

TEXTUALISM’S LAST STAND: A REVIEW OF SCALIA AND GARNER’S *READING LAW*

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In recent years, there has been a marked shift in the way many judges interpret statutes and constitutions. Instead of looking to lawmakers’ “intent” or “purpose”—the long-standard watchwords—judges increasingly say they are looking for the “original public meaning” of legal texts. This view, roughly that legal text means what a typical reader at the time of enactment would have understood it to mean, is known as “textualism.”¹ The primary architect of this textualist turn in the law is Supreme Court Justice Antonin Scalia.

In *Reading Law: The Interpretation of Legal Texts*,² Scalia has teamed up with the distinguished lexicographer and usage expert, Bryan A. Garner, to write a thick, hard-punching, and highly readable book. It is an odd-couple partnership in some ways—Scalia, the witty, pugnacious, conservative icon; Garner, the tweedy, scholarly, pro-choice, pro-gay-marriage wordsmith. Yet the authors’ strengths (and weaknesses) complement each other in a kind of literary and dialectical *feng shui*. The book may not be the “great event in American legal culture”³ that Judge Frank Easterbrook touts it to be in his glowing Foreword. But it is fair to say that it may become a minor classic.

In addition to readability, the book has other notable virtues. First, it modifies and develops Scalia’s textualist theory in ways that make it both

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1. Some commentators call this view “original textualism,” wishing to distinguish it from forms of textualism that do not view meaning as fixed at the time the text was written or enacted. Like Scalia and Garner, I shall ignore that distinction here.

2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) [hereinafter *READING LAW*].

3. *Id.* at xxvi.

more determinate and less vulnerable to liberal hijackers (the so-called “new textualists,” discussed below). Second, it contains the fullest statement to date of Scalia’s criteria for upholding prior holdings that cannot be squared with original meaning. Third, it contains a detailed, lucid, and often entertaining treatment of traditional judge-crafted interpretive maxims—so-called “canons of construction.” Finally, it contains a truly superb bibliography of books and articles on legal interpretation.

The major weaknesses of the book, I shall argue, are first, its inadequate defense of textualism vis-à-vis its major rivals; second, a variety of confusions and inconsistencies that result from faulty views of language and a failure to distinguish various relevant senses of textual “meaning;” and third, problems with the authors’ attempted merger of textualism with the interpretive canons.

I turn first (in Part I) to a summary of the central argument of the book, highlighting ways in which the account modifies or fleshes out previous versions of Scalia’s textualist theory. In Part II, I explain why the argument is unsuccessful and why no form of textualism is ultimately defensible.

I. THE FAIR READING APPROACH: WHAT AND WHY

Scalia and Garner argue for an approach to reading legal texts that they call “the fair reading method.” The method has three parts: textualism (an interpretive theory that equates the meaning of legal texts with original public meaning); a theory of valid canons (judge-made interpretive rules or presumptions that both jibe with textualism and its underlying values and provide greater certainty and objectivity in legal interpretation than textualism left to its own resources can); and a theory of stare decisis, which Scalia and Garner describe as an “exception” to textualism “born not of logic but of necessity.”⁴

By “textualism,” Scalia and Garner mean the thesis that “[i]n their full context, [legal] words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”⁵ They explain this definition more fully as follows.

First, the theory is “textualist” because it emphasizes the conventional meaning of legal language—what the words actually *say*—as opposed to

4. *Id.* at 413–14.

5. *Id.* at 16. Query: Why limit novel applications or changing denotations to technological innovations? Most general terms are elastic enough to encompass new discoveries and unanticipated applications (as “star,” for example, is now understood to embrace neutron stars). Scalia and Garner are evidently concerned that if this referential elasticity is extended to contestable general terms such as “justice,” “equal protection,” and “cruel and unusual punishments,” judicial lawmaking is invited.

what the drafters or enactors of the language may have meant or intended.

Second, textualists recognize that words have determinate meaning only in context. For instance, the phrase “keep off the grass” means one thing on a yard sign and something quite different if offered as a piece of advice by a substance abuse counselor.⁶ Thus, the meaning of legal language cannot be determined simply by looking up words in a dictionary. Context must also be considered.

Scalia and Garner are careful, however, to limit the kinds of context legal interpreters may take into account. Broader issues of social, historical, or cultural context are excluded (presumably because they invite subjectivity or manipulability). So too, is any “inside” information about lawmakers’ intentions, purposes, or expectations not apparent from the words themselves. All that may be considered by way of context are (a) “a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance,” (b) “a word’s historical associations acquired from recurrent patterns of past usage,” and (c) the evident purpose of the text as “gathered only from the text itself”—what Scalia and Garner call the “textual purpose” of the language.⁷ To give it a name, suppose we label this restricted notion of context “immediate-utterance context.”

By “reasonable people” Scalia and Garner don’t mean actual individuals who shared a particular textual understanding at the time when a given text achieved the force of law. This would require a “collective intent,” which they claim is “pure fiction.”⁸ Rather, the relevant standard is analogous to the hypothetical “reasonable person” construct in tort law. The meaning of a legal text is its original public meaning, and the determinant of original public meaning is an “objectivizing construct,” the “reasonable reader,” whom in addition to being reasonable and a reader,⁹ is presumed to be:

fully competent in the language; fully conversant with any relevant

6. See Gerald Graff, “Keep Off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX L. REV. 405, 407–08 (1982).

7. See *READING LAW*, *supra* note 2, at 33 (emphasis added). This restrictive approach to linguistic context is new in Scalia’s jurisprudence. In previous writings, he has permitted more wide-ranging forays into context, including the entire “*corpus juris*” and historical and cultural contexts, in order to discover the “import” or semantic content that vague or ambiguous language would have had to reasonable readers at the time of enactment. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17, 38, 144 (Amy Gutmann ed., 1997) [hereinafter INTERPRETATION]. In practice, Scalia and Garner do permit wider explorations of context, as is clear in their discussions of gun control and capital punishment. See *READING LAW*, *supra* note 2, at 400–01.

