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# **DID JUSTICE SCALIA HAVE A THEORY OF INTERPRETATION?**

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## DID JUSTICE SCALIA HAVE A THEORY OF INTERPRETATION?

Gary Lawson\*

(forthcoming, 92 NOTRE DAME L. REV. – (2017))

### ABSTRACT

*It seems beyond bizarre to ask whether Justice Scalia had a theory of textual interpretation. If he did not have such a theory, what were he and his critics talking about for the past three decades? The answer is that they were talking about part of a theory of textual interpretation but not an actual, complete theory. A complete theory of textual interpretation must prescribe principles of admissibility (what counts towards meaning), significance (how much does the admissible evidence count), standards of proof (how much evidence do you need for a justified conclusion), burdens of proof (does inertia lie with acceptance or rejection of a proposed meaning), and closure (when is the evidence set adequate to justify a claim). Justice Scalia said a great deal about principles of admissibility and significance, but he said very little about the other essential elements of an interpretative theory. Moreover, much of what Justice Scalia said, and much else that can be inferred from his writings, about statutes and constitutions concerned theories of adjudication rather than theories of interpretation. The relationship between interpretation – the ascertainment of textual meaning – and adjudication – the determination of real-world cases – is actually quite complex, even if one has a normative theory of adjudication that says to decide cases as much as possible in accordance with interpretatively derived textual meaning. In the end, one probably cannot say that Justice Scalia had a theory of textual interpretation. He came close, however, to articulating a complete theory of how to apply statutes and constitutions in adjudication; he was lacking only a clear identification of the appropriate standard of proof for resolving legal claims in adjudication.*

Did Justice Scalia have a theory of textual interpretation for either statutes or the United States Constitution?

The question seems beyond bizarre. Justice Scalia co-wrote two of the leading books in the past few generations on statutory and constitutional interpretation.<sup>1</sup> Several of his articles on

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<sup>1</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998), ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS.

constitutional interpretation are modern classics.<sup>2</sup> He is widely seen as having moved the Supreme Court significantly toward his favored position on statutory interpretation; Justice Kagan, for example, said in 2015 that “Justice Scalia has taught everybody how to do statutory interpretation differently.”<sup>3</sup> Advocates of originalism as a method of constitutional interpretation universally see him as quite possibly the most important figure in the development of that methodology.<sup>4</sup> Justice Scalia certainly thought that he had a theory of interpretation; the word “interpretation,” after all, figures prominently in the titles of both of his books. Indeed, in his collaborative work with Bryan Garner, he was deeply critical of J. Harvie Wilkinson’s celebration of non-theory,<sup>5</sup> and he labelled nontextualist modes of analysis as “anything but fully developed theories of interpretation,”<sup>6</sup> presumably in contrast to his own fully developed interpretative theory. Whether one calls his method of interpretation textualism or originalism (along with whatever qualifying adjectives one attaches to either of those terms), and whether one thinks that method is sound or unsound, surely no one doubts that Justice Scalia, perhaps more clearly than any other modern – or, for that matter, non-modern -- jurist, had an articulated theory of statutory and constitutional interpretation. If Justice Scalia did not have a theory of interpretation, then what exactly was he and his critics talking about for the past three decades?

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<sup>2</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989) (showing 1,116 WESTLAW references on October 10, 2016); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (showing 1,479 WESTLAW references on October 10, 2016).

<sup>3</sup> <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>

<sup>4</sup> See, e.g., Gary Lawson, *On Getting It Right: Remembering Justice Antonin Scalia*, 96 B.U. L. REV. 299 (2016).

<sup>5</sup> See SCALIA & GARNER, *supra* note 1, at 26-27 (criticizing J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* (2012)).

<sup>6</sup> *Id.* at 27.

My goal here is to make the opening question seem just a bit less bizarre than it may appear at first glance. It is actually a non-trivial question whether Justice Scalia had a theory of textual interpretation, for either statutory or constitutional texts. To answer that non-trivial question, one must focus on two more fundamental questions that all too often lurk unasked under the radar: (1) what elements must a theory of textual interpretation possess in order to be an actual theory of textual interpretation and (2) what is the relationship, if any, between theories of textual interpretation and theories of legal adjudication? Both questions are quite profound, extremely difficult, and far subtler than is often acknowledged.

In Part I of this article, I will outline the fundamental elements of a theory of textual interpretation and see whether Justice Scalia's position reflects all of those necessary elements. I think it does not, though his seeming competitors (including me) are in no better a position; it may well be that no one in contemporary American jurisprudence (including me) actually has a bona fide theory of textual interpretation. In Part II, I will tentatively explore the relationship between interpretation and adjudication and see the extent to which Justice Scalia's views connect those two quite different activities. In the end, I conclude that while Justice Scalia did not have a theory of interpretation, he came very close to having a fully developed theory of adjudication, though he often conflated adjudication with interpretation, as do many other jurists and scholars.

A great many legal debates are underproductive because participants in those debates do not clearly identify whether they are talking about interpretation or adjudication and, if they are talking about the former, which elements of a theory of interpretation they are discussing. An examination of Justice Scalia's jurisprudential legacy provides an excellent vehicle for framing

ongoing discussions of both interpretation and adjudication in a more focused and constructive fashion.

I. *Does Anybody Really Know What a Theory of Interpretation Is? Does Anybody Really Care?*

A theory of interpretation is a theory of meaning. When one interprets a text, one assigns a meaning to that text. That meaning, in whole or in part, might be thought to be lodged in such things as the communicative signals that one ascertains (or thinks that one ascertains) were encoded in that text by its maker, in one's own consciousness or preferences, in some normative conception of what a good text would mean in the circumstances at hand, and so forth. For present purposes, it does not matter how one fills in that element of a theory of textual meaning. (There are, in fact, right and wrong ways to fill in that element, but that is not my topic here.<sup>7</sup>) My focus for now is on what set of questions anyone, whatever they claim their particular theory involves, must either explicitly or implicitly address in order to have a fully functional interpretative theory.

