Introduction to the Micro--- Symposium on Scalia & Garner's “Reading Law”: The Textualist Technician

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MICRO-SYMPOSIUM
INTRODUCTION TO THE MICRO-SYMPOSIUM ON

SCALIA & GARNER’S
“READING LAW”

Recently, we issued a call for short (1,000 words) essays on Reading Law: The Interpretation of Legal Texts, by Antonin Scalia and Bryan Garner. We sought “[a]ny theoretical, empirical, or practical commentary that will help readers better understand the book.” The result is this micro-symposium.

Our call drew dozens of micro-essays, some thought-provoking, some chuckle-prompting, and some both. Blessed with an abundance of good work but cursed by a shortage of space, we were compelled to select a small set – representative and excellent – of those essays to publish here. Fortunately, our sibling publication, the Journal of Law, could spare a few pages for the presentation of more (but still not all) of the worthy submissions – specifically, papers by William Trachman, Jordan T. Smith, and Eric J. Segall – as well as a longer paper by Steven A. Hirsch. We regret that we cannot do full justice to the outpouring of first-rate commentary we received. May you enjoy reading the following excellent representatives as much as we did.

— The Editors


18 Green Bag 2d 106
A COMMENT ON
SCALIA & GARNER’S “READING LAW”

THE
TEXTUALIST TECHNICIAN

Karen Petroski

READING LAW HAS ALL THE hallmarks of a reference book. Like much of Bryan Garner’s work, it is structurally akin to a highbrow user’s guide. A user can pick Reading Law up, find a topic in the table of contents, read a few pages, and put the volume down, having reached the end of a self-contained chunk of content. The book need not be read cover to cover – but it can be. If it is, it also makes a more general normative point. Justice Scalia’s influence, visible in the individual chunks, becomes quite apparent when the book is considered at this scale. This overall argument, of course, concerns the appropriate attitude for judges, legislators, lawyers, and others to take toward legal texts.

The basic thrust of the argument is that where decisions about language are concerned, proper legal behavior involves mainly the exercise of technical skill; it is analogous to other skills we tend to consider technical, often because they involve “objective,”

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1 Antonin Scalia & Bryan Garner, Reading Law 16 (2012) (noting that textualism relies on “the most objective criterion available”).
“clinical”² determinations. As the authors put it, discussing “interrelating canons”: “The skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies.”³ On this account, the legal treatment of texts is a precise, standardized exercise, something like land surveying or the dispensing of pharmaceutical products. While it involves judgment, it is not an art; it is “exegesis” rather than “eisegesis,”⁴ a matter of the “mind” rather than of the “heart.”⁵ It should aspire to the model of the “rock-hard science[s].”⁶ The shape of the book supports this position, packed as it is with numbers and lists, and ready to be read piecemeal.⁷

*Reading Law* offers itself as a tool for this putative textual technician. But the technician the book posits, to act as instructed, needs more than *Reading Law* by his or her side. This technician also needs an “accurate knowledge of language.”⁸ By this, the authors seem to mean partly an ability to understand instances of language use as other English speakers would.⁹ This skill is not very specialized; it is what we exercise in conversation or in our reading of, for example, traffic signs and menus. *Reading Law* (like Justice Scalia’s judicial writing) occasionally reminds us of how natural this ability feels.¹⁰

At times, however, the authors admit that their technician needs more than basic English fluency and literacy. This technician also needs fluency in legal language,¹¹ as well as a more sophisticated

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² Id. at 40 (noting that the term “literal” as used by the authors “bears a clinical sense”).
³ Id. at 59.
⁴ Id. at 10.
⁵ Id. at 348.
⁶ Id. at 402.
⁷ Principle Number 12, id. at 116-25, is an especially good example.
⁸ Id. at 31 (“Through accurate knowledge of language and proper education in legal method, lawyers ought to have a shared sense of what meanings words can bear and what linguistic arguments can credibly be made about them.”).
⁹ Id. at 71 (“In everyday life, the people to whom rules are addressed continually understand and apply them.”).
¹⁰ Id. at 82 (“[O]riginalism remains the normal, natural approach to understanding anything . . . written in the past.”).
¹¹ See, e.g., id. at 73, 274, 324.
ability to reflect on regularities of usage and to theorize about their frequency and defensibility – to imagine “the ‘reasonable reader,’ a reader who is aware of all the elements . . . bearing on the meaning of the text,” and to make “invariably sound” “judgment[s] regarding their effects.”  

Some of the technicians described in Reading Law need even more: the ability to use language not just functionally, but well, with good judgment. Occasionally, the authors admit that not everyone has this skill: “[I]f . . . legislators themselves are not mindful of ferreting out words and phrases that contribute nothing to meaning, they ought to hire eagle-eyed editors who are. (Many, in fact, do.)”

The skill could also be described as a form of practical wisdom or a virtue, and it does seem necessary for the behavior the authors recommend. The authors themselves have it in spades; they are remarkably well-read and well-informed users of legal English. How many of their readers are their peers in this regard? Comments in the Introduction suggest the authors might answer, “Not too many.” Law schools, they say, “fail[] to inculcate the skills of textual interpretation.” This “lack of training in lawyers produces a lack of competence in judges.”

These brief and unrepeated observations should be more than a way for the authors to justify the existence of their book. They reflect, in a dramatically understated way, a long-term shift in our culture toward the devaluation of critical reflection on language use and of prolonged, supervised training in that ability as part of a general education. The authors’ reference to education in interpretation as education in a “skill” is itself a symptom of this shift. Readers of an age and education comparable to the authors’ are probably aware of others, including changing practices in the publication industry.

12 Id. at 393.
13 Id. at 199.
14 Id. at 7.
15 Id. at 8.
and the increasing marginalization of writing instruction. Younger readers might not be.

Scalia and Garner acknowledge some results of this trend, but they do not address it directly enough. In their second edition, they would do well to put their authority behind the position that the textualist technician needs practical wisdom as well as skill, and to stress that this virtue is valuable in its own right. Otherwise, the ability they take for granted, which is not just a technical skill but something much deeper, wider, and less amenable to summary or soundbite, will continue to become more rare.

READING LAW ADVANCES a jurisprudential tradition that treats legal reasoning as a kind of grammar. Scalia & Garner state their objective as avoiding judicial arbitrariness. To do that, they claim that discretionary judgments about the meaning of a law can be constrained with the rigors of linguistic analysis. Whatever one thinks of their general jurisprudential approach, they come up surprisingly short on what should be their starting point: how do we establish the common linguistic ground for knowing what individual words mean?

This is disappointing. Scalia & Garner clearly love language and Garner is the preeminent legal lexicographer of our time. But their coda, “A Note on the Use of Dictionaries,” and their chapter on “plain meaning” simply exalt off-the-shelf dictionaries as an authori-

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tative solution to this threshold problem. Superficially, this appeals to a sense of hide-bound tradition. But the citation of dictionaries as legal authority, particularly for non-technical words, is something of a modern trend. In the graph below, you can see the result of a Westlaw search for the relative frequency of “dictionary” and its highbrow synonym, “lexicon,” in the decisions of the Supreme Court from 1790-2013. The gray dashes indicate the words’ relative frequency each decade and the horizontal black lines, the average for each five-decade epoch.

Far from traditional, the resort to dictionaries was actually quite rare (0.6% of cases) in the half-century after 1789. While it became more common over the next 150 years, their citation rate hovered around only 2-3% of cases until 1990. Then it shot up, such that 33% of the cases decided since 2010 referenced dictionaries. This trend is also reflected, albeit to a lesser extent, in the decisions of the lower courts, where the citation of dictionaries has doubled over the past three decades. What prompted this abrupt change? The vertical line suggests an obvious guess: the appointment of Justice Scalia in 1986.

The real problem for Scalia & Garner is not this approach’s lack of a historical pedigree. It is that using a dictionary to resolve disputes over the meaning of a word is unjustifiable if one is actually interested in rigorous linguistic analysis. To be sure, Scalia & Garner admonish readers about the quality of various dictionaries, for which they provide a bibliography of authoritative lexicons. But resorting to dictionaries at all is a terribly un-rigorous way of resolving the disputed meaning of any word, past or present.

When we talk about a word’s “meaning,” we are ordinarily describing two concepts. One is the word’s acceptable uses. If I say I am going to “jump into the shower,” you have probably heard other people “jump into the car” or “jump into bed.” You know what I mean when I use the word “jump” instead of “enter” because you have heard these words used interchangeably like this. The other is the cluster of associations a word accumulates in the course of its usage. “Jump” is rarely, if ever, used to describe slow movements. So when I say I am going to “jump into the shower,” you expect me to be quick about it.
THE RATE DICTIONARIES APPEAR IN SUPREME COURT OPINIONS, 1790-2013

A word’s definition requires an editorial judgment about its most noteworthy uses and associations as well as how best to convey them with other presumptively well-known words, a process one philosopher described as coming up with a “lame partial synonym plus stage directions.”¹ Some uses and associations are included. Others are excluded.

