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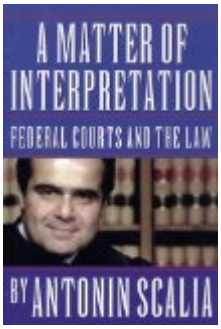
Antonin Scalia. *A Matter of Interpretation: Federal Courts and the Law.* Princeton, N.J.: Princeton University Press, 1997. xiii + 159 pp. $19.95 (paper), ISBN 978-0-691-00400-6; $39.95 (cloth), ISBN 978-0-691-02630-5.



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A Matter of Interpretation: Federal Courts and the Law

The 1997 book, *A Matter of Interpretation: Federal Courts and the Law*, is framed around a clear, accessible essay entitled "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," written by Supreme Court Justice Antonin Scalia. The second section of the book is composed of responses to Justice Scalia's essay by such diverse, prominent scholars as Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin; edited by Amy Gutmann, the book concludes with Justice Scalia's response to each comment.

I used this book in my Senior Seminar on Judicial Decision Making successfully, despite the fact that over one-half of the class had no previous coursework in law and only one student had studied constitutional theory.

Justice Scalia's primary concern in this essay is the lack of a coherent philosophy of judicial decision making within law schools, the academy, and on the bench. He begins by examining the dual function of common law courts' applying the law to the facts and making law. Justice Scalia argues that although our law has evolved away from common law into a statutory legal system, our legal approaches remain the same. Consequently, law schools and judges have continued to focus on such decision-making tools as precedent and distinguishing cases. For Scalia, a democratic system which places the common law power of creating law into the hands of unelected judges is problematic. He concludes that while common law philosophy has a place in our legal process, the focus of the common law judge on "what is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded? " (p. 13) is not appropriate for those who predominately interpret statutes.

Scalia is interested in discovering more appropriate tools for the judicial interpretation of texts. He asserts that the absence of an intelligible theory of statutory interpretation is distressing and he spends a great deal of time rejecting legislative intent as a means of filling that vacuum. He argues that original intent is the most coherent tool for judges, focusing not the intent of the writers, but on the plain intent of the text. This philosophy of interpretism, or textualism, is based on the belief that judges do not have the authority to divine the larger social purposes for which a statute is created or to write new laws to meet these social purposes. "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means" (p. 23). As difficult as statutory interpretation is, constitutional interpretation is more complex. However, Justice Scalia argues that his textual theory of statutory interpretation is clearly applicable; he examines the original meaning of the text, not the purpose of the authors' words. What has happened in law schools and in statutory and constitutional decision making is the tendency not to ask what the constitution or statutory text means, or how it was originally understood, but instead to ask how precedent has interpreted the issue or what the constitution ought to mean.

Justice Scalia sees constitutional interpretation being assumed by *common law judges* as a threat to basic democratic principles.

Although I do not wish to replicate the arguments with a detailed assessment of each response and counter-response, a brief description of the main argument and the individual initial responses is merited. It is impossible in a forum such as this, to do justice to the complexity and far-reaching nature of the discussion, I have attempted to provide a flavor of the analyses provided. The first critique to Justice Scalia's analysis is provided by Professor Gordon S. Wood. He begins with an examination of the historical development of the concept of an independent judiciary, noting that "[r]edefining judges as agents of the sovereign people somehow equal in authority with the legislators and executives fundamentally altered the character of the judiciary in America and deeply affected its role in interpreting the law" (p. 54). Professor Wood goes on to argue that the problem of judicial usurpation is deeply rooted in our history and is not as easily resolved as Justice Scalia appears to indicate.

Professor Laurence H. Tribe addresses the meanings of original intent and textualism, specifically struggling with the possibility of distinguishing between when the Constitution is "enacting fairly abstract principles" and when it is "enacting quite concrete rules" (p. 69). One of his primary critiques of the Justice Scalia's interpretation is of the dichotomy drawn between the original understanding of the text and the meaning that best meets current societal needs. For Professor Tribe, Justice Scalia's decision that the first determination is truly "judging" and the second is "lawmaking impersonating judging" is problematic. What disturbs him about both Professor Dworkin's (in his comment) and Justice Scalia's confidence as to their ability to accurately understand the original meanings of tests (Scalia) or objectives (Dworkin) is their certitude that "they know how the historical fact bears on whether the relevant text expressed a concrete rule or abstract principle."

In her comments, Professor Mary Ann Glendon, focuses on two primary questions, "Have civil-law lawyers and judges fared any better than we Americans in the maze of twentieth-century legal materials? If so, what can we learn from their experience? " (p. 95). Her essay examines the different ways in which common law systems (e.g., United States) and civil law systems (e.g., Germany) made the transition to statutory legal systems. She argues that the primary difference has been one of deliberativeness, in that many civil-law systems recognized the seriousness of a change to a more textual-based system and consequently, focused on forming a clear judicial community of academics, attorneys, and judges with shared interpretory values. Professor Glendon notes that while in the United States initially we had shared values, such as *stare decisis*, but even its role is fading and there is no contemporary interpretory community.

Finally, Professor Ronald Dworkin finds that Justice Scalia's definition of textualism means that the law is "fixed by the best interpretation of the language it used, not by what some proportion of its members wanted or expected or assumed would happen" (p. 118). Professor Dworkin does not find Justice Scalia to be consistent with this interpretation and accuses him of attacking the straw argument of a "morphing" theory of the Constitution, which he finds unrepresented in the contemporary judicial literature. He presses Justice Scalia to demonstrate how his version of interpretative textualism is superior to Professor Dworkin's "moral and principled reading of the Constitution" (p. 122).

What is most useful about this text is the combination of Justice Scalia's carefully defended definition of his judicial philosophy and the comments by which the scholars engage his arguments. While I have always tried to introduce my students to the concepts of "original intent" and "textualism," I have never been confident that I have given this controversial approach enough time or to be honest, a stringent-enough definition. These are concepts that are too easy to oversimplify and intellectually dismiss. Scalia's essay provides intellectual merit to these concepts, concurrently his critics prevent Scalia from rapidly dismissing or disregarding the various challenges to his interpretative approach. While the topic intimidated my students, it is written in such a clear "jargon-free" manner, without condescending to the reader, that my students were easily able to translate the arguments into a sophisticated, well-supported classroom discussion. The students found the book provided a nice juxtaposition to the constitutional theory and judicial behavior materials primarily focused upon in class. The dialogue structure of the book made interesting reading and allowed a clear conservative view to be articulated simultaneously with a strong challenge to that perspective. Finally, they were excited to see a clear articulation of a philosophy of a seated justice, supplying insight into his opinions read and discussed in class.