A Rough and Ready Guide to Interpretation

Prof. Pi

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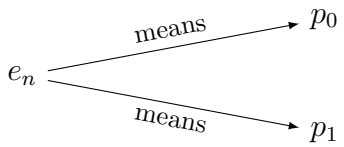
1 The Nature of Interpretation

All the problems of textual interpretation are reducible to a question of *disambiguation*. Every expression in natural language $(e_0, e_1, \ldots)$ is ambiguous as between infinitely many possible propositions $(p_0, p_1, \ldots)$. Where the expression is intended to represent a *rule* (e.g., legislation or contract terms), we require *meta-rules* to disambiguate which of the possible propositions is meant by the expression.



The expression e_n is ambiguous as between p_0 and p_1.

By "meta-rule," I mean any rule for deciding which proposition p_0, p_1, ..., is *meant* when we are given an ambiguous expression e_n. Some of the meta-rules we use to disambiguate language recur frequently in legal reasoning. These familiar patterns of disambiguation are referred to as "canons of construction" or "canons of interpretation."

There exists no "definitive list" of the canons of interpretation. How common a particular pattern must be in order to qualify as a "canon" is indeterminate. And developments in linguistics, psychology, and philosophy can generate new canons of interpretation. For example, a meta-rule, which has emerged in the past several decades, which may credibly be called a "canon of interpretation" is:

> If e is ambiguous as between p and other propositions, and p is the rule which effects efficient outcomes, then e means p.

I expect some (albeit an ever diminishing number of) scholars might dispute whether this is a legitimate "canon." However, that is not an interesting dispute. The point is not to assemble a definitive *list*, but rather to familiarize yourself with patterns of reasoning which are commonly used to decode language in law.

It is worth noting that there is some disagreement about the precise role of the "canons" of interpretation. The meta-rules for interpretation are sometimes given the lexical ordering:

1. Ordinary meaning (also "natural meaning," "plain meaning," "usual meaning")
2. Legislative intent (also "legislative purpose")
3. Tiebreakers

However, not all scholars accept this lexical ordering. Some scholars think the only meta-rule is (1), and the canons are merely tools for clarifying (1). Others think the only meta-rule is (2), and the canons are merely tools for clarifying (2).

Specifically, textualists and originalists contend that the canons should be understood as methods for determining ordinary meaning (and that purpose should not be given any consideration). "Purposivists" argue instead that the canons should be understood as methods for determining the meaning most likely intended by the drafter(s) of a text.

These differing views of interpretation (and the role of "canons") reveals a deep divide in philosophical perspectives. The clash of perspectives is often remarked upon in popular media in political terms. These days, the textualist perspective is identified as "conservative," and the purposivist perspective is identified as "progressive." This is a crude way of looking at the issue. The reduction of legal philosophy to gross political categories should be strongly resisted.

2 The Canons of Interpretation

2.1 Categorizing the Canons

A common categorization of canons of interpretation is the bipartite division into *formal* and *substantive*.

The formal canons are also sometimes called, "textual," or "semantic" (the latter term is potentially confusing, and I think better avoided). The formal canons are concerned principally with the decoding of language *qua* language irrespective of its legal content. Because they are fully general, the formal canons are applicable in any instances the law depends on language—from constitutions to criminal codes to contract terms.

The substantive canons are specific to interpreting language in a particular legal context. For example, the rule of lenity is specific to the criminal law,[1] although there may be approximately analogous substantive canons in other areas of law (for example, the contracts-specific canon *contra proferentum* bears some similarity both formally and functionally to the rule of lenity)[2].

There are a number of possible subdivisions of the categories of canon. For example, Scalia and Garner divide the formal canons into two subsets: semantic and syntactic; and they divide the substantive canons into subsets: contextual, expected-meaning, government-structuring, private-right, and stabilizing.[3] It is worth mentioning also Karl Llewellyn's (illuminating but not very "mainstream") categorization of the canons into pairs of "thrusts" and "parries."[4]

It may be helpful to single out a handful of canons as constituting the "core" of interpretation, which are invariably included in any list: the rule against surplusage, *ejusdem generis*, *expressio unius est exclusio alterius*, *in pari materia*, and *noscitur a sociis*.

