



SOME REFLECTIONS ON NOT READING THE STATUTES

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ON MARCH 18, 1947, ONE OF THE GREAT JUSTICES, Felix Frankfurter, gave one of the great speeches on statutory interpretation. He called it “Some Reflections on the Reading of Statutes.”¹ Sixty years later, we consider his speech a classic on how to read the statutes. The irony, however, is that we no longer read the statutes. Not in the sense that Frankfurter did. Frankfurter actually did read the actual statutes. He did not read the United States Code; he read the Statutes at Large. He jauntily described himself as “one for whom the Statutes at Large constitute his staple reading.”² Frankfurter, in other words, did not read imitation law; he read real law. So did everyone else, in Frankfurter’s day.

Nowadays, we don’t. We read imitation law.

Consider: A text passes both houses of Congress. It is printed on parchment and presented to the President. If it becomes law, it is sent to the National Archives and preserved there. These texts, not

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¹ Felix Frankfurter, “Some Reflections on the Reading of Statutes,” 47 Colum. L. Rev. 527 (1947).

² Frankfurter, 47 Colum. L. Rev. at 527.

any others, are the “Laws of the United States” that form part of the “supreme Law of the Land.”³ They are session laws, and from the early days we have published them in a set of books called the United States Statutes at Large.

We do not read them anymore. We do not cite to them, we do not quote from them, and – the most recent development – we do not use them in statutory interpretation.

We do not like to read session laws, of course. It can be tough going. “Many laws on which lawmakers are asked to vote are not in fact readable, consisting as they do of a string of amendments to existing laws, changing three words in subsection 5 of section 2 of article 7 of something already on the books.”⁴ Who wants to read that?

So we read the United States Code instead. The Code is – no disrespect intended – a Frankenstein’s monster of session laws. The Code is made by taking the session laws, hacking them to pieces, rearranging them, and stitching them back together in a way that gives them false life. Many pieces are altered, and many others are thrown away. The result is something like a Cliffs Notes guide to the real law. That is all the Code is, and that is all it is supposed to be.

The Code is prepared by the Office of the Law Revision Counsel, which operates under the supervision of the Committee on the Judiciary of the House of Representatives. The head of that office in Frankfurter’s day, Dr. Charles Zinn, explained that the Code organizes the session laws “so that you will be able to find them with less trouble than you would have by referring *only* to the Statutes at Large.”⁵ The Code is not law; it is a *law locator*, and a very useful one.

The Code is at its most useful when one session law has been amended by another: “[T]o find the present status of that law would

³ Article VI, clause 2 of the Constitution of the United States.

⁴ Martin Mayer, *THE JUDGES* 365 (2006).

⁵ Charles J. Zinn, “Codification of the Laws,” 45 *Law Libr. J.* 2, 2 (1952) (emphasis added).

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be difficult if the search were limited to the Statutes at Large. . . . [I]t would be necessary to go through each volume of the Statutes at Large since the original enactment and try to piece it all together.”⁶ The Code carries out the amendments for us, ministerially (for the most part), giving us a single clean text. The rest of the amendatory statute, with all its clues to meaning – titles, headings; findings, purposes; structure, arrangement – is thrown away.

The Code can also be useful when one session law affects another without directly amending it – but only if we recognize what is going on behind the curtain. Consider the statute that charters the Senate’s legislative drafting office: section 1303(a) of the Revenue Act of 1918 (40 Stat. 1141). The first sentence provides:

That there is hereby created a Legislative Drafting Service under the direction of two draftsmen, one of whom shall be appointed by the President of the Senate, and one by the Speaker of the House of Representatives, without reference to political affiliations and solely on the ground of fitness to perform the duties of the office.

Section 602 of the Revenue Act of 1941 (55 Stat. 726) amended this by striking “President of the Senate” and inserting “President pro tempore of the Senate.” So far so good. But then, the second sentence of section 531 of the Legislative Reorganization Act of 1970 (84 Stat. 1204) provides:

. . . the provisions of section 1303 of the Revenue Act of 1918 shall have no further applicability of any kind to the Speaker or to any committee, officer, employee, or property of the House of Representatives.

How does the Code show this? By rewriting 1303(a) holistically and placing it in two sections, 2 U.S.C. 271 and 272:

§ 271. Establishment

There shall be in the Senate an office to be known as the Office of the Legislative Counsel, and to be un-

⁶ Zinn, 45 Law Libr. J. at 3.

der the direction of the Legislative Counsel of the Senate.

