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Supertext and Consistent Meaning

Steve R. Johnson
Florida State University College of Law

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by Steve R. Johnson

Opponents of textualism as an approach to statutory interpretation sometimes deride it as myopic. The textualist, those opponents contend, puts on blinders, narrowing the perhaps vast panorama of possible perspectives on meaning to a narrow slice of the whole. Modern textualists beg to differ. They view that criticism as reductionist and are often quick to distinguish textualism from mere literalism. Thus, the leading contemporary textualist jurist — U.S. Supreme Court Justice Antonin Scalia — cautions:

> Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. . . . [T]he good textualist is not a literalist.[1]

Angle of vision is an important difference between textualism and literalism.[2] Literalists may focus on one or a few words of a statute that are deemed to be central to the dispute before the court, locate a dictionary or comparable definition of that word or those words,[3] and impose that meaning on the statute.

In contrast, contemporary textualism surveys a wider field. Context is crucial. It is context that gives meaning to individual words.[4] Context includes at least the structure of the act that contains the critical word or words and other sections of that act. Among other things,[5] it also may include other statutes that are of a piece with the statute at issue.[6]

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This technique of reading statutes together is often called "supertext."[7] Supertext and the related

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[1]Justice Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law* 23-24 (1997). Those interested in a nuanced critique of Justice Scalia's essay by a leading statutory interpretation scholar (and an adherent of a nontextual, or "more than textual," approach to statutory interpretation) may wish to read William N. Eskridge Jr., "Textualism, the Unknown Ideal?" 96 *Mich. L. Rev.* 1509 (1998).

[2]Examples of literalist opinions include *Smith v. United States*, 508 U.S. 223 (1993); *Lopez v. Gonzales*, 549 U.S. 47, 60-68 (2007) (Justice Clarence Thomas, dissenting); *Dolan v. United States Postal Service*, 546 U.S. 481, 492-99 (2006) (Thomas, J., dissenting).

[3]Learned Hand was one of America's most revered judges and could never be mistaken for a textualist or literalist. He famously wrote: "It is one of the surest indexes of a mature

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and developed jurisprudence not to make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).

The use of dictionaries in statutory interpretation has been well studied. *See, e.g.*, Ellen P. Aprill, "The Law of the Word: Dictionary Shopping in the Supreme Court," 30 *Ariz. St. L.J.* 275 (1998); A. Raymond Randolph, "Dictionaries, Plain Meaning, and Context in Statutory Interpretation," 17 *Harv. J.L. & Pub. Pol'y* 71 (1994); Lawrence Solan, "When Judges Use the Dictionary," 68 *Am. Speech* 50 (1993); Samuel A. Thumma and Jeffrey L. Kirchmeier, "The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries," 47 *Buff. L. Rev.* 227 (1999); Note, "Looking It Up: Dictionaries and Statutory Interpretation," 107 *Harv. L. Rev.* 1437 (1994).

[4]*See, e.g.*, Scalia, *supra* note 1, at 37. ("In textual interpretation, context is everything.")

[5]Prominent among such other things are the historical context of the enactment, e.g., *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and a variety of canons of construction, e.g., *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-530 (1989) (Scalia, J., concurring in the judgment based on the "absurd results" canon).

[6]*See generally* Otto J. Hetzel, Michael E. Libonati, and Robert F. Williams, *Legislative Law and Statutory Interpretation: Cases and Materials* 507-516 (3d ed. 2001). *But see* Eric Lane, "Legislative Process and Its Judicial Renderings: A Study in Contrast," 48 *U. Pitt. L. Rev.* 639, 657-658 (1987) (criticizing use of the *in pari materia* canon).

[7]*E.g.*, William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 776-778 (4th ed. 2005). For an early case endorsing this supertext approach, see *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) ("we must

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"consistent meaning" canon are the subjects of this installment of Interpretation Matters. Part I describes the supertext and consistent meaning approaches generally. Parts II and III illustrate those approaches' use in a recent state tax case: the decision of the Supreme Judicial Court of Massachusetts in *CFM Buckley/North, LLC v. Board of Assessors*,[8] a strongly textualist decision. Part II describes the case and the "plain meaning" approach on which the court primarily relied. Part III shows the role of supertext and consistent meaning in the case and suggests that the court failed to fully develop that role.

