power could be delegated to local and regional administrations, the generic operation of interpretation should feasibly be determined across states in order to ensure procedural justice: that which ought to frame judgments must be said clearly, so that whatever ought to remain fluid on a communal level could retain its liberty. However, the principles of such interpretation in the United States Supreme Court do not obviate ambiguity. Attempts at methodological clarification on the theoretical and practical level have generally fallen into two categories: a practical and holistically historical approach in framing and determining legal questions on the one hand, or a textual and more exclusively literal approach that focuses on linguistic nuances of a statutory or constitutional rule on the other hand. This essay seeks to establish, through theoretical analysis and case studies, the possibility of an operative proposal regarding how the Supreme Court might more effectively and reasonably provide answers to difficult questions and rulings.

Keywords: Pragmatism; Textualism; Semiotics; Legislative Interpretation.

1. Introduction

When Steven Breyer identified in his article, "Pragmatism or Textualism," he contrasts the two dominant approaches to legislative interpretation as follows: on the one hand, there is the more traditional approach which had historically assisted judges seeking answers [1]. This approach is considered to be practical, primarily viewing the interpretation of legal statutes as an act both pragmatic and reactive, and not dogmatic. This requires a perspective that treats the law not as a fixed entity but as an object of inquiry in relation to the various institutions and communities involved, influenced by past developments while looking to a future with room for improvement. No single theory could encompass the entire scope of the vision of such legal statutes; rather, it is only through the detailed investigation of cases, historical developments, and the communal and subjective desires and needs, that one could fully interpret the statutes in question. On the other hand, "more and more judges seem to be adopting a method of interpretation often called 'textualism' (in statutory cases) or 'originalism' (in constitutional cases) [1]. That method puts far greater weight upon the linguistic meaning of a legal text, defined as what an ordinary person would understand that text to mean, than the traditional, practical method. Proponents of Textualism suggest that their approach offers an exclusively correct way of reading statutes and mandates, frames the legal discussions to semantics, sets a universal standard for judgment applicable to all judges, and links legal meaning to ordinary semantics. Breyer counters this latter approach, suggesting, instead, that it is infeasible. Feasibility is a primary concern in this essay, for all legal theories must, eventually, be put to the test in the field, in the courts, among judges and jurors with personal understandings and various linguistic dispositions.

From the outset, it would appear that pragmatism, as Breyer describes it and as conceded by other theorists aligning with or against his stance, serves as strategic maneuvering seeking to strike a compromise between operational consistency on the one hand and historical developments, inherited understandings, and communal rules on the other hand. Meanwhile, textualism remains a starkly linguistic endeavor, focusing on semantics for the purpose of purifying the legal process, such that judgements would be framed specifically and clinically, rendering historical precedence rather

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unnecessary, favoring literal clarity over cultural. Immediately, then, we are faced with two intuitive critiques of the two approaches, respectively. Pertaining to pragmatism, that it is so tethered to cultural applications varying across regions raises the question of whether principles established in previous cases are not deliberately vague so as to leave room for judgment and delegate responsibility away from the federal level. Pertaining to textualism, one could note that what, specifically, counts as linguistic truths remain disputable: are we to stick strictly to dictionary definitions, or should we validate colloquial understandings? Should we judge the statutes contextually, based on the individual people likely to encounter them? Would the wordings lead to ambiguity unique to certain cultures but not to others, and how ought we reconcile cross-cultural linguistic understandings? It seems, then, that both approaches lack, albeit in different ways, a more universal form of anchor that could rule out ambiguities for the sake of operational integrity.

2. Theoretical Foundations and Limitations of Textualism

2.1. Textualism as Semantically Grounded

The nature of textualism and originalism in relation to history is a curious one that warrants much more scrutiny for the purposes of clarifying definitions. But let us begin, first, by clarifying the meanings surrounding these approaches. While their namesakes are already reasonably reflective--perhaps a subtle nod to their own rather literal approaches to interpretive projects--the author of this essay believes that their definitions alone provide reasonable clarity regarding their limitations and utility. In the first place, textualism grounds itself in the words, and originalism grounds itself in words-as-intentional. That is, both grant the legal text itself integrity, and consider it to frame itself, so to speak, such that external references to alternative cases and historical precedence ought only to supplement, but not determine, the nature of the words already written.