§ 272. Legislative Counsel

The Legislative Counsel shall be appointed by the President pro tempore of the Senate, without reference to political affiliations and solely on the ground of fitness to perform the duties of the office.

Consider: What is the official name of the office? The Code gives one answer, the statutes another. How many draftsmen are at its head? A Code reader answers “one, of course,” while a session-law reader answers “literally, two ... but one is appointed by the Speaker, and 1303 no longer applies to the Speaker – so effectively, probably only one.”

So the single clean text of 271 and 272 tells us all we need to know – for our garden-variety legal hack work. For statutory interpretation it is useless, even misleading.

Preparing these single clean Code texts – the faithfully ministerial ones, the aggressively holistic ones, and the many varieties in between – and placing them in the Code is called “classification,” and classification is “a matter of opinion and judgment.”⁷

When we remember this, we are fine. The Code is just the “opinion and judgment” of one House office. Ultimately, as Abner Mikva reminded us, “it is for *the courts* to find the meaning of all these statutes, all the amendments to those statutes, and all the amendments to the amendments.”⁸

The Code is only “prima facie” evidence of the law,⁹ while the Statutes at Large is “legal” evidence,¹⁰ and “the very meaning of

⁷ Zinn, 45 Law Libr. J. at 3.

⁸ Abner J. Mikva, “Reading and Writing Statutes,” 28 S. Tex. L. Rev. 181, 182 (1986-1987) (emphasis added).

⁹ 1 U.S.C. 204(a). To be sure, a few of the shorter titles of the Code have been enacted into positive law, and are “legal” evidence of the law (1 U.S.C. 204(a)), but the Statutes at Large is still the source from which these titles are prepared, so the Stat. text must still prevail over the U.S.C. text.

¹⁰ 1 U.S.C. 112.

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‘prima facie’ is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.”¹¹ Thus:

If you go into court and cite a section of the United States Code, your adversary may bring in a dozen Statutes at Large to show that what is in the Code is not an accurate statement. As a result, he may prevail because the Statutes at Large are legal evidence of the law, whereas the Code is only prima facie evidence.¹²

And yet nowadays the Code is what we cite to, quote from, and interpret. We no longer read the Statutes at Large.

We started down this road soon after Frankfurter spoke, and we are now quite far along. At the time he spoke, our primary citation was, and had always been, to “Stat.” When we referred to a law, we gave the Stat. cite first, then the U.S.C. cite in parallel (if at all). If the law had been amended, we gave one Stat. cite for the original session law and another for the amendment. As the 1947 Bluebook explained:

In citing United States statutes, cite the original statute or the particular section desired by volume, page, and date of statute, and then the United States Code (1940 edition) by title, section, and date. 36 Stat. 1094 (1911), 28 U.S.C. § 7 (1940). Where the statute has been amended, include the citation for the amendment in the Statutes at Large, and use two U.S.C. citations if necessary.¹³

In July 1947 we started enacting titles of the Code into positive law, and perhaps this is when we began to drift. Almost immediately, we decided to give only U.S.C. cites – no Stat. cites – for those titles:

¹¹ *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam).

¹² Charles S. Zinn, “Revision of the United States Code,” 51 *Law Libr. J.* 388, 389-90 (1958).

¹³ Harvard Law Review Association, *A UNIFORM SYSTEM OF CITATION* (hereinafter “BLUEBOOK”) 18 (7th ed., 1947).

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Titles of the United States Code which have been enacted into law ... should be cited as the official statute, and no reference should be made to the Statutes at Large. Example: 15 U.S.C. § 42 (1946).¹⁴

(Using title 15 as the example was a very poor choice; that title has never been enacted into law.)

In 1955 we stopped giving Stat. cites for amendatory laws:

In citing statutory material which has been amended ... the Stat. cite is that of the original enactment; omit the amending Stat. cite or cites; give the final form as amended in U.S.C. *E.g.*, 64 Stat. 803 (1950), as amended, 50 U.S.C. App. § 451 (1952).¹⁵

In 1962 Frankfurter retired; in 1965 he died. Then in 1967 we stopped citing to Stat. entirely:

Federal statutes ordinarily are cited to *United States Code* (U.S.C.) *Statutes at Large* ... need not be cited unless the language discussed differs materially from that in U.S.C.¹⁶

“Stat.” was no longer our staple reading. And to this day we generally refer only to U.S.C. section numbers. Even Justice Scalia, once a stickler about using real section numbers,¹⁷ now uses unofficial U.S.C. section numbers.¹⁸

And nowadays we quote almost exclusively from the Code. Consider *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469

¹⁴ BLUEBOOK 20 (8th ed., 1949).

