What a law should mean: the power of a word

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It is always tempting to think that “the law” is absolutely clear and unambiguous – some (strict constructivists) think the US Constitution is so clear and unambiguous that all constitutional questions should follow exactly what the document stipulates. This seems unrealistic, so let us examine a much smaller question: “How do you disturb a bald eagle?”

If the bald eagle is removed from the official US list of threatened and endangered species (delisted), then the primary law protecting bald eagles will be the *Bald and Golden Eagle Protection Act* of 1940 (the “Act”). The Act prohibits the “taking” of bald and golden eagles or their nests and eggs – taking is defined as “to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb”.

Delisting the bald eagle puts the emphasis on the Act, but – in the definition of “taking” – there was no clear definition of “disturb”. In December 2006 the US Fish and Wildlife Service produced a draft environmental assessment: *Definition of “Disturb” as applied under the Bald and Golden Eagle Protection Act*. In the assessment there is no such thing as a correct legal definition, but four alternatives are presented for consideration.

1 Do not define disturb – disturbing the eagles would be prohibited, but no legal interpretation would be provided.
2 “To agitate or bother a bald or golden eagle to the degree that disrupts the normal behavior of the eagle.” We then need a definition of “disrupt”, and a list of disruptions is given (including “flushing from the nest”, and “reactions indicating alarm”).
3 “*Disturb* means to agitate or bother a bald or golden eagle to the degree that causes (i) injury or death to an eagle (including chicks and eggs) due to

interference with breeding, feeding, or sheltering behavior, or (ii) nest abandonment." "Injury" is then defined, and "death" needs no definition. This is the preferred alternative.

4 "To purposefully interfere with normal breeding, feeding, or sheltering habits of a bald or golden eagle, causing injury or death to the eagle or its young or eggs." (I think "to purposefully interfere" means "to interfere on purpose".)

After the alternatives are given, the environmental consequences of each are considered. For example, for the second alternative "Enforcement ... could be difficult, however, because it may appear unreasonable to curtail a large number of human activities that have no meaningful, long-term effect on eagles."

Finally, "We do not foresee negative cumulative impacts resulting from Alternative 3 (proposed action) because the definition of 'disturb' under that alternative is similar to the current accepted use of the term." That is, the *status quo* is maintained.

If you consider the amount of work that has gone into the definition of a simple word in a relatively minor piece of legislation, probably due to pressure from concerned groups, consider some of the not-so-simple words in a major piece of legislation (the *US Constitution*). For example, there were no concerned groups pushing for clarification of the meaning of (say) "citizen" – one suspects that the Constitution's designers and ratifiers in each state thought the meaning seemed obvious, each with his own personal version of its meaning. Times change, societies change, interpretations change, and so the real meaning of "citizen" was left to the Supreme Court: but, as the saying goes, "The Supreme Court isn't." How many think that the Supreme Court is composed of a group of dispassionate, unbiased jurists who objectively evaluate their cases against some higher law? – my guess is not many. And what is the "higher law"?

For Justice Taney and some of his fellow jurists, it was clear that a person of African descent (slave or free) could not be a citizen, and thus had no right to appear before the Supreme Court – this formed the basis for the notorious Dred Scott decision (*Scott v Sandford*, US Supreme Court, 1856). The case had gone

through lower state and federal courts, and Scott's complaint against Sandford was as follows:

> The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.
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> — *Scott v Sandford*, US Supreme Court (1856)

Scott's complaint was that he, his wife, and their children, had been assaulted, a serious accusation, but the complaint was not accepted – there was no examination of the truth of Scott's accusation – because the court ruled that Dred Scott had no standing in the court, and no standing in the USA itself. Two out of the nine justices disagreed, but it was clear to the majority that the creators and the ratifiers of the Constitution thought that those of African descent:

> ... had for more than a century before [the revolutionary war] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.
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> ...
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> And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States.
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> — Majority opinion (Justice Taney) in *Scott v Sandford*, US Supreme Court (1856)

Fear played a part, for the majority also thought that, if they granted Scott's petition:

> It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without

> obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.
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> — Majority opinion (Justice Taney) in *Scott v Sandford*, US Supreme Court (1856)

Clear enough it would seem, and probably more accurate about the designers and ratifiers than is comfortable, though a dissenting opinion noted:

> In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law.
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> — Dissenting opinion (Justice McLean) in *Scott v Sandford*, US Supreme Court (1856)

Times do change, and the Dred Scott decision became yet another reason why many people wanted to do away with slavery and amend the Constitution, but some attitudes are slow to change which is why others thought the decision vindicated the continuation of slavery.