If a legislature makes these editorial judgments by writing a definition into a statute, that may tell you something. But off-the-shelf dictionaries reflect either the lexicographers’ personal biases or the arbitrary collection of texts (from Shakespeare to Twitter) that they used to find examples of a word’s usage. Samuel Johnson, whose is

¹ W.V.O. Quine, *From a Logical Point of View* 56 (1980).
first on Scalia & Garner’s list of authoritative lexicons, relied on his discretion about the words he found in 500 texts from his library. He sought, not to convey how each word was actually used, but to provide “pleasure or instruction, by conveying some elegance of language, or some precept of prudence, or piety.”2 Or take Webster’s. The sense of “jump” as “to enter quickly” is excluded, while violating a bail agreement is included. There is no empirical basis for this choice. A Google search for “jump into the shower” returns 7.5 times as many hits as “jump bail.” Instead, it reflects the editors’ judgment that “jump bail” is more worthy of their page-space.

All a dictionary can tell you is that one particular use of a word existed when the dictionary was written. It cannot rule out other possible uses or resolve disputes over which known use is the most appropriate in a given context. If a word’s meaning is unknown, dictionaries might offer an accessible introduction. But lawmakers presumably know the words they are using and choose them because their use has achieved some desired result in the past. Dictionaries cannot illuminate what motivated those word choices or how society would have understood them any better than other contemporaneous examples of the words’ usage might.

What then does a dictionary offer in disputes over meaning? As is clear from Noel Canning,3 where Justices Breyer and Scalia sparred over Samuel Johnson’s definitions for “recess,” “happen,” and “the,” as if a 1755 dictionary were the Talmud, it is not common linguistic ground. Instead, it offers a rhetorical device for asserting that a preferred interpretation is obvious, a pedantic way of saying, “you’re an illiterate idiot.” It offers an appeal to authority that casts a discretionary judgment as the compelled result of linguistic rules.

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2 Samuel Johnson, The Plan of a Dictionary of the English Language 42 (1747).
3 134 S.Ct. 2550 (2014).
A COMMENT ON SCALIA & GARNER’S “READING LAW”

GOOD FOR LEGISLATIVE GEESE BUT NOT JUDICIAL GANDERS?

Brian S. Clarke

ONE TROUBLING ASPECT of Reading Law is the narrow definition of “legal texts” employed by Justice Scalia and Professor Garner. They define “legal texts” as being limited to constitutions, statutes, and regulations. This, of course, ignores the single largest body of “legal texts”: judicial opinions. The interpretative canons discussed in Reading Law, which place primary importance on the words used by drafters, simply do not apply to judicial opinions.

Why? In short, it seems Justice Scalia (and his fellow textualists on the Supreme Court), can dish it out when it comes to linguistic precision, but cannot take that same level of scrutiny.

Some of the clearest examples of the Court’s significant failures of linguistic precision have come, ironically, in cases in which the Court has applied a strict textualist interpretation to statutes. A trio of cases examining factual causation standards relevant to claims under several federal statutes provide a particularly apt example.¹ In


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Gross v. FBL Financial Services, Inc., the Court interpreted the operative language in the Age Discrimination in Employment Act, which prohibits discrimination “because of age.” Applying the “ordinary meaning” canon of statutory construction, the Court determined that, based on dictionary definitions, “because of” in the ADEA meant “but for” factual causation. However, the Court’s articulation of its factual causation standard was linguistically imprecise and superficial. The Court held that, under the ADEA, age must be “the but for cause” of the employer’s decision and “the reason” for the decision.

Using the Ordinary Meaning Canon and the Grammar Canon to interpret Gross, one would conclude that the Court’s use of the direct article “the” (rather than the indirect article “a”) was purposeful and that the Court intended to require that age was the sole, single or only but-for cause of the employer’s decision. However, such a

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3 See READING LAW at 69-77 (discussing the “Ordinary Meaning Canon”).
4 Gross, 557 U.S. at 175-76.
5 Id. at 176.
6 Id. (emphasis added).
7 READING LAW at 69-77 (the “Ordinary Meaning Canon”) and 140-143 (the “Grammar Canon”).
8 This is how the Court has repeatedly interpreted the use of the definite article in statutes and rules. See Rapanos v. United States, 547 U.S. 715, 732 (2006) (use of direct article “the” showed Congressional intent to indicate specific “waters”); Rumsfeld v. Padilla, 542 U.S. 426, 434-35 (2004) (use of definite article “the” in habeas statute indicated that “generally only one proper respondent to a given prisoner’s habeas petition”). See also Shum v. Intel Corp., 629 F.3d 1360, 1367 (Fed. Cir. 2010) (use of the definite article “the” in Fed. R. Civ. Proc. 54(d)(1) indicates that what follows, “prevailing party,” is specific and limited to a single party); WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1222 (1989); BLACK’S LAW DICTIONARY 1477 (6th ed. 1990).
narrow view of factual causation is logically preposterous.\footnote{See Brian S. Clarke, \textit{The Gross Confusion Deep in the Heart of Univ. Texas S.W. Med. Center v. Nassar}, 4 Cal. L. Rev. Circuit 75, 76 (2013). Predictably, some lawyers and judges have read the Court’s opinion in \textit{Gross} to literally mean what it says, which would be appropriate based on \textit{Reading Law}. This has led to arguments in scores of cases — and holdings in a handful — equating but-for causation with sole causation. See \textit{id.} at 75 n.2-3.}

The Court engaged in an identical textualist analysis of Title VII’s retaliation provision in \textit{Univ. of Texas S.W. Medical Center v. Nassar},\footnote{133 S. Ct. 2517 (2013).} but was even more linguistically imprecise in its opinion. There, the Court used both the definite article “the”\footnote{Id. at 2528.} and the indefinite article “a”\footnote{Id. at 2534.} when describing the requisite factual causation standard for a retaliation claim under Title VII.\footnote{See 42 U.S.C. § 2000e-3.}

The Court’s factual causation trilogy culminated in \textit{Burrage v. U.S.}.\footnote{134 S. Ct. 881 (2014).} There, Justice Scalia himself, writing for the Court, applied the “ordinary meaning” canon to the Controlled Substances Act and relied on \textit{The New Shorter Oxford English Dictionary} to determine the meaning of “results.”\footnote{Id. at 888.} To support the Court’s dictionary-based ordinary meaning interpretation of “results,” Justice Scalia turned to \textit{Gross} and \textit{Nassar}. In doing so, however, Justice Scalia threw \textit{Reading Law} out the window. Instead of applying either the ordinary meaning canon or the grammar canon to the words the Court used in \textit{Gross} and \textit{Nassar}, Justice Scalia instead simply used brackets to change the words used by the Court in those cases.\footnote{I hereby dub this the “Use-Brackets-To-Change-Words-And-Fundamentally-Alter-The-Meaning-Of-The-Sentence Canon” of judicial opinion interpretation.} Specifically, Justice Scalia eliminated the problematic definite article “the” from the Court’s holdings in \textit{Gross} and \textit{Nassar}, and changed it to the far more logical indefinite article “a,” as follows: (1) in \textit{Nassar}, “we held that [Title VII’s retaliation provision] ‘require[s] proof that the desire to
retaliate was \[a\] but-for cause of the challenged employment action;”\(^{17}\) and (2) in Gross, “we held that ‘[t]o establish a disparate-treatment claim under the plain language of [the ADEA] . . . a plaintiff must prove that age was \[a\] ‘but for’ cause of the employer’s adverse decision.’”\(^{18}\)

Justice Scalia and Prof. Garner clearly understand the power of words and demand linguistic precision by the drafters of legal texts. If the canons in Reading Law apply to legal texts created by legislative geese, they should apply equally to legal texts created by judicial ganders.

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\(^{17}\) Id. at 888-89 (quoting Nassar, 133 S. Ct. at 2528) (first brackets added, remaining brackets original; emphasis added).

\(^{18}\) Id. at 889 (quoting Gross, 557 U.S. at 176) (second brackets added, first and third brackets original; emphasis added).
IN READING LAW, Justice Scalia and Professor Garner claim law students today “learn haphazardly” from a curriculum that “fails to inculcate the skills of textual interpretation” essential to practice. (P.7.) Teaching students to interpret legal texts is thus one of the book’s chief aims. Yet despite countless reviews, until now no one has attempted to assess Reading Law’s usefulness in the classroom. As a law professor who uses the book in his first-year legislation course and a law student who just took that course, we present a preliminary assessment based on our class’s review of the book.

A note on methodology: 2014 marked the second year of using Reading Law in this course. Although not required reading, we discussed the book regularly in class – including 71 quotations in presentations and many more references during lecture and discussion. To evaluate its effectiveness as a classroom tool, we asked students 10 questions about the book. Of the 56 students who took the course last semester, 47 (84%) responded. One declined to review
the book because he had not read it. Like many reviewers of Thomas Piketty’s *Capital in the Twenty-First Century*, however, the others were happy to respond regardless whether they had actually read it cover to cover. This doesn’t concern us too much as our objective is to evaluate *Reading Law’s* usefulness in the classroom (though, admittedly, the responses may tell us more about the professor’s ability to teach from the book).

So how did *Reading Law* fare? Figure 1 presents the findings from the first six questions, which were modeled on the law school’s course evaluation form. Based on the student responses to our survey, we make five observations.

*First*, as to perceived quality, nearly everyone agreed (39%) or strongly agreed (57%) that Scalia and Garner “displayed a solid knowledge and understanding of statutory interpretation,” with the remainder (4%) neutral. None disagreed, for a composite score of 4.52 on a 5.00 scale. Similarly, though less enthusiastically, nearly nine in ten agreed (57%) or strongly agreed (30%) that *Reading Law* encouraged them “to think carefully and critically about statutory interpretation.” Again, none disagreed, with the remainder (13%) neutral and a lower composite score of 4.17.

