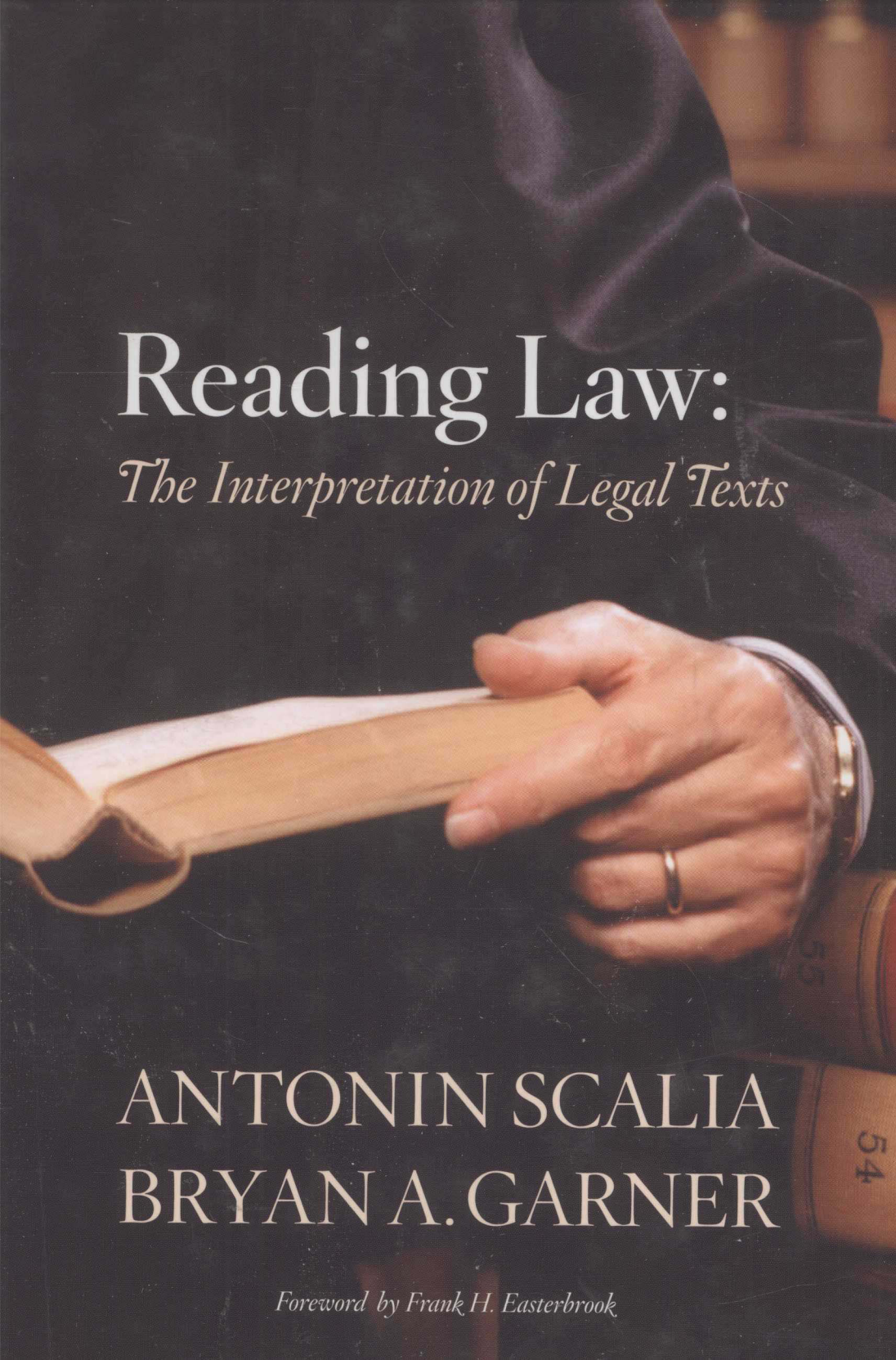
Reading Law:
The Interpretation of Legal Texts
ANTONIN SCALIA
BRYAN A. GARNER
Foreword by Frank H. Easterbrook

The views expressed in this book are those of the authors as legal commentators. Nothing in this book prejudges any case that might come before the United States Supreme Court.

