

NOTES

DISFAVORING STATUTORY PARENTHESES (EXCEPT IN CERTAIN CIRCUMSTANCES)

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Parentheses in statutes have been at issue in an increasing number of court cases, even at the Supreme Court. Parentheses have a slightly different story from other punctuation marks and they have been used consistently throughout legal history. The Federal Constitution, early statutes, and a large part of our modern state and federal law separate words from their sentences using parentheses. But if a parenthetical conflicts with the material outside of the parentheses, it is the current practice to discard the interior text as surplusage, even though the legislature may have had a reason to include that text in a statute.

Interpreters should instead determine what use the parentheses play in the statute. Should the parenthetical text include a definition or an exemption, the parenthetical should control. But if it serves a descriptive purpose, the parenthetical text should be disfavored. This Note proposes a canon of construction that articulates the presumption against using conflicting parenthetical text in statutes (except in certain circumstances).

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INTRODUCTION

Parentheses can determine Medicare benefits,¹ regulatory exemptions,² court jurisdiction,³ and anything else governed by a statute with parentheses in its text. Legislatures often use parentheses to separate provisions,⁴ and their absence has consequences. As one judge wrote, imitating a First Circuit opinion,⁵ “For want of a pair of parentheses, this case ended up in federal court.”⁶ Statutes and litigation regarding this punctuation mark are increasingly important. Four Supreme Court cases have discussed them in the last couple of Terms.⁷ And they are not going away given the large number of parentheses in state and federal law.⁸

Despite parentheses’ large presence in the legal world, there is minimal scholarship discussing the parenthesis and its role in statutory interpretation. This is a shame because the parenthesis has a unique place in legal history and law construction compared to its fellow punctuation marks. And it is also deserving of study because it faces a decline originating from misunderstandings regarding its functions.

There have been recent warnings against parentheses’ continued use due to ambiguous sentences and directives they create.⁹ Court decisions affirm the concern by explicitly disfavoring parentheses and the material they contain. While these decisions are generally correct, the trend is based on a mistaken belief in the parentheses’ use and ignores the important variety of functions they serve.

Justice O’Connor once wrote that there is “no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one”¹⁰ This Note takes the opposite view. A canon of construction against parentheses is certainly necessary but it should not reflect the overzealous nature of the current trend. It should disfavor many parentheses, but permit others based on their intended usage.

1 See *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022).

2 See *Sackett v. EPA*, 143 S. Ct. 1322 (2023); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

3 See *Biden v. Texas*, 142 S. Ct. 2528, 2538–39 (2022); *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493 (2022).

4 See *infra* notes 126–33 and accompanying text.

5 O’Connor v. *Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017) (“For want of a comma, we have this case.”).

6 *Howard v. Mercer Transp. Co.*, 566 F. App’x 459, 460 (6th Cir. 2014).

7 See *infra* Section III.A (discussing those cases).

8 See *infra* notes 106, 109, 112 (providing examples of statutes with parentheses).

9 See *infra* notes 134–40 and accompanying text.

10 *Chickasaw Nation v. United States*, 534 U.S. 84, 98 (2001) (O’Connor, J., dissenting) (citation omitted).

Accounting for distinctions would better respect grammatical realities and current precedents while providing clear guidance for judges dealing with ambiguous statutory parentheses.

The Note continues as follows: Part I will cover the story of punctuation in legal documents, from early British statutes to the current textualist methodology. Part II will describe three important ways parentheses are used in modern statutes. Part III traces a general aura of distrust regarding parentheses in the court system but explains that not all statutory parentheses have been denounced as immaterial. Finally, Part IV synthesizes the other Parts to make the case for a new canon of construction specifically dealing with the parenthesis. It concludes that courts wishing to adopt a historically and grammatically faithful view of parentheses should adopt this canon: a statement in parentheses should be discounted when it conflicts with the outside sentence, but an exception or definition in parentheses should not.

Before beginning, a few clarifications are in order: First, “parentheticals” are mentioned throughout this Note. This does not refer to a parenthetical phrase, which can be separated from a sentence with various punctuation. Here, a “parenthetical” means words appearing inside parentheses (this phrase, for instance, is considered a parenthetical here). Second, this Note does not concern the use of parentheses to denote section numbers, citations, and the like. It concerns only operative words within a statute. Finally, this Note only deals with parentheses in really hard cases, where the parenthetical or certain words therein propose an interpretation at odds with the rest of the statute or a single, important provision. There are many benign parentheses out there and they should not be disfavored due to this analysis and proposal.

I. PUNCTUATION IN STATUTORY INTERPRETATION

Punctuation marks play an important role in the English language.¹¹ They tell a reader how to read complex sentences that may otherwise be confusing or ambiguous.¹² It follows that punctuation marks could also be used to clarify complex sentences in statutes. While it is true that the issue before a court is not often only about

11 See *A Quick Guide to Punctuation*, UNIV. OF LYNCHBURG, <https://www.lynchburg.edu/academics/writing-center/wilmer-writing-center-online-writing-lab/grammar/a-quick-guide-to-punctuation/> [https://perma.cc/WAW2-R4EN].

12 See BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 3 (2d ed. 2006) (“Punctuation marks are like traffic signs that guide readers through sentences.”). See generally KARINA LAW, *LET’S EAT GRANDMA! A LIFE-SAVING GUIDE TO GRAMMAR AND PUNCTUATION* (2015).

punctuation marks,¹³ they nevertheless play a role in statutory interpretation. This is because without punctuation, “a reader will [punctuate] for you, in places you never wanted it.”¹⁴ It might be considered a good interpreter’s “manifesto to master even the most oblique, obscure conventions and designations of the existing system of punctuation.”¹⁵ Yet there was a tradition that prevented such consideration of punctuation in statutory interpretation. This Part will review that tradition and its decline, showing that it should hold no sway over contemporary judges. Punctuation indicates meaning and intent just as much as words do.

A. *Traditional Notions of Dismissal*

The long-standing practice of courts has been to dismiss punctuation marks in statutory text. This practice was partly formed from the belief that early English statutes did not have punctuation marks and thus such marks should not be considered when added later on.¹⁶ But that belief is not true. Punctuation has appeared in English statutes “from the earliest days,” for “the statutes were intended primarily as a permanent written record, and generally—only incidentally for oral delivery.”¹⁷ There was, however, a valid concern about how punctuation was inserted into the statutes.

Originally, marks were inserted into written works to indicate pauses for a reader.¹⁸ Those marks were not standardized, and could range from “heavily punctuated . . . with apparent care” to

13 See Lance Phillip Timbreza, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QLR 63, 66 (2005).

14 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 57 (1982).

15 LENNÉ EIDSON ESPENSCHIED, *THE GRAMMAR AND WRITING HANDBOOK FOR LAWYERS* 80 (2011).

16 See, e.g., J.G. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 232, at 307 (Chicago, Callaghan & Co. 1891); E.E. Brossard, *Report of the Committee on Legislative Drafting*, in *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL CONFERENCE* 227, 227 (1938); David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 705 (2012).

17 DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 159 (1963); Richard C. Wydick, *Should Lawyers Punctuate?*, 1 SCRIBES J. LEGAL WRITING 7, 17–19 (1990) (crediting Mellinkoff with discrediting the theory that early English statutes did not have punctuation marks); see also Statute of Northampton 1328, 2 Edw. 3 Stat. Northampt. c. 2–7 (Eng.) (amended 1809, 1863, 1969) (displaying clear commas, semicolons, and other punctuation). Further, Professors Wydick and Mellinkoff have examined handwritten statutes and discovered marks resembling punctuation. Wydick, *supra*, at 18 n.43. This demonstrates that printed and original acts have marks indicating punctuation. In fact, William the Conqueror’s *Domesday Book* is “heavily dotted” with punctuation. MELLINKOFF, *supra*, at 160.

18 See MELLINKOFF, *supra* note 17, at 152–53.

“completely without punctuation.”¹⁹ Later on, British law was enacted and transcribed by scribes²⁰ and printers,²¹ who punctuated “[i]f there [was] a compelling oral reason for punctuation.”²² Using their own determinations, these aides and publishers might alter the phrasing of law. Naturally, this was a problem, for those post-facto punctuators were not elected members of Parliament.²³ And one version of a statute could be published in more than one way. More worrisome was that “[w]hat passed for a statute in court might or might not be the original and frequently was not even an accurate copy.”²⁴ The argument goes that printers’ and scribes’ views of proper punctuation should not bind English subjects to an unintended meaning. That argument is correct.

In *Barrow v. Wadkin*,²⁵ the issue was whether a statute read “*aliens*, duties, customs, and impositions,” or “*aliens’* duties, customs, and impositions.”²⁶ Did the statute refer to aliens or their duties? One edition of the statute read the first way—with a comma—and another favored the second way—with an apostrophe.²⁷ After even the original draft of the statute provided no help, it was declared that “in the Rolls of Parliament the words are never punctuated” and the court went on to determine the case using the “spirit and object of the Act.”²⁸ Although the statute’s punctuation was the primary issue, the court did not decide whether the mark was an apostrophe or comma. Instead, the court disfavored punctuation altogether and inadvertently began a canon based on a falsehood.²⁹ The punctuation in that case should have been discarded, not because the “words are never punctuated,” but because of the dueling versions of one statute.

In 1917, however, the King’s Bench reexamined the presumption about early statutes and punctuation. As written, the Treason Act 1351

19 *Id.*

20 See BARBARA M.H. STRANG, A HISTORY OF ENGLISH 107–10 (1970).

21 LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 103 (2d ed. 2013); MELLINKOFF, *supra* note 17, at 163.

22 MELLINKOFF, *supra* note 17, at 161.

23 See SUTHERLAND, *supra* note 16.

24 MELLINKOFF, *supra* note 17, at 162.

25 (1857) 53 Eng. Rep. 384; 24 Beav. 327.

26 *Id.* at 384–85; 24 Beav. at 327–30 (emphasis added) (quoting British Nationality Act 1772, 13 Geo. 3 c. 21, § 3 (Eng. & Wales) (repealed 1914)).

27 *Id.* at 385; 24 Beav. at 329.

28 *Id.* at 385; 24 Beav. at 330. Aside from the statute he examined for this case, the Master of the Rolls cited no support bolstering his broad statement about statutes and punctuation.

29 See LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 13 (2014) (describing how an English rule established that punctuation was not part of a statute in early cases); MELLINKOFF, *supra* note 17, at 163.

punishes any man who would “be adherent to the King’s Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere”³⁰ Sir Roger Casement was one such man, convicted of conspiring with the Germans, while in Germany, to smuggle weapons into Ireland to be used for a revolution.³¹ Casement’s lawyer said that because statutes were not punctuated, the crime was limited to treason committed *inside the King’s realm only*.³² The Crown argued that parentheses were inserted around “giving to them Aid and Comfort in the Realm” such that the statute also applied to subjects committing treason *outside the realm*.³³ In determining this case on appeal, Judge Darling closely examined the original Treason Act with an actual magnifying glass and commented that there “are not brackets, but there is a very distinct line drawn right through the line of writing . . . where we should now perhaps put . . . breaks in the print.”³⁴ And Judge Atkins replied that “they really are to represent commas; they are reproduced in the reprint of the Statute as commas. The Statute Roll is printed in the Revised Statutes exactly correctly.”³⁵ Though Casement’s lawyer responded that the ambiguity should favor the defendant,³⁶ Casement was eventually “hanged on a comma.”³⁷ Though only one of the reasons why Casement’s conviction was affirmed, this discussion casts strong doubt on the presumptions made in *Barrow* and its progeny concerning punctuation and early statutes. But nevertheless, it generally became the common view that

30 Treason Act 1351, 25 Edw. 3 Stat. 5 c. 2 (Eng.) (amended 1828, 1829, 1830, 1832, 1887, 1948, 1967).

31 *R v. Casement* (1917) 1 KB 98, 98–103 (Eng. & Wales).

32 *Id.* at 113–14 (“The meaning of that statute, as of all statutes, is to be derived from the words read in their natural sense unelucidated or unobscured by the counsel of commentators however eminent. The words are ‘be adherent . . . within the realm.’ No authority short of a judgment can compel this Court to say that those words mean ‘be adherent . . . without the realm.’”).

33 MELLINKOFF, *supra* note 17, at 168.

34 *Id.* at 169 (quoting *R v. Casement* (1917) 86 LJKB 467 (Crim. App.) at 486 (Eng. & Wales)).

35 *Id.*

36 *Id.* at 170.

37 See Mark Anderson, *Hanged on a Comma: Drafting Can Be a Matter of Life and Death*, IP DRAUGHTS (Oct. 14, 2013, 5:30 PM), <https://ipdraughts.wordpress.com/2013/10/14/hanged-on-a-comma-drafting-can-be-a-matter-of-life-and-death/> [https://perma.cc/Q4FD-BXBF]. There were, however, other arguments put forth during the trial—especially given the uncertainty regarding the mark; this discussion of language did not make it into the final opinion. See Dennis Baron, *Commas Don’t Kill People*, WEB OF LANGUAGE (July 23, 2019, 3:45 PM), <https://blogs.illinois.edu/view/25/801468> [https://perma.cc/H57C-F5TE] (arguing that the context matters when deciding whether to kill by grammar).

punctuation “lack[s] the legal status of words” because the rolls were not punctuated.³⁸

B. *Punctuation in Early America*

The early American legal community departed from the early British model while still retaining a wariness of punctuation. From the start, certain drafters like Thomas Jefferson and John Adams grew to dislike the long sentence that was indicative of the British statute.³⁹ Jefferson wrote that such statutes are “really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.”⁴⁰ In other words, they thought sentences should be more broken up by punctuation than the British statutes were. But as a whole, writers in the Founding Era were perceived not to care about punctuation.⁴¹

The drafters of the Constitution of the United States, however, departed from this perception. The original Constitution features 140 periods, 9 dashes, 5 sets of parentheses, 375 commas, 65 semicolons, 10 colons, 10 em dashes, and 1 set of quotation marks.⁴² And they matter, for one semicolon could drastically change the meaning of a provision.⁴³ The idea that “the Framers paid attention to seemingly small matters of interpretation” and were “conscientious draftsmen who generally paid attention to fine distinctions”⁴⁴ is bolstered by the activities of the Committee of Style.