*Second*, as to real-world usefulness, nearly nine in ten agreed (63%) or strongly agreed (24%) that *Reading Law* prepared them “to conduct statutory interpretation in the real world.” Although none disagreed, the composite score (4.11) was lower due to more “neutral” (13%) and fewer “strongly agree” responses. Similarly, when asked if Scalia and Garner “seemed interested in helping me understand the theories of statutory interpretation courts use in the real world,” nearly three in four agreed (48%) or strongly agreed (26%). One disagreed, with the remainder (24%) neutral and a relatively poor composite score of 3.98. One student thought the authors “seemed more interested in promoting their own theories of statutory interpretation.” But a second said the book was “trying to create a more widely understood system for interpretation, so yes, they are interested in helping us understand the theories.” A third indicated personal use of the book almost daily at a summer internship. Yet a fourth raised what in our view is a legitimate pragmatic
Figure 1. Student Evaluations of Reading Law

- Displayed solid knowledge and understanding of statutory interpretation: 57% Strongly Agree, 30% Agree, 13% Neutral
- Encouraged me to think carefully and critically about statutory interpretation: 39% Strongly Agree, 57% Agree, 13% Neutral
- Prepared me to conduct statutory interpretation in real world: 63% Strongly Agree, 24% Agree, 13% Neutral
- Helped me understand statutory interpretation theories courts use in real world: 48% Strongly Agree, 26% Agree, 24% Neutral
- Was helpful and appropriate to use in statutory interpretation course: 39% Strongly Agree, 54% Agree, 6% Neutral
- Would recommend to students enrolled in statutory interpretation course: 37% Strongly Agree, 37% Agree, 22% Neutral
Christopher J. Walker & Andrew T. Mikac

concern: Scalia’s “very clear opinions about legislative history” mean full reliance on textualism is “not a good real-world strategy” because it downplays the prevalence of more purposivist methods.

Third, two questions explored further this theme of bias or personal agenda. When asked if Reading Law persuaded them “to take a more textualist approach to statutory interpretation,” the results roughly split three ways: 26% disagreed (none strongly), 37% were neutral, and 37% agreed (22%) or strongly agreed (15%). The class similarly divided on whether Reading Law is “less effective” because it is “biased or otherwise incomplete”: 33% disagreed (one student strongly), 35% were neutral, and 33% agreed (28%) or strongly agreed (4%). One student may capture a somewhat common sentiment – one we share: “I think the bias of the authors was evident in some of their descriptions and definitions, but I don’t think it prevented them from giving a pretty well-rounded account of interpretive methods overall.”

Fourth, as for its pedagogical utility, over nine in ten agreed (39%) or strongly agreed (54%) that the book “was helpful and appropriate to use in a statutory interpretation course.” Only one disagreed, and two were neutral – for a respectable 4.46 composite score. In class, many students remarked, and we agree, that the table of contents alone is a valuable supplement as it provides a concise definition of each interpretative principle. One student also echoed our opinion that “it would be hard to teach a well-rounded class with this book alone.” When asked the critical question whether they “would recommend Reading Law to other students enrolled in a course on statutory interpretation,” the composite score dropped to 4.07: 37% strongly agreed, 37% agreed, 22% neutral, and 4% disagreed. To put this number in perspective, when asked the same question about recommending their professors, the school-wide average last semester was around 4.80.

Finally, as to the bottom line, about a third (30%) had actually bought the book by the time they took the survey this summer. When asked how much they would pay for the book, only seven (15%) would pay the $49.95 list price. Instead, the class was willing to pay, on average, about $30. One student would not even accept a free
copy; another who did buy it used it carefully in order to resell it after the final exam. Figure 2 presents the students’ willingness to pay.

In sum, these largely positive reviews reinforce our personal view on Reading Law’s usefulness in the classroom and this professor’s decision to use it again next year. But student feedback was not without dissent. One student perhaps captured this qualified review: “I fundamentally disagree with everything Scalia says but the book does have its uses.”

For those uses, that student would have paid $20.
MICRO-SYMPOSIUM

ON SCALIA & GARNER’S

“READING LAW”

PART 2
INTRODUCTION TO
PART 2
OF THE MICRO-SYMPHOSIUM ON

SCALIA & GARNER’S
“READING LAW”

The Autumn 2014 issue of the Green Bag includes part of our micro-symposium on Antonin Scalia and Bryan Garner’s book, Reading Law: The Interpretation of Legal Texts — specifically, papers by Brian S. Clarke, Michel Paradis, Karen Petroski, and Christopher J. Walker and Andrew T. Mikac.¹ The rest of the micro-symposium is here, with papers by Eric J. Segall, Jordan T. Smith, and William Trachman, plus a longer study commissioned by Scalia and Garner and written by Steven Hirsch. Unfortunately, even the Journal of Law and the Green Bag combined could not spare enough space to accommodate all the fine commentary we received. So, we picked a small, representative set. We regret that we cannot do more.

In our call for papers for the micro-symposium we asked for short (1,000 words) essays on Reading Law that dealt with “[a]ny theoretical, empirical, or practical commentary that will help readers better understand the book.”² The variety of responses was striking. The range of submissions is reflected fairly well in the diversity of topics and outlooks presented here, and in the Green Bag. We hope you enjoy both the variety and the quality of the commentary.

— The Editors

² Call for Papers: “Reading Law,” 17 GREEN BAG 2D 251 (2014).
A COMMENT ON
SCALIA & GARNER’S “READING LAW”

INEFFECTIVE INTENT
DENYING A POLITICAL VICTORY
THROUGH LEGISLATIVE INTERPRETATION

William Trachman†

In Halbig v. Burwell, 2014 U.S. App. LEXIS 13880 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia ruled that Section 1311 of the Patient Protection and Affordable Care Act (ACA) does not empower the IRS to issue regulations expanding the subsidy regime to exchanges created by the federal government. The dispute concerns whether a provision providing that Congress may subsidize exchanges created by a state makes permissible a regulation that subsidizes an exchange created not by the state, but instead by the federal government. See 26 USCS § 36B (covering a “qualified health plan . . . that was enrolled in through an Exchange established by the State under section 1311”); 26 C.F.R. § 1.36B-2(a)(1) (covering individuals “enrolled in one or more qualified health plans through an Exchange.”) (emphasis added).

Absent subsidies for individuals with plans under the federal exchanges, the entire ACA would be in jeopardy. Understandably, commentators have written that the failure to include language ind-

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On September 4, 2014, the original Halbig decision was vacated by the D.C. Circuit, sitting en banc, in Halbig v. Burwell, 2014 U.S. App. Lexis 17099 (D.C. Cir.). However, the Supreme Court has granted certiorari with respect to a Fourth Circuit case that was issued the same day as the original Halbig opinion, King v. Burwell, 2014 U.S. App. Lexis 13902 (4th Cir.). See King v. Burwell, 2014 U.S. Lexis 7428 (granting certiorari). The Court will soon hear oral argument in the King case and will likely reach a ruling by the end of the October 2014 term.
cating that individuals were eligible for subsidies if they enrolled in a plan either through a state or federal exchange is a transparent accidental mistake.\(^2\) To imperil the entire healthcare statute by way of strictly construing a single provision surely does not take into account congressional intent in passing the statute. Indeed, Scalia and Garner – though generally disdainful of the idea that courts ought look to congressional intent – are willing to make an exception where the interpretation relates to the statute’s effectiveness. See Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 63 (2012) (“The presumption against ineffectiveness ensures that a text’s manifest purpose is furthered, not hindered.”). In the same vein, Scalia and Garner are willing to offer aid to a statute if its interpretation would lead to an absurd result. *Id.* at 235 (“Consider, for example, a provision in a statute creating a new claim by saying that ‘the winning party must pay the other side’s reasonable attorney’s fees.’ That is entirely absurd, and it is virtually certain that winning party was meant to be losing party.”).

In the case of Section 1311 of the ACA, however, the presumption that Congress passed both a workable and effective statute offers a political victory to the law’s supporters that was denied at the ballot box. In short, Scott Brown’s election to the Senate on January 19, 2010, changed everything. Senator Brown’s victory – on a platform of providing the 41st vote to filibuster the ACA – changed the manner by which legislators could alter or amend the Senate and House bills that had previously been passed, and forced the hands of Democratic leaders who still sought to pass the bill in one form or another.

After Senator Brown’s election, Democrats possessed an insufficient number of votes to overcome a filibuster in the Senate. In response, the House passed the Senate’s version of the bill, and the two were forced to engage in the reconciliation process to avoid filibuster. Moreover, the electoral consequences of their efforts, made clear by the unusual GOP victory in Massachusetts, led Dem-

\(^2\) To be sure, others have argued that the provision says what Congress intended it to say. See Jonathan Adler & Michael Cannon, Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA (Case Legal Studies Research Paper No. 2012-27, 2012), available at ssrn.com/abstract=2106789.
ocrats to rush to pass the legislation before the summer congressional recesses that had included raucous, uncontrollable town halls the prior summer.