It would appear, immediately, that the theory had reasoned itself into its own existential predicament: a statute's wording is, practically, the most important consideration in any legal interpretation, regardless of how much additional information could add or override, or reformulate either the semantic definition or the normative elements of the words, perceived during the time of their initial formation or in the status quo, when they become relevant to a particular case at hand. Reasonable textual clarity is, of course, a prerequisite to any textual analysis, but the extent to which judges and jurors could take such clarity for granted nevertheless fluctuates for different scenarios. To suggest that textualism remains true to its namesake, then, would seem to strip it of its uniqueness and also, more devastatingly, imply that it prioritizes the text itself when, in reality, the text itself is always already tethered to the social and historical context that gave birth to it and surrounds it. Specifically, insofar as all legal interpretation must begin with textual analysis, textualism is unique not because of its attention afforded to the wording or definitions that complicate a legislature, but because of its specific willingness to make irrelevant certain cultural elements that it considers ought not to supplement the semantic value of said legislature. Yet, immediately, one would encounter the question: what should one do if the historical context is no longer applicable to the status quo? What if the word had changed its meaning? What if a connotation had disappeared or had been recently formed? Words, after all, signify. And signification is an operation both cultural and social, and unmistakably historical. It is, in a sense, subjective; textualism, however, seems to hold on to the hope that, despite this subjective quality of language and words, some things remain feasibly unchanged, such that they could, in a sense, eternalize themselves by writing themselves into legislature.

William Eskridge Jr., in his article "The New Textualism," observes that the nature Supreme Court had traditionally addressed this aforementioned predicament by generally considering any contextual evidence, particularly focusing on historical precedence and past applications, regardless of the apparent semantic clarity of the statute at hand [2]. Now, however, we see that such proponents of textualism seek to counter such an approach. The key question, then, is whether the plain text could feasibly ground interpretations on their own, particularly as they pertain to practical subsequent moves by the courts to decide inherently nuanced cases. Any given statute could not account for all

the statistically possible nuances that could arise from the variables it seeks to regulate and govern. Ambiguity becomes a necessary concession in order to maintain general applicability of the statute. What, then, should we do with this ambiguity? Does textualism address it fully, or does it merely deflect by rendering irrelevant what it ought not?

2.2. Textualism and Originalism through Application

The Supreme Court took an originalist approach in a rather contemporary case, New York State Rifle & Pistol Ass'n v. Bruen, and makes a ruling in relation to whether the New York State Law on handgun carrying is constitutional [3]. Specifically, the state law restricts citizens from carrying handguns freely. A license is required to carry loaded firearms in public. The question, then, is whether such a law violates the Constitutional Second Amendment of the United States, which suggests that carrying weapons like this should be allowed. Specifically, the Second Amendment mandates that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed [4]." Here, then, critics suggest that we see the limitation of textualism: when two sets of words collide with each other, with the legitimacy of one set depending on the other, we are forced into a rather literary analysis devoid of social implications relevant to the status quo. Pertaining specifically to this contradiction, in District of Columbia v. Heller, the Court voted 5-4 and held that the amendment does, indeed, protect the right of a law-abiding citizen to possess a handgun [5]. But the court specifies that this permission is within the confines of one's own home, and only reserved for circumstances involving self-defense. Given that interpretation, does the amendment protect the right to carry a handgun for self-defense outside the home? Does it allow for carrying in general, in certain locations, or only with certain kind of firearms and not others? We are immediately faced with the nature of this ambiguity: it is not only linguistic, but also inherently vague for the purpose, it would seem, of leaving future generations room for adjustments.