I. The Supertext and Consistent Meaning Approaches

The outcome of many state and local tax cases turns on one or a few words in a particular subsection. If the meaning of that particular language is unclear, courts may resort to supertext to decide the case. Viewed through the lens of the larger statutory scheme, the role of the particular subsection may become clearer. Also, the critical language may be repeated elsewhere — in another subsection of the same section, in another section of the same statute, in another statute that functionally relates to or interacts with the statute containing the relevant subsection, or even in a functionally unrelated statute. If the critical language has an accepted meaning in one of those other contexts, it may — or may not — be sound to accord it the same meaning in the subsection at issue.

This latter aspect of supertext is known as the consistent meaning canon. Thus, many federal and state cases have suggested that "a term appearing in several places in a statutory text is generally read the same way each time it appears."[9]

Despite the frequency of such assertions, the canon is far from all-conquering. In actual practice, courts give the same words in various provisions different meanings about as often as they give them the same meaning.[10] Thus, it becomes important to identify reasons in each case why disparate or consistent reading is preferable.

Those reasons typically lie in the extent of similarity or divergence in origin or effect of the provisions being compared. For example, the case for according consistent meaning grows if the two provisions:

- were enacted at or near the same time;
- had the same legislative or interest group authors or supporters;
- were addressed to the same audiences (that is, technical versus popular constituencies); or
- were codified in the same place.[11]

Also, as noted in one state tax case, "in the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law."[12]

In short, the supertext and consistent meaning approaches should not be applied mechanically. Emerson observed that "a foolish consistency is the hobgoblin of little minds."[13] Canons are not warrants for mindlessness.

II. *CFM Buckley/North* Generally

A. Facts and Statutory Framework

The case involved three appeals from decisions of the Massachusetts Appellate Tax Board.[14] Each of the taxpayers (three corporations) operates a facility that provides skilled nursing home care. The facilities serve exclusively indigent elderly and infirm patients on a not-for-profit basis. Each of the taxpayers is organized in Delaware as a limited liability company, and the sole member of each of the LLCs is ElderTrust of Florida Inc. ElderTrust is organized in Tennessee as a corporation for the purpose of owning and operating nursing homes and other elder care facilities. ElderTrust was organized for charitable purposes; it was tax exempt for federal income tax purposes;[15] and financial benefits did not impermissibly flow to ElderTrust's investors.

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gather [legislators'] intention from the language used [in the given statute], comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed").

[8]902 N.E.2d 381 (Mar. 16, 2009) (Marshall, C.J., writing for a unanimous court), *aff'g* 2007 WL 841794 (Mass. App. Tax Bd. Mar. 20, 2007).

[9]*Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *see, e.g., Dearborn Township Clerk v. Jones*, 57 N.W.2d 40, 41-42 (Mich. 1953); Jane Schacter, "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond," 51 *Stan. L. Rev.* 1, 31-33 (1998).

[10]*E.g., General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 594-595 (2004); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) (tax case); *Robinson v. Shell*

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Oil Co., 519 U.S. 337, 342-43 (1997); *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 904 (D.C. Cir. 1993).

[11]*See, e.g.*, Popkin, *supra* note 7, at 776-777.

[12]*Remus v. City of Grand Rapids*, 265 N.W. 755, 756 (Mich. 1936); *see also Andrus v. Allard*, 444 U.S. 51, 62 (1979); *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 277 (1942). ("It is settled that subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject.")

[13]Ralph W. Emerson, "Self-Reliance," in *Essays: First Series* (1841).

[14]The recited facts are drawn from 902 N.E.2d at 383. For greater detail, see 2007 WL 841794 at *1-3.

[15]*See* IRC section 501(c)(3).