Interpretation implicates the wider category of *proof* – or, if one prefers, *justification*. When one interprets a text, using whatever methods of interpretation one chooses to employ, one is at least implicitly making propositional claims about the text. To be intellectually interesting, those claims must be justifiable in some fashion. As noted above, those claims might involve some externally determined meaning, the contents of one's own consciousness, some normative conception, some mixture of the three, or something else altogether, but interpretation always

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<sup>7</sup> For some preliminary thoughts on what right and wrong interpretation involves, see Gary Lawson, *Reflections of an Empirical Reader (Or, Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457 (2016).

involves a justifiable claim of some sort. As such, the interpretative claim is subject to proof. The precise form of proof depends on the underlying metaphysics of the claim; one does not necessarily prove normative claims the same way that one proves claims about the intentions of historically situated individuals, and one does not necessarily prove claims about the intentions of historically situated individuals the same way that one proves claims about the hypothetical intentions of legally constructed makers of texts. The key insight is that there is a certain universal structure to the idea of proof that provides a framework for any and all specific instances of proof, including proof of claims regarding textual meaning. I develop that insight about a universal framework for proof and its implications for legal claims at some length in a forthcoming book,<sup>8</sup> but a short summary will hopefully suffice for the present essay.

The proof of any proposition, in any discipline regarding any subject, requires attention to at least five elements. Without each and every one of those five elements, one cannot justify claims even in principle.

First, one must have some means for ascertaining what does and does not count towards a right answer. The law's formal structure for the proof of adjudicative facts in judicial proceedings labels the mechanism for determining what to look for in seeking right answers *principles of admissibility*, and that is an apt term for the more general idea even outside of that narrow legal context. Every inquiry, in any cognitive context, must have principles of admissibility that determine what counts as evidence for or against a claim. Those principles in some, and even most, contexts might well resemble an idea of free proof much more closely than they resemble the complex and exclusionary evidentiary norms of the American legal system, but they must exist in some form. Even "anything goes" is a principle of admissibility, albeit an

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<sup>8</sup> GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS (2017) (forthcoming).

unlikely and unhelpful one (because the universe is too vast and diverse to take in as a whole – cognition grinds to a halt unless it can narrow its focus in some fashion to some subset of all possible facts). In the context of interpretative theory, principles of admissibility tell you what counts for or against claims of meaning. A textual theory of interpretation will look to different things than will a normative theory, and theories that give different roles to different kinds of (real or hypothetical) intentions might well have principles of admissibility quite different from each other and even more different from the principles that a textualist or normative theory will involve. It is fair to say that a good percentage of the disputes about textual interpretation that take place in law and legal scholarship concern different conceptions of principles of admissibility.

Closely related to principles of admissibility are *principles of significance*. Those are norms that tell you *how much* to count whatever the principles of admissibility tell you to look for. These principles of significance do not have to be well defined. In the proof of adjudicative facts in the American legal system, they are not formally defined at all; the Federal Rules of Evidence, for example, recognize that there is something called “probative value,”<sup>9</sup> but they provide no mechanism for measuring it either cardinally or ordinally. The broad category “rationality” may be all that we have or need to describe these principles of weight or significance. Nonetheless, they must exist in some fashion or no process of cognition can take place. You have to know what kind of evidence to look for, and you have to know what to do with that evidence once you find it. In interpretative theory, many disputes are about significance; different theorists can agree, for example, that the subjective intentions of the text’s historically real maker are admissible for ascertaining the text’s meaning but disagree about the

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<sup>9</sup> FED. R. EVID. 403.



weight or significance to be afforded that evidence relative to other possible pieces of admissible (as determined by the particular interpretative theory's own norms) evidence of meaning.

Once you know what to look for and how to evaluate it once you find it, you need to know *how much* evidence is needed in order to justify a claim. Every act of judgment requires a *standard of proof* that tells you when a judgment is or is not warranted. That standard could range anywhere from “beyond a conceivable doubt” (as Rene Descartes illustrates) to “seems right to me” (something akin to a preponderance-of-the-evidence standard) to “well, it is not wildly implausible” (which is the implicit standard that legal scholars typically employ to evaluate their own work while applying something like the Cartesian standard to evaluate everyone else's), but there always must be some standard of proof behind any judgment. No claim to knowledge of any kind, in any discipline, can be evaluated without knowing the standard of proof that is appropriate to that kind of claim. This idea should be completely familiar to lawyers. Exactly the same evidence, weighted exactly the same way, can yield different verdicts in criminal and civil cases if the evidence supports a judgment by a preponderance of the evidence but does not support a judgment beyond a reasonable doubt. Standards of proof directly and profoundly affect the kinds of claims that one can justifiably make.

Once a claim is put forward, does one require evidence of some sort in order to accept it, or is the baseline position acceptance of the claim, so that affirmative evidence of some sort is required to reject it? It may seem like a strange question: Why should the bare existence of a claim presumptively warrant acceptance of it absent some affirmative reason to reject it? As it happens, it probably shouldn't; there are good epistemological reasons for asking for some

affirmative reason to believe claims before accepting them.<sup>10</sup> The point here is only that one needs to articulate and identify those epistemological reasons; there is nothing in the bare nature of a claim that forecloses a presumptive rule of acceptance. In a legal context: Does the assertion of a claim by a prosecutor operate against a cognitive baseline of guilt or absence of guilt? How about the assertion of a claim of legal meaning by an administrative agency? The answer depends on the operation of the legal system; one can readily imagine systems operating on either presumption. One can usefully call this feature of the proof process the *burden of proof*. The justifiability of claims may well depend on where that burden is placed, though the impact of a burden of proof depends quite heavily on the corresponding standard of proof. If a burden of proof must be overcome by evidence beyond a conceivable doubt, it is a significant burden indeed.

