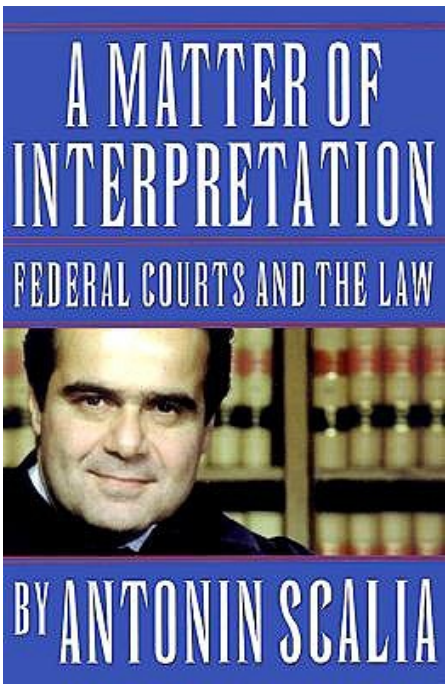

A Matter of Interpretation: Federal Courts and the Law

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In exploring the neglected art of statutory interpretation, Antonin Scalia urges that judges resist the temptation to use legislative intention and legislative history. In his view, it is incompatible with democratic government to allow the meaning of a statute to be determined by what the judges think the lawgivers meant rather than by what the legislature actually promulgated. Eschewing the judicial law-making that is the essence of common law, judges should interpret statutes and regulations by focusing on the text itself. Scalia then extends this principle to constitutional law. He proposes that we abandon the notion of an ever changing Constitution and pay attention to the Constitution's original meaning. Although not subscribing to the "strict constructionism" that would prevent applying the Constitution to modern circumstances, Scalia emphatically rejects the idea that judges can properly "smuggle" in new rights or deny old rights by using the Due Process Clause, for instance. In fact, such judicial discretion might lead to the destruction of the Bill of Rights if a majority of the judges ever wished to reach that most undesirable of goals. This essay is followed by four commentaries by Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin, who engage Justice Scalia's ideas about judicial interpretation, and the volume concludes with a response by Scalia. Dealing with one of the most fundamental issues in American law, A Matter of Interpretation reveals what is at the heart of this important debate.

A Matter of Interpretation: Federal Courts and the Law Details

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From Reader Review A Matter of Interpretation: Federal Courts and the Law for online ebook

Jon Ciliberto says

Judges interpret laws. The question of what interpretation actually is, and how or whether judges ought to go about it, is explored here in the form of an essay by Justice Scalia and responding essays by several scholars in the field. Scalia, say what you will about his weird and crazy ideas (e.g., that the Devil exists and that the reason we don't see as much demonic possession as compared to the old days is that the Devil has gotten 'wilier'
[http://www.abajournal.com/news/articl...]), Scalia is a brilliant thinker -- reading SCOTUS opinions, his are almost always the best-reasoned. The trouble I have with his views in this volume is: he somehow fails to see that his non-interpretative approach is an interpretation nonetheless. I.e., it is impossible to read and not interpret. They may be someone else's words on the page, but my mind has to form the ideas. How I do that -- by reference to what understandings, memories, fears, desires -- is interpretation. Any claim that there is an originalist way to read the Constitution (e.g.) reveals a person who believes he or she can approach old text and come away believing no interpretation is occurring. It is: 'my way is right, and so it isn't really MY way, it is THE way.'

Melissa says

Not just an essay by Justice Scalia, but a series of responses by other noted constitutional and Supreme Court scholars. The format means that there is less coherence than I would have liked, and the writing always has the smack of legalese. I can't point to specific passages; it's just a general sense.

Richard says

Recommended by Cass Sunstein in *Five Books to Change Liberals' Minds* :

> Having read these books, you might continue to believe that progressives are more often right than wrong, and that in general, the U.S. would be better off in the hands of Democrats than Republicans. But you'll have a much better understanding of the counterarguments -- and on an issue or two, and maybe more, you'll probably end up joining those on what you once saw as "the other side."

Tim says

Very interesting. There are several commentaries on Scalia's essay, and his responses, included.