A more literal approach to the constitution that fully respects the words as they stand, it would seem, would rob us of such room. Applying originalism, the Court, voiding New York's law, held that the amendment does, indeed, allow for carrying outside the home. The Court noted that the lower courts applied a two-step analysis when dealing with similar issues. First, they had to decide "whether the contested law regulates activities go beyond the law [The Second Amendment], as it was originally understood [5]." If so, then the law does not contradict the Second Amendment. That is, if the law itself enters unchartered territory, it cannot be expected to be in violation of the Second Amendment, and should, instead, be considered an extension. Otherwise, the courts would proceed to the second stage of verification, a process concerning the nature of the purpose of the law, which the Court applies in various contexts, primarily when analyzing issues related to the First and Fourteenth Amendments. In this second step, the lower courts are to decide whether the relevant activities and details of the case at hand is, in some essential way, related to those particular activities that the law, as generally and originally understood, would (have) allowed. This pertains especially to the Second Amendment. After such a judgement is made, the court would then decide if the law, should it be deemed to be a severe infringement upon the fundamental rights granted by the Second Amendment, is to be considered as specialized for the purpose of governance. That is, if stricter control is deemed normatively necessary, then it should be allowed; if not, and there were no such moral weight, then the court should defer to more interim control.

Before returning to the Bruen case, one must note that the second step of this aforementioned operative protocol for judgment leaves rather large room for ambiguity, despite its reasonableness. That is, the nature of the law in question, and whether it should be allowed to supersede the constitutional amendment in operation or be overridden by the latter, depends on its utility in relation to governance. This is a rather odd formulation, for this second-step analysis grants that, should the law in question be reasonably expected to achieve a compelling governmental interest--where the terms of "reason" and "compelling" and even "interest" add to, rather than clarify, ambiguity--then the courts should be allowed to apply stricter scrutiny.

However, as Breyer continues to note, the Bruen Court abandoned the second part of this test. Instead, the Court focused on the text of the Second Amendment, supported by history [1]. It said that supporters of the law regulating the carrying of weapons should point to the American tradition that justifies the requirements of the law. In other words, supporters must prove that a law or regulation is already part of a historical tradition that defines the outer limits of the right to keep and bear arms. And, most importantly, in interpreting the text of the Second Amendment, the Court took care to emphasize, that its interpretation was based on the public understanding of the legal text in the period after its enactment or ratification.

While this appears to be a rather loyalist return to the wording of the text, the project is still a decidedly historical rather than linguistic one. Breyer points out that this is originalism at its most straightforward application: the nature and meaning of the statute must be deferred culturally and historically. There are, however, several problems with this approach.

2.3. Textualism and its limitations

To begin with, the nature of the historicity made relevant in this approach further complicate, rather than help clarify, a case. Breyer makes it clear in his critique of originalism: while history can often help judges interpret the Constitution, telling judges that they must rely solely on history imposes a task on them that they cannot accomplish. That is, since the task of interpreting the text becomes a project of historical excavation, the judges are required to understand and determine which historical stories and precedence are to be more relevant than others. That is, since the nature of a weapon has drastically changed, and modern technology and firearms could not reasonably be on the minds of those who drafted relevant constitutional mandates centuries ago, could one consider what those minds did reference as metaphors? Analogies? Outlines that allow for developments of similar weapons but not entirely different ones? More specifically, can one suggest that, because swords were more prevalent then and guns more prevalent now, that, all other things remain the same, the considerations regarding swords should find continuity in the current social considerations of guns? Or, perhaps, one should take the opposite approach, and observe that, since swords are historically specific in a way that renders them rather practically irrelevant to determining the more modern cases at hand, that rules pertaining to the former should be taken as only provisionally relevant to what rules should reasonably be expected to cover in the status quo?

