The Incoherence of Antonin Scalia

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Judges like to say that all they do when they interpret a constitutional or statutory provision is apply, to the facts of the particular case, law that has been given to them. They do not make law: that is the job of legislators, and for the authors and ratifiers of constitutions. They are not Apollo; they are his oracle. They are passive interpreters. Their role is semantic.

The passive view of the judicial role is aggressively defended in a new book by Justice Antonin Scalia and the legal lexicographer Bryan Garner (*Reading Law: The Interpretation of Legal Texts*, 2012). They advocate what is best described as textual originalism, because they want judges to "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extra-textually derived purposes and the desirability of the fair reading's anticipated consequences." This austere interpretive method leads to a heavy emphasis on dictionary meanings, in disregard of a wise warning issued by Judge Frank Easterbrook, who though himself a self-declared textualist advises that "the choice among meanings [of words in statutes] must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."

Scalia and Garner reject (before they later accept) Easterbrook's warning. Does an ordinance that says that "no person may bring a vehicle into the park" apply to an ambulance that enters the park to save a person's life? For Scalia and Garner, the answer is yes. After all, an ambulance is a vehicle—any dictionary will tell you that. If the authors of the ordinance wanted to make an exception for ambulances, they should have said so. And perverse results are a small price to pay for the objectivity that textual originalism offers (new dictionaries for new texts, old dictionaries for old ones). But Scalia and Garner later retreat in the ambulance case, and their retreat is consistent with a pattern of equivocation exhibited throughout their book.

One senses a certain defensiveness in Justice Scalia's advocacy of a textualism so rigid as to make the ambulance driver a lawbreaker. He is one of the most politically conservative Supreme Court justices of the modern era and the intellectual leader of the conservative justices on the Supreme Court. Yet the book claims that his judicial votes are generated by an "objective" interpretive methodology, and that, since it is objective, ideology plays no role. It is true, as Scalia and Garner say, that statutory text is not inherently liberal or inherently conservative; it can be either, depending on who wrote it. Their premise is correct, but their conclusion does not follow: text as such may be politically neutral, but textualism is conservative.

A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but is not a good fit with its text. Ignoring the limitations of foresight, and also the fact that a statute is a collective product that often leaves many questions of interpretation to be answered

by the courts because the legislators cannot agree on the answers, the textual originalist demands that the legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. In this way, textualism hobbles legislation—and thereby tilts toward "small government" and away from "big government," which in modern America is a conservative preference.

So, in a preemptive defense against accusations that textual originalism is political, the book gives examples of liberal decisions that Scalia has written or joined, and there are indeed a number of them (not much of a surprise, though, since he must have voted in at least two thousand cases as a justice of the Supreme Court). In *United States* v. *Eichman*, for example, he voted to hold a federal statute forbidding the burning of the American flag unconstitutional, and it was certainly a vote against his ideological grain. But it is a curious example for a textual originalist to give. The relevant constitutional provision—"Congress shall make no law abridging … the freedom of speech"—does not mention non-verbal forms of political protest, and Scalia and Garner insist that legal terms be given their original meaning lest the intent of the legislators or the constitution-makers be subverted by unforeseen linguistic changes. "In their full context," they assert, "words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations." That approach is inconsistent with interpreting "freedom of speech" to include freedom to burn flags, since the eighteenth-century concept of freedom of speech was much narrower than the modern concept, and burning cloth is not a modern technological innovation. According to William Blackstone, whom Scalia and Garner treat as an authority on American law at the time of the Constitution, freedom of speech forbids censorship in the sense of prohibiting speech in advance, but does not prohibit punishment after the fact of speech determined by a jury to be blasphemous, obscene, or seditious. And so an understanding of free speech that embraces flag burning is exceedingly unoriginalist. It is the product of freewheeling Supreme Court decisions within the last century.

The decisive objection to the quest for original meaning, even when the quest is conducted in good faith, is that judicial historiography rarely dispels ambiguity. Judges are not competent historians. Even real historiography is frequently indeterminate, as real historians acknowledge. To put to a judge a question that he

cannot answer is to evoke "motivated thinking," the form of cognitive delusion that consists of credulously accepting the evidence that supports a preconception and of peremptorily rejecting the evidence that contradicts it.