8. *READING LAW*, *supra* note 2, at 392.

9. Slight quibble: Texts can be heard as well as read. See JORGE J. E. GRACIA, HOW CAN WE KNOW WHAT GOD MEANS? THE INTERPRETATION OF REVELATION 18 (2001) (defining a “text” as “a group of entities, used as signs, selected, arranged, and intended by an author to cause specific acts of understanding in an audience in a certain context.”). Strictly, then, Scalia and Garner should say that the relevant standard is the “reasonable reader or hearer.”

technical meanings and terms of art; cognizant of the immediate-utterance context of the text (i.e., immediate syntactic context, historical word-associations, textual purpose); familiar with Garner and Scalia's approved list of valid canons of construction (about one-third of the possible candidates, they remark);¹⁰ and invariably sound in his or her judgments about how the canons bear on the meaning of a text.¹¹

The book's extensive discussion of interpretive canons is a development that was foreshadowed in Scalia's widely-read 1997 essay, *A Matter of Interpretation*.¹² There Scalia argued that the canons, properly viewed and selected, are valuable aids to legal interpretation. In *Reading Law*, Scalia and Garner attempt to make good on this claim. They propose 57 "valid" canons designed, generally, to produce both intelligent public-meaning readings of legal texts and judicial interpretations that further what they see as fundamental legal and political values (primarily: clarity, fairness, predictability, stability, and democracy). Canons that reflect anti-textualist assumptions, such as those that stress factors such as intent, extra-textual legislative purposes, or the controlling "spirit" or "equity" of legal texts, are ignored as invalid. Potential conflicts between the canons are resolved by means of a "principle of interrelating canons," which states that no canon of interpretation is absolute, and that, in cases of conflict, competing canons need to be balanced to produce the soundest interpretation.¹³ Some of the canons are admittedly based on policy considerations rather than on an attempt to discover and honor original public meaning. For example, canons such as the rule of lenity ("resolve ambiguities in favor of the defendant in criminal cases"), the constitutional-doubt canon ("avoid interpretations that place a statute's constitutionality in doubt"), and the prior-construction canon ("if words have already received authoritative interpretation, stick with that interpretation") are clearly policy-based canons that in some cases can run counter to apparent original public meanings. To resolve such conflicts, Scalia and Garner stipulate that the canons are "so deeply ingrained" in American legal culture that they "must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text."¹⁴

The final element of Scalia and Garner's fair reading method is a somewhat grudging acknowledgment, reserved for a brief "Afterword," of their commitment to the principle of stare decisis. There is an obvious tension between their official textualist doctrine—namely, that the original

10. *READING LAW*, *supra* note 2, at 9.

11. These various elements are pieced together from different passages in the book. *See id.* at 33 for competence in the language, 73 for technical terms, 33 for context, 393 for familiarity with the canons and invariably sound judgment.

12. *INTERPRETATION*, *supra* note 7, at 25–29.

13. *READING LAW*, *supra* note 2, at 59–60.

14. *See id.* at 31.

public meaning of a binding legal text is “the law”—and the requirement that precedent (absent compelling reasons) be followed. As Scalia sees it, “[t]he whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”¹⁵ Acknowledging that courts “cannot consider anew every previously decided question that comes before them,”¹⁶ Scalia and Garner accept stare decisis as a legitimate “exception to textualism.”¹⁷ Inferior courts in a judicial hierarchy must follow controlling higher-court precedents, even when they plainly conflict with original textual meaning.¹⁸ Courts that are free to overrule a non-textualist prior holding must weigh a variety of competing legal values. In constitutional cases, Scalia and Garner state, the relevant considerations include: (1) Whether harm will be caused to those who justifiably relied on the decision, (2) how clear it is that the decision was textually and historically wrong, (3) whether the decision has been generally accepted by society, and (4) whether the decision permanently places courts in a position of making policy calls appropriate for elected officials.¹⁹ This important passage—included almost as an afterthought and only very thinly supported by argument or citations—contains the fullest statement to date of Scalia’s criteria for overruling constitutional non-textualist precedent. Thus, the various components of Scalia and Garner’s fair reading method of interpreting legal documents are these: original public meaning (as determined by the “objectivized reasonable reader”); a numbered list of fifty-seven valid canons that serve as guides and in some cases as implicit public-policy qualifiers to original public meaning; and a pragmatic exception for stare decisis. How do they argue for this theory of legal interpretation?

The most novel component of the fair reading method is the addition of the approved canons, which serve various ends. Most are selected because they offer commonsensical ways of getting at likely original textual meaning. Others, as we have seen, were selected because they reflect widely held legal values or important policy preferences. Still others have a clear polemical edge to them and are designed to counter views that, as Scalia and Garner see things, give judges too much wiggle room for judicial policymaking. More generally, the canons are added to the core textualist theory to make it more concrete—and thus provide greater clarity, consistency, and predictability—by offering specific interpretive tips. Much as a manual of English usage might provide both general principles of effective writing and specific rules of sound grammar and

15. INTERPRETATION, *supra* note 7, at 139.

16. READING LAW, *supra* note 2, at 414.

17. *Id.*

18. *See id.* at 41.

