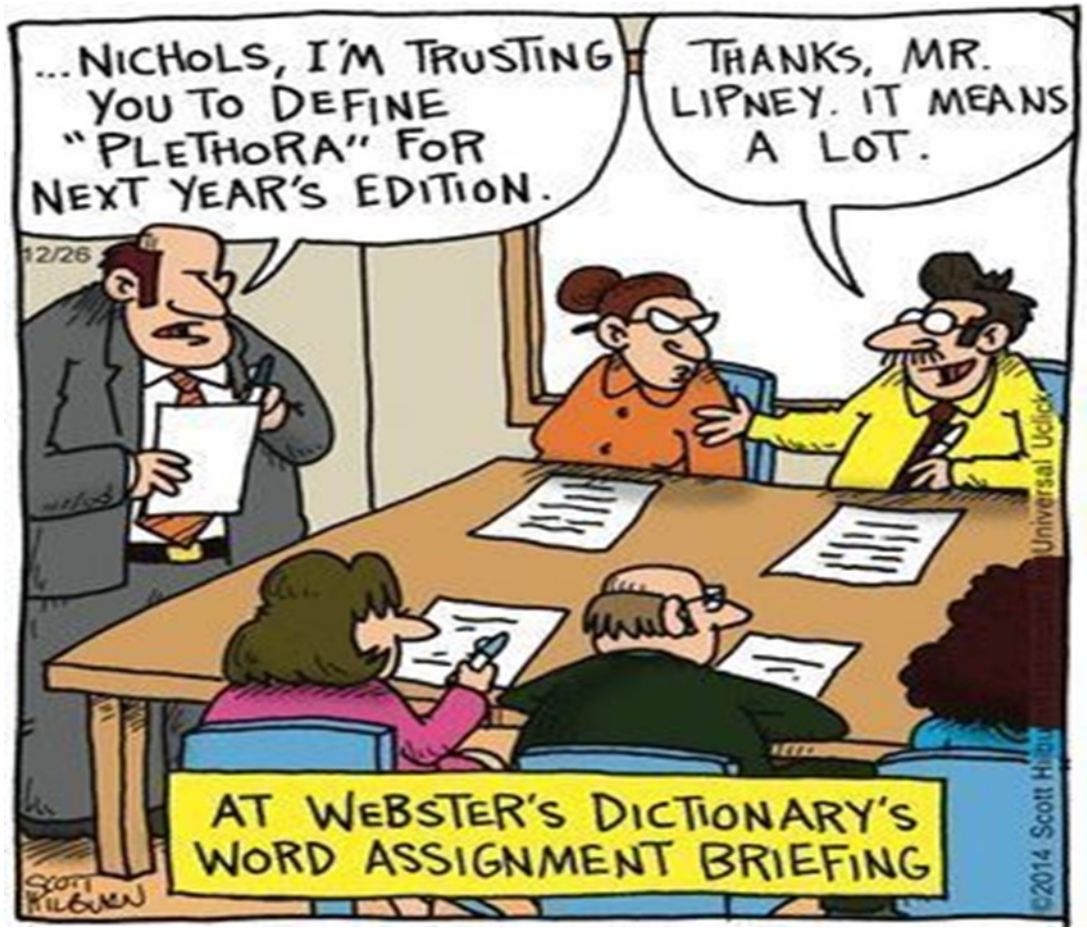
28th ANNUAL
PAUL J. HARTMAN
STATE AND LOCAL TAX FORUM
VANDERBILT UNIVERSITY LAW SCHOOL

It's All About the Words: Statutory Construction

Lindsay LaCava
Partner, Baker McKenzie
New York, NY

Mark Sommer
Member, Frost Brown Todd LLC
Louisville, KY

Martha Wentworth
Judge, Indiana Tax Court
Indianapolis, IN


...NICHOLS, I'M TRUSTING YOU TO DEFINE "PLETHORA" FOR NEXT YEAR'S EDITION.
THANKS, MR. LIPNEY. IT MEANS A LOT.
12/26
AT WEBSTER'S DICTIONARY'S WORD ASSIGNMENT BRIEFING
Universal Uclick
©2014 Scott Hilburn

Learning Objectives

The precise meaning of a statute is critical to tax compliance and winning your case!