The importance of Senator Brown’s election cannot be understated. The version of the ACA that was enacted in March 2010 is nothing like the version in place today, even discounting the effect of administrative regulations and revisions by Article III courts. To say, then, that the ACA can be fairly read as representing what its supporters actually wanted to include in the legislation is misguided, as an empirical matter. Indeed, some have joked that comparing the legislative process to sausage-making is an insult to sausages; in the context of the ACA, that is surely the case.

How then, should courts treat section 1311, assuming that its omission really is an error? Scalia and Garner note that statutes, like contracts, should be “construed, if possible, to work rather than fail.” Scalia & Garner, at 63. Yet in this context, Scalia and Garner’s approach would give to Democrats the unique benefit of having won the 2010 special election in Massachusetts. In other words, courts may be giving supporters of the ACA the benefit of fixing a statute that, in March 2010, could not actually have been fixed legislatively. To use the example provided by Scalia and Garner, a statute that forces a winning party to pay the attorney’s fees of the losing party is absurd, until one realizes that political circumstances made it such that amending that provision was practically impossible.

In all fairness, Scalia and Garner write that the doctrine of absurdity – by which courts may repair flawed statutes – is not meant to “revise purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense.” Id. at 239. But in the context of the ACA, the absurdity itself may not have been purposeful, but rather only the decision to press forward with passage of a statute in an untraditional and hurried manner. For that reason, regardless of ineffectiveness or absurdity, Scalia and Garner should be reluctant to allow courts to fix Congress’s mistake.

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1 For instance, as of July 18, 2014, Congress had made 16 legislative changes to the ACA since March 2010. See Hartsfield & Turner, 42 Changes to ObamaCare . . . So Far, available at www.galen.org/newsletters/changes-to-obamacare-so-far/.
A COMMENT ON
SCALIA & GARNER’S “READING LAW”

FAUX CANONS

Jordan T. Smith†

Justice Scalia has been a vocal critic of so-called “faux canons of construction” – judicial statements that have been blessed with canonical status even though most lawyers have never heard of them. His criticism is well founded. One pronouncement does not a canon make, nor one fine rule. At minimum, an interpretive rule must be known and generally accepted to attain the rank of canon. Unfortunately, Justice Scalia and Bryan A. Garner have etched (at least) one faux canon onto the esteemed monument to constitutional and statutory interpretation that they have built in Reading Law: The Interpretation of Legal Texts.

“Most of the canons of interpretation set forth [in Reading Law] are so venerable that many of them continue to bear their Latin names.” But in Section Twenty, the authors unveil a new canon that was previously unknown to the legal world. And they called it the

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1 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (Princeton Univ. Press 1997) [hereinafter MATTER OF INTERPRETATION] (“There are a number of other faux canons in Llewellyn’s list . . . Never heard of it.”); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 59 (2012) [hereinafter READING LAW] (“Llewellyn’s supposed demonstration, however, treats as canons some silly (and deservedly contradicted) judicial statements that are so far from having acquired canonical status that most lawyers have never heard of them.”).

2 MATTER OF INTERPRETATION at 26 (“[I]t becomes apparent that there really are not two opposite canons on ‘almost every point’ – unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law-bending judge . . . That is not a generally accepted canon. . . .”).

3 READING LAW at 51.
“nearest-reasonable-referent canon.” The text explains that this “canon” applies “[w]hen 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.” This description is the first reported sighting and written account of the nearest-reasonable-referent canon.

Westlaw searches reveal that no reported or unreported case mentions the “nearest-reasonable-referent canon” prior to the publication of Reading Law in 2012. Indeed, the authors fail to cite to any authority that specifically references the nearest-reasonable-referent canon. On the contrary, Harris v. Commonwealth, 128 S.E. 578 (Va. 1925) is cited as an example of a shoddy, result-oriented decision that would have reached the correct conclusion if the court had applied (or known about) the phantom nearest-reasonable-referent canon. The authors concede that the only other highlighted case, In re Sanders, 551 F.3d 397 (6th Cir. 2008), invoked the last-antecedent canon rather than the nearest-reasonable-referent canon. Justice Scalia has rightly scolded critics of the canons of construction for similar deficient citation of authority.

Perhaps to hide the novelty of this new canon, and to excuse the absence of supporting authority, the nearest-reasonable-referent canon comes with a disclaimer: the “principle is often given the misnomer last-antecedent canon (see § 18), [but] it is more accurate to consider it separately and to call it the nearest-reasonable-referent canon.” The authors reason that the last-antecedent canon and nearest-reasonable-referent canon should be treated independently because, technically,

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4 Id. at 152.
5 Id.; see also id. at 434.
7 READING LAW at 152-53.
8 Id. at 152-53.
9 Id. at 153.
10 MATTER OF INTERPRETATION at 26.
11 READING LAW at 152.
only pronouns have antecedents, and the [nearest-reasonable-referent canon] also applies to adjectives, adverbs, and adverbial or adjectival phrases — and it applies not just to words that precede the modifier, but also to words that follow it. Most commonly, the syntax at issue involves an adverbial phrase that follows the referent.12

According to the authors, the distinction between the two canons has been blurred “in modern practice.”13 Nonetheless, the case law reflects that practitioners and courts have historically treated nearest-reasonable-referent cases as a corollary application of the last-antecedent canon. The alleged imprecision is not the modern practice; it has been the only practice. Regardless of the desirability, or increased accuracy, of distinguishing between the two syntaxes, the decision to treat them as separate canons is unprecedented.

If, as the authors claim, Reading Law was meant “to collect and arrange only the valid canons”14 and to omit faux canons that are “not genuinely followed,”15 then it would have been a more accurate statement of existing law to classify nearest-reasonable-referent cases as a subset of, or qualification to, the last-antecedent canon. The authors are undoubtedly skilled enough to explain canonical nuances, and to advocate for differentiation in the future, without needlessly proliferating the number of anointed canons.16 However, by propping up the nearest-reasonable-referent canon on its own, the authors wrongly suggest that it is already recognized and generally accepted.

Before Reading Law, no lawyer had heard of the “nearest-reasonable-referent canon.” Since the volume’s publication, the nearest-reasonable-referent canon has been cited three times and an attribution to Reading Law accompanies each citation.17 It appears

12 Id.
13 Id. at 432.
14 Id. at 9.
15 Id. at 31.
16 See, e.g., id. at 146.
that Reading Law is not only remarkable for its usefulness and superb defense of textualism, but also its ability to launch faux canons into the upper echelon of accepted canons of construction.
A COMMENT ON
SCALIA & GARNER’S “READING LAW”

GRINDING THE CANONS

Eric J. Segall

“And a Bob Hope Joke would still be funny if it were sculpted in sand by the action of the desert wind.”

I was working on my submission for the Green Bag’s symposium on “Reading Law,” but had a few problems. The instructions governing the process stated quite clearly “do not waste your time or ours on tiresome anti-Scalia/Garner or anti-Posner ax-grinding.”

My plan was to summarize and supplement Posner’s persuasive (to me) critique of Reading Law’s thesis that the 57 preferred canons of statutory interpretation can in some meaningful way limit judicial discretion. I was going to start with a few of Posner’s case law examples and then add a few sharp ideas expressed long ago by the great Karl Llewellyn who, among his other contributions, pointed out that for every canon there is an anti-canon, and judges thus have no choice but to choose. But it occurred to me that such an approach might run headlong into the “tiresome” and “ax-grinding” prohibitions.

To avoid wasting my time, I tried to figure out what the editors actually meant by those limitations. My first thought was that they meant prospective authors could not discuss Scalia, Garner or Posner actually grinding an ax. After all, wasn’t that the ordinary meaning

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1 Cf Poets of the Fall, “Grinder’s Blues,” “And if the man he don’t tell, I see no way out of hell.”
2 Interpreting Law, p. 25 (really). This quote has nothing to do with this essay other than any book that says this needs to be seriously questioned. See e.g., “I set out to play golf with the intention of shooting my age, but I shot my weight instead!” www.jokes4us.com/peoplejokes/comedianjokes/bobhopejokes.html
3 If I grind an ax in a park and cut my wrists and there is a rule prohibiting any “vehicle” in
of the words? I wasn’t planning on talking about weaponry (other than maybe when discussing Heller) so I figured I was in the clear especially as Canon No. 6 says “words are to be understood in their ordinary, everyday meanings —unless the context indicates that they bear a technical sense.”

Upon further reflection, I realized that the editors may have had something different (perhaps “technical”) in mind. I googled “Scalia” and “ax-grinding” and to my dismay found nothing about him sharpening weapons. I repeated the process for Posner and Garner with the same results. This led me to believe that interpreting the prohibition to mean literally “ax-grinding” would lead to an absurd result (correctible under Canon No. 37) because discussions of the three of them grinding axes could not possibly be “tiresome.” Canon No. 27 requires that the “provisions of a text should be interpreted in a way that renders them compatible, not contradictory;” thus my literal interpretation was cast into doubt.

So instead I thought I should focus on the word “tiresome.” Scalia and Garner love using dictionaries (maybe because Garner wrote one), so I looked up the phrase. I found two definitions on dictionary.com (which I hope counts as a dictionary). The first was “causing or liable to cause a person to tire.” I couldn’t imagine that a 1000 word essay defending Judge Posner’s critique could cause the editors of the Green Bag (or readers) to “tire.” After all, these are hard-working folks; what’s one short essay?