19. *Id.* at 412.

punctuation, Scalia and Garner use the canons of construction to operationalize a particular brand of textualism, thus producing a kind of “how-to” guide for judges and legal theorists who share their core jurisprudential values.²⁰

But why embrace textualism at all? Here the authors for the most part restate arguments offered in previous works. They claim that textualism is the best approach to legal interpretation because it (1) leads to greater certainty and predictability in the law; (2) curbs judicial policymaking; (3) enhances respect for the rule of law; (4) remains faithful to constitutional requirements of valid lawmaking, such as nondelegability, bicameralism, and presidential participation, by counting as “law” only what has been voted upon and enacted by the authorized lawmaking agents; and (5) encourages better legal draftsmanship by enforcing laws as they are written, even when this produces outcomes that conflict with legislative intentions, purposes, just outcomes or wise policy.²¹ In addition, Scalia and Garner also support textualism by appealing to legal tradition, claiming that textualist approaches were “the all-but-universal means of understanding enacted texts”²² until roughly the mid-twentieth century.

Scalia and Garner’s case for textualism centers mostly on the theory’s

20. The authors note that “many judges who believe in fidelity to text lack the interpretive tools necessary to that end” and remark that one of the purposes of their book is to address this need. *See id.* at 7.

21. *See id.* at xxviii–xxix for a discussion of reasons 1–3 and 5. *See id.* at 388 for a discussion of reason 4. Elsewhere, Scalia has defended textualism by noting that it saves time and energy by excluding putative extrinsic sources of law, such as legislative history. *See* INTERPRETATION, *supra* note 7, at 36–37.

22. READING LAW, *supra* note 2, at xxviii. This claim is misleading. In fact, until roughly the end of the eighteenth century, the prevailing approach tended to exalt the “equity” or “spirit” of laws over their literal or textual meaning and this equitable approach continued to have considerable vitality throughout most of the nineteenth century, as illustrated by such classic late-nineteenth century cases such as *Riggs v. Palmer* and *Church of the Holy Trinity v. United States*. *See Riggs v. Palmer*, 115 N.Y. 506 (1889); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). *See also* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 2–7 (1992) (tracing briefly the course of equitable interpretation from Aristotle through medieval canon law, early modern continental jurisprudence, and eighteenth-century English statutory interpretation up to the American founding era). Equitable interpretation was endorsed by Grotius, Pufendorf, Vattel, Mathew Bacon, Henry Home, Thomas Rutherford, Blackstone, and virtually every other major authority on legal interpretation that influenced the American founders. James Wilson, in his influential *Lectures on Law*, stated that “equity is synonymous with true and sound construction.” 2 JAMES WILSON, *Lectures on Law*, THE WORKS OF JAMES WILSON 502 (Robert McCloskey ed., 1967). Alexander Hamilton asserted that “many things within the letter of a statute are not within its equity and vice versa” and that “in law as in Religion the letter kills, the spirit makes alive.” 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 357 (Julius Goebel Jr. & Joseph H. Smith eds., 1964). On the prevalence of non-textualist approaches in the founding period, see William N. Eskridge Jr., *Early Understandings of the Judicial Power in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001).

comparative advantages over what they claim are its three leading competitors: intentionalism, purposivism, and consequentialism. Each of these theories, they argue, suffers from fatal defects. Consequentialism (which “interpret[s] laws so as to produce sensible, desirable results”) invites uncertainty and short-circuits democracy by encouraging judges to “say that the law is what they think it ought to be.”²³ Purposivism (which “interpret[s] unclear laws in ways that best advance their intended purposes”) leads to unpredictability and judicial manipulability, since “purposes” (goals, justifying reasons, or desired general outcomes) can be defined at many levels of generality.²⁴ Intentionalism (which “interpret[s] laws as their makers intended”) assumes a dubious “group mind,” creates uncertainty by offering no clear guidelines about how “intent” should be determined, violates both the rule-of-law value of fair-notice and constitutional requirements of valid lawmaking by giving effect to unenacted intentions, and rests on the patent legal fiction that lawmakers always have a specific intention or expected application on every potential interpretive issue.²⁵ Textualism isn’t perfect, Scalia and Garner admit; but it offers the only method that recognizes the limited role of judges in a government of laws rather than of men, and provides the only objective standard by which legal meaning may be determined and applied.²⁶

23. *READING LAW*, *supra* note 2, at 22.

24. *See id.* at 18–19.

25. *See id.* at 376–77, 392–93. It is worth noting that this argumentative strategy—“either textualism or purposivism or intentionalism or consequentialism, and not the latter three”—is a false dilemma. Many contemporary legal theorists embrace a *mixed*, or *pluralistic*, interpretive theory which includes elements of all four approaches. *See, e.g.*, KENT GREENAWALT, *STATUTORY INTERPRETATION: 20 QUESTIONS* 35–57 (1999). Indeed, pluralistic theories are probably the leading contemporary competitor to textualism.

26. *See* *READING LAW*, *supra* note 2, at 393. Scalia and Garner also critique non-originalism, or Living Constitutionalism, a widely accepted approach to constitutional interpretation, which denies that the Constitution must be interpreted in accordance with its original meaning, but argues instead that it may be given new meanings to accord with the times. Such a view, they claim, is anti-democratic and invites uncertainty and judicial policymaking. Moreover, the “conclusive argument” against non-originalism is that it “is not an interpretive theory—it is nothing more than a repudiation of originalism, leaving open the question: How does a judge determine when and how the meaning of a text has changed?” *See id.* at 89. “It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never converged on an appealing and practical alternative.” *Id.* at 91–92 (quoting RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004)). For responses to this “it takes a theory to beat a theory” argument, see Gregory Bassham, *Justice Scalia’s Equitable Constitution*, 33 *J. C. & U. L.* 143, 165–66 (2006) and Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 88 (2009).