Another, broader concern, pertains to the extent to which such deference to historical contexts leave room for judges to insert their own personal preferences. That is, it is already certain that many previous mandates were written to address particular technologies that had since been superseded by others, but whose nominal presence in the constitution remains the same--for example, the term weapon is preserved as a linguistic sign but its signified has naturally altered due to time. Should we say that we are dealing with a fundamentally different kind of weaponry, hence the linguistic convergence of the name but not the substance of the word, so to speak, becomes merely a semantic confusion? Or ought we be more loyalist, and insist that, insofar as what is concerned, though materially different, falls under the same linguistic term, we ought to apply more or less the same analytical approach as well?

3. Theoretical Foundations and Limitations of Pragmatism through Analysis of Legislative Purpose

3.1. Pragmatism and History

As Breyer describes it, pragmatism represents the more traditional approach to legislative interpretation, one that requires careful examination of both the nature of the text but also much of what went into the making of the legislatures. For example, judges would consider the motivation, the purpose, and the related values of the legislature, examine its development throughout history, evaluate its relevance as it had been applied in various contexts, and observe the contexts for its policy background and past interpretations. How each element is to be made relevant to a particular case

depends not on some more generic, rule-based principle that the textualists prefer, but on the specific case in hand, depending on the legal issues involved, the legislatures in question, the facts discovered by the judge, and the extent to which the court finds that additional information should be consulted and can be acquired. Unlike the textualist approach, which suggests that the investigation begins and ends with the words--whether they be grounded in more abstract linguistic terms, understood in relation to contemporary definitions, or conceived as reflective of values representative of its historical period.

At the outset, it would appear that textualism and originalism differ from pragmatism particularly in their approaches to history. The former pair stresses a more purist and semantic approach to the legal statutes in question, such that the focus is primarily on the nature of the words in relation to their linguistic corpus--which could, of course, still, be deeply cultural--rather than referring to historical precedence of cases. Immediately, the author of this essay notes that the nature of textualism and originalism's relationship to history is not so clear-cut. That is, while it is true that these approaches are predominantly concerned with returning the courts' attention to the words themselves, the nature of the words is still grounded in their historical context. Indeed, originalism receives its name precisely due to its loyalty to the original definitions of the words used within their original historical and cultural contexts. In this sense, the linguistic approach is by no means untethered and free-floating but is equally operative as pragmatism, only somewhat differently.

3.2. Pragmatism through Application

Pertaining to how pragmatism tends to operate, one could consider a case in the past century: A FDA v. Brown & Williamson Tobacco Corp [6]. Importantly, pragmatism allows for differing opinions regarding the nature of details in a case, but, at the same time, makes it possible that the different opinions nevertheless agree with each other regarding the general methodological approach the court ought to take in relation to solving the case. Specifically, the Court was tasked with determining whether the Food and Drug Administration could be considered to be legally authorized to regulate certain commercial tobacco sails. For example, one question to consider is whether the FDA had the right to forbid sales to children or minors, or the right to mandate certain forms of advertising and prohibit others. The majority of the court ruled that it did not have such rights. However, if one were to analyze the differences in detail, one would recognize that, while the majority and the dissent had varying opinions regarding the scope of rights granted to the FDA, they nevertheless agree with the way in which either of their stances ought to be warranted. The dissent, for example, focused on the FDA's authorizing statute, the Food, Drug, and Cosmetics Act (FDCA), which suggests that the FDA has the right and authority to regulate "articles (other than food) intended to affect the structure or any function of the body.... [7]" Nicotine, it seems, would fit this definition and thus fall under the scope of regulable substances of the FDA.

The dissent's approach is decidedly not textualist, in that it then goes on to point to the purpose of the statute, suggesting that the statute was put in place in order protect public health. Hence, insofar as nicotine is not only, by definition, the responsibility of the FDA, it should also be regulated simply for the sake of respecting the more general guiding principle by which the FDA was founded. It is not simply the words of the statute that matters, but also the nature of the statute in relation to society at large. On the other hand, the majority suggested that the statutory language requires the FDA to not only regulate a substance that would cause harm to public health, but also to remove it from the market; the FDA had not however, done this with tobacco. Furthermore, from the nature of the statute and its historical administration, it would appear that Congress cannot reasonably to be seen as intending the FDA to regulate tobacco.

