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Reading law the interpretation of legal texts

Antonin Scalia (born in Trenton, New Jersey) was an assistant judge on the U.S. Supreme Court appointed by President Ronald Reagan in 1986. He served until his death in 2016. He was the first Italian-American justice. He was known for his conservative views and strong defense of executive power, believing that the President of the United States should be of paramount importance in most areas. In many cases, he wrote different opinions than the court's majority, and used scathing language to get his point across. In this groundbreaking book, Scalia and Garner systematically explain all the most important principles of constitutional, statutory, and contractual interpretation in an engaging and informative style — with hundreds of illustrations from actual cases. Is a burrito a sandwich? Does a company have a right to privacy? If you trade a gun for drugs, are you using a gun in a drug transaction? The authors grapple with these and dozens of equally curious questions while explaining the most principled, lucid, and reliable techniques to derive meaning from authoritative texts. At the same time, the book addresses some of the most controversial issues in modern jurisprudence. The authors write with a well-argued point of view that is definitive yet nuanced, simple but sophisticated. ©2013. Published in Landslide, Vol. 6, No. 2, November/December 2013, by the American Bar Association. Reproduced with permission. All rights reserved. This information or any part thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association or the copyright owner. One of my first impressions when reading Justice Antonin Scalia and Professor Bryan A. Garner's Reading Law: The interpretation of legal texts was that I am much more of a textualist than I had previously appreciated. As Scalia and Garner use the term, textualism is an approach to interpreting legal documents seeking meaning in the governing text itself. Given this definition, I suspect most lawyers, judges and academics are textualists when interpreting statutes, regulations, regulations, contracts, patents, and other types of legal texts. But as I continued through Reading Law, it quickly became apparent (despite the authors' best efforts) that textualism alone rarely gives all the answers. There is a strong tension between the basic-and largely undeniable-need to root the interpretation of legal texts into the words of the texts themselves and a host of problems and inherent contradictions that arise when this approach is employed. My main goal in reading Scalia and Garner's thesis was to examine what Reading Law might have to say for patent law. Of course, supporters of the now famous Posner-Scalia debates was triggered by Reading Law knowing that is not a book aimed at patent law. Yet observations Scalia and Garner make apply to law in general, and while the authors barely mention patent law, it is an area of the law that is no stranger to textualism—especially when interpreting patent claims. Reading law is both a description of textualism and an argument in favor of a strong textualist approach (and, to a lesser extent, originalist approach: looking to the sentence words had at the time the legal text was drafted). As the authors note, almost all interpreters of legal texts begin at least with the text. But the authors believe that the correct method maintains a disciplined focus on the text (even if they distance themselves from the excesses of so-called strict textualism). As the authors explain, we are looking for meaning in the governing text, it attributes the meaning it has borne from the start, and reject legal speculations about both the authors' extratextually derived purpose and the desirability of the fair treatment expected consequences. 1. Textualism is thus different from those which take into account the purpose of the text (purposivism) and those which consider the workability of the text and take the view that statutes should be interpreted in order to produce sensible, desirable results (pragmatism). Objective Summary Scalia and Garner's thesis provides canons of construction to use in the interpretation of legal texts. The authors argue in favor of textualism (and the closely related originalism): Both your authors are textualists. We look for meaning in the regulatory text, attribute this text to the sentence it has carried from its inception, and reject legal speculations about both the formulaually derived purposes and the desirability of the just reading expected consequence Of ObjectiveScalia and Garner's thesis giving canons of construction to use in interpreting legal texts. The authors argue for textualism (and the closely related originalism): Both your authors are textualists: We seek meaning in the governing text, attribute that text to the meaning it has borne from the outset, and reject legal speculations about both the authors' extratextually derived purpose and the desirability of fair reading expected consequences. We hope to convince our readers that this method of interpretation is the healthiest, most principled thing there is. Scalia and Garner consider textualism to be the most objective and reliable method of interpretation. This is the only way to ensure that the judiciary fulfills its constitutionally correct role of interpreting law rather than creating law, which is the role of the legislator. There are opposing interpretative strategies, such as consistency (deciding what the law should say based on how it will affect the outcome in or to a goal) or purpositivism (decide what the law should say based on the perceived purpose of the legislation or legislators). They are unreliable and antithetical to representative democracy. Contrary to interpretive