



DEEP IN THE WEEDS OF TEXTUALISM

Joseph Kimble

Author's note: I wrote this piece in 2017, before a development that's explained in the postscript. Don't peek now. Just enjoy the adventure in drafting and interpretation. The message remains the same.

LAST MARCH, THE INTERNET and the print media were abuzz over a multimillion-dollar case that (it was said) turned on a comma. The *New York Times*, no less, headlined one article with “Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute”¹ and another with “For Want of a Comma.”² And I can attest that my Twitter feed and email discussion groups were also . . . atwitter. This, I thought, could be worth exploring for what it might reveal about textualism.

The case, from the First Circuit, is *O'Connor v. Oakhurst Dairy*.³ I read the first four pages of the slip opinion to get the facts and the issue – and then stopped, deciding to try an experiment. The issue turned on an am-

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¹ Daniel Victor (Mar. 16, 2017), www.nytimes.com/2017/03/16/us/oxford-comma-lawsuit.html.

² Carmel McCoubrey (Mar. 16, 2017), www.nytimes.com/2017/03/16/opinion/for-want-of-a-comma.html.

³ 851 F.3d 69 (1st Cir. 2017).

biguous statute. That was clear from those first pages. In fact, it was pretty clear from the first few sentences:

For want of a comma, we have this case. It arises from a dispute between a Maine dairy company and its delivery drivers, and it concerns the scope of an exemption from Maine’s overtime law. 26 M.R.S.A. § 664(3). Specifically, if that exemption used a serial comma to mark off the last of the activities that it lists, then the exemption would clearly encompass an activity that the drivers perform.⁴

The statute created an exemption from the requirement that employers pay for overtime. The plaintiffs, the delivery drivers, wanted to be paid for overtime and thus did not want to fall within the exemption. These are the activities that the statute exempts:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods.⁵

The defendant, Oakhurst Dairy, was engaged in selling “perishable” dairy products.

You can guess that the disputed language is *packing for shipment or distribution of*. Is *distribution* supposed to be read with *packing*, or is it a separate activity? In other words, is the last item in the series *packing for shipment or distribution*, or is it just *distribution*? Of course, if a comma appeared before *distribution*, that would indicate an intent to separate. But there isn’t one.

MY TEXTUAL ANALYSIS

As I said, I stopped after reading the statute on page 4 of the slip opinion. I wondered: how many purely textual arguments could I have made for either side? Remember that the company wants distribution to be a separate, independent activity so that it falls within the exemption from the overtime-pay requirement. The drivers want the exemption to

⁴ *Id.* at 70.

⁵ Me. Rev. Stat. Ann. tit. 26, § 664(3)(F) (2017).

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cover only *packing for . . . distribution*, since they aren't involved in packing. They want the last item in the series to be *packing for shipment or distribution*, not *distribution* alone.

The arguments (marked as for and against treating *distribution* separately):

1. (Against; drivers win) There's no serial comma after *shipment*.
2. (For; company wins) There's no *or* after *storing* and before *packing*, as you'd expect if *packing* started the last item in the series.
3. (Against) Even if there were an *or* before *packing* and you were starting over again with *distribution* as a new item, you'd expect other changes. Thus: "the canning, processing, . . . storing, or packing for shipment of or the distribution of . . ."
4. (Against) *Distribution* is grammatically parallel with *shipment*, suggesting that they're paired. If *distribution* were the last item in the series, you might expect it to parallel the other *-ing* gerunds – you'd expect *distributing*.
5. (For) Then again, *distribution of* seems far more idiomatic than *distributing of*.
6. (For) If the last item were *packing for shipment or distribution*, you'd have surplusage. Isn't shipment a form of distribution?
7. (Against) Look at the rest of the provision. Doesn't *processing* cover *canning, preserving, freezing, and drying*, or at least some of them? Doesn't *preserving* cover *freezing and drying*? There's surplusage everywhere.
8. (Against) The exemption is mainly about processing, or handling, goods at a facility. There are seven such items (*canning, processing, preserving, freezing, drying, storing, and packing*). *Packing for . . . distribution* fits better with these other items. Otherwise, the statute seems lopsided – with a bunch of words that describe processing and just one that describes a separate activity (distribution).
9. (For) What about *marketing*? That's not processing.
10. (Against) All right, the exemption is mainly about in-house activities.