II. WHY THE FAIR READING METHOD ISN'T FAIR, REASONABLE, OR COHERENT

Scalia and Garner's fair reading method is an improvement in some ways on many previous versions of textualism. It recognizes clearly the importance of context in determining meaning, specifies which elements of context may and may not be consulted, makes textualist interpretation more predictable and less manipulatable by the addition of the canons, addresses the familiar problem of "dueling canons"²⁷ by making the canons only presumptively binding and eliminating putative canons that conflict with text-based approaches,²⁸ permits departures from plain textual meaning in cases of scrivener's error or patent absurdity, recognizes the value of stare decisis, and spells out more clearly than most textualist theories the conditions under which non-originalist constitutional holdings should be overruled. Such features help to address many of the standard criticisms of text-based approaches. Nonetheless, there are still significant problems with Scalia and Garner's fair-reading version of textualism, and to these I now turn.

One problem concerns Scalia and Garner's claim that the fair reading method applies not only to statutes, constitutions, and administrative regulations, but to all "legally operative" texts, including contracts and wills.²⁹ Officially, the fair reading method is not a theory of adjudication, that is, a theory that applies only to judges. It is an all-purpose theory of legal interpretation that tells anyone—judges, lawyers, presidents, or ordinary citizens—how to interpret legal texts and draw out their fair implications. In reality, Scalia and Garner focus heavily on how judges should interpret and apply governmental texts such as statutes, ordinances, and constitutions. Worse, in theory, the approach they endorse has a much wider application.

And therein lies a problem. For in most communicative contexts people are not interested in knowing how an "objectified" reasonable reader (or auditor) would understand a particular bit of language. They want to know what "message" or "thought" the communicator is attempting to convey. If a serious love interest of mine quotes a passage from Shakespeare's sonnets, I want to know what *she* meant by it, not how some bloodless abstraction with an old dictionary would interpret it. The same is true in most communicative contexts—including legal ones. If a police officer says to me, "knock that off or you're going to jail," I want to know what conduct of mine *he* finds objectionable, not what some reasonable auditor,

27. See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-406 (1950) (arguing that the canons are mutually inconsistent and that judges' choice of canons is based on other considerations).

28. READING LAW, *supra* note 2, at 59, 234-35.

29. *Id.* at 42.

considering only the immediate utterance-context, would conclude that he means. In short, in most linguistic contexts we are not textualists and certainly not clause-bound textualists of the sort Scalia and Garner treat as normative in legal contexts.³⁰

As Wittgenstein reminded us, language has many functions.³¹ But certainly one central function of language is to transmit intention-messages from one person to another. And this is true in law as in most other linguistic contexts. There may be special reasons—having to do, perhaps, with curbing judicial discretion, increasing predictability, and giving people fair notice—why objectified public meaning is the appropriate hermeneutical standard when judges interpret statutes and other enacted laws. But in other legal contexts, such as the interpretation of wills, contracts, military commands, and police orders, it is usually “intent” rather than “public meaning” that interpreters are interested in. In fact, given the diversity of legal contexts, it is extraordinarily unlikely that any single interpretive theory will apply to them all.

Even as a theory of judicial interpretation or adjudication, Scalia and Garner’s fair reading method runs into big problems. Let me highlight three: various difficulties with their notion of “public meaning,” the inherent literalism built into their approach, and conflicts between textualism and the canons.

Scalia is widely credited with popularizing the shift in originalist constitutional theory from original intention to objective public meaning.³² This shift has certain advantages but also some drawbacks.³³ One of the drawbacks is the extraordinary slipperiness and ambiguity of the notion of “meaning.”

What sort of animal is (linguistic) meaning? Philosophers and linguists commonly distinguish various aspects of meaning, including *reference* (the set of objects that words pick out or refer to), *sense* (roughly, the essential qualities or attributes cited in a word’s definition), and *connotation* (roughly, the images, feelings, and emotional associations words call to mind either for particular individuals or conventionally, as “home” for many people connotes warmth and comfort).³⁴ They also commonly

30. Stanley Fish gives the example of one spouse complaining to another, “We never go out anymore.” Would we say that the “meaning” of this statement is determined by what a hypothetical reasonable reader would surmise, knowing nothing about the spouses or their marriage other than what is revealed in the immediate utterance-context? See Stanley Fish, *Is There a Constitution in This Text?*, N. Y. TIMES (Oct. 8, 2012), <http://opinionator.blogs.nytimes.com/2012/10/08/is-there-a-constitution-in-this-text/>.

31. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. E. M. Anscombe trans., 3rd ed. 1958).

32. See JONATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 158 (2005).

33. See BASSHAM, *supra* note 22, at 47–51.

34. See generally JOHN LYONS, *1 SEMANTICS* 174–215 (1977). Some would

distinguish between *sentence meaning* (the acontextual conventional meaning of words, abstracted from any particular occasion of use), *speaker's meaning* (the meaning of a text as understood or intended by its author), *utterance meaning* (the conventional meaning of words as expressed in a particular context), and *audiencial meaning* (the meaning of a text as understood or interpreted by a particular audience, such as the framers or those who ratify a particular legal text).³⁵

