

Articles

COMMAS, CONSTITUTIONAL GRAMMAR, AND THE STRAIGHT-FACE TEST: WHAT IF CONAN THE GRAMMARIAN WERE A STRICT TEXTUALIST?

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On May 8, 1998, former United States Senator Jennings Randolph of West Virginia died at the age of 96. The obituary that *The New York Times* wrote for Mr. Randolph focused on the Senator's role as author of the Twenty-sixth Amendment, which, according to the *Times*, was "the amendment giving 18-year-olds the right to vote."¹ Although Mr. Randolph's effort to pass a constitutional amendment lowering the voting age began in 1942, when he was a member of the House of Representatives, the Amendment did not become part of the Constitution until July 1971. Despite Mr. Randolph's early and persistent advocacy of an amendment that would lower the voting age to eighteen, the nation apparently did not perceive a need for such an amendment until 1970, when the Supreme Court decided *Oregon v. Mitchell*.²

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1. David Stout, *Senator Jennings Randolph of West Virginia Dies at 96*, N.Y. Times B16 (May 9, 1998).

2. 400 U.S. 112 (1970). In *Mitchell*, a decision that one commentator referred to as "a constitutional law disaster area," see William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603, 609 (1975), the Court upheld as a valid exercise of Congress's enforcement powers the Voting Rights Act's prohibition of literacy tests in federal and state elections, its establishment of residency requirements in presidential and vice-presidential elections, and its extension of the franchise to eighteen-year-olds in federal elections, but declared unconstitutional the Act's extension of the franchise to eighteen-year-olds in state elections. As a result of the Court's decision in *Mitchell*, eighteen-year-olds could vote for president and vice president and members of Congress, but could not participate in state and local elections in those states where the

Although Mr. Randolph eloquently defended his decades-long effort to lower the voting age from twenty-one to eighteen—he once stated, “I believe that our young people possess a great social conscience, are perplexed by the injustices which exist in the world, and are anxious to rectify these ills”³—his draftsmanship of the Amendment left something to be desired, grammatically speaking. The Twenty-sixth Amendment to the United States Constitution provides:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Although there is little doubt among lawyers and laypersons alike that the Twenty-sixth Amendment grants the franchise to all otherwise-qualified United States citizens who are eighteen years old or older,⁴ read literally the Amendment means something quite different. Read using conventional rules of English grammar, Section 1 of the Twenty-sixth Amendment does two things: first, it defines United States citizenship by age rather than birthplace or naturalization; and second, it prohibits denial of the franchise to those citizens on the basis of age. Quite astonishingly, the Amendment, when read literally, redefines the concept of citizenship established by the first clause of Section 1 of the Fourteenth Amendment, which provides that “[a]ll per-

voting age prescribed by law remained higher than eighteen. This regime created the risk of chaos for the November 1972 elections. In response, the Ninety-second Congress proposed the Twenty-sixth Amendment by a joint resolution, which was approved by the Senate on March 10, 1971, and by the House of Representatives on March 23, 1971. By July 1, 1971, less than three months after the Amendment was proposed by Congress, the requisite three-fourths of the states had ratified the Amendment. On July 5, 1971, the Administrator of General Services declared the Amendment to have been ratified, and the certifying statement was published on July 7, 1971. The 107 days between formal proposal by Congress and ratification by the requisite number of states constitute the fastest ratification of an amendment to the United States Constitution. See Kermit L. Hall, et al., eds., *Oxford Companion to the Supreme Court of the United States* 884 (Oxford U. Press, 1992).

3. Quoted in Stout, N.Y. Times at B16 (cited in note 1).

4. See, e.g., Hall, et al., eds., *Companion to the Supreme Court of the U.S.* at 884 (cited in note 2) (“Congress proposed the Twenty-sixth Amendment to the Constitution, providing that the voting age in all federal, state, and local elections should be prescribed at eighteen.”); Laurence H. Tribe, *American Constitutional Law* 1085 (Foundation Press, 2d ed. 1988) (“[T]he twenty-sixth [amendment] bars minimum voting ages in excess of 18 years.”).

sons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," by referring to the class of United States citizens as those persons "who are eighteen years of age or older."

The fundamental grammatical error in the Twenty-sixth Amendment is the use of a nonrestrictive clause instead of a restrictive clause. A nonrestrictive clause is "one that does not serve to identify or define the antecedent noun,"⁵ but rather merely "adds information about the person, thing, or idea to which the phrase or clause refers."⁶ According to Strunk and White, because authors must "[e]nclose parenthetical expressions between commas"⁷ and because "[n]onrestrictive relative clauses are parenthetical,"⁸ nonrestrictive clauses must be set off by commas.⁹ Strunk and White provide the following examples:

The audience, which had at first been indifferent, became more and more interested.

In 1769, when Napoleon was born, Corsica had but recently been acquired by France.

Nether Stowey, where Coleridge wrote *The Rime of the Ancient Mariner*, is a few miles from Bridgewater.

They explain:

5. William Strunk, Jr., and E.B. White, *The Elements of Style* 4 (Allyn and Bacon, 3d ed. 1979). Put another way, "A nonrestrictive clause is not necessary to identify the meaning of the word or clause modified." Texas Law Review Association, *Manual on Style* ¶ 2:17:61 at 43 (1992).

6. Texas Law Review Association, *Manual on Style* ¶ 4:4:1 at 54 (cited in note 5). Another grammar text describes it this way:

Some adjective clauses are not essential to the meaning of the sentence. They give added information, but the essential meaning of the sentence would not be changed if such clauses were omitted. . . . [Such clauses] give[] additional information . . . , but the meaning of the sentence is not changed if you leave the clause out. The clause does not place any restrictions on the meaning. A *nonrestrictive clause* is a clause that is not essential to the meaning of the sentence. . . . [Nonrestrictive clauses] are not needed in the sentence to identify the person who is mentioned in the main clause. A nonrestrictive clause is a subordinate clause which is not essential to the meaning of the sentence. A nonrestrictive clause functions more like an appositive or a parenthetical expression. You might call it a thrown-in remark. That is the reason why the nonrestrictive clause is set off by commas. . . .

Madeline Semmelmeier and Donald O. Bolander, *Instant English Handbook* 216-17 (Career Publishing, Inc., 1993) (emphasis in original).

7. Strunk and White, *Elements of Style* at 2 (cited in note 5).

8. *Id.* at 3.

