NOTE

THE ASSOCIATION GAME: APPLYING *NOSCITUR A SOCIIS* AND *EJUSDEM GENERIS*

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The Supreme Court has applied noscitur a sociis*, often called the associated words canon, in many notable decisions—including the recent* Fischer v. United States*. This canon has a longstanding history in American jurisprudence, but interpreters face challenges in finding a common theme among words or phrases and supporting it with surrounding context. And some scholars argue judges can use* noscitur *to bring in external policy preferences and ideological beliefs. This Note proposes several steps to guide the use of* noscitur *and, by extension, its cousin* ejusdem generis*, including the clear identification of an association and multiple common themes and principles for transparent contextual analysis. These steps can shield judges from the appearance of guesswork or ideologically influenced decisions and encourage more accurate results by providing a clear roadmap of these canons' proper application. They may also bring interpreters of all methodologies closer to their interpretive goals.*

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INTRODUCTION

What do the words "bud," "mate," "pal," and "partner" have in common? According to the *New York Times* Connections puzzle on August 15, 2024, the answer is . . . nothing.[1] Connections, a fairly recent addition to the *Times*'s growing portfolio of games, asks readers to sort sixteen different words or phrases into four categories of four.[2] The puzzle relies on tricking readers with a number of different possible categories. For instance, in that August 15 scenario, "PARTNER" and "MATE" actually went with "COMPLEMENT" and "MATCH" under the common theme "OTHER HALF."[3] "BUD" connected with "NATTY," "SIERRA," and "STELLA" under "BEERS, FAMILIARLY." "PAL" fell into "WORDS AFTER 'PAY'" with "DIRT," "CHECK," and "PHONE."[4]

The Connections example shows that identifying a common theme among words can be a difficult process—even an impossible one—without context. Unless you knew the rules of the game, you probably

[1] Wyna Liu, Connections No. 431, N.Y. Times (Aug. 15, 2024), https://www.nytimes.com/games/connections/2024-08-15.

[2] See Joyann Jeffrey, Connections Is the NYT's New Wordle Alternative. Here's How to Play, Today (Aug. 29, 2023, 10:30 AM), https://www.today.com/popculture/connections-nyt-puzzle-how-to-play-rcna102300. The *New York Times* crossword has entertained readers since the early 1940s. David W. Dunlap, Birth of the Crossword, N.Y. Times (Dec. 17, 2022), https://www.nytimes.com/2022/12/17/insider/first-crossword.html. In recent years, the *Times* has added several different puzzles to go along with the crossword, including Connections. N.Y. Times Co., Games, https://www.nytco.com/products/games/ [https://perma.cc/85CZ-75KW] (last visited Mar. 28, 2025).

[3] See Liu, supra note 1.

[4] Id. The final category was "BREADTH," featuring "EXTENT," "RANGE," "REACH," and "SCOPE." Id.

would struggle to arrive at the desired common themes. And you would also find it difficult to explain your thought process to a friend without telling them that you need four categories of four.

Courts face a similar struggle in many cases of legal interpretation. They often must interpret a word or phrase as part of a list or grouping, and sometimes the meaning of that word or phrase is not immediately obvious. That is where the tool of *noscitur a sociis* comes in. *Noscitur a sociis* literally translates from Latin to "it is known by its associates."[5] In essence, associated words or phrases around the target word or phrase can influence its meaning.[6]

Take the Connections puzzle for a simple example. If you found a list in a sentence that read "BUD, MATE, PAL, or PARTNER," you would probably assume that "BUD" referred to "buddy."[7] But if the list instead read "BUD, NATTY, SIERRA, or STELLA," you would likely think that "BUD" referred to the short name for a Budweiser. In neither instance would you think that "BUD" meant the beginnings of a flower on a plant (an otherwise perfectly acceptable meaning).[8] Thus, the context of associated words influences the meaning of the target word.

Legal interpreters often face much more difficult instances of association. And unlike the small stakes of winning the Connections game, judges' decisions can affect people's lives, freedom, and finances. Those affected by judicial opinions deserve frank, thorough, and well-reasoned decisions. So, if those decisions in part come down to the application of *noscitur*—to most, an unfamiliar Latin phrase—interpreters ought to explain exactly how they used it and exactly how it informed their conclusions.

In addition, to use *noscitur* effectively, a court must thoroughly investigate the definitions of key words and conduct enough legwork to arrive at an accurate conclusion. It might be tempting for an interpreter to look at a group of words or phrases and claim, without much explanation, to have found *the* common theme. The answer is often not so simple. And in some recent instances, courts have failed to explain their application of

[5] Noscitur a sociis, Black's Law Dictionary (12th ed. 2024). This Note usually refers to the canon simply as *noscitur* and to its relative *ejusdem generis* as *ejusdem*.

[6] Id.

[7] See Bud, Merriam-Webster, https://www.merriam-webster.com/dictionary/bud [https://perma.cc/Q4DQ-CLS5] (last visited Mar. 28, 2025).

[8] Id.

noscitur with sufficient clarity to prove that their purported common theme is the best interpretation.[9]

Perhaps this stems from a lack of documentation about *noscitur*. Existing literature, aside from major casebooks, has not provided much help for interpreters seeking advice on applying the canon.[10] Apart from the well-known handbook *Reading Law* by Justice Antonin Scalia and Professor Bryan Garner, no article has yet centered on guidelines for courts using *noscitur*.[11] Even *Reading Law* spends a mere four pages on *noscitur* as compared to fifteen on a subset of the canon, *ejusdem generis*.[12] So the general principles underlying *noscitur* have not received the treatment they deserve.

This Note seeks to fill that gap by presenting a model for courts planning to employ the *noscitur* canon—and by extension its relative *ejusdem*—in legal interpretation.[13] Part I highlights the history and importance of the canon and its use in the notable recent case *Fischer v. United States*, which concerned a law applied to defendants in the January 6 riot.[14] Part II dives into concerns with *noscitur*'s application. Several notable scholars have argued that it may open the door to the influence of policy preferences or ideology.[15] And the principle behind *noscitur* naturally implies several difficulties: the presence of multiple potential common traits, an undefined trigger, and a possible deviation from dictionary meaning. Part III then answers these concerns, building a model for applying *noscitur*. This model strongly encourages courts to explain the canon's use in detail, including its relationship with the ordinary meaning of each word or phrase involved. It urges interpreters

[9] See, e.g., infra notes 161–67, 262–68 and accompanying text.

[10] See, e.g., Caleb Nelson, Statutory Interpretation 117–20 (2d ed. 2024).

[11] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012). For instance, a search of the HeinOnline Law Journal Library on November 30, 2024, for "*noscitur*" in the title of pieces revealed only two articles, neither of which took this tack. See generally David A. Schlesinger, *Chevron* Unlatined: The Inapplicability of the Canon *Noscitur a Sociis* Under Prong One of the *Chevron* Framework, 5 N.Y.U. Env't L.J. 638 (1996) (discussing why *noscitur* should not be used under prong one of the *Chevron* doctrine); Keegan P. Dennis, Noscitur a Sociis: We Will Never Be the Same, 47 S. Ill. U. L.J. 485 (2023) (reflecting on attending law school during the COVID-19 pandemic).

[12] Scalia & Garner, supra note 11, at 195–98, 199–213.

[13] I often refer to these canons together as the "association canons." Since *ejusdem* also relies on finding a common theme among words or phrases, this Note's conclusions apply to both canons. But there are several unique aspects of *ejusdem* that require further discussion throughout.

[14] 144 S. Ct. 2176, 2181–82 (2024).

[15] See infra notes 68–79 and accompanying text.

to be thorough, since a more detailed explanation wards off possible accusations of ideological influence. Part IV then revisits *Fischer* with this model in mind, examining the majority and dissenting opinions and their relationship with the model. It concludes that *Fischer* did not apply the association canons in the traditional way, and that the Court missed an opportunity to do so.

I. THE PAST AND PRESENT OF *NOSCITUR*

Noscitur a sociis, or the associated words canon, has a deep history in American jurisprudence. The earliest reference to *noscitur* at the Supreme Court appears to come from an 1805 case: *Lambert's Lessee v. Paine*.[16] Justice William Paterson used it to note that the word "estate," "when coupled with things that are personal only," must be "restrained" to personal property.[17] Sixteen years later, Daniel Webster, arguing before the Court in *Cohens v. Virginia*, then applied *noscitur* to whole clauses.[18] He said that a clause authorizing lotteries should be limited to the municipal context (here, to the District of Columbia) because it was "combined with other clauses of a mere municipal character."[19] And in another early American case before the U.S. District Court for the District of Massachusetts, the court found that various French phrases' meanings in the laws of the island of Oleron should be "determined from the subject matter and the connexion."[20] It cited *noscitur* to identify a "different and more limited application."[21]

In *Reading Law*, Scalia and Garner define *noscitur* in this way: "When several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar."[22] Scalia and Garner note that the canon most often applies to "listings—usually a parallel series of nouns and noun phrases, or verbs and verb phrases."[23] But, they add, an "association" is enough to trigger

[16] 7 U.S. (3 Cranch) 97 (1805).
[17] Id. at 134 (opinion of Paterson, J.).
[18] 19 U.S. (6 Wheat.) 264, 435 (1821) (argument of Mr. Webster); see also Mark A. Graber, The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power, 12 Const. Comment. 67, 78 (1995) (explaining Mr. Webster's part in *Cohens*).
[19] *Cohens*, 19 U.S. (6 Wheat.) at 435.
[20] Natterstrom v. The Hazard, 17 F. Cas. 1243, 1245 (D. Mass. 1809) (No. 10,055).
[21] Id.
[22] Scalia & Garner, supra note 11, at 195.
[23] Id. at 197.

the canon.[24] Scalia and Garner use an example from Shakespeare's *The Tempest*—a list where a character says he will not have "treason, felony, sword, pike, knife, gun, or need of any engine."[25] In that list, due to the definitions of the surrounding words, "pike" likely meant the weapon—not the "freshwater fish."[26]

One major variation of *noscitur* is *ejusdem generis*, which literally means "of the same kind or class."[27] This canon applies to a subset of cases involving *noscitur*—those with a general catchall word or phrase following a group of specific items.[28] American lawyers have recognized *ejusdem* since the dawn of our nation's jurisprudence. The highest court of Maryland, in the 1789 case of *Sprigg v. Weems*, considered arguments about the interpretation of a will.[29] An attorney argued that the phrase "other things" in the list "goods, chattels, household stuff, furniture and other things" should be limited to "things of the like nature with those mentioned."[30] He therefore believed "other things" could not include money, since that was not a "household good[]" like the other listed items.[31]

Jurists have regularly employed *noscitur* and *ejusdem*, especially over the past two decades. Although one writer noted that the Supreme Court had only used *noscitur* thirteen times in the five decades before 1996,[32]

[24] Id.

[25] Id. at 195 (quoting William Shakespeare, The Tempest act 2, sc. 1, ll. 176–77).

[26] Id. at 195–96.

[27] Ejusdem generis, Black's Law Dictionary (12th ed. 2024).

[28] See Scalia & Garner, supra note 11, at 199.

[29] 2 H. & McH. 266, 266 (Md. 1789).