Formed during the Constitutional Convention, the Committee was tasked to “revise the stile of and arrange the articles which had been agreed to by the [Convention]”⁴⁵ so as to create a cleaner and more presentable final product.⁴⁶ This included the punctuation of

38 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 258 & n.102 (2000). Remember, though, that the original roll in the *Casement* case *did* have punctuation, which that court thought was “correctly” transferred to the reproductions of the statute. MELLINKOFF, *supra* note 17, at 169 (quoting *Casement*, 86 LJKB at 486).

39 MELLINKOFF, *supra* note 17, at 252–53.

40 *Id.* at 253 (quoting Thomas Jefferson, *Autobiography*, reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 1, 65 (Andrew A. Lipscomb ed., 1905)).

41 *See, e.g., id.* at 250.

42 *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 334 (2002); Yellin, *supra* note 16, at 718.

43 For possible implications and interpretations of certain semicolons, see generally Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667 (2007); and Kesavan & Paulsen, *supra* note 42.

44 Kesavan & Paulsen, *supra* note 42, at 337.

45 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 553 (Max Farrand ed., 1911).

46 For instance, the Committee turned twenty-three approved articles into the seven articles of the original Constitution. John R. Vile, *The Critical Role of Committees at the U.S.*

the Constitution, which led to important phraseology and consequences in constitutional law.⁴⁷ Gouverneur Morris, the Committee's principal draftsman and possibly a "dishonest scrivener," attempted to change the phrasing of the General Welfare Clause by changing a comma to a semicolon,⁴⁸ and succeeded in changing a comma to a semicolon in Article IV, Section 3.⁴⁹ While the first version creates new states with the approval of the state's legislature and Congress, the Committee's version disallows the creation of states by partitioning other states.⁵⁰ This highlights the work one punctuation mark can do in interpretive work and demonstrates that *officials were aware of these marks*. Indeed, the Convention debated the new draft for three days.⁵¹ But despite the valued role of punctuation in constitutional drafting, American courts primarily clung to the British convention when examining statutes.

This analysis starts with Chief Justice Marshall. Riding circuit in 1828, the Chief Justice presided over *Black v. Scott*,⁵² a case concerning a statute requiring that "[t]he estate of a guardian or curator, appointed under this act . . . shall . . . be liable for whatever may be due

Constitutional Convention of 1787, 48 AM. J. LEGAL HIST. 147, 172 (2006). There is an ongoing debate concerning the differences between the Committee draft and the one voted on by the Convention, which this Note does not opine on. See David S. Schwartz, *The Committee of Style and the Federalist Constitution*, 70 BUFF. L. REV. 781, 791 (2022).

47 Famously, for example, the Committee changed "We the people of the States" to "We, the People of the United States." Schwartz, *supra* note 46, at 788–89; accord Vile, *supra* note 46, at 172.

48 See, e.g., 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 45, at 379; William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 5 (2021). This change would have "convert[ed] a limitation on the taxing authority into a broad positive grant of power." *Id.*

49 See Treanor, *supra* note 48, at 98–102. Morris did much more than change punctuation. He also added the words "herein granted" to the Vesting Clause in Article I, but not in Article II. *Id.* at 59–67 (quoting U.S. CONST. art. I, § 1). This difference would later serve as the basis for influential decisions involving the executive removal power, among other important subjects. See, e.g., *Myers v. United States*, 272 U.S. 52, 138 (1926).

50 See U.S. CONST. art. IV., § 3, cl. 1; THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 45, at 454–55; Treanor, *supra* note 48, at 99–100. "A literal reading of Morris's text would have barred the admission of the slave state of Kentucky . . . and Tennessee . . ." Treanor, *supra* note 48, at 100. See generally Kesavan & Paulsen, *supra* note 42, for the application of this reading to West Virginia.

51 Schwartz, *supra* note 46, at 783; 5 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 324 (W.W. Abbot ed., 1997). There may be worthwhile objections concerning the role of "printer[s] and engrosser[s]" in the distributed Constitution, Schwartz, *supra* note 46, at 788 n.15, but the fact still remains that Founders like Morris and his Committee toiled over and changed punctuation marks, and that those changes were eventually approved.

52 3 F. Cas. 507 (C.C.D. Va. 1828) (No. 1,464).

from him or her.”⁵³ Read with the comma inserted after “curator,” the liability would attach to both guardians *and* curators. The statute, however, was interpreted to mean the opposite:

[I]n the printed code, the comma is place[d] after the word, ‘curator,’ so as to connect the guardian with the curator, and apply the [subsequent] words equally to both. I am, however, aware, that not much stress is to be laid on this circumstance; and that *the construction of a sentence in a legislative act does not depend on its pointing*. The legislature can scarcely be supposed to have intended to distinguish between remedies for debts from testamentary and statutory guardians, and I am, therefore, disposed to read the act with the comma after the word ‘guardian.’⁵⁴

The Chief Justice explicitly discarded a comma to rewrite the statute and disconnect “curator” from “guardian.” This might be permissible in a context in which outside scribes and printers controlled punctuation, but that was no longer the case. As demonstrated above, legislators at this time were aware of the effects of punctuation marks,⁵⁵ and it was “presumed that the writer intended to be understood according to the grammatical purport of the language he has employed.”⁵⁶ Even if read aloud before passage, it was assumed “that the principal points [were] observed in the reading.”⁵⁷ The legislatures therefore had no excuse to ignore punctuation. This judicial standard, however, became “habitual” in following the British tradition of neglecting punctuation.⁵⁸

Though the British approach was still dominant, its foundation began to show cracks. In 1837, the Supreme Court declared in *Lessee of Ewing v. Burnet* that “[p]unctuation 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.”⁵⁹ *Lessee of Ewing* was a step taken in the right direction. Instead of a blanket statement against the consideration of punctuation, it was said that it may be used when all other means fail.⁶⁰ This was the beginning of the end for the early English approach, but it was not gone yet. In deciding a contract case, for instance, the Eighth Circuit, citing *Lessee*

53 *Id.* at 508 (quoting Act of Feb. 18, 1819, ch. 108, § 12, 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 405, 408).

54 *Id.* at 510 (emphasis added).

55 See *supra* notes 39–51 and accompanying text.

56 SUTHERLAND, *supra* note 16, § 258, at 338.

57 *Id.* § 232, at 307.

58 MELLINKOFF, *supra* note 17, at 250.

59 36 U.S. (11 Pet.) 41, 54 (1837).

60 *Id.* To be sure, it is not a large step in the right direction. After all, punctuation is more clearly within the “four corners” of a statute than the legislature’s purpose is.

of *Ewing*, said that “[p]unctuation is no part of the English language” and that “[i]t is always subordinate to the text, and is never allowed to control its meaning.”⁶¹ Though the circuit court case was about a contract and not a statute, it demonstrated that the legal community was (or at least some learned judges were) not yet ready to let go of the British approach.

This uncertain trend continued into the twentieth century. At first, the Supreme Court stuck with *Lessee of Ewing*. In *Barrett v. Van Pelt*,⁶² the Court said that “[p]unctuation 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.”⁶³ In this reading, like in *Lessee of Ewing*, punctuation mattered, but only in very narrow circumstances, where all other methods fail. Using this standard, it was unlikely for punctuation to be considered seriously given that it could be changed to conform with subjective views concerning the divined purpose of a statute. Yet *Barrett* allowed for greater consideration of punctuation than was previously customary. But this was not to last.

For then, in *United States v. Shreveport Grain & Elevator Co.*,⁶⁴ the Court laid down a broad rule: “Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.”⁶⁵ Not even the “minor element” test in *Barrett* or the “when all other means fail” approach in *Lessee of Ewing* would be permitted under the *Shreveport* rule.

The tension between *Shreveport* and the *Lessee of Ewing* line of cases was evident in legal guides at that time. While some guides instructed that “when the intention of the statute and the punctuation thereof are in conflict, the former must control,”⁶⁶ others said that

61 *Holmes v. Phenix Ins. Co. of Brooklyn*, 98 F. 240, 241–42 (8th Cir. 1899).

62 268 U.S. 85 (1925).

63 *Id.* at 91 (quoting *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 F. 522, 527 (8th Cir. 1904)).

64 287 U.S. 77 (1932).

65 *Id.* at 82–83; *see also* *Costanzo v. Tillinghast*, 287 U.S. 341, 344 (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.”).

66 EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 199 (1940); *see also, e.g.*, ARTHUR LENHOFF, *COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION* 579 (1949); Brossard, *supra* note 16, at 234, 244. The British method, meanwhile, predictably falls into this camp. *See* EDWARD BEAL, *CARDINAL RULES OF LEGAL INTERPRETATION* 301 (A.E. Randall ed., 3d ed. 1924).

punctuation “may afford some indication of [intent], and even decide it.”⁶⁷ The two perspectives even became one of Karl Llewellyn’s famous pairs of opposing canons of construction.⁶⁸

In summation, the early American period had created a de facto compromise between the British tradition—banning punctuation in interpretation—and the understanding that such a strict rule was becoming less tenable.⁶⁹ Where there was once a no-tolerance policy, an “emergency only” option was introduced through *Lessee of Ewing*. And even though *Shreveport* tried to claw that exception back, the view that “[p]unctuating is interpreting”⁷⁰ became increasingly popular.

C. Punctuation’s Redemption

The judicial philosophy of textualism openly favors the punctuation of a statute instead of the legal traditions described above. Textualists generally hold that the text of a statute governs its interpretation since the legislature voted and compromised for that text, not the statute’s supposed purpose(s).⁷¹ As Justice Scalia wrote, “The text is the law, and it is the text that must be observed.”⁷² This judicial

67 SUTHERLAND, *supra* note 16, at 308; *see also, e.g.*, *United States v. Marshall Field & Co.*, 18 C.C.P.A. 228, 234 (1930) (citing *Markell v. United States*, 16 Ct. Cust. 518 (1929)) (“[M]arks do have their place in ascertaining the meaning of language”); FRANCIS J. MCCAFFREY, *STATUTORY CONSTRUCTION: A STATEMENT AND EXPOSITION OF THE GENERAL RULES OF STATUTORY CONSTRUCTION* §§ 22–26, at 53–56 (1953); One draftsman of the Illinois Constitution wrote that punctuation in legal documents would depend on how masculine they are and how they contribute to the “rugged and bold” search for meaning to which only words may contribute. Urban A. Lavery, *Punctuation in the Law*, 9 A.B.A. J. 225, 225 (1923).

68 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401, 405 (1950).

69 *See* MELLINKOFF, *supra* note 17, at 368 (“The tug of the past is so strong that few courts will come right out and confess that the traditional snobbery toward punctuation has made a mess of legal writing. Instead we are treated to exercises in gamesmanship demonstrating how to ignore punctuation while really using it.”). And the drafters at the Constitutional Convention would likely not have worried about punctuation if it did not matter. *See supra* notes 45–51 and accompanying text.

70 BROSSARD, *supra* note 16, at 23 (“[H]e who points a statute thereby puts his construction upon it.”).

71 *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73–74 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351–57 (2005). This Note does not delve into the role of punctuation in opposing schools of statutory interpretation given the dominance of textualism in today’s judiciary.

72 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* 3, 22 (Amy Gutmann ed., new ed. 2018).

philosophy remains dominant today⁷³ and incorporates punctuation into its interpretive calculation.

Statutory punctuation in the modern day is necessarily scrutinized because textualists presume that “Congress follows ordinary rules of punctuation and that the placement of every punctuation mark is potentially significant.”⁷⁴ “Indeed,” say Professors Manning and Stephenson, “as the textualist influence on the federal judiciary has grown, courts have not hesitated to emphasize rules of grammar and proper punctuation in determining the meaning of legislation, treating these rules as elements of a statute’s ‘plain meaning.’”⁷⁵ And Justice Scalia and Bryan A. Garner say that “[n]o intelligent construction of a text can ignore its punctuation” because, while punctuation “will rarely change the meaning of a word, . . . it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part.”⁷⁶ No matter how punctuation ends up affecting the meaning of a statute, however, textualist philosophy has changed the interpretive landscape, for it is apparent that “the modern trend is for judges to be willing to take punctuation into account.”⁷⁷ Both the British tradition dismissing punctuation marks and the early American “emergencies only” compromise appear dead in the age of textualism.⁷⁸

A prospective death certificate was handed down by the Supreme Court itself⁷⁹ when it said that the “meaning of a statute will typically

73 See, e.g., Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/2UF9-CPQM>] (“[W]e’re all textualists now . . .”).

74 William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990).

75 JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 182 (4th ed. 2021) (first citing *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991); and then citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989)) (discussing the interpretation of a comma). Professors Manning and Stephenson also suggest that cases minimizing punctuation might be products of “an era in which the Court paid less attention to the semantic import of the statutory text.” *Id.* at 182–83.