Finally, hovering over the entire process of proof is the question of the appropriate evidence set. All decisions are made in light of a specific body of evidence that has been assembled in accordance with principles of admissibility and significance. Is that evidence set sufficient to warrant a justified claim about textual meaning? Nobody can know or have access to every possible fact in the entire universe. It is always possible, in any inquiry, to look just a bit longer and more carefully for admissible evidence. At what point does one know enough about one's small portion of the universe to validate a judgment, given principles of admissibility, significance, standards of proof, and burdens of proof? Put another way, when does one stop looking and start deciding? When do you declare the evidence set closed? If the evidence set is still open, judgment will be premature – or at the very least tentative and/or

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<sup>10</sup> See Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 70 (1992).

heavily qualified. Norms about the proper evidence set vitally shape the kinds of claims that one can justifiably make.

If consideration of any of these elements is absent from a purported theory of interpretation, the theory is not actually a theory, in the sense that it cannot justify judgments about the text that is being interpreted. It does no good to have (1) principles of admissibility and (2) principles of significance that tell you what to look for and how much to weigh whatever you find if you do not also know (3) how much of that evidence is required in order to validate a judgment, (4) where the burden of inertia lies, and (5) when it is time to stop looking for more evidence and make a judgment. Similarly, having (3)-(5) does not help much without (1) and (2). All five elements are essential to any act of proof.

Justice Scalia's work on interpretation (and I believe that this is true of everyone who is toiling in the field today) largely focused on (1) and (2). Perhaps the most concise and informative statement of his methodology appears in *Reading Law*, his co-authored work with Bryan Garner, which identifies "What should you consider?"<sup>11</sup> (i.e., principles of admissibility) as one of the central questions of the book:

The interpretive approach we endorse is that of the "fair reading":  
determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research. It also requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the

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<sup>11</sup> SCALIA & GARNER, *supra* note 1, at 2.

purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting – that is, the words that surround it in a specific utterance.<sup>12</sup>

This brief but potent passage contains a substantial amount of information concerning Justice Scalia's<sup>13</sup> principles of admissibility for textual meaning. It tells us that evidence of how historically situated reasonable readers would understand a text is admissible, while evidence of one's own policy preferences is not. It tells us that evidence of textual purpose is admissible for ascertaining meaning, but only when that evidence stems from certain favored sources -- meaning that evidence from disfavored sources, such as legislative history, is not admissible. As Justice Scalia put it even more explicitly: "[T]he purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires."<sup>14</sup> While this statement of interpretative philosophy is too terse to be considered a full evidence code for the subject, it provides enough of a foundation to allow one to make fairly broad and confident judgments about how Justice Scalia would regard the admissibility of a wide range of offered items of evidence of textual meaning. Although the existence vel non of principles of admissibility is really much more of a continuum than an on-off switch, I am prepared to say that Justice Scalia has met the first criterion for a theory of interpretation. He has a workable and

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<sup>12</sup> *Id.* at 33.

<sup>13</sup> For ease of exposition, in the text I will henceforth omit references to Bryan Garner when discussing his joint work with Justice Scalia. Admittedly, that is like omitting references to Lennon or McCartney when discussing The Beatles, but see the first four words of this footnote.

<sup>14</sup> *Id.* at 56.

recognizable theory regarding what one should be looking for as evidence of right answers. I suspect that most of Justice Scalia's critics and competitors satisfy this criterion as well.

The distinction between principles of admissibility and principles of significance or weight is far from sharp. There is no functional difference between saying that something is inadmissible and saying that it is admissible but entitled to so little weight that it plays no serious role in decisions about right answers. But principles of significance still matter in any context – and I suspect that this is every context – in which one cannot say that every single piece of admissible evidence is interchangeable with every other piece. As long as one can meaningfully say that some pieces of evidence are stronger than others, one must be employing some kind of principles of significance when making evaluative judgments.

I have no doubt at all that Justice Scalia's account of textual interpretation includes some hierarchy of sources and thus contains some kind of principles of significance. It is not a problem for him that there is no real way specifically to identify that hierarchy – just as it is not a problem that the law of evidence cannot give more than vague instructions about rationality to decision-makers about how to evaluate evidence that the law deems admissible. “There is no precise algorithm available to explain to jurors, or for that matter to historians, anthropologists, or astrophysicists, how to connect evidence to organizing theories.”<sup>15</sup> Given Justice Scalia's declared object of interpretation – the historically situated public understanding of the reasonable reader – and what we know of his principles of admissibility, it is possible to gauge with some accuracy how he would at least ordinally rank many items of evidence of textual meaning that

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<sup>15</sup> Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 413 (1991). See also William Twining, *Rule-Scepticism and Fact-Scepticism in Bentham's Theory of Evidence*, in *FACTS IN LAW* 75 (William Twining ed., 1983) (“Wigmore, like Bentham, did not believe that questions of weight should generally be subject to formal regulation. It is fair to say that this view, subject to a few exceptions, is shared by all modern writers on evidence.”) (footnote omitted).

satisfy his principles of admissibility. That is enough to satisfy, as much as anything can satisfy, the second criterion for a genuine theory of interpretation.

Justice Scalia's articulated writings on interpretation thus allow one to determine for what to search when seeking textual meaning and, at least roughly, how to evaluate that evidence once one has it. That is an indispensable part of a theory of interpretation. It is a good start on a theory of interpretation. It is not, by itself, a theory of interpretation. A theory of interpretation needs at least three more elements.