Scalia is a pertinacious critic of the use of legislative history to illuminate statutory meaning; and one reason for his criticism is that a legislature is a hydra-headed body whose members may not share a common view of the interpretive issues likely to be engendered by a statute that they are considering enacting. But when he looks for the original meaning of eighteenth-century constitutional provisions—as he did in his opinion in *District of Columbia* v. *Heller*, holding that an ordinance forbidding people to own handguns even for the defense of their homes violated the Second Amendment—Scalia is doing legislative history.

Judge J. Harvie Wilkinson III has argued that because the historical analysis in *Heller* is (from the standpoint of advocates of a constitutional right to own handguns for personal self-defense) at best inconclusive, judicial self-restraint dictated that the District of Columbia's ordinance not be invalidated. His argument derives new support from a surprising source: Judge Easterbrook's foreword to Scalia and Garner's book. The foreword lauds the book to the skies, but toward the end it strikes the following subversive note: "Words don't have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text's adoption under-stood those words. The older the text, the more distant that interpretive community from our own. At some point the difference becomes so great that the meaning is no longer recoverable reliably." When that happens, Easterbrook continues, the courts should "declare that meaning has been lost, so that the living political community must choose." The "living political community" in *Heller* consisted of the elected officials, and the electorate, of the District of Columbia.

Easterbrook goes on: "When the original meaning is lost in the passage of time…the justification for judges' having the last word evaporates." This is a version of the doctrine of judicial self-restraint, which Scalia and Garner endorse by saying that a statute's unconstitutionality must be "clearly shown"—which it was not in *Heller*. Justice Scalia's interpretation of the Second Amendment probably is erroneous, but one who doubts this should conclude that the relevant meaning of the amendment had been "lost in the passage of time," and so the Court should have let the District of Columbia's gun ordinance stand.

Heller probably is the best-known and the most heavily criticized of Justice Scalia's opinions. *Reading Law* is Scalia's response to the criticism. It is unconvincing.

SCALIA AND GARNER contend that textual originalism was the dominant American method of judicial interpretation until the middle of the twentieth century. The only evidence they provide, however, consists of quotations from judges and jurists, such as William Blackstone, John Marshall, and Oliver Wendell Holmes, who wrote before 1950. Yet none of those illuminati, while respectful of statutory and constitutional text, as any responsible lawyer would be, was a textual originalist. All were, famously, "loose constructionists."

Scalia and Garner call Blackstone "a thoroughgoing originalist." They say that "Blackstone made it very clear that original meaning governed." Yet they quote in support the famous statement in his *Commentaries on the Laws of England* that "the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law made, by *signs* the most natural and probable. And these *signs* are either the words, the context, *the subject matter, the effects and consequence, or the spirit and reason of the law*" (emphasis mine, except that the first "signs" is emphasized in the original). Blackstone adds that "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it."

It is possible to glean from judges who actually are loose constructionists the occasional paean to textualism, but it is naïve to think that judges believe everything they say, especially when speaking *ex cathedra* (that is, in their judicial opinions). Judges tend to deny the creative—the legislative—dimension of judging, important as it is in our system, because they do not want to give the impression that they are competing with legislators, or engaged in anything but the politically unthreatening activity of objective, literal-minded interpretation, using arcane tools of legal analysis. The fact that loose constructionists sometimes publicly endorse textualism is evidence only that judges are, for strategic reasons, often not candid.