3.3. Pragmatism as Effective Alternative to Flawed Textualism and Originalism

Let us now look at the nature of the limitations of statutory analysis from another perspective, namely, the relatively recent reversal of the Roe v. Wade decision against the right to abortion. In Roe v. Wade, the Court ruled by 7 votes to 2 that the Constitution protects a woman's right to an abortion [8]. While

it remains the case that the government has certain powers to regulate this right, that is, it is not absolutely granted to women across the board and in all circumstances, the ruling did significantly limit the government's power to interfere in the choice-making process. For example, the woman retains more right to terminate pregnancy earlier on in the process than later. However, almost twenty years later, in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court decided not to overturn Rowe's decision but still suggested that there remains room for the government to regulate abortions to an extent [9]. Then, despite multiple court confirmations of the rulings of Roe v Wade, in Dobbs v Jackson Women's health Organization, the court (by 5 votes to 4) overturned the previous relevant cases and, instead, determined that the Constitution does not, in fact, support the right to abortion to the extent that Roe v Wade allowed it [10].

Breyer suggests that the success of Dobb's application of originalism is problematic for several reasons--problems that, presumably, had the court adopted a more pragmatic approach, it could have addressed more adequately. The first problem, Breyer suggests, is that the Constitution itself makes no mention of the power of abortion or recognize woman's rights at all. The concepts were entirely foreign from the text itself: slaves were not considered citizens or full persons, and women were not considered valid members of the political community except through tangential relations via men. It would seem rather anachronistic and argumentatively convenient to suggest that one ought to return a section of the constitution when it is clear that the texts there did not account for certain subsequent social developments nor anticipated such developments. That is, textual absence cannot be taken to mean a normative social absence.

4. Synthesizing Textualism and Pragmatism

It could be argued that textualism and originalism, then, focuses excessively on the language and historical contexts and disregards the cultural elements and developments that characterize the status quo and molds it in a way that renders certain historical accounts limited at best and morally obsolete at worse. Breyer warns against the adoption of linguistic analysis as it borders, sometimes, on sophistry. Yet it would seem that the more traditional approach to legislative analysis does not entirely bypass this issue either; it would seem, rather, the problems of textualism and originalism are two sides of the same coin. That is, textualism risks sliding into pedantics at the expense of true social and cultural considerations, while pragmatism risks bypassing the clear linguistic mandates of a statute in favor of historical and cultural elements whose precedence may or may not, in fact, be relevant to the statute itself.

The dualism between textualism and pragmatism is both argumentatively clear and also conceptually complicated. As aforementioned, Breyer, in defense of pragmatism, suggests that, while pragmatism could result in different parties arriving at opposing conclusions despite subscribing to the same methodological approach, to this conundrum is not problematic. That is, if one were to return to the FDA case regarding tobacco, one side had considered that, given the nature of tobacco in relation to the declared purpose of the FDA, the regulation thereof ought to be allowed, whereas the other side, by considering different statutes, decide that one cannot reasonably allow the inclusion of tobacco into the scope of regulable substances. The issue, however, is why the methodological agreement makes the disagreement between the majority and the dissent less problematic, if, in the end, one side trumps the other despite the latter being, as a matter a principle, as reasonable as the former. Is this not, actually, a greater cause of concern? Why is it that the nature of the purpose quoted by one side becomes more convincing than that quoted by the opposite side, when both are concerned with statutory interpretations of the same kind?