Scalia and Garner's proposed interpretive touchstone, "objectivized original public meaning," does not map neatly onto any of these familiar distinctions. It's a jerry-rigged construct, designed to insure that interpreters—particularly judges—approach texts in ways that respect what Scalia and Garner regard as core values. In fact, Scalia and Garner are quite vague about how precisely objectivized original public meaning should be determined. In previous works, Scalia conceded that such meaning could not be ascertained merely by consulting dictionaries and linguistic contexts. He has often noted that language is unclear in context and serious research is necessary to determine the "import" that language would have had to a reasonable, fluent, and appropriately informed reader of the time. By "import," Scalia meant what Ronald Dworkin calls a "clarifying translation"³⁶ of a legal phrase or provision. For example, the Eighth Amendment of the U.S. Constitution prohibits the imposition of "cruel and unusual punishments." Scalia concedes that the phrase is unclear in context and hence requires a clarifying translation. Such a translation would state clearly the legal rule or principle a typical reasonable reader of the time, in 1791, would have understood the clause to enact. One possible clarifying translation is this: No punishments that are *really* cruel and unusual—not merely those that are generally believed to be so at the time of enactment—may be inflicted. Scalia, as he consistently does, rejects this "realist" reading and suggests instead that the relevant clarifying translation

include "illocutionary acts" as components of meaning. *Id.* These involve both the delivery of some propositional content and a performative speech act, such as promising, demanding, or requesting. *See id.* at II: 730. At a more abstract level, philosophers and linguists debate whether meaning is best understood in terms of truth-conditions, use, verification-conditions, pragmatic meaning, or a host of other options. *See generally* John Skorupski, *Meaning, Use, Verification*, in *THE COMPANION TO PHILOSOPHY OF LANGUAGE* 29–59 (Bob Hale & Crispin Wright ed., 1997).

35. For versions of these distinctions, *see* GRACIA, *supra* note 9, at 38–39; Jerrold Levinson, *Intention and Interpretation: A Last Look*, in *INTENTION AND INTERPRETATION* 221, 222–23 (Gary Iseminger ed., 1992); and Michael S. Moore, *The Semantics of Judging*, *S. CAL. L. REV.* 151, 247–49 (1981). There is a large literature in literary theory about whether textual meaning should be understood in terms of speaker's meaning/authorial intent ("intentionalism") or audiencial meaning or some other nonintentionalist criterion. *See generally* *THE DEATH AND RESURRECTION OF THE AUTHOR?* (William Irwin ed. 2002) and ISEMINGER, *supra*. I have borrowed the useful expression "audiencial interpretation" from Jorge Gracia. *See* GRACIA, *supra* note 9, at 70.

36. *See* Ronald Dworkin, *Comment*, in *INTERPRETATION*, *supra* note 7, at 117.

is this: No physical punishments that are unusual and were *generally thought to be cruel* at the time of enactment may be inflicted.³⁷

Scalia admits that determining the relevant clarifying translation may be extremely difficult and time-consuming, particularly for busy judges who may not be well-trained in historical research.³⁸ Yet it is unavoidable if we are to have a fixed, objective, and reasonably clear interpretive standard.

In *Reading Law*, Scalia seems to back away from this clarifying-translation approach and opt for something closer to the old “specific-intent” originalist methodology. Why? My guess is that it is because liberal constitutional theorists—the so-called “new textualists”—have latched on to the clarifying-translation strategy as a powerful new weapon against conservative textualists like Scalia.

New textualists, such as Akhil Reed Amar,³⁹ Jack Balkin,⁴⁰ and Lawrence Solum,⁴¹ agree that original textual meaning is the proper standard of sound constitutional interpretation. However, they claim—and argue powerfully—that original meaning generally supports progressive values over conservative ones, and often requires difficult and contestable normative judgments to be made by unelected judges.⁴² For these reasons, new textualists are a major threat to such old-style originalists as Robert Bork, Keith Whittington, Richard Kay, Clarence Thomas, and Scalia.

Scalia and Garner seek to counter this threat in two ways. First, they deny that there is any relevant difference between constitutional “interpretation” and constitutional “construction.” New textualists frequently distinguish these, claiming that interpretation is the search for

37. INTERPRETATION, *supra* note 7, at 146. The restriction to “physical” punishments is something new in Scalia’s Eighth Amendment jurisprudence. See *READING LAW*, *supra* note 2, at 84.

38. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989). In *READING LAW*, Scalia and Garner soften this stance, arguing that in most cases ascertaining the relevant original understanding is not that difficult. See *READING LAW*, *supra* note 2, at 401–02.

39. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). See generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

40. See, e.g., Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007). See generally JACK BALKIN, *LIVING ORIGINALISM* (2011).

41. See, e.g., Lawrence B. Solum, *The Interpretation/Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

42. See generally James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (citing recent progressive interpretations of the commerce clause, the congressional enforcement clauses of the Reconstruction Amendments, the Ninth Amendment, the Fourteenth Amendment Privileges or Immunities clause, to name a few). Ryan traces the roots of new textualism back to Ronald Dworkin’s “Comment” in INTERPRETATION, *supra* note 7, at 144–49. In fact, all the crucial distinctions Dworkin made in that piece were contained in his remarkable 1981 tour de force, “The Forum of Principle.” See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

original public meaning, whereas construction is the task of applying that meaning (particularly when the language is vague or abstract) to particular cases.⁴³

Scalia and Garner deny that there is any meaningful interpretation/construction distinction, arguing that courts have never recognized one and that the task of courts is single and whole: “to ascertain the meaning and will of the lawmaking body, in order that it may be enforced.”⁴⁴ But of course the difference between ascertaining meaning and applying that meaning is perfectly straightforward—think of a baseball ump making a close call at first base or a devout Christian casuist drawing a plausible but debatable inference from Jesus’s command to “resist not evil.”⁴⁵ Scalia and Garner resist the distinction—often covertly employing it⁴⁶—because they dislike the idea that judges might need to use their own judgment in applying open-ended constitutional language.