[30] Id. at 273 (argument of Mr. Chase) (emphasis omitted) ("All things not before bequeathed, shall be restrained to things *ejusdem generis*."). Perhaps this point arose from the idea that the attorney believed "other things" could not mean *everything*, which might be possible under a literal reading. As Dean John Manning notes, "[s]ome of the traditional linguistic canons [like *ejusdem* and *noscitur*] may sometimes help to avoid such absurdities by instructing courts to read particular terms in the context of their surrounding texts." John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2466 n.285 (2003). Thanks to Professor Richard Re for suggesting this point on *Sprigg*.

[31] *Sprigg*, 2 H. & McH. at 273 (emphasis omitted).

[32] Schlesinger, supra note 11, at 655 & n.79. Schlesinger also referred to *noscitur* as "seldom invoked," id. at 655, which may have been fairly true of the Supreme Court at that time. But judges now routinely use canons of interpretation in statutory interpretation. See Abbe R. Gluck & Richard A. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1328 (2018) (noting consistent use of canons among "*all* of the [forty-two federal circuit court] judges" surveyed, regardless of political party or ideology).

the Court has already cited the canon thirty times since.[33] Extending this beyond the Supreme Court, federal courts of appeals have cited to the association canons by name more than 850 times since 1996.[34] So a jurist's methodology in applying the association canons has a definite impact on thousands of current and future litigants.

A. Why Association Canons?

In the first place, one might wonder whether the association canons *should* have such an influence on the judiciary. But they are vitally important. The association canons have a deserved entrenched place in common usage and legal history. A first reply is that they, at some level, reflect principles of language usage shared by American readers and writers. Take a well-cited study by Professors Abbe Gluck and Lisa Schultz Bressman, which surveyed a wide swath of counsels to members of Congress for their familiarity with the interpretive canons.[35] Their work discovered that even though the respondents mostly did not know the names *noscitur* or *ejusdem*, they did agree with the underlying principle that "terms in a statutory list always or often relate to one another."[36] In fact, only 2 of the 137 surveyed individuals said that relationship "rarely or never" existed.[37]

The tendencies of those who take part in drafting legislation tell us something about the overall accuracy of the association canons,[38] but they may not tell us about the ordinary practices of the everyday American. So look also at popular culture. The very existence of the Connections puzzle

[33] This number comes from a Westlaw search on March 22, 2025, for "*noscitur a sociis*" in Supreme Court cases after December 31, 1996.

[34] This number comes from a Westlaw search on February 18, 2025, for "'*noscitur a sociis*' OR '*ejusdem generis*'" in federal circuit court cases after December 31, 1996.

[35] Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 905–06 (2013).

[36] Id. at 931–33.

[37] Id. at 906, 933.

[38] For purposivist interpreters, Gluck and Bressman's study might provide even stronger evidence for the importance of the association canons. Purposivists generally search for "Congress's presumed intent" or purpose. See Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 112 (2010). The tendencies of those who draft laws on behalf of Congress could potentially tell us something about that presumed intent or purpose. See also Gluck & Bressman, supra note 35, at 914 (noting that some interpreters "assume the existence of . . . a 'feedback loop' between the courts and Congress that puts interpreters and drafters on the same page with respect to the interpretive conventions that both will follow").

(and the fact that it can trick readers) shows that the average American can—and often does—find a common theme among a group of words or phrases. And if confronted with a list or grouping of words or phrases that did *not* seem to have a discernable common feature or trait, readers would likely be taken aback.[39]

The lengthy history of the association canons also lends credence to their importance. As previously noted, the Supreme Court first used *noscitur* by name in 1805,[40] and American courts have been using *ejusdem* since at least 1789.[41] If judges have recognized these linguistic principles in English for more than two hundred years, it would be surprising (without some clear shift in language) to find them missing in reality.[42]

B. Fischer v. United States

The Supreme Court faced a recent issue involving *noscitur* and *ejusdem* in *Fischer v. United States*.[43] The case (like many others) concerned the interpretation of the Sarbanes-Oxley Act,[44] but this time, it

[39] See infra notes 170–72 and accompanying text (describing a list of random items). And even in lists of seemingly random words or phrases, a reader might discover a theme of some kind. See infra note 172.

[40] See supra note 16 and accompanying text.

[41] See supra note 29 and accompanying text.

[42] Some commentators have taken aim at *ejusdem*—even Scalia and Garner noted challenges to its accuracy. Scalia & Garner, supra note 11, at 211; see also Joseph Kimble, Ejusdem Generis: What Is It Good For?, 100 Judicature 49, 50–51 (2016) (listing arguments for and against *ejusdem*); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2160–61 (2016) (reviewing Robert A. Katzman, Judging Statutes (2014)) (considering giving *ejusdem* "little weight in modern statutory interpretation" due to its indeterminacy).

[43] 144 S. Ct. 2176, 2183–84 (2024).

[44] The Sarbanes-Oxley Act was a response to the Enron scandal of the early 2000s. See Simon Constable, How the Enron Scandal Changed American Business Forever, Time (Dec. 2, 2021, 1:06 PM), https://time.com/6125253/enron-scandal-changed-american-business-forever/ [https://perma.cc/FJQ6-Q7FL]. The Court has dealt with Sarbanes-Oxley interpretive questions several times in the past decade. See, e.g., Murray v. UBS Sec., LLC, 144 S. Ct. 445, 448–49 (2024); Yates v. United States, 574 U.S. 528, 532 (2015) (plurality opinion). The Act contains many lists of words or phrases—the prerequisites for *noscitur*. See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 306(a)(1), 116 Stat. 745, 779 (codified as amended at 15 U.S.C. § 7244) ("purchase, sell, or otherwise acquire or transfer"); id. § 603(a), 116 Stat. at 795 (codified as amended at 15 U.S.C. § 78u(d)) ("issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock").

also related to the prosecution of a participant in the Capitol riot on January 6, 2021.[45] The section in question read:

> (c) Whoever corruptly—
>
> > (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> >
> > (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.[46]

The issue was whether the language of subsection (c)(2) was limited by the clause, "with the intent to impair the object's integrity or availability for use in an official proceeding" in subsection (c)(1).[47] Chief Justice Roberts, for a 6-3 majority, held that subsection (c)(2) was limited by subsection (c)(1).[48] The Court reasoned that canons of construction (including the association canons), the "distinct purpose of each provision," the history of the Sarbanes-Oxley Act, and the "broader context" of the section in question all pointed to limiting subsection (c)(2).[49] Justice Barrett, joined by Justices Kagan and Sotomayor, dissented, finding that "Congress meant what it said" in that "very broad provision."[50]

In *Fischer*, the Court employed *noscitur* and *ejusdem* to point to the "common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it."[51] Chief Justice Roberts used a hypothetical about a sign at a zoo requiring onlookers to "not pet, feed, yell or throw objects at the animals, or otherwise disturb them."[52] Disturbing an animal by eating in front of it or talking to another person near it, he argued, would not be forbidden by

[45] *Fischer*, 144 S. Ct. at 2181–82.
[46] 18 U.S.C. § 1512(c).
[47] *Fischer*, 144 S. Ct. at 2181.
[48] Id. at 2190.
[49] Id. at 2183–87.
[50] Id. at 2195 (Barrett, J., dissenting).
[51] Id. at 2184 (majority opinion).
[52] Id.

this rule, "even if literally covered by the language."[53] The bottom line, according to the Court, was "that a general phrase can be given a more focused meaning by the terms *linked* to it."[54] The Court then applied this principle to the statute at issue, since it considered the list of verbs in subsection (c)(1) to be a "list" of "many specific examples of prohibited actions" followed by a "residual clause" in subsection (c)(2).[55] Thus, the Court found "that the scope of (c)(2) is defined by reference to (c)(1)."[56] Chief Justice Roberts also marshalled other arguments to arrive at this conclusion, including those related to superfluity, inferred purpose from the nature of the text, the history of the statute, and general context.[57]

In her concurrence, Justice Ketanji Brown Jackson agreed with the analysis of the list in the majority opinion,[58] but she also clarified what she believed about the invocation of *noscitur* and *ejusdem*. She characterized the canons as "useful interpretive tools," but only insofar as they pointed to "the intent of Congress" and "Congress's purpose."[59]

Justice Barrett, on the other hand, believed the canons of *noscitur* and *ejusdem* should never have been applied to this statute.[60] She criticized the majority's zoo sign example, since it matched the traditional format to which *ejusdem* applied (a list of "specific words followed by a catchall"), unlike the provision at hand.[61] Instead, the dissent found that subsection (c)(2) had "an entirely different object" and constituted a "separate prohibition" from subsection (c)(1).[62] Justice Barrett also argued that either interpretation created surplusage, that context worked in favor of a broader interpretation, and that a broad interpretation would not go too far.[63]

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[53] Id.

[54] Id. (emphasis added).

[55] Id. at 2185.

[56] Id.

[57] Id. at 2185–87.

[58] Id. at 2192 (Jackson, J., concurring).

[59] Id. at 2191 n.1 (quoting United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940)).

[60] Id. at 2197 (Barrett, J., dissenting) ("To my knowledge, we have never applied either of these canons to a statute resembling § 1512(c).").

[61] Id. ("But in the absence of a laundry list followed by a catchall, it is hard to see why the *ejusdem* canon fits." (citation omitted)).

[62] Id.

[63] Id. at 2198–2202. This Note returns to *Fischer* in Part IV after discussing the model for applying *noscitur*.

II. DOES *NOSCITUR* WORK?

Noscitur and its cousin *ejusdem*, along with other canons, are meant to "reflect broader conventions of language use" common at the time of a statute's enactment.[64] Textualists generally use these formal canons of construction to help ascertain the meaning of a statute's text.[65] This "rule-based approach"[66] is supposed to constrain judges from "imbu[ing] authoritative texts with their own policy preferences."[67]

But in analyzing the practices of the Supreme Court, some scholars have recently argued that language-based canons, including *noscitur*, have actually become weapons that judges may use to exercise their own personal policy discretion. Professor Anita Krishnakumar maintains that the Roberts Court's textualists are using *noscitur* "to infer an underlying statutory purpose."[68] She sees this phenomenon as unavoidable in the context of these canons. Krishnakumar believes that "by their nature," *noscitur* and *ejusdem* "confer significant discretion on judges and virtually require judicial identification of a statutory purpose."[69] She provides examples from the cases *Dolan v. United States Postal Service* and *James v. United States*, both of which concerned statutory lists, to conclude that "the act of identifying a common theme connecting the listed items required a fair amount of guesswork about Congress's underlying purpose in enacting the statute."[70] This "discretionary free-for-all," Krishnakumar argues, mirrors textualists' criticism of purposivists' supposed manipulation of legislative history and other extratextual sources.[71]

Krishnakumar's analysis aligns with that of Professor William Eskridge, Jr., who also criticizes *noscitur* and other canons for potentially making law "less predictable and more ideologically inflected."[72] Along with Professors Brian Slocum and Kevin Tobia, Eskridge highlights the

[64] Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 383 (2005).
[65] Id.
[66] Id.
[67] Scalia & Garner, supra note 11, at xxviii.
[68] Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1305 (2020).
[69] Id. at 1306.
[70] Id. at 1306–08 (first citing Dolan v. U.S. Postal Serv., 546 U.S. 481, 483–87 (2006); and then citing James v. United States, 550 U.S. 192, 195–99 (2007), *overruled by* Johnson v. United States, 576 U.S. 591 (2015)).
[71] Id. at 1313.
[72] William N. Eskridge, Jr., The New Textualism and Normative Canons, 113 Colum. L. Rev. 531, 576 (2013) (reviewing Scalia & Garner, Reading Law, supra note 11).

well-known case of *Yates v. United States* as an example of "normative evaluation."[73] In *Yates*, when determining the meaning of "tangible object" in the list "record, document, or tangible object," the plurality found the common theme of the list to be "objects used to record or preserve information."[74] Justice Kagan, in dissent, agreed—but she found multiple "common trait[s]" in that list.[75] She argued that every item in the list could also "provide information, and thus potentially serve as evidence relevant to matters under review."[76] Given these two possible common factors, Eskridge, Slocum, and Tobia ask, how does a textualist decide between them in a "neutral" way?[77]

These scholars' work highlights a potential weakness at the heart of *noscitur*. It points out that the result of applying *noscitur* may often be indeterminate, at which point some judges might input personal policy preferences or worldviews.[78] It doesn't help that many courts throughout the long history of *noscitur* have simply pointed out one potential common theme among words without giving credence to any others.[79] The following Sections describe this trend and others in the application of *noscitur* that might cast doubt on its effectiveness.