9. *Id.*

In these sentences, the clauses introduced by *which*, *when*, and *where* are nonrestrictive; they do not limit or define, they merely add something. . . . [Each] clause adds, parenthetically, a statement supplementing that in the main clause. Each of the three sentences is a combination of two statements that might have been made independently.¹⁰

The comma rule for nonrestrictive relative clauses is well established in modern English grammar.¹¹

By setting off with commas the phrase “who are eighteen years of age or older,” then, the framers of the Twenty-sixth Amendment rendered that clause nonrestrictive. Because the clause is nonrestrictive, the grammatically savvy reader should conclude that the clause “*is not essential to complete the meaning of [the] sentence,*” but rather simply “gives added information about the word it modifies.”¹² The word (or phrase) that it modifies, of course, is “citizens of the United States.”¹³ Therefore, read under conventional rules of English grammar (and with deliberate indifference to history and purpose), Section 1 of the Twenty-sixth Amendment does not limit its own application to the *subset* of United States citizens who happen to be eighteen years of age or older, but rather *defines*—by adding information parenthetically—the *entire* class of United States citizens as those persons who are at least eighteen years old. The Amendment then provides that those persons cannot be denied the right to vote. This definition of citizenship stands in stark contrast to that provided in the first clause of Section 1 of the Fourteenth Amendment, which provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The Fourteenth Amendment’s definition of citizenship,

10. *Id.* at 4.

11. See, e.g., Texas Law Review Association, *Manual on Style* ¶ 4:4:1 at 54 (cited in note 5) (“Use commas to set off nonrestrictive clauses or phrases.”); *id.* ¶ 2:17:61 at 43 (“A comma always precedes a nonrestrictive clause.”); Madeline Semmelmeier and Donald O. Bolander, *Instant English Handbook* at 217 (cited in note 6) (“[Nonrestrictive clauses] are set off by commas.”); *id.* at 277 (“The comma is used to set off a nonrestrictive clause. A non-restrictive clause is set off because it *is not essential to complete the meaning of a sentence*. A nonrestrictive clause is similar to a parenthetical expression in that it gives added information about the word it modifies.”) (emphasis in original).

12. Semmelmeier and Bolander, *Instant English Handbook* at 277 (cited in note 6).

13. It would be grammatically nonsensical to conclude that the nonrestrictive clause “who are eighteen years of age or older” modifies the word “rights,” which precedes “citizens of the United States” in the text of the Amendment; it would be similarly strained to read the nonrestrictive clause to modify “States” or “United States.”

which was intended expressly to overrule the *Dred Scott*¹⁴ decision, is a foundation of modern American constitutional democracy.

There is little doubt, of course, that the Twenty-sixth Amendment was not intended to repeal the citizenship clause of the Fourteenth Amendment. It is well established in legal doctrine, as well as in conventional wisdom, that Congress and the people of the states, in ratifying the Twenty-sixth Amendment, intended to bestow the franchise upon all otherwise-qualified citizens who are at least eighteen years old. Given the overwhelming historical record, we may conclude that the drafters of the Amendment inadvertently set off as a nonrestrictive clause the phrase “who are eighteen years of age or older” (and that no grammarians objected loudly enough to encourage Congress to eliminate the commas).

The drafters of the Amendment should have used a *restrictive* relative clause. A restrictive clause is “one that is necessary to identify fully the person, thing, or idea to which the clause refers.”¹⁵ Put another way, “A restrictive clause is a clause that is necessary to complete the meaning of the sentence because the clause identifies the word it modifies. A restrictive clause cannot be left out of a sentence, whereas a nonrestrictive clause can be.”¹⁶ As the Texas Law Review’s *Manual on Style* explains,

The author’s intention determines the correct usage. If an author wants the information contained in the relative clause to define the modified word or clause, or to limit the sense in which the modified word or clause is used, the modifying phrase or clause is restrictive.¹⁷

A restrictive clause is essential to the meaning of the sentence because if the author leaves the clause out, then the meaning of the sentence is changed. Strunk and White provide the following example: “People who live in glass houses shouldn’t throw stones.”¹⁸ They explain that in this example, “the clause introduced by *who* does serve to tell which people are meant; the sentence, unlike [a] sentence [that contains a nonrestrictive clause], cannot be split into two independent statements.”¹⁹ Because re-

14. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

15. Texas Law Review Association, *Manual on Style* ¶ 2:17:61 at 42 (cited in note 5).

16. Semmelmeier and Bolander, *Instant English Handbook* at 277 (cited in note 6).

17. Texas Law Review Association, *Manual on Style* ¶ 4:4:1 at 55 (cited in note 5).

18. Strunk and White, *Elements of Style* at 4 (cited in note 5).

19. *Id.*

strictive clauses are necessary “to identify fully the person, thing, or idea to which the clause refers,”²⁰ and thus by definition are not merely parenthetic, “[r]estrictive clauses are never set off by commas.”²¹

In light of the circumstances that led to the enactment of the Twenty-sixth Amendment, we can easily conclude that the drafters of the Amendment intended it to protect only those citizens who are at least eighteen years old from discrimination on the basis of age in the exercise of the franchise. But to accomplish this goal — to limit the applicability of the Amendment to such a subset of United States citizens — the drafters should have used a restrictive clause. The phrase “who are eighteen years of age or older” was intended to tell *which* citizens, out of the larger group of the American polity, were meant; if the phrase were omitted from the text, then the meaning of the Amendment would be quite different. Without the clause, it would violate the Constitution to deny the right to vote to a four-year-old child. Because the drafters clearly did not intend to establish the franchise for *all* citizens, regardless of age, the relative clause “who are eighteen years of age or older” plainly is “necessary to identify fully the person, thing, or idea to which the clause refers”;²² it is “necessary to complete the meaning of the sentence.”²³ The clause thus should not be set off by commas.

If Mr. Jennings had paid close attention to the rules of grammar, then Section 1 of the Twenty-sixth Amendment likely would have read:

The right of citizens of the United States who are eighteen years of age or older to vote shall not be denied or abridged by the United States or by any State on account of age.

Although this phrasing would not be without its own minor grammatical pitfalls,²⁴ it at least would not, as does the present

20. Texas Law Review Association, *Manual on Style* ¶ 2:17:61 at 42 (cited in note 5).

21. Semmelmeier and Bolander, *Instant English Handbook* 277-78 (cited in note 6); accord Strunk and White, *Elements of Style* at 4 (cited in note 5) (“Restrictive clauses . . . are not parenthetic and are not set off by commas.”); Texas Law Review Association, *Manual on Style* ¶ 2:17:61 at 43 (cited in note 5) (“A comma does not precede a restrictive clause.”); id. at ¶ 4:4:1 at 54 (“Do not use commas to set off restrictive clauses or phrases.”).