But, then to my dismay, I found the second definition of “tiresome” which was “annoying or vexatious.” Now I had a more serious problem. Did the instructions mean that any discussion of the Posner/Scalia/Garner feud would be disqualified as ipso facto “annoying or vexatious?” Trying to make sense of the instructions as a whole was of course required by the very wise Canon 24 which says that “the text must be construed as a whole.”

the park, can an ambulance come into the park to rescue me? Just asking.

4 Sadly, it is not listed in Appendix A to the book which deals with proper dictionary use but I am hoping the editors will be more amenable to internet use than Scalia/Garner. Garner’s dictionary, by the way, is listed as an appropriate dictionary.

5 Note to the DC. Circuit judges who decided Halbig based primarily on one sentence in a law with over two thousand pages. See Canon 24. P.S. @JAdler1969.
But then it occurred to me that maybe only “tiresome” or “annoying” or “vexatious” “ax-grinding” would be prohibited while “ax-grinding” that was not “tiresome,” “annoying,” or “vexatious,” would be permissible, maybe even welcome. What an achievement it would be for the Green Bag to publish something about the Posner/Scalia/Garner feud that, in fact, wasn’t “annoying” or “vexatious.” This interpretation seemed consistent with the Green Bag’s overall mission and with Canon 4 which says a “textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”

But, alas, then I came across Falsity Number 58 which exposes “the false notion that the spirit of a statute should prevail over its letter.” The “letter” of the instructions seemed to be no discussions of Posner/Scalia/Garner ax-grinding” allowed because such discussions were by definition “tiresome.”

How could I figure out which of these two plausible interpretations was the correct one?

The obvious place to turn was the 57 canons of interpretation (and the “Thirteen Falsities Exposed”) to see if I could find my answer therein. I looked and I looked but sadly no solution was in sight.

Having struck out with Scalia’s and Garner’s 57 (really 70) canons, and worried that citing Posner could disqualify me (Canon No. 49, the Rule of Lenity, probably doesn’t apply here), I decided to rest my case with the wonderful and ahead-of-his-time Llewellyn who said that the use of any canon of interpretation to decide a case must “be sold . . . by means other than the use of the canon.” That bit of wisdom seemed to me to be the sharpest tool in the shed.
A COMMENT ON
SCALIA & GARNER’S “READING LAW”

THE HIRSCH REPORT

Steven A. Hirsch

In the wake of my friend Judge Richard A. Posner’s review of the Scalia-Garner book Reading Law — a review that accused Justice Scalia and me of manifold distortions and errors despite our extensive fact-checking — I retained a respected San Francisco lawyer, Steven A. Hirsch, to investigate and assess these allegations.

The purpose was to have an independent examination of the extent to which there was any merit in what Judge Posner had said. I arranged this project without Justice Scalia’s knowledge in the belief that our second edition would benefit from Hirsch’s guidance about any changes that might prove necessary or desirable.

Hirsch received a very modest honorarium of $500, which he later informed me he turned over to his firm to offset expenses. I chose Hirsch because he had been among the most critical reviewers of our book manuscript, and I knew him to be honest, thorough, and fair.

I asked him to be dispassionate and impartial and to report his findings unflinchingly. You can judge for yourself whether he met that standard.

— Bryan A. Garner

Dear Bryan,

As you requested, I have investigated Judge Posner’s charge that your book, Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) (Reading Law), deliberately “misread[s] . . . case after case” to bolster its argument for “textual originalism.” Posner argues that Reading Law inaccurate-

ly characterizes cases as having turned on the application of a single interpretative canon, when they actually turned on a variety of considerations, including multiple canons, legislative intent, legislative history, societal traditions, common (nondictionary) usage, public policy, etc.\(^2\)

As a threshold matter, I am not sure whether Posner accurately characterizes your argument, insofar as he suggests that you believe that a single interpretative canon can or should resolve each case. Reading Law discusses possible conflicts between canons at pp. 59–62, and proposes a metacanon that “No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”\(^3\) You admit that it is not always clear what results the principles produce.\(^4\) And some of your other metacanons arguably help judges adjudicate conflicts between canons (for example, “[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored”; “[an] interpretation that validates outweighs one that invalidates”).\(^5\) But this attempt to resolve canon conflicts through metacanons validates Posner’s characterization in some measure, because using a metacanon to decide which canon to follow enables you to treat that metacanon as the one controlling canon.

Below, I discuss Posner’s 12 specific examples. For the most part, I do not treat his general jurisprudential or philosophical differences with you and Justice Scalia; nor can I address his unspecific statement that he “could give” three additional examples if he so chose.\(^6\) If he’s not willing to argue those examples, I don’t see how you can effectively respond.

With respect to each of Posner’s 12 specific examples, I try to answer two questions: (1) Has Posner accurately summarized your treatment of the authority in question? and, if he has, (2) is his criticism of your treatment of that authority both (a) accurate (i.e., is his

\(^2\) Id.
\(^3\) Reading Law at 59.
\(^4\) See id. at 61 (emphasis in original).
\(^5\) Reading Law at 63–68.
\(^6\) See Reflections at 199 n.55.
description of the reasoning of the case correct, or more nearly cor-
rect than yours?) and (b) supportive of his argument (i.e., does the
difference between his reading of the case and yours support his the-
sis that Reading Law deliberately misreads cases to bolster the case
for “textual originalism”)?

I conclude below that in 8 of Posner’s 12 examples, Posner’s
criticisms are unwarranted. In 2 of the 12 examples (#10 and #11),
and perhaps in a third (#6), there is arguably some substance to
Posner’s criticism that Reading Law omits a relevant aspect of the
case’s reasoning – although not in any glaring way that implicates
your intellectual integrity as he gratuitously suggests. With respect
to the remaining example (#7), I agree with Posner that Reading
Law, while describing the case accurately, endorses a poorly rea-
soned decision; but, once again, that kind of disagreement is not a
valid ground for attacking the authors’ integrity.

On the whole, I am struck by the needlessly *ad hominem* nature of
Posner’s analysis.

1.


**DISCUSSED IN** *Reflections* **AT 199–200.**

This is the first of four cases that Posner discusses to make his
point that “[d]ictionaries are mazes in which judges are soon
lost” and that “[a] dictionary-centered textualism is hopeless.” He
charges *Reading Law* with having exaggerated the degree of reliance
that these courts placed on dictionary definitions; and he impugns
the entire enterprise of using dictionaries to help determine the
meaning of words in legal texts.

The issue in *White City* was whether a lessor violated a lease cov-
enant forbidding it to rent space to any store that derived more than
10 percent of its sales revenues from selling “sandwiches.” The
plaintiff-lessee claimed that “sandwiches” included tacos, burritos,
and quesadillas.

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7 *Reflections* at 200.
Posner charges that *Reading Law* exaggerates the extent to which the *White City* court relied on the dictionary definition of “sandwich.” It is true that, after quoting the dictionary, the court also mentioned that (1) the plaintiff had adduced no evidence that the parties intended the term “sandwiches” to include burritos, tacos, and quesadillas, and (2) the plaintiff would have been prompted to include a special definition if it wanted one, because (a) it drafted the exclusivity covenant, and (b) there were already Mexican-style restaurants nearby at the time of contracting. It is true that *Reading Law* does not mention these two additional reasons. But you had two good reasons for not doing so.

First, you used *White City* to illustrate the role that interpretation plays in enabling syllogistic reasoning by clarifying the “major premise” (the legal rule) so that it could be applied to the facts. You were not purporting to give a complete description of the case – and in that context had no reason or obligation to give one.

Second, the two additional reasons were logically dependent on and subordinate to the dictionary definition, notwithstanding Posner’s unexplained contention that there were “more persuasive points than the dictionary’s definition of ‘sandwich.’” The truth is that without the definition, neither of the additional reasons would matter.

Had the court not already cited the dictionary to establish that the ordinary meaning of “sandwich” excludes tacos, burritos, and quesadillas, it would have had no basis to assert that the plaintiff-lessee had not met its burden of adducing evidence that the parties intended to depart from that ordinary and accepted meaning. Nor would the proximity of Mexican restaurants at the time of contracting have had any relevance. The court’s reliance on the ordinary meaning of “sandwich” (as reflected in the dictionary) is what made those points relevant.

Moreover, if the dictionary definition *had* encompassed tacos, burritos, and quesadillas, the court’s next point would have been that the defendant-lessee – not the plaintiff-lessee – had not met *its*
burden of adducing evidence that the parties meant to exclude those items from the (broader) ordinary definition of “sandwich.” The entire tenor of the court’s argument would have been altered, with the burden of proving a deviation from the dictionary definition being shifted from the plaintiff-lessee to the defendant-lessee. Likewise, the proximity of Mexican-style restaurants would have become a prompt to the lessor, rather than the lessee, to bargain for a special (narrower) definition of “sandwich.” To say that these subsidiary and logically dependent points were “more persuasive” than the dictionary definition is therefore incorrect.

Although you used White City only for the limited purpose of explaining the role of interpretation in syllogistic reasoning, Posner seizes on the case as an opportunity to criticize the use of dictionaries in legal interpretation. But his criticisms fall flat.

Posner does not take issue with the general proposition that it would be useful, in deciding White City, to determine the ordinary meaning of “sandwich.” His point is that a dictionary is a lousy way of doing that. Let’s pause to consider that contention.