76 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 161 (2012). They also cite incidents where punctuation has cost governments millions. *Id.* at 162–64.

77 JIM EVANS, *STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION* 276–77 (1988). In a mirror image of the *Casement* case, for example, Judge Chasanow of Maryland spared a killer from a death sentence for want of a comma. See John Feinstein, *Archard Girl’s Slayer Gets Life Term*, WASH. POST, May 16, 1979, at C1.

78 See SCALIA & GARNER, *supra* note 76, at 161–62.

79 The lower courts, however, also helped lay the past doctrine to rest. See *O’Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017).

heed the commands of its punctuation.”⁸⁰ A classic case illustrating the importance of punctuation in the textualist renaissance is *United States v. Ron Pair Enterprises, Inc.*⁸¹ There, the Court dealt with § 506(b) of the Bankruptcy Code, which “allows a holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, ‘interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.’”⁸² Interpreting the statute, the Court found that the comma after “claim” separates the two types of recovery: the interest, and the fees, costs, or charges.⁸³ Thus, “[t]he natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement.”⁸⁴

Dissenting, Justice O’Connor cited early American cases and came to the conclusion that “the Court has not hesitated in the past to change or ignore the punctuation in legislation,”⁸⁵ but a victorious five-to-four textualist majority showed that the Court was heading in a different direction. In their words, “[t]he language and punctuation Congress used cannot be read in any other way.”⁸⁶ Punctuation mattered and controlled the statutory text, even though the eventual interpretation could be viewed as “contrary to conventional scholarly wisdom and the perceived ‘intent’ of Congress.”⁸⁷ And punctuation continues to matter in the Supreme Court today.⁸⁸

The drafting conventions took note and hammered the final nails into the coffins of *Lessee of Ewing* and the British tradition.⁸⁹ The

80 U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993).

81 489 U.S. 235 (1989).

82 *Id.* at 239–40 (quoting 11 U.S.C. § 506(b) (1982)).

83 *Id.* at 241–42.

84 *Id.*

85 *Id.* at 250 (O’Connor, J., dissenting). Justice O’Connor cited *Lessee of Ewing*, *Tillinghast*, and *Barrett v. Van Pelt* to make her case. *Id.* Each of those cases fall under the “emergencies only” doctrine that became disfavored by the new textualist philosophy.

86 *Id.* at 242 (majority opinion). Note that the majority included textualist Chief Justice Rehnquist and Justices Scalia and Kennedy.

87 Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEVS. J. 289, 332 (1994) (“While one may believe that the interpretation of punctuation in *Ron Pair* led to an absurd result, this is not due to the absurdity of adherence to punctuation in interpretation.”).

88 See Transcript of Oral Argument at 11–15, 36, *Pulsifer v. United States*, No. 22-340 (U.S. argued Oct. 2, 2023) (interpreting an em dash in a criminal statute).

89 See e.g., REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 8.21, at 188 (2d ed. 1986); ESPENSCHIED, *supra* note 15, at 80; EVANS, *supra* note 77, at 276–77; GARNER, *supra* note 12, at 3; RONALD L. GOLDFARB & JAMES C. RAYMOND, *CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING* 42–45 (1982); MANNING & STEPHENSON, *supra* note 75, at 182–

current rule regarding the interpretation of punctuation in statutes is that any punctuation must be considered as operative text, approved by the legislature and the President.⁹⁰

* * *

As this Note moves into its discussion of parentheses, it is important to recall how courts have treated punctuation in the past. Since punctuation in statutes was discounted for much of legal history, cases involving punctuation—and therefore parentheses—rarely came before courts.⁹¹ Yet that does not mean that punctuation did not exist in statutes or did not seek to convey legislative meaning to courts and the public, and there is evidence supporting the opposite view.

II. PARENTHESSES

Part II focuses on the punctuation mark that gives this Note its title. While the parenthesis might seem like an “opaque”⁹² and “incidental”⁹³ way to impart controlling meaning into a statute, there is more to the story. This Part begins by outlining the different uses of parentheses in normal English and will then consider them in the legal drafting context. At the end of this Part, it will become evident that parentheses can help determine the common understanding of a text in certain circumstances, but that the legal community tends to discount or disfavor them.

A. *Parentheses’ Role as Punctuation*

The parenthesis was first seen in English writing in the 1300s and became popularized in the Elizabethan era.⁹⁴ Parentheses remain popular today in statutory text⁹⁵ and in other writing. Generally understood, the “purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information

83; 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 32A:12, at 882–85 (new ed. 2009).

90 For a well-put summary, see Jack L. Landau, *Oregon Statutory Construction*, 97 OR. L. REV. 583, 670, 681 (2019), in which it is said that “[c]ourts generally assume that legislatures intend that statutes be read . . . consistent with . . . punctuation” and that “it is not at all uncommon for courts to ascribe dispositive significance to one punctuation mark.”

91 See *infra* Section II.B.

92 *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2365 (2022).

93 GORDON LOBERGER & KATE SHOUP, *WEBSTER’S NEW WORLD ENGLISH GRAMMAR HANDBOOK* 170 (2d ed. 2009).

94 See JOHN LENNARD, *BUT I DIGRESS: THE EXPLOITATION OF PARENTHESSES IN ENGLISH PRINTED VERSE* (1991) (tracking the use of parentheses in the context of British poetic history).

95 See *infra* Section II.B.

of any sort, into a sentence that is logically or grammatically complete without it.”⁹⁶ It has also been asserted that the words inside the parenthetical are of “theoretically minor importance”⁹⁷ and that the marks therefore “deemphasize information” inside.⁹⁸

But the latter claim is too narrow. Information inside the parenthetical may be removed with no grammatical effect nor logical effect, but it does not follow that such removable information must be relatively unimportant. To the contrary, its inclusion in the sentence demonstrates that the parenthetical is “too *important* to either leave out entirely or to put in a footnote or an endnote.”⁹⁹ And the context and the meaning of the outside words are still changed by those words inside the parentheses. For instance, consider the sentence, “It was a beautiful day in the forest (aside from the incoming logging company and their chainsaws) and the woodland animals were frolicking.” The removal of this parenthetical would not affect the logic or structure of the outside sentence, but it also previews deforestation and a problem for the animals. This necessarily changes the way the sentence is understood by an ordinary reader. In other words, “a parenthetical can add crucial new information to a sentence without disrupting the flow.”¹⁰⁰

The line between important and unimportant parenthetical phrases might depend on the *reason they are being used*. The parenthesis has multiple uses,¹⁰¹ and some might demand more emphasis than others. Three usages are particularly relevant to the legal profession generally. They are described below:

First, parentheticals may be used to provide definitions.¹⁰² For example, “The musician proudly displayed his doodlesack (bagpipes) to the partygoers.” Without the parenthetical definition, that example would likely suggest inappropriate conduct to the modern reader,

96 ERNEST GOWERS, *PLAIN WORDS: THEIR ABC* 283 (1954).

97 H.W. FOWLER & F.G. FOWLER, *THE KING'S ENGLISH* 279 (3d ed. 1931).

98 THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE 281 (1994). This guide goes on to say that dashes emphasize information and that commas indicate that a phrase is a part of the given sentence. *Id.* This spectrum more closely resembles Bryan A. Garner's view of the parenthesis. *See infra* note 137 and accompanying text (describing the Garner view of parentheses).

99 Julia L. McMillan, *Parentheses*, *WRITING COMMONS* (emphasis added), <https://writingcommons.org/article/using-parentheses/> [<https://perma.cc/RYZ3-JN6C>].

100 Nathaniel George, *Parenthetical Phrases*, UNIV. OF NEV., RENO, <https://www.unr.edu/writing-speaking-center/student-resources/writing-speaking-resources/parenthetical-phrases> [<https://perma.cc/H2HR-8A79>].

101 *See, e.g.*, Mark Nichol, *15 Purposes for Parentheses*, *DAILY WRITING TIPS*, <https://www.dailywritingtips.com/15-purposes-for-parentheses/> [<https://perma.cc/9H7G-XB6C>]; McMillan, *supra* note 99 (“Since there are many reasons to use parentheses, be sure that the function of parentheses is always made clear to your readers.”).

102 *See, e.g.*, GOWERS, *supra* note 96, at 283.

unless he somehow knew the meaning of “doodlesack.” With the parentheses, however, the definition is provided and the reader’s understanding of the sentence is changed and clarified, and the sentence remains intact.

While this might not be important to a defense of the parenthesis in regular writing since definitions remain obvious in most contexts and are thus superfluous parentheticals, they matter a great deal in statutes.¹⁰³ When interpreting statutes, one generally looks to definitions as they “suggest that legislatures intended for a term to have a specific meaning that might differ in important ways from its common usage.”¹⁰⁴ In other words, the definition of a statute would control its meaning, and so the punctuation with which it is written must also matter. Most statutes include definitions,¹⁰⁵ and those definitions might be explicitly stated or referenced by a parenthetical.¹⁰⁶ This is even more important should a parenthetical definition indicate a one-time departure from a statute-wide definition.

Second, parentheticals may be used illustratively.¹⁰⁷ This can be done in two ways. The first illustrative use places an explanatory phrase meant to clarify or contextualize inside a parenthetical, thereby modifying words outside the marks. For instance, consider these sentences: “The queen and princess (having been brainwashed) demanded that the knight duel the nurse.” and “The maps of Blackbeard and Davy Jones (locations of diamonds) are hidden in the Oval Office.” Both parentheticals add information that enhances the rest of the sentence and can be removed without damaging the logic and structure of the sentence. The contextual information might still be important. In

103 See Transcript of Oral Argument at 28, *Pugin v. Garland*, 143 S. Ct. 1833 (2023) (Nos. 22-23, 22-331).

104 WRITING CTR. AT GEORGETOWN UNIV. L. CTR., *A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES*2 (rev. 2017); see also Jeanne Frazier Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEV. ST. L. REV. 999, 1004 (2013); Chris Micheli, *The Use of Definitions in Legislation*, CAL. GLOBE (Nov. 6, 2020, 6:31 AM), <https://californiaglobe.com/articles/the-use-of-definitions-in-legislation/> [<https://perma.cc/NJ46-H79Z>].

105 See Price, *supra* note 104, at 1000.

106 E.g., 6 U.S.C. § 1137a(d) (2018); 18 U.S.C. § 20 (2018); 42 U.S.C. § 29341(f) (2018); ARK. CODE ANN. § 28-72-302(a) (2011); IND. CODE § 6-3.6-2-14 (2023); KAN. STAT. ANN. § 79-4605(1) (2019); KY. REV. STAT. ANN. § 273.400 (West 2020); LA. STAT. ANN. § 47:49 (2019); MASS. GEN. LAWS ch. 68A, § 4 (2022); MINN. STAT. § 290.091 (2022); MISS. CODE ANN. § 41-21-97 (2023); MO. REV. STAT. § 376.960 (2016); NEV. REV. STAT. § 81.630 (2021); N.H. REV. STAT. ANN. § 564:22 (2019); N.M. STAT. ANN. § 59A-22-5 (2022); N.Y. EDUC. LAW § 6231(B) (McKinney 2016); OHIO REV. CODE ANN. § 5747.024 (LexisNexis 2019); 8 R.I. GEN. LAWS § 8-8.3-1 (Supp. 2022); S.D. CODIFIED LAWS § 1-44-11 (2021); VT. STAT. ANN. tit. 11, § 561 (2016); VA. CODE ANN. § 13.1-826(D) (2021); WASH. REV. CODE § 24.40.020 (2023); W. VA. CODE ANN. § 18B-13-1 (LexisNexis 2022). This is not exhaustive.

107 See THE CHICAGO MANUAL OF STYLE 6.95, at 402 (17th ed. 2017) (“He suspected that the noble gases (helium, neon, etc.) could produce a similar effect.”).

these examples, the facts that the royalty are brainwashed relieves them of some responsibility for the unfair duel, and that the maps are useful for diamond hunting. But there are also degrees of ambiguity. For instance, is the princess the only one brainwashed and does Blackbeard's map lead to something other than diamonds? One could use the last-antecedent rule¹⁰⁸ to find meaning, but either reading is still plausible. This first sort of illustrative use is a widely done practice in legal documents and in regular writing.

The second type of illustrative use involves words like “including” inside a parenthetical so as to elaborate what might be affected by a sentence. For instance, “The ghoulish attendants (including poltergeists, banshees, horned beasts, and harmless bunnies) are to be escorted to the river Styx.” Here, the parenthetical illuminates the meaning of “attendants” for those doing the escorting without committing to an exhaustive list of escorts. The sentence sets nonexhaustive guideposts and the parenthetical sets certain things within those guideposts. This style of parenthetical is often used in statutes¹⁰⁹ and causes controversy when a listed item makes little sense contextually, like the harmless bunnies in the example.¹¹⁰

Third, parentheticals may be used to denote exceptions.¹¹¹ Used this way, a parenthetical would sever a particular thing or things from

108 See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (“[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . .”). But as the Court says, the last antecedent rule “is not an absolute and can assuredly be overcome.” *Id.* This was the case in *United States v. Hayes*, in which the Court found that the context and construction of a statute made the rule an ill fit. 555 U.S. 415, 425 (2009). Of course, the departure from such a rule risks the departure from the text. See *id.* at 431 (Roberts, C.J., dissenting) (accusing the majority of “jumping over two line breaks . . . to reach the more distant antecedent”). Syntactic canons have a strong hold given their grammatical command, see *infra* note 247 and accompanying text, but this debate demonstrates that one syntactic or linguistic canon might be more useful than another in a case.