A. Multiple Common Traits

Noscitur, when applied to a list of words, phrases, or clauses, often centers around a "common trait."[80] Scalia and Garner refer to it as "the least common denominator."[81] Much of courts' analyses when using *noscitur* centers around identifying that common trait and using it to guide the interpretation of the word or phrase in question. But when jurists select that trait, they often ignore other potential common factors that might just as well define the list.

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[73] William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, Textualism's Defining Moment, 123 Colum. L. Rev. 1611, 1651–52 (2023) (discussing *Yates v. United States*, 574 U.S. 528 (2015)).

[74] *Yates*, 574 U.S. at 544 (plurality opinion) (quoting 18 U.S.C. § 1519). This case famously asked the question: Is a fish a "tangible object"? Id. at 532.

[75] Id. at 564 (Kagan, J., dissenting).

[76] Id.

[77] Eskridge, Slocum & Tobia, supra note 73, at 1652.

[78] An initial indeterminate result, though, does not *necessitate* the subsequent influence of personal opinions. See infra Part III.

[79] See infra Section II.A.

[80] *Yates*, 574 U.S. at 564 (Kagan, J., dissenting).

[81] Scalia & Garner, supra note 11, at 196.

For instance, the U.S. Court of Appeals for the Fifth Circuit recently needed to address whether COVID-19 constituted a "natural disaster" for the purposes of the Worker Adjustment and Retraining Notification ("WARN") Act.[82] The statute waived a layoff notice requirement if the layoffs were "due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States."[83] The court invoked *noscitur* in finding that the common theme of the list limited "natural disaster" to "hydrological, geological, and meteorological events."[84]

On its face, though, the words "flood, earthquake, or . . . drought" could lead to several common themes. The most obvious commonality is that all three are natural disasters. Although the court found no definition of the full phrase "natural disaster" from the time of the WARN Act's enactment,[85] writers had already been using the phrase to refer to each of the listed terms.[86] Since all three examples are literally natural disasters, the phrase "natural disaster" did not *necessarily* require limitation. That said, it is also fair to read the list "flood, earthquake, or . . . drought" to imply a more specific limitation. The court here chose the theme of "hydrological, geological, and meteorological events."[87] Yet floods, earthquakes, and droughts share other commonalities too. Each can kill humans. Each might affect a large swath of land. Each might cause areas to become uninhabitable. Some of these commonalities are perhaps baked into "natural disaster," but they would each narrow the playing field from all natural disasters to those that have a particular effect. And depending on the commonality selected, COVID-19 may or may not have been included. The Fifth Circuit did not address those possibilities.

Fischer provides another example. Chief Justice Roberts gave a hypothetical football rule in which a player cannot "grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or

[82] Easom v. US Well Servs., Inc., 37 F.4th 238, 240 (5th Cir. 2022).
[83] Id. at 241–42 (quoting 29 U.S.C. § 2102(b)(2)(B)).
[84] Id. at 244.
[85] See id. at 243.
[86] See generally, e.g., Barbara J. Powell & Elizabeth C. Penick, Psychological Distress Following a Natural Disaster: A One-Year Follow-Up of 98 Flood Victims, 11 J. Cmty. Psych. 269 (1983); David Alexander, Housing Crisis After Natural Disaster: The Aftermath of the November 1980 Southern Italian Earthquake, 15 Geoforum 489 (1984); The Politics of Natural Disaster: The Case of the Sahel Drought (Michael H. Glantz ed., 1976).
[87] *Easom*, 37 F.4th at 244.

otherwise attack, assault, or harm any player."[88] In dissent, Justice Barrett found that the words "attack" and "assault" limited the meaning of "harm," preventing the rule from applying to mere insults.[89] But that limitation is not obvious. "Attack" and "assault" share another commonality besides physicality. *Merriam-Webster* defines "attack" in one sense as meaning "to assail with unfriendly or bitter words."[90] It also defines "assault" as "a violent physical or verbal attack."[91] Both these definitions allow for a verbal barrage of some kind, so without the context of the other clause, the list in question was susceptible of multiple common traits.

Take Connections as a final example. One game involved the list "BOX, DIVE, FENCE, ROW."[92] The stated common theme was to "PARTICIPATE IN SUMMER OLYMPIC EVENTS."[93] But at a different level of generality, the theme easily could have been "sports," "ways to compete," or even "actions that involve your arms." Perhaps the solution is to choose the "most general quality."[94] Deciding which of these options is the most general, though, seems like a difficult task. Is "sports" broader than "actions that involve your arms?" Probably not, so the "most general quality" solution might point in favor of what seems like a very strange common theme at a very high level of generality. That is certainly true sans context. Without a clear explanation of why surrounding context points in favor of one of these options, a court's selection among several choices might appear (or actually be) arbitrary and even influenced by policy.

B. Occasion for Application

Courts are also split on when to apply *noscitur*. Some canons of interpretation only apply in certain circumstances. For instance, the *ejusdem generis* variant of *noscitur* only applies when there is a "catchall

[88] Fischer v. United States, 144 S. Ct. 2176, 2184 (2024).

[89] Id. at 2197 (Barrett, J., dissenting).

[90] Attack, Merriam-Webster, https://www.merriam-webster.com/dictionary/attack [https://perma.cc/QM57-EGRU] (last visited Mar. 28, 2025).

[91] Assault, Merriam-Webster, https://www.merriam-webster.com/dictionary/assault [https://perma.cc/N2W2-NAP2] (last visited Mar. 28, 2025). The verb "assault" means, in part, "to make an assault." Id.

[92] Wyna Liu, Connections No. 446, N.Y. Times (Aug. 30, 2024), https://www.nytimes.com/games/connections/2024-08-30.

[93] Id.

[94] Scalia & Garner, supra note 11, at 196.

phrase" or general word that comes after "an enumeration of specifics."[95] The series-qualifier and last-antecedent canons only apply when there is a modifier of some kind for a series of some kind.[96] This creates debates over whether the canons should apply in given situations. Is there in fact a catchall phrase? Does a word modify a series? Cases sometimes turn on such questions.[97]

In the same way, *noscitur*'s application often depends on whether there is an association between given words. Consider *Fischer*. The majority and dissent disagreed in part on whether 18 U.S.C. § 1512(c)(1) narrowed the application of subsection (c)(2) and, if so, in what way.[98] The majority applied *noscitur* and *ejusdem*.[99] It reasoned that the "specific text" of (c)(1) "accompanie[d]" (c)(2), or the more specific terms were "linked" to the "general phrase," giving it "a more focused meaning."[100] In contrast, Justice Barrett argued that applying *noscitur* was "like using a hammer to pound in a screw."[101] Importantly, she then added: "Unlike the pattern to which the *noscitur* canon applies, § 1512(c) is not a list of terms that includes an ambiguous word."[102]

In other cases, the Court has chosen not to apply *noscitur* to an arrangement of potentially associated words. Justice Stevens, writing for the majority in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, declined to apply *noscitur* to a list of three words.[103] The question was whether—in a list reading "congressional, administrative, or Government Accounting Office [(GAO)] report, hearing, audit, or investigation"—"administrative" included "state and

[95] Id. at 199.

[96] See id. at 144, 147.

[97] See, e.g., Lockhart v. United States, 577 U.S. 347, 351–52 (2016) (finding that a sentencing enhancement for prior sexual conduct only needs to "involv[e] a minor or ward" if the conduct was "abusive sexual conduct," since that limitation only modified one item in the list, not the whole list); infra notes 103–15 and accompanying text.

[98] See Fischer v. United States, 144 S. Ct. 2176, 2185 (2024) ("The 'otherwise' provision of Section 1512(c)(2) is similarly limited by the preceding list of criminal violations [in Subsection (c)(1)]."); id. at 2195–96 (Barrett, J., dissenting) ("Subsection (c)(2) then prohibits obstructing, influencing, or impeding an official proceeding by means different from those specified in (c)(1), thereby serving as a catchall." (emphasis omitted)); see also supra note 46 and accompanying text (discussing the text of 18 U.S.C. § 1512(c)).

[99] *Fischer*, 144 S. Ct. at 2183–84.

[100] Id. at 2184.

[101] Id. at 2196 (Barrett, J., dissenting).

[102] Id.

[103] 559 U.S. 280, 288–89, 289 n.7 (2010).

local sources as well as federal sources."[104] The Fourth Circuit had limited "administrative" to federal sources only, partially because it used *noscitur* to read that word in light of "congressional" and "GAO."[105]

Justice Stevens called this "unpersuasive."[106] He found the words "too few and too disparate to qualify" for applying *noscitur*.[107] In fact, the Court noted that the words "do not share any comparable core of meaning—or indeed any 'common feature' at all" besides "a governmental connotation."[108] "A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating," Justice Stevens wrote.[109] Justice Sotomayor, joined by Justice Breyer, dissented and relied heavily on applying *noscitur*, arguing that the canon "readily yields a common feature:" all three sources were "federal in nature."[110]

Justice Sotomayor is probably right that "congressional" at least *may* refer exclusively to federal sources, and the GAO is certainly a federal body.[111] "Administrative," too, may refer to federal executive agencies. So even if the Court was right that "administrative" should include state and local bodies, it seems strange to hold that the list did "not share . . . *any 'common feature' at all*" besides government in general.[112] The Court could have applied *noscitur* to acknowledge a federal commonality, but then decided that state and local sources were nonetheless included because the definition of "administrative" and the context of the surrounding text—both of which it used anyway—were strong enough to overcome *noscitur*'s common feature of being federal in nature.[113] Instead, it found that the canon *didn't apply*.

[104] Id. at 286 (alteration in original) (quoting 31 U.S.C. § 3730(e)(4)(A) (footnote omitted)); id. at 283.

[105] United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist., 528 F.3d 292, 302 (4th Cir. 2008), *rev'd and remanded*, 559 U.S. 280 (2010).

[106] *Wilson*, 559 U.S. at 288.

[107] Id. at 289.

[108] Id. at 289 n.7 (citation omitted).

[109] Id. at 288.

[110] Id. at 306 (Sotomayor, J., dissenting). For Justice Sotomayor's full discussion of *noscitur*, see id. at 304–06.

