The Doctrine of the Last Antecedent, the Example in *Barnhart*, Why Both Are Weak, and How Textualism Postures

Joseph Kimble

Start with an innocuous example: *men and women who are tall.* Are you talking about all men or only those who are tall? That is, does the *who*-clause modify both nouns? There's no way to tell — no syntactic principle, no grammatical rule or convention, that resolves the ambiguity. Yes, English meaning depends on placement, and ideally the modifier would attach only to the nearest antecedent, but here it may not. You might guess that since the example seems to have something to do with a minimum-height standard and men are generally taller to begin with, the modifier applies only to women. Then again, some men are short, and why would you set up a standard that could be applied unevenly? Without the context, there's just no way to even begin to tell.

A court that resolved this ambiguity by applying the doctrine (or rule, or canon) of the last antecedent would be a court that's at a loss. And a court that uses it to support a decision made for other reasons is throwing in a feather. Even worse is deploying it to counter or trump sensible opposing arguments. The doctrine has little weight or value (except as an expedient), and judges should treat it with skepticism — if they mention it at all.

Go back to our example and add context:

- The headroom in this car will be uncomfortable for men and women who are tall.
- It's a stereotype that ballet is not suited to men and women who are tall.

Now you can at least begin to discuss the apparent meaning. But the doctrine of the last antecedent has nothing to do with it.

I'll take up that contention first in this article and then examine two of the central tenets of textualism.

Overview of the Doctrine

Three texts are helpful for an overview: *Reading Law*, the formidable high-profile book by Justice Antonin Scalia and Bryan Garner;[1] a 2004 article by Terri LeClercq;[2] and a 2009 article by Jeremy Ross.[3]

Scalia and Garner endorse the doctrine as one of their syntactic canons: "A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent."[4] Although Scalia and Garner do not comment on the canon's relative strength or weakness, in their "fundamental principles" they acknowledge that "[i]t is a rare case in which each side does *not* appeal to a different canon to suggest its desired outcome."[5] Thus, "sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies."[6] And the canons, including, presumably, the last antecedent, "are indeed helpful, neutral guides."[7]

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1 *Reading Law: The Interpretation of Legal Texts* (2012).

2 *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 40 Tex. J. Bus. L. 199 (2004).

3 *A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court*, 39 Sw. L. Rev. 325 (2009).

4 Scalia & Garner, *Reading Law* at 144.

5 *Id.* at 59.

6 *Id.*

7 *Id.* at 61.

LeClercq and Ross, on the other hand, are highly critical.

According to LeClercq, the doctrine was formalized by Jabez Sutherland in his original treatise on statutory construction.[8] As part of the formulation, editors later included a rule that a comma after the last item in the series, before the modifying words, defeats the doctrine — that is, throws the modification back to all the previous items.

Here is the current version of the doctrine, from the seventh edition of Sutherland's treatise (now edited by Norman Singer and Shambie Singer):

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the "last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. . . ." A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one. As with all the rules of interpretation, the last antecedent rule is merely another aid to discover legislative intent or statutory meaning, and is not inflexible and uniformly binding.[9]

LeClercq says that the doctrine "contradicts other linguistic principles; it contradicts the historical use of the comma; and . . . [it has] created as much confusion and disagreement as the ambiguous modifier its drafter set out to clarify."[10]

Ross is even more disparaging. Concentrating on U.S. Supreme Court cases, he asserts that the decision to apply the doctrine "may be less a matter of common sense than nonsensical

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[8] 40 Tex. J. Bus. L. at 204–05; *see* J.G. Sutherland, *Statutes and Statutory Construction* § 267, at 349 (1891) ("Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." (citations omitted)).

[9] 2A *Statutes and Statutory Construction* § 47:33, at 494–501 (7th rev. ed. 2014) (citations omitted).

[10] 40 Tex. J. Bus. L. at 207.

statutory construction."[11] He says that in cases going back to 1799, the Supreme Court has referred to the doctrine "mostly in passing," but that changed in 2003 with a "seminal" case.[12] In *Barnhart v. Thomas*, Justice Scalia stated the doctrine as a grammatical rule

> according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . . While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, we have said that construing a statute in accord with the rule is "quite sensible as a matter of grammar."[13]

Ross notes that, since 2003, the doctrine's use has increased not only in the Supreme Court but also in the circuits. And he concludes that the doctrine is "so flexible that calling it a rule at all may be oxymoronic."[14] Indeed: "Because the question of whether to apply [the doctrine] essentially amounts to a coin toss, it seems entirely implausible to rely on it as a method of inferring actual congressional intent or meaning."[15]

The Doctrine's Strength

One thing is beyond dispute: the doctrine gets attention. A search of WestlawNext for "last antecedent" produces over 1,650 state and federal cases — including 700 in the years since *Barnhart*. How do we begin to organize and assess them?

A preliminary point: different authorities and cases seem to state the doctrine with different degrees of strength — the

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[11] 39 Sw. L. Rev. at 326.

[12] *Id.* at 326, 332.

[13] 540 U.S. 20, 26 (2003) (citing two other Supreme Court cases and quoting, for the rule itself, 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47:33, at 369 (6th rev. ed. 2000)).

[14] 39 Sw. L. Rev. at 336.

[15] *Id.* at 337.

strength, that is, of the presumption in favor of the last antecedent. Here are several formulations:

- Scalia and Garner (as quoted earlier): the modifier "generally refers to the nearest reasonable antecedent." [A mild presumption? Note the two qualifiers, *generally* and *reasonable*.]
- *Barnhart v. Thomas* (as quoted earlier): the modifier "ordinarily" refers to the last antecedent. [A moderate presumption? Only one qualifier, *ordinarily*.]
- Singer–Sutherland (as quoted earlier and repeated in many cases): the modifier refers "solely" to the last antecedent "where no contrary intention appears." [A strong presumption? A contrary intention must appear?]
- A Michigan case: the modifier applies "solely" to the last antecedent "unless something in the statute requires a different interpretation."[16] [A strong presumption again, given the word *requires*?]

This may be splitting hairs, and without much more research and analysis, it's hard to know whether the different formulations produce different results. But regardless of how the doctrine is stated, you'd expect that it would make a difference in many cases. The presumption must surely have *some* force. But how much?

In early 2014, my research assistant reviewed 50 cases — the 25 most recent federal and 25 most recent state cases that even mention the doctrine. We did not count 11 of them because it came up in only a fleeting way. Of the rest, in 11 of the 39 cases — 28% — the court discussed the doctrine, yet concluded that the modifier applied all the way back; in 28 cases — 72% — the court concluded that the modifier applied to the last antecedent only.

[16] *Stanton v. City of Battle Creek*, 647 N.W.2d 508, 511 (Mich. 2002).

Here's the catch, though: in just 1 of those 28 cases did the court rely exclusively on the doctrine, and in just 4 of them was it the primary reason. In all the rest, 23 of 28 cases — 82% — the doctrine was at most a supporting reason, and usually not the only one. So even though the doctrine in its most common formulation (Singer–Sutherland) is strongly worded, courts are reluctant to rest on it entirely or even primarily. They must sense that, compared with other interpretive principles, the doctrine of the last antecedent especially needs bolstering. It may be strongly worded, but it has little independent force.

The Doctrine Standing Alone — An Illustrative Case

Despite the ever-increasing number of cases that cite the doctrine, it's a rare one — as we just saw — that hangs a decision on the doctrine alone. Looking at a case that does, from the Michigan Supreme Court, will confirm the wisdom of not ever doing it.