¹⁵ BLUEBOOK 12 (9th ed., 1955).

¹⁶ BLUEBOOK 26-27 (11th ed., 1967) (italics in original).

¹⁷ *E.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (concurring opinion) (“The Court refers to this section as ‘525,’ which corresponds to the unofficial codification of the section in the United States Code, 50 U.S.C. App. 525. I find it more convenient to use the actual statutory section number – ‘205’ – in discussing the history of the provision”).

¹⁸ *E.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005) (majority opinion) (using the unofficial section number, 8 U.S.C. 1231, rather than the actual one, section 241 of the Immigration and Nationality Act).

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(1992): The majority and dissent both quoted the same law, but the majority used the Code while the dissent used the Statutes at Large.¹⁹ The majority claimed the “present form . . . [is] the form we have quoted” and it took the text “as written,”²⁰ but the claims were simply not true. Holistic edits had been made by the Code preparers: “this Act” became “this chapter”; a heading appears in the majority’s Code that does not exist in the Statutes at Large.

That same 1967 Bluebook also added this wrinkle:

When a statutory section is amended . . . cite both versions to the code, if therein. If discussing the present version, cite: 28 U.S.C. § 2201(b) (Supp. I, 1965), *amending* 28 U.S.C. § 2201 (1964). If discussing the former version, cite: 28 U.S.C. § 2201 (1964), *as amended*, 28 U.S.C. 2201(b) (Supp. I, 1965).²¹

That’s right: *Cite both versions to the Code; cite neither version to Stat.* From there it is only a small step to *Read both versions of the Code; read neither version of Stat.* And so when Congress uses one law to amend another, we no longer take the Stat. text of the base law and read it alongside the Stat. text of the amendment. Our Statutes at Large gather dust. Meanwhile, we stock our shelves with obsolete Codes just so that we can read an old U.S.C. text against a new one.

Disregard for the Statutes at Large is no longer just a habit reflected in our citation guides; it’s a doctrine declared by our courts. When the Supreme Court tells us that to gauge the change wrought by a 1996 amendment “one lays the pre-1996 version of the statute beside the current version,”²² no one bats an eye. We don’t need the Court to tell us; we’ve been doing it for 40 years.

What is striking is that we, as a federal legal community, have traveled this far without any real debate. Many have lamented the disconnect between the judicial and legislative branches, but no one proposes that we go back to reading the actual text of the actual

¹⁹ 505 U.S. at 472-73, 489-90.

²⁰ 505 U.S. at 473, 476.

²¹ BLUEBOOK 30 (11th ed., 1967) (italics in original).

²² *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 n.3 (2005).

statutes. We are not even aware that we no longer do. On this point, there are no conservatives in one camp and liberals in another. There are no textualists here and pragmatists there. We are all on the bus.

Should we be? Suppose we no longer had a code. We would have a tougher time researching federal law, but we would use other research tools and we would survive. Our staple reading would again be the Statutes at Large. Whenever one session law directly amended another, we would make sense of the two the way we used to do it, by reading both together:

In construing any act of legislation ... regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.²³

That is how we read statutes in Frankfurter's day: We read each new session law against the background of the old ones. As another of our great justices, Oliver Wendell Holmes, explained, "a page of history is worth a volume of logic"²⁴ and "[t]he statutes are the outcome of a thousand years of history. ... They form a system with echoes of different moments, none of which is entitled to prevail over the other."²⁵

For help, we kept "compilations":

I consider a compilation just a collection of statutes without any change of language at all. You might collect all of the statutes on the subject of labor and put them into a group without changing a single word.²⁶

²³ *United States v. Wong Kim Ark*, 169 U.S. 649, 653-54 (1898).

²⁴ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (majority opinion).

²⁵ *Hooper v. Tax Commission of Wisconsin*, 284 U.S. 206, 219 (1931) (dissenting opinion).

²⁶ Zinn, 51 Law Libr. J. at 389.