Under Delaware law,[16] the certificates of formation of the three LLCs provide that each LLC "shall serve only such purposes and functions and shall engage only in such activities as are consistent with . . . the charitable purposes and objectives of its sole member [ElderTrust]."[17] Also, the LLCs' operating agreements say that ElderTrust "shall have full and complete authority, power, and discretion to manage and control the business affairs, and properties of [the LLCs], to make all decisions regarding those matters and to perform any and all acts or activities customary to the management of [the LLCs'] business."

Massachusetts property tax law provides: "All property, real and personal [is subject to taxation] unless expressly exempt."[18] As is the case in many states, one stated exemption applies to the property of charitable organizations. The exemption applies to:

> Personal property of a . . . charitable or scientific institution . . . incorporated in [Massachusetts] . . . and real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations.[19]

Charitable organization is defined as "(1) a literary, benevolent, charitable or scientific institution or temperance society incorporated in [Massachusetts], and (2) a trust for literary, benevolent, charitable, scientific or temperance purposes."[20]

The municipalities in question rejected the taxpayers' applications for exemption. The taxpayers petitioned the Appellate Tax Board, which granted judgment for the municipalities on the pleadings. On appeal, in an opinion written for the court by Chief Justice Margaret H. Marshall, the Supreme Judicial Court of Massachusetts affirmed the board's decision.

The rejection of the applications was not based on the statutory language "incorporated in Massachusetts." The court had previously held that limiting the exemption to only Massachusetts corporations violated the equal protection clause of the 14th Amendment to the U.S. Constitution.[21] As discussed below, the denial rested on other grounds.

[16]2007 WL 941804 at *1.

[17]6 Del. Code section 18-101.

[18]Mass. Gen. L. ch. 59, section 2.

[19]*Id.* ch. 59, section 5, Third.

[20]*Id.*

[21]*Davis v. Commissioner*, 458 N.E.2d 1195 (Mass. 1984); *Mary C. Wheeler School, Inc. v. Assessors of Seekonk*, 331 N.E.2d 888 (1975). The *CFM Buckley/North* court reaffirmed this position. 902 N.E.2d at 384 and n.3. *Cf. Camps*

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B. Bases of Decision

The taxpayers maintained that they were charitable institutions within the meaning of the exemption statute. Alternatively, they contended that at least their real property was exempt as "real property owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized."

The *CFM Buckley/North* opinion is a treasure trove of statutory interpretation. In the course of rejecting the taxpayers' arguments, the court addressed many constructional issues, some of which have been topics of previous installments of this column[22] and others that will be taken up in future installments.[23]

Other points in the case, however, were secondary to the plain meaning canon. Plain meaning was the single most potent interpretational principle in the case, defeating both of the taxpayers' main arguments.

First, the plain language principle torpedoed the taxpayers' argument that they are charitable organizations. As quoted in Part I, the statute provided that those organizations are some "incorporated" entities and some trusts. The taxpayers were neither. They were LLCs. "A limited liability company," the court said bluntly, "is not a corporation." Indeed, the state statute authorizing LLCs defines an LLC as "an *unincorporated* organization" having certain characteristics.[24] LLCs can elect to be treated as corporations under the federal check-the-box regulations,[25] but that alchemy does not control for state law purposes. The plain language of the statute — the word "incorporated" — meant the LLCs were not charitable organizations.

Second, the plain language principle sunk the taxpayers' alternative argument that their real property qualified for exemption. Their argument was that they hold the nursing homes in trust for their sole member, ElderTrust, and that ElderTrust is a charitable organization. The problem was the

Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (invalidating on commerce clause grounds a Maine charitable property tax exemption largely excluding institutions benefitting principally nonresidents).

[22]Such as the "strict construction of tax exemptions" precept. *See, e.g.*, Steve R. Johnson, "Interpreting State Tax Exemptions, Deductions, and Credits," *State Tax Notes*, Feb. 23, 2009, p. 607, *Doc 2009-2323*, or *2009 STT 34-7*.

[23]Such as deference to an agency's interpretation of the statute, "equitable interpretation" of statutes, the functional equivalence approach to defining statutory terms, taxpayers' denial of their own transactional form, and evolving statutory meaning.

