Micro-
Symposium

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INTRODUCTION TO THE MICRO-SYMPOSIUM ON

SCALIA & GARNER'S "READING LAW"

Recently, we issued a call for short (1,000 words) essays on *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia and Bryan Garner. We sought "[a]ny theoretical, empirical, or practical commentary that will help readers better understand the book."[1] The result is this micro-symposium.

Our call drew dozens of micro-essays, some thought-provoking, some chuckle-prompting, and some both. Blessed with an abundance of good work but cursed by a shortage of space, we were compelled to select a small set – representative and excellent – of those essays to publish here. Fortunately, our sibling publication, the *Journal of Law*, could spare a few pages for the presentation of more (but still not all) of the worthy submissions – specifically, papers by William Trachman, Jordan T. Smith, and Eric J. Segall – as well as a longer paper by Steven A. Hirsch.[2] We regret that we cannot do full justice to the outpouring of first-rate commentary we received. May you enjoy reading the following excellent representatives as much as we did.

— The Editors

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[1] *Call for Papers: "Reading Law,"* 17 GREEN BAG 2D 251 (2014).
[2] *See* 4 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (2014).

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

THE
TEXTUALIST TECHNICIAN

Karen Petroski

Reading 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,"[1]

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[1] Antonin Scalia & Bryan Garner, Reading Law 16 (2012) (noting that textualism relies on "the most objective criterion available").

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

Reading Law offers itself as a tool for this putative textual techni-cian. 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."[8] By this, the authors seem to mean partly an ability to understand instances of language use as other English speakers would.[9] 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.[10]

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,[11] as well as a more sophisticated

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[2] Id. at 40 (noting that the term "literal" as used by the authors "bears a clinical sense").

[3] Id. at 59.

[4] Id. at 10.

[5] Id. at 348.

[6] Id. at 402.

[7] Principle Number 12, id. at 116-25, is an especially good example.

[8] 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.").

[9] Id. at 71 ("In everyday life, the people to whom rules are addressed continually understand and apply them.").

[10] Id. at 82 ("[O]riginalism remains the normal, natural approach to understanding anything . . . written in the past.").

[11] See, e.g., id. at 73, 274, 324.

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."[12] 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.)"[13]

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."[14] This "lack of training in lawyers produces a lack of competence in judges."[15]

These brief and unrepeated 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[16]

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[12] Id. at 393.

[13] Id. at 199.

[14] Id. at 7.

[15] Id. at 8.

[16] See, e.g., Alex Clark, The Lost Art of Editing, The Guardian (U.K.), Feb. 11, 2011.

and the increasing marginalization of writing instruction.[17] 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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[17] See, e.g., David R. Russell, Writing in the Academic Disciplines: A Curricular History (2d ed., 2002).

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

A NOTE ON
"A NOTE ON THE USE OF
DICTIONARIES"

Michel Paradis

R EADING LAW ADVANCES a jurisprudential tradition that treats legal reasoning as a kind of grammar. Scalia & Garner state their objective as avoiding judicial arbitrariness. To do that, they claim that discretionary judgments about the meaning of a law can be constrained with the rigors of linguistic analysis. Whatever one thinks of their general jurisprudential approach, they come up surprisingly short on what should be their starting point: how do we establish the common linguistic ground for knowing what individual words mean?

This is disappointing. Scalia & Garner clearly love language and Garner is the preeminent legal lexicographer of our time. But their coda, "A Note on the Use of Dictionaries," and their chapter on "plain meaning" simply exalt off-the-shelf dictionaries as an authori-

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tative solution to this threshold problem. Superficially, this appeals to a sense of hide-bound tradition. But the citation of dictionaries as legal authority, particularly for non-technical words, is something of a modern trend. In the graph below, you can see the result of a Westlaw search for the relative frequency of "dictionary" and its highbrow synonym, "lexicon," in the decisions of the Supreme Court from 1790-2013. The gray dashes indicate the words' relative frequency each decade and the horizontal black lines, the average for each five-decade epoch.