According to Justice Scalia, how certain must one be of an interpretation before one can pronounce it correct? To my knowledge, none of his published works on interpretation addresses this question. That is not surprising. Almost no one in the law, in scholarship or otherwise, addresses the standard of proof for anything other than adjudicative facts. Indeed, the rather stunning absence of any such discussion regarding questions of law started me on a mission (some would say obsession) more than 25 years ago to highlight the indispensability of standards of proof to any discussion of interpretation, or of anything else that can be expressed in propositional form.<sup>16</sup> But if Justice Scalia is in good company in not addressing this topic, that company consists of people who also do not have genuine theories of interpretation.

The best clue to Justice Scalia's thought on this topic of which I am aware is his statement in *Young v. United Parcel Service*<sup>17</sup> that "our task is to choose the best possible

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<sup>16</sup> I raised this problem of standards of proof for interpretation in the very first article that I ever wrote, see Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U.L. REV. 21, 24-26 (1988), flagged it as a central question for interpretative theory shortly thereafter, see Gary S. Lawson, *An Interpretivist Agenda*, 15 HARV. J.L. & PUB. POL'Y 157, 159 (1992), explored it in depth in a subsequent article, see Gary Lawson, *Proving the Law*, 86 NW. U.L. REV. 859 (1992), and have recently expanded on the inquiry in book-length form. See LAWSON, *supra* note 8. The problem continues to be almost universally ignored, including by people who know better.

<sup>17</sup> 135 S.Ct. 1338 (2015).

reading of the law -- that is, what text and context most strongly suggest it conveys.”<sup>18</sup> There are numerous other cases in which Justice Scalia also invoked the idea of a “best” reading of a statute,<sup>19</sup> but those cases generally involved deference to an administrative agency under the *Chevron* doctrine,<sup>20</sup> in which the Court was determining only whether an interpretation of a statute was reasonable, not whether it was correct by any applicable standard.<sup>21</sup> The statement in *Young* appeared in a context that did not involve a substantive canon of interpretation that might skew the decisional process and thus may be as “pure” an articulation of Justice Scalia’s position as we are going to find. The context of the case, however, suggests caution in affording the statement much significance.

*Young* involved interpretation of the Pregnancy Discrimination Act, which added to Title VII a provision stating: “The terms ‘because of sex’ or ‘on the basis of sex’ [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”<sup>22</sup> According to Justice Scalia, there are two

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<sup>18</sup> *Id.* at 1366 (Scalia, J., dissenting).

<sup>19</sup> *See, e.g.*, *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 538 (2009); *Atlantic Mutual Ins. Co. v. CIR*, 523 U.S. 382, 389 (1998); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744-45 (1996);

<sup>20</sup> Many people might, at this point, expect to see a citation to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Nope. I won’t do it. What we know today as the *Chevron* doctrine owes very little to that decision, to the point that it is actually misleading to cite *Chevron* as support for it. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013).

<sup>21</sup> For another expression of a standard of proof in the context of a different substantive canon of construction, see *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013) (“If, but for Arizona’s interpretation of the ‘accept and use’ provision, the State would be precluded from obtaining information necessary for enforcement, we would have to determine whether Arizona’s interpretation, though plainly not the best reading, is at least a possible one . . . . Happily, we are spared that necessity, since the statute provides another means by which Arizona may obtain information needed for enforcement . . . . [N]o constitutional doubt is raised by giving the ‘accept and use’ provision of the NVRA its fairest reading”).

<sup>22</sup> 42 U.S.C. § 2000e(k) (2012).

possible interpretations of the key phrase “shall be treated the same . . . as other persons” in the context of pregnancy-related employment actions.

The most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability or inability *because of pregnancy*. Here, that means pregnant women are entitled to accommodations *on the same terms* as other workers with disabling conditions. If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been “treated the same” as everyone else . . . .

There is, however, another way to understand “treated the same,” at least looking at that phrase on its own. One could read it to mean that an employer may not distinguish *at all* between pregnant women and others of similar ability. Here, that would mean pregnant women are entitled, not to accommodations on the same terms as others, but to *the same accommodations* as others, no matter the differences (other than pregnancy) between them.<sup>23</sup>

The statement regarding the “best possible reading” of a statute thus was not made in connection with a self-conscious discussion of standards of proof in interpretation. (Indeed, to my knowledge, the Supreme Court has never engaged in a serious discussion of standards of proof in connection with textual interpretation.) Rather, Justice Scalia was objecting to the principles of admissibility and significance employed by the majority, which he saw as “craft[ing] a policy-driven compromise between the possible readings of the law, like a congressional conference

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<sup>23</sup> 135 S.Ct. at 1362 (Scalia, J., dissenting).



committee reconciling House and Senate versions of a bill.”<sup>24</sup> Nonetheless, his statement about the “best possible reading” contains an implicit standard of proof for claims of statutory meaning if one tries to universalize it to interpretation in general.

Apart from the difficulty of inferring that this cryptic comment represents Justice Scalia’s universally applicable view of standards of proof in textual interpretation, there are two problems that prevent this implicit standard from filling in that requisite element for Justice Scalia in a theory of interpretation.