Our Panel will identify & discuss:

I. When Statutory Construction is necessary, the role of ambiguity, and the best suited interpreter
II. Prevalent theories of statutory construction (& the Justices who love them)
III. Important canons of statutory construction – use, character & criticism

I. When Statutory Construction is Necessary, Ambiguity, & the Best Suited Interpreter

The Role of Ambiguity

The first step in interpreting a statute is to ask whether the statute is ***ambiguous***.

Where the language of a statute is *plain and unambiguous*, effect will be given to the statute as written, without engaging in statutory construction.

- Look at the usual and ordinary meaning of the words.
- There is no need to consult extrinsic evidence or legislative history or intent.

Where the language of a statute is *ambiguous*, rules of construction will be used for guidance and the reasonableness of proposed interpretations will be considered.

When is a Statute Ambiguous?

A statute is ambiguous when the language is capable of more than one *reasonable* construction.

A statute is not ambiguous merely because a clever argument can be made about a different meaning.

Example: Is the following statute ambiguous?

"No Person May Bring a Vehicle into the Park"

"No Person May Bring a Vehicle into the Park"

Although this law seems straightforward and unambiguous, its application has inherent complications.

- Does it prohibit bicycles? Strollers? Golf carts? Drones? Park upkeep vehicles? Ambulances? A tank for a Vietnam War memorial?

Could enforcing the law against a coach driving his little league team to the park's baseball diamond be justified? Should this issue be resolved by referring to the law's **text**? To its **purpose**?

What **tools** should be used to discover the meaning of the **text** or the lawmaker's **purpose**?

Does the **underlying theory of interpretation** influence answers to these difficulties of application?

Who is the Best Suited Interpreter?

When the meaning of a statute is in dispute, judges must interpret the law, ambiguous or not.

Judicial interpretations of statutes are generally the final statutory meaning that will determine how the law is carried out, unless the legislature amends the law.

The legitimacy of judicial power over statutory interpretation flows from the assumption that judges “say what the law is” to carry out the legislature’s will.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

Marbury v. Madison, 5 U.S. 137, 177 (1803)

Separation of Powers

The Constitution constrains judicial discretion by giving the legislature, not the courts, the power to make the law.

Therefore, when a judge interprets a statute, her or she seeks to give effect to the intent of the legislature.

Accordingly, a judge's role is that of a translator:

- to interpret meaning as written, ambiguous or not.
- to "say what the law is" to carry out the legislature's will, not to substitute its own policy views.

Separation of Powers: The Role of Agency Deference

Courts use the judge-made concept of **deference** as a tool of interpretation.

- Courts may give deference to agency guidance or interpretations, essentially yielding to the judgement and interpretation of the agency.

Whether an administrative agency should be afforded deference, and the level of that deference, has been litigated in several contexts over the years.

To Defer or Not to Defer?

Justifications for Agency Deference

- Expertise: Agency has special expertise.
- Political Accountability: Agency has more political accountability than the courts.
- Directed by Law: Legislature may delegate interpretive authority to the agency.
- Efficiency: Agency is best suited to make decisions that maximize use of agency resources.
- Confidentiality: Certain decisions require confidential information.

To Defer or Not to Defer?

Criticisms of Agency Deference

- Contrary to Law: Under the federal Administrative Procedures Act (APA), a reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."
- Violates Separation of Powers: Granting executive branch agencies legislative and judicial powers abdicates the courts' duty to independently interpret the law.
- Due Process: If the agency is a party to the dispute, deference creates inherent bias in favor of the agency's position.
- Inconsistently Applied: Not all court's apply deference.
- Thumb on the Scale: Strict construction of tax statutes favors revenue agencies.
- Dedicated Tax Tribunals: Which expert is due deference?