In *Stanton v. City of Battle Creek*,[17] a statute creating a motor-vehicle exception to governmental immunity was at issue:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, *as defined in* [*the Michigan Vehicle Code*], *as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.*[18]

The court of appeals had assumed, without a word of discussion, that the *as defined in* language applies to the term *motor vehicle* (as well as *owner*, presumably). But on review the su-

[17] *Id.*

[18] Mich. Comp. Laws § 691.1405 (emphasis added to indicate the ambiguous modifier, as elsewhere in this article).

preme court cited our handy doctrine, said that nothing in the statute "demands a different interpretation,"[19] and concluded that the modifier applies only to *owner*.

Now, put aside that courts will soften ostensibly strong language — like "requires" or "demands" a different interpretation — when they see fit. In fact, the same supreme court, 11 years later, advised that the doctrine "should not be applied blindly" and that "a court should first consider what are the logical metes and bounds of the 'last' antecedent."[20]

Also put aside two textual points. First, because the *as defined in* modifier refers to the entire Michigan Vehicle Code, rather than a specific section, perhaps the definition of any term in that sentence should come from the Vehicle Code. Second, the supreme court said nothing about the comma before *as defined in*. To discount the comma is one thing; to ignore or overlook it is another.

But here's the deeper problem: the mechanical application of our doctrine prevented the court from asking more substantial and substantive questions. Why should the statute refer to the Vehicle Code for a definition of *owner*, but not *motor vehicle*? A textualist might say the legislature made that call, so case closed. But did it really? Did it draft the statute with the doctrine in mind and trust that it would be applied? Isn't it just as likely, or even more likely, that no one ever thought twice about modification — or that the drafters assumed that the term would be applied to both antecedents, as the court of appeals did?

What's more, even if the doctrine controls just as the drafters and legislators planned, is there a compelling reason why the court can't look to the Vehicle Code for guidance on the meaning of *motor vehicle*? What the court must follow and may consult are two different things. Surely the definition of *motor vehicle* in the Vehicle Code itself is at least as helpful as

[19] *Stanton*, 647 N.W.2d at 511.

[20] *Hardaway v. Wayne Cnty.*, 835 N.W.2d 336, 339 (Mich. 2013).

a dictionary. But no, the opinions in *Stanton* degenerated into a battle of dictionary meanings. The majority chose a narrower definition from the *Random House Webster's Collegiate Dictionary*, citing the principle that exceptions to governmental immunity should be narrowly construed. It rejected a broader definition from the *American Heritage Dictionary*. The minority, one justice, picked a second definition from *Random House Webster's*, combined it with the rejected definition from *American Heritage*, and produced a definition that she said accorded with the commonly understood meaning of *motor vehicle*: "any self-propelled device that is used to transport someone or something on a road."[21]

The vehicle in *Stanton* was a forklift. Is that a motor vehicle? In a footnote to its preferred dictionary definition, the majority cited what it described as "analogous legislative provisions concerning 'motor vehicles.'"[22] One of them — surprisingly — was the Vehicle Code, which was apparently *not* off-limits and which the majority said "expressly excluded" a forklift from the definition of *motor vehicle* "for purposes of the civil liability act. M.C.L. 257.33."[23]

True, but the majority was using the Vehicle Code's definition in a truncated way. The definition:

> "Motor vehicle" means every vehicle that is self-propelled, but for purposes of [the Civil Liability Act] motor vehicle does not include industrial equipment such as a forklift . . . .[24]

The action in *Stanton* was not brought under the Civil Liability Act, which applies to private owners, but against a government owner under the statutory motor-vehicle exception to governmental immunity. So why wouldn't the relevant definition

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[21] *Stanton*, 647 N.W.2d at 514 (Kelly, J., dissenting).

[22] *Id.* at 512 n.10.

[23] *Id.*

[24] Mich. Comp. Laws § 257.33.

be the general one at the beginning — "every vehicle that is self-propelled"?

The court of appeals had to dig deeper. Recall that the court assumed that it was necessarily taking the definition of *motor vehicle* from the Vehicle Code — it assumed, in other words, that the *as defined in* modifier applied not only to *owner* but also to *motor vehicle*. So the court had to consider at length whether, as a matter of policy and statutory construction, the same narrower definition of *motor vehicle* (excluding a forklift) should apply in actions against private and government owners.[25] In a further twist, the exception for industrial equipment had been created by a recent amendment that was expressly made retroactive to pending cases. Hence the additional question faced by the court: whether applying the amended definition would violate the plaintiff's due-process rights.[26]

Doesn't it make sense to at least consult the Vehicle Code for a definition of *motor vehicle*, even if there is some ambiguity about whether a court is required to? All in all, the court of appeals dealt with the definition squarely. Not so the supreme court. Instead, it defaulted first to a weak doctrine and then to dictionaries.

The Exception for a Comma Before the Modifier

The doctrine itself is weak enough, and the supposed exception when a comma precedes the modifying words only compounds the infirmity. Scalia and Garner do not mention the exception. But the latest edition of Singer–Sutherland shows about 35 cases that have cited it.[27] I'll bet there are more.

The grammatical analysis behind the exception is rather hazy. Granted, there is some linguistic authority that "commas

[25] *Stanton v. City of Battle Creek*, 603 N.W.2d 285, 288–89 (Mich. Ct. App. 1999).

[26] *Id.* at 289.

[27] 2A Singer & Singer, *Statutes and Statutory Construction* § 47:33, at 499–500 n.4.

at the end of series can avoid ambiguity."[28] In one recent case, decided by the Second Circuit (and discussed in the article following this one), the court offered these examples:

- "This basketball team has a seven-foot center, a huge power forward, and two large guards, who do spectacular dunks."
- "This basketball team has a seven-foot center, a huge power forward, and two large guards who do spectacular dunks."[29]

The first example, but not the second, was said to "convey[] that all four players do spectacular dunks."[30] These readings might be less clear, though, if either example were taken by itself, without the comparison.

Relative clauses like these (beginning with *who*, *which*, or *that*) are usually categorized as restrictive or nonrestrictive.[31] A restrictive clause gives essential information about the preceding noun, the antecedent, so that omitting the clause would change the basic meaning of the sentence. ("Praise lawyers who write well.") A restrictive clause does not take a comma. A nonrestrictive clause gives incidental information; omitting it would not change the basic meaning. ("A curse on poor writers, who waste their readers' time.") A nonrestrictive clause should take a comma. Under this conventional analysis, you could read the first basketball example as describing players "who [by the way] do spectacular dunks" — leaving the ambiguity unresolved.

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[28] *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971) (citing three reputable older usage books, but observing that "such commas [are] discretionary" and refusing in that case to "attach significance to an omitted comma").

[29] *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 782 (2d Cir. 2013).

[30] *Id.*

[31] *The Chicago Manual of Style* § 6.22 (16th ed. 2010); Bryan A. Garner, *Garner's Dictionary of Legal Usage* 888 (3d ed. 2011); William A. Sabin, *The Gregg Reference Manual* §§ 148–149 (10th ed. 2011).

But under the legal analysis, the comma before *who*, rather than indicating nonessential information, apparently ties the information to all the possible antecedents. The comma operates as "nonrestrictive" only in the sense that it doesn't restrict the modifier to the last antecedent alone. How confident can drafters be that legal readers will reliably identify the comma as "nonrestrictive" in that way?

At any rate, the comma exception remains somewhat of a contrivance, especially if the comma can't be nonrestrictive in the conventional sense. Imagine seeing or writing this: "The headroom in this car will be uncomfortable for men or women, who are tall." Or this (the example from *Barnhart* that we'll take up in detail later): "You will be punished if you throw a party or engage in any other activity, that damages the house."

Even in less contrived uses, the comma is often not nearly as telling as context and common sense. The Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Of course the Amendment wasn't distinguishing between life and liberty (taking always forbidden) and property (taking conditionally forbidden).

