



A COMMENT ON  
SCALIA & GARNER'S "READING LAW"

# THE TEXTUALIST TECHNICIAN

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**R**EADING LAW HAS ALL THE hallmarks of a reference book. Like much of Bryan Garner's work, it is structurally akin to a highbrow user's guide. A user can pick *Reading Law* up, find a topic in the table of contents, read a few pages, and put the volume down, having reached the end of a self-contained chunk of content. The book need not be read cover to cover – but it can be. If it is, it also makes a more general normative point. Justice Scalia's influence, visible in the individual chunks, becomes quite apparent when the book is considered at this scale. This overall argument, of course, concerns the appropriate attitude for judges, legislators, lawyers, and others to take toward legal texts.

The basic thrust of the argument is that where decisions about language are concerned, proper legal behavior involves mainly the exercise of technical skill; it is analogous to other skills we tend to consider technical, often because they involve "objective,"<sup>1</sup>

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<sup>1</sup> Antonin Scalia & Bryan Garner, *Reading Law* 16 (2012) (noting that textualism relies on "the most objective criterion available").

“clinical”<sup>2</sup> determinations. As the authors put it, discussing “interrelating canons”: “The skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies.”<sup>3</sup> On this account, the legal treatment of texts is a precise, standardized exercise, something like land surveying or the dispensing of pharmaceutical products. While it involves judgment, it is not an art; it is “exegesis” rather than “eisegesis,”<sup>4</sup> a matter of the “mind” rather than of the “heart.”<sup>5</sup> It should aspire to the model of the “rock-hard science[s].”<sup>6</sup> The shape of the book supports this position, packed as it is with numbers and lists, and ready to be read piecemeal.<sup>7</sup>

*Reading Law* offers itself as a tool for this putative textual technician. But the technician the book posits, to act as instructed, needs more than *Reading Law* by his or her side. This technician also needs an “accurate knowledge of language.”<sup>8</sup> By this, the authors seem to mean partly an ability to understand instances of language use as other English speakers would.<sup>9</sup> This skill is not very specialized; it is what we exercise in conversation or in our reading of, for example, traffic signs and menus. *Reading Law* (like Justice Scalia’s judicial writing) occasionally reminds us of how natural this ability feels.<sup>10</sup>

At times, however, the authors admit that their technician needs more than basic English fluency and literacy. This technician also needs fluency in legal language,<sup>11</sup> as well as a more sophisticated

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<sup>2</sup> Id. at 40 (noting that the term “literal” as used by the authors “bears a clinical sense”).

<sup>3</sup> Id. at 59.

<sup>4</sup> Id. at 10.

<sup>5</sup> Id. at 348.

<sup>6</sup> Id. at 402.

<sup>7</sup> Principle Number 12, id. at 116-25, is an especially good example.

<sup>8</sup> Id. at 31 (“Through accurate knowledge of language and proper education in legal method, lawyers ought to have a shared sense of what meanings words can bear and what linguistic arguments can credibly be made about them.”).

<sup>9</sup> Id. at 71 (“In everyday life, the people to whom rules are addressed continually understand and apply them.”).

<sup>10</sup> Id. at 82 (“[O]riginalism remains the normal, natural approach to understanding anything . . . written in the past.”).

<sup>11</sup> See, e.g., id. at 73, 274, 324.

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ability to reflect on regularities of usage and to theorize about their frequency and defensibility – to imagine “the ‘reasonable reader,’ a reader who is aware of all the elements . . . bearing on the meaning of the text,” and to make “invariably sound” “judgment[s] regarding their effects.”<sup>12</sup> Some of the technicians described in *Reading Law* need even more: the ability to use language not just functionally, but *well*, with good judgment. Occasionally, the authors admit that not everyone has this skill: “[I]f . . . legislators themselves are not mindful of ferreting out words and phrases that contribute nothing to meaning, they ought to hire eagle-eyed editors who are. (Many, in fact, do.)”<sup>13</sup>

The skill could also be described as a form of practical wisdom or a virtue, and it does seem necessary for the behavior the authors recommend. The authors themselves have it in spades; they are remarkably well-read and well-informed users of legal English. How many of their readers are their peers in this regard? Comments in the Introduction suggest the authors might answer, “Not too many.” Law schools, they say, “fail[] to inculcate the skills of textual interpretation.”<sup>14</sup> This “lack of training in lawyers produces a lack of competence in judges.”<sup>15</sup>

These brief and unrepeatable observations should be more than a way for the authors to justify the existence of their book. They reflect, in a dramatically understated way, a long-term shift in our culture toward the devaluation of critical reflection on language use and of prolonged, supervised training in that ability as part of a general education. The authors’ reference to education in interpretation as education in a “skill” is itself a symptom of this shift. Readers of an age and education comparable to the authors’ are probably aware of others, including changing practices in the publication industry<sup>16</sup>

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<sup>12</sup> Id. at 393.

<sup>13</sup> Id. at 199.

<sup>14</sup> Id. at 7.

<sup>15</sup> Id. at 8.

<sup>16</sup> See, e.g., Alex Clark, *The Lost Art of Editing*, *The Guardian* (U.K.), Feb. 11, 2011.

and the increasing marginalization of writing instruction.<sup>17</sup> Younger readers might not be.

Scalia and Garner acknowledge some results of this trend, but they do not address it directly enough. In their second edition, they would do well to put their authority behind the position that the textualist technician needs practical wisdom as well as skill, and to stress that this virtue is valuable in its own right. Otherwise, the ability they take for granted, which is not just a technical skill but something much deeper, wider, and less amenable to summary or soundbite, will continue to become more rare.



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<sup>17</sup> See, e.g., David R. Russell, *Writing in the Academic Disciplines: A Curricular History* (2d ed., 2002).