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Reading Law

"*Verbis legis tenaciter inhaerendum.*"
—Medieval legal maxim meaning
"Hold tight to the words of the law."

"[L]aw, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion."
—William Blackstone
1 *Commentaries on the Laws of England* 62 (4th ed. 1770).

"Various and discordant readings, glosses, and commentaries will inevitably arise in the progress of time, and, perhaps, as often from the want of skill and talent in those who comment, as in those who make the law."
—James Kent
1 *Commentaries on American Law* 437 (1826).

"[J]udges must be aware today that there are currents of ferment in the legal world that seek to revise or even overthrow traditional notions of judicial interpretation."
—William H. Rehnquist
"The Nature of Judicial Interpretation,"
in *Politics and the Constitution: The Nature and Extent of Interpretation* 3, 3 (1990).

"What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."
—*Finley v. United States*,
490 U.S. 545, 556 (1989) (per Scalia, J.).

To Maureen McCarthy Scalia

and

Karolyne H.C. Garner

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A.S.
B.A.G.

Foreword

Frank H. Easterbrook[1]

"[S]trict construction . . . is not a doctrine to be taken seriously" (p. 356). Many people will be surprised to read this line, which is elaborated in an entire chapter (§ 62) of a book by two textualists who think that statutory language is both the start and the finish of the interpretive process. But no one who has paid close attention to how textualists decide cases (on the bench) or explain their methods (on or off the bench) *should* be surprised. Some texts proclaim that they should be read "strictly" (i.e., narrowly); others demand a broad or general application. The text's author, not the interpreter, gets to choose how the language will be understood and applied. The court's job is to carry out the legislative project, not to change it in conformity with the judge's view of sound policy.

Those who favor a more open-ended judicial role often quote a passage from Chief Justice John Marshall, who is usually accounted the greatest of our Justices—and whose status as a member of the founding generation (he participated in Virginia's ratifying convention) gives him a claim to represent the original understanding about interpretive method. Chief Justice Marshall once wrote: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."[2] This passage has been used to argue for resort to legislative history, the (imputed) intent of the legislators, and a dominant role for the judge's sense of whether a given reading produces good consequences (if a judge can determine what the consequences will be, often a hard task even for social scientists who can draw on data unavailable to a court making a prediction).

That's not remotely what Chief Justice Marshall meant, however. Here is the full sentence: "Where the mind labours to dis-

1 Chief Judge, United States Court of Appeals for the Seventh Circuit.

2 *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (per Marshall, C.J.).

cover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." He was advocating, not a departure from statutory text, or a role for extra-statutory materials, but consideration of *all* the enacted text rather than a subset of it. This book takes the same position (§ 24). It is brimming with quotations from Chief Justice Marshall, all of which support a textualist approach to interpretation.

What Chief Justice Marshall knew—what this book develops—is that the more the interpretive process strays outside a law's text, the greater the interpreter's discretion. Extra materials are bound to look in multiple directions. Legislators' talk (whether on the floor or in a committee report) is not as precise as statutory language, and it is not adopted by the process for creating laws (bicameral approval plus signature by the chief executive). Legislative intent is a fiction, a back-formation from other and often undisclosed sources. Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a mind; it "intends" only that the text be adopted, and statutory texts usually are compromises that match no one's first preference.

If some legislators say one thing and others something else, if some interest groups favor one outcome and others something different, how does the interpreter choose which path to follow? Direction often comes from the interpreter's sense of wise policy. That sense may be mistaken—the Law of Unintended Consequences applies to judicially created rules as much as it does to those with origins in the legislature or an agency—but the real problem lies in a transfer of authority from elected officials to those with life tenure. The legislature acts first, the executive branch (or private parties) second, and the judiciary third. If the final decision-maker exercises significant discretion, then it rather than the legislature (or the executive) is the real author of policy. Yet in a democracy, policy-makers are supposed to be on short leashes: for the federal government two years (the House), four years (the President and his appointees), or six years (the Senate). Judges serve for 20 years or more and never face the voters. Democratic choice under the

constitutional plan depends on interpretive methods that curtail judicial discretion.