[111] See id. at 287 & n.6 (majority opinion).

[112] Id. at 289 n.7 (emphasis added) (quoting id. at 306 (Sotomayor, J., dissenting)).

[113] See id. at 287 (discussing the dictionary definition of "administration"); id. at 289–90 (discussing context).

As Justice Stevens wrote, whether a court applies *noscitur* may also depend on the length of the list.[114] He argued that a three-item list was "too short" to be helpful.[115] But interpreters do not always treat this factor as dispositive for the canon's application. In multiple cases, a three-item list has proven enough to use *noscitur*.[116] Some have even argued that a two-word list might be enough to apply the principle of *noscitur*.[117]

C. Relationship with Ordinary Meaning

For a host of interpreters, many canons of interpretation are subservient to a dominant one. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[118] The Supreme Court has affirmed this idea multiple times.[119] But the relationship between applying *noscitur* and the ordinary meaning of both the target word and associated words is fuzzy—in three major ways.

1. Unclear Final Meaning

First, it is often not clear how the result of applying *noscitur* to a word connects with the ordinary meaning of that word. *Noscitur* usually operates in the direction of narrowing a possible meaning.[120] However, the deciding court does not always clarify exactly how much a meaning

[114] Id. at 288.

[115] Id.

[116] See, e.g., Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (interpreting "discovery" as "only the discovery of mineral resources" from a list of three terms); Yates v. United States, 574 U.S. 528, 543–44 (2015) (plurality opinion) (applying *noscitur* to "tangible object" in light of only two other words: "record" and "document").

[117] See, e.g., Steven Calabresi, January 6, 2021 Was Not an Insurrection, Reason: Volokh Conspiracy (Jan. 6, 2024, 8:12 PM), https://reason.com/volokh/2024/01/06/january-6-2021-was-not-an-insurrection/ [https://perma.cc/LL6E-Z6FR]; cf. Scalia & Garner, supra note 11, at 206 (requiring at least two words in addition to the interpreted word or phrase to apply *ejusdem*).

[118] Perrin v. United States, 444 U.S. 37, 42 (1979) (citing Burns v. Alcala, 420 U.S. 575, 580–81 (1975)).

[119] See Nelson, supra note 10, at 111 (listing examples); William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 34–35 (2016) (describing the "primacy of the ordinary meaning rule").

[120] Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (finding that the canon helps "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words").

is narrowed. Sometimes, it does not even give a full final definition to provide notice to those affected in the future.

Take an example that Scalia and Garner provide in *Reading Law*. In *State v. Taylor*, the Minnesota Court of Appeals interpreted a statute criminalizing the carrying or possession of a pistol in a car unless that pistol was "contained in a closed and fastened case, gunbox, or securely tied package."[121] In answering whether "case" in that statute included a purse, the court applied *noscitur* to limit the meaning of "case."[122] It found that a purse did not count as a "case," and therefore that the defendant's actions "did not fit within the statutory exception."[123] Scalia and Garner praise this as the "rightly held" outcome.[124]

Yet the court never explained exactly what "case" meant after the decision. It rejected a dictionary definition that defined "case" in part as "that which encloses or contains,"[125] and in the syllabus it said "case" is talking about a "gun case."[126] It held that the word should have "a limited, technical meaning similar to 'gunbox,' the word that follows it," but then immediately added that such a meaning did not make "gunbox" superfluous.[127] If the common trait the court found is that the container "does not make the gun readily retrievable,"[128] would a secure and fastened case designed to store something other than a gun count? The court left this door open.

In a 2019 case citing *Taylor*, the Fifth Circuit also did not specify the final definition of the phrase in question. The court interpreted the phrase "educational benefit" in the context of "an obligation to repay funds received as an educational benefit, scholarship, or stipend."[129] It found that "educational benefit" did not include specific student loans, relying

[121] State v. Taylor, 594 N.W.2d 533, 535 (Minn. Ct. App. 1999) (quoting Minn. Stat. § 624.714, subd. 9(e) (1996)); Scalia & Garner, supra note 11, at 196–97 (quoting id.).

[122] *Taylor*, 594 N.W.2d at 536.

[123] Id.

[124] Scalia & Garner, supra note 11, at 197. The authors also note that the result may have differed if "closed" and "fastened" had not come before "case." See id.

[125] *Taylor*, 594 N.W.2d at 535 (quoting Case, Webster's New Universal Unabridged Dictionary 279 (2d ed. 1983)).

[126] Id. at 534. The court did provide examples of "gun case" in other statutes, but it never decided precisely what the meaning was in this statutory subdivision. See id. at 535–36.

[127] Id. at 536.

[128] Scalia & Garner, supra note 11, at 197.

[129] Crocker v. Navient Sols., L.L.C. (In re Crocker), 941 F.3d 206, 217–19 (5th Cir. 2019) (quoting 11 U.S.C. § 523(a)(8)(A)(i)–(ii)).

in part on *noscitur*.[130] Its final definition found that "educational benefit" was "limited to conditional payments with similarities to scholarships and stipends."[131] The "common quality" the court elicited was "that scholarships and stipends *may not* need to be repaid."[132] This ends up defining the phrase "educational benefit" through a negative: whatever it is, it is *not* something that *needs* to be repaid. Where exactly does this leave the affirmative definition of the phrase?[133]

The Supreme Court has often provided a final, exact, fixed meaning for the word or phrase in question after applying *noscitur*.[134] But if a court fails to do so, it not only unpins a meaning from its dictionary (or otherwise accepted) definition but also neglects to give proper notice to the statute's readers. Judicial restraint may explain this lack of clarity. A court's main purpose is to resolve the case before it, and the role of the judiciary and other concerns may counsel against continued interpretation after the issues sufficient to resolve the case are decided.[135] But if an interpreter stops without declaring a phrase's meaning, or at least the common theme of the associated list, ordinary citizens could be left unsure about future action. More importantly, without settling on at least one final, coherent interpretation, the jurist can cast some doubt on her own analysis. It seems less compelling to declare one interpretation incorrect without a clear-cut favorite to compare it against. If an interpreter chooses "not *X*" over *X*, she may overlook latent (and potentially even worse) interpretive problems with alternatives *Y* and *Z*. Although it may be an acceptable use of *noscitur*—within the bounds of judicial restraint—to exclude a suggested common theme rather than to fix one, a judge's argument could be more effective if it clearly laid out the correct alternative. There may be a point at which too much restraint

[130] Id. at 224.

[131] Id.

[132] Id. at 219.

[133] The Fifth Circuit "offer[ed] one definition of 'benefit'" from the *American Heritage College Dictionary* that limited benefits to those given "in accordance with a wage agreement, an insurance policy, or a public assistance program." Id. at 220 (quoting Benefit, American Heritage College Dictionary 127 (3d ed. 1997)). The court did not say whether this definition actually created the limits for "benefit." Id.

[134] See, e.g., Gutierrez v. Ada, 528 U.S. 250, 254–55 (2000) (defining "any election" as "an election for Governor and Lieutenant Governor"); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (defining "discovery" as "only the discovery of mineral resources").

[135] See Richard M. Re, Relative Standing, 102 Geo. L.J. 1191, 1205–07 (2014) (discussing the "judicial value" of restraint and noting Chief Justice Roberts's commitment to the principle).

undermines judicial accuracy and clarity (both for lower courts and the populace).

2. Disconnect from Dictionary Meaning

In *Jarecki v. G.D. Searle & Co.*, the Court reasoned that *noscitur* "is often wisely applied where a word is capable of many meanings."[136] Many of the examples of applying *noscitur* involve words that, in different contexts, may mean several different things.[137] For instance, *Jarecki* concerned the word "discovery."[138] As Chief Justice Warren put it, "'[d]iscovery' is a word usable in many contexts and with various shades of meaning."[139] But the *Jarecki* Court did not choose among one of the various meanings of "discovery." Instead, it imposed a limit on the ordinary meaning of the word by concluding that, in context, "discovery" meant "only the discovery of mineral resources."[140]

This imposition of a restraint not found in a dictionary definition typifies some *noscitur* cases[141]—especially those involving the *ejusdem generis* variant. For example, the Federal Arbitration Act exempts employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from its purview.[142] The Court, in *Circuit City Stores, Inc. v. Adams*, restricted "any other class of workers" to "transportation workers" only.[143] No dictionary definition of "class" or "class of workers" would be restricted to transportation alone. This restriction on the otherwise ordinary

[136] 367 U.S. at 307.

[137] See supra notes 25–26 and accompanying text.

[138] *Jarecki*, 367 U.S. at 305 (quoting Excess Profits Tax Act of 1950, ch. 1199, § 456(a), 64 Stat. 1137, 1186).

[139] Id. at 307. Chief Justice Warren did not actually give an explicit definition of "discovery" in *Jarecki*, although he referenced its usage in one dictionary and in several previous statutes. See id. at 308 n.3, 309–11.

[140] Id. at 307.

[141] Other *noscitur* cases, though, involve the selection of one of several dictionary meanings. See, e.g., United States v. Williams, 553 U.S. 285, 294–95 (2008) (using dictionary definitions to limit "promotes" and "presents" to the context of transactions); McDonnell v. United States, 579 U.S. 550, 568–69 (2016) (similarly "choos[ing] between . . . competing definitions" of "question" and "matter").

[142] 9 U.S.C. § 1.

[143] 532 U.S. 105, 109, 119 (2001) (quoting 9 U.S.C. § 1).

dictionary meaning comes from the text and context of the statute, not from a regularly acceptable definition of the words on their own.[144]

A disconnect from the dictionary does not doom these canons. After all, interpreters are often trying to use the canons to reflect the "speech patterns of ordinary English speakers."[145] If an ordinary person saw a list reading "Stephen Curry, LeBron James, Kevin Durant, and other athletes," that person might mentally impose a limitation on "other athletes" to the sport of men's basketball.[146] But the phrase "other athletes" does not, from its own definition, provide much help in creating this limitation because there are multiple possible common themes in this list.[147] "Other athletes" does not tell us whether the phrase should merely be limited to all male athletes or (on the opposite side of the generality spectrum) to members of the 2024 U.S. Men's Olympic basketball team.[148] Context must tell an interpreter what the correct limitation on "other athletes" should be—or whether it should have any limitation at all.

Justice Scalia contemplated the existence of contextually implied modifiers in his concurrence in the judgment in *Green v. Bock Laundry Machine Co*.[149] In determining whether the word "defendant" in Rule 609(a)(1) of the Federal Rules of Evidence referred specifically to a *criminal* defendant, Justice Scalia noted that qualifications are sometimes "omitted in normal conversation."[150] He suggested that if someone said, "I believe strongly in defendants' rights," she is likely to be referring to *criminal* defendants.[151] In this example, the context of the statement ("rights") tells readers what kind of defendant the speaker is talking about,

[144] The word "other" might provide a definitional hook for *ejusdem*. Interestingly, the *Oxford English Dictionary* defines "other" in part as "[a] separate or distinct person or thing of a kind specified or understood contextually." Other, Oxford English Dictionary, https://www.oed.com/dictionary/other_adj?tab=meaning_and_use (last visited June 21, 2025). That meaning, especially the phrase "specified or understood contextually," could open the door to a canon like *ejusdem* straight from the dictionary pages since it relies on contextual understanding.