One can think of three ways to determine a word’s ordinary meaning. The first would be to design a survey instrument and scientifically ascertain what a relevant sample of people thinks “sandwich” means. This method exceeds both the competence and the means of the courts, and Posner does not advocate it here (although he elsewhere advises using Google to trace the changes in a word’s meaning over time).

The second way would be to examine dictionaries or, perhaps, style-and-usage manuals. This method isn’t perfect, because it’s likely to generate more than one definition; and selecting among them may turn out to be a bit like “entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” But consulting these reference works may at least help the court identify a core of commonly accepted meaning.

The third way would be for the court to consult its own beliefs about what most people think the word means. In his discussion of

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White City, Judge Posner opts unabashedly for the third method. As mentioned above, he deems dictionary definitions and the like to be “hopeless” as a guide to meaning. More specifically, he alleges that the White City court “got the definition wrong” and that “Scalia and Garner miss this, too.” Posner does not cite any other dictionary definition or usage manual to prove his point. Instead, he consults himself. Unfortunately, “Posner’s Guide to Modern American Usage” proves to be less well-researched than your work on that subject. Posner writes:

• “A sandwich does not have to have two slices of bread; it can have more than two (a club sandwich), and it can have just one (an open-faced sandwich).”10 But this ignores the fact that, as everyone knows, burritos, tacos, and quesadillas are made on tortillas, not bread. Tortillas are not “slices” of bread because they are not sliced from a larger loaf. And tortillas are ground meal that is pounded flat; they don’t rise like bread due to the action of yeast. They are about as much like sandwich bread as matzo crackers are. One wonders whether Judge Posner has ever eaten Mexican food or watched it being prepared.

• “The slices of bread do not have to be thin, and the layer between them does not have to be thin either.”11 But this is of no relevance to deciding the White City case, since tortillas are, by any measure, thin.

• “The slices do not have to be slices of bread: a hamburger is generally regarded as a sandwich, as is also a hot dog – and some people regard tacos and burritos as sandwiches, and a quesadilla is even more sandwich-like.”12 Really? Can you even imagine this exchange in a restaurant? “Customer: Um, I think I’ll have a sandwich. Waiter: Great, which one? We’ve got clubs, egg salad, tuna, pastrami . . . Customer: I think I’ll make that a . . . a hot-dog sandwich. No, wait. Let’s change that to a taco sandwich. Waiter: Sure thing. We also have some great burrito sandwiches and hamburger sandwiches, by the way.” Who would regard this as being a normal conversation?

10 Reflections at 200.
11 Id.
12 Id. (emphasis added).
Posner does not actually commit himself to any affirmative definition of what a “sandwich” is. He can’t because he has no authoritative basis for including or excluding any particular foodstuff from consideration as long as it contains a layer of something derived from flour or grain, plus something else. By his reasoning, a cake or a bread pudding or a heaping plate of matzo brei (look it up) could be a sandwich. What practical good is such reasoning to a court?

Thus, Posner’s disquisition on sandwiches fails to prove that using a dictionary definition to determine ordinary meaning is less useful or less reliable than resorting to an armchair analysis of what the judge thinks “some people regard” a word to mean. If anything, Posner’s quirky and unpersuasive discussion proves the opposite: the dictionary definition of “sandwich” much more closely accords with what most real people – as opposed to his imaginary “some people” – regard a sandwich to be.

2.

**COMMONWEALTH v. McCoy, 962 A.2d 1160 (PA. 2009), discussed in Reflections at 201.**

The issue was whether a state penal statute that prohibited “knowingly, intentionally or recklessly discharg[ing] a firearm from any location into an occupied structure” encompassed discharging a firearm from a location within that structure. The court concluded that it did not.

Posner faults Reading Law for supposedly portraying the entire decision as hinging on the dictionary definition of “into” when the court actually “decided the case on other grounds” – but he doesn’t say what those grounds were. It’s odd that Posner makes such a big deal of this case. All you said about it was that it demonstrated that dictionaries “can illuminate a question such as the precise contours of into.” You did not purport to give a full account of the case’s reasoning; yet Posner beats you up for not doing so.

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13 962 A.2d at 1162 (emphasis added).
14 Reflections at 201.
15 Reading Law at 72 (emphasis in original).
And if one does examine the court’s other reasons, one realizes that they could have been plucked right out of *Reading Law*. The court observed that

- “the object of interpretation and construction of statutes is to ascertain and effectuate the intention of the” legislature;\(^\text{16}\)

- “[a] statute’s plain language generally provides the best indication of legislative intent”;\(^\text{17}\)

- “[t]he plain meaning of ‘into’ can be gleaned from its dictionary definition”;\(^\text{18}\)

- based on those definitions, “in the context of spatial relations, the plain meaning of the term ‘into’ requires that the original location is outside of the destination”;\(^\text{19}\)

- although the court was “unable to turn to a dictionary to ascertain the plain or ordinary meaning of the phrase ‘from any location,’ . . . if considered without relation to the word ‘into,’ the plain meaning of ‘from any location’ encompasses . . . the interior of the occupied structure”;\(^\text{20}\)

- it was impossible to give “full logical effect” to both terms; rather, one must be “interpreted as modifying or limiting the other, and thus principles of construction are implicated.”\(^\text{21}\)

The implicated “principles of construction” were that

- “[e]very statute shall be construed, if possible, to give effect to all its provisions” (*Reading Law* Canon #26);\(^\text{22}\)

- “[i]n determining legislative intent, we must read all sections of a statute ‘together and in conjunction with each other,’ construing them ‘with reference to the entire statute’” (*Reading Law* Canon #27);\(^\text{23}\)

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\(^\text{16}\) 962 A.2d at 1166.
\(^\text{17}\) Id.
\(^\text{18}\) Id.
\(^\text{19}\) Id. at 1167.
\(^\text{20}\) Id.
\(^\text{21}\) Id. (emphasis added).
\(^\text{22}\) Id. at 1167–68.
\(^\text{23}\) Id. at 1168.
courts “are not permitted to ignore the language of a statute, nor may [it] deem any language to be superfluous” (Reading Law Canon #26); 24

• “[w]hen there is an interpretation available that gives effect to all of the statute’s phrases and does not lead to an absurd result, that interpretation must prevail” (Reading Law Canon #26 & #27); 25

• “penal statutes ’shall be strictly construed’” (Reading Law Canon #49). 26

Applying these principles, the court concluded that it did less violence to the statute’s words to read “into” as “modifying] the meaning of ‘from any location’ to include only any location from which the shooter can physically shoot ‘into’ the occupied structure, including other structures, moving vehicles and any other location outside of the occupied structure,” than to read “from any location” as modifying “into” to mean “into, or from within.” 27

Thus, in determining which of the partially conflicting terms would modify the other, the court gave primacy to the term whose clear and established dictionary definition otherwise would have been utterly transgressed. Along the way, the court relied on a canon-driven analysis that accords well with the approach urged in Reading Law. Should Posner be denounced as intellectually dishonest for failing to mention this? Or can we just have a civil discussion about the interpretation of legal texts?

3.

STATE EX REL. MILLER V. CLAIBORNE, 505 P.2D 732 (KAN. 1973), DISCUSSED IN REFLECTIONS AT 201.

The issue was whether a state penal statute that defined and forbade cruelty to “animals” effectively barred cockfighting. The court held that it did not, because, “even though we must recognize

24 Id.
25 Id.
26 Id.
27 Id.
that biologically speaking a fowl is an animal; a sentient, animate creature as distinguished from a plant or an inanimate object” (a definition for which no dictionary was cited), other considerations proved dispositive – namely:

- Most people think of a chicken as a bird, “not a hair-bearing animal.”

- Kansas animal-cruelty statutes “traditionally” protected “four-legged animals, especially beasts of the field and beasts of burden” and forbade “overloading, overdriving, overworking, tortur[ing], beating, underfeeding or cruel killing” of them.

- Kansas prohibited Sunday cockfighting for over a century and, when that law was repealed, instituted no law barring cockfighting at any time, leading to an inference that cockfights could be held “seven days a week.”

- There was nothing “in the record” indicating a legislative intent to include “gaming cocks” within the class of protected animals.

Posner says that Reading Law gives this decision short shrift by criticizing it for “perversely [holding] that roosters are not ‘animals’” and that the animal-cruelty statute therefore did not bar cockfighting. If he is trying to say that you inaccurately restricted your account of the case’s reasoning to whatever it might tell us about dictionary usage, he is wrong on two counts. First, the only thing you said about the case was that its result was perverse (and you imply that the court could have avoided that perverse result by using a dictionary). That’s all. You did not purport to give a full account of the case’s reasoning. Second, you observed in a parenthetical that the Miller court “not[ed] that the cruelty-to-animals-statute had traditionally applied only to four-legged animals” – the second bullet point shown above.

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28 505 P.2d at 735.
29 Id.
30 Id.
31 Id.
32 Id.
33 Reading Law at 72 n.10.
Posner cites the other rationales that the court gave for its decision; but so what? Your point was that the plain meaning of “animal” should have controlled. Unless Posner can show that the court’s countervailing reasons were strong enough to overrule plain meaning, his criticism falls flat. He makes no such showing.

4.