strategies incorrectly and unconstitutionally insert judges into the role of legislator. When judges act as de facto legislatures, they silence or override the will of the people. The law of the United States consists of the Constitution and adopted statutes and regulations. It does not consist of any unprinted legislative intent,which is a fiction when applied to a multi-member body like Congress whose members may not have read-let alone understood, or agreed with-the-statutes that are passed. And it should not consist of what unelected judges fancy at any given time in history. Scalia and Garner argue that the law is and should be just what is passed in writing by Congress. (The authors focus on federal law and courts, but the same reasoning applies at the state level.) So how does a textualist interpret statutes? By giving a fair reading to the words of the text in context. How do you do that? Yes, there's carving. Textualists use numerous canons of constructions to help them give a fair reading to a text and confront the inevitable ambiguities, whimsy, omissions, and errors that occur when humans try to capture concepts in written words. Guns are presumptions and guidelines rather than strict rules. And different guns can point to different conclusions in a particular case. Textualist interpretation is an art based on sound probe and logic that is reflected in durable canons. The guns included in this thesis, which are drawn directly from the Table of Contents, are as follows. Principles applicable to all textsFounding principles1. Principle of interpretation. Any application of a text to specific circumstances entails interpretation.2. Text overlay policy. The words of a governing text are of paramount importance, and what they convey, in context, is what the text means.3. Principle for Interrelating Canons. No canon of interpretation is absolute. Each can be overcome by the strength of the various principles pointing in the other direction.4 Presumption against inefficiency. A textually permissible interpretation that promotes rather than hinders the purpose of the document should be promoted.5. Presumption of Validity. An interpretation that validates outweighs one that invalidates. Semantic Canons6. Ordinary-Meaning Canon. Words shall be understood in their usual, everyday meanings — unless the context indicates that they bear a technical meaning.7. Fast-meaning Canon. Words must have the meaning they had when the text was adopted.8. Omitted-goal Canon. Nothing should be added to what the text says or reasonably means. In other words, an issue that is not covered should be treated as not General terms Canon. General terms shall be given their general meaning.10. Negative-Implication Canon. The expression of one thing means the exclusion of others.11. Mandatory/Permissive Canon. Mandatory words impose a duty; permissive words grant discretion.12. Conjunctiva/disjunctive Canon. And join a conjunctliist, or a disjunctive list—but with negatives, plurals, and different specific formulations are nuances.13. Subservient/Superordinating Canon. Subservient language (signaled by subordination) or super-ordaining language (signaled with after all, defiance) only shows the provision in the event of a crash—but does not necessarily denote a conflict between regulations.14. Gender/Number Canon. In the absence of an opposite indication includes masculine feminine (and vice versa) and singular include plural (and vice versa).15. Presumption for Ickexclusive include. The verb to include introduces examples, not an exhaustive list.16. Incomprehensible Canon. An incomprehensible text is out of order. Syntactic Canons17. Grammar Canon. Words should have the meaning that correct grammar and usage would assign them.18. Last antecedent Canon. A pronoun, relative pronoun, or demonstrative adjective generally refers to the closest reasonable predecessor.19 Series-Qualifier Canon. When there is an uncomplicated, parallel design involving all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.20. Nearest-reasonable-Referent Canon. Typically, when the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier applies only to the nearest reasonable referent.21. Proviso Canon. A caveat condition the main issue that it qualifies—almost always the question immediately before.22. Scope-of-subdivides Canon. Materials within a retracted part only concern this part; material contained in unindented text means all following or previously indented parts.23. Punctuation Canon. Punctuation is a permissible indicator of meaning. Contextual Canons24. Whole-Text Canon. The text must be interpreted as a whole.25. Presumption of consistent use. A word or phrase is assumed to have the same meaning throughout a text; a significant variation in terms indicates a variation in importance. 26. Excess Canon. If possible, each word and each provision shall be given effect. No one should be ignored. No one should in undue provision that causes it to duplicate another provision or has no consequence. 27. Harmonic-Reading Canon. The provisions of a text should be interpreted in such a way as to make them compatible, not contradictory.28 General/Specific Canon. In the event of a conflict between a general provision and a specific provision, the specific provision applies.29. Canon. Where a text contains genuinely incompatible provisions at the same level of generality, and they have been adopted at the same time, none of the provisions should be allowed to take effect.30. Predicate-Act Canon. Authorization of an act also authorizes a necessary predicate act.31. Associated-Word Canon. The associated words bear each other's meaning.32 Ejusdem Generis Canon. When general words follow an enumeration of two or more things, they apply only to persons or things of the same general type or class specifically mentioned.33. Distributive-Phrasing Canon. Distribution phrasing applies each expression to its appropriate referent.34. Prefatory Material Canon. A preamble, purpose clause or recital is a permissible indicator of importance. 