First, it is unclear what Justice Scalia meant by “the best possible reading” of a text. Does it mean something resembling a “preponderance of the evidence” notion, so that one must think an interpretation is more likely than not correct (where “correct” is a function of the interpretative theory’s own norms of admissibility and significance) in order to pronounce it correct? Perhaps that is what Justice Scalia meant. But the context in which he made this statement involved a dispute concerning, by his lights, two competing understandings of the meaning of a statute. If the choice is truly binary, then the “best” reading of the statute will of necessity be more likely than not correct. Not all choices of textual meaning, however, are binary. Indeed, Justice Scalia said of the majority opinion in *Young*: “Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither.”<sup>25</sup> That means in *Young* there were at least three offered interpretations of the statute on the table. To be sure, Justice Scalia would place the majority’s offering deep at the bottom of the heap because it rests on what Justice Scalia would regard as inadmissible evidence of statutory purpose, but it is part of the heap. And one can surely think of additional candidates for the meaning of the text –

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1361.

especially if one is not constrained by the text's public meaning to the degree that Justice Scalia considers himself constrained. Once one recognizes the possibility of multiple competing interpretations of a text, the idea of the "best possible reading" becomes both ambiguous and problematic. Suppose that there are five competing interpretations of a text. Suppose further (though I do not think that this is really possible, but it is helpful as a thought experiment for illustrative purposes) that one can assign cardinal probabilities to each interpretation and that those probabilities are 24 percent for one interpretation, 23 percent for a second, 22 percent for a third, 21 percent for a fourth, and 10 percent for the fifth. Is the first interpretation correct because it is the "best" interpretation? Even though the chances are better than three in four that it is actually wrong by the theory's own criteria? Does an interpretation have to meet some absolute threshold of reliability, apart from its relative plausibility compared to multiple competing alternatives, in order to be correct? Anyone who proposes a "best possible reading" standard of proof has to address precisely what they mean by that standard in any setting in which there is not a stark binary choice. Without that specification, the idea of a best possible reading cannot serve as a standard of proof for a theory of interpretation. And if the standard of proof is the weak, purely comparative form of a "best possible reading," is it really plausible to declare to be "correct" answers that one is very confident are wrong? With a bit of tweaking and the addition of many alternative interpretations, the absolute level of confidence that one can have in the "best" option in a relative sense can be so low that it makes little sense to call that option "correct." And if there is an absolute standard of proof instead that any correct interpretation must clear, one must specify that absolute standard. One could try to default to something like a preponderance-of-the-evidence standard, but one would have to justify that default.

All of the foregoing work certainly can be done, and indeed all of it must be done in order for a fully developed interpretative theory to exist. My point is only that Justice Scalia never filled in this part of his methodology. Without it, he did not really have a theory of interpretation.

There is an even more basic reason why it would be hasty to treat Justice Scalia as adopting a “best possible reading” standard of proof for interpretation: It is far from clear that Justice Scalia in *Young* was talking about textual interpretation at all. He was talking about how to decide a case. I will say more about this fundamental distinction in Part II.

What about burdens of proof? Did Justice Scalia articulate a position regarding the default viewpoint for claims of textual meaning? I am not aware of any such articulation, but I have no reason to think that Justice Scalia would adopt anything other than the epistemologically sensible view that existence-affirming propositions require positive evidence in order to warrant acceptance. It is not difficult to slot such a view into his approach to satisfy that formal element of an interpretative theory, thereby giving Justice Scalia three out of four so far. While that might be even better than Meatloaf and Jim Steinman could muster, a theory of interpretation, in order to be a theory of interpretation, must go five for five.

That leaves the construction of the evidence set as the remaining element of a fully functional interpretative theory. How does one know when one has looked enough for evidence of interpretative meaning, however that evidence is defined by the relevant principles of admissibility and significance, to justify making a judgment in light of the specified standard and burden of proof? To my knowledge, Justice Scalia never addressed this question in the context of interpretation, though he showed an acute awareness of the problem in the context of

adjudication.<sup>26</sup> That is not surprising. I am not aware of any significant discussion by anyone, in any context, that specifically deals with the construction of an evidence set for textual interpretation. I have certainly never spelled out any norms for such an enterprise. Without such norms, however, one cannot have a theory of interpretation. One can have a framework for a theory of interpretation, or a really good start towards a theory of interpretation, but one cannot actually have a theory of interpretation. All five elements – principles of admissibility, principles of significance, standards of proof, burdens of proof, and principles of closure (as one might call the principles for fixing the evidence set) – are essential to the formulation of anything that can be called a right answer to any inquiry.

Perhaps, however, one can construct a set of principles of closure from some of Justice Scalia's remarks. In 1983, while a court of appeals judge, Justice Scalia wrote that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."<sup>27</sup> This suggests a mechanism for constructing evidence sets: Let the parties to a case construct whatever evidence sets they like and then decide based on those evidence sets. Of course, Justice Scalia did not universally endorse a fully party-centric view of the process of constructing an evidence set. Elsewhere he said: "I must acknowledge that the basis for reversing the Court of Appeals on which I rely has not been argued by the United States, here or below. The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one. Even so, there must be enough play in

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<sup>26</sup> See Scalia, *Originalism: The Lesser Evil*, *supra* note 2, at 860-61.

<sup>27</sup> *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983).

the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it -- particularly when the judgment will reinforce error already prevalent in the system.”<sup>28</sup> So his party-centric view was presumptive only. For present purposes, the relevant question is whether this party-centric approach at least allows us to credit Justice Scalia with the fifth element of a theory of interpretation.

The answer is a clear and resounding “no.” Then-Judge Scalia in this passage was not putting forth a method for constructing evidence sets in interpretation. He was putting forth a method for constructing evidence sets in *adjudication*, which is a completely different matter. This fundamental, and too-often ignored, distinction between theories of interpretation and theories of adjudication is our next topic.

## II. *Next Phase, New Wave, Dance Craze, Anyways, It’s Still Adjudication to Me*

When courts decide cases in which parties are arguing about the meaning of statutes, constitutions, or other texts, do courts engage in textual interpretation? Do they do anything else?

The answers are “sometimes” and “always,” respectively. Adjudication – the determination of disputes – sometimes involves statutory or constitutional interpretation as one of its component parts, but it always involves, to one degree or another, cognitive endeavors that are quite different from textual interpretation. It is misleading at best to speak of the activities

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<sup>28</sup> *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment) (citations omitted).

engaged in by courts, and by scholars who are prescribing outcomes for courts or other official bodies, as textual interpretation.