109 *E.g.*, 20 U.S.C. § 2342 (2018); 42 U.S.C. §§ 6985, 9837, 11292 (2018); ALA. CODE § 22-9A-13(b) (2015); CAL. CIV. CODE § 1102.6g (West 2023); COLO. REV. STAT. § 32-11-624 (2023); DEL. CODE ANN. tit. 7, § 6052 (2019); GA. CODE ANN. § 36-71-2 (2019); HAW. REV. STAT. § 328-1 (2022); 205 ILL. COMP. STAT. 620/2-11 (2022); IND. CODE § 3-6-4.2-12.5 (2023); KAN. STAT. ANN. § 12-3802 (2022); LA. STAT. ANN. § 30:548 (2017); MISS. CODE ANN. § 37-23-133 (2019); MONT. CODE ANN. § 22-2-403 (2021); N.Y. PUB. AUTH. LAW § 1299-a (McKinney 2017); N.C. GEN. STAT. § 78A-27 (2021); 18 PA. CONS. STAT. § 501 (2020); 23 R.I. GEN. LAWS § 23-24.10-3 (Supp. 2022); S.C. CODE ANN. § 50-13-665 (Supp. 2023); S.D. CODIFIED LAWS § 37-6-12 (2022); TENN. CODE ANN. § 39-17-408 (Supp. 2023); VT. STAT. ANN. tit. 3, § 2471a (2015); W. VA. CODE ANN. § 8-23-2 (LexisNexis 2023). This is not exhaustive.

110 See *infra* notes 142–54 and accompanying text.

111 See, *e.g.*, Jennifer Gunner, *Parenthetical Expressions: Types and Usage in Grammar*, YOURDICTIONARY (Sept. 23, 2022), <https://grammar.yourdictionary.com/style-and-usage/parenthetical-expression-types-and-usage.html> [<https://perma.cc/ETA6-9TZR>].

the meaning of the outside sentence. Generally, this use may be identified with indicator words like “except,” “but,” “other than,” and “aside from.” For example: “Nothing (except true love’s kiss) could awaken Snow White.” The author of such statements specifically cuts away certain circumstances, indicating his consideration of those possibilities. Given that nature of specificity, it makes sense that the federal government and most states use exempting parentheticals and a variety of indicator words in statutes.¹¹² This use also emphasizes the point that words inside the parentheses can be critical to the meaning of a sentence; not taking note of exceptions is a mistake in any play-book.

The parenthesis can be a useful punctuation mark when a writer seeks to separate information from the main body of a sentence. But just because words are put aside does not always mean they are less important. Parentheticals often have weight that changes the ordinary meaning of the external text. Legislators regularly used parentheses when drafting state and federal statutes to create definitions, illustrations, and exceptions. And despite the pervasiveness of the parentheses throughout legal writing and writing generally, there is an ongoing trend that aims to lessen their inclusion in statutes for fear of creating festering statutory ambiguity.

112 See, e.g., 46 U.S.C. § 7313 (2018) (“[E]ndorsement . . . (except vessels operating on rivers or lakes (except the Great Lakes)) may be prescribed by regulation.”); 5 U.S.C. § 7342 (2018); 7 U.S.C. § 1387 (2018); 39 U.S.C. § 3626 (2018); ALA. CODE § 25-4-130 (2016); ALASKA STAT. § 43.56.210(5) (2022); ARK. CODE ANN. § 3-4-602 (Supp. 2019); CAL. WATER CODE § 60017 (West 2004); COLO. REV. STAT. § 32-11-221 (2023); DEL. CODE ANN. tit. 5, § 702 (Supp. 2022); FLA. STAT. § 625.031 (2023); GA. CODE ANN. § 48-2-33 (2021); HAW. REV. STAT. § 803-47.6 (2022); IDAHO CODE § 23-912 (2019); 220 ILL. COMP. STAT. 15/6 (2022); IND. CODE § 16-44-2-5 (2023); KAN. STAT. ANN. § 50-708 (2005); KY. REV. STAT. ANN. § 66.523 (West 2020); LA. STAT. ANN. § 3:3761 (2011); MD. CODE ANN., COM. LAW § 9-317 (West 2013); MD. CODE ANN., ENV’T § 15-505(b) (West 2017); MICH. COMP. LAWS ANN. § 123.155 (West 2006); MINN. STAT. § 167.50 (2022); MISS. CODE ANN. § 27-9-13 (2017); MONT. CODE ANN. § 50-31-103 (2021); NEB. REV. STAT. § 21-19,131 (2022); NEV. REV. STAT. § 612.142 (2021); N.H. REV. STAT. ANN. § 146:2 (2021); N.M. STAT. ANN. § 5-5-5 (2022); N.Y. INS. LAW § 1204 (McKinney 2015); N.Y. PUB. LANDS LAW § 75(d) (McKinney Supp. 2023); N.C. GEN. STAT. § 58-7-15 (2021); N.D. CENT. CODE § 19-03.1-01(17) (Supp. 2023); OHIO REV. CODE ANN. § 1546.90 (LexisNexis 2022); OKLA. STAT. tit. 84, § 271 (2021); OR. REV. STAT. § 663.145 (2021); 16 PA. STAT. AND CONS. STAT. ANN. § 4520 (West 2021); 42 R.I. GEN LAWS § 42-116-31 (2007); S.C. CODE ANN. § 39-15-1150 (2022); S.D. CODIFIED LAWS § 37-6-12 (2022); TENN. CODE ANN. § 47-18-702 (2013); UTAH CODE ANN. § 59-7-302 (LexisNexis Supp. 2023); VT. STAT. ANN. tit. 24A, § 56 (2013); VA. CODE ANN. § 58.1-341 (2022); W. VA. CODE ANN. § 33-26A-3 (LexisNexis 2018); WYO. STAT. ANN. § 35-2-425 (2023). This is not exhaustive.

B. *Parentheses in Legal Documents*

Parentheses offer an interesting challenge in the field of legal drafting. And their history in statutes departs from the regular story of statutory punctuation. The early English statutes were held to include parenthetical marks in their original drafts.¹¹³ As time went on, Britain continued to have parentheses included in the original statutes, or at least in the reprinted copies, used to demonstrate illustrations and exceptions.¹¹⁴ This is especially interesting since parentheses were the exception to the general rule; while other marks were extremely uncommon, the parenthesis remained commonly used in *The Statutes of the Realm*.¹¹⁵ As a discontented British lawyer, James Burrow noted, “To put one [p]arenthesis *within* another, is a great Fault in Language: But, to *begin* a [p]arenthesis *only*, and then (within that) to *begin another*, and never to *end* either, is . . . much greater.”¹¹⁶ Burrow also noted, however, that the parenthesis “is of great Use; and tends, in my Apprehension, very much to Perspicuity.”¹¹⁷ Burrow was right in noting both the danger and usefulness of the mark.

Early American legal writers similarly used parentheses in the absence of other marks. Thomas Jefferson, for instance, wrote that statutes create confusion “from . . . parenthesis within parenthesis, and their multiplied efforts at certainty.”¹¹⁸ The use of parentheses in the long, unpunctuated statute was seen from the first days of the American colonies¹¹⁹ but diminished after the American Revolution to make way for the regular system of short-sentence punctuation. Though not

113 See *supra* notes 30–37 and accompanying text.

114 See, e.g., Trade with Africa Act 1697, 9 Will. 3 c. 26, § 7 (Eng. & Wales) (repealed 1867) (“[T]o pay Five pounds per Centum ad valorem at the Place of Importation upon all Goods and Merchandize (Negroes excepted) imported [in] England” (second alteration in original) (footnote omitted)); Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2 (Eng. & Wales) (amended 1825, 1867, 1948, 1950, 2013) (“[E]very King and Queene of this Realme . . . at the time of his or her takeing the said Oath (which shall first happen) make subscribe and audibly repeate the Declaration mentioned in the Statute”); Pacification, England and Scotland Act 1640, 16 Car. 1 c. 17 (Eng. & Wales) (repealed 1863) (“[W]hosoever shall be found upon triall and examination by the Estates of either of the two Parliaments (they judging against the persons subject to theire owne authority) to have been the authours and causers of the late and present troubles”).

115 See, e.g., *supra* note 17.

116 JAMES BURROW, *DE USU ET RATIONE INTERPUNGENDI: AN ESSAY ON THE USE OF POINTING, AND THE FACILITY OF PRACTISING IT* 21 (London, J. Worrall & B. Tovey 1771).

117 *Id.* at 21 (emphasis omitted).

118 MELLINKOFF, *supra* note 17, at 253 (quoting Jefferson, *supra* note 40).

119 See FOR THE COLONY IN VIRGINEA BRITANNIA: LAWES DIVINE, MORALL AND MARTIALL, ETC. para. 18, at 15–16 (William Strachey comp., David H. Flaherty ed., Univ. Press of Va. 1969) (1612) (“[I]f hee die intestate, his goods shall bee put into the store, and being valued by two sufficient praisers, his next of kinne (according to the common Lawes of England[])” (second alteration in original) (footnote omitted)).

a statute, this is best seen in the Constitution's use of punctuation as illustrative or exemptive. For instance, Article II, Section 1 states that the President must "solemnly swear (*or affirm*)" his oath.¹²⁰ Parentheses were also used in early state statutes¹²¹ and legislation from the First Congress,¹²² which was liberal with its use of the marks.

Despite their historically common usage, however, the parentheses recently became embroiled in the normal debate regarding statutory punctuation. This is not because the understanding of punctuation changed,¹²³ nor because parentheses became less useful.¹²⁴ Rather, it is due to their ability to confuse a reader. As Burrow said, it is wrong to omit the use of parentheses, but they might be inadvertently made to "obscure the Sentence into which [they are] introduced."¹²⁵ Such effects run afoul of a key tenet of interpretation and create tension with a strictly textual view of the parenthesis's role in statutes: if the history and traditional usage of the parenthesis advise its inclusion in a statute but textual clarity advises its exclusion, which viewpoint should govern?

When interpreting a statute, one must give effect "to all its provisions, so that no part will be inoperative or superfluous."¹²⁶ Provisions necessarily include punctuation and may include parentheses,¹²⁷ and such provisions should be clear to grant them their due effect. Yet punctuation has a relatively greater chance of being deemed a scrivener's error,¹²⁸ and since parentheses modify sentence structure and references, they contribute to "the biggest source of uncertainty of meaning" in statutes.¹²⁹ Thus, the broad use of parentheses presents a problem. Not all punctuating modifiers are equal, however, and some accounts suggest the superiority of the parenthesis in certain circumstances. For instance, one leading book points out that "[p]arentheses, though generally frowned upon, are sometimes more reliable than commas in setting off a phrase when there is possible

120 U.S. CONST. art. II, § 1, cl. 8 (emphasis added); *see also id.* art. I, § 8, cl. 17.

121 *See, e.g.*, Act of Apr. 21, 1787, ch. 100, 1787 N.Y. Laws 578, 578 (using an illustrative parenthetical).

122 *See, e.g.*, Act of July 20, 1790, ch. 29, 1 Stat. 131; Act of May 31, 1790, ch. 15, 1 Stat. 124, 125; Act of Sept. 1, 1789, ch. 11, 1 Stat. 55. This is *far* from exhaustive.

123 *See* Yellin, *supra* note 16, at 718 ("[T]he Framers used [parentheses] in ways that are both familiar to modern readers and easy to understand.").

124 *See, e.g.*, Lavery, *supra* note 67, at 228 ("For the draftsman the parentheses are of great importance . . .").

125 BURROW, *supra* note 116, at 21.

126 *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

127 *See supra* notes 106, 109, 112.

128 SCALIA & GARNER, *supra* note 76, at 164–65.

129 *See* DICKERSON, *supra* note 89, § 6.1, at 101; *id.* § 8.21, at 188.

uncertainty as to how the ideas that follow the phrase are linked to those that precede it.”¹³⁰ It also discusses how parentheses create clearer demarcations of asides than other marks.¹³¹ Some other guidebooks agree that parentheses may impart clarity,¹³² and Pennsylvania even advises legislators of that idea.¹³³

But the majority of sources disagree. The common wisdom provides “a rule against parentheses” in statutes.¹³⁴ The reason supporting the rule is that “[h]ow the courts would treat a parenthetical phrase . . . is purely speculative.”¹³⁵ Instead, it is suggested that such illustrations and exemptions be placed at the beginning or end of a sentence in a statute.¹³⁶

Moreover, prominent legal writing commentators like Bryan A. Garner subscribe to the view that the words inside the parenthetical are less important to the overall meaning by virtue of their placement.¹³⁷ Less important words are dangerous in statutes, for judges typically follow clear statements from Congress,¹³⁸ and an “afterthought” or “aside” placed in parentheses would not meet that requirement.¹³⁹ A large number of state drafting guides have followed suit, explicitly disfavoring parentheses.¹⁴⁰

130 *Id.* § 8.21, at 188.

131 *Id.* § 6.1, at 101.

132 *See, e.g.*, LYNN BAHRYCH & MARJORIE DICK ROMBAUER, *LEGAL WRITING IN A NUTSHELL* § 6.2(e)(1), at 134 (3d ed. 2003); HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* 58–61 (2d ed. 2008).