Federal Deference Authorities

- ***Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.***, 467 U.S. 837 (1984) – Court must defer to agency's interpretation of a statute if:
  - the statute is ***ambiguous***; and
  - the agency's interpretation is ***reasonable***, a fairly low standard.

- ***Auer v. Robbins***, 519 U.S. 452 (1997) – Court must defer to agency's *informal interpretation* of ambiguous *regulation* if not "plainly erroneous"
  - Informal interpretation is an interpretation adopted without notice-and-comment rulemaking or formal adjudication.

Federal Deference Authorities

- ***Kisor v. Wilkie***, 139 S.Ct. 657 (2018) – Narrowed ***Auer*** by adopting a multi-step analysis:
  1. Is the regulatory provision ***genuinely ambiguous*** after exhausting all "traditional tools" of statutory construction?
  2. Is the agency's interpretation ***reasonable***?
  3. Is the agency's interpretation deserving of ***controlling weight*** because of its character and context?
     - Is the agency's interpretation the agency's "***authoritative***" or "***official position***"?
     - Does the agency's interpretation implicate the agency's ***substantive expertise***, showing superior knowledge than the court to decide?
     - Does the interpretation reflect ***a fair and considered judgment***, not just a litigation position that creates an unfair surprise?

Deference at the State Level: A Patchwork of Standards

- Strong deference: Court must defer to an agency's interpretation when the statute is ambiguous (or silent) and the agency's interpretation is reasonable.
- Intermediate deference: Court may defer (not mandatory) or give due weight to agency where the relevant statute is ambiguous.
- De novo review: Court would consider the persuasiveness of the specific position, acknowledging agency expertise, but not predetermining the conclusion.
- Non-deferential de novo review: Court would consider the persuasiveness of the specific position, but would not cede any deference to the position.

The Move to Abandon Deference at the State Level

Several states have ***abandoned*** or otherwise ***limited*** agency deference, either judicially or legislatively.

Judicial Limitations

- Mississippi – The Mississippi Supreme Court recently reaffirmed its decision to abandon deference to agency interpretations. *HWCC-Tunica, Inc. v. Mississippi Dep't of Revenue and Mississippi Gaming Comm'n*, 296 So.3d 668 (Miss. 2020).
- Wisconsin – The Wisconsin Supreme Court has abandoned its practice of granting deference to interpretations of administrative agencies. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018).
- New York – The Division of Taxation and Finance's interpretation of a tax imposition statute (a statute that does not provide an exclusion, exemption or deduction) is not entitled to deference. *In the Matter of TransCanada Facility USA, Inc.*, NYS TAT, Docket No. 827332 (May 1, 2020).

The Move to Abandon Deference at the State Level

Legislative Limitations

- Arizona - Arizona has amended its statutes to provide that courts must decide all questions of law "without deference to any previous determination" that may have been made by the agency. Ariz. Rev. Stat. § 12-910(F).
- Georgia – Georgia recently enacted a law that prohibits courts and the Georgia Tax Tribunal from granting deference to agency interpretations (other than formal regulations adopted under the APA). Georgia S.B. 185 (2021).

Ballot Initiatives

- Florida – A ballot initiative was passed by voters in the November 2018 general election to prohibit state courts from deferring to an administrative agency's interpretation of a statute or rule they are charged to administer. Fla. Const. Art. V, § 21.

II. Major Approaches to Statutory Construction (& the Justices who love them)

Introduction

Basic approaches to statutory construction

-- **Originalism** - considers that the Constitution was written exactly as intended and should be applied as written.
-- **Textualism** – considers actual words of a statute not legislative intent, legislative history, or policy arguments.
-- **Purposivism** – considers the words of a statute within the context of the law's purpose gleaned from extraneous pre-enactment materials.
-- **Intentionalism** – considers that the Constitution should be interpreted giving primary weight to the intentions of framers, members of proposing bodies, and ratifiers

Originalism

- **What is Originalism?**

  An approach to interpreting the ***Constitution*** with its **Original Meaning** & without any consideration of Congressional intent or legislative history. An Originalist believes the meaning of the Constitution does not change or evolve over time, but is fixed, knowable, & the sole guide for applying or interpreting a Constitutional provision.

