



TO THE BAG

RE-READING LAW

To the *Bag*:

I was intrigued by and grateful for the Micro-Symposium on *Reading Law: The Interpretation of Legal Texts* in the Autumn 2014 issue of the *Bag*. As something of a Garner acolyte, I knew of the book but had not had a chance to review it. After reading your piece I promptly snatched the tome from the Essex Law Library and dug into it.

Like many scholars, the authors begin with pithy quotes from authorities in the field. They list five of them down through the ages, from a medieval maxim to a Scalia opinion; each appears to support the textualist theory. Conspicuously absent, however, was the following from a pre-eminent Massachusetts justice (of the Story, Brandeis, and Holmes caliber and said to be the first American jurist quoted by the English bench). It describes what the authors acknowledge is our “common-law tradition in which judicial improvisation has abounded” (p. 3):

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlighten public policy, modified and adapted to the cir-

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cumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceedings, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.

Norway Plains Co. v. Boston and Maine Railroad, 67 Mass (1 Gray) 263, 267 (1854) (Shaw, C. J.).

Shaw was of the common-law tradition and his point is as well-taken now as it was then. Circumstances creating questions change; principles providing answers do not. And hey, let's fess up about one thing: legislation and case law often lack, er, clarity. As lawyers (who become judges) are increasingly disinclined toward literature, the process will only worsen as time goes on. But that's another topic.

As for Shaw's text, it may seem to be a verbose exemplar of nineteenth century writing, but there is a Garner-like parsimony to it. He says it all and no more; I wouldn't strike a word or a comma. And if this would not have fit on one page – publishers do have their limitations – perhaps something shorter from one of his elders, *viz.*:

If there is any truth . . . it is that in proportion as a government is free, it must be complicated. Simplicity belongs to those only where one will governs all . . . where few arrangements are required, because no checks to power are allowed; where law is not a science but a mandate to be followed and not to be discussed; where it is not a rule for permanent action but a capricious and arbitrary dictate of the hour.

Joseph Story, *Miscellaneous Writings*, 619 (1852).

So to say that the common-law tradition is one in which judicial improvisation has abounded is, well, redundant. In any event, I did enjoy the Mini-Symposium.

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