

Reading Law

The Justice Antonin Scalia
Associate Justice
Supreme Court of the United States

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The moderator of this seminar was Roberto Alexandre Vieira Ribeiro, permanent judge for the Court of Final Appeal in Hong Kong.

Justice Scalia and Professor Garner gave a talk about their latest book, “Reading Law: The Interpretation of Legal Texts”.¹ The topic of this book is of eminent importance to any person active in the legal profession and both speakers are experts in this area due to their professional background and skills.

Although speakers with such impressive professional and academic achievements as Justice Scalia and Professor Garner do not need any introduction at all, Justice Ribeiro found the perfect way into the talk when he mentioned the following anecdote about Justice Scalia: “If you go to the University of Chicago and ask about Justice Scalia, you will often hear: Whether you agree with Justice Scalia or not is not the question because he is certainly worth listening to.”

Background of “Reading Law: The Interpretation of Legal Texts” and textualism

Before going into the details of their latest book, Justice Scalia and Professor Garner explained the background of their work. According to Professor Garner, there exists a great deal of confusion in the common law world as to how judges should interpret legal texts. Professor Garner concluded this was due to a lack of a state of the art work that explains how such an interpretation should be properly done. Justice Scalia agreed with this statement and added that during his education in law school he was never taught in a comprehensive way, how to interpret legal texts. However, both Justice Scalia and Professor Garner considered this ability crucial, especially since they thought that a number of practitioners have a flawed approach to the interpretation of legal texts.

This last notion has to be understood against the background of Justice Scalia’s and Professor Garner’s method of interpreting the law: They both follow textualism. Textualism means that the interpreter wants to give the legal text its fairest meaning by sticking as closely to the text as possible instead of placing the focus on factors that are not embodied in the text. “Fair” in this context means that the interpreter should understand the text in the way the legislator had meant the text to be understood by *reading* the *text*. The underlying reasoning for this method has its origins in democracy: The speakers held that legislators, who are democratically legitimized, enact a piece of legislation on which the people can usually directly vote. An appointed judge on the other hand is only entrusted with applying the law, which is not a

¹ Thomson/West, St. Paul 2012.

democratic process. Therefore, the judge should not have the power to replace the legislative decisions stemming from a democratic process with his own views.

Justice Scalia and Professor Garner contrasted textualism with two other approaches to the interpretation of legal texts, which in their opinion are undemocratic approaches. The first one is purposivism. Proponents of this approach argue that the interpreter of a text should not only adhere to the text as enacted by the legislators but also take into account the underlying purpose(s) of the legal document. Justice Scalia pointed out that there are always several underlying purposes of a piece of legislation. Thus, if a judge were to adopt purposivism, the judge would have a gigantic amount of leeway to actually change the enacted piece of legislation by randomly choosing which purpose is to be served in that particular case.

The second contrasting concept to textualism is consequentialism. When adopting this approach, one not only has to look at the legal text but also at the possible consequences of a certain interpretation. Thus, a judge would have to give a legal text the meaning that the judge thinks produces the best consequences. In essence a judge will be doing “what the law ought to be” in his mind, instead of “what the legislators want”. Justice Scalia issued his concerns that a judge thereby unilaterally replaces the democratic legislators and as a consequence acts in a highly undemocratic way. Hence, Justice Scalia argued that a judge should instead always have to apply the law as foreseen by the text of the legislation even if such an application leads to absurd consequences.

In order to conclude the general introduction, Justice Scalia and Professor Garner pointed out that “to interpret” is synonymous “to explain” or “to construe” and *not* “to perfect” or “to morph”. Therefore, the interpreter of a legal document should exclusively follow the text of this document. The purpose of this textualism is not to adopt a narrow or unreasonable mode of interpretation. Rather, the interpreter should take the drafter(s) of the text serious and give the text a fair meaning.

Before the speakers went into the details of the canons, Justice Scalia mentioned that many of the canons have Latin names because the canons have existed for a long time. This is due to the fact that these canons mostly stem from common sense.

57 canons of construction

After the general theoretical introduction, Justice Scalia and Professor Garner went into the details of “Reading Law” by providing the audience with 18 out of the 57 canons described in their book. These canons are shortly explained:

Canon 1: Interpretation principle: Every time you read a statute, you derive a meaning from it. Therefore, you always need interpretation; you cannot “just” read a statute without interpreting it.

Canon 2: Supremacy-of-text principle: Every time an interpreter wanders from the text, the interpreter does not do its job as a lawyer or as a judge. As Justice Scalia said: “Text is king”.

Canon 3: The principle of interrelating canons: No canon is absolute. Rather, when some canons are in conflicts, the interpreter has to decide which canon is more convincing than others in a specific case.

Canon 4: Principle of effectiveness: A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favoured. If a text or parts of it are ambiguous and one interpretation could render the text effective and the other one ineffective, you should choose the one that renders the text effective.