22. Texas Law Review Association, *Manual on Style* ¶ 2:17:61 at 42 (cited in note 5).

23. Semmelmeier and Bolander, *Instant English Handbook* at 277 (cited in note 6).

24. So phrased, the clause “who are eighteen years of age or older” technically

Amendment, suggest that only persons who are eighteen years of age or older qualify as citizens of the United States.

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On May 13, 1912, in response to Progressive-era pressure²⁵ to democratize further the national legislature, the Sixty-second Congress proposed the Seventeenth Amendment to provide, among other things, for the direct election of Senators.²⁶ On May 31, 1913, after the requisite number of states had approved the Amendment, the Secretary of State declared the Amendment to have been ratified. The Seventeenth Amendment provides in part:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. . .

Despite over seven decades of agreement that the Seventeenth Amendment requires that Senators be elected directly by the people, rather than selected by the state legislatures,²⁷ read un-

could be read to modify "United States" (or, even more implausibly, "States"), a reading that could suggest that only citizens (elsewhere defined) who live in states that are at least eighteen years old enjoy the protection of the Amendment. This problem could be alleviated by the following construction: "The right of any United States citizen who is eighteen years of age or older to vote shall not be denied or abridged by the United States or by any State on account of age." Cf. U.S. Const., Amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. Const., Amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

In addition, the word "who," which is used in the text above, probably should be replaced with "that." As explained in Texas Law Review's *Manual on Style*:

Who (and *whom*) usually applies to specific individuals, and *that* usually applies to generic terms for people. Although strict compliance with the rule differentiating between *who* and *that* would make *who* applicable only if its antecedent by itself represents a specific person or persons, also use *who* if its antecedent is a generic term referring to another word that represents a specific person or persons.

Texas Law Review Association, *Manual on Style* ¶ 2:17:61 at 43-44 (cited in note 5) (emphasis in original). The *Manual* gives the following example: "Defendants that plead guilty receive swift sentencing. (The antecedent of *that* is *defendants*, a generic term for a class of individuals.)" *Id.* at 44 (emphasis in original). Similarly, eighteen-years-of-age-and-older United States citizens constitute a class of individuals that merits the generic term "that."

25. "There was much pressure on Congress—including the threat of calling a constitutional convention—to amend the clause. In response, Congress proposed an amendment, ratified by the states in 1913, providing that senators be elected directly by those citizens qualified to vote for the 'most numerous branch' of the state legislature." Hall, et al., eds., *Companion to the Supreme Court of the U.S.* at 780 (cited in note 2).

26. The proposal was set out in 37 Stat. 646.

27. See, e.g., Tribe, *American Constitutional Law* at 1084 (cited in note 4) ("The Constitution originally conferred the power to elect Senators upon the state legislatures,

der ordinary rules of grammar the Amendment is susceptible to the reading that direct election shall be the means of selecting the membership of the Senate only for six years from the date of the Amendment's adoption, with the selection process for future Senates left unresolved.

The ambiguity in the Seventeenth Amendment is a result of the use of commas to set off the phrase "elected by the people thereof." The first comma (that is, the comma that precedes the word "elected") would, if the second comma were not there, make grammatical (as well as stylistic) sense. Without the second comma, the Amendment would read: "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof for six years." Although it would have been more clear to have included the phrase "terms of" after the word "for" and before the phrase "six years"—thus making the text read, "The Senate . . . shall be composed of two Senators from each state, elected by the people thereof for terms of six years"—omission of the second comma at least would have eliminated the possibility of reading the Amendment to imply that it should be the means of determining the composition of the Senate only for six years from its effective date. By including the second comma (that is, the comma that follows the word "thereof"), however, the drafters rendered the clause "elected by the people thereof" something like a parenthetical aside. If the second comma is not supposed to set off the phrase "elected by the people thereof," then there is no reason to include that comma at all.

Reading the text of the Amendment as written, then, the phrase "for six years" technically should be treated as the final part of the initial clause, which begins before the parenthetical clause. This point is best illustrated by rewriting the provision using parentheses instead of commas: "The Senate of the United States shall be composed of two Senators from each state (elected by the people thereof) for six years." Eliminating the parenthetical—which by grammatical definition "do[es] not limit or define [but rather] merely add[s] something"²⁸—the text

but the seventeenth amendment provided for the popular election of Senators by voters with the same qualifications required of voters for members of the House of Representatives."); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1348-49 (1996) (noting that Seventeenth Amendment "requires direct election—by the People of each State—of members of the United States Senate").

28. Strunk and White, *Elements of Style* at 4 (cited in note 5).

would read, "The Senate of the United States shall be composed of two Senators from each state for six years." The error of the second comma then becomes more apparent: by including the comma that follows "thereof," the drafters of the Seventeenth Amendment not only created an awkward grammatical construction but also seemingly neglected to provide for the composition of the Senate for the period of time beginning six years after the effective date of the Amendment. That is, plainly read, Section 1 of the Seventeenth Amendment seems to define the composition of the Senate only for six years from the effective date of the Amendment, leaving the nation to contrive a new means of selection (or, at least, to enact another, similar provision) once six years from the effective date have passed.

The phrase "elected by the people thereof," of course, is the most important clause in Section 1 of the Amendment; it is the clause that makes clear that selection of Senators will be by direct election and not by state legislatures. Perhaps the perceived importance of the phrase is why the drafters of the Amendment chose to set it off with commas. Ironically, setting off the crucial language rendered the text of the Amendment ambiguous at best and contrary to the intent of the ratifying populace at worst. Certainly Congress and the ratifying public did not spend well over one year working to amend the Constitution only to add a provision with a built-in six-year sunset clause. Why, then, did the drafters construct the text of Section 1 of the Seventeenth Amendment as they did?

Presumably, the drafters simply chose to mirror the language of the Constitution's original provision governing the selection of Senators. Article I, Section 3, Clause 1 of the Constitution provides: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years." The substitution of the phrase "elected by the people thereof" for "chosen by the Legislature thereof" makes clear the purpose of the Amendment. But the original provision suffers from the same grammatical infirmities as does the Seventeenth Amendment, at least when read under modern rules of grammar.²⁹ The section in the original Constitution providing for membership in the House of Representatives would have been a more grammatically sound model upon which

29. Grammatical problems in the original text of the Constitution and the Bill of Rights probably can be attributed to different grammatical conventions in the late eighteenth century. See text accompanying notes 32-34.

to base the Seventeenth Amendment than was the comparable provision for the Senate. Article I, Section 2, Clause 1 provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States" This provision is not prone to the erroneous (as a matter of intent and purpose), though grammatically correct, reading to which Article I, Section 3, Clause 1 and the Seventeenth Amendment are susceptible; the phrase "chosen every second Year" in Article I, Section 2, Clause 1 can be read only to modify "Members" (i.e., it is the Members who are to be chosen every second year) and thus cannot be read to imply that the method for determining the composition of the House will not be governed by that provision after two years.