133 *See* 101 PA. CODE § 15.129 (1998) (“Parentheses . . . are sometimes more reliable than commas in setting off a phrase where there is possible uncertainty . . .”).

134 ROBERT N. COOK, *LEGAL DRAFTING* § 1, at 31–32 (rev. ed. 1951).

135 ROBERT C. DICK, *LEGAL DRAFTING* § 5.14, at 110 (1972).

136 *See* COOK, *supra* note 134, § 1, at 32 (discussing exemption parentheticals).

137 BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* 153 (2001); GARNER, *supra* note 12, §§ 1.33–.34, at 24; *see also* ESPENSCHIED, *supra* note 15, § 4.4, at 96; MORTON S. FREEMAN, *THE GRAMMATICAL LAWYER* 17 (1979).

138 *See, e.g.*, Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 376 (2019).

139 BRYAN A. GARNER, *GARNER’S MODERN ENGLISH USAGE* 1228 (5th ed. 2022).

140 *See, e.g.*, *Drafting Rule 11*, ALA. LEGISLATURE, <https://alison.legislature.state.al.us/legal-division-manual#rule11> [<https://perma.cc/2TEN-H3XT>]; BUREAU OF LEGIS. RSCH., STATE OF ARK., *LEGISLATIVE DRAFTING MANUAL* § 4.4(f), at 48 (2020); LEGIS. COMM’RS’ OFF. OF THE CONN. GEN. ASSEMBLY, *MANUAL FOR DRAFTING REGULATIONS* 40 (rev. 2018); LEGIS. COUNCIL DIV. OF RSCH., *DELAWARE LEGISLATIVE DRAFTING MANUAL* 107 (Holly Vaughn Wagner ed., 2022); LEGIS. RSCH. COMM’N, KY. GEN. ASSEMBLY, *BILL DRAFTING MANUAL, INFORMATIONAL BULLETIN NO. 117*, at 40 (rev. 2021); OFF. OF THE REVISOR OF STATUTES, ME. STATE LEGISLATURE, *MAINE LEGISLATIVE DRAFTING MANUAL* 127 (rev. 2016); COUNS. TO THE SENATE & COUNS. TO THE HOUSE OF REPRESENTATIVES, MASS. GEN. CT., *LEGISLATIVE RESEARCH AND DRAFTING MANUAL* 25 (5th ed. 2010); OFF. OF THE REVISOR OF STATUTES, MINNESOTA REVISOR’S MANUAL WITH STYLES AND FORMS 313 (2013); LEGIS. COUNCIL SERV., STATE OF N.M., *LEGISLATIVE DRAFTING MANUAL* 97 (2015); LEGIS. COUNCIL, NORTH

Even though this dominant view discredits helpful uses for parentheses in legal documents and incorrectly assumes parenthetical phrases to be unimportant, it is right in one regard. Courts seem to have trouble determining the weight they should give to matter within parentheses. If the ambiguity faced by courts confronting parentheses is grievous, then the argument against their inclusion and interpretive weight holds water, despite the extensive history of the statutory parentheses and their various uses.

III. PARENTHESES IN PRACTICE

This Part examines the interpretation of statutory parentheses in court cases. It highlights only cases in which the parenthetical statement *contributes* to the ambiguity. If the meaning is clear, there is no reason to consider parentheses. The Supreme Court appears to generally disfavor the parenthesis. And yet there appear to be exceptions to this generalization. Lower courts, meanwhile, have little predisposition to parentheses and their interpretations vary. This parentheses problem is ongoing and there is no reliable guidance for interpreters.

A. *The Supreme Court*

The Supreme Court has not adequately addressed the proper role of parentheses in statutory interpretation. Its opinions, however, reflect the dominant view that parenthetical information should be disfavored. The Court's most explicit discussion of parentheses was in *Chickasaw Nation v. United States*.¹⁴¹ Both the majority and dissent acknowledged that parentheses played a role in the case, but they battled over how much weight those marks should be given. The parenthesis lost the battle in both the majority and dissenting opinions.

At stake in *Chickasaw Nation* were tax exemptions for Native American tribes.¹⁴² Specifically, the Court examined language in the Indian Gaming Regulatory Act that reads:

The provisions of [the Internal Revenue Code of 1986] (including sections 1441, 3402(q), 6041, and 60501, and chapter 35 of such [Code]) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall

DAKOTA LEGISLATIVE DRAFTING MANUAL 109 (2023); OFF. OF LEGAL SERVS., GEN. ASSEMBLY OF TENN., 2019 LEGISLATIVE DRAFTING GUIDE 14 (2019); TEX. LEGIS. COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL 102 (2020). This list is not exhaustive, and there are exceptions. See, e.g., LEGIS. REFERENCE BUREAU, STATE OF ILL., ILLINOIS BILL DRAFTING MANUAL 236 (2012).

141 534 U.S. 84 (2001).

142 *Id.* at 86.

apply to Indian gaming operations conducted pursuant to this chapter¹⁴³

Two tribes argued that they were exempt from paying Chapter 35 taxes under this law since those taxes were included in the illustrative parenthetical, even though Chapter 35 had nothing to do with the “reporting and withholding of taxes.”¹⁴⁴ A reading of the statute without the illustrative parenthetical examples would clearly require payment, but because Chapter 35 was listed in the illustrative parenthetical, the tribes argued that Congress intended to include the unrelated chapter in the provision. The parenthetical’s illustration was therefore at odds with the rest of the statute. Although the case primarily concerned the application of the Native American substantive canon of construction,¹⁴⁵ the Court discussed the parentheses to determine whether the statute was ambiguous.

Writing for the majority, Justice Breyer declined to give the parenthetical controlling weight. He began by saying that the language outside the parentheses was clear, limiting the illustration to items related to reporting and withholding and thereby making the illustration redundant¹⁴⁶; if the items were already included in the outside language, why would examples be necessary to the meaning or effects of the statute? In his words, “[t]he presence of a bad example in a statute does not warrant rewriting the remainder of the statute’s language,”¹⁴⁷ especially when Congress would likely have made an exemption explicitly. Finally, the “give effect to each word” canon¹⁴⁸ was found to be inapplicable since Chapter 35 would deny the purpose of the statute and was set aside from the outside language anyway.¹⁴⁹ To the majority, “[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of the statute.”¹⁵⁰ The majority therefore endorsed the normal view of the legal community: parentheses deemphasize information.

Writing for the dissent, Justice O’Connor wrote that the language inside the parenthetical controlled. To her, however, the parentheses themselves were unimportant, mirroring her broad claim in *Ron*

143 *Id.* at 87 (alterations in original) (quoting 25 U.S.C. § 2719(d)(1) (2000)).

144 *Id.* (quoting 25 U.S.C. § 2719(d)(1) (2000)).

145 *Id.* at 88.

146 *Id.* at 89 (“One would have to read the word ‘including’ to mean what it does not mean, namely, ‘including . . . and.’” (ellipsis in original)).

147 *Id.* at 90.

148 *See supra* note 126 and accompanying text.

149 *Chickasaw Nation*, 534 U.S. at 93–94.

150 *Id.* at 95 (quoting *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 990 (4th Cir. 1996)).

Pair.¹⁵¹ Writing in a more purposivist fashion, O'Connor said that the parentheses, and the punctuation in general, did not matter and could be changed since a close analysis might "distort[] a statute's true meaning."¹⁵² And reading without clear punctuation, she found that, if Congress included the illustration, there was reason to question both interpretations.¹⁵³ O'Connor concluded that there is "no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one today."¹⁵⁴

Neither opinion offered the parentheses support. On the one hand, the majority suggested that illustrative parentheticals are superfluous support for information already written. This would contradict traditional usage in favor of an overbroad grammatical understanding. On the other hand, the dissent would move back to the *Lessee of Ewing* days and ignore contrarian but congressionally approved punctuation. It was not until last Term that the Supreme Court better addressed the use of statutory parentheticals.¹⁵⁵ In these cases, the Justices mostly steered towards the majority's view in *Chickasaw Nation*, that parentheticals should not control meaning, while adding a grammatical presumption to the mix.

The first case, *Boechler, P.C. v. Commissioner*,¹⁵⁶ involved a statute that allows one to "within 30 days of a determination under this section, petition the Tax Court for review of [a] determination (*and the Tax Court shall have jurisdiction with respect to such matter*)."¹⁵⁷ The illustrative parentheses here allow a reader to question whether the Tax Court has jurisdiction over the issue *only during the thirty-day period*. Finding the statute ambiguous, the Court turned to the use of parentheses as punctuation marks and dismissed them out of hand, finding them not to indicate an "express" condition.¹⁵⁸ Quoting Bryan A. Garner, the Court formally took the view that a parenthetical is "typically used to convey an 'aside' or 'afterthought.'"¹⁵⁹

151 Compare *id.* at 98 (O'Connor, J., dissenting), with *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 250 (1989) (O'Connor, J., dissenting).

152 *Chickasaw Nation*, 534 U.S. at 98 (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993)).

153 *Id.* And, therefore, the substantive canon of construction would load the dice in favor of the Native American tribes. *Id.* at 99–100.

154 *Id.* (citation omitted).

155 *United States v. Woods*, 571 U.S. 31 (2013), did graze the issue, but the interpretation revolved mostly around the meaning of words, not the parenthesis as a punctuation mark. *Id.* at 45–46.

156 142 S. Ct. 1493 (2022).

157 *Id.* at 1497 (emphasis added) (quoting 26 U.S.C. § 6330(d)(1) (2018)).

158 *Id.* at 1498.

159 *Id.* (quoting GARNER, *supra* note 139, at 1020 (4th ed. 2016)).

The next case, *Becerra v. Empire Health Foundation*,¹⁶⁰ solidified this renewed disfavoring of parentheses. At issue was a “byzantine” hospital reimbursement statute that said a hospital could be refunded based on a fraction.¹⁶¹ That fraction is calculated in part by counting “the number of [a] hospital’s patient days’ attributable to low-income patients ‘who (*for such days*) were entitled to benefits under part A of [Medicare].’”¹⁶² A similar fraction is calculated for Medicaid, and the two are added together to determine a possible refund.¹⁶³ The ambiguity involved how Medicare patients are counted in the fraction of days which they are not eligible for payment.¹⁶⁴ The respondent hospital argued that a regulation finding such patients eligible is not reflected in the statutory language.¹⁶⁵ As part of its argument, it read “entitled” to be modified by the parenthetical “(for such days).”¹⁶⁶ This interpretation would mean that a patient must be able to *actually receive* Medicare for their hospital days, rather than simply meeting Medicare’s automatic enrollment requirements.

The majority tore that reading apart. Justice Kagan, citing *Boechler*, said that Congress would not wish to change a statutory scheme with parentheses and “(for such days)” is therefore “incapable of bearing so much interpretive weight.”¹⁶⁷ Congress would not, in the majority’s view, change a “settled” statutory definition of being entitled to benefits by using a “subtle, indirect, and opaque” punctuation mark.¹⁶⁸ Instead, the majority said, that parenthetical works “hand in hand” with the normal definition of entitlement and asks hospitals to include a patient when he is eligible for Medicare on a given day.¹⁶⁹ This makes sense. The parenthetical did not clearly provide a new definition nor did it use exemplifying words to indicate a departure from the common meaning.

Though correctly decided, however, the majority went too far in its treatment of parentheses. The decision could have been narrowly written to disfavor only these particular illustrative marks. Instead, Justice Kagan and the majority deemed parentheses to be altogether unhelpful in determining congressional intent by virtue of Garner’s

160 142 S. Ct. 2354 (2022).

161 *Id.* at 2362 (quoting *Cath. Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 916 (D.C. Cir. 2013)).

162 *Id.* at 2358 (alterations in original) (emphasis added) (quoting 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I) (2018)).

163 *Id.* at 2360.

164 *Id.* This would happen, for instance, if a Medicare user had private insurance. *Id.*

165 *Id.* at 2361.

166 *Id.* at 2365 (quoting 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I)).

167 *Id.* (citing *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1498 (2022)).

168 *Id.*

169 *Id.*

incorrect grammatical understanding. Writing for the dissent in this 5–4 case, Justice Kavanaugh addressed this misguided treatment, saying that “[p]arentheticals can be important.”¹⁷⁰ To be sure, the parentheses were only a small part of this case and its conclusion, but they nevertheless played a role in both statutory interpretations and underscored disagreement about their importance in hard cases.

Regardless of the Court’s poor treatment of parentheses in *Empire Health*, a majority (that included Justice Kagan) used a parenthetical to establish jurisdiction in *Biden v. Texas*.¹⁷¹ The provision in question decreed that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [certain immigration statutes].”¹⁷² One issue in this case was whether lower courts had subject-matter jurisdiction for such injunctive immigration cases. Writing for the majority, the Chief Justice wrote that “the parenthetical explicitly preserv[ed] this Court’s power to enter injunctive relief.”¹⁷³ It determined that Congress had given the Court a specific “carveout” that permitted the injunctive-relief case at bar.¹⁷⁴ To ignore the parenthetical exception that Congress “took pains” to address would be, in the majority’s view, to fail the “give effect” presumption of statutory interpretation.¹⁷⁵ And parenthetical exceptions must have use under the “give effect” canon since Congress set the exception apart.

