
Seth Barrett Tillman
ARTICLES

The Law's Mystery
Linda L. Berger and Jack L. Sammons

Hope, Fear and Loathing, and the Post-Sebellius Disequilibrium: Assessing the Relationship between Parties, Congress, and Courts in Tea Party America
Bruce G Peabody and Kyle Morgan

Textualisms
Stephen M Durden

Lewis M Wasserman and James C Hardy

From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?
Haydn Davies

Oath Martyrs
Virgil Wiebe

Criminal Punishment and the Pursuit of Justice
Mike C Materni
BRITISH JOURNAL OF AMERICAN LEGAL STUDIES
VOLUME 2 - ISSUE 1
Spring 2013

ARTICLES

The Law’s Mystery
Linda L Berger and Jack L Sammons .................................................... 1

Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium:
Assessing the Relationship between Parties, Congress, and Courts
in Tea Party America
Bruce G Peabody and Kyle Morgan .................................................... 27

Textualisms
Stephen M Durden ........................................................................ 59

U.S. Supreme Court Justices’ Religious and Party Affiliation, Case-Level Factors,
Decisional Era and Voting in Establishment Clause Disputes Involving Public
Education: 1947-2012
Lewis M Wasserman and James C Hardy ........................................ 111

From Equal Protection to Private Law: What Future for Environmental
Justice in U.S. Courts?
Haydn Davies .................................................................................... 163

Oath Martyrs
Virgil Wiebe ..................................................................................... 205

Criminal Punishment and the Pursuit of Justice
Mike C Materni .................................................................................. 263
TEXTUALISMS

Stephen M. Durden*
Florida Coastal School of Law

ABSTRACT

This article concerns "Textualism," or rather, "Textualisms," and interpretation of the United States Constitution. Uncountable numbers of scholars and commentators use the term "textualism" as a singular noun, implicitly or explicitly, suggesting that one "textualism" exists. Sometimes commentators support "textualism" as the one true interpretational methodology. Those who support "textualism" argue that interpretation of the United States Constitution should rely on "textualism" because of that interpretational methodology's virtue of limiting the discretion of the interpreter. "Textualism," so supporters argue, keeps judges and justices from each creating his or her own version of the Constitution. This article seeks to demonstrate the existence of a multitude of different "textualisms." The article notes the dozens of different types of "textualism," each version of which can be chosen by any judge or justice as a methodology for interpreting the Constitution. If different types of "textualism" do indeed exist, then (any particular version of) "textualism" becomes nothing more than a personal choice for a constitutional interpreter. "Textualism," so the article urges, becomes "textualisms," and loses all power to constrain the personal choice of justices as to the meaning of the Constitution.

CONTENTS

I. INTRODUCTION TO THE FEARS BEHIND AND THE PROMISE OF TEXTUALISMS ................................................. 60
   A. CONSTITUTIONAL FEARS ........................................ 60
   B. TEXTUALISM'S (FALSE) PROMISE .............................. 61
   C. METHODOLOGY FOR ANALYZING TEXTUALISMS ............. 64
   D. THE TEXTUALIST DIFFICULTY ................................ 66

II. ADJECTIVE TEXTUALISMS ...................................... 68
   A. "PLAIN" ADJECTIVE AND NO-ADJECTIVE TEXTUALISMS .... 68
   B. LITERAL TEXTUALISM ............................................ 70
   C. WOODEN TEXTUALISM .......................................... 72
"or," strongly suggesting the interchangeability of the words. Some commentators prefer to use one term to modify the other, inventing terms such as "literalistic textualism" or "textual literalism." Suggesting that textualism and literalism have different meaning. Adding to the complexity of the seemingly simplistic concept of literalism, some commentators have suggested sub-categories of literalist(ic) textualism, including but certainly not limited to (1) ahistoric literalist textualism, (2) Anglo-American, traditional, eighteenth-century, literalistic textualism, (3) severe and literal-


63 Jeffrey D. Jackson, Be Careful What You Wish For: Why McDonald v. City of Chicago’s Rejection of the Privileges and Immunities Clause May not be Such a Bad Thing for Rights, 115 Penn. St. L. Rev. 561, p. 567 n. 41 (citing to Bree Boyce, Heller, McDonald and Originalism, 2010 CaroZo. L. Rev. de Novo 2, 11-12 (2010) (in which the authors refer to Slaughterhouse as “an example of ahistorical literalist textualism”).

some “[t]extualists ... seek to distance their version of ‘textualism’ from ‘literalism.’”82 As explained by Daniel A. Farber, and Brett H. McDonnell, “[t]extualism does not equal literalism...,”83 Johnathon R. Siegel goes further and speaks for all textualists saying that they all “argue that textualism should not be confused with literalism.”84 Anthon P. Pecora distinguishes textualism from literalism’s “‘mindless[ness].’”85 Similarly, many commentators describe literalism as a wooden approach to interpretation86 as “boneheaded[ness].”87 Literalism, then, might be distinguished as “wooden-textualism.”88

The foregoing discussion provides insight into the textualists’ conundrum. Textualists must take one of at least two irreconcilable positions, (1) textualism equals literalism and (2) textualism never equals literalism. The discussion also demonstrates the multitude of textualism’s monikers, names which may or may not have same meaning, e.g., textualism, literal textualism, and wooden textualism. The textualist difficulty is picking a moniker without demonstrating a personal predilection.