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If an agency or congressional committee was responsible for a subject, it maintained a compilation on the subject. The Court used them,²⁷ and so did the rest of us.

A compilation included all the relevant session laws, unedited, verbatim. If one session law directly amended another, no attempt was made to show a composite “as amended” text; the compilation showed the two session laws, the original one and the amendatory one. A compilation of the Securities Act of 1933, for example, showed the original 1933 session law and all the other session laws that later amended it. Making sense of the amendments – striking this, inserting that – was seen not as a ministerial task for the compiler but as a holistic task for the reader and, ultimately, as a holistic task for the judge.

We do not have compilations like this anymore. The agencies and committees now carry out the amendments for us.²⁸ A so-called “compilation” made today of the Securities Act of 1933 shows a single, “as amended” text. In Frankfurter’s day this was not a compilation, but rather

what is known as a “consolidation.” The present United States Code is a good example of this. In it, we have taken all the laws on particular subjects, rearranged them according to the subject matter, and tried to show their current status by giving effect to later amendments or later inconsistent laws.²⁹

Consolidations are not real law. A text that “giv[es] effect to later amendments or later inconsistent laws” is very useful, but it is not official: It is not a text that has been passed by Congress and presented to the President. When we read a consolidation we lose meaning. An amendatory statute has text and structure; titles and

²⁷ See, e.g., *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 n.4 (1958), referring to a 1951 compilation of antitrust laws.

²⁸ One early consolidation was House Judiciary Committee, “The Antitrust Laws: A Basis for Economic Freedom” (1950).

²⁹ Zinn, 51 *Law Libr. J.* at 389.

headings; findings and purposes. There is meaning in all of these things.³⁰

So if a law has been amended and there is a question about the new meaning, the consolidated text is relevant, but does not trump the session laws. Except that the Supreme Court now says that it *does*. In *Lamie v. United States Trustee*, 540 U.S. 534 (2004), the Court held that if the Code is clear, we do not look at the underlying session laws. Session laws are “predecessor statutes” that are trumped by “existing text”:

The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes. It is well established that when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.³¹

Eight Justices joined. (Justice Stevens did not.) It was a casual, almost throwaway, line. “Predecessor statutes”: Put them with the committee reports and the dogs that didn’t bark.

What about the legal evidence of the law? What about the documents that passed Congress, were presented to the President, and are preserved on parchment in the National Archives? What about the supreme law of the land? No one answers. (No one even asks.) So we read the Code first. If it is clear, we read nothing else. If it is not clear, we look at the old Code. We no longer ask what Congress wrote; we ask what the Code says.

This is where we are. Is this where we should be? Consider this (fanciful) scenario. In 1968 Congress enacted the “Coffee Shop Act.” Section 130(a)(2)(A) provided:

(A) Any coffee shop that spills a hot drink on a person is liable to that person for statutory damages equal to (i) in the

³⁰ “Statutory construction is a ‘holistic endeavor’ ... and, at minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.” *United States Nat’l Bank of Ore. v. Independent Ins. Agents*, 508 U.S. 439, 455 (1993).

³¹ 540 U.S. at 534 (citations and internal quotation marks omitted).

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case of coffee 100 times the price of the drink, or (ii) in the case of tea 200 times the price of the drink, except that the liability under this subparagraph shall not be greater than \$100.

That \$100 cap, courts consistently held, applied both to coffee under (i) and tea under (ii). A grammar maven would object (under the grammatical rule of the last antecedent, the “except ...” phrase would apply only to (ii)), but this became settled law.

In 1995, Congress enacted the “Coffee Shop Act Amendments of 1995.” Section 6 provided:

Section 130(a)(2)(A) of the Coffee Shop Act is amended as follows:

- (1) TECHNICAL AMENDMENT. – By striking “or (ii)” and inserting “(ii)”.
- (2) LATTE SPILLS. – By inserting before the period at the end the following: “, or (iii) in the case of coffee with steamed milk, not greater than \$200”.

Along comes a coffee shop that spills a \$4 coffee (not with steamed milk) on a little girl. She sues for \$400, arguing that, under a plain reading of the consolidated text, the \$100 cap no longer applies: grammatically, the \$100 cap attaches only to (ii) and applies only to tea. The coffee shop argues that the \$100 cap applied in 1968 and the 1995 law didn’t change that. Who wins?

