Elephants, Mouse Holes, Non-Barking Dogs, and Statutory Interpretations

by Steve R. Johnson

This installment of Interpretation Matters examines a canon of statutory construction that has been applied in state and federal cases, both tax and nontax. Under the canon, a court will require clear legislative evidence before it holds that a statute was intended to effect a major substantive change. Inferences from wisps of textual or other evidence will not suffice. As the title of this installment suggests, and as will become clear below, the jurisprudence regarding this canon has been particularly rich in metaphors.

Part I below describes the U.S. Supreme Court cases that are the foundation of the canon, including a recent tax case. Part II surveys the canon’s use in state and local cases, including tax cases. Part III analyzes the justification for the canon and its relations to other canons. Part IV sets out practical suggestions on how to use, and how to oppose the use of, the canon in actual cases.

I. U.S. Supreme Court Cases

Although intimations of the principle exist in earlier cases, the current prominence of the canon rests on a series of cases from the 1990s and 2000s. MCI Telecommunications Corp. v. American Telephone & Telegraph Co., decided in 1994, involved construction of language in the Communications Act of 1934. The Federal Communications Commission contended that because the act gave it discretion to “modify any requirement” that the act imposed, the FCC had the authority to render voluntary an otherwise mandatory requirement that long-distance carriers file their rates. The Supreme Court held:

It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion — and even more unlikely that it would achieve that through such a subtle device as permission to “modify” rate-filing requirements.1

In 2000, in FDA v. Brown & Williamson Tobacco Corp., the Court considered the Food and Drug Administration’s belated assertion of authority to regulate tobacco products. The administration located that authority in the general language of the Food, Drug, and Cosmetic Act. A majority of the Court rejected that interpretation on several grounds, including that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must . . . adopt an extremely strained understanding” of the statutory language.2

In 2001, in INS v. St. Cyr, the Court rejected an interpretation of an immigration statute. It noted the paucity of legislative evidence that Congress intended to enact the position advocated and held that “in a case where the construction of legislative language such as this makes so sweeping and so unorthodox a change as that made here, [we] think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”3

The same year brought Whitman v. American Trucking Ass’n, Inc., the most frequently cited case of the line. The Court considered a contention that a particular feature of the Clean Air Act authorized the Environmental Protection Agency to consider

cost effects in a specific context. Because there is a strong general policy in the act against considering cost, the Court found that there must be a clear textual commitment reversing that general policy in the particular instance. “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.”

In 2006, in Gonzalez v. Oregon, the Court invalidated a Justice Department rule that physicians who assist in the suicide of terminally ill patients under a state Death With Dignity Act would violate the federal Controlled Substances Act. The Court rejected “the idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [act’s] registration provision.”

Most recently, the Supreme Court applied the canon in a tax case, United States v. Home Concrete & Supply, LLC. Section 6501(e) of the Internal Revenue Code provides for an extended statute of limitations on assessment of deficiencies when there has been a sufficiently large omission of gross income. In a 1958 case, the Court held that this provision does not apply when the deficiency results not from omitted receipts but rather from overstated basis in sold property.

The government argued that later changes to the statute displaced the 1958 decision. The Court rejected the argument, finding the changes insufficient in strength. The Court added the following to the metaphorical luxuriance of the canon: “To rely in the case before us on this solitary word change in a different subsection is like hoping that a new batboy will change the outcome of the World Series.” The dissent offered the view that the statutory changes were of greater moment and created sufficient space for the government’s argument.

II. State Cases

The “no elephants in mouse holes” principle has been applied in numerous state and local cases. Those include tax and tax-related cases, as the following examples illustrate.

In a 2011 case, the California Supreme Court considered a challenge to state statutes requiring windup and dissolution of community redevelop agencies (CRAs) under some circumstances. In part, the challenge was based on a provision of the state constitution generally prohibiting the State Legislature from requiring CRAs to pay property taxes under some circumstances. That provision, it was argued, both presumes and protects the existence of CRAs.

The court rejected the argument. Because legislatures are presumed to be able to eliminate instrumentalities they have created, upholding the challenge “would represent a profound change in the structure of state government.” There was no express language in the relevant provision (adopted via an initiative) mandating that profound change. The court observed: “It would be unusual in the extreme for the people, exercising legislative power by way of initiative, to adopt such a fundamental change only by way of implication, in an initiative facially dealing with purely fiscal matters in a corner of the State Constitution addressing taxation.”

Another California case involved application for a writ of mandamus to direct an agency to set aside its decision that rehabilitation projects funded by state low-income housing tax credits were not required to comply with the state’s prevailing wage law. The argument for the writ was based on an inference from a statute. The court rejected the argument and the application. It reasoned that the argument would require the court to accept that the Legislature had used the statute “as an oblique way” of introducing a new principle. But “we would need much stronger proof that the legislature played such...

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7United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842 (2012); see also id. at 1849 (Scalia, concurring in part and concurring in judgment) (stating that the prior interpretation should not “be overturned on the basis of statutory indications as feeble as those asserted here”).