It is a singular embarrassment for textual originalists that the most esteemed judicial opinion in American history, *Brown* v. *Board of Education*, is nonoriginalist. In 1868, when the Fourteenth Amendment was ratified, the provision that states not deny to any person the "equal protection of the laws" meant that states—the former states of the Confederacy being the particular concern, of course—must not deny legal protection to the newly freed slaves (and to blacks more generally). In particular, states could not, without facing legal consequences, turn a blind eye to the Ku Klux Klan's campaign of intimidation of blacks and carpetbaggers. Had the provision been thought, in 1868, to forbid racial segregation of public schools, it would not have been ratified. Yet Scalia and Garner claim that "recent research persuasively establishes that [the ruling in *Brown* that separate but equal is not equal] was the original understanding of the post-Civil War Amendments," citing for this proposition a single law review article published seventeen years ago. They do not mention the powerful criticism of that article by Michael Klarman, a leading legal historian—which the author of the article they cite, Michael McConnell, is not, although he is a distinguished constitutional law professor and a former federal judge. And, ironically, McConnell based his analysis on the legislative history of the Fourteenth Amendment, which should be anathema to Scalia.

Similarly, the book's defense of the *Heller* decision fails to mention that most professional historians reject the historical analysis in Scalia's opinion. *Reading Law* quotes approvingly Joseph Story's analysis of preambles—"the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute"—but fails to apply the analysis to the preamble of the Second Amendment, which reads: "A well regulated Militia being necessary to the security of a free State." The preamble implies that the Second Amendment (which creates a right "to keep and bear arms") is not about personal self-defense, but about forbidding the federal government to disarm state militias. Contra Story, Justice Scalia treated the preamble dismissively in his opinion in *Heller*.

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OMITTING CONTRARY evidence turns out to be Scalia and Garner's favorite rhetorical device. Repeatedly they cite cases (both state and federal) as exemplars

either of textual originalism or of a disreputable rejection of it, while ignoring critical passages that show the judges neither ignoring text nor tethered to textual originalism. Thus they applaud *White City Shopping Center, LP* v. *PR Restaurants, LLC*, a decision that held that the word "sandwiches" in a lease did not include burritos, tacos, or quesadillas, because Merriam-Webster's dictionary defines "sandwich" as "two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them." Scalia and Garner stop there, as if that dictionary reference were the court's entire decision, thus confirming the use of the dictionary as a guide to the meaning of legal documents. But the court had not stopped with the dictionary.

A company called PR had leased space to operate a sandwich shop in a shopping center. Its lease forbade the shopping center to lease space to another store if more than ten percent of the new store's sales would be of sandwiches. PR claimed that the shopping center violated the lease when it leased space to a Mexican-style restaurant that planned to sell burritos, tacos, and quesadillas. After noting Merriam-Webster's definition of sandwich, the court made a series of points in support of its decision against PR that were unrelated to dictionary definitions: "PR has not proffered any evidence that the parties intended the term 'sandwiches' to include burritos, tacos, and quesadillas. As the drafter of the exclusivity clause, PR did not include a definition of 'sandwiches' in the lease nor communicate clearly to White City during lease negotiations that it intended to treat burritos, tacos, quesadillas, and sandwiches the same. [PR] was aware that Mexican-style restaurants near the Shopping Center existed which sold burritos, tacos, and quesadillas prior to the execution of the Lease yet, PR made no attempt to define, discuss, and clarify the parties' understanding of the term 'sandwiches.'"

Those are more persuasive points than the dictionary's definition, and as is often the case, the court got the definition wrong. (Scalia and Garner miss this, too.) A sandwich does not have to have two slices of bread; it can have more than two (a club sandwich) and it can have just one (an open-faced sandwich). The slices of bread do not have to be thin, and the layer between them does not have to be thin either. The slices do not have to be slices of bread: a hamburger is regarded as a sandwich, and also a hot dog—and some people regard tacos and burritos as sandwiches, and a quesadilla is even more sandwich-like. Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless.

Yet in further obeisance to the dictionary Scalia and Garner commend a court for having ordered the acquittal of a person who had fired a gun inside a building and been charged with the crime of shooting "from any location into any occupied structure." They say that the court correctly decided the case (*Commonwealth* v. *McCoy*) on the basis of the dictionary definition of "into." They misread the court's opinion. The opinion calls the entire expression "from any location into any occupied structure" ambiguous: while "into" implies that the shooter was outside, "from any location" implies that he could be anywhere, and therefore inside. The court went on to decide the case on other grounds.