This observation goes far beyond the obvious fact that courts often self-consciously place other values above what they describe as their interpretation of relevant texts, such as when courts invoke precedent. As Justice Scalia put it, “[s]tare decisis . . . is not a part of textualism. It is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity.”<sup>29</sup> I am saying instead that when courts (and scholars trying to influence courts) speak of the meaning of the relevant texts, they are not generally referring to meaning derived from interpretation. They are referring to a very different kind of meaning, which we might call “adjudicative meaning,” which is a meaning – which the judges themselves might well recognize as interpretatively false -- postulated for the purposes of deciding a case.

Interpretation is a positive, descriptive enterprise that involves the ascription of meaning to a text. Even when the underlying theory of interpretation contains normative elements, such as a theory (however implausible it may be as a theory of interpretation) that says that statutes or constitutions mean whatever a good moral theory says that they should mean, claims about the meaning of texts grounded in those theories are positive, descriptive claims about meaning. What kinds of materials and arguments one needs to *prove* those claims is a quite different question from the characterization of the claims themselves, and it is important to keep those ideas distinct. It is a purely factual question, for example, whether a particular interpretation of a text maps onto a particular moral theory, if for some reason one considers that correspondence relevant for ascertaining interpretative meaning.

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<sup>29</sup> SCALIA & GARNER, *supra* note 1, at 413-14.

Adjudication, by contrast, is a normative enterprise. Assuming that there is some actual stake to the process, the adjudicator is deciding what behaviors will be permitted and how resources will be allocated, with the decision backed up by officially sanctioned force if necessary. Adjudication is about deciding what one should do and what one thinks other people, including people with guns and badges, should do. Because adjudicative decisions are always normative, they can only be defended through normative arguments. All questions about what judges, enforcement agents, legislators, citizens, non-citizen aliens, etc. should do are questions of moral and political theory. Accordingly, they are outside the bounds of interpretative theory – and I would say outside the bounds of legal theory altogether, though that last view rests on the empirical, and I suppose contestable, premise that legal theorists are very unlikely to have anything intellectually interesting to say about moral and political theory.

Interpretation of texts may or may not have much to do with adjudication. Descriptively, it is an empirical question how much of a role interpretative conclusions play in adjudicative decisions. Normatively, it is a question of moral and political theory, not interpretative theory, how much of a role they *should* play. Interpretative theory can tell you what a text means. It cannot tell you what, if anything, to do with that meaning once you have it or whether obtaining that meaning is a worthwhile enterprise given the opportunity costs. It is certainly possible to have a normative theory of adjudication that says to decide all matters in accordance with interpretatively derived meanings. One would have to come to such a theory through application of moral and political theory; it cannot be reached through the interpretative theory itself. As it happens, no one, including Justice Scalia, actually has such a normative theory of adjudication that relies exclusively on interpretatively derived meaning. Everyone, including Justice Scalia,

balances off interpretative truth , as determined by each person’s own methods of interpretation, against other adjudicative goals, such as finality, certainty, consistency, legitimacy, and so forth.

In the pages of this law journal, Steve Calabresi and I have demonstrated that Justice Scalia consistently traded off a substantial measure of interpretative truth – and by this I mean interpretative truth that Justice Scalia would likely have regarded as truth – for other values, such as constraining judges by deciding cases in accordance with relatively clear rules.<sup>30</sup> Over a non-trivial range of cases, Justice Scalia preferred false but rule-like answers over true but standard-like ones. And he did not cast this activity as an exception to textualism, as he did with precedent, but as part of the application of that textualist methodology in the specific context of adjudication. What Justice Scalia called his theory of interpretation was chock-full of non-interpretative policy choices.

Every theory of adjudication contains some such set of tradeoffs between interpretative truth and other values. How many resources does one devote to ascertaining interpretative truth, as that truth is defined by one’s own interpretative methods? If the answer is less than infinite, one is almost certainly trading off some measure of interpretative truth for some other value. No sane person deciding cases in the real world pursues interpretative truth without regard to costs. “Anyone who says that there is no price tag on justice understands neither price tags nor justice.”<sup>31</sup>

To be sure, as I noted above, it is theoretically possible to have a normative theory of adjudication that says to decide all cases in strict accordance with the meaning of a particular

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<sup>30</sup> See Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014).

<sup>31</sup> Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 446 (2014).



text, as that textual meaning is ascertained through descriptive interpretative theory. It is just that such a theory is entirely impracticable in the real world, for several reasons. One is the already-mentioned problem of costs. In the real world, decisions take place in limited spans of time. One simply does not have the luxury of spending as much time and money as one would like figuring out the right interpretative answer. That is as true, with differences of degree only, for ivory-tower scholars as it is for Supreme Court justices who need to complete their opinions by July 1. A scholar who keeps researching rather than publishing will lose both income and reputation; for good or ill, published wrong answers are more highly valued, by deans and colleagues alike, than inchoate, unpublished, still-developing right ones. People seeking interpretative answers need short-cuts that allow decisions to be made in the face of uncertainty caused by incomplete evidence sets, lack of clarity about the application of principles of admissibility and significance, and the like.

A second, equally important problem with basing adjudication strictly on interpretative truth is the ability of real-world actors to apply interpretative theories correctly. Interpretative theories yield interpretative truth, as defined by their own internal norms, if, but only if, they are applied correctly. But what if one can reliably predict that real-world adjudicators are going to misapply those theories over some range of cases – and possibly over quite a large range? Could it be “better,” by the lights of one’s own interpretative theory, to instruct those fallible decisionmakers to apply some other method that imperfectly proxies your favored interpretative theory? In other words, could it be the case that you will better pursue interpretative truth, as you understand it, by deliberately fostering error in the search for it?