Finally, the comma exception may sometimes divert attention from a better indicator: a pair of commas. In the Second Circuit case, for instance, the court was faced with this drafting specimen:

> arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, *either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries* . . . .[32]

The court concluded that because of the comma before *either*, the language following that word applied back to all the items

[32] *Am. Int'l Grp.*, 712 F.3d at 780 (emphasis added) (quoting 12 U.S.C. § 632).

in the series. But notice the pairs of commas around the second and third items. They do support modification all the way back, as in "The headroom in this car will be comfortable for men, or for women, who are tall."[33]

The single-comma exception is much less solid. Yet it will stay in play for as long as judges and lawyers continue to dial up the doctrine of the last antecedent.

Further Confusion in the Courts

Scalia and Garner distinguish between two canons that courts tend to lump together. Since, strictly speaking, only pronouns have antecedents, the last-antecedent canon is a "misnomer" when the modifier involves other kinds of words or phrases (such as an adverbial phrase).[34] In those cases, Scalia and Garner would apply what they call the "nearest-reasonable-referent canon": "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."[35] They cite as an example a case involving this language:

> [I]f the debtor has received a discharge . . . in a case filed under chapter 7 . . . *during the 4-year period preceding the date of the order for relief under* [*chapter 13*] . . . .[36]

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[33] *See* Scalia & Garner, *Reading Law* at 161–62, 163 (analyzing two examples, including the *Barnhart* example).

[34] *Id.* at 152.

[35] *Id.*

[36] *In re Sanders*, 551 F.3d 397, 399 (6th Cir. 2008) (second brackets in original) (emphasis added); *see also Am. Int'l Grp.*, 712 F.3d at 781–82 (discussing an adverbial modifier in terms of antecedents).

The adverbial phrase *during the 4-year period* involved a referent (either *discharge* or *filed*), not an antecedent, although the court invoked the last-antecedent canon.

Courts will no doubt continue to lump together the two canons for years to come. Even if judges were as grammatically sophisticated as Scalia and Garner would like them to be, the authors have carved out a distinction that, however valid, is one that few courts have historically recognized. But since the canons produce the same result with a trailing modifier, the confusion is largely benign.

Another, more egregious form of confusion arises when a court or a party tries to apply the doctrine of the last antecedent to ambiguity caused by a modifier in the middle of two possible referents. Instances like these typically involve a so-called squinting modifier — one that could look either backward or forward. Example: "The court must order the defendant promptly to pay restitution." What does *promptly* modify — *must order* or *pay*? Our doctrine has no application here, because it purports to resolve ambiguity in referring to items that appear before the modifier (antecedents), not items on either side.[37] For the same reason, it does not apply when the question is whether an in-between word or phrase modifies backward *and* forward. But it has wormed its way into that context nonetheless.

One case, notable for its "extraordinarily tortured procedural history," was *Sun Valley Foods Co. v. Ward*,[38] again from the Michigan Supreme Court. (I doubt that many other states are beyond criticism in applying the doctrine.) The case dragged on for seven years. First, the underlying suit went from the trial court to the court of appeals to the supreme court (leave denied). Then a legal-malpractice suit went through the same cycle

[37] *See, e.g.*, *State v. Mallett*, No. 02-1906, 2003 WL 22901008, at *2 (Iowa Ct. App. Dec. 10, 2003) (rejecting the State's attempt to apply the doctrine to a squinting modifier).

[38] 596 N.W.2d 119, 121 (Mich. 1999).

three times — from trial court to the court of appeals to the supreme court.

The dispute in *Sun Valley* was over this wording:

> If an appeal is taken . . . *before the expiration of the period during which the writ of restitution shall not be issued* and if a bond to stay proceedings is filed . . . .[39]

Oddly, Sun Valley argued that the italicized phrase modified *if a bond . . . is filed* (as well as the initial *if*-clause, presumably). And sure enough, the court trotted out the "general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears."[40] The "last" of one antecedent? The court's decision may have been right, but citing the doctrine was questionable at best.

From a textual standpoint, this should have been an easy case. You have two parallel *if*-clauses with a modifier after the first one; the modifier can attach only to the clause it follows. That is, the second *if*-clause starts the syntactic construction — and the meaning — over again, as in "If you are a woman who is tall or if you are a man . . . ." There was no ambiguity on the face of the *Sun Valley* language — despite 13 years of litigation.

The Dizzying Clash of Canons

Now we move from confusion to conflict. What happens when the possible antecedents or referents are items in a parallel series? Scalia and Garner offer another canon, called the "series-qualifier canon": "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."[41]

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[39] *Id.* at 122–23 (emphasis added).

[40] *Id.* at 123 (citations omitted).

[41] Scalia & Garner, *Reading Law* at 147.

Observe: with a trailing modifier, this canon clashes with the last-antecedent canon by throwing the modification all the way back. So which controls? Which carries the winning load? Does the series-qualifier canon create an exception, as it apparently does with the nearest-reasonable-referent canon quoted earlier? If so, does the exception always control? Who knows for sure? In our example of *men and women who are tall*, you could obviously argue either canon.

Although courts do tend to apply a front-end modifier to the entire series, it's different with a trailing modifier: many, if not most, put forward the doctrine of the last antecedent and say nothing about a series qualifier.[42] It's the last antecedent that

[42] *See, e.g.*, *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1250, 1257–58 (11th Cir. 2014) ("to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service *for which the called party is charged for the call*") (emphasis added to all the quotations in this footnote); *Enron Creditors Recovery Corp. v. Alfa*, 651 F.3d 329, 332, 335–36 (2d Cir. 2011) ("a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment *commonly used in the securities trade*"); *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 609, 613 (S.D.N.Y. 2013) ("any offense (1) involving fraud or attempted fraud against the United States . . . , or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with . . . any contract, subcontract, or purchase order *which is connected with or related to the prosecution of the war*"); *Ashton v. Nat'l Farmers Union Prop. & Cas. Co.*, No. 11-4002-SAC, 2012 WL 2814129, at *4, *6–9 (D. Kan. July 10, 2012) ("You or any relative *for the ownership, maintenance or use of any car or utility trailer.*"); *Conn. Ins. Guarantee Ass'n v. Drown*, 37 A.3d 820, 824, 827–29 (Conn. App. Ct. 2012) ("the rendering or failure to render professional services by individual physicians or nurse anesthetists, or by any paramedical *for whom a premium charge is shown on the declarations page*"); *Ada Cnty. Prosecuting Attorney v. 2007 Legendary Motorcycle*, 298 P.3d 245, 247, 248–49 (Idaho 2013) ("the transportation, delivery, receipt, possession or concealment, *for the purpose of distribution or receipt of* [*controlled substances*]"); *City of Fort Wayne v. Consol. Elec. Distrib., Inc.*, 998 N.E.2d 733, 736, 737 (Ind. Ct. App. 2013) ("the board or officer of a political subdivision or an agency *having the power to award contracts for public work*"); *Sano v. Tedesco*, 995 N.E.2d 87, 89, 92 (Mass. App. Ct. 2013)

seems to spring to mind first when judges and lawyers grapple with trailing modifiers. In short, the analysis and result may well differ depending on whether a modifier appears before a series or after it — an indefensible state of affairs.

On the other hand, some courts have recognized, at least implicitly, the conflict between the two doctrines, or canons (last antecedent and series qualifier).[43] In fact, the conflict has played out in recent decisions of the United States courts of appeals and Supreme Court interpreting a federal statute that provides for restitution to victims of child pornography. The same language was at issue in all the cases. It defines "full amount of the victim's losses" as including

> (A) medical services relating to physical, psychiatric, or psychological care;
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> (B) physical and occupational therapy or rehabilitation;

("All foundations, structural columns, girders, beams, supports, exterior walls, roofs, party walls and common walls between the units *and not included as part of the units* . . . ."); *People v. Henderson*, 765 N.W.2d 619, 630, 631–32 (Mich. Ct. App. 2009) ("An owner, possessor, or person *having the charge or custody of an animal* . . . ."); *In re Estate of Butler*, 803 N.W.2d 393, 397, 397–98 (Minn. 2011) ("unless there is clear and convincing evidence of a different intention, or there is a different disposition made by valid will as herein provided, *specifically referring to such account*"); *Wohl v. Swinney*, 888 N.E.2d 1062, 1064, 1065–66 (Ohio 2008) ("Any other person occupying your covered auto who is not a named insured or an insured family member *for uninsured motorists coverage under another policy.*").