The author of this essay wishes to examine one final case to illustrate and defend the value of textualism while also taking into consideration the primary concerns of pragmatism. The case in question is Pulsifer v. United States [11]. Without getting into too much detail, this essay shall present the main issues of the case as Breyer does in his article. While Breyer mentions this case to demonstrate the futility of textualism in parsing through purely semantic complications, this essay

maintains that this case does not, in fact, essentially challenges textualism but simply point to the way in which textualism ought to work in tandem with additional cultural scrutiny by becoming more a more, rather than less, rigorous discipline. Breyer describes the case as follows: it hinges upon a "First Step Act known as the "safety valve," which permits federal judges to depart from statutory mandatory minimum sentencing requirements in criminal cases if certain requirements are met [12]. The current version of the statute "requires that a defendant 'does not have A, B, and C'--where A, B, and C refer to three ways in which past criminality may suggest future dangerousness and therefore warrant a more severe sentence'--to be eligible for an individualized sentence [12]." The problem, then, is to determine whether the Act means to suggest that the requirement involves the defendant not possessing A, B, and C together and at the same time, or simply not possessing A, or B, or C. Justice Kagan, Breyer notes, argues for the former interpretation, while Justice Gorsuch, dissenting, argues for the latter. To demonstrate their respective points, Breyer brings several examples. Kagan's point is similar to suggesting that "I'm not free on Saturday and Sunday" means the same thing as "I'm not free on Saturday [or] Sunday [13]." Gorsuch's point is similar to suggesting that "don't drink and drive" does not mean "that you shouldn't drink and that you shouldn't drive"; rather, it refers only to the two actions in tandem [13].

Yet neither perspective reflect the full systematicity of the English language. For example, one might say the "and" in the two examples the justices provide respectively mean "and" in one and "or" in the other, but one must also note that the former example concerns nouns whereas the latter concerns actions; the former is also descriptive whereas the latter is imperative. That is, if one changes the sentence "I'm not free on Saturday and Sunday" into "I'm not free to drink and drive," one would realize that, in the former sentence, the speaker means to say, "I am neither free on Saturday nor free on Sunday," whereas in the latter sentence, colloquially, a native speaker might find it more awkward than its counterpart: "I'm not free to drink or drive," in which the "or" here functions the same as the "and" in the previous sentence. Thus modified, this sentence would mean: "I am neither free to drink nor free to drive." If anything, the analysis of both justices seem arbitrarily limited in scope and dangerously veering into colloquial analysis rather than methodological linguistic investigation. It is not the case, as Breyer would prefer, that linguistic analysis does not solve the conundrum; it is more the case, this essay argues, that linguistic analysis has not taken place to the extent that it should.

5. Conclusion

Textual ambiguity remains a crucial obstacle to developments of legislative interpretation. This essay seeks to establish that, while neither textualism nor pragmatism fully solves such ambiguity, the former, despite its critics, could remain useful at the same time as the latter, while more considerate of cultural and social developments and historical nuances, nevertheless allow room for manipulation the courts could rather do without. Thus, pertaining to the nature of the word, every aspect of the text must be considered in relation to everything else, and any example raised ought to not serve as a good-enough reasoning but should, as textualism requires, offer a clearer principle for operation. While this essay could not dive deeper into semantics, it proposes that there is a way to combine textualism and pragmatism into an approach in which linguistic analysis and relevant non-colloquial universal definitions could serve as basis while still allowing room for cultural and communal scrutiny and variation in rare cases only. Historical precedence could become suggestive but not foundational, introduced to clarify the nature of the wording of statutes when needed. Textualism, then, requires more theoretical rigor in order to maintain its legitimacy without slipping into being pedantic; pragmatism, on the other hand, must nevertheless allow room for literal understandings of the statutes and constitutional mandates.

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[7] 21 U.S.C. §§ 301-399d.
[8] 410 U.S. 113 (1973).
[9] 505 U.S. 833 (1992).
[10] Dobbs v. Jackson Women's Health Org., 142 S. Ct. (2022) 2228-2265.
[11] Pulsifer, 144 S. Ct. at 723; 18 U.S.C. § 3553(f). sections of the U.S. Code).
[12] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.
[13] Pulsifer, 144 S. Ct. at 727, 728.