Far from traditional, the resort to dictionaries was actually quite rare (0.6% of cases) in the half-century after 1789. While it became more common over the next 150 years, their citation rate hovered around only 2-3% of cases until 1990. Then it shot up, such that 33% of the cases decided since 2010 referenced dictionaries. This trend is also reflected, albeit to a lesser extent, in the decisions of the lower courts, where the citation of dictionaries has doubled over the past three decades. What prompted this abrupt change? The vertical line suggests an obvious guess: the appointment of Justice Scalia in 1986.

The real problem for Scalia & Garner is not this approach's lack of a historical pedigree. It is that using a dictionary to resolve disputes over the meaning of a word is unjustifiable if one is actually interested in rigorous linguistic analysis. To be sure, Scalia & Garner admonish readers about the quality of various dictionaries, for which they provide a bibliography of authoritative lexicons. But resorting to dictionaries at all is a terribly un-rigorous way of resolving the disputed meaning of any word, past or present.

When we talk about a word's "meaning," we are ordinarily describing two concepts. One is the word's acceptable uses. If I say I am going to "jump into the shower," you have probably heard other people "jump into the car" or "jump into bed." You know what I mean when I use the word "jump" instead of "enter" because you have heard these words used interchangeably like this. The other is the cluster of associations a word accumulates in the course of its usage. "Jump" is rarely, if ever, used to describe slow movements. So when I say I am going to "jump into the shower," you expect me to be quick about it.

THE RATE DICTIONARIES APPEAR IN SUPREME COURT OPINIONS, 1790-2013
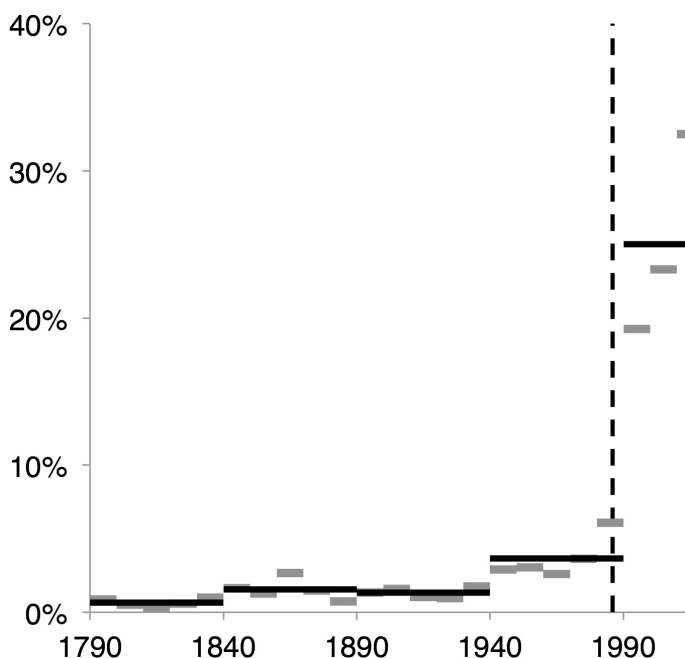
A word's definition requires an editorial judgment about its most noteworthy uses and associations as well as how best to convey them with other presumptively well-known words, a process one philosopher described as coming up with a "lame partial synonym plus stage directions."[1] Some uses and associations are included. Others are excluded.

If a legislature makes these editorial judgments by writing a definition into a statute, that may tell you something. But off-the-shelf dictionaries reflect either the lexicographers' personal biases or the arbitrary collection of texts (from Shakespeare to Twitter) that they used to find examples of a word's usage. Samuel Johnson, whose is

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[1] W.V.O. Quine, *From a Logical Point of View* 56 (1980).

first on Scalia & Garner's list of authoritative lexicons, relied on his discretion about the words he found in 500 texts from his library. He sought, not to convey how each word was actually used, but to provide "pleasure or instruction, by conveying some elegance of language, or some precept of prudence, or piety."[2] Or take Webster's. The sense of "jump" as "to enter quickly" is excluded, while violating a bail agreement is included. There is no empirical basis for this choice. A Google search for "jump into the shower" returns 7.5 times as many hits as "jump bail." Instead, it reflects the editors' judgment that "jump bail" is more worthy of their page-space.

