

Linguistic Canons of Construction: An Overview

Tracy Hester

Statutory Interpretation and Regulatory Practice

Feb. 13, 2013



Linguistic Canons of Construction

- One subset of *Textual Canons*
 - Linguistic
 - Whole Act
 - Whole Code
- General strategies
 - Courts almost always start with the text itself, and then expand outward to other statutory provisions, statute structure and other statutes
 - Move from narrow to broad

Ejusdem Generis



- “of the same kind”
- When general words follow a list of specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words
- *Ali v. Federal Bureau of Prisons* (U.S. 2008) – a list alone isn’t sufficient; must share a common attribute. *Ejusdem generis* doesn’t apply to “disjunctive” pairings.



Noscitur a Sociis

- “Known by the company it keeps”
- A word is given more precise content by the neighboring words with which it is associated.
- *United States v. Williams* (“presents” child pornography)
- Like *ejusdem generis*, *noscitur* doesn’t apply if the list has no common feature.



- “the mention of one thing excludes another”
- Requires listing of specific terms that support the inference that the failure to include others reflected an intentional decision by the legislature
- Again, requires group that share a characteristic or association



Variations of *Expressio Unis*

- More specific variations of *expressio unis* include:
 - A list of specific exceptions to a general prohibition means that Congress intentionally excluded any further exceptions.
 - If the statute requires an action to be performed in a particular way, that requirement reflects a decision by Congress to prohibit other ways to perform that action
 - Specific legislative provisions on pre-emption mean that Congress intended to foreclose other general types of preemption



Other linguistic rules

- “May” vs. “Shall”
 - But note ambiguity of “shall”
 - Federal Rules of Civil Procedure
- The Last Antecedent Rule – a limiting phrase only applies to the clause immediately before it, and doesn’t migrate upward through the statute.
 - The errant teenager’s house party
- Conjunctive vs. Disjunctive (in other words, “and” vs. “or”)
- Punctuation – the deadly comma (“knowingly”), limited weight of parentheticals



Dictionary Act

- 1 U.S.C. sections 1-8.
- Passed originally in 1871, but modified several times (including 2008).
- Limited effect – applies “unless the context indicates otherwise.”
 - Section 1
- More than just definitions
 - Section 7 – look familiar?
 - Section 8
- What if Section 1 did not allow courts flexibility to interpret otherwise?