[1] The rule of lenity is the meta-rule: that if e is ambiguous as between p_0 and p_1, and p_1 is more favorable to the defendant than p_0, then e means p_1.

[2] *Contra proferentem* is the doctrine: that if e is ambiguous as between p_0 and p_1, and p_1 is more favorable to the contract drafter than p_0, then e means p_0.

[3] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012).

[4] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

2.2 A Basic List

A reasonably comprehensive list of canons of construction may be found in the appendix to Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*.[5] That list is a compilation derived from two sources: Scalia & Garner's book,[6] and William Eskridge's casebook on statutory interpretation.[7]

The CRS Report recognizes 56 canons, divided into two categories: "semantic" and "substantive." That list is reproduced below with footnotes omitted. The main text of the report is incidentally a very useful general introductory resource on the problems of statutory interpretation, and I encourage you to give it a quick read.

Semantic Canons

1. "Artificial-Person Canon": "The word person includes corporations and other entities, but not the sovereign."

2. Casus Omissus: A matter not covered by a statute should be treated as intentionally omitted (casus omissus pro omisso habendus est).

3. "Conjunctive/Disjunctive Canon": "And" usually "joins a conjunctive list," combining items, while "or" usually joins "a disjunctive list," denoting alternatives.

4. *Ejusdem Generis*: A general term that follows an enumerated list of more specific terms should be interpreted to cover only "matters similar to those specified."

5. *Expressio Unius*: "The expression of one thing implies the exclusion of others (expressio unius est exclusio alterius)." This canon is strongest "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."

6. "Gender/Number Canon": Usually, "the masculine includes the feminine (and vice versa) and the singular includes the plural (and vice versa)."

[5]Congressional Research Service Report R45153 at 54 (2018), *available at:* https://fas.org/sgp/crs/misc/R45153.pdf.

[6]Scalia & Garner, note 3, *supra*.

[7]William N. Eskridge, Jr., et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy (5th ed. 2014).

7. "General/Specific Canon": Where two laws conflict, "the specific governs the general (generalia specialibus non derogant)." That is, "a precisely drawn, detailed statute pre-empts more general remedies," and conversely, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."

8. "General-Terms Canon": "General terms are to be given their general meaning (generalia verba sunt generaliter intelligenda)."

9. Grammar Canon: Statutes "follow accepted standards of grammar."

10. "Harmonious-Reading Canon": "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."

11. "Irreconcilability Canon": "If a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect."

12. Legislative History Canons: "[C]lear evidence of congressional intent" gathered from legislative history "may illuminate ambiguous text." The most "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." Floor statements, especially those made by a bill's sponsors prior to its passage, may be relevant, but should be used cautiously. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."

13. "Mandatory/Permissive Canon": "Shall" is usually mandatory and imposes a duty; "may" usually grants discretion.

14. "Nearest-Reasonable-Referent Canon": "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."

15. *Noscitur a Sociis*: "Associated words bear on one another's meaning . . . ."

16. Ordinary Meaning Canon: Words should be given "their ordinary, everyday meanings," unless "Congress has provided a specific definition" or "the context indicates that they bear a technical sense."

17. Plain Meaning Rule and Absurdity Doctrine: "Follow the plain meaning of the statutory text, except when a textual plain meaning requires an absurd result or suggests a scrivener's error."

18. "Predicate-Act Canon": "The law has long recognized that the '[a]uthorization of an act also authorizes a necessary predicate act.'"

19. "Prefatory-Materials" and "Titles-and-Headings" Canons: Preambles, purpose clauses, recitals, titles, and headings are all "permissible indicators of meaning," though they generally will not be dispositive.

20. Presumption of Consistent Usage: "Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning." Conversely, "a material variation in terms suggests a variation in meaning."

21. "Presumption of Nonexclusive 'Include'": "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."

22. "Presumption of Validity": "An interpretation that validates outweighs one that invalidates (ut res magis valeat quam pereat)." Stated another way, courts should construe statutes to have effect.

23. "Proviso Canon": "A proviso," or "a clause that introduces a condition," traditionally by using the word "provided," "conditions the principal matter that it qualifies—almost always the matter immediately preceding."

24. Punctuation Canon: Statutes "follow accepted punctuation standards," and "[p]unctuation is a permissible indicator of meaning."

