

The Times They Are A-Changin’ Adaptive Qualities of the Law

The past century has seen the pace of technological and societal change rapidly increase. Such an increased pace has elevated the importance of determining whether law is able to adapt and keep pace with a changing society, lest society be organized around antiquated rules. Yet, to pose the question in terms of whether “the” law can change or accommodate modernity is inaccurate. “The” law does not adapt uniformly. Instead, one must account for the many different sources of law, each one containing different interpretive norms and customs. The interpretive norms associated with each area of the law determine that area’s ability to adapt.¹ As discussed in parts one through three, the analysis of these norms indicates that statutory law is largely resistant to adaptation, the common law allows for slow adaptation over time, and constitutional law, with its multitude of interpretive norms, has the capacity to be either the most or least accommodating of changes to society and technology.

I. The rigidity surrounding statutory interpretation indicates limited adaptability to modern advancements, absent expansive statutory language.

Statutory laws are accompanied by a variety of interpretive tools that are more rigid than those found in other legal areas. The democratic component of statutory law makes it unique. Courts will closely follow the legislatively created language of the statute.² Indeed, judges often

¹ For the purposes of this essay, I use “interpretive norm” to mean a common practice for a particular area of law that aids a judge in determining the current state of the law. Interpretive norms can be statutory rules, popular lenses through which to view constitutional protections, the common law practices of analogical reasoning and extension of precedent to new facts, etc....

² *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, at 30, col. 1.

employ various rigid rules of statutory construction that avoid rendering language superfluous, give meaning to each word, and apply rules of grammar. Given the interpretive norms associated with statutes, the ability of statutory law to adapt to and accommodate modern society appears to be driven by the choice of language employed by the legislators themselves rather than flexibility in interpretation by the judiciary.

Given the rigid norms associated with statutory law, a statute's ability to adapt to a changing society stems from the breadth of its language. The advancements surrounding tracking devices emphasize this notion. The Electronic Communications Privacy Act of 1986 ("ECPA") was passed at a time when all tracking devices utilized radio-homing technology.³ Yet, in a quarter century, the radio homing beepers became outdated. Tracking data from cell towers proved more reliable and removed the difficulty of having to plant the device, as cell phones could double as tracking devices.⁴ However, the new technology generated legal questions because the existing statutory regime had been designed for outdated technology. The court in *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.* emphasized the exacting nature of statutory analysis and noted it could not deviate from the provided definition.⁵ Yet the court also made clear that the definition of "tracking device" in the ECPA was extremely broad and avoided using language based off of then-current technology.⁶ The result of such foresight (or perhaps luck) was that the ECPA could accommodate these more accurate and widely-used modern tracking techniques without having to be rewritten. However,

³ *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, at 30, col. 2.

⁴ *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, at 30, col. 2–31, at col. 1.

⁵ *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, at 30, col. 1.

⁶ *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, at 30, col. 1–2.

one could easily imagine a scenario where the law had been written to reflect the prevailing technology at the time of passage, and thus would not be able to adapt to new techniques and practices. Therefore, statutory law's ability to adapt to changing times is a function of the breadth of the statutory language, given the rigid interpretive norms associated with this area of law.

II. The norms associated with the common law make it more receptive to change than statutory law, but also allow the common law to continue out of date practices.

The norm most associated with the common law is deference, because it has developed over the course of centuries. Legal questions are resolved through analogical reasoning from respected precedent, which makes the common law inherently backward looking. Yet, this deference does not match the rigidity of statutory law. The common law evolves on the margins, as a common practice of judges is to analogically “stretch” the holdings of previous cases to fit novel facts.

As illustrated by the law of trespass, the norms and the customs of the common law allow it to adapt to the modern world, but change is slow. Section 821 of the Restatement Second of Torts captured the traditional common law approach to trespass by concluding that “[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it....”⁷ A Massachusetts case referred to as “*Smith*,” cited by *Ward v. McGlory*, dealt with modern technology in the form of low flying aircraft.⁸ The court in *Smith* does not appear to have tossed aside the common law trespass rules, or *Ward* would not have engaged in trespass analysis. It appears that *Smith* maintained some level of deference to common law trespass, in accordance

⁷ Restatement (Second) of Torts § 821, at 53, col. 1.

⁸ *Ward v. McGlory*, at 52, col. 1.

with the norms in this area, and simply “stretched” it to include low flying airplanes above the property as a form of interference sufficient for the cause of action. With common law changed on the margin, the *Ward* court then recognized electricity passing over property as sufficient interference for trespass actions by relying on *Smith*.⁹ This line of decisions encapsulates the slow modernization of common law. Rather than “across the board” rule changes, we see new possible interferences being deemed sufficient or insufficient for trespass.

Yet, as capable as the common law is of change, it also retains vestiges of bygone eras due to the deference it is given. The requirement of usage since “time immemorial” for recreation rights based on customary use is a prime example of an element that is out of step with our modern world. *State ex rel. Haman v. Fox* explains that the “time immemorial” standard really only requires that no one can remember a time when the land was used in a way contrary to the usage of the plaintiff.¹⁰ With record keeping bolstered by literacy and technology, the “time immemorial” standard appears nearly impossible to fulfill today. However, deference to such an old standard ensures that it is alive and well.

III. Constitutional law presents a wider array of interpretive norms, thus making it capable of being either severely out of touch or incredibly adaptive to current society.

Unlike statutory law, constitutional law involves a number of interpretive tools, known as modalities, that provide the judiciary with varying levels of flexibility.¹¹ Historical, textual, doctrinal, ethical, prudential, and structural modalities each create different routes to understanding and applying the current state of constitutional law. Of these modalities,

⁹ *Ward v. McGlory*, at 52, col. 1–2.

¹⁰ *State ex rel. Haman v. Fox*, at 130, col. 1.

¹¹ The modalities were covered in Constitutional Law I; no independent research was conducted.

historical, doctrinal, and prudential approaches have the most significance for the law's ability to adapt, but have very different effects.

Historical

Analyzing constitutional law through the historical modality, the intentions of the founders and framers, greatly limits the Constitution's ability to accommodate societal and technological change. To wholly approach legal questions from the historical modality is to freeze the law in the 18th century. The intent of the framers is certainly a valid consideration, but when applied to legal scenarios that exist in a world unlike the one familiar to the framers, the modality can yield results that fail to reflect such change. While *Youngstown Sheet & Tube Co. v. Sawyer* is primarily known as a textualist decision, Justice Black used the historical modality to buttress his interpretation of the Constitution.¹² Justice Black explained that the Court's decision is so clearly supported by the framers' intent to give the power in question solely to the Congress, that any discussion would be unnecessary.¹³ However, a reliance on the framers' intent regarding the executive's ability to nationalize steel mills deprives the law of the ability to account for modern circumstances. Technology had created larger problems that required faster responses. For example, technology increased the speed of warfare, requiring fast decisions surrounding the supply of steel for the military. As speed was not a quality the framers sought to give Congress, one could argue that modern problems required a broader interpretation of executive power. Yet the Court chose to use interpretive tools that forced the law to address 20th century problems through an 18th century prism.

¹² *Youngstown Sheet & Tube Co. v. Sawyer*, at 94, col. 2.

¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, at 94, col. 2.

Doctrinal

Analyzing constitutional law through the doctrinal modality permits the law to be more accommodative than the historical modality as it allows the law to change over time, but still hinders its ability to keep pace with swift changes. Doctrinalism focuses not on the original text of the document, but on the various rules and tests that have built up over the life of the Supreme Court, a prime example being the clear and present danger test in *Whitney v. California*.¹⁴