All a dictionary can tell you is that one particular use of a word existed when the dictionary was written. It cannot rule out other possible uses or resolve disputes over which known use is the most appropriate in a given context. If a word's meaning is unknown, dictionaries might offer an accessible introduction. But lawmakers presumably know the words they are using and choose them because their use has achieved some desired result in the past. Dictionaries cannot illuminate what motivated those word choices or how society would have understood them any better than other contemporaneous examples of the words' usage might.

What then does a dictionary offer in disputes over meaning? As is clear from *Noel Canning*,[3] where Justices Breyer and Scalia sparred over Samuel Johnson's definitions for "recess," "happen," and "the," as if a 1755 dictionary were the Talmud, it is not common linguistic ground. Instead, it offers a rhetorical device for asserting that a preferred interpretation is obvious, a pedantic way of saying, "you're an illiterate idiot." It offers an appeal to authority that casts a discretionary judgment as the compelled result of linguistic rules.

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[2] Samuel Johnson, *The Plan of a Dictionary of the English Language* 42 (1747).
[3] 134 S.Ct. 2550 (2014).

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

GOOD FOR LEGISLATIVE GEESE
BUT NOT JUDICIAL GANDERS?

Brian S. Clarke

ONE TROUBLING ASPECT of *Reading Law* is the narrow
definition of "legal texts" employed by Justice Scalia
and Professor Garner. They define "legal texts" as be-
ing limited to constitutions, statutes, and regulations.
This, of course, ignores the single largest body of "legal texts:" judi-
cial opinions. The interpretative canons discussed in *Reading Law*,
which place primary importance on the words used by drafters,
simply do not apply to judicial opinions.

Why? In short, it seems Justice Scalia (and his fellow textualists
on the Supreme Court), can dish it out when it comes to linguistic
precision, but cannot take that same level of scrutiny.

Some of the clearest examples of the Court's significant failures
of linguistic precision have come, ironically, in cases in which the
Court has applied a strict textualist interpretation to statutes. A trio
of cases examining factual causation standards relevant to claims
under several federal statutes provide a particularly apt example.[1] In

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[1] Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) (factual causation for

Gross v. FBL Financial Services, Inc.,[2] the Court interpreted the opera-
tive language in the Age Discrimination in Employment Act, which
prohibits discrimination "because of age." Applying the "ordinary
meaning" canon[3] of statutory construction,[4] the Court determined
that, based on dictionary definitions, "because of" in the ADEA
meant "but for" factual causation.[5] However, the Court's articula-
tion of its factual causation standard was linguistically imprecise and
superficial. The Court held that, under the ADEA, age must be "*the*
but for cause" of the employer's decision and "*the* reason" for the
decision.[6]

Using the Ordinary Meaning Canon and the Grammar Canon[7] to
interpret *Gross*, one would conclude that the Court's use of the di-
rect article "the" (rather than the indirect article "a") was purposeful
and that the Court intended to require that age was the sole, single
or only but-for cause of the employer's decision.[8] However, such a

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claim under Age Discrimination in Employment Act); Univ. of Texas S.W. Med.
Center v. Nassar, 133 S. Ct. 2517 (2013) (factual causation standard for retalia-
tion claim under Title VII of the Civil Rights Act of 1964); Burrage v. U.S., 134
S. Ct. 881 (2014) (factual causation for mandatory minimum sentence under
Controlled Substances Act).

[2] 557 U.S. 167 (2009).

[3] See READING LAW at 69-77 (discussing the "Ordinary Meaning Canon").