[43] *See, e.g.*, *Payless Shoe Source, Inc. v. The Travelers Cos.*, 569 F. Supp. 2d 1189, 1193, 1196–97 (D. Kan. 2008) ("an actual or alleged violation of [six federal statutes], any workers' compensation, unemployment insurance, social security, or disability benefits law, *other similar provisions of any federal, state, or local statutory or common law*") (emphasis added to all the quotations in this footnote); *Pawn 1st, LLC v. City of Phx.*, 294 P.3d 147, 149, 149–50 (Ariz. Ct. App. 2013) ("a taxpayer, officer or department of the municipality *affected by a decision*"); *State v. Hazard*, 68 A.3d 479, 484, 485–88 (R.I. 2013) ("'Firearm' includes any machine gun, pistol, rifle, air rifle, air pistol, 'blank gun,' 'BB gun,' or other instrument *from which steel or metal projectiles are propelled, or which may readily be converted to expel a projectile* . . . .").

> (C) necessary transportation, temporary housing, and child care expenses;
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> (D) lost income;
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> (E) attorneys' fees, as well as other costs incurred; and
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> (F) any other losses suffered by the victim *as a proximate result of the offense.*[44]

What does the italicized phrase modify? The Fifth Circuit applied it only to *any other losses*, in (F);[45] ten other circuits applied it to all the items, (A) through (F), and two of those ten recognized that the two canons conflict.[46]

The Seventh Circuit, in an opinion by Judge Posner, said it bluntly: "the 'series-qualifier' canon contradicts the 'last-antecedent' canon . . . ."[47] What's more, the court said that "we don't know how to choose between them."[48] Exactly right. Pick your canon. The court then went on to conclude that there was "no rational basis" for applying the modifying phrase to the last item only — no reason why those last, unspecified losses

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[44] 18 U.S.C. § 2259(b)(3) (emphasis added).

[45] *In re Amy Unknown*, 701 F.3d 749, 762 (5th Cir. 2012) (relying on the "rule" of the last antecedent).

[46] *United States v. Rogers*, 714 F.3d 82, 89 (1st Cir. 2013) (relying on other circuits); *United States v. Benoit*, 713 F.3d 1, 19–21 (10th Cir. 2013) (relying on other circuits and congressional intent, but recognizing the "contradictory canons"); *United States v. Fast*, 709 F.3d 712, 720–22 (8th Cir. 2013) (relying on a comparable statute and congressional intent); *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012) (recognizing the contradictory canons); *United States v. Burgess*, 684 F.3d 445, 456–59 (4th Cir. 2012) (relying on other circuits, tort law, congressional intent, and policy); *United States v. Evers*, 669 F.3d 645, 658–59 (6th Cir. 2012) (relying on other circuits); *United States v. Aumais*, 656 F.3d 147, 152–53 (2d Cir. 2011) (relying on other circuits); *United States v. Monzel*, 641 F.3d 528, 535–37 (D.C. Cir. 2011) (relying on tort and criminal law); *United States v. McDaniel*, 631 F.3d 1204, 1208–09 (11th Cir. 2011) (relying on a canon like the series-qualifier canon, to be discussed in the text); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (having little analysis).

[47] *Laraneta*, 700 F.3d at 989.

[48] *Id.*

"would be subject to a proximate-cause limitation but not the very similar costs specified in the preceding subsections of the statute."[49]

Then came the Supreme Court, in *Paroline v. United States*.[50] A 5–4 majority agreed with the majority of circuits. The Court first observed that it had more than once required a showing of proximate cause, a "standard aspect of causation" in tort and criminal law, even when a statute did not mention it.[51] A general proximate-cause requirement "accords with common sense" because it limits claims for attenuated losses.[52] That's a matter of policy.

And what about canons? To counter the "grammatical rule of the last antecedent," the Court cited two that "work against" it.[53] First: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all" (citing *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).[54] This sounds like the series-qualifier canon — and two circuit-court decisions called it that[55] — although the series-qualifier canon applies to premodification as well, and the Scalia–Garner book, when propounding it, does not cite the foundational *Porto Rico* case.

The second countering canon deployed in *Paroline* was said to be "a familiar canon of statutory construction": "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated."[56] The Court did not seem to have in mind the *ejusdem generis* canon, by which a

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[49] *Id.* at 989–90.

[50] 134 S. Ct. 1710 (2014).

[51] *Id.* at 1720.

[52] *Id.* at 1721.

[53] *Id.*

[54] *Id.*

[55] *Benoit*, 713 F.3d at 20; *Laraneta*, 700 F.3d at 989.

[56] *Paroline*, 134 S. Ct. at 1721 (brackets in original).

general term is restricted to the same kind or class as specifically enumerated items.[57] The Court was not limiting a general term in light of the specifics; it was limiting the specifics in light of the general description, with its syntactically ambiguous modifier.

If this analysis is incorrect, you wonder why the Court didn't use the traditional name *ejusdem generis*. If the analysis is correct, the Court's "familiar" canon is not one that's included in the Scalia–Garner book, which aspires to "collect and arrange only the valid canons."[58] And the canon received little attention in any of the ten circuit-court opinions that had also applied subpart (F) to the other subparts: it was cited, parenthetically, in just one of them.[59]

By the way, neither of the dissenting opinions in *Paroline*, one of which Justice Scalia joined, disagreed with the majority on the reach of the ambiguous modifier in (F). And neither of the dissents cited canons.

Another curious point. The list in the statute was a vertical list, not a horizontal list. Yet all the justices and all the circuit judges — except those in the Fifth Circuit — ignored or overlooked the strong implication that a phrase or clause in one item of a vertical list can modify only something inside that item. Scalia and Garner call this the "scope-of-subparts canon."[60] Any judge who did notice and ignored it must have concluded that the legislative drafting was extremely poor (if indeed the drafters supplied the formatting).[61]

In the Fifth Circuit, which sat en banc, the majority paid particular attention to the "divided grammatical structure that

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[57] *See* Scalia & Garner, *Reading Law* at 199–213 (using as their first example *dogs, cats, horses, cattle, and other animals*).

[58] *Id.* at 9.

[59] *Fast*, 709 F.3d at 720–21.

[60] Scalia & Garner, *Reading Law* at 156–60.

[61] For a Senate bill that would override *Paroline* — by moving the final item in the list into its own subparagraph — see S. 295, 114th Cong., § 3 (passed Feb. 11, 2015).

does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separations."[62] Because of this structural difference — between a vertical and horizontal list — the majority declined to apply the canon (whatever it's called) from the *Porto Rico* case, the canon that the Supreme Court later relied on. The Court must have known about the Fifth Circuit's interpretation. Does that mean the Court rejected the scope-of-the-subparts canon?

So it often seems to go with the textualist exercise. Canons that conflict — which is something more than different canons pointing to different outcomes in a particular case. A "familiar" canon about catchall clauses that was apparently familiar only to the Supreme Court and one of ten circuits. Another structural indicator, if not a canon, that no justice and no judge in those ten circuits acknowledged. In the end, we can be glad that most judges do not look to canons alone, with their bewildering interplay, in trying to arrive at the most logical, sensible result.

The Example in *Barnhart*

Back to *Barnhart v. Thomas*, the seminal case on our last-antecedent doctrine, the case that has spurred its use. In an opinion that Justice Scalia wrote for a unanimous Court, he offered an example to illustrate how the doctrine works. The example needs to be quoted at length:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their

[62] *In re Amy Unknown*, 701 F.3d at 763.