The second response Scalia and Garner make to the new textualist threat is sharply to limit the kinds of context that interpreters may legitimately consider, to adopt canons that limit judicial discretion in applying vague or

43. See, e.g., Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE, 3–4 (Robert W. Bennett & Lawrence B. Solum ed., 2011). Though versions of the interpretation/construction distinction date back at least to the first half of the nineteenth century, current discussions of the distinction in constitutional theory owe much to Keith Whittington. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–14 (1999). For Whittington, “interpretation” “represents a search for meaning already in the text,” whereas “construction” is a creative and political process that goes beyond a text’s discoverable meaning. *Id.* at 6, 12. This way of drawing the interpretation/construction distinction calls into doubt the legitimacy of constitutional construction by unelected judges. See ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM 24–25 (1997). Other legal theorists think of “construction” as the conversion of norms that emerge from interpretation into other norms (e.g., multi-part legal tests) that are better suited to judicial enforcement. See, e.g., Mitchel Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on Carving Up Implementation Space*, 27 CONST. COMMENT. 39, 42–44 (2010). I prefer to think of “construction” in terms of what Larry Solum calls “the model of construction as principle.” On this model, judges engaged in construction should aim to create constitutional doctrines or make particular applications “that comport with political ideals for which the general, abstract, and vague provisions of the Constitution aim.” Solum, *supra*, at 70. “When we construe a constitutional provision, we determine the legal effect of the text.” *Id.* at 3. No multi-parts tests or elaborate “doctrine” need be produced; any application of a vague or otherwise indeterminate constitutional norm to specific cases counts as construction. *Pace* Whittington, such determinations need not be notably “creative” or “political,” though they may well be contestable.

44. READING LAW, *supra* note 2, at 15.

45. Matt. 5:39. For a strikingly literalistic reading of this passage, see LEO TOLSTOY, A CONFESSION, THE GOSPEL IN BRIEF AND WHAT I BELIEVE 318–27 (1974).

46. See, e.g., READING LAW, *supra* note 2, at 85–86 (arguing that the fourth amendment search-and-seizure provision prohibits police from planting a GPS tracker on a car without a warrant). This is one of many examples Scalia and Garner discuss, where the hard part is applying the law, not ascertaining its meaning.

abstract constitutional language,⁴⁷ and to embrace a methodology for determining public meaning that prioritizes readers' specific application-intentions (i.e., what they specifically hoped, expected, or intended the law to prohibit or permit) over any alleged abstract semantic intentions. A striking example of the latter is their discussion of the term "vehicle" in H. L. A. Hart's classic hypothetical about a city ordinance that states: "No person may bring a vehicle in the park."

What sorts of things would such an ordinance, properly interpreted, prohibit? Ordinary cars, trucks, motorcycles, clearly. But what about bicycles, airplanes, rollerblades, hot dog carts, toy dump trucks, motorized wheelchairs, jet-powered bicycles, decommissioned tanks, a child's little red wagon, snow sleds, golf carts, city garbage trucks, snowmobiles, fire-trucks, police paddy wagons, and ambulances? One standard way to approach such issues is to recognize, first, that the term "vehicle" is vague and thus has no "plain meaning" that can be straightforwardly applied, and second, that a sensible way to make the meaning of "vehicle" more concrete in this context is to examine the guiding purposes for the ordinance. Was the main purpose to promote safety in the park? Then airplanes are clearly prohibited and toy dump trucks are clearly permitted. Or was the primary purpose to limit noise? If so, then city garbage trucks and police paddy wagons are plausibly "vehicles" but rollerblades and decommissioned tanks are not. Regardless of whether the primary purpose was to improve safety or to reduce noise, ambulances and other emergency vehicles are presumably not covered by the ordinance. To conclude that they are would be to revert to a kind of "formalistic" or "literalistic" approach to legal interpretation that has been consistently rejected in Anglo-American law for over a century.

Scalia and Garner approach the case very differently. As textualists, they reject any resort to extratextual purposes in interpreting statutes. Their touchstone is objectivized original public meaning: how would a hypothetical reasonable reader, correctly applying the canons and looking only at the immediate utterance-context, determine what the ordinance prohibits and permits? In answering this question, dictionaries would be a good place to start. However, dictionaries are not always adequate. Often the definitions they provide are vague or do not accurately reflect ordinary usage. Such is the case with the term "vehicle," which a typical dictionary might define as "a means of conveyance, usually with wheels, for transporting people, goods, etc.; a car, cart, truck, carriage, sledge, etc."⁴⁸ This broad definition would include toy dump trucks, baby carriages,

47. *READING LAW*, *supra* note 2, at xx. Examples include the "general/specific canon" (specific language trumps general language in cases of conflict) and the "omitted-case canon" (nothing is to be added to what a text states or reasonably implies).

48. *Id.* at 37.

skateboards, and other things that aren't colloquially considered "vehicles." The proper procedure, then, is to ask: what sorts of things would ordinary people call a "vehicle"? Answer: any *sizable* wheeled conveyance.⁴⁹ So small wheeled conveyances such as rollerblades, bicycles, and toy automobiles are permitted in the park, as are large non-wheeled conveyances such as attack helicopters, sea-planes, snowmobiles, and, presumably, *Star-Wars*-like Imperial Walkers.⁵⁰ Large wheeled conveyances such as golf carts, garbage trucks, and ambulances are *verboten*.

There is something highly instructive—even perverse—about this approach. For starters, it makes Scalia and Garner's "reasonable reader" distinctly *unreasonable* (a point I shall return to in a moment). But it also reveals something very interesting about how Scalia and Garner think language works. Clearly, they think that the "ordinary meaning" of a word can be determined simply by giving typical readers a kind of lengthy quiz—a quiz in which all the questions are of the form: "The word 'W' applies to object *O*. True or false?" The ordinary meaning of "W" is simply a function of these quiz results.