Scalia and Garner ridicule a decision by the Supreme Court of Kansas (*State ex rel. Miller* v. *Claiborne*)that held that cockfighting did not violate the state's law against cruelty to animals. They say that the court, in defiance of the dictionary, "perversely held that roosters are not 'animals.'" When I read this, I found it hard to believe that a court would hold that roosters are not animals, so I looked up the case. I discovered that the court had not held that roosters are not animals. It was then that I started reading the other cases cited by Scalia and Garner.

In fact, the court said that "biologically speaking a fowl is an animal," but that it was not in the class of animals protected by the statute. The court gave a number of reasons for this conclusion—all ignored by Scalia and Garner. One, which was in fact textual originalist, was that "persons of common intelligence" conceived of chickens as birds in contradistinction to animals. But the most cogent reason for the court's result was that the legislature had passed a statute forbidding cockfighting on Sundays, which implied that it was permissible the rest of the week, and had later repealed the statute, implying that cockfighting was again permissible on any day of the week—and in fact cockfighting was an open and notorious sport in Kansas (to the surprise and disgust of the judges).

Scalia and Garner denounce a court that held, in a case called *Braschi* v. *Stahl Associates Co.*, that the word "family" in a New York rent-control statute that prohibited a landlord from dispossessing a "member of the deceased tenant's family who has been living with the tenant" included "a cohabiting nonrelative who had an emotional commitment to the deceased tenant." The word "family" was undefined in the statute. The case may be right or wrong; what is disturbing is Scalia and Garner's failure to mention that it was a homosexual couple at a time when homosexual marriage was not recognized in New York, and that the opinion states that the two

men had been living together just like spouses and had been accepted as such by their families.

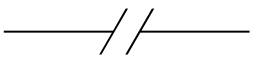
Scalia and Garner applaud a decision (*State by Cooper* v. *French*) holding that a refusal to rent a house to an unmarried heterosexual couple did not violate a statute forbidding discrimination in rentals on grounds of "marital status," a term not defined in the statute. The court relied for this conclusion on another statute, one forbidding fornication. One may doubt whether that statute was the actual motivator of the decision, given the statement in the majority opinion—remarkable for 1990—that "it is simply astonishing to me that the argument is made that the legislature intended to protect fornication and promote a lifestyle which corrodes the institutions which have sustained our civilization, namely, marriage and family life." This statement is not quoted by Scalia and Garner. (And two sentences later the judge referred, contrary to a Scalia-Garner *Diktat*, to the statute's legislative history.)

After the refusal to rent, but before the court's decision, the anti-discrimination law had been amended to define "marital status" as "whether a person is single, married, remarried, divorced, separated, or a surviving spouse"; and the man and woman who had wanted to rent were both single, a protected marital status under the amended statute. On the page following their discussion of the case, Scalia and Garner, having moved on to another case, remark that "the meaning of an ambiguous provision may change in light of a subsequent enactment … unless the ambiguous provision had already been given an authoritative judicial interpretation." The original provision—"marital status"—had been undefined and therefore ambiguous, and had not been given an authoritative judicial interpretation. So the amendment, which broadened statutory protection to unmarried persons, provided some basis (though far from conclusive), consistent with textual originalism as understood by Scalia and Garner, for the court's decision that they denounce. They do not mention this possibility.

Scalia and Garner are capable of reveling in absurdity. A provision of federal immigration law allowed the wife of a naturalized American citizen to be admitted to the United States for treatment in a hospital without being detained as an alien. The non-citizen wife of a native-born (as distinct from naturalized) American citizen was denied entry for treatment, and the Supreme Court upheld the denial in *Chung Fook* v. *White*. Scalia and Garner applaud the result, which gave more rights to the wife of a naturalized citizen than to the wife of a native-born citizen, while calling it "admittedly absurd." They recognize a doctrine of "absurdity" that permits

interpretive deviations from literal readings that produce ludicrous results, but they declare the doctrine inapplicable in this case because a provision relating to native-born Americans would be out of place in an immigration statute, which is about aliens—yet the citizen's wife whose right of entry was in question was an alien.