[24]*Id.* at 384 (citing Mass. Gen'l L. ch. 156C, section 2(5))(emphasis added).

[25]Treas. Reg. section 301.7701-3(a).

statute's use of the conjunctive. The exemption applies to "real estate owned by or held in trust for a charitable organization *and* occupied by it or its officers for the purposes for which it is organized." Even if the LLCs' real property was held in trust for ElderTrust (an arguable proposition), the other portion — the element following the "and" — was not. ElderTrust did not occupy the properties. Thus, the court emphasized, the "express words" of the statute were not satisfied.[26]

In the first installment of this column, I inveighed against uncritical application of the "plain meaning" technique in some state and local tax decisions.[27] Nonetheless, the technique is a commonplace in both federal[28] and state[29] tax case law. And in proper cases — in cases of genuine, not manufactured, clarity — it should be. Reliance values, predictability, and decent regard for legislative competence all suggest that when statutory text truly is clear, and is not convincingly countered by other relevant considerations, text should control. In my view, *CFM Buckley/North* is such a case.

III. Supertext and Consistent Meaning in *CFM Buckley/North*

As noted above, the court looked to ch. 156C in ascertaining the meaning of ch. 59. That is supertext. To buttress that analysis, the court also invoked the consistent meaning canon. The court noted an earlier case in which an LLC had been denied property tax exemptions under another portion of ch. 59, a provision dealing with corporations and banks.[30]

The taxpayer sought to distinguish that case on the ground that different considerations should apply to not-for-profit corporations. Rejecting that attempt, the court remarked that a word ("corporation," in this case) "used in one part of a statute in a definite sense should be given the same meaning elsewhere in the statute, barring some plain contrary intention."[31] There the analysis stopped.

I believe that *CFM Buckley/North* was correctly decided. Nonetheless, its consistent meaning discussion is disappointingly abbreviated. Even if consistent meaning is treated as a presumption, the presumption is rebuttable,[32] and, as shown in Part I, it frequently has been rebutted.

The taxpayers offered a substantial argument against the presumption: the contention that the two exemptions had different purposes. If true, that could suffice to defeat the presumption. The consistent meaning canon "readily yields when there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[33] The court, however, chose not to explain why it thought the purposes of the two exemptions were sufficiently close as to warrant imposing consistent meaning.

The taxpayers, and we who study statutory construction, were perhaps due such an explanation. Attorneys and others making statutory construction arguments, however, must learn to live with such lack of requital. Failure to fully explain why supertext and consistent meaning are or are not being applied is far more common in the case law than is careful balancing and explication of relevant differences in structural, historical, and purposive differences and similarities of context. ☆

Interpretation Matters is a column by Steve R. Johnson, the E.L. Wiegand Professor of Law and associate dean for faculty development and research, William S. Boyd School of Law, University of Nevada, Las Vegas. He can be contacted at stevejohnson@unlv.edu.

[26]902 N.E.2d at 386.

[27]Steve R. Johnson, "Use and Abuse of 'Plain Meaning,'" *State Tax Notes*, Sept. 22, 2008, p. 831, *Doc 2008-19121*, or *2008 STT 185-3*.

[28]*E.g., Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994).

[29]*E.g., Duke Power Co. v. South Car. Tax Comm'n*, 354 S.E.2d 902, 903 (S.C. 1987).

[30]*RCN-BecoCom, LLC v. Commissioner of Revenue*, 820 N.E.2d 208 (Mass. 2005) (addressing Mass. Gen'l Law ch. 59, section 5, Sixteenth). (For the decision, see *Doc 2005-665* or *2005 STT 8-12*.)

[31]902 N.E.2d at 384 (quoting *Connolly v. Division of Pub. Employee Retirement Admin.*, 616 N.E.2d 59 (Mass. 1993)).

[32]*See, e.g.*, Yule Kim, *Statutory Interpretation: General Principles and Recent Trends* 13-14 (Aug. 31, 2008) (Cong. Res. Serv. #97-589).

[33]*Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1933).