- **What is Original Meaning?**

  The meaning of the text as understood by some segment of the populace at the Founding

  1. Ratifiers of the Constitution in the various state conventions or the public who elected them;
  2. The original "legal" meaning - because the Constitution is written in legal language.

Pros of Originalism

1. Reduces risk that unelected judges will seize power from elected representatives.
2. Preserves the authority of the Court.
3. Diminishes risk that a jjudge's neutral, objective decision-making may be supplanted by her own subjective, elitist values because understanding the framers & ratifiers of a constitutional text provides neutral criteria.
4. Forces the people to amend the Constitution promotes public debate about government and its limitations.
5. Better respects the notion of the Constitution as a binding contract.
6. Forces legislatures to reconsider and possibly repeal or amend bad laws, rather than leaving it to the courts to get rid of them.

Cons of Originalism

1. At the Philadelphia Convention, the Framers indicated they did not want their specific intentions to control interpretation.
2. No written Constitution can anticipate all the means the future government might use to oppress people, so sometimes judges must fill in the gaps.
3. Intentions of framers are various, sometimes transient, and often impossible to determine, a text is often ambiguous, and judicial precedents can be found to support either side.
4. Judges cannot deter crises that may result from inflexible interpretations of a Constitutional provision that no longer serves its original purpose and amending is too difficult to rely on.
5. Non-originalism allows the Constitution to evolve to fit more enlightened understandings on matters such as the equal treatment of blacks, women, and other minorities.
6. Originalists lose sight of the forest – the larger purpose – the animating spirit of protecting liberty – for the trees.

Originalism - Criticism #1

Originalism is *illegitimate* because the Founders themselves were not Originalists

&

the approach developed as a reaction to the judicial activism of the Warren Court (1953 – 1969)

Originalism - Retort #1

The Founders were Originalists

"In the exposition of laws, and even of Constitutions, how many important errors may be produced by mere innovations in the use of words and phrases, if not controlled by a recurrence to the original and authentic meaning attached to them!" **James Madison – 1826**

"[T]the intention of the [Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended." **Chief Justice John Marshall - 1827**

The Constitution must be interpreted in its "common and popular sense – in that sense in which the people may be supposed to have understood it when they ratified the Constitution." **Daniel Webster – 1840**

"[J]ust about everybody [in Congress] was an originalist" "The Constitution in Congress [between 1789 and 1861]" by **David P. Currie**.

Originalism - Criticism #2

The *Originalist* approach does <u>NOT</u> apply to modern circumstances

Originalism - Retort #2

It <u>Does</u> Apply to Modern Circumstances because . . .

Originalists are bound by the ***original meaning*** of the Constitution, which can and does apply to new and changing factual circumstances, **<u>NOT</u>** by the originally expected applications of the Constitution's text.

For example, generally Originalists AGREE that

- 1st Amendment's protection of free speech applies to the Internet
- 4th Amendment's prohibition against unreasonable searches and seizures applies to GPS devices that police put on cars
- 2nd Amendment right to bear arms applies to more than just muskets
- 10th Amendment allows issues not addressed in the Constitution, including changes in society, to be addressed by the states

Originalism - Criticism #3

Originalism is a rationalization to advance conservative philosophical results

Originalism - Retort #3

Originalism is NOT an approach to ensure conservative outcomes

Originalists do **not** alter their approach to prevent an unwanted outcome

- 16th Amendment (1913) - Originalists may dislike the federal income tax, but accept the 16th Amendment's original meaning
- 17th Amendment (1913) Originalists may dislike the direct, unapportioned election of Senators by voters of the states, but accept the original meaning of the 17th Amendment

Indeed, Originalists believe controversial political and moral questions should be decided by the democratic, legislative process that can lead to progressive, libertarian, or conservative outcomes.