They fail to mention that the Supreme Court appears to have agreed with the sensible alternative interpretation of the statute that the court of appeals had adopted. The statute by its terms applied only if the marriage had taken place after the husband was naturalized, and was therefore limited to cases in which the wife had become an American citizen as a result of the marriage even though she was living abroad; the immigration law provided that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." In the *Chung Fook* case, however, because the wife was Chinese, she could not, as the law then stood, become an American citizen despite being married to a native-born American. If, therefore, as the court of appeals held, the right of entry was limited to citizen wives, Chung Fook was not a beneficiary of the statute allowing entry. The Supreme Court said that it was "inclined to agree with [the] view" of the court of appeals, which saved the statute from absurdity (though not from offensiveness)—the view that the statute rested on the different status of citizen and non-citizen wives rather than of native-born and naturalized citizens. It was only after stating its inclination to agree with the court of appeals' sensible interpretation that the Court embraced, it seems reluctantly, the alternative ground that the right of entry without detention did not apply to wives of native-born Americans. One wonders whether the Court would have embraced an obviously unintended statutory distinction between citizen wives of native-born and of naturalized American citizens to the disadvantage of the former, if to do so would have affected the outcome.



THERE IS A COMMON THREAD to the cases that Scalia and Garner discuss. Judges discuss the meanings of words and sometimes look for those meanings in dictionaries. But judges who consult dictionaries also consider the range of commonsensical but non-textual clues to meaning that come naturally to readers trying to solve an interpretive puzzle. How many readers of Scalia and Garner's

massive tome will do what I have done—read the opinions cited in their footnotes and discover that in discussing the opinions they give distorted impressions of how judges actually interpret legal texts?

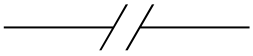
Another problem with their defense of textual originalism is their disingenuous characterization of other interpretive theories, typified by their statement that textual originalism is the only "objective standard of interpretation even competing for acceptance. Nonoriginalism is not an interpretive theory—it is nothing more than a repudiation of originalism, leaving open the question: How does a judge determine when and how the meaning of a text has changed? To this question the nonoriginalists have no answer—or rather no answer that comes even close to being an objective test." But "non-originalism" is not the name of an alternative method of interpretation. It is just a bogeyman, like what they call "so-called consequentialism"—"is this decision good for the little guy?"

A problem that undermines their entire approach is the authors' lack of a consistent commitment to textual originalism. They endorse fifty-seven "canons of construction," or interpretive principles, and in their variety and frequent ambiguity these "canons" provide them with all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and guns.

Thus they declare that "a fair system of laws requires precision in the definition of offenses and punishments," implying that judges are entitled to use a concept of "fairness" to interpret statutes creating offenses and punishments. How is that to be squared with textual originalism? They say that "textualism, *in its purest form*, begins and ends with what the text says and fairly implies" (emphasis added), but evidently Scalia and Garner are not committed to its "purest form," for they say that "determining what is *reasonably* implied [by the words of a statute] takes some judgment" (emphasis in original). They endorse the "rule of lenity"—the interpretive principle that ambiguity in criminal statutes should be resolved in favor of the criminal defendant—without showing how it can be consistent with textual originalism.

They assert that what they call "fair reading" requires "an ability to comprehend the purpose of the text, which is a vital part of its context," and though they add that "the purpose is to be gathered only from the text itself, consistently with the other aspects

of its context," they also say that "a sign at the entrance to a butcher shop reading 'No dogs or other animals' does not mean that only canines, or only four-legged animals, or only domestic animals are excluded." That is certainly right, but it is not right by virtue of anything textual. It is right by virtue of the principle that meaning includes what "would come into the reasonable person's mind," or what we know an author has "in mind" in writing something. On such grounds (which surprisingly the authors embrace as well) a sign that says "No dogs, cats, and other animals allowed" must be read to include totally unrelated animals (contrary to the principle of *eiusdem generis*—the "canon," which they also approve, that a last general term in a series is assumed to be of the same type as the earlier, specific terms) because "no one would think that only domestic pets were excluded, and that farm animals or wild animals were welcome." Right again! But right because textualism is wrong. Similarly, although a human being is an animal, a sign forbidding animals in a restaurant should not be interpreted to ban humans from the restaurant. It is the purpose of the sign, not anything in the sign, that tells you what meaning to attach to the word "animals" among its possible meanings.