Justice Barrett took a different view. She noted that the majority gave “surprisingly little attention” to the parenthetical, which “does not appear to have an analogue elsewhere in the United States Code.”¹⁷⁶ Specifically, her dissent posited that the parenthetical might *illustrate* preexisting jurisdiction rather than provide an *exemption* in certain cases.¹⁷⁷ This ambiguity, among other reasons, was reason enough for the dissent to reconsider the parenthetical, despite its “surface appeal.”¹⁷⁸

Though the possibility of reconsideration remains in light of the dissent, this case departs from the presumption against parentheses because a parenthetical granting jurisdiction was allowed to control against an otherwise restrictive outside text. And, given the indicator

170 *Id.* at 2369 (Kavanaugh, J., dissenting) (pointing out constitutional provisions with parentheses).

171 142 S. Ct. 2528, 2538–39 (2022).

172 *Id.* (quoting 8 U.S.C. § 1252(f)(1) (2018)).

173 *Id.* at 2539.

174 *Id.*

175 *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

176 *Id.* at 2561 (Barrett, J., dissenting).

177 *Id.* at 2562.

178 *Id.*

words “other than” in the statute, this case deviates from the others because it deals with an exemptive parenthetical rather than an illustrative one.

The Court recently decided *Sackett v. EPA*,¹⁷⁹ which concerned to what extent certain wetlands are considered “waters of the United States.”¹⁸⁰ If those wetlands fit within the EPA’s expansive definition, then the Sacketts’ property, which was across the road from an offshoot of a river, could be regulated.¹⁸¹ The unclear language came from 33 U.S.C. § 1362(7), which says that “‘navigable waters’ means the waters of the United States.”¹⁸² The Court examined other statutes to provide insight into the meaning of that language. One of these statutes allowed states to administer a “program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used . . . as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within its jurisdiction” by submitting a request for such a program.¹⁸³ This law, 33 U.S.C. § 1344(g), was said to indicate that navigable waters might include wetlands since they were mentioned as an example in the exemption parenthetical.¹⁸⁴ It would therefore favor a broader interpretation.

The Sacketts maintained that this parenthetical should not be read to control the statutory meaning as it would be “an inversion of statutory interpretation to say that this parenthetical reference in a provision dealing principally with permit[s] changes the scope of the central definitional portion of the Act.”¹⁸⁵ The Sacketts also cited the *Boechler* decision and its adoption of the Garner view in their brief.¹⁸⁶ This view seemed to gain traction; during oral argument, Justice Alito questioned the use of the parenthetical to provide a “clear statement” of congressional intent.¹⁸⁷

In the end, the Sacketts prevailed. A majority of the Court found that the definition of navigable waters was narrower than the one the EPA promulgated. An inference was first drawn establishing that § 1344’s parenthetical “presumes that certain wetlands constitute

179 143 S. Ct. 1322 (2023).

180 *Id.* at 1331 (quoting 33 U.S.C. § 1362(7) (2018)).

181 *Id.* at 1331–32.

182 33 U.S.C. § 1362(7).

183 *Id.* § 1344(g)(1).

184 *Sackett*, 143 S. Ct. at 1339. Justice Alito, writing for the Court, described this statutory language as a “convoluted formulation,” further demonstrating a trend against the parenthesis in statutory drafting. *See id.*

185 Transcript of Oral Argument at 57–58, *Sackett*, 143 S. Ct. 1322 (No. 21-454).

186 Reply Brief at 7, *Sackett*, 143 S. Ct. 1322 (No. 21-454) (citing *Boechler*, P.C. v. Comm’r, 142 S. Ct. 1493, 1498 (2022)).

187 Transcript of Oral Argument, *supra* note 185, at 106.

‘waters of the United States.’”¹⁸⁸ Thus, a correct interpretation would “harmonize the reference to adjacent wetlands” in the § 1344 parenthetical with the operative provision in § 1362.¹⁸⁹ The Court then set to work dissecting § 1344’s use of “adjacent” with dictionary definitions, statutory context, and prior caselaw.¹⁹⁰ Ultimately, it found that “adjacent” in § 1344 meant that a wetland must be “*part of* ‘the waters of the United States’”¹⁹¹ such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins” before it may be regulated.¹⁹² Finally, the Court reiterated that § 1344 “does not conclusively determine the construction to be placed on . . . the relevant definition of ‘navigable waters.’”¹⁹³ Nor could it be said that Congress intended to amend the definition with its later passage of § 1344.¹⁹⁴ No mention was made of parentheses in that opinion.

The concurrences also provided few hints as to how parenthetically placed language should be treated. Justice Kagan differed on the definition of “adjacent” in the Court’s interpretation of the parenthetical language and the use of clear-statement rules in discarding the “clear” text of § 1344.¹⁹⁵ Justice Kavanaugh similarly found the Court’s definition lacking, writing that there is a difference between “adjoining” and “adjacent,” and that § 1344 used the latter term.¹⁹⁶ Only Justice Thomas referenced parentheses. In the context of clear-statement rules, he theorized that expanding the meaning of § 1362 “based on nothing more than a negative inference from a parenthetical in a subsection that preserves state authority, is counterintuitive to say the least.”¹⁹⁷ All the Justices seemed to understand, however, that the language inside the parentheses was highly relevant to uncovering the proper extent of EPA regulation. Congress had certainly anticipated that certain wetlands could be navigable waters, given their parenthetical exemption from § 1344’s state permit allowances.¹⁹⁸ The disagreement centered not on relevance, but on whether parenthetical language could bear the burden of a subtle amending of law. That disagreement was insufficiently addressed.

188 *Sackett*, 143 S. Ct. at 1339 (quoting 33 U.S.C. § 1344(g)(1)).

189 *Id.*

190 *Id.* at 1339–44.

191 *Id.* at 1341, 1340–41 (emphasis added).

192 *Id.* at 1341 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion)).

193 *Id.* at 1343 (quoting *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 171 (2001)).

194 *Id.*

195 *Id.* at 1360–61 (Kagan, J., concurring in judgment).

196 *Id.* at 1363–64 (Kavanaugh, J., concurring in judgment).

197 *Id.* at 1355 n.9 (Thomas, J., concurring).

198 *See id.* at 1339 (majority opinion).

Together, these few cases demonstrate that the modern, textualist Supreme Court has not firmly determined how parentheses are to be weighed in statutes. The overall trend, however, indicates that parentheticals are disfavored in tough cases. *Chickasaw Nation* said it outright regarding conflicting illustrative parentheticals. Newer decisions defer to Garner's view: that parentheses indicate unimportant asides and should therefore not control meaning. The decision in *Biden v. Texas*, meanwhile, offers the opposite conclusion given the Court's explicit reliance on a parenthetical. The *Sackett* decision did little to help, conceding that parentheses can demand certain constructions but perhaps not enough to demonstrate a clear statement if the construction goes too far. The treatment of the parenthesis is therefore an ongoing question in the Supreme Court, and there is no consensus one way or another from the lower courts in years past.

B. Other Courts

Other courts, state and federal, have both favored and disfavored statutory text in parentheses. Though these rulings predate recent Supreme Court rulings, they still provide helpful insights. And unlike Supreme Court cases, lower courts have acknowledged the different contextual uses of parentheses.¹⁹⁹ As such, this Section will look at the treatment of definitional, exempting, and illustrative parentheses, as explained in Section II.A of this Note.

Beginning with parentheticals defining or clarifying statutory terms, only one case is worth pointing out. In *United States v. Coscia*,²⁰⁰ a defendant challenged language that made it criminally unlawful to engage in behavior "known to [his] trade as . . . 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)."²⁰¹ The defendant argued that the statute did not define "spoofing," but referred to industry terminology because quotation marks were inserted around "spoofing."²⁰² That argument did not work. The Seventh Circuit held that the presence of a parenthetical definition made industry reference "irrelevant."²⁰³ The defendant next relied on *Chickasaw Nation* to disfavor the parenthetical definition. That comparison was flawed as well. The court wrote that, unlike the surplus, illustrative parentheses in *Chickasaw Nation*, the marks in *Coscia* were used to identify a definition, and that the Supreme Court relied on a

199 See, e.g., *United States v. Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999); *infra* Section II.A.

200 866 F.3d 782 (7th Cir. 2017).

201 *Id.* at 791 (quoting 7 U.S.C. § 6c(a)(5) (2012)).

202 *Id.*

203 *Id.*

parenthetical definition before.²⁰⁴ Further, the circuit court noted that an illustrative use was indicated by the word “including,” which was not at issue in its case.²⁰⁵ Eventually, those parentheses were held to define “spoofing” and were therefore used to uphold the defendant’s conviction.²⁰⁶ In applying definitions, the parenthesis was found to be a helpful interpretive aid.²⁰⁷ That case explicitly favors the use of the marks to carry congressional meaning.

Lower courts have generally found the same helpfulness when applying exemptive parentheses. For instance, in *United States v. Thomas*,²⁰⁸ a court relied on parenthetical information in the U.S. Sentencing Guidelines that discuss drug crimes.²⁰⁹ The specific wording concerned a law “that prohibits the . . . distribution . . . of a controlled substance (or a counterfeit substance).”²¹⁰ Noticeably, the use of “or” here, rather than “except” or something similar, makes this an atypical exemption. The effect, however, remains the same; the parenthetical carves out an instance in which the outside language would not control. In *Thomas*, even though there was no controlled substance, the sentence still applied due to the parenthetical exception.²¹¹ The Tenth Circuit, interpreting this text, also distinguished the case from *Chickasaw Nation*. They wrote that the Supreme Court did not consider parentheses as “necessarily surplusage” and that, since the marks were a “central subject” in that case, they should be given “substantive effect” in the Guidelines.²¹² Unlike the illustrative parenthetical, the court found that the exempting parenthetical in this case was intended to “expand[] the scope of the guideline to include things that would generally not be considered subsets of the term in its common meaning.”²¹³ Thus, the Guidelines intended the given sentence to apply also to counterfeit drugs. The majority also noted that the parentheses

204 *Id.* at 792 (citing *Lopez v. Gonzales*, 549 U.S. 47, 52–53 (2006)). *Lopez* was not included in Section III.A since the dispute there did not involve the parentheses themselves. The Court just applied the definition therein. *See Lopez*, 549 U.S. at 53.

205 *Id.*

206 *Id.* at 790–93, 803.

207 *See also* *Janssen Pharmaceutica, N.V. v. Eon Labs Mfg., Inc.*, 134 F. App’x 425, 428 (Fed. Cir. 2005) (understanding parentheses to clarify or define terms in a patent case).

208 939 F.3d 1121 (10th Cir. 2019).

209 *Id.* at 1123.

210 *Id.* (emphasis omitted) (quoting U.S. SENT’G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT’G COMM’N 2018)).

211 Though the Guidelines are not a statute, the court uses normal statutory interpretation in this case, as if examining a statute. *See id.*

212 *Id.* at 1126–27.

213 *Id.* at 1127.

were “more likely to have been for purposes of readability than to signify unimportance.”²¹⁴

The dissent would disfavor this parenthetical. First, conforming to the broad Garner approach or an appeal to a clear-statement rule, it says that “[t]he substantive reach of the district court’s and majority’s reading would seem to merit more than a mere parenthetical.”²¹⁵ Next, it argues the parenthetical would better “*illustrate or explain* the broader proposition” since an exemptive, expansive meaning would take the definition “too far.”²¹⁶ The majority counters by writing that “including” would have been used instead of “or” if that view were correct.²¹⁷ While the use of “or” is not the clearest way to demonstrate an exception to the outside text, other courts have followed the majority in similar cases involving statutes rather than the Garner approach or *Chickasaw Nation*.²¹⁸

Lower courts have also favored the more straightforward exceptions. In *United States v. Krahenbuhl*,²¹⁹ a magistrate judge confirmed that the parenthetical “(and not under the charge and control of the General Services Administration)” created a “statutory exception to the VA statute when the GSA is in control of a facility.”²²⁰ And in *Fellows v. City of Los Angeles*,²²¹ a party challenged parentheses’ control over text requiring that anyone “having in any county in the state (other than in any city, city and county, or town therein) appropriated waters for sale” to provide water to inhabitants.²²² The California Supreme Court, even at a time when punctuation was not understood to be part of statutes, recognized the language to include an “exception [en]closed in parentheses.”²²³ Overall, these past cases and others indicate that the lower courts tend not to discount exempting parentheticals since they demonstrate legislative carveouts from otherwise applicable statutory texts.²²⁴

214 *Id.*

215 *Id.* at 1141 (Matheson, J., dissenting).

216 *Id.* at 1141–42 (quoting *Mizrahi v. Gonzales*, 492 F.3d 156, 166 (2d Cir. 2007)).

217 *Id.* at 1127 (majority opinion) (italicization omitted).

218 *See, e.g.*, *Disabled in Action v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 212 (3d Cir. 2008); *Holmes Fin. Assocs., Inc. v. Resol. Tr. Corp.*, 33 F.3d 561, 566–67 (6th Cir. 1994); *Kuhns v. Ledger*, 202 F. Supp. 3d 433, 437–48 (S.D.N.Y. 2016); *Cemco Invs., LLC v. United States*, No. 04 C 8211, 2007 WL 951944, at *9 n.8 (N.D. Ill. Mar. 27, 2007).

219 No. 21-CR-127, 2022 WL 134732 (E.D. Wis. Jan. 14, 2022).

220 *Id.* at *4–5 (quoting 38 C.F.R. § 1.218(a) (2021)).

221 90 P. 137 (Cal. 1907).