[145] Amy Coney Barrett, Congressional Insiders and Outsiders, 84 U. Chi. L. Rev. 2193, 2203 (2017).

[146] Cf. Scalia & Garner, supra note 11, at 199 (creating a similar list).

[147] See supra Section II.A (discussing the phenomenon of multiple common traits).

[148] See ESPN, Team USA Basketball: 2024 Paris Olympics Roster, Scores, Schedule, News (Aug. 11, 2024, 5:20 PM), https://www.espn.com/olympics/story/_/id/40483397/team-usa-basketball-2024-paris-olympics-roster-schedule-news [https://perma.cc/M9YS-ZNDN].

[149] See 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

[150] Id. at 528–29.

[151] Id. at 529.

even though the dictionary definition of "defendant" does not change.[152] Take another example using our earlier list: "Stephen Curry, LeBron James, Kevin Durant, and other athletes." Suppose the sentence including that list reads, "People like Stephen Curry, LeBron James, Kevin Durant, and other athletes are often generous with their wealth." The immediate context suggests an implied modifier: that the athletes are *professional*. A reader would probably not believe the speaker's uncle, who plays pickup basketball at a high level every other week, is included in "other athletes"—even if he happens to be generous with his wealth.[153]

That said, dictionaries ordinarily provide helpful evidence to make a court's interpretation of a word or phrase credible.[154] Without that type of documented evidence for an ad hoc common theme while using *noscitur* (or *ejusdem*), a court should show its work to prove that its chosen commonality is in fact accurate.[155]

3. Meanings of Theme-Creating Words

Finally, courts often fail to delve into the meanings of the words or phrases that build the common theme for application of *noscitur*. In *Yates*, the plurality's common thread among "record, document, or tangible object" was the use "to record or preserve information."[156] Surprisingly, the Court never actually defined either "record" or "document" in that case. It presented a definition of the entire phrase from the Sentencing Commission's Guidelines Manual.[157] It defined "object" in the context of "tangible."[158] And it defined several of the verbs in the list of actions applying to the nouns in question.[159] Perhaps some might think the

[152] Thanks to Professor John Harrison for suggesting this point.

[153] This example came up in a conversation with my father. Thanks to him for sparking the idea.

[154] See Scalia & Garner, supra note 11, app. A, at 415–19 (describing the importance of dictionaries in legal interpretation and providing important principles for their use).

[155] One of the deficits of dictionaries is that they do not account for every context-specific word usage. In the above example, you would not expect to find the "professional" implied limitation as one of the definitions of "athlete." See Athlete, Merriam-Webster, https://www.merriam-webster.com/dictionary/athlete [https://perma.cc/RAB5-LJN2] (last visited Mar. 28, 2025). *Noscitur* corrects for that deficit by allowing interpreters to find the implied limitation. Thanks to Christopher Baldacci for inspiring this point.

[156] Yates v. United States, 574 U.S. 528, 531–32 (2015) (plurality opinion) (quoting 18 U.S.C. § 1519).

[157] Id. at 544.

[158] Id. at 537.

[159] Id. at 544.

definitions were unnecessary—after all, records and documents must certainly "record or preserve information." But, to the dissent's argument in that case, looking at the explicit definitions of those two words could have revealed multiple commonalities, including that they "potentially serve as evidence."[160]

The Tenth Circuit recently fell into the same trap in *M.S. v. Premera Blue Cross*.[161] It considered a section of the Employee Retirement Income Security Act ("ERISA") requiring administrators to disclose certain documents upon request.[162] Those documents included "the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."[163] As a part of its decision, the court needed to define "other instruments."[164] It used *noscitur* and *ejusdem* to conclude that "other instruments" meant "legal documents of the type recited in the preceding list."[165]

But the court never explicitly said what that "type" was. It had already defined "instrument" as "a legal document" using dictionaries.[166] So what exactly was this list adding? Perhaps the court was trying to confirm that "instruments" means "legal documents" by implying each of the items in the list are also legal documents. If so, it should have explained that. To a layman's ear, "annual report" or even "terminal report" might not sound like "legal documents," even if other items in the list like a "bargaining agreement" or a "contract" do sound legal.[167] Without explaining the meanings of the words in the list, the court left its claimed common attribute unclear.

[160] Id. at 564 (Kagan, J., dissenting). The dissent, too, chose not to define either "record" or "document." See id. at 556.

[161] 118 F.4th 1248 (10th Cir. 2024).

[162] Id. at 1254 (citing 29 U.S.C. § 1024(b)(4)).

[163] Id. at 1264 (quoting 29 U.S.C. § 1024(b)(4)).

[164] Id. at 1270.

[165] Id.

[166] Id. (quoting Instrument, Webster's Third New International Dictionary 1172 (1976)).

[167] It is possible that an "annual report" and a "terminal report" are legal documents, since they are often required by law or regulation, including in ERISA. See, e.g., 29 U.S.C. § 1021(c) (requiring plan administrators to file terminal reports if the plan ends); id. § 1365 (requiring annual reports from plan administrators). Yet if a "legal document" is one that "evidenc[es] legal rights or duties," the court should have explained why each item in that list also did so. *Premera Blue Cross*, 118 F.4th at 1270 (quoting Instrument, supra note 166, at 1172). That's especially true since the court held that the document at issue was not an "other instrument" because it *didn't* "establish legal rights or duties." Id. at 1271.

III. THE ASSOCIATION MODEL

The trends listed in Part II highlight uncertainties about *noscitur* and *ejusdem*. But all is not lost. To defuse concerns about courts bringing in "guesswork" or normative determinations from outside the ordinary bounds of interpretation,[168] and to ensure accurate application, judges applying *noscitur* should be clear about their method. They should apply it whenever words or phrases reflect an association, even when they are not in an explicit list. If there is such an association, judges should not claim the canon *does not apply*. They should highlight multiple possible common themes in a group of associated words or phrases, avoiding overly definitive claims about the common trait.

A. Clear Trigger

One of the biggest gray areas involving canons of interpretation centers around their triggers: *In what situations* are you supposed to use them?[169]

The first key requirement for *noscitur* is an *association*. The text must indicate that the words, phrases, or sentences in question ought to have something to do with one another. As Scalia and Garner put it, the context should "suggest[] that the words have something in common."[170] A list should provide enough evidence that the words or phrases are associated with one another—writers do not usually place completely unrelated objects in a list. Scalia and Garner pull an example of a list that did not have some quality in common from the famously random author Lewis Carroll in *Through the Looking Glass*. The Walrus says that it is time to speak "[o]f shoes—and ships—and sealing-wax—[o]f cabbages—and kings."[171] Most lists in everyday life do not pull from this kind of random assortment. But even here, for the first step of the *noscitur* trigger, these words do have an association—the fact that they are in a list makes it seem as though they should have something to do with one another. The

[168] See Krishnakumar, supra note 68, at 1308; Eskridge, Slocum & Tobia, supra note 73, at 1651–52.

[169] See Nelson, supra note 10, at 109 (noting "[w]hat is the trigger for the canon?" is an important question); cf. Kavanaugh, supra note 42, at 2149 (considering the "indeterminacy of the trigger" a major issue with using legislative history).

[170] Scalia & Garner, supra note 11, at 195.

[171] Lewis Carroll, Through the Looking Glass 53 (HarperCollins Publishers 2010) (1871); see Scalia & Garner, supra note 11, at 196.

humor of the sentence, in fact, is that they do not have a clear commonality, which upsets our ordinary expectations.[172]

Even without a list, an association may appear. Some of the earliest cases applying *noscitur* did not deal with a traditional list. For instance, the 1809 case of *Natterstrom v. The Hazard* involved a statute in French that the court translated as,

> And if the vessel be ready for her departure, she ought not to stay for the said sick party; but if he recover, he ought to have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it.[173]

The court in *Natterstrom* sought the meaning of "tout comptant," which roughly translated to the "full wages" portion.[174] It determined, from reviewing other similar laws, that "tout comptant" did not "necessarily . . . mean wages for the whole voyage."[175] Instead, its meaning came from "the subject matter and the connexion," and the court cited *noscitur* for that principle.[176] In other words, the context surrounding the phrase in question, as long as there was a "connection," might inform the definition of the phrase.[177]

The second requirement is a *common trait*. Justice Kagan used this phrase in her *Yates* dissent,[178] but other formulations get a similar point across, such as a "common feature" or the more stringent "comparable core of meaning."[179] No matter the exact wording, an interpreter must be able to look at the definitions of associated words and extract some feature that is common to them all. The identification of this common trait may

[172] One could still argue that these seemingly random ideas *do* have a common factor from context without digging into the individual definitions: they are all things that the Walrus wishes to speak about. It is unclear whether such a commonality would help clear up ambiguity. See also infra note 184 (explaining unclear common traits).

[173] Natterstrom v. The Hazard, 17 F. Cas. 1243, 1243 (D. Mass. 1809) (No. 10,055).

[174] See id. at 1244. "Tout" has a host of English equivalents today—it can mean "all," "every," "everything," "any," "very," and much more. Tout, The Oxford-Hachette French Dictionary 820–22 (Marie-Hélène Corréard & Valerie Grundy eds., 2d ed. 1997). "Comptant" refers to "cash." Comptant, id. at 167.

[175] *Natterstrom*, 17 F. Cas. at 1245.

[176] Id.

[177] Other early American legal minds saw *noscitur* as relating to the "subject matter of the sentence," which could influence the interpretation of "different clauses of the same sentence." Watson v. Mercer, 33 U.S. (8 Pet.) 88, 105 (1834) (argument of Mr. Rogers).

[178] Yates v. United States, 574 U.S. 528, 564 (2015) (Kagan, J., dissenting).

[179] Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280, 289 n.7 (2010) (quoting id. at 306 (Sotomayor, J. dissenting)).

be difficult to nail down, and it should involve analysis of the definitions of each potentially associated word or phrase and the surrounding context.[180] But if there is no common trait at all, an interpreter should not apply *noscitur*.[181]

The *ejusdem* variant of *noscitur* may require a more stringent test to apply. Unlike *noscitur*, it does not just require a mere association, but instead "a catchall phrase at the end of an enumeration of specifics."[182] Scalia and Garner laid out restrictions for *ejusdem*, including (1) the requirement of at least two specific words before the general phrase; (2) the generalized nature of finding a common class; (3) its non-application when no common theme exists; (4) the relevance of the rule against superfluity; and (5) the modern irrelevance of the "inferiority rule."[183]

In some respects, this Note seeks to ensure that courts intending to properly apply *noscitur* in general take some of the same precaution required to apply *ejusdem*. Although a particular formatting, like a list, is not mandatory, an interpreter should be able to clearly state the association between words and at least one common trait from those words if she wishes to apply *noscitur*.[184]

Justice Barrett pointed out this necessity in her *Fischer* dissent. She believed the majority had failed to "settle on the 'common

[180] See infra Sections III.B–C.

[181] As for the interaction between these two requirements, the existence of a well-supported common trait may provide prima facie evidence that an association exists as well. For example, imagine three straight sections of a provision that refer to the "49ers," the "Bengals," and the "Packers," respectively. If a fourth section then referred to the "Giants," one would probably imagine that it meant the New York Giants of the NFL, not the San Francisco Giants of the MLB (or the Gujarat Giants, a multisport organization based in India). See About Gujarat Giants, https://www.gujaratgiants.com/about-us [https://perma.cc/X82K-JW6G] (last visited Mar. 28, 2025). Even if those sections were not structured as a traditional list or were spaced out, the common theme of NFL teams would still be apparent, although the association could be weaker the farther apart the terms were.