Canon 5: Principle of validity: If a text or parts of it are ambiguous and one interpretation could render the text valid and the other one invalid, you should choose the one that renders the text valid. The difference between this canon and canon 4 is that an ineffective text is not invalid.

Canon 6: Ordinary-meaning canon: Legal documents are meant for practical people that adopt a practical meaning of words. Hence, terms should be given their ordinary meaning unless it is clear from the context that the terms shall have technical meanings. An example for the latter would be technical terms in a medical contract concluded between people in the medical industry.

Canon 7: Fixed-meaning canon: This canon is also known as “originalism”. It requires the interpreter to give the words the meaning they had when they were written. However, according to the speakers, originalism is but a part of textualism. This does not apply to constitutional interpretation, although Justice Scalia thinks it should. The speakers explained this canon with the example of the death penalty: In the U.S., a penalty is unconstitutional if it is cruel and unusual.² According to Justice Scalia and Professor Garner the death penalty cannot have been unusual when the constitution was enacted because the death penalty was the only punishment for felonies back then. To underscore the importance of this canon, Professor Garner mentioned an ancient statute on the interpretation of legal texts from the year 1427. This statute provided: “Anyone who argues anything other than original meaning is punishable at the King’s will.”

Canon 8: Omitted case canon: It says that an omitted case should be treated as omitted. In other words, if a statute does not mention something, the interpreter should assume that the statute omitted this “something” on purpose and the interpreter should therefore not “perfect” the statute by adding something the statute does not cover.

Canon 10: Negative implication canon: If for example a statute prescribes that an activity has to be done in one way, the statute excludes that the activity may be done in another way. The speakers made reference to a recent case of the U.S. Supreme Court in connection with ObamaCare. In this case, the judges had to decide whether a provision in ObamaCare that explicitly granted subsidies for those who had enrolled for insurance in *state* exchange should also be applicable to those who had enrolled in *federal* exchanges.³ The majority opinion held this was indeed possible. Justice Scalia on the other hand strongly disagreed, stating that exactly because the statute only mentioned an enrolment in state exchange, an enrolment in federal exchange was excluded.

Canon 18: Last-Antecedent canon: A pronoun, relative pronoun or demonstrative pronoun generally refers to the nearest reasonable antecedent.

Canon 24: Whole text canon: The text must be construed as a whole and not in an isolated way. The speakers thought that this is the canon that most lawyers and justices fail to observe.

Canon 25: Presumption of consistent usage: A word is presumed to have the same meaning throughout the whole document. If you use a different word, it should have a different meaning. The speakers made the example of a contract that contains the expressions “land” and “real estate”. In this context, “land” should mean only the land as such, whereas “real estate” should refer to the land *and* the improvements of the land. The speakers warned the audience of some lawyers’ tendency to be literary, which would lead to confusion. Hence, Justice Scalia gave some very pointed advice: Be repetitious!

Canon 31: Associated words canon: When you have a list of words, the words are presumed to bear meaning relevant to others on the list. For example, in a list that contains the word “clips”, “screws” and “nails”, the word “nails” does not refer to fingernails.

Canon 32: Ejusdem Generis canon: Where you have a listing of items of narrow meaning in the front and a general term at the end, the general term will refer to items of the same sort. For example, if a person’s will reads: “I leave to my nephew all my cabinets, chairs, linen, tableware

² See Eighth Amendment to the U.S. Constitution.

³ King v. Burwell, 576 U.S.

and all other property”, the nephew will not get cash or real state because the list only mentions personal property. This is because according to this rule, the general term “all other property” at the end does not extend to anything else than personal property. Justice Scalia and Professor Garner considered this canon to be very strong.

Canon 33: Distributive phrasing canon: If a sentence reads for example “I give USD 3’000 and USD 4’000 Dollars to Emily and Jennifer” it means that Emily gets USD 3’000, whereas Jennifer gets USD 4’000.

Expected-meaning canons

This type of canons only applies to governmental prescriptions.

Canon 43: Extraterritoriality canon: There is a presumption that statutes only apply domestically. If a statute shall extend to acts outside the own territory, a statute has to specifically mention this. The speakers explained this canon again by means of U.S. Supreme Court case law. In one case before this court, the question was whether the U.S. anti-trust law, the Sherman Act, was applicable to a conspiracy of a banana cartel that initially took place in Latin America. The U.S. Supreme Court held that the Sherman Act was indeed applicable to extraterritorial acts although the act did not mention an extraterritorial applicability.⁴ Justice Scalia unsurprisingly criticised the majority opinion heavily.

Canon 45 Repealability canon: This canon provides that every statute can be repealed. In other words, no legislators can enact a statute that cannot be repealed. A later Congress is entirely free to change the statutes’ intended meaning.

Canon 49: Rule of lenity: If in the context of criminal law a statute is ambiguous, the ambiguity should be resolved in the defendant’s favour. The speakers mentioned a case where a statute provided a punishment for anyone who “steals horses”. The defendant in that case had only stolen one horse and his lawyer argued that the statute did not cover this conduct. The judge followed this reasoning and acquitted the defendant.