To a reader of session laws, this is not a hard case: The coffee shop wins. We read the two session laws, 1968 and 1995, and ask whether 1995 *clearly* signals a change in the policy expressed in 1968:

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible.³²

³² *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (internal citations omitted).

It makes no difference to the reader of session laws that one act is amendatory of the other. When Congress amends, it does so “simply to serve the causes of convenience and certainty,” and a court will “attribute no effect to the plan of dove-tailing the amendment into the original.”³³

In 1968 the \$100 cap applied both to coffee and tea. Did the 1995 amendment contain a “clearly expressed” signal to change that? Plainly not. It added a (iii) to provide a higher cap for the special case of coffee with steamed milk. Striking the “or” before (ii) was just a “technical” change, as the heading indicates.

It helps to know that when Congress creates an “and” list or an “or” list, the standard rule is to use only one conjunction, and to place that conjunction before the next-to-last item.³⁴ When adding a third item to a two-item list, moving the “or” is not only expected, but stylistically required.

It also helps to remember that the two-item list did not follow the structure of the grammar maven. The “(i)” and “(ii)” did not mark islands of grammar, but categories of drink. This is not ordinary structure in the abstract, but it was settled law here. When adding a third drink, inserting “(iii)” before that drink is not only expected, but structurally required.

Before *Lamie*, the Court easily disposed of cases like this. In 2001, for example, it was asked to decide whether a self-described “technical amendment” striking two sentences from the Farm Credit Act of 1933 had also granted an exemption from state taxes to certain banks. The Court read the base law, read the amendment, and held – unanimously – that it had not. The right of states to tax those banks was settled law, and “it would be surprising, indeed,” if Congress had effected such a “radical” change through a technical and conforming amendment.³⁵

³³ *Posadas v. National City Bank of New York*, 296 U.S. 497, 505-06 (1936).

³⁴ See, e.g., Reed Dickerson, *LEGISLATIVE DRAFTING* 85 (1954), and many drafting manuals since, some of which were listed in *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50 (2004).

³⁵ *Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 323 (2001).

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Now consider a second scenario, same as the first, except the 1995 law does not contain headings: no “TECHNICAL AMENDMENT.” What result now?

Without the clear signal of the heading, the meaning of the stricken “or” becomes a little less clear. Still, the reader looks to the four corners of the two laws, 1968 and 1995, and also at the consolidated text, searching for textual and structural clues in each. (Such a reader might also look to legislative history and post-enactment history, if so inclined; a session-law reader may, but need not, be a textualist.)

As it turns out, section 6 takes up six lines of text toward the back end of a 280-line law that makes a variety of changes to the original law. The long title is generic: “An Act to amend the Coffee Shop Act to clarify the intent of such Act and to reduce burdensome regulatory requirements on coffee shops.” Sections 3, 4, 5, and 7 each impede, in various ways, the ability of spill victims to recover damages.

Not much to see here, but vaguely suggesting a policy to protect coffee shops, not clearly signaling a policy to uncap their coffee-spill liability. The absence of a clear signal in the text of the 1995 session law is the crux of the case – more important than, for example, the absence of a clear signal in the legislative history. This second scenario is a closer call than the first, but the result is never seriously in doubt.

The real case from which these fanciful scenarios are drawn is *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50 (2004). That case involved a consumer, a car dealer, and a Truth in Lending Act violation rather than a girl, a shop, and a coffee spill, but as an exercise in the reading of statutes the problem is the same. As in the second scenario above, the real 1995 law in *Koons* did not have headings.

The Fourth Circuit had ruled against the car dealer. It read only the consolidated text, explaining that “when a statute has been amended we interpret the new statute, not the old” and

the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent.

... It is the statute, not any inferential intent, that constitutes the law.³⁶

All we have is the amended statute: This is, of course, very close to *Lamie*. Yet *Lamie* had not happened yet, and would not happen for another year. As in *Lamie*, the court felt no need to back up the statement. As in *Lamie*, the court was just taking judicial notice of what we, as a federal legal community, already do. To a reader of session laws *Lamie* is a coup; to us it is a fait accompli.

In this posture *Koons* went to the Court, one term after *Lamie*. Seven Justices joined the majority opinion; Scalia (dissenting) and Thomas (concurring in the judgment) did not. There were also two concurrences, thus five opinions in all. A reader of session laws would find none of them satisfactory. For one thing, all five opinions refer to the provision by its unofficial section number, 15 U.S.C. 1640, rather than its real one, section 130 of the Truth in Lending Act. But of course we all do this, nowadays.