[182] Scalia & Garner, supra note 11, at 199. That enumeration need not be of only one format, according to Scalia and Garner. "[A]ll sorts of syntactic constructions" featuring "particularized lists followed by a broad, generic phrase" will do. Id. at 200.

[183] Id. at 206–11. The inferiority rule posits that "the general word will not be treated as applying to persons or things of a higher quality, dignity, or worth than those specifically listed." Id. at 210.

[184] It is possible that at an early stage of analysis, an interpreter could see a potential common trait and go through the process of applying *noscitur*, only to discover later that the trait is not actually supported by the meanings of the associated words or by the context. In that case, it would not have been wrong for the interpreter to use *noscitur* in the first place, even if there turned out to be no clear common theme later on.

attribute' . . . that cabins" the subsection at issue.[185] She highlighted two interpretive options—one that focused on physical evidence ("records, documents, or objects") and one that focused on general "evidence impairment."[186] Justice Barrett then argued that both commonalities were "problematic."[187] No matter the legitimacy of each proposed common attribute, the majority's lack of clear selection between the two provided the dissent with a path of attack.

B. Listing Commonalities

Once an interpreter has decided that an association and a common trait exist, she then must determine which common trait ought to influence the interpretation of the word or phrase at issue. Importantly, this common feature should connect with the overall context of the list or group of associated language.[188] For instance, in *Ali v. Federal Bureau of Prisons*, the petitioner argued that *noscitur* and *ejusdem* should apply to the phrase "any officer of customs or excise or any other law enforcement officer."[189] He believed the "common attribute" between "officer of customs or excise" was that "both types of officers are charged with enforcing the customs and excise laws."[190] But the Court rejected that interpretation. Justice Thomas, writing for the majority, found it "not apparent what common attribute connects" the words.[191] He suggested that other relevant characteristics, too, could just as easily have applied.[192]

[185] Fischer v. United States, 144 S. Ct. 2176, 2199 (2024) (Barrett, J., dissenting) (quoting Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 225 (2008)). To review the statute in question, see supra note 46 and accompanying text.

[186] *Fischer*, 144 S. Ct. at 2199 (Barrett, J., dissenting) (quoting id. at 2186 (majority opinion)) (citing United States v. Fischer, 64 F.4th 329, 363 (D.C. Cir. 2023) (Katsas, J., dissenting), *vacated*, 144 S. Ct. 2176 (2024)).

[187] Id.

[188] Scalia & Garner, supra note 11, at 196 ("The common quality suggested by a listing should be its most general quality . . . *relevant to the context*." (emphasis added)).

[189] 552 U.S. at 224–26 (quoting 28 U.S.C. § 2680(c)).

[190] Id. at 225. The structure of the list also does not make it clear that finding a common theme is possible or wise with one conjunctive item, especially with a stricter test for *ejusdem*. See supra notes 114–117 and accompanying text (analyzing the appropriate length of list for *noscitur*); supra notes 182–183 and accompanying text (discussing the factors needed to apply *ejusdem*).

[191] *Ali*, 552 U.S. at 224–25. Justice Thomas then went on to note that the context of the list at issue did not support the petitioner's claimed commonality either. Id. at 226.

[192] Id. at 225–26 (noting, for example, that another common attribute could be the "collection of taxes").

It is especially important that a jurist acknowledge other potential common themes that would lead to a different result in the case. If an average reader could look at the same list that a judge reviews and come up with several other commonalities, it would probably appear strange that none of the other options came up in the opinion. In laying out these commonalities, courts should explicitly define all the words that lend themselves to the unifying theme.[193] This is part of showing an interpreter's work, and it avoids jumping straight to a commonality that might be unsupported by the ordinary meanings of its constituent words.[194] The accuracy of association analysis relies on extracting a common theme from the associated words or phrases, and failure to explain associated items' meaning hurts that accuracy.

The Court provided a good example of this in the unanimous opinion of *McDonnell v. United States*.[195] The debate in *McDonnell* centered around the definition of "official act" as part of a bribery charge.[196] The Court had to determine whether certain actions like "setting up a meeting, hosting an event, or contacting an official—without more" were "official act[s]."[197] Federal law defined "official act" as "any decision or action" taken on a "question, matter, cause, suit, proceeding or controversy . . . before [any] public official."[198] The Court stepped through the definitions of each of those terms, both from other statutes and from legal dictionaries, to determine that "cause," "suit," "proceeding," and "controversy" referred to "formal exercise[s] of

[193] If a list is very long, perhaps a court might not have to provide an explicit definition for *all* the words. But having some number of words in a list that do not share a potential common theme provides evidence that the theme might not be accurate. Justice Scalia discussed this possibility in his debate with Justice Stevens's majority opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. 515 U.S. 687, 719–20 (1995) (Scalia, J., dissenting). There, in a ten-word list, Justice Scalia argued that "harm" must have a "sense of affirmative conduct intentionally directed against a particular animal or animals," since the nine other words in the list *by definition* had the same sense. Id. (quoting 16 U.S.C. § 1532(19)). But Justice Scalia also did not explicitly define the other words in the list to prove his point, despite extensive definitional citations for the relevant words "take" and "harm." See id. at 717–20. This is not to say that his theme was incorrect—just that defining even some of the other listed words (especially borderline ones) might have added credibility to his analysis.

[194] See supra Subsection II.C.3.

[195] 579 U.S. 550, 554 (2016).

[196] Id. at 555.

[197] Id. at 555–56.

[198] Id. at 566 (quoting 18 U.S.C. § 201(a)(3)).

governmental power."[199] It then applied that carefully chosen common factor to the more general "question" and "matter" using *noscitur*.[200] The Court bolstered this application by finding that both "question" and "matter" had ordinary dictionary definitions that were more tailored to the formal context.[201] The analysis from *McDonnell* thus built a case for a common attribute with evidence from ordinary meaning, providing a model for future interpreters to do the same.

C. Careful Contextual Analysis

The heart of proper association canon application centers around a careful review of the context of the word or phrase. As Scalia and Garner put it, "[t]he common quality suggested by a listing should be its most general quality . . . *relevant to the context*."[202] If an interpreter has discovered multiple common themes, only one of which finds support in the context, she should select that option. But the idea of context selecting a common theme begs several questions. What is "context"? How should an opinion writer indicate context's support for a common trait? And does this analysis change when applying *ejusdem*, rather than the broader *noscitur* canon?

The definition of context may differ based on one's interpretive priors and idiosyncrasies within those priors. Scalia and Garner begin their discussion of contextual canons of interpretation with the "whole-text canon," considering the entire text of an interpreted document to be vital context.[203] Professor Caleb Nelson explained that "no 'textualist' favors isolating statutory language from its surrounding context,"[204] but textualists also differ in their ideas of what fits in that box.[205] Judge Frank Easterbrook, for example, referenced several kinds of contexts, including

[199] Id. at 568.
[200] Id. at 569.
[201] Id. at 568 (first citing Question, Webster's Third New International Dictionary 1863–64 (1961); and then citing Matter, id. at 1394).
[202] Scalia & Garner, supra note 11, at 196 (emphasis added).
[203] Id. at 167 ("The entirety of the document thus provides the context for each of its parts.").
[204] Nelson, supra note 64, at 348.
[205] Professors Eskridge, Slocum, and Tobia recently contended that "no stable metarules . . . constrain textualists from subjectively picking and choosing among possible inferences from context." Eskridge, Slocum & Tobia, supra note 73, at 1660. They provide a diagram placing various sources of context on a line from closer to the interpretive target (and therefore more impactful) to farther (and therefore less impactful). Id. at 1663.

"linguistic, structural, functional, social, [and] historical."[206] These might all be important since "[c]larity depends on context."[207] But what exactly fits in each of those buckets is up for debate.[208]

This Note does not provide a definite answer to what interpreters should consider "context" and what they should avoid using. But it does assume that, *at minimum*, the full text of a statute in question provides context that may help an interpreter find a common theme.

What exactly does that context do? Under a textualist framework, the hunt for a common theme in context can often relate to purpose. Scalia and Garner make this plain in describing the application of *ejusdem*. In finding the common link, they say, "the evident purpose of the provision" often answers the question.[209] A call to discover "evident purpose" might initially throw off textualist interpreters. It hearkens back to Krishnakumar and Eskridge's criticisms of applying the association canons.[210] But recall the underlying motivations for textualism. Textualists generally seek ordinary meaning—the meaning an ordinary person should find in the same text based on linguistic principles.[211] If it turns out that an ordinary American would also use evident purpose, built from textual support, to influence their interpretation of a word or phrase, why shouldn't a textualist judge too?[212]

Ordinary Americans do follow this process. Imagine a letter arrives in your mailbox. It reads:

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[206] In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

[207] See id.

[208] Justice Thomas, for instance, challenged the use of "social history" to interpret a statute as an "unprecedented step" without clear definition of that phrase. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 607 (2004) (Thomas, J., dissenting).

[209] Scalia & Garner, supra note 11, at 208; see also Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2106 (2024) (Kavanaugh, J., dissenting) (applying this "evident purpose" framework in the *ejusdem* context to analyze a "common thread").

[210] See supra notes 68–77 and accompanying text.

[211] See Scalia & Garner, supra note 11, at 33; see, e.g., Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1788 (2022).

[212] See Scalia & Garner, supra note 11, at 33–40 (describing the "fair-reading method," which considers the "purpose of the text . . . gathered only from the text itself" as a "vital part" of context and referring to the "textually manifest purpose" of a law (emphasis omitted)); John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 84–85 (2006). A Canadian scholar has also recently argued that "text-as-medium interpretation provides a more complete account of the role of purpose" in a legislative system, as opposed to "purpose-as-medium interpretation." Mark P. Mancini, Two Uses of Purpose in Statutory Interpretation, 45 Statute L. Rev. (forthcoming 2024) (manuscript at 2–3). In other words, Professor Mancini posits that "purpose" ascertained from the text and distilled into a principle may "guide interpretation and shed light on broad statutory terms." Id. (manuscript at 2).

> Dear Neighbor,
>
> > Unfortunately, your cat seems to have ruined several of my flowers. I'd prefer to keep my garden safe, especially with important visitors on the way soon. So, if your cat harms any more orchids, lilies, hydrangeas, or other plants, I will call animal control.
>
> All the best!
>
> Neighbor

What does "other plants" refer to? Surely not all the plants in the world, even though the phrase could literally stretch that far. The previous sentences communicate an evident purpose: keeping the neighbor's garden safe. An opinion interpreting the phrase would cite the textual phrase "keep my garden safe" as an example of that purpose. The implication: if your cat broke a blade of grass in your own yard, an ordinary reader wouldn't expect the neighbor to enforce his promise. But if your cat crushed a gardenia in your neighbor's garden, everyone would expect the cat to get in trouble.

Take a borderline case, though. Your cat delivers a killing blow to your neighbor's aloe vera plant, which is nestled among the rest of his flowers in his garden. Even though your neighbor mentioned "flowers" explicitly in the message, the evident purpose from context is probably not limited to flowers alone. The focus on "my garden" and the ordinary definition of "plants" would probably override the common theme that orchids, lilies, and hydrangeas are all flowers. Instead, you would back up a level of generality and assume that the common theme is that of all plants in your neighbor's garden. Most ordinary readers would likely expect the cat to get in trouble here too.