This curious approach to language explains many things that commentators have often found puzzling in Scalia's jurisprudence. Why, for instance, does he say that the *text* is what ultimately matters in constitutional interpretation, yet consistently construes broad constitutional language in ways that are far narrower and more specific than the words suggest?⁵¹ Why does he consistently say that it is the original textual meaning that matters, yet in practice, give decisive weight to lawmakers' "expectation intentions," even when these are discoverable only outside the four-corners of the text?⁵² Clearly because he thinks "ordinary meaning" is

49. *Id.*

50. *Id.* at xx. Only the first three of these examples are Scalia and Garner's; the others are mine.

51. In Scalia's view, for example, "free speech" protects only speech that the founding generation considered worthy of protection; "free exercise" does not protect religious exercise at all against neutral and generally applicable laws; the Equal Protection Clause does not bar sex discrimination; and the Eighth Amendment, as we have seen, prohibits only punishments that the founding generation would have considered as "cruel and unusual." On speech and the Eighth Amendment, see READING LAW, *supra* note 2, at 135-36 (speech) and 145 (Eighth Amendment). On religious accommodation, see *Emp't Div., Dep't. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990). On sex discrimination, see Adam Cohen, *Justice Scalia Mouths Off On Sex Discrimination*, TIME (Sept. 22, 2010), <http://www.time.com/time/nation/article/0,8599,2020667,00.html>.

52. See, e.g., READING LAW, *supra* note 2, at 407 (claiming that the Eighth Amendment's prohibition of cruel and unusual punishments permits any manner of imposing the death penalty "that is less cruel than hanging, which was an accepted manner in 1791"); *Id.* at 400 (arguing that historical inquiry demonstrates that the Second Amendment was understood to guarantee a right to keep and bear arms for personal use, including self-defense).

simply a construct generated out of conventional application-expectations.

This is a serious mistake. People do not ordinarily suppose that the “meaning” of their words can be equated with, or extrapolated from, what they personally believe, or guess, those words denote. This is obvious in the case of scientific or technical words, such as “echidern” or “bill of attainder.”⁵³ But it is also true, as philosophers of language have shown, of many if not all ordinary terms, such as “toxic,” “justice,” and “death.”⁵⁴ Nobody thinks of himself as a walking dictionary, with an infallible grasp of correct definitions and applications. We realize we can make mistakes in our use of language, and so our dominant “semantic” intention in most cases is simply to use words “correctly,” whatever that turns out to be.⁵⁵ This is inconsistent with Scalia’s standard move of treating original public meaning as fixed and precise by constructing “meanings” out of expectation-intentions. Only because he does this can he blithely say, “[t]he death penalty? Give me a break. It’s easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state.”⁵⁶ In short, Scalia and Garner’s reversion to something like the old “specific intent” approach to textual meaning rests on a faulty view of language and is not an adequate response to the challenge posed by the new textualists.

There is a second problem with Scalia and Garner’s fair reading method that their discussion of “the no vehicles in the park” example makes plain—the striking literalism of their approach.

Recall that Scalia and Garner argue (implausibly) that the no-vehicle ordinance would prohibit ambulances entering the park to pick up sick or injured people, but would not ban roaring snowmobiles or Imperial Walkers. This perverse result follows partly from Scalia and Garner’s mistaken claim that the term “vehicle” properly applies only to “sizable wheeled conveyances” (snowmobiles, jet-powered bicycles, and unwheeled

53. See *READING LAW*, *supra* note 2, at 73, 441.

54. See generally *BASSHAM*, *supra* note 22, at 71-77. In philosophical parlance, our semantic intentions are ordinarily “realist” rather than “conventionalist.”

55. Scalia and Garner specifically deny that this is the case with constitutional language, claiming that the founding generation, which distrusted judicial activism and recognized that the “whole purpose” of a Constitution is to prevent change, would have wished to embed *their* values and specific understandings into the nation’s permanent charter of government. See *INTERPRETATION*, *supra* note 7, at 135-36, 146; *READING LAW*, *supra* note 2, at 404-05. For a response, see *BASSHAM*, *supra* note 22, at 163-67.

56. *Scalia: Abortion, Death Penalty “Easy” Cases*, CBS NEWS (Oct. 5, 2012), http://www.cbsnews.com/8301-250_162-57526578/scalia-abortion-death-penalty-easy-cases. Cf. *READING LAW*, *supra* note 2, at 401 (claiming that it is “entirely clear” that the Constitution does not guarantee a right to abortion, sodomy, or assisted suicide). Of course, these are easy cases only if one treats original meaning as dispositive and assumes that concrete expectations constitute, or are conclusive evidence of, original meaning.

tanks are clearly vehicles). But it also results from a formalistic literalism that is the Achilles heel of all textualist approaches.

Very frequently, language is not meant to be understood literally. A thousand times a day we say things like, “drop everything and come right away,” without bothering to add, “unless you’re holding a baby over a bathtub, are lying paralyzed in bed, or have some other sufficient reason for not doing as I request.”⁵⁷ In law, of course, a higher standard of precision is ordinarily expected; though as we’ve seen, “law” is not limited to statutes and constitutions but also includes a vast amount of relatively informal, unenacted law, such as military commands (for example, “attack at dawn”). It remains undeniable, however, that legislation and legal method casebooks are chock-full of examples of laws that plainly weren’t intended to be interpreted literally and become far less sensible and just when they are.⁵⁸

To be fair, Scalia and Garner do offer a response of sorts to this obvious criticism. They deny that they are “hyperliteralists,” noting that “reasonable readers,” *qua* reasonable, will not read language literally if it would be obviously absurd or stupid to do.⁵⁹ This sounds reassuring until one realizes that by “hyperliteralism,” Scalia and Garner actually mean “hyper-hyperliteralism.” As in the no-vehicle case, they do not shy away from what most would consider perversely literalistic readings. And this, indeed, is where Scalia and Garner take their stand. In their eyes, a little perversity (perhaps even a lot?) is a reasonable price to pay for the greater certainty, predictability, objectivity, judicial deference, and so forth that textualism allegedly affords. Others, of course, will disagree. The “revolt against formalism”⁶⁰ runs deep in American legal culture. It is not a praxis noted for its high tolerance for perversity.