I spent a couple of hours identifying these arguments (longer to write them out). Anybody can play this game with ambiguity, and you don't need canons or reference books to do it. Your own intuitive sense of language is all you need.

At any rate, I would have said that the lean was toward reading *distribution* with *packing for shipment* – in the drivers' favor. But the lean was not pronounced enough to resolve the ambiguity.

THE COURT'S TEXTUAL ANALYSIS

Then I read the next 13 pages of the slip opinion – Part III (sadly, no heading) – for the purely textual analysis. I looked for my ten arguments and for any new ones.

As far as my arguments go, the court discussed 1, 2, 4, and 6. (Trust me, please, without citations.) I think the rest were worth considering, but apparently not. The court also discussed, or at least mentioned, seven others – four of which I wouldn't have known about without more research.

11. (For treating *distribution* separately; company wins) The *Maine Legislative Drafting Manual* advises drafters not to use the serial comma. So its absence should be discounted.
12. (Against; drivers win) But the manual goes on to warn about possible ambiguity when the series has a modifier. The manual would not ban the comma if using it would have made clear that *distribution* is the last item in the list. (By the way, this instance is a shining reminder of why the only-when-needed-for-clarity approach to the serial comma is so unreliable and misguided. If the comma wasn't needed here, when would it ever be?)
13. (Against) The terms *shipment* and *distribution* are not redundant. Both can attach to *packing for*. According to two dictionaries, *shipment* refers to outsourcing goods to a third-party carrier for transportation, while *distribution* refers to a seller's in-house transportation directly to recipients.
14. (Against) Besides, if the terms do mean the same thing, why not use the same word for both activities: *packing for X and X [itself]*?

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15. (Against) Another Maine statute treats *shipment* and *distribution* as if they were distinct activities.
16. (Against) The conjunction *or* might have been purposely omitted before *packing*, a technique known as asyndeton.
17. (For) Drafters generally avoid asyndeton, and the drivers don't cite any other Maine statutes that use it.

There you have it: 17 arguments total, and where did it get us? The court's answer came on page 17 of the slip opinion, at the beginning of Part IV: "The text has, to be candid, not gotten us very far."⁶ What a surprise.

HOW THE COURT'S TEXTUAL ANALYSIS SHOULD HAVE BEEN WRITTEN

Ambiguity caused by unclear modifiers rarely admits of a purely textual resolution. You can parse your brains out – as this court did for 13 pages in its slip opinion – to no avail. After laying out the background, the statute, and the issue, the court should have made short work of the hopeless ambiguity. Something like this:

The delivery drivers contend that *distribution* modifies *packing* so that the last item in the series is *packing for shipment or distribution*. Among other things, they note the absence of a separating serial comma before *distribution* and the form of *distribution* itself: if it were the last item in the series, you might expect it to parallel the other *-ing* gerunds – you'd expect *or the distributing of*.

Oakhurst Dairy, on the other hand, contends that *distribution* is the last item, a stand-alone item, in the series. Oakhurst emphasizes that there's no *or* after *storing* and before *packing*, as you'd expect if *packing* were the last item in the series. Oakhurst also argues that because *shipment* and *distribution* are synonymous, attaching both of them to *packing for* would produce surplusage. Finally, Oakhurst points out that the *Maine Legislative Drafting Manual* advises drafters not to use the serial comma.

The parties adduce, and so could we, other arguments pointing one way or another. For instance, the drivers contend that *shipment*

⁶ *O'Connor*, 851 F.3d at 76.

and *distribution* are not synonyms: the first refers to outsourcing of the delivery of goods to third-party carriers for transportation, while the second refers to a seller's in-house transportation of goods directly to recipients. The drivers note that this distinction is supported by dictionary definitions.* But the drivers' contention that *distributing of* would have been the form used for an independent, parallel item is unpersuasive. *Distribution of* is far more common and idiomatic in English.†

In the end, no amount of purely textual scrutiny – no listing and weighing of all the arguments – will resolve this ambiguity. The statute cannot be unlocked by parsing it.

* See *New Oxford American Dictionary* 497, 1573-74 (2001); *Webster's Third New International Dictionary* 666, 2096 (2002).

† See Google Ngram Viewer, books.google.com/ngrams (enter “distribution of, distributing of”).

A few paragraphs would have done the job.