Curtail does not mean "eliminate." Interpretation is a human enterprise, which cannot be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules, such as those that this book covers in detail, and misuse of these rules by a crafty or willful judge then can be exposed as an abuse of power. A more latitudinarian approach to interpretation, by contrast, makes it hard to see when the judge has succumbed to the Dark Side of Tenure—which, like the Dark Side of The Force in *Star Wars*, is marked by self-indulgence. Tenure is designed to insulate the judge from popular will, so that the judge will be more faithful to a text that may have been adopted by a political coalition that is now out of favor. But tenure can also liberate the judge from those texts. A system of interpretation is good to the extent that it makes this kind of misuse more visible—both to the interpreter (who often thinks that his ideas of wise policy really just *must* be the same as the legislature's) and to the public.

Political scientists, editorial page writers, and cynics often depict judges as doing nothing other than writing their preferences into law. Careful observers of the judiciary do not make that mistake. The Supreme Court of the United States decides about 80 cases a year, a tiny fraction of the nation's litigation. The Justices choose most of those 80 because they pose questions that have divided other judges. In other words, the 80 cases present the questions that the legal system finds hardest to address, and in which decent arguments can be made for different resolutions. Yet the Justices resolve almost half of their cases unanimously, and many of the others by lopsided votes.[3] The amount of real disagreement has not increased in the last 70 years.[4] Judges of the courts of appeals, whose cases are (on average) less contentious,

3 *See* Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. Empirical Legal Studs. 129 (2012).

4 *See* Frank H. Easterbrook, *Agreement Among the Justices: An Empirical Note*, 1984 Supreme Court Rev. 389. Edelman, Klein & Lindquist show that the numbers have been stable since that analysis was conducted.

agree even more often.[5] Recently the Supreme Court issued a unanimous decision in a reapportionment dispute that had different political parties (and different ethnic groups) at each others' throats.[6] Professional norms—including norms about interpretive method—produce much more consensus than would be expected if judges' decisions mirrored the disagreement in legislative bodies or political debates.[7]

It is tempting to say that the approach reflected in this book is the source of this substantial agreement, though that cannot be verified empirically. What is certain is that the rate of agreement would be higher if the authors' methods were more widely followed. This would not push the body of American law to either the left or the right on the political spectrum. Just as well-defined property rights permit people to pursue their own goals through contracts or trade, so well-defined interpretive principles permit legislators to pursue their goals with confidence that the political bargains will be enforced. Some sessions of the legislature are liberal, some conservative, and some reach compromises that include benefits for all sides. The more straightforward the rules of interpretation, the better this process can work—and the easier the people will find it to change public policy by electing persons who support their views.

The textualist method of interpretation cannot produce judicial unanimity across the board, however. One reason is the selective nature of litigation. People will pay lawyers to press their cases in courts of appeals, or the Supreme Court, only if they see a chance of prevailing. Litigation is expensive, and no one but a zealot or madman throws good money after bad by taking a pointless appeal or filing a doomed petition for certiorari. So the cases available for decision by an appellate tribunal depend on the prevailing interpretive method. Imagine a Supreme Court comprising Justice Scalia and eight near clones. That Court would find lots of cases

5 Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (2007) (finding a disagreement rate of about 6%).

6 *Perry v. Perez*, 132 S.Ct. 934 (2012) (per curiam).