The drafters of the Seventeenth Amendment could have eliminated the grammatical ambiguity in the current text by following the example of Article I, Section 2, Clause 1:

The Senate shall be composed of Senators chosen every sixth year by the people of the several States³⁰

Or the drafters could have phrased Section 1 of the Amendment to be similar to Article I, Section 3, Clause 1:

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof for terms of six years

Either construction makes clear that direct election by the polity will replace selection by state legislatures as the means of determining the composition of the Senate; more important, neither construction suggests that the nation will have to start from scratch six years after the effective date of the Amendment.

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Let me be clear at this point that I am not attempting to make a serious argument that the Twenty-sixth Amendment overrules the Citizenship Clause of the Fourteenth Amendment, that the Seventeenth Amendment has a "sunset" clause that no one ever noticed, or that either amendment means anything other than what the conventional wisdom says it means. The ar-

30. The only potential ambiguity in this construction is that it is not immediately apparent from the text alone that the electorate of each state will vote only for the prospective Senators from the State in which the given electorate resides. Perhaps this problem could be alleviated by substituting the word "respective" for "several": "The Senate shall be composed of Senators chosen every sixth year by the people of the respective States"

gument that I make here, rather, is that the Twenty-sixth Amendment *means* precisely what everyone thinks it means—that no American citizen who is at least eighteen years old may be denied the right to vote simply because he or she is too young (or too old)—and that, likewise, the Seventeenth Amendment occupies the place in constitutional structure that for decades we have presumed that it does—it requires, *inter alia*, the direct election of United States Senators—despite that fact that each actually *says* something else. Any principled approach to textual construction, of course, must presuppose, at least to some extent, normative rules of grammar and syntax. This essay is about what to do when we are confronted by an (all-too-common) example of a text that, according to established rules of grammar, does not actually say what we all know it to mean. More important, this essay is about the propriety of rigid “plain meaning” interpretation as an approach to textual construction, given the tendency of legislators to draft statutory and constitutional provisions that defy grammatical sensibilities.

Developing an approach to interpreting poorly drafted texts is not simply an academic exercise; grammatical errors—especially the misuse of the comma—appear throughout the Constitution, not to mention the United States Code.³¹ One might, of

31. Notwithstanding the tendency of drafters to err grammatically, the Court often has relied upon grammatical arguments in determining the meaning of texts. See, e.g., *Moreau v. Klevenhagen*, 508 U.S. 22, 32 (1993) (“Purely as a matter of grammar, [the Fair Labor Standards Amendments of 1985, section 7(o)(2)(A),] subclause (ii)’s reference to ‘employees’ remains unmodified by subclause (i)’s focus on ‘agreement,’ and ‘employees . . . covered’ might as easily comprehend employees with representatives as employees with agreements.”); *United States v. Idaho, ex rel. Director, Idaho Dep’t of Water Resources*, 508 U.S. 1, 7 (1993) (“The argument of the United States is weak, simply as a matter of grammar . . . [because w]e do not believe that Congress intended to create such a legal no-man’s land in enacting the McCarran Amendment.”); *Rowland v. California Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 205 (1993) (“[I]t would wrench the rules of grammar to read ‘he’ [in 28 U.S.C. § 1915] as referring to the entity.”); *Evans v. United States*, 504 U.S. 255, 288 (1992) (Thomas, J., dissenting) (“[The majority’s interpretation of 18 U.S.C. § 1951] is, I concede, a conceivable construction of the words. But it is—at the very least—forced, for it sets up an unnatural and ungrammatical parallel between the verb ‘induced’ and the preposition ‘under.’ The more natural construction . . . comports with correct grammar and standard usage by setting up a parallel between two prepositional phrases, the first beginning with ‘by’; the second with ‘under.’”); *Int’l Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 79-80 (1991) (“We find that, when construed in the relevant context, the first clause of [28 U.S.C.] § 1442(a)(1) grants removal power to only one grammatical subject, ‘[a]ny officer,’ which is then modified by a compound prepositional phrase: ‘of the United States or [of] any agency thereof.’ Several features of § 1442(a)(1)’s grammar and language support this reading. The first is the statute’s punctuation. If the drafters of § 1442(a)(1) had intended the phrase ‘or any agency thereof’ to describe a separate category of entities endowed with removal power, they would likely have employed the comma consistently.”).

course, attribute seemingly grammatically incorrect phrasing in the original text of the Constitution (including the Bill of Rights) to different rules of grammar that were observed at the time of the founding. For example, the Framers had (by today's grammatical standards) an annoying habit of inserting an unnecessary comma before the word "shall," thereby splitting the subject from the verb.³² The most well-known and ambiguity-creating example of this form of comma-abuse is the Second Amendment, which provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Of course, the misplaced comma before "shall" is only the tip of the grammatical iceberg for this troubled phrase. Assuming that the Framers followed the convention of inserting a comma before "shall," which they used many times in the original document (in a cursory read through the Constitution, including the Amendments, I found this error twelve different times),³³ the text of the Second

32. Although this grammatical defect appears most frequently in conjunction with the word "shall," the Framers inserted superfluous commas in other constructions, as well. For example, in Article II, § 1, cl. 7, there is an unnecessary comma before the phrase "a Compensation": "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . ." This construction appears again in Article III, § 1, which protects federal judges' salaries. There is an extra comma before the phrase "to support this Constitution" in Article VI, cl. 3, which provides: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . ." Similarly, there is an unnecessary comma in the Fourteenth Amendment, § 3: "But Congress may by a vote of two-thirds of each House, remove such disability." Section 4 of the Twenty-fifth Amendment twice adds an extra comma before the word "transmit": in clause 1 ("Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate . . .") and in clause 2 ("[H]e shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate . . ."). The Fifth Amendment can be read either as missing a comma or as having an extra comma; it provides, "No person shall be held to answer for a capital, or otherwise infamous crime . . ." Because the word "capital" is intended to modify the word "crime," the Framers either should have inserted a comma after the word "infamous" or omitted the comma after the word "capital."