> reasons for prohibiting the home-alone party may have had nothing to do with damage to the house — for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically prohibiting the one activity — hosting a party — that was most likely to cause damage and most likely to occur.[63]

Justice Scalia apparently sees no ambiguity in the parents' warning: the son "should hardly be able to avoid punishment by arguing that the house was not damaged." My question: why so? Isn't this just a bald assertion? Why couldn't the sentence be read or understood like this?

> You will be punished if you
>
> 1. throw a party or
> 2. engage in any other activity
>
> that damages the house.

(As noted earlier, you could achieve the same reading with dashes or commas around *or engage in any other activity*.[64]) The very definition of ambiguity is that the language "is susceptible of at least two reasonable interpretations."[65] Why is the son's interpretation unreasonable or implausible?

I conducted an experiment with 12 professors in my school's writing department. I make no claim for its scientific validity, but I think it's strongly indicative of how careful, experienced

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[63] 540 U.S. 20, 27–28 (2003).

[64] *See* Scalia & Garner, *Reading Law* at 161 (stating that commas would "cancel the last-antecedent canon").

[65] Garner, *Garner's Dictionary of Legal Usage* at 50.

legal readers would interpret the warning. I sent the professors this e-mail message:

> Would you all please vote on something? This is an example given in a case. Don't worry about the case. Just consider it in isolation.
>
> A parent warns his or her teenage son: "You will be punished if you throw a party or engage in any other activity that damages the house." The son throws a party. The house is not damaged.
>
> Please vote, as honestly as you can, for 1, 2, or 3. Don't "Reply to all."
>
> 1. The son will be punished.
> 2. The son will not be punished.
> 3. It's unclear — because the warning is ambiguous — whether the son will be punished.

Result: four voted for #1 and eight for #3. Conclusion: we can judge what the parent probably meant, but the language is ambiguous.

After all the votes were in, I sent the professors a follow-up e-mail that included these three questions:

> 4. Did the so-called doctrine of the last antecedent cross your mind before you voted? (Reminder: the doctrine says that a trailing modifier ordinarily refers only to the noun or phrase that it immediately follows.)
> 5. If you voted for #1 (the son will be punished), did the doctrine affect your vote in a significant way?
> 6. If you knew that the parent's only concern was to prevent damage to the house, would that change your vote? If so, what would your new vote be?

Of the 12 professors, only two answered no to #4, so the doctrine was in the mix for almost everyone. Of the four who said the son will be punished (no ambiguity), three said that the doctrine affected their vote. The doctrine mattered, then, to just a

quarter of all the voters, and one of those three volunteered a comment about "a parenting perspective," while another mentioned "common sense." The answers to #6 surprised me a little: knowing the parent's "concern" would have changed only four votes — but for all four of those professors, knowing the legislative intent, or purpose, would have resolved the ambiguity in favor of not punishing the son. That's half of those who originally found the example ambiguous.

Yet, according to Justice Scalia, knowing that the parents intended to prevent damage would still not be enough to even create ambiguity, because the parents may have had a deeper intent. They just might have wanted to preclude an argument about whether damage occurred, and the best way to accomplish that was to forbid parties altogether. No doubt the implication is that expressions of legislative intent are slippery. Perhaps, but does that mean they have no value? I think my experiment — limited though it is — suggests otherwise. If we knew that the parents intended to forbid throwing a party because of the potential damage, then for many readers — half in my experiment — the ambiguity would be resolved and the case decided. So why shouldn't that at least be considered? No relevant information should be off limits to the conscientious judge. Regardless of how weak you think the evidence of legislative intent is, it can hardly be weaker than the doctrine of the last antecedent.

One other point. Let's return to the example, standing alone. Suppose you have no evidence of legislative intent but only the words on the page. If you decide that the parents wanted to avoid any party, regardless of damage, I submit that you would in some measure be bringing to bear your intuition, your judgment as a parent: no parents want their teenage child to throw a party while they're gone. (In that respect, the example is loaded to favor the doctrine of the last antecedent.)

All in all, Justice Scalia presents a classic example of syntactic ambiguity that is best resolved through resources he would

have little truck with: legislative history and judicial intuition.[66] Whether or not they point in different directions, they should be brought to bear.

The Supposed Objectivity of Textualism

I believe that the principles reflected in many canons are useful guides to meaning, but not that interpretation should be a matter of just sorting through a welter of canons. In any event, the doctrine of the last antecedent does not make the cut. It has no validity to begin with in resolving ambiguity, it seemingly contradicts another canon, and courts sometimes misapply it altogether.

But I have other bones to pick with the canons-based textualism that it tends to be associated with. I'll mention just two of them here, one in this section and one in the next.

Above all else, textualism proclaims its objectivity:

> [W]e must lay to rest at the outset the slander that [textualism] is a device calculated to produce socially or politically conservative outcomes. Textualism is not well designed to achieve ideological ends, relying as it does on the most objective criterion available:

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[66] For an argument that intuitive thinking has value and happens anyway, see Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 Legal Comm. & Rhetoric: JALWD 1 (2013); *see also* Richard A. Posner, *Reflections on Judging* 205 (2013) ("Even judges who consult dictionaries . . . consider the range of commonsense nontextual clues to meaning that come naturally to readers trying to solve an interpretive puzzle."). *But cf.* John Campbell, *Mis*-Concepcion*: Why Cognitive Science Proves the Emperors Have No Robes*, 79 Brook. L. Rev. 107, 109, 117–25 (2013) (reviewing "[a] growing body of [cognitive-science] literature" on how emotions and beliefs drive intuition and identifying six markers of unchecked "intuition rationalization"). For an argument, supported by a study of 122 U.S. Supreme Court cases, that even textual analysis has traditionally — and justifiably — relied on something like intuition, see Lawrence M. Solan, *The Language of Statutes* 74–75 (2010) ("During most of American judicial history [until Justice Scalia was appointed], the predominant methodology for discovering ordinary meaning has been introspection. Without fanfare, judges simply rely upon their own sense of how common words are typically used.").

> the accepted contextual meaning that the words had when the law was enacted. A textualist reading will sometimes produce "conservative" outcomes, sometimes "liberal" ones.[67]

On that basis, you might expect Justice Scalia's voting record to produce *something* like an even number of politically conservative and liberal results. Maybe not 50–50, but a record that could stake some faint claim to objectivity. But the evidence makes a different case.

It's no answer, by the way, to cite some of Justice Scalia's decisions that may be categorized as liberal. Look instead at the broader record (explored below). Nor is it any answer to say that other judges are result-oriented or that other interpretive theories are even more open to manipulation. Textualism purports to operate on a loftier, more neutral "rule-of-law" plane.

Now, most observers will know about the divide between critics and supporters of textualism and its most prominent advocate, Justice Scalia.[68] My concern in what follows is not with the merits of the arguments for and against textualism, but with the notion that its outcomes have no ideological cast.

Summarized below are six studies. These kinds of observational studies have been criticized for, among other things, a "maddeningly simplistic" view of what is a liberal or conservative result, and for assuming that "ideology is invariably extrinsic to law."[69] That criticism has itself been addressed: the measures

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[67] Scalia & Garner, *Reading Law* at 16.

[68] For a brief summary of the public debate that followed publication of *Reading Law*, see Ross Guberman, Reading Law *or Reading Ourselves: How to Think About Posner v. Scalia*, Legal Writing Pro, http://www.legalwritingpro.com/articles/H72-posner-scalia.php (last visited Apr. 28, 2015).