Hadrian says

This is a series of essays about the role of federal courts in interpreting common law and statutory law, with the centerpiece being an essay by Associate Justice Antonin Scalia.

Scalia's view is that there is no single unified method of jurisprudence today about the interpretation of laws, whether in law schools or in the courts themselves. His concern is on the undemocratic institution of non-elected judges passing decisions on statutory law, and his aim is to produce a more coherent philosophy of interpretation that does not necessarily rest on precedent or common law.

His personal belief is that of 'textualism', which focuses on the original intent of those who authored the laws, and that judges should not, and cannot, reinterpret the meaning of those laws. He disagrees with the overuse of legislative history and its usage in setting precedent. He is well aware of the usage of precedent and *stare decisis*, but is concerned over the differing interpretations which different judges could impose.

The following four essays discuss Scalia's proposals. The first, from history professor Gordon Wood, discusses the history of the judiciary branch in the United States, and says that Scalia raises questions which are even more intractable than even he anticipated. The second, form Laurence Tribe, wants to distinguish between abstract principles (as established in the Constitution, for example) and their more concrete mandates. The third essay, by Mary Ann Glendon, takes an comparative analysis approach, by investigating the 'civil law' cases as seen in Germany, where the main principles of the law are in a single main code. Finally, Ronald Dworkin finds inconsistencies within Scalia's argument, by noting the general abstractions within the constitution.

After all these, Scalia addresses their points in turn. He is largely in agreement with Glendon's approach, takes a few points against Wood, and all but gets into fisticuffs with Dworkin and Tribe.

Now I am obviously simplifying their arguments, (and I share Gordon Wood's bewilderment that I am even discussing this topic at all - I've only had some formal training in international law and my bare knowledge of con-law is largely self-taught). Though I often disagree with many of Scalia's decisions (admittedly, when they have been at my personal expense), he is presenting a clear and forceful argument for his own legal philosophy, and the debate which comes after is something enjoyable to read.

Joey says

I truly want to get onboard with Justice Scalia’s brand of interpreting common law, statute, and the Constitution. It is attractive because it is true to our contemporary understanding of the democratic structure and processes of our country: legislatures create laws, the executive branch executes those laws, and, when disputes arise, judges apply the laws to the facts and thus reaffirm the law while deciding the dispute. It is also attractive because of its consistency: a judge, Scalia maintains, deciphers the meaning of the text of the law according to the judge’s determination of what the text’s drafters meant to codify through the text. This is relatively neat and tidy; though this interpretive model cannot entirely block the willful judge from wielding her personal views and biases, it at least limits the space in which she can do it.

Sadly, however, I am not entirely convinced that Scalia's methodology is correct, or even that his conception of the judicial role is entirely correct. First, I will evaluate Justice Scalia's views on statutory interpretation, which is arguably the most important role that modern judges play given the volume of regulation they are called upon to interpret. I think I appropriately represent Scalia's view when I say that his brand of textualism necessarily permits some flexibility to the manner in which the judge attributes meaning to the text. There is, nevertheless, a limit to that flexibility; beyond a point, text cannot bear semantic parsing because the meaning attributed to the text no longer passes the laugh test. Smith v. United States is such an example, and I believe I agree with Scalia's incredulity at the meaning the case's majority attached to the phrase "use a firearm." Scalia believes that judges should pronounce upon the text the meaning it most realistically bears and, if that is contrary to the will of the legislature, leave it to the legislature to adjust the text.

However, this assumes that the Founders consciously created a system propounding neat lines between the roles of the legislature and the judiciary. Legislatures make laws and judges apply laws to concrete disputes. Professor Wood, however, convincingly speculates that the Founders' understanding of the roles of legislatures and judges was not nearly so clear or so harmonious with our contemporary conceptions. Drafting clear, directive codes was more challenging, and legislatures less guided by republican ideals than the colonists anticipated. In this historical context, could the Founders have accepted that the judiciary, far from representing a sycophantic arm of the hated crown, could be a buffer between the people and the majoritarian legislatures? At least some evidence seems to suggest they did. The Founders embedded a judiciary in the Constitution despite the view in the preceding decades that judges merely constituted an element of the executive branch. Congress received power to establish lower courts, which it did. And, although some certainly scowled at Chief Justice Marshall's jurisprudential jujitsu in Marbury v. Madison that secured for the judiciary the power to review acts of the legislature, the concept stuck less than 15 years after the birth of the Constitution.