This example has flaws. Legislatures do not usually pass acts with explicit purpose statements immediately abutting ambiguous text, like in this letter.[213] But if an interpreter can tell from a textual source that a purpose is evident and can explain how she found that purpose through a

[213] Legislatures do, however, use enacted purpose statements, and they could be helpful to both textualist and purposivist interpreters in dealing with ambiguity. See Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L. Rev. 669, 683–85, 721–24 (2019).

thorough written discussion, that purpose should help guide the choice among common themes in associated words or phrases.[214]

This example is also an occasion for the use of *ejusdem generis*, which requires an even more careful application of context. Although *noscitur* often operates when a term is susceptible of two or more plausible meanings, *ejusdem* nearly always deviates from the literal meaning of a phrase.[215] Already, then, the interpreter faces a burden of sorts in showing that some common theme overcomes the dictionary definition. Jurists building a case to override the literal definition thus should be very clear about exactly how they derive a limiting principle from context.[216]

D. Impact

Scalia and Garner analogize *noscitur* to finding the "least common denominator" of a group of words.[217] The process should be like math in another way—jurists should show their work. Even when a common

[214] In addition to Scalia and Garner, many interpreters with different methodologies have agreed on the importance of "evident purpose." See, e.g., Fischer v. United States, 144 S. Ct. 2176, 2185 (2024) (Roberts, C.J., joined by Thomas, Alito, Gorsuch, Kavanaugh & Jackson, JJ.) (citing Scalia & Garner, supra note 11, at 208); Yates v. United States, 574 U.S. 528, 552–53 (2015) (Kagan, J., dissenting, joined by Scalia, Kennedy & Thomas, JJ.); Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 368, 391 (2009) (Kennedy, J., concurring in part and dissenting in part, joined by Souter & Ginsburg, JJ.).

[215] See, e.g., supra notes 141–48 and accompanying text (discussing examples of *ejusdem* where interpretations divert from the literal meaning of a phrase); see also Scalia & Garner, supra note 11, at 199 (noting that *ejusdem* "implies the addition" of a limitation to a literal phrase).

[216] Professor Joseph Kimble suggests similar care for drafters writing lists with general and specific terms. Kimble, supra note 42, at 55–56 (urging drafters to be clear about what the class of a list actually is and, if they wish to avoid *ejusdem*, to eliminate specific terms in favor of keeping the general alone).

[217] Scalia & Garner, supra note 11, at 196. A brief note: One could apply this "least common denominator" idea in a rule-like fashion. An interpreter could default to the narrowest common thread among words barring clear contextual evidence to the contrary. But such a method would be difficult to apply and would likely come back to the same contextual analysis. Take the list we have used before: "Stephen Curry, LeBron James, Kevin Durant, and other athletes." The least common denominator here might be very narrow indeed: perhaps people who started in *both* the 2014 and 2019 NBA All-Star Games. This would narrow "other athletes" to only Kyrie Irving, James Harden, and Paul George. See 2014 NBA All-Star Game, Basketball Reference, https://www.basketball-reference.com/allstar/NBA_2014.html [https://perma.cc/4E2N-GJME] (last visited Mar. 5, 2025); 2019 NBA All-Star Game, Basketball Reference, https://www.basketball-reference.com/allstar/NBA_2019.html [https://perma.cc/C3WN-5659] (last visited Mar. 28, 2025). Barring clear contextual evidence in *favor* of that theme, no human is likely to have meant exactly that narrow reading.

theme seems obvious to a reader, explaining the method that a judge took to get there fosters transparency, credibility, and accuracy in legal interpretation.

Such benefits are especially important in the age of information. Although judges in the early days of the Republic did not explain *noscitur* in great detail,[218] opinions from the Supreme Court are now available at the touch of a button, and social media users release their takes as soon as the Justices read their decisions from the bench.[219] Some pundits may accuse the Court (and lower courts) of partisanship no matter what the opinion actually says. But for those readers who do care about the precise methods and reasoning—and for the scholars with legitimate concerns about judges' explanations—applying the foregoing methods can prove on paper that a jurist's work is not mere guesswork or ideology.[220]

This model can also increase accuracy in achieving interpretive goals, whether the judge is a textualist or a purposivist. The line between those two camps, at least in relation to the canons of interpretation, has blurred somewhat in the twenty-first century. Purposivist judges often now focus on the semantic meaning of the text in their approach to statutory language.[221] If a purposivist jurist finds legislative history or other extraneous documents that indicate a list or group of associated words is supposed to mean *X*, it would still be helpful to have well-developed evidence that the plain meaning of the text confirms *X*.[222] And if a purposivist does not have clear extratextual evidence, what could be better than a context-focused analysis of the text to divine legislative

[218] See, e.g., Lambert's Lessee v. Paine, 7 U.S. (3 Cranch) 97, 134 (1805) (opinion of Paterson, J.) (simply stating "[*n*]*oscitur a sociis*" for the principle and devoting only a few sentences to analysis under that principle).

[219] See, e.g., Roe v. Wade Supreme Court Decision: Twitter's Decidedly Negative Reaction, Tufts Univ.: Digit. Planet (July 6, 2022), https://digitalplanet.tufts.edu/roe-v-wade-supreme-court-leak-twitters-decidedly-negative-reaction/ [https://perma.cc/8JAH-KDY8] (noting the nearly two million tweets posted after the Court's decision in *Dobbs v. Jackson Women's Health Organization*).

[220] See supra notes 68–79 and accompanying text (explaining claims that *noscitur* is "guesswork" or "ideologically inflected").

[221] Manning, supra note 212, at 87; see John F. Manning, The New Purposivism, 2011 Sup. Ct. Rev. 113, 175 (arguing that "[n]ew purposivists are more prone to consult semantic resources than their more traditional forebears," including "the once-discredited semantic canons of construction").

[222] Cf. Muscarello v. United States, 524 U.S. 125, 127–32 (1998) (Breyer, J.) (conducting an in-depth analysis of the ordinary meaning of the word "carry" before proceeding to the question of purpose).

purpose?[223] For the goals of ordinary meaning, legislative intent, and discovered purpose, a systematic *noscitur* process engenders confidence and clarity.

IV. *FISCHER* REVISITED

In light of this model for applying *noscitur*, let's return to *Fischer v. United States*.[224] The main debate in *Fischer* involving *noscitur* matches the first step of the model, which predicts debates over whether the canon is triggered by an association.[225] Recall that Chief Justice Roberts and Justice Barrett argued over whether "otherwise" created an association such that *noscitur* applied.[226]

Justice Barrett argued that using *noscitur* or *ejusdem* in this case would be inappropriate for two reasons. First, she said that *noscitur* only applies when there is "an ambiguous word," and that the Court inappropriately used the canon to "add[] an adverbial phrase" instead of "select[ing] between multiple accepted meanings."[227] Second, she found that *ejusdem* could not apply since there is no "general or collective term following a list of specific items to which a particular statutory command is applicable."[228]

To the first point, the Court has in fact used *noscitur* in cases where it did not select between multiple accepted meanings. Consider *Jarecki v. G.D. Searle & Co.*, where the Court used *noscitur* (not *ejusdem*) to limit the word "discovery" to the "discovery of mineral resources."[229] The Court did not provide a dictionary definition of "discovery" that aligned with its chosen interpretation. It merely added a modifying phrase to the ordinary meaning of the word from the context of the statute.[230] The same was true in *Gustafson v. Alloyd Co.*, where the Court interpreted the word

[223] Justice Ketanji Brown Jackson, in her concurrence to *Fischer v. United States*, discussed the use of canons like *noscitur* in a purposivist framework. 144 S. Ct. 2176, 2191 n.1, 2192 (2024) (Jackson, J., concurring) ("[O]ur assessment of the words that the drafters used informs our understanding of what the rule was designed to do."). She added that "the rule's context . . . can further inform our understanding of the rule." Id. at 2192 n.2.

[224] Id. (majority opinion).

[225] See supra Section III.A.

[226] *Fischer*, 144 S. Ct. at 2182–86; id. at 2195 (Barrett, J., dissenting). For a reminder of the statutory text at issue, see supra note 46 and accompanying text.

[227] *Fischer*, 144 S. Ct. at 2196 (Barrett, J., dissenting).

[228] Id. at 2196–97 (quoting United States v. Aguilar, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part)).

[229] 367 U.S. 303, 307 (1961); see notes 136–40 and accompanying text.

[230] See *Jarecki*, 367 U.S. at 307.

"prospectus."[231] Congress defined "prospectus" in a different section of the relevant act as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television."[232] The Court found, based on the word "prospectus" coming before it, that "communication" actually meant "a public communication."[233] It again provided no dictionary or statutory definition of "communication" that was limited to "public" messaging. So, like in *Jarecki*, the Court limited a word with a modifier that did not come from one of multiple accepted meanings.[234]

But Justice Barrett is right to be concerned about the discretion inherent in "adding an adverbial phrase" to a definition.[235] As we have seen, this anxiety underwrites *noscitur*'s academic critics.[236] If jurists are not thorough about explaining why they chose a common theme from a list to apply to a potentially ambiguous word in that list, it may lead to more accusations of ideological influence.[237] Even worse, without following specific steps to reach their conclusion in adding a modifier, interpreters may get the answer wrong. The solution is not to avoid unstated modifiers. They are often a part of ordinary linguistic practice, and thus they might often be part of the correct interpretation.[238] Instead, if interpreters follow the process laid out here to select the right modifier, using contextual and definitional analysis, they should be more likely to come to the right result.

Justice Barrett's second reason not to apply the association canons was that there was no "general or collective term following a list of specific items to which a particular statutory command [was] applicable."[239] That argument asks this question: Is the clause following "otherwise" in subsection (c)(2) *part* of the list at the beginning of subsection (c)(1)?[240]

[231] 513 U.S. 561, 566 (1995).

[232] Id. at 573–74 (quoting 15 U.S.C. § 77b(a)(10)).

[233] Id. at 575.

[234] Perhaps Justice Barrett would argue that the Court decided these cases wrongly. If so, she would not be alone. In *Gustafson*, Justice Thomas and three other Justices argued in dissent that by using "prospectus" to control the meaning of all the listed words, the Court "def[ied] common sense" and stopped Congress from effectively using "expansive words in a list." Id. at 584, 586–87 (Thomas, J., dissenting, joined by Scalia, Ginsburg & Breyer, JJ.).

[235] See Fischer v. United States, 144 S. Ct. 2176, 2196 (2024) (Barrett, J., dissenting).

[236] See supra notes 68–77 and accompanying text.

[237] See supra notes 68–71 and accompanying text.

[238] See, e.g., supra notes 145–52 and accompanying text (discussing examples of lists with unstated modifiers, including from Justice Scalia).

[239] *Fischer*, 144 S. Ct. at 2196–97 (Barrett, J., dissenting) (quoting United States v. Aguilar, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part)).

[240] See supra note 46 and accompanying text to review the exact language at issue.