[69] Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L.J. 1895, 1945, 1948 (2009). For a balanced review of empirical research, see Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 Nw. U. L. Rev. 743, 769–71 (2005) (concluding that, in studies of the lower federal courts, political ideology has a statistically significant but still modest effect on judging).

of ideology, however crude, still have a "significant explanatory effect"; and the idea that normal judging involves forms of moral or political reasoning is puzzling in ways (what exactly is this reasoning? why call it "reasoning" instead of "beliefs"?) but at the same time concedes that such "reasoning" is sometimes required in appellate cases — especially those that shape the law.[70] Yet *Reading Law* seems to hold textualism out as basically uninfluenced by anything social, moral, or political: through a set of 57 neutral canons, it "rise[s] above politics."[71]

So here are the studies, which you can read and assess for yourself.

First, a study by William Eskridge and Lauren Baer.[72] The authors analyzed all 1,014 Supreme Court opinions from 1984 to 2006 involving federal-agency interpretations of statutes. All these opinions were written after the landmark case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[73] which seemed to give a large measure of judicial deference to agency interpretations. When a statute does not speak directly to the precise question at issue, courts should uphold an agency's "permissible construction," or "reasonable interpretation," of the statute.[74]

Eskridge and Baer found that Justice Scalia agreed with liberal agency interpretations 53.8% of the time and conservative interpretations 71.6% of the time — a conservative–liberal difference of 17.8% that was somewhat larger than Justice Breyer's 14.6% liberal–conservative difference.[75] In a later article, Eskridge drew two conclusions from the study: (1) "Justice

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[70] Richard A. Posner, *Realism About Judges*, 105 Nw. U. L. Rev. 577, 582, 584, 586 (2011).

[71] Frank H. Easterbrook, Foreword to Scalia & Garner, *Reading Law* at xxvi.

[72] *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083 (2008).

[73] 467 U.S. 837 (1984).

[74] *Id.* at 842–44.

[75] Eskridge & Baer, 96 Geo. L.J. at 1154 tbl.20.

Scalia's text-driven votes in statutory cases have a strong ideological tilt that cannot be explained by chance . . ." and (2) "[a]t the very least, . . . textualism is no more constraining [than pragmatism or purposivism]."[76]

Second, another post-*Chevron* study, by Thomas Miles and Cass Sunstein.[77] They analyzed all Supreme Court cases (69 of them) between 1989 and 2005 that explicitly applied the *Chevron* framework to agency interpretations. The study "reveal[ed] a strong relationship between the justices' ideological predispositions and the probability that they will validate agency determinations."[78] The most conservative justices are 30 percentage points more likely to validate ideologically conservative decisions than liberal ones, while liberal justices are 27 percent more likely to validate liberal decisions.[79] Besides that, the conservatives' validation rates varied significantly — and somewhat more than the liberals' rates — depending on whether the agency decision was made during the Clinton administration or the two Bush administrations.[80] Finally, the overall validation rate of Justice Scalia, the objective textualist, was the lowest of any justice at 52%.[81] And this within a framework of deference.

Third, a study by Lee Epstein, Christopher Parker, and Jeffrey Segal.[82] The authors examined over 4,500 votes in 516 Supreme Court free-speech cases from 1953 to 2010. The authors found that the justices are "opportunistic free speechers": liberal justices are more likely to support, for instance, a stu-

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[76] William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 Colum. L. Rev. 531, 551 (2013) (book review of the Scalia–Garner text).

[77] *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. Chi. L. Rev. 823 (2006).

[78] *Id.* at 825–26.

[79] *Id.* at 826, 835 tbl.2.

[80] *Id.* at 826, 836 tbl.3.

[81] *Id.* at 832 tbl.1.

[82] *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*, epstein.wustl.edu/research/InGroupBias.pdf (last visited Apr. 28, 2015).

dent's display of a pro-marijuana banner, whereas conservative justices would be more likely to support a pro-life advocate's complaints about restrictions on protests near an abortion clinic.[83] But the two groups are not equally opportunistic. In an update to a related paper, the authors broke out the numbers for the current justices.[84] The voting disparity is significantly more pronounced for the conservative justices than the liberal justices. On the liberal side, Justice Ginsburg registers a liberal–conservative difference of 17.4% and Justice Breyer only 1.4%. (Justices Kagan and Sotomayor have not yet cast enough votes to be analyzed.) On the conservative side, Justice Scalia's conservative–liberal difference is 47.1%, second only to Chief Justice Roberts's 56.6%.[85]

Fourth, a study by James Brudney and Corey Ditslear.[86] They analyzed more than 600 Supreme Court labor-law cases from 1969 to 2003. They found that (1) "reliance on . . . canons . . . virtually doubled from the Burger to the Rehnquist eras"; (2) use of canons by liberal justices tended to be linked to liberal (pro-worker) outcomes, and use by conservative justices to conservative (pro-employer) outcomes; (3) in one subset of cases, "conservative members of the Rehnquist court [used] the canons . . . to ignore — and thereby undermine — the demonstrable legislative preferences of Congress"; and (4) "the canons are regularly used in an instrumental if not ideologically con-

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[83] *Id.* at 2–3.

[84] *A Response to a Critique of Our Study on In-Group Bias* (Sept. 30, 2014), epstein.wustl.edu/research/InGroupBiasResponse.pdf (responding to the critique cited in the next footnote).

[85] *Id.* at 4 app. B, "Corrected" Table. *But see* Todd E. Pettys, *Free Expression, In-Group Bias, and the Court's Conservatives: A Critique of the Epstein–Parker–Segal Study*, 63 Buff. L. Rev. 1, 70–71 (2015) (criticizing the coding in about 25% of the cases that the author reviewed, especially as the classifications affect Chief Justice Roberts and Justice Alito, but acknowledging that adjustments would perhaps not affect Justice Scalia's more sizable voting record "to a large degree").

[86] *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1 (2005).

scious manner."[87] So much, once again, for the superior neutrality of canons and their constraining effect. In fact, using their labor-law database, Brudney and Ditslear concluded that, at least until 1986, when the Burger Court ended, it was legislative history that had a moderating effect: liberal justices were more likely to vote in favor of employer interests, and conservative justices in favor of worker interests, when they consulted legislative history.[88]

Fifth, a study by Peter J. Smith.[89] He studied the citation patterns in the Court's federalism cases since 1970, analyzing the extent to which the conservative majority and liberal minority relied on the Federalist and Anti-Federalist views expressed during the debate over ratification. No surprise: (1) the current majority pretty consistently cites Anti-Federalist views only to argue that the Constitution's meaning accommodated them in one way or another, whereas the minority always cites them as evidence that the Constitution means precisely what the Anti-Federalists feared it would mean; (2) the majority is much more likely than the minority to cite Federalist statements meant only to allay concerns about national power, without even once (in 81 citations) acknowledging that the statement could be read more narrowly, given the context; and (3) in 63 of 71 citations, the majority either discounted or read narrowly Federalist statements that were more strongly nationalistic.[90]

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[87] *Id.* at 5–6.

[88] *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 Berkeley J. Emp. & Lab. L. 117, 139 tbl.4, 144 tbl.6, 160–69 (2008) (also concluding that, ironically, after 1986 liberal justices tended to avoid using legislative history when writing pro-employer decisions — a strategy that made their overall use seem more pro-employee).

[89] *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. Rev. 217 (2004).

[90] *Id.* at 256–59 tbls.1, 2 & 3.

Smith's conclusion should come as no surprise either:

> The ability of the current Justices to find support in the historical record for sharply conflicting views of the original understanding demonstrates that one of the principal defenses of originalism — that it[ ] . . . constrains the ability of judges to impose their own views under the guise of constitutional interpretation — is overstated at best and illusory at worst.[91]

Finally, a study by Geoffrey Stone.[92] He polled colleagues to identify the 20 most important Supreme Court cases since 2000. In these 20 cases, the five very conservative justices voted for the conservative position 98.5% of the time — and Justice Scalia 100% of the time.[93] The five moderately liberal justices (Stone explains the "moderately" label) voted for the liberal result only slightly less often, but remember that we are assessing how objective Justice Scalia's textualism is. And in the most important cases of our time, it produced a 100% conservative result.