7 Karl Llewellyn, one of the original legal realists, developed a similar proposition in *The Common Law Tradition: Deciding Appeals* (1960).

to be hard; this book shows the sorts of interpretive issues that might cause the Justice Scalia of 2011 to disagree with the Justice Scalia of 2012. It would grant review of those hard cases and decide many of them five to four (Scalia I to V versus Scalia VI to IX). Cases that the Warren Court found hard and decided 5–4, this hypothetical Court would find easy and decide 9–0; lawyers would stop presenting those disputes. But they would bring more and more of the disputes that divide textualists—and there are lines of division among textualists, as footnote 4 on page 247 of this book demonstrates.

Another reason why textualists are bound to disagree among themselves is built into the rule that meaning depends on the enacted text rather than what the text's authors meant, intended, planned, or expected the text to accomplish. 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. The older the text, the more distant that interpretive community from our own. At some point the difference becomes *so* great that the meaning is no longer recoverable reliably. Perhaps that point has been reached for the Cruel and Unusual Punishments Clause of the Constitution's Eighth Amendment and some of the Constitution's other grand generalities.

When it becomes hard to understand how the original interpretive community heard a text, a court must choose from among three options: (1) it can give that text a new meaning; (2) it can attempt a historical reconstruction; or (3) it can declare that meaning has been lost, so that the living political community must choose. The second of these methods is bound to produce disagreement, as happened a few years ago when the Supreme Court tackled the Second Amendment and all nine Justices tried to understand the original meaning of a text that concerned a form of organization (the 18th-century militia) alien to the modern interpretive community.[8]

8 *District of Columbia v. Heller*, 554 U.S 570 (2008) (per Scalia, J.).

The first of these methods—the way of the "Living Constitution"—is often praised as preferable to rule by the dead. But the "Dead Hand" is not the opposite of the "Living Constitution." When the judiciary is suitably modest about its ability to understand an interpretive community of long ago, the alternative is *neither* rule by the dead nor rule by living (but tenured) judges; it is democracy, rule by the people through their representatives.[9] The Constitution prevails over a statute to the extent that the Constitution contains a legal rule. When the original meaning is lost to the passage of time—or when it was never really there but must be invented—the justification for judges' having the last word evaporates. The alternative is choice through the Constitution's principal means of decision: a vote among elected representatives who can be thrown out if their choices prove to be unpopular. That outcome should be welcomed rather than feared.

This book is a great event in American legal culture. One of your coauthors is the preeminent legal lexicographer of our time. As for your other coauthor, not since Joseph Story has a sitting Justice of the Supreme Court written about interpretation as comprehensively as in the book you are holding. And Justice Story's magisterial *Commentaries on the Constitution of the United States* (1833) dealt principally with substance rather than interpretive method. Every lawyer—and every citizen concerned about how the judiciary can rise above politics and produce a government of laws, and not of men[10]—should find this book invaluable.

9 *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119 (1998).

10 Although the origin of this phrase is lost to time, it states a goal common to this nation's founding generation and those alive today.

Preface

Our legal system must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts. In this treatise we seek to show that (1) the established methods of judicial interpretation, involving scrupulous concern with the language of legal instruments and its meaning, are widely neglected; (2) this neglect 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; and (3) it is not too late to restore a strong sense of judicial fidelity to texts.

Both your authors are textualists: We 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. We hope to persuade our readers that this interpretive method is the soundest, most principled one that exists. But even those who are unpersuaded will remain, to a large degree, textualists themselves—whether or not they accept the title. While they may use legislative history, purposivism, or consequentialism at the margins, they will always begin with the text. Most will often end there.

Hence the importance, to all of us, of textual meaning. How is that meaning to be determined? By convention. Neither written words nor the sounds that the written words represent have any inherent meaning. Nothing but conventions and contexts cause a symbol or sound to convey a particular idea. In legal systems, there are linguistic usages and conventions distinctive to private legal documents in various fields and to governmental legislation. And there are jurisprudential conventions that make legal interpretation more than just a linguistic exercise (see especially §§ 48–51 [private-right canons], 54 [prior-construction canon]).