33. See U.S. Const., Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."); Art. I, § 6, cl. 2 ("[N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); Art. I, § 7, cl. 2 (Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes Law, be presented to the President of the United States . . .); Art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ."); Art. I, § 9, cl. 8

Amendment could be rewritten under modern rules of grammar this way: "A well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms shall not be infringed." This construction suffers from other defects; most obviously, it is a run-on sentence. The drafters of the Amendment could have avoided the run-on problem by phrasing the text as follows (although presumably Charlton Heston and others would contend that the implications of this reading were not intended by the Framers): "Because a well-regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

The comma seems to have been a particularly troublesome grammatical tool for the Framers. In addition to the misuse (and overuse) described above, the Framers committed the same mistake that the drafters of the Twenty-sixth Amendment made; the Seventh Amendment, which creates a right to trial by jury in most federal civil cases, provides in part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." By setting off

("No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."); Art. II, § 4 ("The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); Art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."); Amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); Amend. XII ("The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed . . ."); *id.* ("The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed . . .").

It is difficult to argue, however, that the Framers followed a grammatical convention that required the insertion of the comma before the word "shall," because there are numerous examples in the original text of the Constitution in which the drafters did not use commas. See, e.g., U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."). Moreover, it does not even seem that the Framers inserted the comma before "shall" only when the phrase containing the subject was particularly long or complex, because there are provisions that contain such complex subject phrases yet that do not use the extraneous comma. See, e.g., U.S. Const. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . .").

with commas the phrase “where the value in controversy shall exceed twenty dollars”—and thereby using a nonrestrictive phrase instead of a restrictive phrase—the Framers inadvertently defined “Suits at common law” as those cases “where the value in controversy shall exceed twenty dollars.” Read plainly (and, again, without any attention to context, intent, or purpose), the Seventh Amendment says by implication that parties in suits for less than twenty dollars not only do not have a right to a trial by jury, but also are not parties to a suit at common law *at all*. Presumably, the Framers instead meant to write something like the following: “In Suits at common law where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved”³⁴

34. The Framers also misused the comma in ways that do not significantly affect meaning, but that nevertheless offend hyper-refined grammatical sensibilities. For example, the Framers were inconsistent in the use of the comma in series with three or more terms and a single conjunction. Although some modern grammatical authorities tolerate omission of the comma after the penultimate term, the Framers sometimes used the final comma and sometimes did not. (It is worth noting, however, that many modern authorities still require use of the final comma. See, e.g., Strunk and White, *Elements of Style* at 2 (cited in note 5) (“In a series of three or more terms with a single conjunction, use a comma after each term except the last.”)). For example, the Framers omitted the comma after “Places” in Article I, § 4, which provides in part: “The Times, Places and Manner of holding Elections for Senators and Representatives” In Article I, § 7, cl. 3, on the other hand, the Framers inserted the last comma (after “Resolution”): “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary” In Article I, § 8, the Framers used conflicting constructions in consecutive clauses; Clause 15 omits the comma after the penultimate term (“suppress Insurrections”), stating, “[The Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” whereas Clause 16 includes the comma after the penultimate term (“arming”), stating, “[The Congress shall have Power] To provide for organizing, arming, and disciplining, the Militia” Of course, Clause 16 suffers as well from an extraneous comma before the phrase “the Militia.”

Indeed, punctuation in general seems to have been a problem for the Framers. Some printed versions of the Constitution—including, as far as I can tell, the original document—contain an egregiously misused apostrophe, although not all printed versions of the Constitution have included this particular error. In Article I, § 10, cl. 2, the original document appears to provide: “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing *it’s* inspection Laws” (Emphasis added). See, e.g., *Federal Civil Judicial Procedure and Rules* 1148 (West Publishing Co., 1998); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 1339 (5th ed. 1995). Of course, the word “it’s” is a contraction for “it is.” See Strunk and White, *Elements of Style* at 1 (cited in note 5). “Its” is the possessive that the Framers should have used. Perhaps because it is not entirely clear that there is an apostrophe in the original, handwritten version of the Constitution (although it certainly looks as though there is) or because most editors prefer to avoid having to insert “[sic]” in the text of the charter of our nation’s government, many reprints of the Constitution have omitted the apostrophe and instead used the clearly intended possessive, “its.” See, e.g., Richard H. Fallon, Jr., Daniel J. Meltzer, and David L. Shapiro, *The Federal Courts and the Federal System* lxxxvii (4th ed. 1996); Erwin Chemerinsky, *Federal Jurisdiction* 850 (Aspen Publishing, 2d ed. 1994); Tribe, *American*

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A number of scholars have written about “constitutional grammar,” a term intended to refer to the rhetoric and form of constitutional argument.³⁵ Little has been said, however, about the more basic and conventional sense of the word “grammar” as it applies in the constitutional context. This lack of attention is distressing because the use (or misuse) of grammar in constitutional texts potentially can determine how subsequent generations will interpret those texts.

Whether interpreting courts will be affected by grammatical errors in drafting generally depends on the gravity of the error. When punctuation and syntax are misused in a way that does not fundamentally alter meaning but rather merely “embarrasses interpretation”³⁶ (that is, says to the world, “this text is poorly written”), there is little for an interpreting court to do but ignore the grammatical errors and read the text as if it were written correctly. When, on the other hand, punctuation and syntax are misused—judged in light of the clear intent of the drafters—so that when read in isolation the text is not grammatically incorrect but rather merely different than what the drafters thought they were writing, a reviewing court is confronted with a choice between crediting the “plain meaning” of the text and implementing the obvious intention behind the provision in spite of the text.

To illustrate the difference between the two types of grammatical errors (that is, between those that merely reflect poorly on the grammatical acuity of the drafters and those that actually change meaning), compare Article III, Section 3 of the Constitution, which states, “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort,” with the Seventh Amendment, which, as noted above, states, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved” The former is grammatically incorrect because of the superfluous comma before the word “shall,” but the meaning of the provision does not change depending upon whether the comma is inserted or omit-

Constitutional Law at xxxv (cited in note 4).

35. See, e.g., J. M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998); J. M. Balkin and Sanford Levinson, *Constitutional Grammar*, 72 Tex. L. Rev. 1771 (1994); H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. Rev. 949 (1993).