What's even more, Stone finds no principled explanation for it. If the liberal justices can be accused of activism, it's activism that the framers of our Constitution endorsed in two situations:

> (1) when the governing majority systematically disregarded the interests of a historically underrepresented group . . . and (2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the political status quo, and/or perpetuate its own political power.[94]

But no such principled theory explains the conservative justices' selective judicial activism. Originalism?

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[91] *Id.* at 225.

[92] *The Behavior of Supreme Court Justices When Their Behavior Counts the Most*, 97 Judicature 82 (Sept.–Oct. 2013).

[93] *Id.* at 84.

[94] *Id.* at 87 (quoting Jefferson, Madison, and Hamilton).

> [I]t does not in any way explain the voting behavior of the very conservative justices in these cases. . . . [T]heir votes . . . were determined first and foremost by their own personal policy preferences.[95]

These six studies are all empirical in the sense that they involved numbers. Many other examinations of Justice Scalia's opinions also cast doubt on the neutrality and consistency of his textualism. Please digress to a long footnote.[96] So what do

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[95] *Id.* at 89.

[96] *See, e.g.*, Frank B. Cross, *The Theory and Practice of Statutory Interpretation* 177 (2009) (finding, again from empirical analysis, that the opinions of Justices Scalia and Thomas show "a highly statistically significant association with ideological outcome judging"); Richard H. Fallon, Jr., *The Dynamic Constitution* 293 (2d ed. 2013) (pointing out that "originalists reserve the right to pick which [entrenched] precedents to reject and which to accept, largely on the basis of their own judgments concerning which are important, desirable, and undesirable"); Campbell, 79 Brook. L. Rev. at 110 (examining in detail two business-friendly conservative-majority opinions, including one by Justice Scalia, and finding all the telltale signs that "the conservative majority . . . engag[ed] in *post hoc* reasoning to justify opinions that align with their fundamental goals and beliefs"); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385, 391, 392 (2000) ("Is it mere coincidence that in virtually every case Justice Scalia discerns from the Constitution the conclusion is consistent with his conservative personal ideology? . . . [I]n these cases [examined by the author] Justice Scalia is very much making a personal value choice and then invoking the history that he wants to support it."); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 297 (2009) ("[Justice Scalia] has sometimes employed versions of originalism that he has otherwise criticized in order to reach results that appear to be consistent with his personal preferences . . . . [H]e has done so frequently enough that one must question whether originalism is quite the constraining tool that its proponents . . . claim that it is."); Paul Killebrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. Rev. 1895, 1900, 1901, 1922–27 (2007) (using two of Justice Scalia's opinions to illustrate how his textualism, by insisting on an especially high degree of clarity and precision — and finding clarity when others do not — puts "constraints on Congress, government agencies, and the judiciary" and "serve[s] prominent textualists' philosophical preference for limited government"); Andrei Marmor, *The Immorality of Textualism*, 38 Loy. L.A. L. Rev. 2063, 2072–77, 2078 (2005) (arguing that delving into ordinary meaning, dictionaries, and canons does not resolve the hard cases that reach appellate courts — those typically involving ambiguity, the application of vague terms, and other linguistic

you think? Is it really such a "slander" to say that textualism is calculated to produce politically conservative results?

For a fairly balanced view of the Scalia–Garner book — and an end to this section you're reading — consider a review by Margaret Lemos.[97] She says that although the authors "hotly deny" that textualism is political, they "fail to develop the argument, or to confront the widespread association of textualism and conservatism."[98] She contends that the differences between the theories of interpretation are exaggerated — that they are "too similar to one another, and too malleable, to

indeterminacies; rather, textualism "reflects a political stance" because its "whole point . . . is to undermine the ability of the legislature to pursue broad regulatory goals"); Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 134, 135, 170 (2008) (finding, from a random sample of Justice Scalia's dissenting opinions, that he "entirely suspends textualism in about a quarter of the cases [studied]"; he "does not usually construe statutory language in light of its ordinary meaning"; and he "usually interprets statutes in light of what he takes to be the statute's purpose" — often derived from his own "bald[] . . . hunches"); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 Vill. L. Rev. 93, 100 (1995) (finding "selective and tortured use" of textualist rules and "consistently . . . conservative values as Justice Scalia attempts . . . to narrow or eliminate statutory protection for disadvantaged individuals"); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 549, 567 (2006) (exploring the "deep tensions between the jurisprudence and political practice of originalism" and describing Justice Scalia as a "particular master" at "us[ing] . . . judicial opinions . . . to excite the anger, fears, and resentments of conservative constituencies"); Jane S. Schacter, *Text or Consequences?*, 76 Brook. L. Rev. 1007, 1009 (2011) (arguing, from an analysis of selected opinions by Justice Scalia, that "textualism in action often uses strikingly consequentialist methods. In other words, it can and does argue for and against particular interpretations . . . based explicitly on the policy consequences that would follow — consequences that are *not* imputed to Congress as part of the legislative purpose.").

[97] *The Politics of Statutory Interpretation*, 89 Notre Dame L. Rev. 849 (2013) (book review).

[98] *Id.* at 849, 853.

drive outcomes in meaningful and predictable ways."[99] They have instead become "political brands, marking judges as conservatives or liberals."[100] In particular, textualism, or the new textualism, gained prominence in the 1980s, during the Reagan years, when it was "embrace[d] by conservative activists eager to challenge the legal status quo."[101]

Regardless of whether Lemos is right or wrong in these contentions, she makes another point that I think is undeniable:

> [T]extualism is not inherently conservative in design . . . [b]ut . . . the broader *practice* of textualism surely is. . . . To deny the political nature of contemporary textualism is to blink reality.[102]

The Exclusionary Side of Textualism

I once was privately (and amicably) debating textualism with a friend who knows a lot more about it than I do. He asked, "Why should I care about how a Ugandan court has interpreted language similar to language in a U.S. law?" Well, because you should not refuse to consider *any* thoughtful analysis, regardless of the source. You may think it deserves little or even no weight, but to automatically exclude it seems to me extreme.

That brings us to legislative history. I acknowledge the strong, well-supported case that the Scalia–Garner book makes against it (besides their basic one that judges should not be looking for a fictional legislative intent): committee reports are not voted on and rarely read; legislators try to manipulate legislative history; it's a conglomeration open to selective use; legislators cannot constitutionally delegate lawmaking authority to one

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[99] *Id.* at 898; *see also* Solan, *The Language of Statutes* at 51 ("Gone largely unnoticed in the battles between these camps during the past quarter century is . . . that [they] agree upon almost everything when it comes to statutory interpretation.").

[100] Lemos, 89 Notre Dame L. Rev. at 906.

[101] *Id.* at 891.

[102] *Id.* at 853, 907.

of their committees; and more.[103] With the limited exception of using it like a newspaper or dictionary to "establish linguistic usage," the authors advocate a return to the "no-recourse doctrine" of the pre-20th century.[104] Almost total abstinence. Apparently, judges cannot be trusted to make fair, honest use of legislative history.

But consider these arguments for a contrary view:

- Legislative history has a constitutional and historical foundation; the canons do not.[105]
- The sources of legislative history have a fairly well-settled hierarchy of reliability; canons do not.[106]
- It's quite possible to use legislative history in ways that are generally sound and objective.[107]
- In the federal courts of appeals, which decide thousands of cases a year, the cases "usually do not involve conflicting legislative history; in fact, the history itself often is clear enough to clarify the statute . . . ."[108]
- Federal agencies, whose reasonable interpretations courts should defer to on issues that statutes don't address, "view legislative history as essential reading."[109]
- The legislative process necessarily depends on the work of staff, as in any large institution, and enough

[103] Scalia & Garner, *Reading Law* at 369–90.