8Id. at 1849 (Justice Anthony Kennedy, dissenting).
10California Redevelopment Ass’n v. Matosantos, 267 P.3d 580, 600 (Cal. 2011).
11Id. at 601 (quoting American Trucking).
a sleight-of-hand game. Courts do not lightly conclude that substantial statutory changes are intended or accomplished by legislative misdirection.\footnote{State Building & Construction Trades Council v. Duncan, 162 Cal. App. 4th 289, 323 (2008).}

State and local tax departments sometimes are commanded to perform nontax operations incident to their revenue functions.\footnote{For example, when Nevada legalized casino gaming, the state Department of Taxation initially was charged with administering the applicable regulatory statutes.} So it was in a 2009 Colorado case. A state statute requires the Colorado Department of Revenue to revoke the licenses of suspected drunk drivers who refuse to submit to blood or breath testing. A trial court held that a new statute implicitly set a time limit on police requests for the testing. The appellate court reversed. It concluded: "if the legislature intended to . . . create a new [time limit], it would have said so clearly and directly. [The lower court] read [the new statute] more broadly than its plain language and purposes require."\footnote{Stumpf v. Colorado Dep’t of Revenue, 231 P.3d 1, 3 (Colo. App. 2009), cert. denied, 2010 WL 1948672 (Colo. May 17, 2010).}

In contrast, substantive canons attempt not to shed light on legislative intent, but to protect cherished values. They are rooted in broader policy or value judgments. They attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution.\footnote{See generally Steve R. Johnson, "The Two Kinds of Legislative Intent," State Tax Notes, Mar. 30, 2009, p. 1045, Doc 2009-5906, or 2009 STT 59-3.}

Finally, action-forcing canons are directed to other actors in the legal system, whether they be legislatures, agencies, litigants, or others. They announce the position of the courts in order to influence the behavior of other actors.

From that perspective, there are at least three justifications for the "no elephants in mouse holes" precept of statutory interpretation. First, textually, it is a legitimate clue to the meaning aimed at by the legislature. People who intend to make big changes customarily say so — clearly and expressly, not by hint or indirection.\footnote{E.g., Larson v. Casual Male Stores, LLC, 2009 WL 932648, at *6 (Cal. App. Apr. 8, 2009) (unpublished decision).}

Second, substantively, the canon we consider operates as a principle of repose and of conservation of effort. Substantial institutional and political resources are invested when a rule of law is established. The canon reflects the common-sense realization that that investment should not be abandoned lightly.

Third, the canon has an action-forcing aspect. Legislatures, agencies, and initiative drafters craft the statutes and regulations that establish the tax law. To the extent the courts consistently apply the "no elephants in mouse holes" precept, those actors will know that they bear a burden of clarity in drafting, a burden proportionate to the significance of the rule they want to establish. The hope is that will improve the statutes and regulations they produce.\footnote{Cf. Eskridge et al., supra note 15, at 354 (making a similar point as to the "plain statement" canon of construction).}

In those respects, our canon is similar to a number of other action-forcing and substantive canons, including (1) the rule that statutes are not to be read as modifying the common law unless that purpose is made manifest,\footnote{E.g. Harrison v. Harrison, 733 N.W. 2d 451, 456 (Minn. 2007) ("if the legislature intended to modify the common law rule . . . it would have used language that clearly expressed its intent to do so.") (citing Gonzales and American Trucking).} (2) "the traditional principle" that "the Government’s consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires,"\footnote{United States v. Nordic Village, Inc., 508 U.S. 30, 34 (1992) (punctuation omitted).} and (3) the "plain statement" canon under which a statute will be construed as contravening a traditionally honored policy or value only if the legislature plainly stated its intention to do so.\footnote{See, e.g., William Eskridge Jr. and Philip Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 Vand. L. Rev. 593 (1992).}

Indeed, the "no elephants in mouse holes" canon is a cousin (or perhaps a variety) of the "plain statement" principle.
that wise caution. In the case of the canon discussed here, the metaphors are not misleading; they are analytically helpful.

The party who is the proponent of the canon needs to show both that there is an elephant (that is, that the adversary is attempting to establish a major principle or a major change in principle) and that it is being hidden in a mere mousehole (that is, that the legislative evidence is too weak to support the principle, that it opens insufficient space to house it). The party who opposes the canon may prevail by defeating either of those elements.

Creative legal arguments should not, and usually will not, carry the day when bold claims are insufficiently grounded in legislative evidence.

A Massachusetts case illustrates the failure of the canon because of the first ground: the absence of an elephant. A company challenged the validity of state environmental regulations, arguing that they effected major changes well beyond the sanction of the statute. The state’s highest court rejected the contention. It noted that the regulation was “a relatively minor adjunct to a comprehensive scheme established by the Legislature,” that it did not vastly expand the agency’s power, that the regulation did not expand the class of regulated parties, and that it expanded only the range of regulated activities at facilities already regulated. In short, “nothing in the record [suggested that the regulation] is the ‘elephant’ that [the company] suggests.”

The other part of the ratio is the size of the mousehole. The bulk of the case law holds that statutory language, punctuation, and legislative history all are consulted in determining the weight of the evidence in support of the proposition. The easy cases against the application of the canon, of course, are those in which the evidence for the proposition is nonexistent or equivocal. But the existence of some support — such as “scattered ancillary provisions” or “non-substantive” punctuation — is not enough. The point of the canon is proportionality: A major change must have major support.

Clients with weak cases hire lawyers in part for their creativity. The no “elephants in mouse holes” canon reminds us that — although we may admire the artistry of creative legal arguments — those arguments should not, and usually will not, carry the day when bold claims are insufficiently grounded in legislative evidence.

24Entergy Nuclear Generation Co. v. Dep’t of Environmental Protection, 944 N.E.2d 1027, 1044 (Mass. 2011).