[4] Gross, 557 U.S. at 175-76.

[5] Id. at 176.

[6] Id. (emphasis added).

[7] READING LAW at 69-77 (the "Ordinary Meaning Canon") and 140-143 (the
"Grammar Canon").

[8] This is how the Court has repeatedly interpreted the use of the definite article in
statutes and rules. See *Rapanos v. United States*, 547 U.S. 715, 732 (2006) (use of
direct article "the" showed Congressional intent to indicate specific "waters");
Rumsfeld v. Padilla, 542 U.S. 426, 434-35 (2004) (use of definite article "the" in
habeas statute indicated that "generally only one proper respondent to a given
prisoner's habeas petition"). See also *Shum v. Intel Corp.*, 629 F.3d 1360, 1367
(Fed. Cir. 2010) (use of the definite article "the" in Fed. R. Civ. Proc. 54(d)(1)
indicates that what follows, "prevailing party," is specific and limited to a single
party); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1222 (1989); BLACK'S
LAW DICTIONARY 1477 (6th ed. 1990).

narrow view of factual causation is logically preposterous.[9]

The Court engaged in an identical textualist analysis of Title VII's retaliation provision in *Univ. of Texas S.W. Medical Center v. Nassar*,[10] but was even more linguistically imprecise in its opinion. There, the Court used both the definite article "the"[11] and the indefinite article "a"[12] when describing the requisite factual causation standard for a retaliation claim under Title VII.[13]

The Court's factual causation trilogy culminated in *Burrage v. U.S.*[14] There, Justice Scalia himself, writing for the Court, applied the "ordinary meaning" canon to the Controlled Substances Act and relied on *The New Shorter Oxford English Dictionary* to determine the meaning of "results."[15] To support the Court's dictionary-based ordinary meaning interpretation of "results," Justice Scalia turned to *Gross* and *Nassar*. In doing so, however, Justice Scalia threw *Reading Law* out the window. Instead of applying either the ordinary meaning canon or the grammar canon to the words the Court used in *Gross* and *Nassar*, Justice Scalia instead simply used brackets to change the words used by the Court in those cases.[16] Specifically, Justice Scalia eliminated the problematic definite article "the" from the Court's holdings in *Gross* and *Nassar*, and changed it to the far more logical indefinite article "a," as follows: (1) in *Nassar*, "we held that [Title VII's retaliation provision] 'require[s] proof that the desire to

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[9] See Brian S. Clarke, *The Gross Confusion Deep in the Heart of Univ. Texas S.W. Med. Center v. Nassar*, 4 Cal. L. Rev. Circuit 75, 76 (2013). Predictably, some lawyers and judges have read the Court's opinion in *Gross* to literally mean what it says, which would be appropriate based on READING LAW. This has led to arguments in scores of cases – and holdings in a handful – equating but-for causation with sole causation. See *id.* at 75 n.2-3.

[10] 133 S. Ct. 2517 (2013).

[11] Id. at 2528.

[12] Id. at 2534.

[13] See 42 U.S.C. § 2000e-3.

[14] 134 S. Ct. 881 (2014).

[15] Id. at 888.

[16] I hereby dub this the "Use-Brackets-To-Change-Words-And-Fundamentally-Alter-The-Meaning-Of-The-Sentence Canon" of judicial opinion interpretation.

retaliate was *[a]* but-for cause of the challenged employment action;'"[17] and (2) in *Gross*, "we held that '[t]o establish a disparate-treatment claim under the plain language of [the ADEA] . . . a plaintiff must prove that age was *[a]* 'but for' cause of the employer's adverse decision.'"[18]

Justice Scalia and Prof. Garner clearly understand the power of words and demand linguistic precision by the drafters of legal texts. If the canons in *Reading Law* apply to legal texts created by legislative geese, they should apply equally to legal texts created by judicial ganders.

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[17] Id. at 888-89 (quoting *Nassar*, 133 S. Ct. at 2528) (first brackets added, remaining brackets original; emphasis added).