The final problem with Scalia and Garner’s fair reading method is the obvious tension that exists between their official interpretive touchstone (“ascertain and enforce the original public meaning”) and the canons (some

57. Adapted from WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION*, 225 (2000).

58. Often-discussed examples include *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892) (ruling that a church’s importation of a pastor did not violate a federal statute prohibiting payment of an alien’s transportation costs “to perform labor or service of any kind”); *U.S. v. Kirby*, 74 U. S. 482 (1868) (holding unanimously that arresting a mail carrier suspected of murder is not obstruction of the mail, as a literalistic approach would require); and *Riggs v. Palmer*, 115 N.Y. 506 (1889) (holding that a person may not inherit from a testator whom he has murdered in order to collect the inheritance, despite the fact that New York’s statute of wills contained no such exception). Scalia and Garner strongly criticized *Church of the Holy Trinity*. *READING LAW*, *supra* note 2, at 11-13. *Cf.* *INTERPRETATION*, *supra* note 7, at 18-23 (offering similar criticisms).

59. *READING LAW*, *supra* note 2, at 39-41.

60. See generally MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1976).

of which are clearly policy-based and can easily run counter to original public meaning). Scalia and Garner offer a fix for this disconnect, but the fix doesn't work.

The solution that Scalia and Garner propose is to build the canons right into the "meaning" of legal texts. Their hypothetical "reasonable reader" (blind to most aspects of context but godlike in other respects) knows, accepts, and flawlessly applies the canons in such a way that they become "inseparable from the meaning"⁶¹ of legal texts. Thus, there is no conflict between original meaning and the policy-based canons because the canons are part of the original meaning.

As legal fictions go, this is clearly a whopper. It is absurd to suppose that average readers in, say, 1787, were cognizant of canons that in many cases didn't even exist until years later. It is wildly implausible to suppose that presumptions such as the repealability canon ("a legislature cannot derogate from its own authority or the authority of its successors") are somehow part of the "meaning" of all laws, including the ordinance that bans vehicles in a public park: meanings are simply not that jam-packed. Moreover, as Scalia and Garner concede,⁶² the canons aren't completely consistent with one another; sometimes they pull in opposite or conflicting directions and have to be balanced against one another.⁶³ Building those crosscutting tensions into the very "meaning" of legal texts risks making those texts speak with conflicting voices. Finally, the very idea of building the canons into the meaning of laws exists in obvious tension with the reasons that Scalia and Garner give for treating "ordinary usage" as the standard for legal meaning. Such a standard is supposed to be fairer, clearer, and more consistent with lawmaking desiderata than, say, adverting to legislators' unenacted intentions or general purposes. But of course the *canons themselves* are unenacted and generally unknown to average citizens. Reading them into the "meaning" of ordinary laws does not serve the goals of fair notice and valid enactment; it conflicts with them.⁶⁴

61. *READING LAW*, *supra* note 2, at 31.

62. *Id.* at 59.

63. Thus: The Supremacy-of-Text Principle ("the words of a text are of paramount concern") may conflict with the Constitutional-Doubt Canon ("a statute should be interpreted in a way that avoids placing its constitutionality in doubt"); the Ordinary-Meaning Canon ("words are to be understood in their ordinary, everyday meanings") can conflict with the Artificial-Person Canon ("the word *person* includes corporations and other entities, but not the sovereign"); and the General-Term Canon ("general terms are to be given their general meaning") may conflict with the General/Specific Canon ("if there is a conflict between a general provision and a specific provision, the specific provision prevails"). *Id.* at xx-xx.

64. A lesser problem: As Scalia and Garner acknowledge, some of the canons imply that the meaning of laws can *change* over time. *Id.* at 254-55. For example, their claim that statutes dealing with the same subject should be interpreted together, as if they were one law, logically implies that the meaning of vague or ambiguous laws may change as later, related laws are enacted. This conflicts with their oft-repeated claim that "words must be given the meaning they had when the text was adopted." *Id.* at 78.

None of this suggests that textualists cannot embrace the canons. But they need to be transparent about how the canons, and the significant stare decisis qualifier, are used. In effect, Scalia and Garner adopt a kind of modified textualism in which they say: “Original public meaning is the usual norm, but there are pragmatic exceptions in cases X, Y, and Z.” They don’t want to say this openly, because “original meaning: sort of binding, sort of not” is not a slogan likely to rouse the troops. So instead they resort to the hokey fiction of the canons being determinants of original public meaning. Honesty would be the better policy.

I said earlier that I thought *Reading Law* might become a minor classic. In addition to being informative, entertaining, and highly readable, it provides a kind of test case of how well textualism can be defended against long-standard objections. *Reading Law* fails this test, but in a way that is particularly instructive. Given its scope and rhetorical power, the book may well mark the high-water mark of textualism. Its very failure is therefore significant.

Presumably, they would deal with this conflict by invoking the “principle of interrelating canons” (“no canon is absolute”). But it is clearly a tension they acknowledge only *sottovoce*.