36. *Barrett v. Van Pelt*, 268 U.S. 85, 90 (1925).

ted; either way, Article III, Section 3 limits the definition of “Treason against the United States” to “levying War against them” or “adhering to their Enemies,” which in turn is defined as “giving [their Enemies] Aid and Comfort.” The extra commas in the latter, on the other hand, fundamentally alter the meaning of the provision. As noted above, the commas that set off the clause “where the value in controversy shall exceed twenty dollars” change that clause from restrictive to nonrestrictive, thereby inadvertently defining “Suits at common law” as those suits in which the value in controversy exceeds twenty dollars.

When drafters of constitutional provisions (or statutes) make this second, more serious grammatical error, courts confronted with the text must choose whether to construe the text in accord with its (generally) clear plain meaning or instead to interpret the text with fidelity to the (generally) clear intent behind the text.³⁷ The Court has not been of one mind on this choice. Of course, if one believes that the obvious plain meaning of a text by definition always represents the intent of the drafters, then one need not make this choice.³⁸ There have been many cases, however, in which at least some members of the Court believed that there was a tension between intent and textual manifestation.

For example, in *United States v. Ron Pair Enterprises, Inc.*,³⁹ the Court was confronted with whether § 506(b) of the Bankruptcy Code of 1978⁴⁰ entitled “a creditor to receive postpetition interest on a nonconsensual oversecured claim allowed in a bankruptcy proceeding.”⁴¹ Section 506(b) provided in relevant part: “[T]here shall be allowed to the holder of [an oversecured

37. In cases in which the drafters of a text have made the less serious type of grammatical error (i.e., one that does not alter meaning but merely diminishes clarity), the Court generally has been willing to ignore the grammar and read the provision as intended. See, e.g., *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179-80 (1998) (Scalia, J., concurring in judgment) (“The phrase [in 20 U.S.C. § 954(d)(1)] ‘taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public’ is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached Even so, it is clear enough that the phrase is meant to apply to those who do the judging.”); *Dole v. United Steelworkers of America*, 494 U.S. 26, 40 (1990) (“While the grammar of [44 U.S.C. § 3512] can be faulted, its meaning is clear”).

38. Even the strictest textualists, however, recognize an exception to the general rule that plain meaning governs when the plain meaning would result in a “patent absurdity.” See text accompanying notes 65-70.

39. 489 U.S. 235 (1989).

40. 11 U.S.C. § 506(b).

41. *Ron Pair Enterprises*, 489 U.S. at 237.

claim], interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.” The precise question before the Court was whether the clause “interest on such claim” was qualified by the clause “provided for under the agreement under which such claim arose.” Justice Blackmun concluded for the majority that it was not so qualified and, accordingly, that the creditor could receive postpetition interest.⁴² In reaching this conclusion, the Court stated:

This reading is . . . mandated by the grammatical structure of the statute. The phrase “interest on such claim” is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words “and any.” As a result, the phrase “interest on such claim” stands independent of the language that follows. “Interest on such claim” is not part of the list made up of “fees, costs, or charges,” nor is it joined to the following clause so that the final “provided for under the agreement” modifies it as well. The language and punctuation Congress used cannot be read in any other way.⁴³

Although the Court conceded that “[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,” the Court concluded that this was not one of those rare cases.⁴⁴ Justice O’Connor dissented, arguing: “Although the use of the comma is exceedingly arbitrary and indefinite, the Court is able to read § 506(b) the way that it does only because of the comma following the phrase ‘interest on such claim.’”⁴⁵ “Without this capricious bit of punctuation,” however, the statute would have an entirely different meaning: “[t]he phrase ‘interest on such claim’ would be qualified by the phrase ‘provided for under the agreement under which such claim arose,’ and nonconsensual liens would not accrue postpetition interest.”⁴⁶ And the statute should have been interpreted differently, according to Justice O’Connor, because there was no evidence in the text or the legislative history that § 506(b) was intended to change pre-Bankruptcy-Code law, under which the creditor would not have received postpetition

42. *Id.* at 241-42.

43. *Id.* (internal citation omitted).

44. *Id.* at 242 (internal quotation omitted).

45. *Id.* at 249 (O’Connor, J., dissenting) (internal quotations and citations omitted).

46. *Id.* at 249-50 (O’Connor, J., dissenting) (internal quotations and citations omitted).

interest, and because “[p]unctuation is not decisive of the construction of a statute.”⁴⁷

As a preliminary matter, the grammarian ought to note that the grammar of § 506(b) was far from crisp. Even if the comma that followed the phrase “interest on such claim” is properly read as severing the phrase from the later, qualifying language, there was an extraneous comma *before* the phrase “interest on such claim” that merely served to confuse the meaning of the text.

Assuming *arguendo*, however, that the text of § 506(b) was grammatically clear, what is important about *Ron Pair Enterprises* for our purposes is that the Court’s interpretation of the text was arguably in tension with the intent of the drafters. It also is important to note that both the majority and the dissent agreed upon the basic framework for interpreting the text: “The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself.”⁴⁸ The Court continued: “The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’ In such cases, the intention of the drafters, rather than the strict language, controls.”⁴⁹ The majority and the dissent parted company, however, over whether the statute’s meaning was “plain”⁵⁰ and whether the ostensibly clear grammar and syntax of the text accurately reflected the intent of the drafters.

Justice O’Connor’s conclusion that the Court at times may (and indeed ought to) ignore the grammar of a given text in order to carry out the intent of the drafters is not anomalous in the case law.⁵¹ In *Barrett v. Van Pelt*,⁵² for example, the Court read a

47. *Id.* at 250 (O’Connor, J., dissenting) (quoting *Constanzo v. Tillinghast*, 287 U.S. 341, 344 (1932)).

48. *Id.* at 241 (citation omitted).

49. *Id.* at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

50. Compare *id.* at 241 (“The language before us expresses Congress’ intent—with sufficient precision so that reference to legislative history and pre-Code practice is hardly necessary.”) with *id.* at 249 (O’Connor, J., dissenting) (“As Justice Frankfurter remarked some time ago . . . ‘The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.’”) (quoting *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting)).