There is no general answer to this last set of questions, because it implicates problems of second-best that are quite possibly intractable.<sup>32</sup> One would also need a thorough account of error, as different kinds of errors might result from different methodological approaches, and not all errors are necessarily created equal. It is enough for now simply to note the questions, as they show that there is not necessarily a straight line from theories of interpretation to theories of adjudication, even when one's normative theory of adjudication tries to draw one. It is not self-evident that one will prescribe one's favored theory of interpretation as a theory of adjudication. Formulating those different theories requires different cognitive processes, disciplines, and bodies of information.

The relationship between interpretation and adjudication, even as an ideal matter, is decidedly contingent. One could well believe, for example, that some species of originalism is the correct way to ascertain the meaning of the United States Constitution but believe, on normative grounds, that courts should instead decide cases in accordance with the political platform of the liberal wing of the Democrat Party because one thinks that it will yield morally better results. Similarly, one could believe that originalism is a terrible way to ascertain constitutional meaning but a wonderful way for courts to decide cases because it places just the right constraints on fallible decisionmakers and thus yields morally better results.<sup>33</sup> The same is true of statutory interpretation: How one thinks meaning is best ascertained does not lead inexorably to a view of how courts should decide cases. There are a great many intermediate

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<sup>32</sup> For a brief exploration of second-best problems in the context of legal theory, see LAWSON, *supra* note 8, at Ch. 5.

<sup>33</sup> See Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of legal Theory*, 64 FLA. L. REV. 1551, 1555-56 (2012).

steps between those two conclusions. It would actually be close to miraculous if they connected up precisely.

Virtually all of Justice Scalia's writings have been directed towards articulating a theory of adjudication, not a theory of interpretation. He was instructing judges, and indirectly lawyers, about how to decide cases. Accordingly, his instructions on how to construe texts were not really designed to interpret those texts, in the sense of finding their meaning as accurately as possible, but were instead designed to provide instructions on how to decide cases. A quick look at his theory of adjudication makes this very clear.

Jack Balkin has written that that “[c]oncerns about legitimacy underwrite theories of constitutional interpretation . . . [and] we argue for or against different theories of constitutional interpretation in terms of their effects on legitimacy.”<sup>34</sup> That is an accurate description of, at the very least, a good portion of both academic and judicial writings on constitutional law.

“Legitimacy” might or might not be related to interpretative truth, depending on what one means by “legitimacy,” but it is at least conceivable that a focus on legitimacy necessitates some non-trivial trade-off of interpretative truth in order to reach the goal of legitimation. On this broad point about the role of legitimacy in constitutional law, Justice Scalia was entirely aligned with Professor Balkin. Justice Scalia wrote in 1989: “I take the need for theoretical legitimacy seriously, and even if one assumes . . . that the Constitution was originally meant to expound evolving rather than permanent values, . . . I see no basis for believing that supervision of the evolution would have been committed to the courts.”<sup>35</sup> In other words, courts should be pursuing legitimacy rather than interpretative truth. To be sure, Justice Scalia believed that his

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<sup>34</sup> JACK M. BALKIN, *LIVING ORIGINALISM* 64 (2011).

<sup>35</sup> Scalia, *The Rule of Law as a Law of Rules*, *supra* note 2, at 862.

legitimizing originalist method also reasonably approximated interpretative truth across a broad range of cases; I doubt whether he would have advocated a legitimizing theory that was utterly unremoved from what he regarded as correct interpretation. But he was quite prepared to trade some measure of interpretative truth for some measure of legitimacy in at least some contexts. This accounts for his strong adjudicative preference for rule-based decisions, even when truth-seeking interpretation leads one to relatively mushy and difficult-to-apply standards.<sup>36</sup> Indeed, Justice Scalia's whole defense of originalism as a method of interpretation appears to have been grounded more in a consequentialist account of judicial role than in the kind of theory of concepts and communication that would be necessary in order to validate an interpretative theory committed to ascertaining meaning.<sup>37</sup>

We can now see how Justice Scalia has a near-fully developed account of adjudication that does not translate directly, or even easily, into a theory of interpretation. Justice Scalia, we have noted, identified principles of admissibility and significance for statutory and constitutional meaning, reflected in his notion of a "fair reading" of the relevant text. The bulk of *Reading Law* consists of a series of rules for reaching fair readings. At least some of the most important of those rules are geared *to the decision of legal cases* rather than *to the ascertainment of communicative meaning*. Sometimes this gap is openly acknowledged, as when Justice Scalia recognizes that "[m]any established principles of interpretation are less plausibly based on a reasonable assessment of meaning than on grounds of policy adopted by the courts."<sup>38</sup> Sometimes the gap is subtler and is found only in the explanations given for various

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<sup>36</sup> See Calabresi & Lawson, *supra* note 27.

<sup>37</sup> See, e.g., SCALIA & GARNER, *supra* note 1, at 25-25, 402.

<sup>38</sup> *Id.* at 30.

interpretative principles. For example, when defending original meaning against so-called “dynamic” modes of interpretation,<sup>39</sup> it would be sufficient as a matter of ascertainment of meaning to point out that communicative meaning comes from the communicator and that it therefore presumptively must be original meaning, although subject always to the possibility that the communicator intended for meaning to be ascertained in a dynamic fashion, so that fixed-meaning originalism as a theoretical matter could lead to dynamic interpretation as an operational matter.<sup>40</sup> There is a brief nod to this kind of argument in *Reading Law*,<sup>41</sup> but it is incomplete (because it does not contain the acknowledgment that original meaning might itself sometimes call for dynamic interpretation), and it is followed by a much longer, and obviously more important to Justice Scalia, discussion of the democratic role of judges and legislators, which leads to a categorical rejection of dynamic interpretation on adjudicatory-based consequentialist grounds.<sup>42</sup> Justice Scalia’s apparent principles of admissibility and significance for interpretation are really principles of admissibility and significance for adjudication. The two sets of principles are not necessarily the same, as they are not aimed at the same ends. How one ascertains meaning and how one prescribes decision-making methodologies for courts are two distinct enterprises.