[104] *Id.* at 369, 388.

[105] James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 Cal. L. Rev. 1199, 1217–25 (2010).

[106] *Id.* at 1225–32.

[107] *See, e.g.*, Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70, 90–134 (2012) (offering five principles, based on Congress's own rules, to guide judges and lawyers).

[108] Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 862 (1992). *But see* Lawrence M. Solan, *Is It Time for a Restatement of Statutory Interpretation?*, 79 Brook. L. Rev. 733, 734 (2014) ("[T]he use of legislative history as evidence of legislative intent . . . rarely plays anything resembling a dispositive role in determining cases.").

[109] Robert A. Katzmann, *Judging Statutes* 28 (2014).

review, personal involvement, and decision-making by legislators goes into the process to give its history at least a plausible claim to legitimacy — and to underpin its constitutionality.[110]

- As for the "fiction" of legislative intent, "we routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play. The legislature is a prototypical example . . . ."[111]
- "It is a bipartisan institutional perspective within Congress that courts should consider reliable legislative history and that failing to do so impugns Congress's workways."[112] In other words, to apply canons, especially judge-made canons, and ignore legislative history creates a "democracy problem."[113]
- Besides defeating the expectations of legislators, if courts stopped consulting legislative history, they would probably worsen, not improve, the quality of legislation.[114]
- In a recent empirical study of congressional drafters that "puts to shame Justice Scalia's cynical attitude toward [legislative history],"[115] the authors concluded that "[a] real-world look into the drafting process undermines the constitutional case against legislative history";[116] they were told that legislators "are more

[110] Breyer, 65 S. Cal. L. Rev. at 858–60, 863–64; *see also* Katzmann, *Judging Statutes* at 13–22 (describing the lawmaking process in some detail and asserting that "[w]ithout committees, Congress could not function").

[111] Solan, *The Language of Statutes* at 82–83, 89–98 (discussing the justification and circumstances for this common practice); *see also* Nourse, 122 Yale L.J. at 82 ("Just as corporations are bound by the statement of their agents, Congress may be bound by the statements of its agents.").

[112] Katzmann, *Judging Statutes* at 36–37 (quoting several prominent legislators).

[113] Eskridge, 113 Colum. L. Rev. at 567–68.

[114] Breyer, 65 S. Cal. L. Rev. at 871–74.

[115] Eskridge, 113 Colum. L. Rev. at 571.

[116] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the*

likely to vote . . . based on a reading of legislative history than on a reading of the statute itself";[117] they learned from the drafters that "legislative history was emphatically viewed . . . as the *most important* drafting and interpretative tool apart from text";[118] and they reported very mixed results on whether the drafters followed or even knew about various substantive and textual canons.[119]

- In a similar study of agency rule drafters, 76% of them agreed that "legislative history is a useful tool for interpreting statutes."[120] And the study, together with the study of congressional drafters, confirms that the sources have a generally accepted order of reliability.[121]
- Finally, given how manipulable — and manipulated — the canons are (see the previous section), it's unavailing to criticize legislative history on those grounds without good evidence that it is even less constraining.

Let's round out this debate with an example, the famous one of an ordinance that states: "No person may bring a vehicle into the park." Scalia and Garner dissect it in some detail.[122] They consult dictionaries, decide that none of the definitions "seem right," and conclude that the "proper colloquial meaning" is "a *sizable* wheeled conveyance (as opposed to one of any size that

Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part 1, 65 Stan. L. Rev. 901, 967 (2013).

[117] *Id.* at 968.

[118] *Id.* at 965.

[119] *Id.* at 926–48.

[120] Christopher J. Walker, *Inside Agency Interpretation*, 67 Stan. L. Rev. 999, 1038 (2015).

[121] *Id.* at 1043–44 (noting that the order of the reliability rankings in the two studies is "virtually identical," although the agency drafters rated the individual sources as "generally . . . less reliable than was indicated by their congressional counterparts").

[122] Scalia & Garner, *Reading Law* at 36–38.

is motorized)."[123] Hence, these are permitted: airplanes, bicycles, roller skates, and toy automobiles. But not these: ambulances, golf carts, mopeds, motorcycles, and (perhaps) Segways.

William Eskridge responds in a powerful, wide-ranging critique of the book:

> This strikes me as an utterly judicious, well-informed, and highly illuminating linguistic analysis — but a crazy legal analysis.
>
> Let me explain the crazy point. I do not see how a judge can even begin to answer the interpretive questions in the no-vehicle law without understanding, from the perspective of the legislature and the political culture that produced the statute, what the purpose of the statute was. For example, the city council could have been responding to complaints that kids riding bicycles as well as motorscooters have been running into older park visitors and even little children, with injurious consequences. . . . [T]he councilmember sponsoring the measure promised her colleagues and the voters that the ordinance "would head off accidents like these bicycling and motorscooter atrocities, by banning them from the park altogether." If *that* were the legislative background of the ordinance, its purpose was to preserve public safety, especially for the very old and the very young persons using the city parks. To say, as Scalia and Garner do, that the statute does not apply to bicycles is quite crazy from the perspective of responsible governance.[124]

Here's the upshot. Canons as a group have no superior claim to legitimacy, orderliness, reliability, or acceptance. If judges can make informed, sensible decisions about them in individual cases, then surely judges can make informed, sensible decisions about legislative history.

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[123] *Id.* at 37.

[124] Eskridge, 113 Colum. L. Rev. at 560–61.

Parting Thoughts

I leave it to others with more expertise to carry on the debate about interpretation. It may be that, apart from disagreement about using legislative history, the differences between approaches are exaggerated. And it's no doubt true that "the [Scalia–Garner] book contains a great number of generalizations that would be considered acceptable . . . by the authors' opponents."[125] Certainly, the book contains a wealth of examples that could sharpen the work of any legal drafter.

I suspect that most judges do not follow the strict, formalistic, canons-balancing textualism espoused in *Reading Law*. Rather, they follow the more fluid, expansive approach outlined by William Eskridge:

> [T]he judge applying the larger array of canons contemplated by the funnel of abstraction [Eskridge's hierarchy of canons] does not apply the textual canons in isolation. Instead, she or he forms tentative conclusions from thinking about the ordinary meaning and reconsiders them as she or he examines other sources, including legislative history. That is, a judge's announcement that "the statute has a plain meaning" comes only after she or he has considered legislative history and purpose, precedent, agency views, reliance interests, and public values.[126]

But I have a reservation. Eskridge puts the textual canons at the bottom of his abstraction funnel as the most authoritative and concrete canons. As I've tried to show in this article, though, one of the most familiar and widely cited textual canons is beset with flimsiness, confusion, and conflict. And I wonder what the same close scrutiny would reveal about some of the other textual canons, such as the surplusage canon and the *ejusdem generis* canon.

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[125] Solan, 79 Brook. L. Rev. at 736.

[126] Eskridge, 113 Colum. L. Rev. at 586.

You might respond that weak canons like the last antecedent rarely carry the day by themselves — courts almost invariably cite other reasons — so why does it matter? Well, because courts do themselves a disservice by enlisting such props. And because they are too often used to declare a "plain meaning" in the face of ambiguity — as Justice Scalia did with his *Barnhart* example.[127] And because they lend an undeserved air of certainty and objectivity to the textualist endeavor. Witness Justice Scalia's pronouncement in *Barnhart* that the son "should hardly be able to avoid punishment by arguing that the house was not damaged."

That's what's most objectionable — the pretense of objectivity and political neutrality. At least as textualism is practiced, those claims for it are deeply and disturbingly untrue.

[127] Posner, *Reflections on Judging* at 215 ("Principles of interpretation do not dispel ambiguity; rather, they impose a meaning on an ambiguous text.").