51. See *United States v. Smith*, 499 U.S. 160, 186 n.13 (1990) (Stevens, J., dissenting) (“If forced to choose between an assumption that Congress used imperfect grammar to achieve a benign purpose identified in the legislative history and an assumption that it

comma out of a statute because the meaning of the text with the comma included was not in accord with the statute's obvious intent. The question presented was whether the respondent, who sued claiming that a shipment of eggs had been delivered late, was required under the First Cummins Amendment to the Act to Regulate Commerce⁵³ to give to the petitioner notice of his claim before suing. The relevant provision of the law stated:

Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged [sic] in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.⁵⁴

Noting that "[t]he language and structure of the second clause is so inapt and defective that it is difficult to give it a construction that is wholly satisfactory,"⁵⁵ the Court concluded that the comma after the word "unloaded" was not intended to sever the

inadvertently achieved a heartless purpose disclaimed in the legislative history, I have no difficulty in choosing the former."); *Crandon v. United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring in judgment) ("Substance as well as grammar dictates this [interpretation] I acknowledge that this interpretation of the second clause means that the comma after the phrase 'the salary of' should instead have been placed after the word 'supplements.' But a misplaced comma is more plausible than a gross grammatical error, plus the destruction of an apparently intended parallelism, both leading to the peculiar introduction of a condition in the second clause which one would surely have expected to find in the first."); *Sorenson v. Secretary of the Treasury of the United States*, 475 U.S. 851, 867 (1986) (Stevens, J., dissenting) ("I agree that the Court's reading of the statutory language is faithful to its grammar. I am not persuaded, however, that it actually reflects the intent of the Congress that enacted OBRA."); *Simpson v. United States*, 435 U.S. 6, 12 n.6 (1978) ("In order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113(d), the phrase 'by the use of a dangerous weapon or device' must be read, *regardless of punctuation*, as modifying both the assault provision and the putting in jeopardy provisions.") (emphasis added) (quoting *United States v. Beasley*, 438 F.2d 1279, 1283-84 (6th Cir. 1971)); *Constanzo v. Tillinghast*, 287 U.S. 341, 344-45 (1932) ("It has often been said that punctuation is not decisive of the construction of a statute. Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent. . . . We must look to the whole of the section, in order not to give undue effect to particular words or clauses"); *Barrett v. Van Pelt*, 268 U.S. 85, 91 (1925) ("Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning.") (quoting *Chicago, M. & St. P. Ry. v. Voelker*, 129 Fed. 522, 527 (8th Cir. 1904)); *Ewing v. Burnet*, 11 Pet. 41, 53 (1837) ("Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.").

52. 268 U.S. 85, 91 (1925).

53. 38 Stat. 1196, 1197 c. 176 (1915).

54. *Barrett*, 268 U.S. at 87 (quoting 38 Stat. 1196, 1197 c. 176) (emphasis in original).

55. *Id.* at 88.

qualifying clause (“by carelessness or negligence”) from the preceding clause.⁵⁶

The Court frequently has recognized that punctuation misplaced due to drafting errors should not be a bar to enforcement of the drafters’ actual intent. In *Barrett*, the Court stated: “Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or repunctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning.”⁵⁷ Punctuation is important, however, in determining meaning, as evidenced, for example, by the profound implications of the use of commas in the Twenty-sixth or Seventh Amendments. Ideally, courts would rely on the meaning created by punctuation, just as they rely on the ordinary meaning of words, in interpreting texts. When in light of the history behind a text punctuation clearly has been misused by drafters, however, courts must be willing to look beyond the mistaken grammar to give force to the (obvious) intent of the drafters. A willingness to forgive grammatical errors is particularly important given the tendency of drafters to err. As Justice Souter stated in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*:⁵⁸

A statute’s plain meaning must be enforced, of course, and the meaning of a statute typically will heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute’s true meaning. Along with

56. *Id.* at 91. In addition, the Court read the word “damaged” to mean “damage”: “The context does not permit the use of the word ‘damaged’ or allow any meaning to be given to it. Its presence makes a grammatical defect and embarrasses interpretation. It seems obvious that the word ‘damage’ was intended. That word is in harmony with context as well as with the probable intention of Congress. The final ‘d’ may be eliminated. The intention of the lawmaker constitutes the law. Being satisfied of the legislative intention, the court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute.” *Id.* at 90 (internal citations omitted). The Court therefore concluded that “[t]he elimination of the final ‘d’ in ‘damaged’ and the omission of the comma after ‘unloaded’ would make the clause read as follows: ‘Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.’” *Id.* at 90.

57. *Id.* at 91 (quoting *Chicago, M. & St. P. Ry. v. Voelker*, 129 Fed. 522, 527 (8th Cir. 1904)); see *Ewing v. Burnet*, 11 Pet. 41, 53 (1837) (“Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.”).

58. 508 U.S. 439 (1993).

punctuation, text consists of words living “a communal existence,” in Judge Learned Hand’s phrase, the meaning of each word informing the others and “all in their aggregate tak[ing] their purport from the setting in which they are used.” Over and over we have stressed that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute’s meaning. Statutory construction “is a holistic endeavor,” and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.⁵⁹

The difficult task for Courts, then, is determining *when* the grammar of a particular text may safely be ignored in the name of drafters’ intent; this task takes on added importance when the text as written has a meaning that differs significantly from the meaning that the text would have had if the drafters had used different grammar and syntax.

In *United States v. X-Citement Video, Inc.*,⁶⁰ the Court chose not to follow the “most natural grammatical reading” of a federal criminal statute, in part “because of anomalies which [would have] result[ed] from [such a] construction.”⁶¹ Dissenting, Justice Scalia stated: “I have been willing, in the case of civil statutes, to acknowledge a doctrine of ‘scrivener’s error’ that permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result.”⁶² But that doctrine was not applicable in this case, Justice Scalia argued, because “[t]here [was] no ambiguity” in the statute before the Court.⁶³ He continued: “the *sine qua non* of any ‘scrivener’s error’ doctrine . . . is that the meaning genuinely intended but inadequately

59. *Id.* at 454-55 (internal citations omitted); see *United States v. Shirey*, 359 U.S. 255, 260-61 (1959) (“Statutes . . . are not inert exercises in literary composition. They are instruments of government, and in construing them the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. Statutory meaning, it is to be remembered, is more to be felt than demonstrated . . .”) (internal quotations and citations omitted).

60. 513 U.S. 64 (1994).

61. *Id.* at 68-69; see *id.* at 69 (“Some applications of respondents’ position [advocating the most natural grammatical reading] would produce results that were not merely odd, but positively absurd.”).

62. *Id.* at 82 (Scalia, J., dissenting).

63. *Id.*

expressed must be absolutely clear; otherwise, we might be rewriting the statute rather than correcting a technical mistake.”⁶⁴

Justice Scalia also has been willing, as have most strict textualists, to recognize a “patent absurdity” exception to “the venerable principle that if the language of a statute is clear, that language must be given effect”⁶⁵ For example, in *Green v. Bock Laundry Mach. Co.*,⁶⁶ Justice Scalia agreed with the majority that Federal Rule of Evidence 609(a)(1) could not be read in accordance with its plain language. He stated:

We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word “defendant” in Federal Rule of Evidence 609(a)(1) that avoids this consequence; and then to determine whether Rule 609(a)(1) excludes the operation of Federal Rule of Evidence 403.