ANOTHER interpretive principle that Scalia and Garner approve is the presumption against the implied repeal of state statutes by federal statutes. They base this "on an assumption of what Congress, in our federal system, would or should normally desire." What Congress would desire? What Congress should desire? Is this textualism, too?

And remember the ambulance case? Having said that the conclusion that an ambulance was forbidden to enter the park even to save a person's life was entailed by textual originalism and therefore correct, Scalia and Garner remark several hundred pages later that the entry of the ambulance is not prohibited after all, owing to the "common-law defense of necessity," which they allow to override statutory text. Yet just four pages later they say that except in "select fields such as admiralty law, [federal courts] have no significant common-law powers." And still elsewhere, tacking back again, they refer approvingly to an opinion by Justice Kennedy (*Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*), which states that "the Sherman Act's use of 'restraint of trade' invokes the common law itself … not merely the static

content that the common law had assigned to the term in 1890." In other words, "restraint of trade" had a specific meaning (and it did: it meant "restraints on alienation") in 1890 that judges are free to alter in conformity with modern economics—a form of "dynamic" interpretation that should be anathema to Scalia and Garner. A few pages later they say that "federal courts do not possess the lawmaking power of common-law courts," ignoring not only the antitrust and ambulance cases but also the fact that most of the concepts deployed in federal criminal law—such as *mens rea* (intent), conspiracy, attempt, self-defense, and necessity—are common law concepts left undefined in criminal statutes.

Scalia and Garner indicate their agreement with a number of old cases that hold that an heir who murders his parents or others from whom he expects to inherit is not disqualified from inheriting despite the common law maxim that no person shall be permitted to profit from his wrongful act. (Notice how common law floats in and out of their analysis, unpredictably.) They say that these cases are "textually correct" though awful, and are happy to note that they have been overruled by statute. Yet just before registering their approval they had applauded the rule that allows the deadlines in statutes of limitations to be "tolled" (delayed) "because of unforeseen events that make compliance impossible." The tolling rule is not statutory. It is a judicial graft on statutes that do not mention tolling. Scalia and Garner do not explain why that is permissible but a judicial graft disqualifying a murdering heir is not.

Scalia and Garner defend the canon of construction that counsels judges to avoid interpreting a statute in a way that will render it unconstitutional, declaring that this canon is good "judicial policy." Judicial policy is the antithesis of textual originalism. They note that "many established principles of interpretation are less plausibly based on a reasonable assessment of meaning than on grounds of policy adopted by the courts"—and they applaud those principles, too. They approve the principle that statutes dealing with the same subject should "if possible be interpreted harmoniously," a principle they deem "based upon a realistic assessment of what the legislature *ought* to have meant," which in turn derives from the "sound principles… that the body of the law *should* make sense, and…that it is the responsibility of the courts, within the permissible meanings of the text, to make it so" (emphasis added). In other words, judges should be realistic, should impose right reason on legislators, should in short clean up after the legislators.

The remarkable elasticity of Scalia and Garner's methodology is further illustrated by their discussion of a case in which the Supreme Court held, over a dissent by Scalia, that a federal statute providing that no state could require a statement relating to smoking and health to be placed on a cigarette package, other than the statement required by the statute, did not preempt state tort suits charging cigarette advertisers with misrepresentation concerning the health hazards of smoking. The ruling was consistent with the canon approved by Scalia that I mentioned earlier—that a federal statute is presumed to supplement rather than displace state law. The majority held that suits based on the state's view of the health hazards of smoking were preempted (and this part of the decision Scalia concurred in), just not suits based on the duty to avoid misrepresentation. Scalia and Garner ignore the distinction, saying instead that "when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word." But the statute was not explicit about overriding all state tort suits that might relate to cigarette advertising—it did not mention such suits; and so the approved canon should have carried the day for Scalia.

Justice Scalia has called himself in print a "faint-hearted originalist." It seems he means the adjective at least as sincerely as he means the noun.