Commercial speech jurisprudence showcases the moderately adaptive nature of constitutional law under a doctrinal approach. The area of freedom of expression has drastically departed from the text of the Constitution, which states “Congress shall make no law ... abridging the freedom of speech.”¹⁵ Instead, abridgment is acceptable in certain instances, based on tests developed through precedent.¹⁶ The Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* relied on doctrinal reasoning to afford commercial speech some level of First Amendment protection.¹⁷ The Court reasoned that previous case law established that information recipients had a right to receive messages and that speech did not lose protection simply because money was spent to transmit it.¹⁸ The Court combined precedent with a belief that a free-flow of information was valuable to our market system and determined that commercial speech should be afforded some protection, which allowed the Virginia pharmacies in the case to advertise their prices.¹⁹ In doing so, the Court, perhaps unwittingly, modernized First Amendment law. Reliance on modern technology, especially medication from pharmacies, has increased over the last century, making access to retail price information important for

¹⁴ *Whitney v. California*, at 3, col. 1–2.

¹⁵ U.S. Const. amend. I.

¹⁶ *Citizens United v. Fed. Election Comm’n* (Stevens, dissenting), at 9, col. 2.

¹⁷ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, at 17, col. 1–2.

¹⁸ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, at 17, col. 1–2.

¹⁹ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, at 18, col. 1.

Americans, particularly low-income Americans living on modest budgets. A more narrow interpretive tool would have ignored the immense impact commercial speech has on society. Instead, doctrinalism allowed the law to accommodate new realities by relying on rules formulated over time.

However, *Citizens United* shows that doctrinalism can fail to allow the law to account for societal change.²⁰ The majority simply proclaimed that nothing in the Court's precedent established that speech could be limited because the source was a corporation.²¹ The doctrinal approach taken by the Court meant that the First Amendment had failed to recognize the changes in tactics and technology that had increased the cost of campaigns and, in turn, allowed for possibly excessive influence by corporations.²² By relying on what came before it, the decision maintained an absolutist approach to corporate speech rights that perhaps fit the time period of *Bellotti*, but was out of step with present day realities. A prudential approach would have balanced the competing interests and produced an optimal level of First Amendment protection, like the test in *Whitney*, which could then be invoked via doctrinalism in subsequent decisions. This ultimately captures the adverse effect doctrinalism can have on adaptive capabilities: every so often doctrinalism deviates from the direction in which society is headed and must be course-corrected with a more flexible interpretive tool, such as prudentialism.

Prudentialism

Analyzing constitutional law through the prudential modality allows the law to be at its most accommodating of a changing society. Prudentialism focuses on interpreting the law in

²⁰ *Citizens United v. Fed. Election Comm'n*, at 7, col. 2–8, col. 1.

²¹ *Citizens United v. Fed. Election Comm'n*, at 7, col. 1.

²² *Citizens United v. Fed. Election Comm'n* (Stevens, dissenting), at 8, col. 2.

such a way that the resulting rule balances the costs and benefits. Such flexibility allows for the law to keep pace with the world, as a rule that optimally balances costs and benefits will likely have to be in sync with societal changes. In determining whether a Fourth Amendment violation had occurred, the Court in *Kyllo v. United States* created a new rule to address the use of new thermal imaging technology: a search has occurred when information that is obtained with “sense-enhancing technology” would not have been obtainable otherwise without physical intrusion.²³ The Court put forth a broad test and remarked that “the rule we adopt must take account of more sophisticated systems that are already in use or in development.”²⁴ A doctrinal approach, relying on previous trespass-based tests, or a historical approach, relying on the framers’ definition of a search, would likely have allowed the government to use thermal imaging simply because the technology had not been anticipated. Instead, the Court created a new rule that allowed Fourth Amendment law to keep pace with technological change.²⁵

Conclusion

The law is not a monolithic concept. Rather, there are distinct areas of the law, each with interpretive norms that help to define the scope of its ability to adapt to changing societal conditions. The result of these norms appears to be a non-uniform embrace of modernity. If we can better understand the key drivers and key constraints of adaptability, then perhaps we can help promote optimal legal outcomes by ensuring our rules reflect the society they are intended to manage.

²³ *Kyllo v. United States*, at 21, col. 2.

²⁴ *Kyllo v. United States*, at 22, col. 1.

²⁵ *Kyllo v. United States*, at 21, col. 2–22, col. 1.