III. MODIFYING ADJECTIVE TEXTUALISMS

The discussion above, concerning textualism, plain meaning language textualism, literal textualism, literalism, and wooden textualism introduces one of the fundamental difficulties of trying to discuss textualism logically and rationally. Writers often use adjectives in front of the word “textualism,” e.g., plain meaning textualism, literal textualism, and wooden textu-

---

82 Durden, Plain Language Textualism, supra note 1, at 342.
stitution, but that textualism would be flawed, because it would not be faithful to the actual meaning of the text.\textsuperscript{110} Rephrased, whatever textualism McGinnis and Rappaport describe in their article provides a meaning faithful, or at least more faithful, to the textual meaning. It follows that McGinnis and Rappaport distinguish “wooden,” i.e., bad textualism, from good, or at least, better textualism. Others seem to agree, also serving to distinguish “wooden textualism” from other, better textualisms.\textsuperscript{111}

In the end, many use “wooden” in a pejorative way, either (a) describing “Textualism” (capitalizing the first letter to suggest (1) inclusion of all versions of textualism or (2) the existence of only one textualism, neither of which conclusion seems to make much sense) as “wooden” or (b) distinguishing one version of textualism, i.e., wooden textualism from other textualism. Others use adjectives in lieu of “wooden” to describe textualism. As with “wooden” the following adjectives appear to suggest a negative view, i.e., a pejorative. In addition, these pejoratives could suggest (1) Textualism’s failures or (2) the existence of the pejorative textualism contradistinguished from some “better” textualism. The pejorative adjective textualisms that seem akin to “wooden” textualism include:

(1) “rigid” textualism;\textsuperscript{112}

unnecessary. As noted before, some believe and assert that textualism limits meaning to literal or dictionary definitions of words, and such an approach would not include “one’s imagination.”

\textsuperscript{110} Id. McGinnis and Rappaport do not define “look[ing] outside a constitution,” but inferentially (and only inferentially) “outside” suggests an “inside” to a constitution, which inside might include blank space or the words (or text) of the piece of paper, but likely includes only the words. So according to McGinnis and Rappaport, looking only at the constitution’s words, i.e., text, is not “faithful to the actual meaning of the text.”


Textualisms


Eric M. Freedman, The United States and the Articles of Confederation: Drifting Toward Anarchy or inching Toward Commonwealth?, 88 YALE L.J. 142, 161 (1978) ("close textual ties to the corresponding provisions of the Articles").


McGinnis & Rappaport, Original Methods Originalism, supra note 129 at 799.


(2) "close-reading" textualism;\textsuperscript{133}
(3) "close textualism," which bears close relationship to close-reading textualism;\textsuperscript{134}
(4) "close (as in similarity of words) textualism;\textsuperscript{135}
(5) "narrow" textualism;\textsuperscript{136}
(6) "super strict" textualism;\textsuperscript{137}
(7)(a) "hypertextualism," as in being too "faithful [an] agent" of the drafter of a document such as a statute, "by trying to 'hear the words ... as they would sound in the mind of a skilled, objectively reasonable user of words,'" but then carry[ing] this approach too far.\textsuperscript{138}


\textsuperscript{135} Eric M. Freedman, The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?, 88 YALE L.J. 142, 161 (1978) ("close textual ties to the corresponding provisions of the Articles").


\textsuperscript{137} McGinnis & Rappaport, Original Methods Originalism, supra note 129 at 799.

(13) “superstrict textualism,” which, apparently, “relies only on meanings expressly stated in the text without reference to history, intent, or purpose;” and
(14) “radical textualism;”\textsuperscript{146}
(15) “naïve textualism.”\textsuperscript{147}

Perhaps not all these textualisms necessarily indicate a negative or pejorative view of textualism. In many ways these textualisms suggest the possibility of dual meaning. As with “wooden textualism,” these textualisms suggest either (1) the existence of (at least) two textualisms, i.e., “textualism” and “adjective textualism” or (2) the conclusion that textualism (whatever it may be to the author) is properly described by the adjective, i.e., “wooden textualism” simply states that textualism is wooden. Not all of the preceding versions of textualism easily fall into each of the above two categories, but they each suggest, at a minimum, the possibility of two (or more) versions of textualism.

C. OTHER JUDGMENTAL ADJECTIVE TEXTUALISMS

While some use adjectives that suggest, or at least arguably suggest, a pejorative of textualism, others use adjectives that, at a minimum, suggest some sort of judgment about one version of textualism and by doing so suggest at least one other version of textualism, for example words such as weak and strong, honest and objective suggest judgment of some sort even if they do not necessarily suggest good or bad. Additionally, those types of adjectives strongly suggest other versions of textualism. For example, “weak textualism” may not be a negative or positive description, but it does suggest a textualism other than weak. These various versions include, but are not necessarily limited to, the following textualisms discussed below.

Walter Benn Michaels describes “weak textualism,” as relying on “what the authors said as the best evidence of what they meant.”\textsuperscript{148} More than 25 years before Michaels, Sanford Levinson, relied on the work of...