[18] Id. at 889 (quoting *Gross*, 557 U.S. at 176) (second brackets added, first and third brackets original; emphasis added).

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Reading Law
in the Classroom

Christopher J. Walker & Andrew T. Mikac

I N *READING LAW*, Justice Scalia and Professor Garner claim law
students today "learn haphazardly" from a curriculum that "fails
to inculcate the skills of textual interpretation" essential to
practice. (P.7.) Teaching students to interpret legal texts is thus
one of the book's chief aims. Yet despite countless reviews, until now
no one has attempted to assess *Reading Law*'s usefulness in the class-
room. As a law professor who uses the book in his first-year legisla-
tion course and a law student who just took that course, we present
a preliminary assessment based on our class's review of the book.

A note on methodology: 2014 marked the second year of using
Reading Law in this course. Although not required reading, we dis-
cussed the book regularly in class – including 71 quotations in
presentations and many more references during lecture and discus-
sion. To evaluate its effectiveness as a classroom tool, we asked stu-
dents 10 questions about the book. Of the 56 students who took the
course last semester, 47 (84%) responded. One declined to review
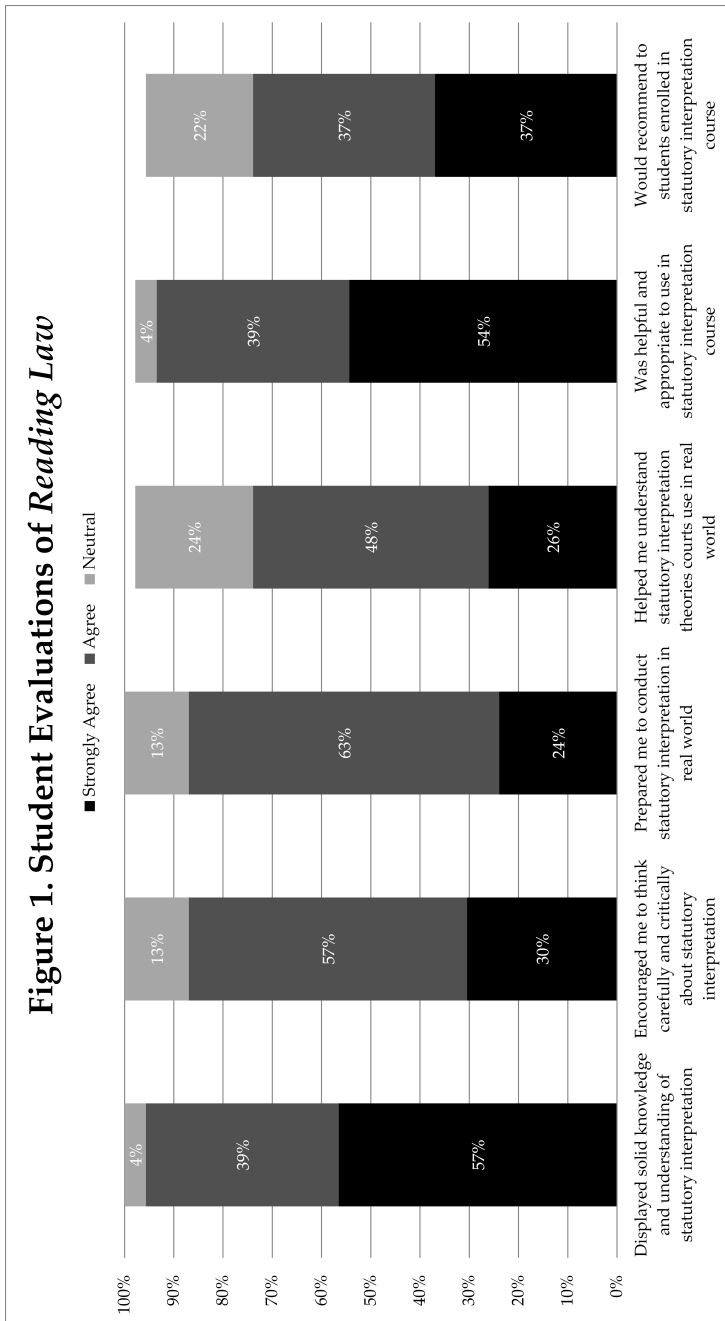
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the book because he had not read it. Like many reviewers of Thomas Piketty's *Capital in the Twenty-First Century*, however, the others were happy to respond regardless whether they had actually read it cover to cover. This doesn't concern us too much as our objective is to evaluate *Reading Law*'s usefulness in the classroom (though, admittedly, the responses may tell us more about the professor's ability to teach from the book).