I wonder, then, if Justice Scalia's insistence that judges kowtow to Congress's oh-so-carefully chosen statutory language is as historically necessary as he contends that it is. Although some statutes—typically those that make legal news—are ambiguous, most are not. Perhaps it is therefore somewhat inaccurate to intimate that judges in every jurisdiction are chomping at the bit to create law in spite of statutory language that, if read by its plain meaning, would not permit any result but one. I suspect that most cases of statutory interpretation present at least largely unambiguous text and that judges charged with interpreting it do so fairly faithfully to that text. I also suspect that, where statutory text is vague few judges flagrantly flout all the text's reasonable textual interpretations to arrive at a completely implausible but personally pleasing outcome, or ignore the text's statutory context to arrive at a similar result. Rather, I think most judges employ statutory interpretation tools similar to those Justice Scalia wields when confronted with an imprecisely worded statute. They try where possible to construct a reasonable interpretation based on the text. They attempt to reconcile the text's meaning with the overall structure and content of the statute. They employ other canons of construction. Reasonable minds may and do differ on the meaning of text even after these methods have been applied. I do not think this is divergence of reasonable minds is occasion to castigate judges that look for textual meaning outside the original understanding of the text's drafters; divining that original understanding seems to me a comparably imprecise exercise to many, but not all, others. Perhaps I am naïve and flat out wrong; if so I will sheepishly stand corrected.

I turn very briefly to Church of the Holy Trinity v. United States to make a final point in conclusion. Like Justice Scalia, I cannot help but find the Court's outcome troubling at best and, at worst, ridiculous. Where judges willfully and admittedly step outside the clear boundary of reasonableness permitted by the text, it is cause for alarm. It alarms me just as it alarms Justice Scalia. My question, however, is whether that alarm is conditioned by a slightly skewed understanding of the role the Founders intended the judiciary to play. If

Scalia and conservatives more generally are correct and judges making law is absolutely inconsistent with the system the Founders intended, then Holy Trinity is wrong. If, however, Professor Wood’s thinking is correct and the Founders conceived of the judiciary as a backstop to protect justice from legislative gaffes, I am not so sure Holy Trinity represents the wrong result or judicial process.

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chris says

It's really a collection of essays: A central tract by Scalia, responses by several interesting and learned professors, a useless introduction by another professor, and a rebuttal by Scalia.

While I find Mr. Scalia's rulings often troubling, the theory that he presents here is well-grounded and coherent. It's originalism, or textualism, or strict textualism, or textual interpretation; whatever the name, Scalia believes in a formalistic, reasonable reading of the Constitution that's not informed by what the current reading or current intention (or even current desire) might be. This would seem to be the only way to limit injection of personal, nondemocratic opinion into Supreme Court holdings. It becomes more problematic in and upon application, where some interpretation and historical analysis of understanding must be done by a justice, and it can't uphold certain essential decisions— for example, Scalia would have to vote against Brown.

The responding essays are worthwhile for their sources' varied backgrounds: Wood teaches (or taught— he might have just retired) American history at Brown; Glendon is an expert in comparative politics, particularly modern European law; and Tribe and Dworkin are both focused on Con. law. As seems to be the case with most Supreme Court rulings too, all sides have read and responded to each others' essays prior to publication, which does make the construction of the book slightly odd. Still, the writing is for the most part very clear, and (at least when paired with well-conducted seminar discussions) the topic and the ensuing debate is fascinating.

It's too bad, though, that Scalia actually gets to implement any of these theories. It just makes everything way too f———ing real. Can't we exist happily (naïvely, maybe) in the realm of pure theory?