The issue was whether goldfish were protected by a state statute forbidding anyone from “offer[ing] or giv[ing] away any live animal as a prize or an award in a game, contest or tournament involving skill or chance.”34 The court held that goldfish were protected. The court quoted an earlier case – not a dictionary – holding that “[t]he word ‘animal’, in its common acceptation, includes all irrational beings,”35 and noted that “[t]his broad definition, which accords with most dictionary meanings, leaves us little to contribute by deliberating on any taxonomic scale. We merely conclude, in interpreting this humane statute designed to protect animals subject to possible neglect by prizewinners, that [the statute] applies to goldfish.”36 In a footnote, the court cited two dictionary definitions that did not, in fact, equate “animals” with “irrational beings.”37

Thus the case had very little to do with dictionary definitions, but rather more to do with ordinary meaning as defined by an earlier decision; and the court checked its result for consistency with the statutory purposes of avoiding animal neglect and forbidding acts toward living creatures that dull the sensibilities and corrupt the morals of humans who observe or know of those acts.38 This extra check for consistency with overall purpose accords well with Reading

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34 425 N.E.2d at 395 (emphasis added).
35 Id. at 396.
36 Id. (footnote omitted).
37 Id. at 396 n.4.
38 See id. at 395–96.
Law Canon #4 ("[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored").

Oddly, Posner faults *Reading Law* for failing to properly distinguish *Knox* from *Claiborne*, the Kansas cockfighting case (#3, above). He notes that, “in contrast to the Kansas case, no reason had been given for rejecting the dictionary definition of ‘animal’”39 (by which he apparently means the judicially promulgated “irrational beings” definition). Well . . . exactly! No such reason was cited, and the ordinary meaning was adopted – which is why *Reading Law* prefers this case to *Claiborne*. Note, too, that at least one of the reasons cited in *Claiborne* could have applied equally in *Knox*; apparently there was no evidence in the record of a legislative intent to protect goldfish. In *Knox*, however, that reason was not even mentioned, let alone allowed to trump the ordinary meaning of “animals.” And that’s why (from your textualist standpoint) it’s a better decision than *Claiborne*.

5.

**STATE V. GONZALES, 129 SO. 2D 796 (L.A. 1961), DISCUSSED IN REFLECTIONS AT 202.**

The issue was whether a state statute providing that minors are “emancipated of right” by marriage and may act without the assistance of a curator in any act or proceeding deprived a married 16-year-old girl of the protections of a state penal statute that forbade anyone over the age of 17 from contributing to the delinquency of “any child under the age of” 17 by having sexual relations with that “child.”40 The 16-year-old girl in question had been married twice (the second time bigamously) before meeting and having sex with the defendant.

The court applied the maxim that penal statutes “cannot be extended by analogy so as to create crimes not provided for therein” and must be construed “according to the fair import of their words, taken in their usual sense, in connection with the context, and with

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39 Reflections at 202.
40 129 So.2d at 798.
reference to the purpose of the provision.”41 Accordingly, the word “child” must be given its “ordinary accepted meaning in civil law, that is, a juvenile subject to parental control or guardianship and . . . does not include a minor emancipated by marriage.”42 The court added that, “[h]ad it been [the Legislature’s] design to extend the law to all minors under the age of seventeen, irrespective of their legal status, the lawmaker would have used the word ‘person’ or ‘anyone’ under seventeen instead of ‘child.’”43 The court observed that, because penal statutes cannot be enlarged by implication or by changes in “social legislation,” it was irrelevant that a statute defining the jurisdiction of the juvenile courts had been amended to include minors emancipated by marriage. What mattered was how “child” was understood when the penal statute was enacted.44

Posner takes Reading Law to task for commending the Gonzales court’s use of a “technical meaning” of the word “child” to exonerate the defendant. He cites two grounds.

First, he asserts that the ruling “had nothing to do with the meaning of ‘juvenile’ or ‘child’ in the criminal statute.”45 Posner is just flat wrong about this. As Reading Law correctly explains, the decision hinged entirely on the technical meaning of “child.”

Second, Posner criticizes Reading Law for giving Gonzales’s reasoning an undeserved endorsement. He argues that the emancipation statute merely allowed married minors to make contracts without the permission of their husband or a judge, and that making contracts has nothing to do with having sex.46 He asks, “[i]f children were forbidden to drink liquor, would the court have made an exception for married children? It would not have; but that is the logic of the opinion commended by Scalia and Garner.”47

But that misses the point. If state law contemplated the marriage of minors at all, it necessarily contemplated that their spouses, at least,
could have sex with them, as this is a fundamental attribute of marriage. By contrast, being married has no necessary connection with being able to drink liquor. A man above the age of 17 might rationally conclude that he was just as free (or unfree) to commit adultery with a lawfully married and emancipated 16-year-old as with a lawfully married and emancipated 17-year-old. To interpret the statute as more severely punishing adultery with the former might have created the kind of due-process issue that concerned the Gonzales court.

One wonders, moreover, why Posner fixated on this particular case. He thinks the case was wrongly decided; you do not. Both positions are supportable. The disagreement may stem from different views about when it is proper to use a definition from one statutory scheme to interpret a different one. But how does that difference of views illuminate the larger interpretative debate between you and him? The answer is not obvious, and Posner does not explain.

6.


The issue was whether the surviving member of a gay couple was a member of the decedent’s “family” for purposes of a state statute providing that, upon the death of a rent-control tenant, the landlord could not dispossess “either the surviving spouse of the deceased tenant or some other member of the deceased tenant’s family who has been living with the tenant.”

I think that Posner is right to point out that Reading Law omitted important facts about this case. It is pertinent to your exposition, even if not to the court’s resolution of the case, that the two men were legally prohibited from marrying but behaved in every way as spouses and were regarded as such by their families. Even if you think that such considerations should not control or even be considered, it is important to acknowledge the cost that an adherence to strict textualism may impose on the parties in a given case. Not to do so makes a difficult decision—and fidelity to your method—look too easy.

543 N.E.2d at 50 (emphases added) (citation omitted).
I say “strict” textualism because your designation of true and false canons is purposefully skewed in favor of canons that reduce judicial discretion to do equity or justice in particular cases. For example: You could have approved of the holding in Braschi based on the canon that remedial statutes should be liberally construed. But you disapprove of that one. The remedial-statute canon allows courts to rule equitably in contexts where the Legislature in all probability wanted equity to be done. Only a hypertechnical construction of “family” would allow a court to say that a life partner who sticks with someone literally unto death, but whom the decedent was legally prohibited from marrying, was not part of the decedent’s “family.” Of course, I recognize that we are not going to agree on that, and that you are in fact likely to view my reasoning as a perfect example of why courts should abandon the remedial-statute canon.

7.

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990), discussed in Reflections at 203.

The issue was whether, in 1990, a state statute barring owners from refusing to rent real property to another because of “marital status” barred an owner from refusing to rent to a woman who intended to cohabit – or “live in sin” – with her fiancé on the rented premises, even though an anti-fornication statute criminalizing extramarital sex remained on the books.

It’s important to note that the controversy surrounding this case is not whether Reading Law misreads the case as being “textualist” when it’s not, but rather, whether the book’s endorsement of the case as a good example of textualism was warranted.

I agree with Posner that the endorsement was not warranted. I find it implausible that Minnesota state legislators in the late 1980s meant to exclude from the “marital status” category the largest and most obvious group of likely beneficiaries (unmarried heterosexual couples) because of the legislators’ presumed familiarity with an ancient and completely outmoded anti-fornication statute.

49 See Reading Law at 364–66.
I agree with Posner’s comments about this case, and would go further by stating that housing discrimination obviously is based on “marital status” if the owner rents to married couples who might have sex with each other, but does not rent to unmarried couples because they might have (or be thought to have) sex with each other. The only difference between them is their “marital status” and the fact that the unmarried couple’s conduct falls within the terms of a “fornication” statute so obviously antiquated (and probably unconstitutional) that the best evidence the court could cite for its continued relevance was a case involving “fornication” with a minor.

The majority opinion ignored the obvious legislative intent. Even if one cannot make the case for an implied repeal of the fornication statute, there was at least a change of legislative policy that should inform the way one reads the antidiscrimination statute. How could a legislature that forbade discrimination because of “marital status” continue to countenance the notion that sexual relations between unmarried people is a crime while sexual relations between married people is not? The only known reason why property owners refuse to rent to unmarried heterosexual couples is because those owners disapprove of extramarital sex. So how could the legislature possibly pass this antidiscrimination statute if it believed that anti-fornication laws had any continuing claim on public policy? And what could “marital status” protection accomplish if read so as to accommodate a fornication statute?

The court provides an utterly inadequate answer purportedly based on a plain-language parsing of a later statute providing that marital status means “whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse.”

The court explained that “[t]he plain language of this new definition shows that, in non-employment cases, the legislature intended to address only the status of an individual, not an individual’s relationship with a spouse, fiancé, fiancée, or other domestic partner.”

50 460 N.W.2d at 6.
51 Id.
There are three problems with this reasoning.

First, the statute’s “employment” clause is strictly limited to discrimination relating to a “spouse or former spouse.” The clause has nothing to say, by negative implication or otherwise, about discrimination against unmarried persons. Indeed, the most one could say by negative implication from the “employment” clause is that, in nonemployment cases, the phrase “marital status” does not protect against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse. On its face – as any textualist must admit – the clause provides no clue as to whether the legislature intended to ban discriminating against unmarried couples because they will commit or give the appearance of committing fornication.