MORE ON SURPLUSAGE AND DICTIONARIES

The magistrate judge, whose recommended decision was adopted by the district court, apparently relied in part on the surplusage canon in granting Oakhurst's motion for summary judgment: “The Magistrate Judge determined that the ‘plaintiffs’ reading would render the words “or distribution” surplusage.”⁷

On appeal, the plaintiff-drivers delivered a threefold response.⁸ First, they pointed out that Oakhurst's own organizational arrangement treats shipping and distribution as different operations, with separate departments and managers for each one. Second, the drivers argued for the difference in meaning noted above in my revision: “shipment” is the outsourcing of delivery to a third party, while “distribution” is direct delivery to recipients. Finally, the drivers observed (as I did in my initial experiment of listing arguments) that the contested provision “is already rife with overlapping and superfluous terms.”⁹

⁷ Brief of Plaintiffs-Appellants (No. 16-1901), 2016 WL 8943292 (PDF), at 7.

⁸ *Id.* at 37-39.

⁹ *Id.* at 37.

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Elsewhere, I have described the surplusage canon as “weak and ill-founded.”¹⁰ This case shows why – in spades. The provision, remember, is just one sentence – 23 words that are indeed rife with superfluous terms. (See argument 7 above.) And for a final touch of irony, is there any other reason for packing the food products besides shipping or distributing them? If not, aren’t *shipment* and *distribution* both superfluous? Why not stop with *packing*?

As for dictionaries, they don’t deserve much more standing as a guide to interpretation than the surplusage canon.¹¹ But they get it nonetheless. In fact, even in the face of strong and persistent criticism, they are “a main (perhaps *the* main) tool of interpretation used by textualists.”¹²

In this case, the drivers and the court cited the *New Oxford American Dictionary* 497, 1573-74 (2001) and *Webster’s Third New International Dictionary* 666, 2096 (2002). In the *New Oxford*, the main, broad definition for *distribution* is “the action of sharing something out among a number of recipients.” A subsense is “the action or process of supplying goods to stores and other businesses that sell to consumers.” In *Webster’s Third*, one of 18 senses of *distribution*, sense 2f, is this: “delivery or conveyance (as of newspapers or goods) to the members of a group (the ~ of telephone directories to customers).” These definitions do suggest a meaning of delivering directly to customers, but the senses of “sharing something out among . . . recipients” and “delivery . . . to the members of a group” are certainly broad enough to cover delivery to third-party carriers.

Likewise, the *New Oxford* definition of *shipment* and *shipping* would cover delivery directly to customers (not necessarily through a third-party carrier): *shipment* is “the action of shipping goods”; and *ship* (*shipped*, *shipping*) can mean “transport by some other means [besides on a ship].”

Or take a dictionary that the drivers didn’t cite. *Webster’s New World College Dictionary* 427 (5th ed. 2014) defines *distribution*, in sense 1b, as “the

¹⁰ See Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000-2015*, 62 Wayne L. Rev. 347, 366 (2017) (citing eight other commentators).

¹¹ See *id.* at 359-60 (summarizing various criticisms – especially that reliance on dictionaries is unsound as a matter of language theory and that judges’ use of them is inconsistent, ad hoc, and unprincipled).

¹² Brian G. Slocum, *Ordinary Meaning* 23 (2016).

process by which commodities get to final consumers, including storing, selling, shipping, and advertising.” This hardly suggests a distinction between a company’s direct delivery to consumers and “shipment” to a third-party carrier for delivery. How confident can we be, then, that a distinction was intended, especially given all the other surplusage?

In sum: even when a dictionary does offer a definition that (possibly) favors one side, the other side can usually counter with a definition from the same dictionary or a different one. So round and round it goes.

THE REST OF THE OPINION

After getting nowhere with textualism, the court turned to the statute’s purpose, to legislative history, and then to a default rule of liberal construction. This was all done in ten slip pages – three pages fewer than the textual scrutiny.

The court concluded that the purpose of the statutory exemption didn’t clearly favor Oakhurst or the drivers. In Oakhurst’s view, the general purpose was “to protect against the distorting effects that the overtime law otherwise might have on employer decisions about how best to ensure [that] perishable foods will not spoil.”¹³ The magistrate judge had agreed: the aim was “to achieve the most efficient possible production and delivery given the nature of the product.”¹⁴ On the other hand, said the court, the time needed to drive goods from one place to another is pretty fixed; whether the drivers are paid overtime won’t affect spoilage.