Vincent Li says

A great introduction into the now nearly dominant legal philosophy of textualism and originalism. Scalia's article reads like a manifesto that pithily summarizes the opening volley of a frontal assault on the then existing interpretive schemas. Even if one does not agree with Scalia, (for example, I am not totally sold on many of his ideas), it is worth reading because of the influence of his ideas (for people who despite him, know thy enemy). The main article basically summarizes the main tenets of textualism that I learned in my first year course "legislation and regulation" (in fact, even the three semantic canon examples Scalia uses are the ones I learned in the course along with a sustained critique of the famous Dueling Canons article). The article lays out the theoretical and practical issues with trying to read legislative intent (the words enacted, not unexpressed intention are the law and the "legislature's intent" seem often to match the policy preferences of the judge respectively). Scalia also discusses the illegitimacy of legislative history as manipulatable by lobbyists, unhelpful or illegally creating lawmakers. Scalia discusses how textualism is not the same as strict constructionism and uses famous US v. Smith case (whether someone trading a gun for

drugs is "using" a gun in meaning of a criminal statute) as an example that distinguishes the two (between reasonable construction and literal reading). Scalia also takes the time to mourn the common law practices that he sees as imported to constitutional interpretation (most famously the living constitution concept) that makes the constitution overly pliable to the machinations of clever judges. Scalia argues that this is fundamentally undemocratic, and a subversion of the purpose of the constitution as protecting rights from the flows and ebs of unsustained popular opinion. To curtail this, Scalia suggests originalism, and looking at the publically understood meaning of the constitution at the time of adoption, any other interpretive method is dismissed as giving judges undue power.

Scalia's article itself is worth the price of admission, but the book contains comments by several renowned scholars (for the first time I recognize every name in a collection of essays, including the name of my property professor). The first comment is by Gordon Wood (my favorite historian), who expands a minor theme in radicalism of the american revolution, by tracing the history of judges in early american history. Wood claims that judges (even justices) were seen as political figures who saw nothing wrong with taking political sides and frequently co-served in political positions such as the cabinet. It was only later that the judiciary transformed into an independant and technical (legalistic) profession. Wood argues that while many lament the power of judges to set aside statutes in favor of the common law, this was a design and not a defect. Wood traces the history of how minor magisterial judges which were seen as extensions of the crown transformed into a coordinate branch of the legislature (which frequently acted like a court before). Wood also discusses the transformation of the constitution as a political document to be interpreted by all political branches into a legalistic document that gave the courts a monopoly over interpretation. At the very least Wood challenges many of the traditions that Scalia claims to be returning to.

Tribe's article discusses a theme he later develops in the Invisible Constitution, that of a lack of meta-rule for interpretation in the constitution (which itself would require a meta-rule ad infinitum, a variation of a Godel's incompleteness theorem) which requires looking beyond the four corners of the text to interpret the document. In fact, Tribe argues that the only amendment that guides interpretation is the ninth amendment discussing unenumerated rights. Tribe argues that Scalia's portrayal of the living constitution is a strawman and argues that the line that Dworkin and Scalia drew between general principle and specific rules is hard to pin down the certainty.

Professor Glendon's article looks at the issue through comparative law lenses. She notes the progress of civil law jurisdictions in adopting common law tools and the lack of comparable progress in the common law world to develop traditions of statutory interpretation (both Scalia and Glendon discuss how law school education tends to focus on reading appellate cases rather than any training in statutory interpretation, luckily this situation has been rectified since the time this book was written, at least at Harvard, Legislation and Regulation is a required first year class).

Finally, Dworkin discusses (seemingly preempting Balkin's thesis in Living Originalism) how certain general principles are understood even at the time of the founding to be abstract principles. Dworkin argues that Scalia's originalism seems to be based on the expected applications of these principles by those who wrote them, rather than the meaning the enactors intended.

Scalia responds to each comment in turn, (suffice to say that lawyers are good at arguing), and I'm not doing justice to the nuances and counterarguments that each author brings to the table. A highly recommended collection.

Jenny says

The first time I read this book, I was a senior in college, graduation mere weeks away. I didn't pay attention to Scalia's pompous narrative so much as his message. I just wanted to finish the damn book, get the paper written, and walk across the stage. Reading it again, I notice an almost dangerous sense of self-righteousness in his book, much like the air in Justice Breyer's. However, Scalia's conclusions on Constitutional Law fall more along my line of thinking, and so I can partly forgive him. Reading this book felt more like having a dialogue than being preached to/at. I can argue or agree with what he says and hold these debates with attorneys I work for, and in doing so, the book continues to have significance in my life.