Second, the court’s individual-versus-relationship distinction doesn’t hold water because the factors that the statute recognizes in employment cases – namely, “the identity, situation, actions, or beliefs of a spouse or former spouse” – exist independently of and have nothing specifically to do with the relationship between the employee and the spouse or former spouse. Indeed, it is precisely in recognition of the employee’s autonomy that the statute prevents employers from adversely altering that employee’s employment conditions based on who the spouse or former spouse is, or what that spouse or former spouse believes or does.

Third, the conclusion that the court reaches is ridiculous on its face – namely, that the legislature could not have intended the phrase “marital status” to have anything to do with “an individual’s relationship with a spouse, fiancé, fiancée, or other domestic partner.” Really? What did they think it meant, then? The only type of person who has no “relationship with a spouse, fiancé, fiancée, or other domestic partner” is a single person who is not affianced. By this reasoning, the statute only could bar discrimination based on the status of being single and not affianced – a conclusion at odds with the definition of “marital status” (“whether a person is single, married, remarried, divorced, separated, or a surviving spouse”).

The decision gets more traction, in my view, when it talks about infringing on the free-exercise rights of property owners. That is more worrisome. You may not want to rent your former home to
unmarried people who will “fornicate” there; I may not want to rent my former home to Nazi-party members who will hold antisemitic pep rallies there. Maybe the Constitution protects such preferences, at least where the rental property is small and personal in nature and thus arguably less of a public accommodation. But if we are going to talk about the Constitution, what about the fact that the fornication statute in all likelihood violates the constitutional right of privacy? In any event, the decision’s constitutional aspects are not at issue here.

8.

_Chung Fook v. White_, 264 U.S. 443 (1924), discussed in _Reflections_ at 203–04.

The question was whether, under Section 22 of the Immigration Act of 1917, an alien ineligible for citizenship under anti-Chinese immigration laws, and afflicted with a dangerous contagious disease, could be detained by U.S. immigration authorities even though she was married to a native-born U.S. citizen. Her native-born husband, Chung Fook, argued that this made no sense because a different statute exempted an afflicted spouse from detention if she was married to a naturalized citizen. How could the wife of a native-born citizen have fewer rights than the wife of a naturalized one?

The district court denied the husband’s writ of habeas corpus and the court of appeals affirmed, reasoning that the exemption from detention applied to an afflicted spouse who (under yet another statute) had acquired her naturalized husband’s citizenship by marriage – but not to an afflicted spouse who (like Chung Fook’s wife) was ineligible for citizenship although married to a natural-born citizen. Affirming, the Supreme Court was “inclined to agree with this view” but did not adopt it because it found as a purely textual matter that Section 22, the detention statute at issue, “plainly relates only to the wife . . . of a naturalized citizen and we cannot interpolate the words ‘native-born citizen’ without usurping the legislative function.”

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52 264 U.S. at 445.
You used Chung Fook as an example of a proper refusal to apply the canon that courts should avoid interpretations that produce absurd results. Posner does not engage you on that point. Instead, he criticizes Reading Law for not mentioning the Supreme Court’s dicta that it was “inclined to agree” with the court of appeal’s more “sensible interpretation,” and that the high court appeared to adopt the pure textualist approach only “reluctantly.”

So what? There is no obligation to discuss dicta. Moreover, the Supreme Court’s devotion to textualism in Chung Fook must be deemed extraordinarily strong because the court adhered strictly to the statutory text despite finding the court of appeal’s reasoning attractive and despite noting that Chung Fook had “forcefully contended” that the statute “unjustly discriminat[ed] against the native-born citizen” and was “inhuman in its results.” The sirens of nontextualism beckoned, but the Supreme Court tied itself to the mast and sailed on. Posner can argue whether this was right or wrong, but he can’t accuse Reading Law of having misrepresented the holding or reasoning of the case.

9.

MCBOYLE V. UNITED STATES, 283 U.S. 25 (1931), DISCUSSED IN REFLECTIONS AT 206.

Posner pounces on a bullet-point about this case (““automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails’ – held not to apply to an airplane”), complaining that “[t]he summary distorts Holmes’s analysis.”

But you weren’t trying to summarize Holmes’s analysis. You were trying to furnish a list of examples in which courts applied the ejusdem generis canon. And the McBoyle court did, indeed, apply the canon. Posner himself admits that the decision “alludes to without naming the principle of ejusdem generis.”

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53 Id. at 446.
54 Reading Law at 200.
55 Reflections at 206.
McBoyle involved a statute called the National Motor Vehicle Theft Act, which defined “motor vehicle” as including “an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.” The question presented was whether the word “vehicle” in the phrase “any other self-propelled vehicle not designed for running on rails” included an airplane. The Supreme Court concluded that it did not, for the following reasons:

- “[A]fter including automobile truck, automobile wagon and motor cycle, the words ‘any other self-propelled vehicle not des- signed for running on rails’ still indicate that a vehicle in the pop- ular sense, that is a vehicle running on land[,] is the theme.”
- “It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class.”
- “[I]n everyday speech ‘vehicle’ calls up the picture of a thing moving on land.”
- “It is a vehicle that runs, not something, not commonly called a vehicle, that flies.”
- “Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or in the debates in Congress.”
- The “motor vehicles” definition followed earlier statutes of other states, including the District of Columbia traffic regulations, which surely did not involve flight.
- The principle of fair warning in criminal statutes prevented the Court from extending the definition to aircraft “simply because it may seem to us that a similar policy applies, or upon the specula-

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56 283 U.S. at 26–27.
57 Id. at 26
58 Id. at 27.
59 Id. at 26.
60 Id.
61 Id.
62 Id. at 27.
tion that if the legislature had thought of it, very likely broader words would have been used.\textsuperscript{63}

It is true that only the first of these reasons concerns \textit{ejusdem generis}, the point for which \textit{Reading Law} cited the case. But the second, third, and last reasons are all textual in nature and correspond to \textit{Reading Law} Canon #6, #6 (again), and #49. Again, should Posner be denounced as intellectually dishonest for failing to mention this?

10. \textbf{AMARAL V. SAINT CLOUD HOSPITAL, 598 N.W.2d 379 (MINN. 1999), DISCUSSED IN REFLECTIONS AT 207.}

The issue was whether a statutory exception to a statute that granted hospitals a privilege not to disclose peer-review data could be invoked by doctors who (a) had not yet filed any lawsuit or (b) had filed a lawsuit, but not one challenging a denial of hospital admitting privileges or other adverse action. The privilege was intended to foster candid input from physicians who otherwise might be afraid to say anything that could lead to a defamation action; and there was concern that reading the exception broadly would swallow the rule of privilege.

Posner is correct that this case was not decided based on the “series-qualifier canon”\textsuperscript{64} but rather, on an examination of legislative purpose, the court having given up on the text of the statutory exception as hopelessly ambiguous. Perhaps it would have been better to decide the case based on the canon, but I doubt it. The text of the statutory exception was truly ambiguous, and it could not be read as the plaintiffs urged without undoing the entire statutory privilege scheme and violating the policies underlying that scheme. In this instance, there is some substance to the criticism that the true basis of the court’s decision was not accurately stated.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} The canon states that “[w]hen 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.”
The issue was whether a liability policy that covered “[a]ny infringement of copyright or improper or unlawful use of slogans in your advertising” covered “infringement of copyright” that did not occur “in [the insured]’s advertising.” In other words, did the prepositional phrase “in your advertising” modify “infringement of copyright” as well as “improper or unlawful use of slogans”? The Arizona Supreme Court held that it didn’t because, under a canon of interpretation called “the last antecedent rule,” a qualifying phrase applies only to the immediately preceding word or phrase unless a contrary intent is indicated. The court also noted that this interpretation protected the reasonable expectations of the insured; and it cited a treatise’s statement that “[a]n insurance policy is not to be interpreted in a factual vacuum” (although the court failed to explain how that maxim informed its decision).

Posner faults Reading Law for suggesting that the case turned on the rule that ambiguities should be construed against the drafter. He is correct that the court did not mention contra preferentem and relied instead on the last-antecedent rule. But he goes too far when he implies that Reading Law deliberately fails to mention the last-antecedent rule because it too obviously conflicts with the “series-qualifier canon,” which would have called for the court to apply “in your advertising” to both antecedent terms (“infringement of copyright” and “improper or unlawful use of slogans”). Surely we can disagree with an author’s description of a case without automatically attributing it to bad faith? Here, as elsewhere, one is struck by the excessively harsh nature of Posner’s critique.

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65 796 P.2d at 466.
12.


Posner’s account of Frankfurter’s statements about canons of construction is correct; Frankfurter grants them some worth while cautioning against their excessive rigidity and their tendency to mask the indeterminate and judgmental nature of statutory interpretation. But all that is implicit in the brief quotation in *Reading Law* (“insofar as canons of construction are generalizations of experience, they all have worth”) (emphasis added). To say that *Reading Law* “distorted” Frankfurter’s meaning is therefore unwarranted.

Bryan, I hope that you’ll find this memo helpful. Feel free to call me to discuss any aspect of it.

Best regards,

Steve