Textualism

What is Textualism?

An approach to statutory interpretation focusing on the words of the statute – the words that survived the political processes to be enacted by lawmakers, exercising their constitutional power to legislate.

- Textualists focus on the words of a statute, relying on the text over any unstated purpose and over the intent behind the law.
- Theoretically, textualist interpretation is content-neutral - often looking to dictionaries and grammar rules to determine the "ordinary meaning" of words.
- Applying a text as written does not require strict assignment of dictionary definitions to each word, but looks to a reasonable person's interpretation of the text.

Textualism

- Textualists believe statutory construction should be constrained by statutory interpretation and the legal effect of a statutory text should follow its linguistic meaning.
    - Textualist interpretation generally eschews the use of legislative history as well as statutory purpose unless it is self-evident from the text.
    - Textualists largely rely on rules of grammar in seeking plain meaning or on the “canons of construction” that reflect broader conventions of language use common in larger society at the time the statute was enacted.

Textualism-Criticisms/Retorts

- Critics believe textualism is an overly formalistic approach to determining the meaning of a statutory text, ignoring that courts have interpretive authority under the Constitution.
  - **Formalism is a restraint on courts making subjective interpretations**
- Some critics claim lawmakers legislate fully expecting courts will consider their legislative processes & the law's purpose when applying the law to the facts.
  - **Judges are not expert in complex congressional processes that shape enacted laws & the records of the legislative history are often internally contradictory and otherwise unreliable re: legislative purpose**
- Considering evidence of a statute's purpose is a superior constraint on a judge than merely considering the text dissociated from evidence of legislative intent.

What is the Difference Between Originalism & Textualism?

- **Little/None**
  - Originalists interpret the Constitution with its original meaning: textualists interpret statutes with their original meanings
  - Both believe that the hidden intent of the Founders or the legislative intent of the lawmakers cannot override the text's clear meaning

Purposivism

- **What is Purposivism?**

  - Purposivism interprets statutory text by considering the words of a statute within the context of **the law's purpose** gleaned from extraneous pre-enactment materials & the legislature's intention at enactment

  - Purposivists are more willing than textualists to consider **legislative history**.

Purposivism

"Legislation is a purposive act, and judges should construe statutes to execute that legislative purpose." Robert A. Katzmann, *Judging Statutes* 31 (2014).

The focus is on the legislative process

1. What problem was Congress trying to resolve by enacting the disputed statute (the purpose) **&**
2. How the statute accomplished that goal (furthered the purpose)

Purposivists advocate using legislative history, unlike **Textualists** who use the canons of construction.

Purposivism–Criticisms/Retorts

- Critics claim this approach fails to separate the powers between the legislator & the judiciary because it allows the judiciary more freedom to interpret extraneous materials in applying the law.
- Critics consider this approach too easily manipulable, allowing the text to be ignored to achieve what is believed to be the provision's purpose.
- **Proponents claim judges' use of legislative history – their consideration of these deliberative materials - illuminate the context and purpose of a statutory provision.**

Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)

- Parents successfully sued a school district under the **Individuals with Disabilities Education Act**.
- The Act stated **a court may award reasonable attorneys' fees as part of the COSTS to parents who prevail in an action brought under the Act**.
- Here, the parents sought the fees paid to an education expert who assisted throughout the proceedings.
- **Issue: Did the Act authorize the compensation of *expert* fees?**
- Justice Alito's **textualist opinion** held the Act's plain language did not authorize compensation for expert witness fees.
- He emphasized courts must "begin with the text" and "enforce it according to its terms," stating the text "provides for an award of 'reasonable attorneys' fees,'" but not even a hint" the award included expert fees
- The majority rejected the parents' arguments that awarding expert fees would be consistent with the statute's goals and its legislative history, "in the face of the [Act's] unambiguous text." (**Purposivism**)

Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006)

- Justice Breyer's purposivist dissent concluded that the disputed term "**COSTS**" should be interpreted to include the award of expert fees because: (1) Congress said that was what it intended by the phrase, and (2) that interpretation furthered the Act's statutorily defined purposes.