His writing style is much more relaxed and readable than Breyer's, and I appreciate that. Keep the flowery, over-the-top writing patterns to the decisions. This book is about explaination, and it's hard to communicate explainations when you're preoccupied with making yourself sound pretty.

Myles says

"The man was so full of shit, that if you'd given him an enema, he could have been buried in a matchbox."

With a creepily avuncular tone, Scalia advances his originalist agenda without really acknowledging that maybe we're better off not giving the final say on the great legal questions of our time to unelected judges who want us to believe that the framers of the Constitution are on their side of the ideological divide. Instead of the text and manipulative historical readings, which he admits are prone to error, we need to interpret the law to reflect who we are not who certain justices wants us to believe the founding fathers were.

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thethousanderclub says

Adam C. Zern opines . . .

"I heard about A Matter of Interpretation by looking over The Federalist Society’s “Conservative and Libertarian Pre-law Reading list.” (In fact, I found what became one of my favorite books—A Conflict of Visions by Thomas Sowell—on this reading list). After reading The Federalist Papers I realized I had a tremendously lacking understanding of our judiciary and the nuances of our system. Reading A Matter of Interpretation was an effort to try and fill in some of the gaps of my judicial knowledge.

A Matter of Interpretation is a collection of essays—one written by Supreme Court Justice Antonin Scalia, 4 written by legal/historical scholars in response to Scalia’s essay, and one essay from Scalia responding to the scholar’s comments. The collection overall is interesting, but it is definitely Justice Scalia’s comments that make the compilation worth reading. His comments and arguments were perfectly lucid, very readable, and very enjoyable. His legal and logical defense of ‘textualism’ as a viable mode of interpretation is interesting to read and his arguments are compelling.

As expected, the biggest problem with the essays—especially some of the professors—is that they expect a certain level—a significant level—of knowledge regarding case law and judicial theory. Some of the

arguments and finer points are lost (at least on me). The essays are worth reading if you have, like I do, a desire to learn more about judicial theory and practice. Otherwise, it will probably be a difficult chore to complete."

http://thethousanderclub.blogspot.com/

Brandon says

Agree or disagree with him (I often end up on the ladder), the man is a brilliant writer whose lively writing style can make even the most esoteric legal topic perhaps not fun, but at least bearable. That being said, Scalia decries the import of the common-law mindset into the federal court system- especially as it pertains to interpreting statutes and the Constitution. He agrees that Judges in the common law tradition, contrary to once popular opinion, legislate from the bench. To the reader abreast of our American system of governance, one thing should automatically seem problematic about this: this seems to subvert the rule of law since one cannot possibly conform one's behavior to rules that are declared by a judge ex post facto. Moreover, it violates (seemingly) a treasured principle enshrined in our system: the separation of powers. Espousing the oft battle cry of a true formalist, Scalia declares that judges must only do one thing: interpret the law and apply it to the facts. (Ignoring the many cases that, as professor Hart once said, have open texture.)

Scalia, of course, has valid and sound arguments. He is a smart guy after all. What it oft comes down to though is that we have to sacrifice some values for others. In my case, I do not think it is desirable that a country adheres to the rule of law to a perfection. (Indeed, as a descriptive matter, we have never done so.) Additionally, our founders contemplated a workable government of 3 branches that worked together. Our founders knew of the common law and still believed it to be a useful tool. There are many indications that, in regards to constitutional interpretation, our founders expected some provisions of the constitution (esp. the 8th amendment) to be interpreted in light of changing circumstances. (To this point, Dworkin is at his strongest. He points out that its absurd that statesman a part of the enlightenment would have thought that they were writing a document that could not be interpreted in light of changing circumstances.) In any case, putting history aside, I have 2 "beefs" w/ Scalia.