Likewise, the legislative history was said to be inconclusive. Oakhurst argued that the overtime law piggybacked on an earlier statute that included distributing within an exclusion. But the court found enough differences between the two provisions to raise doubt that the second one was modeled on the first.

In the end, the court invoked the default rule for ambiguous provisions in the state’s wage-and-hour laws: they “should be liberally construed to further the beneficent purposes for which they are enacted.”¹⁵ And since

¹³ *O’Connor*, 851 F.3d at 77.

¹⁴ *Id.* (quoting the district court’s opinion).

¹⁵ *Id.* at 79 (quoting *Dir. of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987)).

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the “broad remedial purpose of the overtime law . . . is to provide overtime pay protection to employees,”¹⁶ the court adopted the drivers’ reading of the ambiguous exemption.

Incidentally, some textualists disapprove of the remedial-statute rule. In their book *Reading Law*, Justice Antonin Scalia and Bryan Garner, while acknowledging that it is “an oft-repeated and age-old formulation,” object to it on two grounds: “the difficulty of determining what constitutes a remedial statute” and the “impossib[ility]” of “identifying what a ‘liberal construction’ consists of.”¹⁷ But judges make difficult determinations all the time – that’s their job. The idea of “remedial” is no more vague than countless other legal terms that judges have to apply in case after case. As for the second objection, is it really so impossible to apprehend what is a liberal construction of a wage-and-hour law?

Scalia and Garner also reject the opposite notion that words in general or exemptions in particular should ever be strictly construed.¹⁸ Fair enough, and something that committed textualists should bear in mind.¹⁹ If we are to deep-six liberal constructions of some statutes, we ought to do the same with strict, or narrow, constructions of others.

At any rate, *O’Connor* was undoubtedly a hard case even as hard cases go. If it had been up to me, I would have probably staked my decision on the statute’s purpose. I think the magistrate judge was right: essentially, the statute takes decisions about getting perishable foods to market outside the overtime law. You might conjure other reasons, but none so obvious as that one.

¹⁶ *Id.* at 80-81.

¹⁷ *Reading Law: The Interpretation of Legal Texts* 364, 365 (2012).

¹⁸ *Id.* at 355-63.

¹⁹ *Lane v. Pena*, 518 U.S. 187, 192 (1996) (“[A] waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.”); *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000) (“[L]egislative grants of immunity [in derogation of common law] must be strictly construed.”); *Nawrocki v. Macomb Cty. Rd. Comm’n*, 615 N.W.2d 702, 711 (Mich. 2000) (“[S]tatutory exceptions [to governmental immunity] are to be narrowly construed.”); *Cain v. State*, 882 S.W.2d 515, 519 (Tex. App. 1994) (“The language and legal effect of a statute may require its ‘strict’ construction . . . [in] two classes of statutes, those that authorize a penalty and those that infringe upon private property or liberty interests.”).

Isn't this conclusion, though, contrary to the earlier observation (page 299) that the statute is mainly about in-house activities? Yes, but that argument was from a strictly textual perspective: it was based on counting a bunch of redundant descriptions. Now we're talking about the statute's purpose, as best we can gauge it.

I would have decided for Oakhurst, but that's beside the point. My kick is against the exceedingly deep dive into ambiguous text, searching for a right answer. The court should have briefly explained the ambiguity and moved on. Instead, the court fell prey to the obsessive textualism that marks so much modern-day decision-making.

POSTSCRIPT

Some months after the First Circuit issued its opinion, the wondrous statute was amended. The amendment was made retroactive, but with a specific exception for cases pending on March 12, 2017 (as *O'Connor* was). The revised version:

The canning; processing; preserving; freezing; drying; marketing; storing; packing for shipment; or distributing of²⁰

The drafters (unnecessarily) supercharged the serial comma and converted *distribution* to *distributing* for parallelism. How well do you think the semicolons work with *of* at the end of the list?

After all that, in February 2018 the parties settled the case for \$5 million.²¹ Future drivers, though, are out of luck.



²⁰ 2017 Me. Legis. Serv. ch. 219 (West).

²¹ Daniel Victor, *Oxford Comma Dispute Is Settled as Maine Drivers Get \$5 Million* (Feb. 9, 2018), www.nytimes.com/2018/02/09/us/oxford-comma-maine.html.