MICRO-SYMPOSIUM

ON SCALIA & GARNER'S "READING LAW"

PART 2

INTRODUCTION TO PART 2 OF THE MICRO-SYMPOSIUM 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*

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[1] *Micro-Symposium: Antonin Scalia and Bryan A. Garner's "Reading Law"*, 18 GREEN BAG 2D 105-123 (2014).

[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.[1] 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 indi-

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[1] 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.[3] 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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[3] 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.[1] 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.[2] 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."[3] 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."[4] 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."[5] 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.[6] Indeed, the authors fail to cite to any authority that specifically references the nearest-reasonable-referent canon.[7] 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.[8] 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.[9] Justice Scalia has rightly scolded critics of the canons of construction for similar deficient citation of authority.[10]

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*."[11] 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.

[6] Only two cases come close. IBM Corp. v. Liberty Mut. Ins. Co., 363 F.3d 137, 147 (2d Cir. 2004) (referring to "nearest *preceding* referent"); Perrine v. Downing, No. 260105, 2006 WL 1115981, at *2 (Mich. Ct. App. Apr. 27, 2006) (discussing the "'proximity rule,' which requires a modifier typically to refer to its last antecedent or to its nearest referent" but declining to apply it). Two opaque references do not establish a canon.

[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

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[12] *Id.*
[13] *Id.* at 432.
[14] *Id.* at 9.
[15] *Id.* at 31.
[16] *See, e.g., id.* at 146.
[17] U.S. Fire Ins. Co. v. Kelman Bottles, 538 Fed. App'x 175, 180 (3d Cir. 2013); Goldberg v. Companion Life Ins. Co., 910 F. Supp. 2d 1350, 1353 (M.D. Fla. 2012); Zachry Const. Corp. v. Port of Houston Auth. of Harris Cnty., No. 12-0772, 2014 WL 4472616, at *5 (Tex. Aug. 29, 2014).

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[1]

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."[2]

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.[3] 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).[4] 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."[5]

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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."[1] Posner argues that *Reading Law* inaccurate-

[1] *See* RICHARD A. POSNER, *Reflections on Judging* 208 (2013) (*Reflections*).

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"; "[a]n 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 correct than yours?) and (b) supportive of his argument (*i.e.*, does the difference between his reading of the case and yours support his thesis 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 reasoned 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.

WHITE CITY SHOPPING CENTER, LP V. PR RESTAURANTS, LLC, 2006 WL 3292641 (MASS. SUPER. CT. OCT. 31, 2006), 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."[7] 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 covenant 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.

[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.[8]

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-lessor* – not the plaintiff-lessee – had not met *its*

[8] 2006 WL 3292641, at *3.

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-lessor. 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."[9] 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

[9] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

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?

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[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.[13] 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.[14] 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*."[15] 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;[16]
- "[a] statute's plain language generally provides the best indication of legislative intent";[17]
- "[t]he plain meaning of 'into' can be gleaned from its dictionary definition";[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";[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";[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*."[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);[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);[23]

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[16] 962 A.2d at 1166.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 1167.
[20] *Id.*
[21] *Id.* (emphasis added).
[22] *Id.* at 1167–68.
[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] and
- "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 "modif[ying] 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"[28] (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."[29]
- 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.[30]
- 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."[31]
- There was nothing "in the record" indicating a legislative intent to include "gaming cocks" within the class of protected animals.[32]

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.[33]

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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.
KNOX V. MASSACHUSETTS SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS, 425 N.E.2D 393 (MASS. APP. 1981), DISCUSSED IN *REFLECTIONS* AT 201–02.

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*

[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 (LA. 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

[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,

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[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*. at 798–99.
[45] *Reflections* at 202.
[46] *See id*.
[47] *Id*.

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.

BRASCHI V. STAHL ASSOCIATES CO., 543 N.E.2D 49 (N.Y. 1989), DISCUSSED IN *REFLECTIONS* AT 202.

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."[48]

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.

[48] 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.[49] 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.

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[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."[50]

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."[51]

[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."[52]

[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."[53] 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"[54]), 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*."[55]

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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."[56] 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 designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land[,] is the theme."[57] "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."[58]
- "[I]n everyday speech 'vehicle' calls up the picture of a thing moving on land."[59]
- "It is a vehicle that runs, not something, not commonly called a vehicle, that flies."[60]
- "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."[61]
- The "motor vehicles" definition followed earlier statutes of other states, including the District of Columbia traffic regulations, which surely did not involve flight.[62]
- 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-

[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."[63]

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

10.
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"[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.

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[63] *Id*.

[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."

11.
PHOENIX CONTROL SYSTEMS, INC. V. INSURANCE CO. OF NORTH AMERICA, 796 P.2D 463 (ARIZ. 1990), DISCUSSED IN *REFLECTIONS* AT 207–08.

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"[65] (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.

[65] 796 P.2d at 466.

12.

FELIX FRANKFURTER, *SOME REFLECTIONS ON THE READING OF STATUES*, 47 COLUM. L. REV. 527 (1947), DISCUSSED IN *REFLECTIONS* AT 217.

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