First, take H.L.A. Hart's infamous example of a vehicle. (I'll modify it a bit.) Say that a city bans all vehicles in a park. Okay, clearly it applies to cars- that makes sense. But does it apply to tricycles? How about electric wheelchairs? Scalia would have us say that we ought not to look at the legislative history to find the purpose of why the law was enacted. Why? B/c 1) he says purpose does not exist when you have numerous legislators voting for different reasons. Okay fair enough, but thats not always the case. 2) He says that the rule of law dictates that we as citizens only answer to laws, not legislative history. Few responses: first, legislative history can be quite illuminating. Even the most conservative jurists will use it as a tool. For instance, say in our hypothetical that the town promulgated the rule in response to complaints by the elderly that people were driving their loud and dangerous cars in the park. Is that not illuminating? Why should a court interpret the rule to mean that it bars tricycles! That is absurd and does not help further the legislature's purpose of enacting the law! Of course, Scalia doesn't miss a beat and would argue that we could get to the same result by using statutory cannons. I don't oppose them, my only point is that judges should use all the tools at their disposal to get to what the legislature would have intended. Or perhaps he would have said the legislature should have been more clear and therefore, the court should also apply the law to exclude tricycles! This comes from one point that I found myself having to contend with the most: Scalia believes his approach is more democratic and more deferential to legislatures. I'll get to the deferential point later on, but as to the former point, citizens think in terms of purposes. When they advocate for laws, they have a purpose

in mind. Is it not democratic to try to ascertain what the people's representatives would have done with an unthought scenario. Furthermore, Scalia would have us say that a legislature should craft new laws when things are not clear. For that's more democratic. But this is unrealistic. Courts ought to partner with the legislature. In summation, I'm not convinced that Scalia's approach is that conducive to democracy.

Second, Scalia's record on the court buttresses against his colorful rhetoric of deference to the legislature. Want to know who has the highest record of opting to defer the legislature and not strike down laws as unconstitutional? Why that darned living constitutionalist liberal Stephen Breyer! The conservative's rhetoric of "activist judges" (A term Scalia does not use just to be clear) is toxic. Its code for: I don't agree with this decision. I might disagree with Scalia's conservative jurisprudence, but I recognize that every legal question often points in many directions. Indeed, as stated earlier, we must choose which values we think are worth sacrificing. With that mind, I still respect Scalia. He was brilliant and although he was not always consistent with his philosophy of oringialism (read Akil Reed Amar and his eloquent critique of Scalia's Heller decision), I do not doubt that he was genuine. (Moreover, who is always consistent?)

In sum, the book is gold, even for those of us that don't agree with his methodology. Putting aside my numerous disagreements, I can't help but lament one aspect of the book: his constant strawman of "living constitutionalist" judges. (Read the portion of Ronald Dworkin's critique of his philosophy and Dworkin's differentiation b/w semantic intention and expectation intention.)

That being said, Scalia surely changed the terms of the debate. He's encouraged left leaning organizations like the Constitution Accountability Center (a liberal orginalist org.) to enter the debate. Again, the book is gold. After reading this, I encourage readers to grab a copy of Breyer's Active Liberty to get a taste of how Justice Breyer responds to the book.

Soren Schmidt says

A relatively short and accessible introduction to textualism as a method for judicial interpretation of statutes and the constitution. The real meat of this book for me was the Scalia-Dworkin exchange, though the other perspectives are interesting.

Rex says

This book helped me understand the controversy surrounding how to appropriately interpret the Constitution. Supreme Court Justice Antonin Scalia first presents his view on proper interpretation--textualism. Then five other legal minds weigh in on the pros and cons of a textualist interpretation (at least Scalia's textualist version) of the Constitution. Scalia then gets a final say to clarify/rebut the invited comments.

Scalia's initial essay was the easiest to read and most interesting portion of the book. Scalia has a gift to communicate effectively. His clarity is laudable.

Interesting points:
1. The law lacks a widely accepted intelligible theory of statutory interpretation
2. Distinction between strict constructionism and fair textualism
3. The difficulty of dealing with the reality that judge-made law is ex post facto law

4. The anti-evolutionary purpose of the constitution
5. Difficulty of deciding when stare decisis is appropriate to follow
6. Professor Wood's history suggests that perhaps the role of a judge is at least partly legislative

I'm not completely convinced with Scalia's view, but it is compelling and addresses some difficult-to-answer questions regarding interpretation.

Dana Powers says

I have always enjoyed Justice Scalia's writing. He raises important points about the rule of law and the role of the judicial system in a democracy.