- Breyer relied primarily on the bill's legislative history and the Act's "basic purpose:" to guarantee children with disabilities get a quality public education.

- Breyer did not agree that the statute's text was unambiguous, and despite noting that a literal reading of the text would not authorize the costs sought by the parents, he concluded the literal reading was "not inevitable."

- Instead, he concluded that his reading, "while linguistically the less natural, is legislatively the more likely."

Intentionalism

What is Intentionalism?

- Intentionalism is an approach to interpretation that is **similar to Originalism** but gives primary weight to the intentions of Framers, members of proposing bodies, and ratifiers.

- Courts should attempt to discover the rule that the law-maker intended to establish, the intention the law-maker had in making the rule, or the sense the law-maker attached to the words used to express the rule.

Intentionalism v. Purposivism

- **Intentionalists & Purposivists** both believe linguistic meaning of statutory texts should be subordinated to other considerations (e.g., subjective legislative intent or objective statutory purpose).

- The *actual* intent of the legislature that enacted a statute is usually unknowable with respect to the precise situation presented to a court; thus, both theories construct an objective intent.

- The rules of statutory interpretation allocate lawmaking power among the branches of government, and those rules should reflect and respect what, if anything, the Constitution has to say about that allocation."

Intentionalism

- The rationale for Intentionalism is that the Constitution restrains judicial discretion by designating Congress, not the courts, as the lawmaking branch.
- Most judges believe they should restrain themselves to act as merely the translator of the Legislature's command.
- To do otherwise risks attempting to make law and policy, usurping the legislative function.
- It is widely agreed it is improper for judges to prioritize their own policy views over those actually codified by the legislature.

Other Approaches

Professor William Eskridge – Dynamic Statutory Interpretation – requires judges to interpret statutes in light of their present societal, political, and legal context.

Judge Richard Posner – Pragmatism – 4 main aspects: (1) the importance of context; (2) the lack of foundations; (3) the instrumental nature of law; & (4) the unavoidable presence of alternate perspectives.

A Living Constitution - the authors of the Constitution intended us to identify what the Constitution says, consider other writings, and put those writings into the context of the time and apply those intentions to current-day situations.

Formalism – a judge is simply a vehicle for expressing the law's meaning, interpreting it without adding her own gloss, but simply applying the rules and standards previously chosen through democratic processes.

Legal Realism – interpreting the law by adapting it to the realities of ever-changing social, industrial and political conditions because the law must be more or less impermanent, experimental, and therefore not neatly calculable.

How SCOTUS Justices Align?

John G. Roberts – T, F
Clarence Thomas – T, F
Neil M. Gorsuch – O, T
Brett Kavanaugh - T
Amy Coney Barrett – O, T
Elena Kagan - T
Sonia Sotomayor – Legal Realism
Samuel A. Alito, Jr. - T
Stephen G. Breyer - P

III. Important Canons of Statutory Construction – Use, Character & Criticism

Most commonly used canons of statutory construction

- Plain Meaning Canon
- Semantic/Linguistic Canons
- Substantive Canons
- Agency deference as a valid indicator of meaning

Ordinary/Plain Meaning

"Congress uses common words in their **popular** meaning, as used in the common speech of men." (Frankfurter)

What does it mean to "use" a gun?

- Carrying? Firing? Brandishing?
- Use for its intended purpose: firing (Scalia)

Specialized ***Legal*** Meaning?

Sources of Meaning:

- Introspection
- Dictionaries
- Books / Media
- Judicial Decisions
- Government Materials

Ordinary/Plain Meaning

- **ONLY GOES SO FAR:** Clear in a prototypical application, but more difficult when judges apply the law to new circumstances.
- Other tools may be needed
- **DANGER: The ordinary meaning is <u>my</u> ordinary meaning – the importance of paradigm**

Statutory Context – Whole Text Canon

Courts will interpret a word in light of its full statutory context.