222 *Id.* at 139 (quoting Act of Mar. 12, 1885, ch. 115, § 10, 1885 Cal. Stat. 95, 98).

223 *Id.* The language in question, passed in 1885, further supports the contention that parentheses are the exception to an otherwise punctuation-less standard in statutory drafting.

224 *See also* *United States v. Monjaras-Castaneda*, 190 F.3d. 326, 330 (5th Cir. 1999); *Lewis v. Hiit*, 370 So. 2d 1369, 1370 (Ala. 1979); *cf. Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*,

Finally, even after the *Chickasaw Nation* decision, lower courts divide over the weight of illustrative parentheses. Some courts have held that they bear interpretive meaning. In *United States v. Monjaras-Castaneda*,²²⁵ a defendant appealed a conviction for an “aggravated felony [which includes] an offense described in paragraph 1 (A) or (2) of section 1324(a) of [the] title (relating to alien smuggling).”²²⁶ That use of parentheses is certainly illustrative since it contextualizes and modifies the outside text. The defendant argued that the statute was ambiguous, reading the parentheses to modify “offense” rather than the specified sections in the statute.²²⁷ In this case, the defendant *transported* aliens but did not *smuggle* them. The majority affirmed the conviction, using the parentheses “descriptively” as an “aid to identification.”²²⁸ The parenthetical generally described the sorts of offenses in the listed sections. Because the referenced sections were held not to restrict transportation crimes, the punctuation had identified the defendant as a felon.²²⁹

The issue is that the rest of the statute tended to differentiate smuggling from transportation crimes.²³⁰ It is at least possible that the parenthetical used this way inverted the statutory text as the *Chickasaw Nation* parentheses did. The dissent noted this conflict, writing that “if Congress had intended to include *any* crime listed in [the sections] as an aggravated felony, it simply would have said so.”²³¹ Further, it commented that grammatical analysis did not resolve the ambiguity and therefore the “language [was] not properly weighed.”²³² If *Chickasaw Nation* was applied, this illustrative parenthetical would have been disfavored, but this case took the opposite view: “Courts have often construed parentheticals in statutes in this manner.”²³³ In the right case, an illustrative parenthetical might control the outside language.²³⁴

148 F.3d 396, 406 (4th Cir. 1998) (affirming an exemption parenthetical in construing an insurance policy).

225 190 F.3d. 326.

226 *Id.* at 328 (quoting 8 U.S.C. § 1101(a)(43)(N) (Supp. III 1998)).

227 *Id.* at 328–29.

228 *Id.* at 330.

229 *Id.*

230 *Compare* 8 U.S.C. § 1324(a)(1)(B)(i) (Supp. III 1998), *with id.* § 1324(a)(1)(B)(ii), *and id.* § 1227(a)(1)(E)(i).

231 *Monjaras-Castaneda*, 190 F.3d at 332 (Politz, J., dissenting).

232 *Id.*

233 *Id.* at 330 (majority opinion).

234 *See also* Sweatt v. Foreclosure Co., 212 Cal. Rptr. 350, 351–52 (Cal. Ct. App. 1985); *cf.* Stifel, Nicolaus & Co. v. Shift Techs., Inc., No. 21 Civ. 4135, 2022 WL 3648145, at *4–5 (S.D.N.Y. Aug. 23, 2022) (reading “illustrative” parentheses to control the construction of a contract).

But the Supreme Court readings concerning illustrative parentheticals are powerful. In *Cabell Huntington Hospital, Inc. v. Shalala*,²³⁵ the same “(for such days)” parenthetical later disfavored in *Empire Health* was under review by the Fourth Circuit.²³⁶ The majority opinion in that case wrote that “an oblique ‘for such days’ parenthetical [does not imply] that Congress was superseding its own statutory definition. [The dissent] relies on the parenthetical to drive the interpretation of the whole provision, thereby allowing the statutory tail to wag the dog.”²³⁷

In *Chipperfield v. Missouri Air Conservation Commission*,²³⁸ at issue was a regulation requiring an analysis that computes “[a]n emission limitation (*including a visible emission limit*) based on the maximum degree of reduction for each pollutant which would be emitted.”²³⁹ The word “including” shows that this use of parentheses mirrors those in *Chickasaw Nation*. One party interpreted the parenthetical to mean that a visible emission limit must be found for all cases involving a pollutant, while the other said that it would be necessary only sometimes.²⁴⁰ The Missouri Court of Appeals’s treatment also mirrored *Chickasaw Nation*. But it also took the step of combining the surplusage approach with the Garner approach. The court began by saying that “the meaning of the words within the parentheses should be considered as incidental explanatory matter which is not a part of, or at least is not essential to, the main statement.”²⁴¹ This conclusion was reached by first noting that the parenthesis separates textual matter, and then following Garner and his inferential step. The use of “incidental[] and helpful[]” marks could not conjure a condition that would lead to the “absurd result of requiring a visible emission limit for an invisible pollutant.”²⁴² Thus, the parenthetical there was not held to control the text.²⁴³

* * *

In practice, courts generally steer away from giving operative meaning to parenthetical statements. The Supreme Court initially

235 101 F.3d 984 (4th Cir. 1996).

236 *Id.* at 988 (quoting 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) (1994)); *see supra* note 167.

237 *Id.* at 990.

238 229 S.W.3d 226 (Mo. Ct. App. 2007).

239 *Id.* at 251 (emphasis added) (quoting MO. CODE REGS. ANN. tit. 10, § 10-6.020(2)(B)(5) (2006)). Regulations are interpreted with normal tools of statutory interpretation. *See id.* at 251–52.

240 *Id.* at 251.

241 *Id.* at 252.

242 *Id.*

243 *Cf., e.g.,* *United States v. Bank of Am. Corp.*, 753 F.3d 1335, 1338 (D.C. Cir. 2014) (similarly interpreting a claim release); *Bos. Helicopter Charter, Inc. v. Augusta Aviation Corp.*, 767 F. Supp. 363, 370–71 (D. Mass. 1991) (interpreting a contract); *Knox v. Krueger*, 145 N.W.2d 904, 908 (N.D. 1966) (interpreting a judgment).

threw out illustrative parentheses in *Chickasaw Nation* and questioned their substantivity in recent cases. Lower courts, meanwhile, have no standardized method. At that level, it is at least clear that some grammatical uses have higher survival rates than others. And that it is time for some guidance on interpreting parentheses in statutory language.

IV. A PROPOSAL ABOUT PARENTHESSES

The current lay of the land regarding the statutory parenthesis is confusing and contradictory. Courts would be correct to limit the application of certain purpose-defying parentheses, but wrong to adopt an overbroad view. This Part provides a solution with a proposed canon of construction.

A. *The Need for a Canon of Construction*

Canons of construction are neutral “rules of thumb” often used by judges to determine legislative intent using the text of the statute.²⁴⁴ While they have existed for hundreds of years,²⁴⁵ they are especially popular in today’s textualist era because “they approximate Congress’s drafting practices and likely preferences” for statutes, and are linked directly to the words on the page.²⁴⁶ For similar reasons, the prevailing canons tend to be “synta[ctic],” rather than “substantive,” meaning they contain “grammatical and punctuation rules . . . by reference to what ordinary English speakers mean when they use or read particular words and sentences.”²⁴⁷ As such, these syntactic canons “pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature’s intent.”²⁴⁸ Among these canons are the last-antecedent, inclusio unius, and punctuation canons.²⁴⁹ Such canons are brought to bear when two readings of a legal text are possible and the best meaning must be determined, for “the canons

244 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2465 n.285 (2003); see also Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 79 (2018).

245 Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinventing Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 542 (1998).

246 Mendelson, *supra* note 244, at 75; see also, e.g., Eskridge, *supra* note 74, at 625; Mank, *supra* note 245, at 549.

247 Mendelson, *supra* note 244, at 80; see also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2159 (2016) (book review).

248 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010).

249 See *id.*; VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 51–56 (2023); Mendelson, *supra* note 244, at 80.

are the vocabulary of statutory interpretation.”²⁵⁰ While some may question the viability or the correct usage of these canons, such debates are beyond the scope of this Note, and it is simply enough that they continue to be prevalent today.

Just as some canons can fall out of favor, others may be created by the courts. Possibly since it has become so woven into the fabric of modern textualism, the punctuation canon has fallen out of explicit use.²⁵¹ Other canons, however, have been “invented” fairly recently,²⁵² or older canons have been “modified” to fit modern understandings.²⁵³ Professor Nina Mendelson found that new additions “had to take a *rule-like form*—to be articulated as an *interpretive principle* applicable across a range of statutory settings—and had to have been *applied repeatedly*.”²⁵⁴ Longtime practice or tradition is also a necessary element of the equation because some legal or historical foundation is needed to stop courts from arbitrarily creating canons.²⁵⁵ Applying the original understanding of a grammatical rule or punctuation mark might serve to satisfy this element in new syntactical canons.

The ongoing mess concerning the statutory parenthetical calls for a new canon of construction. Although the last-antecedent rule has been applied to uncover which words a parenthetical has modified,²⁵⁶ it is not enough to provide a useful range of guidance. It is the role of the parenthesis itself that provides courts with the confusion: whether treating it as less important would upset congressional intent. Such questions have been litigated repeatedly in state and federal court, and they are not going away given the number of parentheses in federal and state law. Chief Justice Roberts has even said that the Supreme Court has faced an “unfortunately large number of cases where we do this type of parsing.”²⁵⁷ Resting on the safe assumption that the punctuation canon is implicitly used in current statutory interpretation cases, it would help to have an agreed-upon usage of parentheses. That

250 See WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 21 (2016).

251 See Mendelson, *supra* note 244, at 101–02, 111. The punctuation canon tells courts that “[p]unctuation is a permissible indicator of meaning.” SCALIA & GARNER, *supra* note 76, at 161.

252 Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Eric for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 765 (2013).

253 Mendelson, *supra* note 244, at 123.

254 *Id.* (emphasis added).

255 Cf. Barrett, *supra* note 248, at 128–54 (tracking historical underpinnings of substantive canons).

256 See *Bos. Helicopter Charter, Inc. v. Agusta Aviation Corp.*, 767 F. Supp. 363, 370–71 (D. Mass. 1991).

257 Transcript of Oral Argument at 27–28, *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493 (2022) (No. 20-1472).

way, courts would no longer need to inquire as to their significance while parsing such language.²⁵⁸

Two arguments against a new canon must be addressed. First, one could argue that a canon is not necessary since other, more entrenched, canons could already do the heavy lifting in parenthetical interpretation. This argument has merit. There are, after all, other syntactic or contextual canons that diminish the need for a new one. For instance, it might be that the *eiusdem generis* canon²⁵⁹ or the harmonious-reading canon²⁶⁰ might signal the discounting of contrary words in an “including” illustrative parenthetical. And the interpretive-direction canon could be used to convince courts to follow parenthetical definitions.²⁶¹ The issue is that these canons were not invoked in the applicable cases, and they might not always achieve the correct result even if they were.²⁶² There could be cases where an item in a parenthetical list could include something of a general class but that nonetheless contradicts the meaning of the text, defeating the applicability of *eiusdem generis*. Further, the mood of current textualist judges is to inquire about the punctuation marks themselves before the context of the words around them. Those marks are more closely linked with the passed text than contextual relationships and such a textually based relationship should therefore be standardized with a new canon.

One could also argue that the Court has already implicitly made a canon that would discount parenthetical information when it conflicts with outside text. After all, in multiple cases over the past couple of years, the Garner definition of parentheses—that they indicate unimportant phrases—has been cited favorably in the Supreme Court.²⁶³ There are three things wrong with this view as a canon. First, this line of cases is disrupted by *Biden v. Texas*, in which the Court explicitly

258 See Transcript of Oral Argument, *supra* note 185, at 106; Transcript of Oral Argument at 56, *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022) (No. 20-1312); Transcript of Oral Argument, *supra* note 257, at 13, 27–31, 53–54.

259 See SCALIA & GARNER, *supra* note 76, at 199.

260 See *id.* at 180. This may also be used to discount a confusing or contrarian illustrative parenthetical.

261 See *id.* at 225.

262 For an example of the shortcomings, or at least contentiousness, of looser, linguistic canons and the disputable context they may permit, see the debate concerning the *eiusdem generis* and *noscitur a sociis* canons in *Yates v. United States*, 574 U.S. 528, 545–46 (2015); *id.* at 550–51 (Alito, J., concurring in judgment); *id.* at 563–65 (Kagan, J., dissenting). Unlike these canons, the canon this Note proposes depends on relatively little context or few linguistic clues; a judge need only determine what sort of parenthetical is at issue and how this canon interacts with other applicable canons and the ever-present wish for clear statements. See *infra* Section III.B.

263 See *Empire Health*, 142 S. Ct. at 2365; *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1498 (2022).

relied on parentheses.²⁶⁴ For a canon to be born, it must be similarly “applied repeatedly” across cases, and the *Biden v. Texas* departure violates that principle. Second, it does not account for the various uses of parentheses and would apply negative treatment across the board. Such lack of nuance could circumvent congressional intent, especially in cases like *Biden v. Texas* and the parenthetical in *Sackett* that involves expressly carved-out exceptions. Third, it is likely that the Garner view of parentheses in legal writing is incorrect. Parentheses can and do change the meaning and context of sentences and statutes.²⁶⁵ Lower courts have noted this across cases and have interpreted them differently to reflect this.²⁶⁶

It would be wrong to jettison the lower courts’ decisions and an ongoing grammatical and legal debate for a narrow and blunt understanding. If parentheses cannot impart important commandments of a law, why does Congress use them at all? A well-reasoned canon of construction would instead recognize and apply the weaknesses and strengths of statutory parentheses in light of their history and grammatical context. The next Section proposes such a canon.

