

Textualism is the dominant method of interpreting statutes among conservative judges. It purports to base interpretation on the “ordinary meaning” of the statutory language. This approach ignores traditional tools of statutory interpretation like considering what was actually said in Congress. Ignoring what Congress actually intended seems odd to me. Still, lawyers have to make arguments to the judges we have, not those we wish we had. Fortunately, textualism is an approach that can be adapted to support environmental ends.

I said that textualism is supposed to find the “ordinary meaning” of a law. Ironically, that phrase turns out to have a meaning that’s anything but ordinary. Instead, there are a series of rules that textualist judge apply which supposedly decode the meaning a “reasonable reader” of the law would find. Basically, the “reasonable reader” means something akin to “the sophisticated textualist judge.”

Textualists sometimes disagree heatedly with each other over methodology. Here are some of the rules embraced by some or all textualists:

1. The dictionary meanings of terms are important. (When I looked up “textualist” in a dictionary just now, the first definition I saw was: “A person who adheres strictly to a text, especially that of religious scriptures”).
2. Broader linguistic studies of word usage may also be relevant.
3. Individual words must be interpreted in the context of the surrounding text.
4. How Congress uses the same term in other statutes is also relevant.
5. Guidelines (“canons”) about grammar and interpretation are also relevant.
6. Sometimes terms have specialized legal or technical meanings rather than their common meanings.
7. Statutes can also be interpreted on the basis of general policies (“canons of interpretation”), such as interpreting ambiguous criminal laws in favor of defendants.
8. The overall structure of a statute can be relevant.
9. Congress does not “hide elephants in mouseholes,” meaning that obscure portions of a statute don’t conceal major policy decisions.
10. Provisions of a statute should not be construed in a way that would make the statute ineffective. (This one is controversial among textualists.)
11. The statute should be given a reasonable interpretation. (Another controversial one.)
12. Words and phrases are usually, but not always, given the same meaning when they are used throughout a law.

If you’re a lawyer and you see a list of a dozen rules, your first thought has to be: “A dozen rules! So many opportunities to pick and choose and create interesting arguments.” And within each rule, there are different ways to play the game. For instance, Rule 2 says that

dictionary meanings are important, but there are a lot of different dictionaries and they don't always agree. And since the textualist judges don't completely agree on the list of rules, or how to apply each one, there's lots of room to craft arguments to persuade a particular Justice.

Justice Stevens's opinion in *Massachusetts v. EPA* is an example of textualist interpretation used to further an environmentalist legal interpretation. The issue was whether the Clean Air Act applied to greenhouse gases. In dissent, Justice Scalia argued that it was reasonable to interpret the statute to apply only to substances that cause harm in the lower atmosphere. Stevens pointed out that the statute made no such distinction. He said the text was perfectly clear.

Even Justice Scalia was sometimes persuaded to vote in favor of environmental protection by textualist arguments. In one key case, he rejected arguments for using cost-benefit analysis to set national air quality standards. He argued that the text of the statute prevented consideration of cost. Instead, EPA could only consider public health in setting the standards.

Lawyers have always made textualist arguments. Non-textualists think that things like the purpose of a lawyer and the legislative intent are also important, while textualists deride those ideas. Environmental advocates are just going to have to do better than their opponents in crafting their textualist arguments. They have the advantage that the environmental laws were actually written to further environmental goals. So the statutory language is often quite conducive to environmental arguments.

Textualism is, in my view, an odd way to interpret the law. Why ignore the purpose of a law and pretend that the text fell from the sky? Still, when one is in Textualism Land, one must learn their ways and do as they do. "When in Rome," after all . . .