Even though ordinarily, according to a textualist, “once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant,”⁶⁷ Justice Scalia was willing, in the face of patent absurdity,

to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word “defendant” in the Rule.⁶⁸

Justice Scalia’s concession that the Court should, in cases of a clear error in drafting, enforce “the meaning genuinely intended but inadequately expressed”⁶⁹ provides, to be sure, an escape hatch for the strict textualist confronted with a text, such as the Twenty-sixth Amendment, that clearly was drafted incor-

64. *Id.*

65. *Immigration & Naturalization Service v. Cardoza-Fonesca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment).

66. 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment).

67. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 623 (1990). This approach to statutory construction differs markedly from the Court’s “traditional” approach, under which the “plain meaning of a statute governs its interpretation, unless negated by strongly contradictory legislative history.” *Id.* at 624.

68. *Bock Laundry*, 490 U.S. at 527 (Scalia, J., concurring in the judgment); see also *Callanan v. United States*, 364 U.S. 587, 598-99 (1961) (Stewart, J., dissenting).

69. *X-Citement Video*, 513 U.S. at 82 (Scalia, J., dissenting).

rectly. But his concession also proves too much. If one concedes that judges may (and at times should) conclude that the plain meaning of a text is "absurd" and thus unintended, then one has conceded that text is *always* devoid of meaning when viewed in isolation from the circumstances that gave rise to the enactment and from the purpose of the enactors. This is because in order to determine that the plain meaning of a text is patently absurd, one necessarily must refer to contextual clues beyond the text itself.

For example, the plain, grammatically precise reading of the Twenty-sixth Amendment as written (that is, that the Amendment defines United States citizens as only those persons who are at least eighteen years old) seems absurd only because we know, based upon history, that the Amendment is not supposed to mean that. One could not conclude, however, by looking solely at the language of the Amendment divorced from history, that the Amendment is absurd merely because it seems to redefine United States citizenship; indeed, the Fourteenth Amendment dramatically changed the definition of United States citizenship, but most certainly is not absurd on its face simply because it did. Rather, one can reasonably conclude that the plain, grammatical reading of the Twenty-sixth Amendment is patently absurd *only because* the historical record makes absolutely clear that the Amendment's sole purpose was to grant the franchise to all otherwise-qualified persons who are at least eighteen years old. If a court may (and, of course, should) read the Twenty-sixth Amendment to mean what we all know it means (and not what it says it means), because to do otherwise would be patently absurd, then courts *always* may (and should) look to historical context and purpose when construing texts; otherwise, it would be impossible to determine when patent absurdity exists and when it does not. It is not enough to say that some texts are so absurd as written that they clearly fail the "straight-face test" (i.e., that it is impossible to keep a straight face while arguing that the literal reading was intended), because one must have a sense of humor to know what fails the straight-face test in the first place. And, of course, nothing is funny without a broader context.⁷⁰

70. Cf. Cass R. Sunstein, *Principles, Not Fictions*, 57 U. Chi. L. Rev. 1247, 1247 (1990) ("[T]he culture furnishes the interpretive principles that courts and other interpreters use in order to give meaning to any 'text.' Legal words are never susceptible to interpretation standing by themselves, and in any case they never stand by themselves.").

I recognize that some (though not all) adherents to the “new textualism,”⁷¹ to borrow Professor Eskridge’s phrase, believe that constitutional, as opposed to statutory, texts should be interpreted by a quite-different methodology. By insisting that constitutional provisions be interpreted in light of the “original intent” of the drafters, Justice Scalia⁷² (and Judge Bork⁷³ and many others) in effect have conceded that at least *some* texts can accurately be interpreted only by reference to the context in which they were enacted. Presumably, then, Justice Scalia would have no trouble in concluding that the Twenty-sixth Amendment granted the franchise to all otherwise-qualified citizens over the age of eighteen or that the Seventeenth Amendment was not limited in application to the six-year period following its adoption. But even though the “original intent” approach eliminates some of the interpretive problems discussed above when the text to be interpreted is from the Constitution, one is left to wonder why, if words have ascertainable meanings when read pursuant to established rules of grammar and syntax, we need one approach to interpretation for one set of texts and a completely different—and oftentimes contradictory—approach to another set of texts.⁷⁴ Why should text, divorced from historical context, be the ultimate manifestation of intent for statutes but not for constitutional provisions?⁷⁵ If the Twenty-sixth Amendment had instead been enacted as a congressional statute implementing, say, the Fourteenth Amendment and the Court had been confronted with the meaning of that statutory text,⁷⁶ a strict textualist on the Court presumably would have conceded that the plain meaning of the text, when discerned under traditional and established rules of grammar, did not accord with the clear intent of the drafters; but the devout textualist could have reached this conclusion only after invoking the straight-face test and falling back on the “patent absurdity” exception to the plain meaning rule,

71. Eskridge, 37 UCLA L. Rev. at 623 (cited in note 67).

72. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37-47 (Princeton U. Press, 1997).

73. See Robert Bork, *The Tempting of America* 143-160 (1990).

74. For critiques of originalism, see John Hart Ely, *Democracy and Distrust* (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 476-500 (1981); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

75. Cf. Eskridge, *The New Textualism*, 37 UCLA L. Rev. at 625 (cited in note 67) (“Justice Scalia himself uses legislative history when interpreting the Constitution.”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1280 (1995).

76. Cf. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

an exception that calls into doubt the entire methodology itself by threatening to swallow the rule.

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At first blush, there is great appeal in an approach to textual construction that assures drafters that their texts will be read plainly, in light of established meanings of words and under established rules of grammar and syntax. Ignoring for the moment the inherent malleability of words, such an approach could make sense if we could be confident that drafters, too, would heed those rules when expressing their intent in statutory and constitutional provisions. The established rules of grammar, however, often have eluded those who draft statutes and constitutional provisions, and to rely on those rules too strictly in interpreting texts would be unfaithful to those texts that are inartfully drafted. That even Justice Scalia would interpret the Twenty-sixth Amendment (and the Seventeenth and Seventh Amendments, for that matter) to mean precisely what we all know it to mean, despite what it actually says, goes a long way in demonstrating that even “plain” meaning isn’t always as plain as it seems and that language—even language expressed as clearly as is possible—divorced from context rarely, if ever, has a meaning that is truly plain.