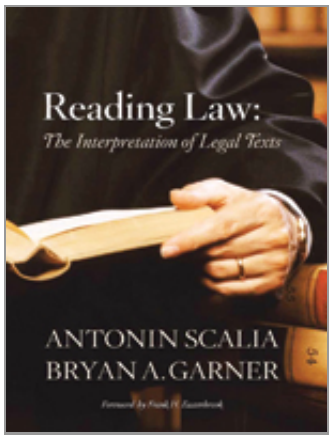
Scalia opines on canons of interpretation

by Alex G. Philipson

Published: September 20th, 2012



"Reading Law: The Interpretation of Legal Texts"

By Antonin Scalia and Bryan A. Garner

West Publishing, 2012

597 pages; $49.95

In the most anticipated decision of the U.S. Supreme Court's last term, the fate of the American health care system hinged on the meaning of a single word: "penalty."

Did the Affordable Care Act's penalty, the payment required of citizens who fail to purchase health insurance, constitute a tax?

As the media widely reported, the court said "yes," allowing it to uphold the individual mandate as an exercise of Congress's power to lay and collect taxes.

But lost in the headlines was another answer the court gave: "no." Was the suit barred by the Anti-Injunction Act, which prevents challenges to taxes that have yet to be paid? No, the court said, because in that context the penalty was not a tax.

The dissenters complained that interpreting "penalty" as a tax for constitutional purposes but as a nontax for jurisdictional purposes "carrie[d] verbal wizardry too far."

The meaning a word can bear was a subject of special concern to senior dissenter Antonin Scalia. Just two weeks before the decision was issued, he and coauthor Bryan A. Garner published a treatise on the topic, "Reading Law: The Interpretation of Legal Texts."

The project marks the second collaboration between Scalia and Garner, whose first effort yielded the slim litigation handbook "Making Your Case: The Art of Persuading Judges."

This new tome covers far more ground, weighing in at over 500 pages. But its heft is deceiving. Buoyed by Scalia's trademark talent for turning a phrase, the authors have found just the right style to carry the reader along at a lively pace — whatever one thinks about their conclusions.

Polemical at its core, "Reading Law" is the self-described first work in over a century to collect and arrange "only the valid canons" of interpretation (about one-third of possible candidates).

The book offers 57 canons that the authors consider useful for understanding constitutions, statutes, regulations and contracts, and 13 more that they deride as "falsities." But before discussing the canons, the authors give provocative reasons (in about 50 pages) for writing the book.

Scalia and Garner lament the widespread interpretive practice, since the mid-20th century, of exalting authorial intent over textual meaning.

They attack the use of legislative history — committee reports often written by lobbyists, and floor debates usually poorly attended — to climb the "ladder of generality" of a statute's language to discover "often a highly abstract" purpose. An example: reading an attorney's fees provision to cover expert witness fees, on the view that the purpose of the provision is to make the winner whole for the costs of the suit.

They distinguish statutory history (repeals and amendments) from legislative history, and approve of the former because legislators can be presumed to be aware of prior versions of a statute when voting on a new one.

The authors similarly criticize the modern preoccupation with the consequences of interpreting a statute

one way rather than another. This approach usually means speculating about what the Legislature "must have intended," so as to reach a result that, in the judge's view, is sensible

and desirable.

For Scalia and Garner,

focusing on purposes and consequences has led to less predictable decision making, unequal treatment of similarly situated litigants, and a weakened democratic process with a distorted system of checks and balances.

The authors even take issue with the oft-used judicial phrase "we begin with the words of the statute," because it means the court inevitably goes beyond the words.

The text and what it fairly implies should both begin and end the matter, the authors submit.

With that perspective, the authors define themselves as "textualists"; they take a text's purpose into account only "in its concrete manifestations as deduced from a close reading of the text." Of course, context is critical, and so the entire document must be considered, not just sentence-level text.

As for difficulties that arise when language is ambiguous (where two or more meanings can apply) or vague (whether a text's unquestionable meaning applies to a particular set of facts), the authors seek to "restore sound interpretive conventions," anchored by a "fair reading" approach to legal language. "In their full context, words mean what they conveyed to reasonable people at the time they were written — with the understanding that general terms may embrace later technological innovations."

Scalia and Garner contend that select canons of interpretation can aid in observing this overarching principle — despite the common criticism that there are two opposing canons for almost every interpretive question. The skill, the authors assert, is in deciding where the balance lies.

The 57 canons that make the grade are arranged according to such topics as semantics, syntax and context. The authors succinctly explain each canon, illustrate it with a case, and say whether they think the court applied the canon correctly and why. They do all of this in five pages or fewer for almost every canon, creating manageable, bite-sized mini-chapters.

It may surprise those who expect a thoroughgoing conservatism to permeate the book that many of the cases chosen to illustrate healthy legal interpretation involve victorious plaintiffs in civil matters and exonerated defendants in criminal ones.

Concerning Canon No. 49, the rule of lenity, the authors propose what they consider a more defense-friendly formulation than most: A statute is sufficiently ambiguous for the rule to apply when "after all the legitimate tools of interpretation have been applied, a reasonable doubt persists." For those hoping for the unabashedly conservative Scalia, there is some of him in these pages, but in small doses.

While overt politics are postponed until the latter part of the book, an undercurrent that runs throughout is the importance of using reliable, period-appropriate dictionaries.

"Reading Law" includes an appendix that lists trustworthy dictionaries for finding contemporaneous meanings from 1750 to today. Other useful interpretive tools mentioned here include legislative drafting manuals.

Among the bounty of cases illustrating good legal interpretation are the following examples: In a Pennsylvania prosecution against a man for firing a gun "into an

occupied structure," the defendant's conviction was overturned where he was already inside the structure when he discharged the firearm.

And in a federal tax case where a misplaced comma proved costly for the U.S. Treasury, fruit importers successfully argued that importing all fruit was duty free under a statute that exempted

from tax not only “fruit plants” but “fruit, plants.”

Toward the end of the book, the authors revisit their reasons for writing it. In describing 13 “falsities,” they discredit canons that promote the spirit of a statute over its letter, attempt to discover the intent of the Legislature, or seek to do justice generally.

Here is where Scalia the social conservative appears, trumpeting his well-known disparagement of Roe v. Wade, and his derision of attempts to locate in the Constitution rights governing such matters as assisted suicide and the death penalty.

The final “falsity” that “Reading Law” takes aim at is the notion of a living constitution. Preferring elected legislators to decide matters that the authors believe are not controlled by the Constitution, Scalia and Garner say: “In practice, the Living Constitution would better be called the Dead Democracy.”

And yet, in an afterword, they concede that many substantive due process decisions of the past several decades should be given stare decisis effect. Except, that is, for Roe v. Wade.

Alex G. Philipson is founder of the appellate boutique Philipson Legal in Newton Centre, Mass.