35. Title-and-Headlines Canon. The heading and headings are relevant indicators.36. Interpretive Direction Canon. Definition sections and interpretative clauses shall be closely followed.37. Absurdity The Doctrine. A provision can either be disregarded or legally corrected as an error (when the correction is textually simple) if failure to do so would result in a disposition that no reasonable person could approve. Policies that apply specifically to government prescriptionsExpected-meaning Canons38. Constitutional-Doubt Canon. A Charter should be interpreted in a way that avoids calling into question its constitutionality.39. Related-statutes Canon. Statutes in par matter shall be interpreted together, as if they were a law.40. Reenactment Canon. If the legislature amends or reenacts a provision other than through a consolidating charter or restyling project, a significant change in language is assumed to bring about a change in meaning.41. Presumption against retroactivity. A statute has presumptively no retroactive application.42. Pending-Action Canon. When legal law is amended during the criminal proceedings, the courts at all levels must apply the new law unless this would violate the presumption against retroactivity.43. Extraterritoriality Canon. A statute has presumptively no extraterritorial application.44. Artificial-Person Canon. The word person includes companies and other entities, but not the sovereign. Government-Structure Canons45. Repeal canon. The legislature cannot derogate from its own authority or the authority of its successors.46. Presumption against waiver of sovereign immunity. A statute does not waive sovereign immunity—and a federal statute does not eliminate the sovereign immunity of the state—unless this disposition is unequivocally clear.47. Presumption against federal section. A federal law is enacted to supplement rather than displace state law. Private-right Canons48. Penalty/Illegality Canon. A charter punishing an act makes it illegal.49. The rule of Lenity. Ambiguity in a statute defining a crime or imposing a penalty should be resolved in s favor.50. Mens Rea Canon. A statute that creates a crime whose elements are similar to those of a common-law crime will be presumed to require a guilty state of mind (mens sale) in its commission. Any statutory offense involving significant penalties will be assumed to require at least awareness of committing the law.51. Presumption against implied right to action. The mere prohibition of a particular act does not create a private right to action for its violation. The creation of such a right must be either explicit or clearly implied from the text of the CharterStabilize Canons52. Presumption against change in common law. A statute will be interpreted as changing the custom only when this outline is completed.53. Canon of imputed common-law meaning. A charter that uses a common-law term, without defining it, assumes its common-law meaning.54. Former-Construction Canon. Where a statute uses words or phrases which have already been authoritatively designed by the court of jurisdiction by last resort, or even uniform construction of inferior courts or an appropriate administrative authority, they shall be understood in accordance with this construction.55. Presumption against implied repeal. Suspensions are implicitly mistitled-very misunderstood. But a provision that flatly contradicts a previously adopted provision repeals it.56. Repeal of the repeal canon. The repeal or expiry of a repeal statute does not reinstate the original Charter.57. Desuetude Canon. A statute is not repealed by nonuse or desuetude. Thirteen folds Exposed58. The false notion that the spirit of a charter should prevail over its letter.59. The false notion that the pursuit of statutory interpretation is to administer justice.60. The false notion that, when a situation is not properly covered by a statute, the Court should reconstruct what the legislature would have done if it had confronted the matter.61. The half-truth consequences of a decision provide the key to sound interpretation.62. The false notion that words should be interpreted strictly.63. The false notion that tax exemptions—or any other exemptions for that matter—should be interpreted strictly.64. The false notion that remedial statutes should be interpreted liberally.65. The false notion that a statute cannot dismiss courts unless it does so explicitly.66. The false notion that committee reports and floor numbers are valuable support in statutory construction.67. The false notion that the purpose of interpretation is to discover intent.68. The false notion that a charter is the best proof of legislative intent.69. The false notion that lawyers and judges, not historians, are unqualified to do the historical research that originalism requires.70. The false notion that the living Constitution is an exception to the rule legal texts must be given which means they bore when they are adopted. Subjective ThoughtsThis is a legal treatise on text interpretation. It's reference material that I read from the beginning to as a novel. But it's not a novel. It is dense material that throws around grammatical terms such as: syndtone, asyndeton, polysyndtone, synecdoche, prepositive and postpositive modifiers, anaphoric and cataphoric pronouns. I have one: yeeesh. The book was a beat at times, and I had a hard time finishing. As an instruction manual for a kitchen appliance, it's nice to have when you need it, but it's not fun to read. It's a useful compilation of authority, and Scalia and Garner know what they're