For the majority, Justice Ginsburg applies *Lamie* (without actually citing *Lamie*): She declares an ambiguity and, with *Lamie* thus appeased, she turns to the “predecessor statutes”: old Codes. She discusses an agency interpretation of the post-1995 law, the settled interpretation of the pre-1995 law, silence in the legislative history, and the canon of “common sense.”

Her centerpiece, however, is the revelation that “subparagraph” is a legislative term of art. As applied here, “liability under this subparagraph” means all of (A), not just (ii). Had Congress intended to limit the cap to (ii), it would have changed “liability under this subparagraph” to “liability under this clause.”

“Subparagraph” is the peg on which the majority hangs a *Lamie* ambiguity. If the term used had been something generic – “subdivision,” for example – there would be no *Lamie* ambiguity and no basis for looking beyond the consolidated text.

(The reader of session laws would reply: it does not matter whether “subparagraph” is a term of art. What matters is that pre-1995, it was settled that “subparagraph” referred to all of (A), and

³⁶ *Nigh v. Koons Buick Pontiac GMC*, 319 F.3d 119, 127, 128 (4th Cir. 2003).

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nothing in the 1995 law changed that. The term could have been “subdivision” or “thingamajig” and the result would be the same.)

Justice Kennedy (the author of *Lamie*), concurring with Chief Justice Rehnquist, explains that the majority opinion is consistent with *Lamie*, having found an ambiguity in the consolidated text before considering other materials. (The reader of session laws would reply: *Lamie* is bad law; the session laws in Stat., not the consolidated text in U.S.C., is the superior evidence of the law and the supreme law of the land.)

Justice Stevens (the lone holdout in *Lamie*), concurring with Breyer, rejects *Lamie*. To him, the case turns on silence in the legislative history. (The reader of session laws would reply: What about the silence in the 1995 law itself?)

Justice Scalia, dissenting, applies *Lamie*. He consults only the consolidated text, finds it clear, and applies standard grammar: the cap applies only to (ii). (The reader of session laws would reply: You have produced an elephant from a mousehole.³⁷ And come 2006 would also reply: Are you a consolidated-law textualist or a session-law textualist? *Lamie*, and your dissent in *Koons*, embrace the primacy of consolidated law, as in the Code. But your concurrence in *Zedner v. United States* embraces the primacy of the session laws.³⁸ How do you square them?)

Finally we come to Justice Thomas, not joining the majority opinion but concurring in the judgment:

I believe that it is unnecessary to rely on inferences from silence in the legislative history Instead, in my view, the text . . . prior to Congress' 1995 amendment to it, the consistent interpretation . . . given to the statutory language

³⁷ Compare *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001): “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” (Scalia, J., majority opinion).

³⁸ “. . . I believe that the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, §7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.” 126 S. Ct. 1976, 1990 (2006).

prior to the amendment, and *the text of the amendment itself* make clear that Congress tacked on a provision addressing a very specific set of transactions ... but not materially altering the provisions at issue here.³⁹

Two cheers, the session-law reader would say. But not three: In his next breath, Thomas emphasizes that he is following the *Lamie* framework, too. “If the text in this case were clear, resort to anything else would be unwarranted. See *Lamie* But I agree with the Court that [the provision] is ambiguous”

So the reader of session laws likes much of what Thomas wrote (reading the session laws) and some of what Stevens, joined by Breyer, wrote (rejecting *Lamie*). An unlikely threesome, perhaps. But these three Justices were, then as now, the only Justices on the Court to have worked at some point for Congress; as such, they were the only three for whom session laws have been, at some point, their staple work.

This is not to declare a crisis. Nor is it to propose a solution. It is simply to reflect that we are not where we used to be. We used to read the session laws, however ungainly they might be. Now we don't.

One last thought: What if the 1995 law in *Koons* had headings? What if *Koons* was the first scenario rather than the second? To a reader of session laws, the “TECHNICAL AMENDMENT” heading would be significant. But to the Justices (save Thomas) it would make no difference. Zero. They do not read the session laws. None of us do, anymore.

Is this how it should be? Can we ponder the question? Should we reflect upon *Lamie* and how we came by it? Or shall we continue, not reading the statutes?



³⁹ 543 U.S. at 67 (emphasis added).