If so, the limitation of "with the intent to impair the object's integrity or availability for use in an official proceeding" almost certainly applies, since it modifies that list. If not, the modifying clause may not apply. Under Chief Justice Roberts's interpretation, which connects the lists, *noscitur* could apply.[241] Under Justice Barrett's, which keeps them separate, it might not—or at least it does so weakly.[242]

Judge Gregory Katsas noted two different approaches to the word "otherwise" in his *Fischer* dissent in the D.C. Circuit: the government's, which read it "to mean 'in any other way;'" and the district court's and defendants', which read it "to require some further similarity" between the two subsections.[243] Judge Katsas and the Supreme Court took the latter approach, referencing a prior case in which the Court had also read "otherwise" to limit a different criminal statute.[244] They also relied on several statute-specific arguments to select this definition of "otherwise," including the "evident purpose" of the clauses,[245] Section 1512's place in the criminal code, the canon against surplusage, and the history of the Sarbanes-Oxley Act.[246]

This debate has important implications for *noscitur*, since continuous lists are classic examples of required association.[247] A lack of listing should not necessarily eliminate *noscitur*, but it may instead reduce its weight among interpretive methods compared to when it is applied to a list.[248] Whether or not the canon applies in the absence of a clear list, interpreters should carefully consider—using context—the question of

[241] *Fischer*, 144 S. Ct. at 2183–84.

[242] Id. at 2196–97 (Barrett, J., dissenting).

[243] United States v. Fischer, 64 F.4th 329, 369 (D.C. Cir. 2023) (Katsas, J., dissenting).

[244] Id. at 367 (citing Begay v. United States, 553 U.S. 137 (2008), *abrogated on other grounds by* Johnson v. United States, 576 U.S. 591 (2015)); *Fischer*, 144 S. Ct. at 2184–85 (same).

[245] See supra Section III.C for a discussion of "evident purpose" in relation to the association canons.

[246] *Fischer*, 144 S. Ct. at 2185–88.

[247] See supra notes 22–24 and accompanying text.

[248] See supra Section III.A.

the list's existence.[249] In *Fischer*, context and precedent pushed the Court toward the existence of a list.[250]

But what exactly was the common limiting theme of that list? The majority did not explicitly describe any feature as a "common theme," and Justice Barrett's dissent highlighted its absence.[251] The D.C. Circuit in the decision below also considered whether a "common attribute" existed.[252] The majority of the lower court's panel found no evidence of an association between the two subsections and no "common attribute" that might connect them.[253] Given the Supreme Court's definition of "otherwise" to imply a similarity, the Court needed to find the commonality in subsection (c)(1) that applied *through "otherwise"* to the remaining terms in subsection (c)(2). Yet the Court never conducted an analysis, such as that recommended by this model, to select that commonality. It simply stated that the listed actions in subsection (c)(1) "by their nature, impair the integrity or availability of records, documents, or objects for use in an official proceeding."[254] Then, applying that finding, it held that subsection (c)(2) "makes it a crime to impair the availability or integrity of records, documents, or objects used in an

[249] Some scholars question whether, in the absence of a list, *noscitur* brings any meaning to the table at all. They contend that if *noscitur* only means "that context can help select the correct word meaning," the canon reduces to "an uncontroversial truism of linguistics." Kevin Tobia, Brian G. Slocum & Victoria Nourse, Statutory Interpretation from the Outside, 122 Colum. L. Rev. 213, 242 & n.157 (2022). But even if a canon is "obvious and broad," see id. at 242, its encapsulation of common linguistic principles might be the very thing that gives it utility. Cf. Nelson, supra note 10, at 109 (noting that certain canons seek to "formalize common principles of English usage").

[250] *Fischer*, 144 S. Ct. at 2185–88. The specific issue of whether "otherwise" created an association in this case was close, but the Court's contextual analysis and the application of other canons showed that an association likely did exist. That said, as Justice Barrett noted, "otherwise" can easily mean "in a different manner," and that may be the proper interpretation in other cases. See id. at 2195 (Barrett, J., dissenting) (quoting Otherwise, 10 The Oxford English Dictionary 984 (2d ed. 1989)). If other canons and context point toward "otherwise" as a differentiator, a *noscitur*-like analysis may still be helpful. An interpreter would have to answer the question, "In a different manner *from what*?" Thus, finding the common theme of the associated words preceding "otherwise" would still help interpret the words coming after "otherwise." One might call this the "uncommon theme."

[251] See supra notes 185–87 and accompanying text.

[252] See United States v. Fischer, 64 F.4th 329, 346 (D.C. Cir. 2023) (quoting Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 224–26 (2008)).

[253] Id. at 345–46.

[254] *Fischer*, 144 S. Ct. at 2185. Earlier, the Court found the list in subsection (c)(1) to be of "many specific examples of prohibited actions undertaken with the intent to impair an object's integrity or availability for use in an official proceeding: altering a record, altering a document, concealing a record, concealing a document, and so on." Id.

official proceeding in ways other than those specified in (c)(1)."[255] It added that subsection (c)(2) covered "*other* things" beyond records and documents used in official proceedings.[256]

Explaining the common theme matters because the Court's holding required it. The majority found that "other things" beyond records and documents are covered by subsection (c)(2). That finding relies on the common theme's level of generality. Is the commonality limited to actions that "impair the integrity or availability of records, documents, or objects," or does the list imply a broader ban on dishonest handling of evidence in general?[257] The first reading would narrow subsection (c)(2) to only actions other than those listed in subsection (c)(1) that affect *physical* evidence. The second, which it appears the Court chose, included "other things."[258] How did the Court get from its common theme to its conclusion? If it believed "other things" was implied, either from the commonality in subsection (c)(1) or from the text of subsection (c)(2), it should have explained why.[259] As it is, the Court did not identify an explicit common theme and did not connect it to a conclusion.

In sum, the Court used the association canons to do two important things. It found an association between the text of subsection (c)(1) and subsection (c)(2). And it drew the general principle that associated words have similar meanings to support a limiting interpretation of the word "otherwise," citing precedent, context, statutory history, and other canons to back that interpretation.[260] But it could have also used the methods discussed here to establish a precise common theme and apply it to the

[255] Id. at 2186.

[256] Id.

[257] Judge Katsas noted this tension. He saw the two options for the common theme of subsection (c)(1) that should have been applied to subsection (c)(2) through "otherwise" as either a focus on "physical evidence" alone or instead a focus on "evidence" generally. *Fischer*, 64 F.4th at 370 (Katsas, J., dissenting). Under both interpretations, he believed the defendants prevailed. Id.

[258] See *Fischer*, 144 S. Ct. at 2186 (emphasis omitted).

[259] The Court supported its "other things" reading by citing a previous prosecution under subsection (c)(2) for attempting to "orchestrate a witness's grand jury testimony." Id. (citing United States v. Mintmire, 507 F.3d 1273, 1290 (11th Cir. 2007)). But it is unclear how one past interpretation of subsection (c)(2) opens the door on its own to the Court's definitive reading. Justice Barrett argued, "The 'other things' formulation comes from the Court, not Congress." Id. at 2199 (Barrett, J., dissenting).

[260] Id. at 2185–88 (majority opinion).

subsection in question—which may have led to a different final interpretation or at least a better explanation.[261]

CONCLUSION

Consider one last example of the modern use of *noscitur*. The Second Circuit recently analyzed (as part of a much larger issue) whether a church could arguably be considered a "banquet hall" for the purpose of firearm regulations.[262] The court said no, finding that its "intuitive understanding" was "confirmed by an examination of the company the phrase keeps."[263] Using *noscitur*, the court noted that New York law considered a "banquet hall" an example of any "place used for the performance, art entertainment . . . , gaming, or sporting events."[264] "A church," the court held, "is not such a place."[265] Why is that? The court did not elaborate. It then went on to note an explicit list—the classic example of *noscitur*—that comes just before "banquet halls."[266] That list in the statute included "theaters, stadiums, racetracks, museums, amusement parks, performance venues, concerts, exhibits, [and] conference centers."[267] According to the Second Circuit, this context confirms the "legislature could hardly have intended" for churches to be included.[268]

This analysis fails to properly apply *noscitur*. It does not identify a clear common theme among the various words. It does not use the definitions of any of the related words to establish such a theme. And it does not lay out the steps leading from the common theme to the exclusion of the application in question (namely, churches).

In both this case and in the recent *M.S. v. Premera Blue Cross* Tenth Circuit decision, courts in 2024 added *noscitur* into decisions without

[261] The Court could have waited for a case, perhaps about someone convincing a witness to change their testimony in an official proceeding, to test the line between physical evidence and "other things," and merely held that no matter the exact interpretation, the government was wrong in *Fischer*. This hearkens back to the debate over judicial restraint and whether courts should usually fix a list's theme in the course of resolving a dispute. See supra note 135 and accompanying text. But either way, since it did choose a fixed meaning for subsection (c)(2), the Court should have explained exactly how it got there.

[262] Antonyuk v. James, 120 F.4th 941, 1035 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025).

[263] Id. at 1036 (citation omitted).

[264] See id. (quoting N.Y. Penal Law § 265.01-e(2)(p) (McKinney 2024)).

[265] Id.

[266] Id.

[267] Penal § 265.01-e(2)(p).

[268] *Antonyuk*, 120 F.4th at 1036.

telling readers how it actually supports their conclusions.[269] It is a Latin condiment with little flavor. Without proper implementation, jurists allow scholars to plausibly challenge the canon's application as a "free-for-all" that invites ideological influence.[270]

Language is complex, and so is its interpretation. We spend much of our daily lives interpreting and communicating, but when we decide what something means, most of us do not have to explain how we got to our conclusion. Judges lack that luxury. And explaining the interpretive process, even regarding seemingly small questions, takes up reams of paper in court reporters. So why add more work? To preserve accuracy, even when *noscitur* is not the interpreter's main focus.

Some jurists might reach a conclusion without using the association canons. But they might still seek to support it by any legitimate means. Courts have a veritable arsenal of linguistic canons at their disposal.[271] As some scholars suggest, judges may mention canons that did not play a critical role in their thinking as support for their answer.[272] That could be why *noscitur* ends up amidst a sea of other canons—or as a secondary tack-on to a court's picture of ordinary meaning.

Instead, interpreters should do one of two things. First, if a thorough application of *noscitur* or *ejusdem* leads to more ambiguity or no convincing answer, a judge need not mention the canon in an opinion (or could cabin that fact to a footnote).[273] The writer can use other tools at her disposal to resolve the issue—tools that, in the case at hand, *do* point to a particular interpretation when taken together. And second, if the association canons do provide an answer that helps to convince the interpreter, she should detail that process to readers.

Judges face hard problems. They should not be afraid to tell readers that a question is difficult and requires many steps, including a challenging contextual judgment. Wrestling with the difficulty head-on gives ordinary Americans confidence that their problems are being taken seriously and that judges are acting impartially. Most importantly, it gives

[269] See supra notes 161–67 and accompanying text.

[270] See Krishnakumar, supra note 68, at 1305; supra notes 68–77 and accompanying text.

[271] See Scalia & Garner, supra note 11, at xii–xiv (listing more than thirty such canons).

[272] Gluck & Posner, supra note 32, at 1329–31.

[273] If a concurring or dissenting opinion purports to be convinced about the results of *noscitur* or *ejusdem*, a majority writer might want to explain the reasons it finds the application unconvincing.

interpreters the best chance of finding the correct answer in the thorny association game.