25. Purposive Construction: "[I]nterpret ambiguous statutes so as best to carry out their statutory purposes."

26. *Reddendo Singula Singulis*: "[W]ords and provisions are referred to their appropriate objects . . . ."

27. Rule Against Surplusage: Courts should "give effect, if possible, to every clause and word of a statute" so that "no clause is rendered 'superfluous, void, or insignificant.'"

28. 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 . . . ."

29. "Scope-of-Subparts Canon": "Material within an indented subpart relates only to that subpart; material contained in unindented text relates to all the following or preceding indented subparts."

30. Series-Qualifier Canon: "'When there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series.'"

31. "Subordinating/Superordinating Canon": "Subordinating language (signaled by subject to) or superordinating language (signaled by notwithstanding or despite) merely shows which provision prevails in the event of a clash—but does not necessarily denote a clash of provisions."

32. "Unintelligibility Canon": "[A] statute must be capable of construction and interpretation; otherwise it will be inoperative and void."

33. "Whole-Text Canon": Courts "do not . . . construe statutory phrases in isolation; [they] read statutes as a whole."

Substantive Canons

1. Canon of Constitutional Avoidance: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

2. "Dog that Didn't Bark" Presumption: A "prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule."

3. Federalism Canons: Courts will generally require a clear statement before finding that a federal statute "alter[s] the federal-state balance." Thus, for example, courts require Congress to speak with "unmistakeable clarity" in order to "abrogate state sovereign immunity."

4. *In Pari Materia*: "[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'"

5. "Mens Rea Canon": Courts should "presume that a criminal statute derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text—unless it is clear that the Legislature intended to impose strict liability." In the context of civil liability, "willfulness . . . cover[s] not only knowing violations of a standard, but reckless ones as well."

6. Nondelegation Doctrine: Courts should presume that "Congress does not delegate authority without sufficient guidelines."

7. "Penalty/Illegality Canon": "[A] statute that penalizes an act makes it unlawful . . . ."

8. "Pending-Action Canon": "When statutory law is altered during the pendency of a lawsuit, the courts at every level must apply the new law unless doing so would violate the presumption against retroactivity."

9. Presumption Against Extraterritoriality: Courts should presume, "absent a clear statement from Congress, that federal statutes do not apply outside the United States."

10. "Presumption Against Hiding Elephants in Mouseholes": "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."

11. Presumption Against Implied Repeals: "[R]epeals by implication are not favored."

12. Presumption Against Implied Right of Action: Courts should not imply a private remedy "unless . . . congressional intent [to create a private remedy] can be inferred from the language of the statute, the statutory structure, or some other source." Without such intent, "a cause of action does not exist."

13. Presumption Against Retroactive Legislation: "[C]ourts read laws as prospective in application unless Congress has unambiguously instructed retroactivity."

14. Presumption Against Waiver of Sovereign Immunity: A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."

15. Presumption for Retaining the Common Law: "'[W]hen a statute covers an issue previously governed by the common law,' [courts] must presume that 'Congress intended to retain the substance of the common law.'"

16. Presumptions in Favor of Judicial Process: Courts sometimes require clear statements from Congress in order to bar judicial review of certain claims.

17. "Presumption of Continuity": "Congress does not create discontinuities in legal rights and obligations without some clear statement."

18. Presumption of Legislative Acquiescence: "[A] long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence . . . ." This also applies to judicial interpretations of the statute. If Congress reenacts a statute without any change, it incorporates any settled judicial constructions of the statute "so broad and unquestioned that [a court] must presume Congress knew of and endorsed it." However, "[o]rdinarily, . . . courts are slow to attribute significance to the failure of Congress to act on particular legislation."

19. Presumption of Narrow Construction of Exceptions: "An exception to a 'general statement of policy' is 'usually read . . . narrowly in order to preserve the primary operation of the provision.'"

20. "Presumption of Purposive Amendment": Courts should assume that Congress intends any statutory "amendment to have real and substantial effect."

21. "Repeal-of-Repealer Canon": "The repeal or expiration of a repealing statute does not reinstate the original statute."

22. "Repealability Canon": "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and . . . one legislature cannot abridge the powers of a succeeding legislature."

23. Rule of Lenity: "Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor."