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The Law Is Above the Lawyers

By Allen Mendenhall on 10.2.12 @ 6:05AM

Legal texts mean what they meant when written, as written. Neither more nor less.

Reading Law: The Interpretation of Legal Texts
By Antonin Scalia and Bryan A. Garner
(Thomson West, 608 pages, $50)

Do not let its girth fool you: *Reading Law* by U.S. Supreme Court Justice Antonin Scalia and legal writing guru Bryan A. Garner is an accessible and straightforward clarification of originalism and textualism.* A guide for the perplexed and a manual of sorts for judges, this book presents 57 canons of construction. Each canon is formatted as a rule -- e.g., "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent" -- followed by a short explanation of the rule.

Frank H. Easterbrook, who provided the foreword to the book, submits that originalism is not about determining legislative intent, but construing legislative enactment. In other words, originalists interpret as strictly as possible the words of the particular text and do not look to the earlier maze of political compromises, equivocations, and platitudes that brought about the text. Each legislator has unique intent; projecting one person's intent onto the whole legislative body generates a fiction of vast proportion.

That the process of enacting a law is so rigorous and convoluted suggests the importance of adhering closely to the express language of the law; legislators, after all, have taken

into account the views of their constituents and advisors and have struggled with other legislators to reach a settlement that will please enough people to obtain a majority. A judge should trust that painstaking process and not overturn or disregard it.

Originalism involves what Stanley Fish, the eminent Milton scholar and literary critic turned law professor, has called "interpretive communities." That is the very term Easterbrook employs to describe how judges should account for cultural and communal conventions at the time a text is produced: "Words don't have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text's adoption understood those words."

To be sure, the original meaning of a text -- what reasonable people living at the time and place of its adoption ordinarily would have understood it to mean -- is never fully accessible. The meanings of old laws are particularly elusive. When a judge can no longer identify the context of a law by referring to dictionaries or legal treatises available when it was promulgated, then he should defer to the legislature to make the law clearer.

Judges should not impose their interpretative guesses onto the law and, hence, onto the people; nor should judges make new law on the mere supposition, however reasonable, that a text means something that it might not have meant when it was written. "Meaning" is itself a slippery signifier, and it is in some measure the aim of this book to simplify what is meant by "meaning."

The book is not all about grammar, syntax, and punctuation. It has philosophical and political urgency. The authors propose that the legal system is in decline because of its infidelity to textual precision and scrupulous hermeneutics. A general neglect for interpretive exactitude and consistency has "impaired the predictability of legal dispositions, has led to unequal treatment of similarly situated litigants, has weakened our democratic processes, and has distorted our system of governmental checks and balances." All of this has undermined public faith in lawyers and judges.

Scalia and Garner, who recently teamed up to write *Making Your Case: The Art of Persuading Judges* (Thomson West, 2009), proclaim themselves "textualists," because they "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences." Most of us, they say, are textualists in the broadest sense; the purest textualists, however, are those who commit themselves to finding accurate meanings for words and phrases without regard for the practical results.

Consequences are the province of legislators. A judge ought to be a linguist and lexicographer rather than a legislator; he or she must be faithful to texts, not accountable to the people as are elected officials. (Leaving aside the issue of elected judges at the state level.) The authors seem to be suggesting that their approach needn't be controversial. Originalism and textualism are simply names for meticulous interpretive schemes that could lead judges to decisions reflecting either conservative *or*

liberal outcomes. One doesn't need to be a fan of Scalia to appreciate the hermeneutics in this treatise.

Never have we seen a plainer, more complete expression of originalism or textualism. *Reading Law* could become a landmark of American jurisprudence, numbered among such tomes as James Kent's *Commentaries on American Law*, Oliver Wendell Holmes Jr.'s *The Common Law*, H.L.A. Hart's *The Concept of Law*, and Lon L. Fuller's *The Morality of Law*. Although different from these works in important ways, *Reading Law* is equally ambitious and perhaps even more useful for the legal community, especially on account of its sizable glossary of terms, extensive table of cases, impressive bibliography, and thorough index.

Every judge should read this book; every lawyer who cares about law in the grand sense -- who takes the time to consider the nature of law, its purpose and role as a social institution, and its historical development -- should read this book as well. If Scalia and Garner are correct that the general public no longer respects the institutions of law, then this book is valuable not only for revealing the root causes, but also for recommending realistic and systematic solutions.

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* Originalism and textualism are not the same thing; this review treats them as interchangeable only because Judge Easterbrook's forward uses the term "originalism" whereas Scalia and Garner use the term "textualism," but each author appears to refer to the same interpretive approach.

About the Author

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