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<sup>39</sup> See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

<sup>40</sup> Similarly, all meaning must ultimately be grounded in the intentions of a communicator, but oftentimes the communicator’s intention is to set forth utterances that will be interpreted in accordance with some kind of public meaning. Intentionalism can lead, operationally, to a theory of public meaning. This is actually the correct account of constitutional and statutory interpretation, but that is a topic for another time. See Lawson, *supra* note --.

<sup>41</sup> See SCALIA & GARNER, *supra* note 1, at 82.

<sup>42</sup> See *id.* at 82-84.

Justice Scalia also has a fairly extensive set of burden-of-proof rules to recommend to legal decisionmakers, ranging from the rule of lenity<sup>43</sup> to the constitutional avoidance doctrine.<sup>44</sup> Here it is quite clear that these are norms of adjudication, not attempts to discern actual communicative meaning. They are grounded in adjudicative policies and a normative conception of the role of courts in the American legal system, not on a theory of concepts and communication as would be required for a theory of communicative meaning.

With respect to the construction of an evidence set, we can now return to Justice Scalia's judicial writings on the subject, which were noted earlier.<sup>45</sup> In adjudication, Justice Scalia generally, but not universally, regards the evidence set as the materials provided by the parties, supplemented at unspecified times by the independent research of the judge. That is perhaps not the clearest or most elegant method for constructing evidence sets for statutory or constitutional cases, but it is a method. It is also tailored uniquely to the adjudicative context. It is grounded, first of all, in a conception of adjudication that is party-centered rather than inquisitorial. Second, it is obviously designed to facilitate timely and efficient disposition of cases rather than to ascertain communicative truth. Third, it is not a method that can be prescribed universally for truth-seeking, because there will not always be parties available to provide materials (imagine an ivory-tower academic trying to figure out the communicative meaning of a statute), and even when there are such parties, there is no reason to think that they are likely to provide an optimal evidence set. Thus, while Justice Scalia had a method for closing evidence sets in adjudication, he never really addressed the problem of closing evidence sets in interpretation more generally.

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<sup>43</sup> *See id.* at 296-302.

<sup>44</sup> *See id.* at 247-52.

<sup>45</sup> *See supra* --.

Thus, much of Justice Scalia’s theory of “interpretation” is not really a theory of interpretation, understanding interpretation as the process of discerning the communicative content of a text. It is a theory about how to decide cases in the context of a specific legal system oriented around specific and contingent assumptions about the nature of dispute resolution. Certainly that is true of much of his account of burdens of proof and the construction of evidence sets, and it is true to a significant degree of his account of principles of admissibility and significance.

None of this, I think, would have been at all surprising to Justice Scalia. After all, the working definition of interpretation in *Reading Law*, drawn from a 1900 legal encyclopedia, is “the ascertainment of the thought or meaning of the author of, or the parties to, *a legal document*, as expressed therein, according to the rules of language *and subject to the rules of law.*”<sup>46</sup> Justice Scalia was not really trying to set forth a methodology for interpreting texts, or even for ascertaining the meaning of distinctively legal texts. He was setting forth a methodology for resolving legal disputes in which texts are invoked by one or the other party. Meaning plays a role in that methodology, but the role is far from exclusive, and it is often decidedly secondary. To describe the operations involving texts in that adjudicative enterprise as “interpretation” invites the fallacy of equivocation. One can certainly use the word “interpretation” to mean those operations, just as one can use the word “interpretation” to mean any operation that one likes, from the normative prescription of courses of action to the reading of cattle entrails. But one must then avoid switching meanings, or connotation, of the term “interpretation” in mid-argument. “Interpretation” for purposes of deciding cases is not necessarily “interpretation” for

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<sup>46</sup> H.T. Tiffany, *Interpretation and Construction*, in 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1, 2 (David S. Garland & Lucius P. McGehee eds. 2d ed., 1900) (emphasis added) (quoted in SCALIA & GARNER, *supra* note 1, at 53).

ascertaining the meaning of texts, and one must be careful to keep those quite different understandings of “interpretation” distinct.<sup>47</sup>

Does that mean that Justice Scalia has a fully articulated theory of adjudication, even if he does not have a fully articulated theory of textual interpretation? Not quite. The one element that is not really ascertainable in Justice Scalia’s adjudicative theory is the standard of proof. How clear does meaning have to be in order to justify a decision in favor of one or the other party? I am aware of no general answer to that question in Justice Scalia’s writings, even in the adjudicative context, just as I am aware of no general answer to that question in the writings of any prominent jurist or scholar. The American legal system (and the same seems to be true of other legal systems as well, from what I can glean) has never squarely faced the problem of identifying a standard of proof for questions of law or for questions of meaning more generally. But that is a story for another time.

The moral of the story is simply one of clarification: When one speaks of Justice Scalia’s theory of interpretation, one is probably speaking of his theory of adjudication instead. Neither theory was actually a complete theory, though the adjudicative model needs only a specification of a standard of proof for completeness. More generally, when one argues about interpretation in a legal context, there is always the question whether one is arguing about interpretation (meaning) or adjudication (normative theory). And if one is arguing about interpretation (meaning), there is always the question whether one is arguing about admissibility, significance, standards of proof, burdens of proof, or evidence sets (or any or all of the above). Justice Scalia

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<sup>47</sup> Or, at least, one must be careful to keep them distinct if one wants to promote clear thinking. If one’s goal is instead to sow confusion, make the weaker argument defeat the stronger, or dupe people into handing over their wealth, equivocation may be a very attractive course of action.



contributed enormously to clear thinking about most of these topics, even if the answer to the question at the beginning of this article ultimately proves to be “no.”