talking about. As usual, Scalia talked me into his arguments. My takeaways from his main arguments were these:1. Textualism is the only game in town when it comes to objectivity in the interpretation of the written word. Everyone else is just making shit up. 2. The country would be better off around the judiciary if the judiciary returned to textualism as an interpretative means, which it did until the 1960s. Legislative intent is a meaningless term and should be ignored when interpreting laws. The law is what is written, not what some legislators intended.4. The role of judges is to say what the law is, not what the law should be.5. A textualist interpretation of the Constitution has simple answers to today's most controversial questions: there is no right to abortion, gay marriage, assisted suicide, or sodomy. There is a right to own firearms. The state can execute people for certain crimes without violating the Eighth Amendment.6. The Constitution is not alive. It means what it says, not what people think it should say. If you want to change a law, pass a bill. Don't pretend that the Constitution always said what you wish it would say today. This, not to say textualism, is easy or the canons will provide clear answers. On the contrary, it can get muddy. There are enough guns listed in this thesis for genuine (or clever) liens and judges to marshal powerful arguments on both sides of litigation. However, just like representative democracy itself, it is the best option that has been developed so far. Finally, as I often say because it so often applies, a smaller government conceived by libertarians would reduce the total number of laws, thereby reducing the inherent complexity that arises in passing and applying laws. With less room for errors, fewer errors can be made. And the people can go on about their business unbemed by trying to interpret laws related to tax, ERISA, or discrimination that should not exist in the first place. [T]he Justices resolve nearly half of his cases unanimously, and many of the others by skewed votes. It used to be said that not 'make' law—they simply apply it. In the 20th century, the legal realists convinced everyone that judges really do laws. It was true, that is, the judges did not really find the common law but invented it over time. Yet this view has been extended to a belief that judges make law through the legal interpretation of democratically adopted statutes. The practice of injecting one's own thoughts into texts has long been given free rein in some schools of biblical exegesis—so long, in fact, that scientists have given the practice their own dishonorable name: eisegesis. Antonym of exegesis, the term eisegesis denotes the inclusion of the reader's own ideas in the text, making the reader a complete collaborator with the original author and allowing the introduction of all sorts of new material. For eisegetes, the possibilities are endless. Liberation from text is attractive to judges as well. It increases their ability to do what they think is good. [W]e seek a return to the oldest and most commonsensical interpretive principle: In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may include later technological innovations. . . . The exclusive reliance on text in the interpretation of text is called textualism. Textualism, in its purest form, begins and ends with what the text says and fairly means. In what age or culture, human intelligence follows certain principles of expression that are as universal as principles of logic. For example, intelligent expression does not contradict itself or contains two proposals that are completely superfluous. . . . [the canons listed in the book] are not rules of interpretation in any strict sense, but presumptions about what an intelligently produced text conveys. In the English-speaking nations, the earliest charter directed to statutory interpretation made it a criminal offense for counsel to argue anything other than original understanding. Passed by the Scottish Parliament in 1427, the law entitled 'The Nane Interpret Kingis Statutes' was wrangoeulie'. Blackstone (1723-1780), the great exponent of the 18th century, was a thorough originalist. [O]riginalism remains the normal, natural approach to understanding everything that has been said or written in the past. Originalism is the only approach to text that is compatible with democracy. When government-taken texts take on a new meaning, the law changes; and amend written law, which to adopt written law in the first place, is the function of the first two branches of government-elected legislators and (in the case of authorized prescriptions of the executive branch) elected executive officers and their prohibition of cruel and unusual punishments in the Federal Constitution was not intended to prevent categorically the imposition of the death penalty for the conviction of certain crimes. Well into the 20th century, the conviction of certain crimes (such as the murder of a police officer) led to an automatic death penalty. Originalism prevents this kind of nine people (or even five people) constitutional review. The crucial argument in favor of originalism is a simple one: It is the only objective interpretative standard even competing for acceptance. Nonoriginalism is not an interpretive theory—it's nothing more than a repudiation of originalism, leaving open the question: How does a judge decide when and how the meaning of a text has changed? To this question, the nonoriginalists have no answer—or rather no answer that comes even close to being an objective test. The choice is this: Give the text the meaning it had when it was adopted, otherwise let each judge decide for himself what it will mean today. Quotes continued in comments. . . . More... More

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