A COMMENT ON
SCALIA & GARNER'S "READING LAW"

GOOD FOR LEGISLATIVE GEESE BUT NOT JUDICIAL GANDERS?

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ONE TROUBLING ASPECT of *Reading Law* is the narrow definition of "legal texts" employed by Justice Scalia and Professor Garner. They define "legal texts" as being limited to constitutions, statutes, and regulations. This, of course, ignores the single largest body of "legal texts:" judicial opinions. The interpretative canons discussed in *Reading Law*, which place primary importance on the words used by drafters, simply do not apply to judicial opinions.

Why? In short, it seems Justice Scalia (and his fellow textualists on the Supreme Court), can dish it out when it comes to linguistic precision, but cannot take that same level of scrutiny.

Some of the clearest examples of the Court's significant failures of linguistic precision have come, ironically, in cases in which the Court has applied a strict textualist interpretation to statutes. A trio of cases examining factual causation standards relevant to claims under several federal statutes provide a particularly apt example.[1] In

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[1] Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) (factual causation for

Gross v. FBL Financial Services, Inc.,[2] the Court interpreted the operative language in the Age Discrimination in Employment Act, which prohibits discrimination "because of age." Applying the "ordinary meaning" canon[3] of statutory construction,[4] the Court determined that, based on dictionary definitions, "because of" in the ADEA meant "but for" factual causation.[5] However, the Court's articulation of its factual causation standard was linguistically imprecise and superficial. The Court held that, under the ADEA, age must be "*the* but for cause" of the employer's decision and "*the* reason" for the decision.[6]

Using the Ordinary Meaning Canon and the Grammar Canon[7] to interpret *Gross*, one would conclude that the Court's use of the direct article "the" (rather than the indirect article "a") was purposeful and that the Court intended to require that age was the sole, single or only but-for cause of the employer's decision.[8] However, such a

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claim under Age Discrimination in Employment Act); Univ. of Texas S.W. Med. Center v. Nassar, 133 S. Ct. 2517 (2013) (factual causation standard for retaliation claim under Title VII of the Civil Rights Act of 1964); Burrage v. U.S., 134 S. Ct. 881 (2014) (factual causation for mandatory minimum sentence under Controlled Substances Act).

[2] 557 U.S. 167 (2009).

[3] See READING LAW at 69-77 (discussing the "Ordinary Meaning Canon").

[4] Gross, 557 U.S. at 175-76.

[5] Id. at 176.

[6] Id. (emphasis added).

[7] READING LAW at 69-77 (the "Ordinary Meaning Canon") and 140-143 (the "Grammar Canon").

[8] This is how the Court has repeatedly interpreted the use of the definite article in statutes and rules. See *Rapanos v. United States*, 547 U.S. 715, 732 (2006) (use of direct article "the" showed Congressional intent to indicate specific "waters"); *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (use of definite article "the" in habeas statute indicated that "generally only one proper respondent to a given prisoner's habeas petition"). See also *Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) (use of the definite article "the" in Fed. R. Civ. Proc. 54(d)(1) indicates that what follows, "prevailing party," is specific and limited to a single party); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1222 (1989); BLACK'S LAW DICTIONARY 1477 (6th ed. 1990).

narrow view of factual causation is logically preposterous.[9]

The Court engaged in an identical textualist analysis of Title VII's retaliation provision in *Univ. of Texas S.W. Medical Center v. Nassar*,[10] but was even more linguistically imprecise in its opinion. There, the Court used both the definite article "the"[11] and the indefinite article "a"[12] when describing the requisite factual causation standard for a retaliation claim under Title VII.[13]

The Court's factual causation trilogy culminated in *Burrage v. U.S.*[14] There, Justice Scalia himself, writing for the Court, applied the "ordinary meaning" canon to the Controlled Substances Act and relied on *The New Shorter Oxford English Dictionary* to determine the meaning of "results."[15] To support the Court's dictionary-based ordinary meaning interpretation of "results," Justice Scalia turned to *Gross* and *Nassar*. In doing so, however, Justice Scalia threw *Reading Law* out the window. Instead of applying either the ordinary meaning canon or the grammar canon to the words the Court used in *Gross* and *Nassar*, Justice Scalia instead simply used brackets to change the words used by the Court in those cases.[16] Specifically, Justice Scalia eliminated the problematic definite article "the" from the Court's holdings in *Gross* and *Nassar*, and changed it to the far more logical indefinite article "a," as follows: (1) in *Nassar*, "we held that [Title VII's retaliation provision] 'require[s] proof that the desire to

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[9] See Brian S. Clarke, *The Gross Confusion Deep in the Heart of Univ. Texas S.W. Med. Center v. Nassar*, 4 Cal. L. Rev. Circuit 75, 76 (2013). Predictably, some lawyers and judges have read the Court's opinion in *Gross* to literally mean what it says, which would be appropriate based on READING LAW. This has led to arguments in scores of cases – and holdings in a handful – equating but-for causation with sole causation. See *id*. at 75 n.2-3.

[10] 133 S. Ct. 2517 (2013).

[11] Id. at 2528.

[12] Id. at 2534.

[13] See 42 U.S.C. § 2000e-3.

[14] 134 S. Ct. 881 (2014).

[15] Id. at 888.

[16] I hereby dub this the "Use-Brackets-To-Change-Words-And-Fundamentally-Alter-The-Meaning-Of-The-Sentence Canon" of judicial opinion interpretation.

retaliate was *[a]* but-for cause of the challenged employment action;'"[17] and (2) in *Gross*, "we held that '[t]o establish a disparate-treatment claim under the plain language of [the ADEA] . . . a plaintiff must prove that age was *[a]* 'but for' cause of the employer's adverse decision.'"[18]

Justice Scalia and Prof. Garner clearly understand the power of words and demand linguistic precision by the drafters of legal texts. If the canons in *Reading Law* apply to legal texts created by legislative geese, they should apply equally to legal texts created by judicial ganders.

[17] Id. at 888-89 (quoting *Nassar*, 133 S. Ct. at 2528) (first brackets added, remaining brackets original; emphasis added).

[18] Id. at 889 (quoting *Gross*, 557 U.S. at 176) (second brackets added, first and third brackets original; emphasis added).