So how did *Reading Law* fare? Figure 1 presents the findings from the first six questions, which were modeled on the law school's course evaluation form. Based on the student responses to our survey, we make five observations.

First, as to perceived quality, nearly everyone agreed (39%) or strongly agreed (57%) that Scalia and Garner "displayed a solid knowledge and understanding of statutory interpretation," with the remainder (4%) neutral. None disagreed, for a composite score of 4.52 on a 5.00 scale. Similarly, though less enthusiastically, nearly nine in ten agreed (57%) or strongly agreed (30%) that *Reading Law* encouraged them "to think carefully and critically about statutory interpretation." Again, none disagreed, with the remainder (13%) neutral and a lower composite score of 4.17.

Second, as to real-world usefulness, nearly nine in ten agreed (63%) or strongly agreed (24%) that *Reading Law* prepared them "to conduct statutory interpretation in the real world." Although none disagreed, the composite score (4.11) was lower due to more "neutral" (13%) and fewer "strongly agree" responses. Similarly, when asked if Scalia and Garner "seemed interested in helping me understand the theories of statutory interpretation courts use in the real world," nearly three in four agreed (48%) or strongly agreed (26%). One disagreed, with the remainder (24%) neutral and a relatively poor composite score of 3.98. One student thought the authors "seemed more interested in promoting their own theories of statutory interpretation." But a second said the book was "trying to create a more widely understood system for interpretation, so yes, they are interested in helping us understand the theories." A third indicated personal use of the book almost daily at a summer internship. Yet a fourth raised what in our view is a legitimate pragmatic

Figure 1. Student Evaluations of *Reading Law*

Legend: Strongly Agree ■ Agree ■ Neutral

- Displayed solid knowledge and understanding of statutory interpretation: 4%, 39%, 57%
- Encouraged me to think carefully and critically about statutory interpretation: 13%, 57%, 30%
- Prepared me to conduct statutory interpretation in real world: 13%, 63%, 24%
- Helped me understand statutory interpretation theories courts use in real world: 24%, 48%, 26%
- Was helpful and appropriate to use in statutory interpretation course: 4%, 39%, 54%
- Would recommend to students enrolled in statutory interpretation course: 22%, 37%, 37%

concern: Scalia's "very clear opinions about legislative history" mean full reliance on textualism is "not a good real-world strategy" because it downplays the prevalence of more purposivist methods.

Third, two questions explored further this theme of bias or personal agenda. When asked if *Reading Law* persuaded them "to take a more textualist approach to statutory interpretation," the results roughly split three ways: 26% disagreed (none strongly), 37% were neutral, and 37% agreed (22%) or strongly agreed (15%). The class similarly divided on whether *Reading Law* is "less effective" because it is "biased or otherwise incomplete": 33% disagreed (one student strongly), 35% were neutral, and 33% agreed (28%) or strongly agreed (4%). One student may capture a somewhat common sentiment – one we share: "I think the bias of the authors was evident in some of their descriptions and definitions, but I don't think it prevented them from giving a pretty well-rounded account of interpretive methods overall."