The statute doesn't define a term…

The meaning isn't plain…

What's next?

"Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . ." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.* (1988)

Canons of Construction

Canons are Default Assumptions; NOT Rules

Not ironclad; don't count on the canon always applying

Disagreement as to What Qualifies

Courts **disagree** on both:

(1) how to use canons, and

(2) whether a certain canon is even viable

Semantic v. Substantive Canons

Semantic Canons

Presumption of Grammatical Rules

- E.g., rule against superfluities

Favored by textualists

The rules of grammar that govern ordinary language usage

Substantive/Pragmatic Canons

Presumption of Outcomes: Courts favor certain outcomes, unless statute clearly says otherwise

Legal consequences of interpretation rather than linguistic issues

If statute is ambiguous, a Substantive Canon may tip the scale toward a particular result

Semantic Canons

Rule of the Last Antecedent

"A limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."

Example:

"A tax is hereby imposed on automobiles, motorcycles, and tangible personal property operated by means of an internal combustion engine."

vs.

"A tax is hereby imposed on automobiles, motorcycles, and tangible personal property, operated by means of an internal combustion engine."

Semantic Canons

The Rule Against Surplusage

- Each word & clause has an operative effect
- Don't render the statute inoperative or redundant
- Does the legislature ***always*** avoid redundancy? Some judges aren't so sure.

Example:

"Uses or Carries a Firearm" – *Bailey v. United States*

"Use" cannot have such a broad reading that "no role remains for 'carry.'"

"Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"

Substantive Canons

Constitutional Avoidance

- If "serious doubt" about the statute's constitutionality exists, court should look for another, "fairly possible" reading to avoid the constitutional issue
- ***Even if*** not otherwise "the most natural interpretation" of the disputed statute
- What's a "fairly possible" alternative reading?
- **Serious Doubt**: How doubtful is doubtful?

Remember: Most courts won't apply substantive canons unless ***after consulting other interpretive tools***, the statute still remains ambiguous

Substantive Canons

Other Common Substantive Canons in State Tax Matters

- Presumption against Implied Repeals
- Presumption against Retroactive Legislation
- Presumption against Continuity
- Presumption of Legislative Acquiescence
- Presumption of Narrow Construction of Exceptions
- Presumption of Purposive Amendment

Remember: Canons apply when the text still remains **ambiguous** even after a plain meaning analysis.

If the statute **clearly** violates the canon, the clear language of the statute controls.

Canons vs. Legislative History

Purposivists v. Textualists → Legislative History v. Canons of Construction

Commonalities:

- Faithful agents of the legislature
- Both seek an objective legislative intent
- A statute's clear, unambiguous text is primary

Disagreements:

- What **contexts** require use of other interpretive tools?
- Which **interpretive tools** are necessary to understanding the statute?

Canons vs. Legislative History

Textualists:

Figure out meaning using **ordinary meaning and linguistics**

Judges don't have the **capacity** to determine a statute's purpose; they need rules of thumb

Canons give traditional, accepted **background rules**

Even if not legislature's "actual" intent, still a greater **constraint** on judge's discretion than legislative history

Purposivists:

Figure out what legislature **did**, focusing on process; history shows what they tried to do & how they did it

Canons, by contrast, are **judicially** created and not rooted in actual legislative processes

Reliable legislative history is a better constraint than canons; court's decision reflects legislative intent—not judge's preferences. But what constitutes "**reliable**"?

Administrative Interpretation

Agency rulings or patterns of action may provide **evidence** of a statute's meaning.

Rationale: Agencies **must** interpret statutes—more regularly than courts. Agency's implementation can show the targeted problem and how the statute works to address it

BUT: Judges will reject agency interpretations if contrary to text or other strong evidence of statute's meaning

NOT *Chevron* deference; *Chevron* applies when reviewing ***official*** interpretation of a statute that the agency is administers

QUESTIONS???