B. *The Proposed Parenthesis Canon*

Courts should adopt the following as a new syntactic canon of construction: “a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not be discounted.” This “rule-like form”²⁶⁷ meets the test for becoming an accepted canon as it makes sense legally, grammatically, and historically. This final Section delves into those reasons.

First, the legal history of parentheses and punctuation is inverted in a way that justifies a dedicated canon of construction. Parentheses aided legislators from the very start in a way their sister marks did not. Statutory drafting necessarily required breaks in sentences, especially during a time when commas and semicolons were rarely used. The parenthesis was, however, commonly used to mark those breaks, even in the fourteenth century.²⁶⁸ Moreover, those early punctuations indicating sentence breaks were invoked in the *Casement* case as a matter of statutory interpretation.²⁶⁹ Parentheses remained in use by

264 See *supra* notes 171–75 and accompanying text.

265 See *supra* Section II.A.

266 See *supra* Section III.B.

267 Mendelson, *supra* note 244, at 111.

268 See, e.g., *supra* notes 33–35 and accompanying text.

269 MELLINKOFF, *supra* note 17, at 168–69 (citing *R v. Casement* (1917) 86 LJKB 467 (Crim. App.) at 486 (Eng. & Wales)) (mentioning parenthesis by name).

legislators in the American colonies and the First Congress,²⁷⁰ and should therefore be acknowledged as a valuable interpretive asset.

Though each of the uses of the parenthesis—definitional, exemptive, and illustrative—were used in those past eras, certain uses had clearer intentions than others. For instance, in one old British statute, a parenthetical read that a person would be tried by the “[English and Scottish] Parliaments (they judging against the persons subject to their own authority)” in certain cases.²⁷¹ When compared against two-word exemptions seen in other statutes,²⁷² and perhaps ornamental parentheticals in others,²⁷³ it becomes apparent that some uses have always been cleaner. Similarly, the constitutional wording, “(Sundays excepted),”²⁷⁴ demonstrates a clear intention that Sundays are not included in counting the days a President has to consider a bill.²⁷⁵ The drafters clearly knew what they were doing in setting exceptions, and those clear intentions are neither extraneous nor unimportant.²⁷⁶ In fact, the interior matter could determine what is a law and what is not. Later on, the idea of using punctuation to decide cases was shunned, but this canon of construction favoring the differentiation of uses based on clarity has early historical and traditional strength.

Yet the proposed canon is not blind to modernity. As the favorability of other punctuation increased, the favorability of parentheses rightly decreased. If a detached phrase contradicts its parent sentence, there are compelling reasons to discard it. And due to such ambiguous parentheticals, legal guides across the country warned against any usage.²⁷⁷ The proposed canon takes both the good and bad into account. It recognizes that ambiguity is the greatest danger in interpretation by setting a presumption against parentheses. Yet it also respects that different uses are less ambiguous and avoids the overbroad view seducing the courts by creating an exception for two uses.

270 See *supra* notes 118–22 and accompanying text.

271 Pacification, England and Scotland Act 1640, 16 Car. 1 c. 17 (Eng. & Wales) (repealed 1863).

272 See Trade with Africa Act 1697, 9 Will. 3 c. 26, § 7 (Eng. & Wales) (repealed 1867).

273 See Bill of Rights 1688, 1 W. & M. Sess. 2 c. 2 (Eng. & Wales) (amended 1825, 1867, 1948, 1950, 2013) (“[T]he Prince of Orange (whome it hath pleased Almighty God to make the glorious Instrument of Delivering this Kingdome from Popery and Arbitrary Power) . . .”).

274 U.S. CONST. art. I, § 7, cl. 2.

275 See *id.* For similar constitutional language, see also *id.* 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 . . .” (emphasis added)).

276 See *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2369 (2022) (Kavanaugh, J., dissenting); *Kesavan & Paulsen*, *supra* note 42, at 337.

277 See *supra* notes 134–40 and accompanying text.

Under this canon, the hardest part of interpreting a problematic parenthetical would be determining what use the parentheses at issue serve.

Second, the proposed canon can be synthesized by examining past caselaw. It is thereby seen that it has been “applied repeatedly” by the courts “across a range of statutory settings.”²⁷⁸ The presumption against parentheses comes from previous Supreme Court directives and the benefits of legal certainty. The most influential case concerning parentheses is *Chickasaw Nation*, and that case also controls many interpretations under the proposed canon. As in that case, the canon accepts many parentheticals as disfavored because they “cannot be used to overcome the operative terms of the statute.”²⁷⁹ This is especially true for illustrative uses like those in *Chickasaw Nation*, for such parentheses are only there to give courts an understanding of how outside text might apply or be implemented; if the inside text is confusing or risks the purpose of the provision, then it makes sense to discard it as surplusage since it serves to elucidate the outside text.²⁸⁰ While *Boechler* and *Empire Health* did not feature the same kind of “including” illustrative parentheses, they followed the same rule as the majority in *Chickasaw Nation* and disfavored the marks.

Empire Health interpreted the illustrative parenthetical in question as a poor indication that Congress sought to drastically morph the meaning and values of a complex Medicare scheme and definitions.²⁸¹ This decision makes sense logically and keeps in line with the proposed canon and lower court decisions. In fact, it mirrors the view of the Fourth Circuit in interpreting the same statute in a different case. Just as the Court found it unlikely that the illustration would change the meaning through an “opaque . . . mechanism,”²⁸² the Fourth Circuit refused to “allow[] the statutory tail to wag the dog.”²⁸³ It is true that some courts, like the Fifth Circuit in *United States v. Monjaras-Castaneda*, have interpreted illustrative parentheses the other way.²⁸⁴ But these cases are the outliers, especially after the new clear-statement guidance from the Supreme Court in *Empire Health*, *Boechler*, and *Sackett*. Thus, the canon respects the Supreme Court’s recent decisions, stabilizing them into a presumption against most parentheticals.

278 Mendelson, *supra* note 244, at 111.

279 *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (quoting *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 990 (4th Cir. 1996)).

280 See SCALIA & GARNER, *supra* note 76, at 63–65.

281 See *Empire Health*, 142 S. Ct. at 2365.

282 *Id.*

283 *Cabell Huntington*, 101 F.3d at 990.

284 See 190 F.3d 326, 331 (5th Cir. 1999).

There is a distinction, however, that is important to note in drawing the new canon. *Empire Health* and *Sackett* left the perception of parentheses open,²⁸⁵ while *Boechler* adopted the overbroad view characterizing the parenthesis as “used to convey an ‘aside’ or ‘afterthought.’”²⁸⁶ The *Boechler* case indiscriminately targets the parenthesis. It is that view the proposed canon battles. Attorneys and courts must not prevail on an argument that important, controlling statutory language should always be dropped by virtue of its unfortunate placement in a parenthetical.

The proposed canon exempts definitional and exemptive parentheses from the above presumption to add the nuance *Boechler* misses. This move is also backed by caselaw. On the Supreme Court level, *Biden v. Texas* incorporates the idea that exceptions in parentheticals deserve protection. Though it was an ambiguous statement warranting its own dissent,²⁸⁷ the parenthetical was held to exempt the Supreme Court from a prohibition of jurisdiction.²⁸⁸ And *Sackett* buttresses this nuance as well. In that case, § 1344 was understood by each Justice to remove certain navigable waters from state permitting regimes, including adjacent wetlands.²⁸⁹ This exemption was made in parentheses and potentially contrasts with a narrower definition of navigable waters.²⁹⁰ But it was still unanimously held that the language did some work, clearly setting aside various navigable waters and adjacent wetlands from state permitting ability. An exemptive parenthetical had a controlling effect, even if it might have conflicted with the general, narrow view of national waters. The question remains, however, if the exemption can denote a clear statement.

In similar cases interpreting an exempting parenthetical, lower courts favored the reasoning in *Biden v. Texas*. They used the parentheses to chart the interpretation. Courts including the Tenth

285 Compare *Empire Health*, 142 S. Ct. at 2365, with *id.* at 2369 (Kavanaugh, J., dissenting). And *Sackett* left the question open by conceding that parenthetical language created a congressional directive, if not a clear statement amending a law. *Sackett v. EPA*, 143 S. Ct. 1322, 1339 (2023).

286 *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1498 (2022) (quoting GARNER, *supra* note 139, at 1020 (4th ed. 2016)).

287 See *Biden v. Texas*, 142 S. Ct. 2528, 2562 (2022) (Barrett, J., dissenting). And that dissent challenged the use of the parenthetical, claiming that it was illustrative and not exemptive, rather than claiming that the parentheses had no value. This dissent is thus compatible with Justice Kavanaugh’s dissent in *Empire Health*.

288 See *supra* notes 171–75 and accompanying text.

289 See *Sackett*, 143 S. Ct. at 1339. Nothing in the concurring opinions suggests the exemptive parentheses do not carve out certain waters.

290 See *id.* at 1338–39; Reply Brief, *supra* note 186, at 7.

Circuit,²⁹¹ the California Supreme Court,²⁹² and the Eastern District of Wisconsin²⁹³ have all recognized parenthetical supremacy against the rest of the text when faced with an exempting parenthetical. Indicator words signaled to the court that the inside words were specifically considered by the drafter, and were therefore given authority. The proposed canon does the same, preserving these decisions along with the others.

Definitional canons are the second class of protected parentheses but are under relatively less stress than exempting parentheses. Cases like *United States v. Coscia* contribute to the structural integrity of the canon since they explicitly concern parenthetical definitions.²⁹⁴ This inclusion, however, should go without saying, since courts recognize that definitions in statutes play a large role in their interpretation,²⁹⁵ and Congress often places those definitions within parentheses.²⁹⁶ The proposed canon therefore synthesizes recent Supreme Court cases doubting parentheses with other cases identifying their particular uses. If adopted, recent cases would not be harmed,²⁹⁷ and the current trends may continue.

Third, the proposed canon fits neatly into existing notions concerning canons of construction. The proposed canon fully falls into the “syntactic” classification of canons, separate from its “linguistic” and “substantive” cousins, since it simply tries to determine the right way to read a text, using basic rules of the English language. There is little place for contextual reasoning in applying this or other syntactic canons. It operates either as a subset of the punctuation canon, like the rules concerning the serial comma,²⁹⁸ or as its own independent canon. Since the punctuation canon has gone out of use due to its own obviousness, the clear and best option would be to give the parenthesis its own canon. And, like any other syntactic canon, it may be eroded or bested by its brothers and sisters.²⁹⁹ No canon is absolute, but they are useful in arguing for one interpretation over another.

291 See *United States v. Thomas*, 939 F.3d 1121, 1123–27 (10th Cir. 2019).

292 See *Fellows v. City of Los Angeles*, 90 P. 137, 139 (Cal. 1907).

293 See *United States v. Krahenbuhl*, No. 21-CR-127, 2022 WL 134732, at *5 (E.D. Wis. Jan. 14, 2022).

294 866 F.3d 782, 791 (7th Cir. 2017).

295 See SCALIA & GARNER, *supra* note 76, at 225.

296 See *supra* note 105–06 and accompanying text.

297 The dicta in *Boechler* regarding the use of parentheses would, however, need revisitation. See *Boechler, P.C. v. Comm’r*, 142 S. Ct. 1493, 1498 (2022).

298 See SCALIA & GARNER, *supra* note 76, at 165–66.

299 See, e.g., *id.* at 59, 63, 66, 134, 170, 234 (describing the principle of interrelating canons, presumption against ineffectiveness, presumption of validity, unintelligibility canon, presumption of consistent usage, and the absurdity doctrine). Each of these

A “rule against parentheses”³⁰⁰ is desirable as a canon of construction so long as certain grammatical and legal realities are observed. Illustrative parentheses can often be confusing surplusage, disconnected from legislative intent, but they should not drag exemptive and definitional parentheses down with them. The proposed canon has been implicitly followed by the courts, has a legal and historical foundation, and is stated here as a generally applicable rule. It should be adopted.

CONCLUSION

For want of a parenthesis canon, we have this Note. Parentheses are a sudden concern in statutory interpretation. And they are a valuable addition to the discussion: their history of statutory usage differs from that of other punctuation marks, and their perception in the legal community is similarly complex. Though the parenthesis has been used and interpreted for hundreds of years, it is falling out of favor. A veneer of ambiguity combined with a trend peddling an incorrect grammatical assumption entices judges and lawyers interpreting statutes to take the easy way out and discount any parenthetical wording out of hand.

But the enticement leads interpreters astray. It correctly points out that some provisions contradict the rest of the statute and should be disfavored. Yet it does not consider the varied uses of parentheses and the different meanings those uses might impart. A new canon of construction is therefore required to put the pieces together and provide proper guidance: statements in parentheses should be discounted when they conflict with the rest of the text, but an exception or definition in parentheses should not be discounted.

This canon best synthesizes modern legal understanding and accounts for the parenthesis’s legal history and current usage. As litigation including parentheses continues, courts that adopt this canon may continue their trend of disfavoring statutory parentheses (except in certain circumstances).

interpretive considerations can counteract the proposed parenthesis canon in the right statute and case.

300 COOK, *supra* note 134, at 32.