Anglo-American law has always been rich in interpretive conventions. Yet since the mid-20th century, there has been a breakdown in the transmission of this heritage to successive generations

of lawyers and lawmakers—indeed, a positive disparagement of the conventions by teachers responsible for their transmission. The result has been uncertainty and confusion in our systems of private ordering and public lawmaking—and, to the extent that judicial invention replaces what used to be an all-but-universal means of understanding enacted texts, the distortion of our system of democratic government.

The descent into social rancor over judicial decisions is largely traceable to nontextual means of interpretation, which erode society's confidence in a rule of law that evidently has no agreed-on meaning. Nontextual interpretation, which makes "statesmen" of judges, promotes the shifting of political blame from the political organs of government (the executive and the legislature) to the judiciary. The consequence is the politicizing of judges (and hence of the process of selecting them) and a decline of faith in democratic institutions. It was with characteristic foresight that George Washington declared: "I have always been persuaded, that the stability and success of the National Government and consequently the happiness of the people of the United States, would depend, in a considerable degree, on the *interpretation and execution of its laws.*"[1]

We seek to restore sound interpretive conventions. The "fair reading" approach that we endorse will not make judging easy. (Easier, perhaps, but never easy.) Nor will it produce an absolute sameness of results. But it will narrow the range of acceptable judicial decision-making and acceptable argumentation. It will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences. It will also discourage legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders.[2] Many of these interpretive goals

1 George Washington (1790), in *Maxims of Washington* 128 (1909) (emphasis added).

2 *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 298 (1989) ("Judges must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later."); Felix Frankfurter, *A Symposium on Statutory Construction: Foreword*, 3 Vand. L. Rev. 365, 368 (1950) ("Judicial expansion of meaning beyond the limits indicated is reprehensible because it encourages slipshodness in draftsmanship and irresponsibility in legislation.").

can be achieved—especially in fields other than constitutional law—even by a diluted strain of textualism. As for what we have called pure textualism, we hope to convince the reader of that as well.

Our approach is consistent with what the best legal thinkers have said for centuries. Textualism will not relieve judges of all doubts and misgivings about their interpretations. Judging is inherently difficult, and language notoriously slippery.[3] But textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law. A system of democratically adopted laws cannot endure—it makes no sense—without the belief that words convey discernible meanings and without the commitment of legal arbiters to abide by those meanings. As one commentator aptly puts the point: "[I]t is not too much to say that the preference for the rule of law over the rule of men depends upon the intellectual integrity of interpretation."[4] And as Chief Justice John Marshall put it:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.[5]

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3 *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) (per Marshall, C.J.) ("Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . . "). *See also* Richard A. Epstein, *Design for Liberty* 15 (2011) ("Hard cases are endemic to all legal regimes, no matter what their substantive commitments.").

4 Gary L. McDowell, Introduction to *Politics and the Constitution: The Nature and Extent of Interpretation* vii, vii (1990).

5 *Osborn v. Bank of the U.S.*, 22 U.S. 738, 866 (1824) (per Marshall, C.J.). *See* Lackland H. Bloom Jr., *Methods of Interpretation: How the Supreme Court Reads the Constitution* 3 (2009) (showing that "for Marshall the underlying rationale for judicial review itself was dependent on an understandable and legally applicable text").

Our basic presumption: legislators enact;[6] judges interpret.[7] And *interpret* is a transitive verb: judges interpret texts. We propose to explain how they should perform this task.

One final personal note: Your judicial author knows that there are some, and fears that there may be many, opinions that he has joined or written over the past 30 years that contradict what is written here—whether because of the demands of stare decisis or because wisdom has come late. Worse still, your judicial author does not swear that the opinions that he joins or writes in the future will comply with what is written here—whether because of stare decisis, because wisdom continues to come late, or because a judge must remain open to persuasion by counsel. Yet the prospect of "gotchas" for past and future inconsistencies holds no fear.

A.S.
B.A.G.

6 *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States").

7 *See id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Alexander Hamilton, *The Federalist*, No. 78 ("The interpretation of the laws is the proper and peculiar province of the courts.").