Fourth, as for its pedagogical utility, over nine in ten agreed (39%) or strongly agreed (54%) that the book "was helpful and appropriate to use in a statutory interpretation course." Only one disagreed, and two were neutral – for a respectable 4.46 composite score. In class, many students remarked, and we agree, that the table of contents alone is a valuable supplement as it provides a concise definition of each interpretative principle. One student also echoed our opinion that "it would be hard to teach a well-rounded class with this book alone." When asked the critical question whether they "would recommend *Reading Law* to other students enrolled in a course on statutory interpretation," the composite score dropped to 4.07: 37% strongly agreed, 37% agreed, 22% neutral, and 4% disagreed. To put this number in perspective, when asked the same question about recommending their professors, the school-wide average last semester was around 4.80.

Finally, as to the bottom line, about a third (30%) had actually bought the book by the time they took the survey this summer. When asked how much they would pay for the book, only seven (15%) would pay the $49.95 list price. Instead, the class was willing to pay, on average, about $30. One student would not even accept a free

Figure 2. Student Willingess To Pay for Reading Law
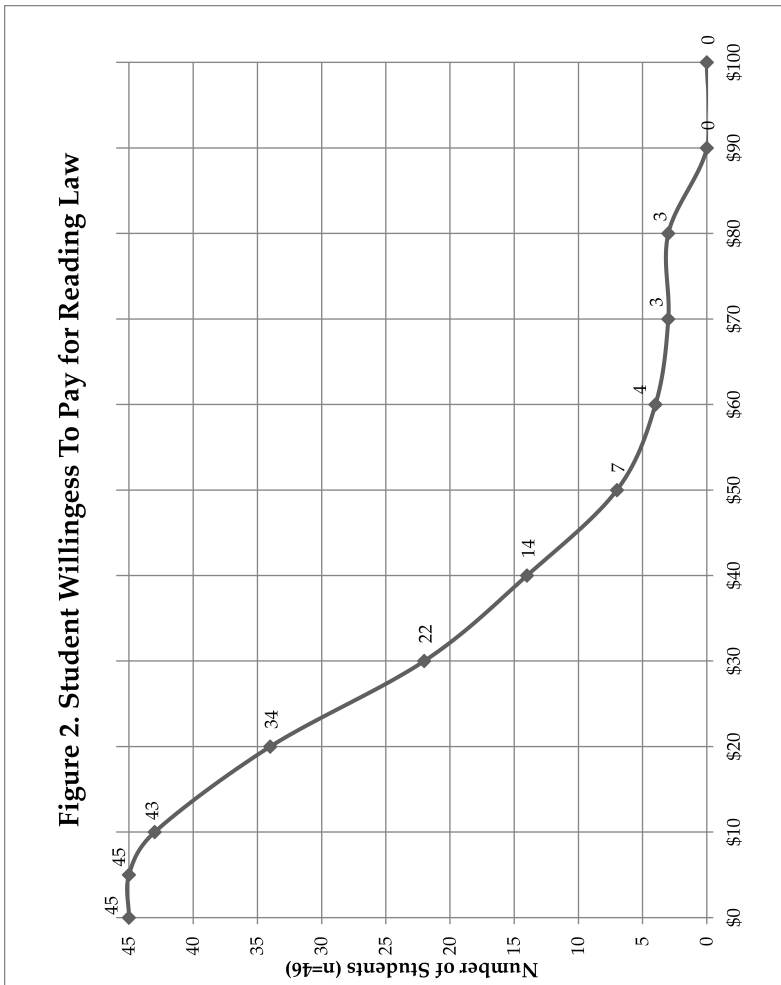
copy; another who did buy it used it carefully in order to resell it af-
ter the final exam. Figure 2 presents the students' willingness to pay.

In sum, these largely positive reviews reinforce our personal view
on *Reading Law*'s usefulness in the classroom and this professor's
decision to use it again next year. But student feedback was not
without dissent. One student perhaps captured this qualified review:
"I fundamentally disagree with everything Scalia says but the book
does have its uses."

For those uses, that student would have paid $20.