Canon 55: Presumption against implied repeal: This canon means that repeals by implication are “very much disfavoured”. Nevertheless, if a later provision contradicts a provision that was enacted earlier, the earlier provision is repealed.

Quiz

The speakers not only demonstrated their outstanding legal abilities, they also showed their experience as lecturers: After they had finished the presentation of their book, they tested the audience with a quiz: By means of five real cases, Justice Scalia and Professor Garner asked the participants of the event to correctly interpret legal texts by applying the right canons. The audience provided well-reflected answers and thereby earned free copies of another co-authored book of Justice Scalia and Professor Garner, “Making Your Case. The Art of Persuading Judges.”⁵

Question & Answer session:

1. Question: *Which canons did the U.S. Supreme Court apply in its Citizens United v. Federal Election Commission case?*⁶

⁴ American Banana Co. v. United Fruit Co., 213 U.S. 347.

⁵ Thomson/West, St. Paul 2008.

⁶ 558 U.S. 310.

Justice Scalia: In this case, the U.S. Supreme Court held that the first amendment of the U.S. constitution, which grants the freedom of speech to “people”, not only protects “people” but also corporations. While one could have argued with the omitted case canon stating that the constitution’s omission of “corporations”, there was actually a stronger canon pointing to the other direction: The “Artificial-Person canon”. This canon provides that the word “person” or “people” also includes corporations. Therefore, the majority opinion followed this canon.

2. Question: *Can you apply both textualism and purposivism at the same time? What are the pitfalls of jumping from textualism to purposivism?*

Justice Scalia: I do not think you can apply both at the same time. Yet, sometimes also textualists have to consider the purpose(s) of a statute. For example, the meaning of the term “draft” may vary in statutes concerned with beer, harbours or the environment.

3. Question: *Should consequentialism ever be relevant? If so, under what circumstances? Could you use “Citizens United” as an example where a court looked at consequences?*

Justice Scalia: For me, consequentialism should never be relevant. If a statute produces absurd consequences, it is the Congress’s problem. However, you can also as a textualist take into account consequences to a limited extent. For example, if you have two textual interpretations of a statute and one of them produces an absurd consequence and the other one produces a reasonable consequence, you should choose the one that produces the reasonable consequence. Furthermore, I do not consider “Citizens United” the best possible example because this case only confirmed the law as it has been for centuries. Although “Citizens United” overturned one older decision,⁷ you must understand that this older decision was an exception to previous jurisprudence. Therefore, “Citizens United” should not be considered as such a spectacular decision.

4. Question: *How do you find a reputable dictionary? I ask you because of David Foster Wallace’s statement that dictionaries are not self-evident. Rather, they have to present good authority themselves for their definitions. So how do dictionaries then earn their rhetorical reputation?*

Professor Garner: First of all, I think David Foster Wallace’s quote refers to dictionaries of usage. Therefore, while he might have a point in that context, his quote is less problematic regarding ordinary English dictionaries or the *Black’s Law Dictionary*. Nevertheless, it is indeed important to use dictionaries in a sophisticated way because depending on the dictionary that you use for the definition of a term, you might come up with the wrong answer.

Justice Scalia: It is recommendable to check the foreword of the dictionary before you use the dictionary. Is the first meaning that the dictionary gives the oldest, the newest or the most ordinary meaning?

5. Question: *You were talking about the death penalty and mentioned cruel and unusual punishment. I think when the constitution was drafted, no one would have considered the death penalty to be cruel or unusual. However, nowadays there might be a different understanding of cruel and unusual in society. Should also the legal sensibility of cruel and unusual change over time?*

Justice Scalia: No, because the drafters of the constitution established a fixed bar when they prohibited cruel and unusual punishment. The drafters did not mean to allow future

⁷ Austin v. Michigan Chamber of Commerce, 494 U.S. 652, U.S. Supreme Court.

generations to replace the initial meaning of cruel and unusual punishment with their own modern understanding of these terms.

Follow-up question: *But the constitution does not specifically mention what cruel is. Does this lack of definition not imply that future generations should be allowed to define on their own what cruel and unusual means?*

Justice Scalia: No, the American people never voted to abandon the death penalty. An interpreter of the constitution should be democratic and therefore give the words the meaning they had when the people voted on them at the time of drafting of the constitution.

Professor Garner: Exactly. Any state can repeal the death penalty if it wishes to do so but only in a democratic process with the consent of the people.

6. Question: *How do you prioritize the canons if they lead to different directions? For example you mentioned previously the ObamaCare decision. Was it not correct for the court to extend it to federal exchanges in order to render the statute effective?*

Justice Scalia: You have to prioritise the canons very carefully. You need to do it on a case-by-case basis and not a priori. As for the affordable care decision, I do not think the canon of effectiveness even came into play. This canon only matters with an ambiguous reading. However, in this case the reading was clear.