

INTERPRETING ANTI-BOYCOTT LAWS IN THE SHADOW OF THE FIRST AMENDMENT

*Joseph A. Tomain**

Abstract

Thirty-eight states have enacted “anti-BDS” laws. These laws require people or entities doing business with the state to certify that they do not participate in the Boycott Divestment Sanction movement against Israel. Typically, these laws define boycott as a “refusal to deal, terminating business, or other actions” that limit commercial relations with Israel or Israeli entities. It is highly contested in the courts and commentary whether these anti-boycott laws violate the First Amendment. Assuming *arguendo* that the “refusal to deal” and “terminating business” clauses do not implicate the First Amendment, that leaves the residual clause. At least one court and one commentator find that the “or other actions” clause does not implicate the First Amendment by applying the canon of statutory construction, *ejusdem generis*. *Ejusdem generis* looks to the specifically listed items that precede the residual clause to define and often limit its scope. This semantic canon of statutory construction is centuries old and still actively used today. In the October 2023 Term, the Supreme Court discussed *ejusdem generis* in four cases.

But the First Amendment issue raised by these anti-boycott statutes cannot be avoided simply by invoking *ejusdem generis* because semantic canons cannot be used to contradict a statute. A statute-by-statute analysis is required to determine whether *ejusdem generis* can be properly applied to the residual clause of these laws. To avoid the intractable debate about the use of legislative history, I reach this conclusion by focusing on anti-BDS laws that include enacted legislative findings, statutory definitions of “boycott,” and clauses that expressly exclude speech from their coverage. This analysis shows that applying *ejusdem generis* to some anti-BDS laws may contradict the statutes whereas applying it to other statutes may honor them.

In all instances, however, the context of each statute must be individually analyzed to determine the propriety of applying *ejusdem generis*. In addition to analyzing statutory text, Supreme Court cases applying *ejusdem generis* are analyzed, including four cases from the October 2023 Term. Moreover, these anti-BDS laws are being used as a template for anti-boycott laws in other contexts, such as fossil fuels, firearms, and economic boycotts generally. Thus, this Article’s relevance

* Joseph A. Tomain is a Senior Lecturer in Law at the Indiana University Maurer School of Law. J.D., University of Notre Dame. Thank you to Nicholas Almendares, Luis Fuentes-Rohwer, Susanah P. Mroz, William D. Popkin, Joseph P. Tomain, and D.A. Jeremy Telman for their valuable time and feedback on various drafts of this Article. Thank you to Nyssa Kruse and Cameron J. Rachford for being excellent Research Assistants. All errors are mine.

transcends the BDS context and raises important and timely questions regarding the intersection of statutory interpretation and the First Amendment.

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INTRODUCTION

Thirty-eight states have adopted laws colloquially referred to as anti-BDS laws.¹ Typically, these laws refer to the Boycott, Divest, and

1. See *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 731 (W.D. Tex. 2019) (showing that the sponsor of the Texas bill and Governor Greg Abbott have referred to it as the “anti-BDS bill”); Complaint at 18, *Ark. Times LP v. Waldrup*, No. 4:18-cv-00914-BSM (E.D. Ark. Dec. 11, 2018) (similarly demonstrating that the complaint filed by the ACLU in the Arkansas case described that law as seeking to “suppress participation in political boycott campaigns, particularly Boycott, Divestment, and Sanctions (“BDS”) campaigns”); see also *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/anti-bds-legislation> [<https://perma.cc/2PUU-4NYA>] (last visited June 13, 2024) (maintaining a list of states that adopted anti-BDS measures); *State Legislation*, PALESTINE LEGAL (Sep. 29, 2023), <https://legislation.palestinelegal.org/state-legislation/> [<https://perma.cc/CDM3-MQGC>].

Sanction Israel movement (BDS).² Most of these laws require a person or entity who wishes to enter a contract with the state to sign a written certification that they will not participate in a boycott of Israel during the term of the contract.³ At least five cases in five separate jurisdictions have challenged the constitutionality of these laws. Plaintiffs have included a newspaper,⁴ a reporter for a local NPR station,⁵ a journalist invited to provide the keynote address at a university-hosted conference,⁶ a curriculum coach for a public school,⁷ a freelance writer who volunteers for civil rights and immigrant rights organizations,⁸ and an attorney who provides legal services to incarcerated individuals.⁹

One need not stake out a position on the seemingly intractable Israel-Palestine conflict to address whether these anti-BDS laws might implicate First Amendment rights. Indeed, the owner of the plaintiff-newspaper challenging Arkansas's anti-BDS law expressly stated that his concern with the law was not based on support for BDS. Rather, he filed a lawsuit because he believes that the law violates his newspaper's First Amendment rights.¹⁰ This Article takes no position on the merits or demerits of the BDS movement or any other substantive matters in the Israel-Palestine conflict. Instead, the purpose here is to consider one aspect of the conflict that has spilled over into U.S. law in ways that might affect the First Amendment rights of all Americans who wish to contract

2. See JEWISH VIRTUAL LIBR., *supra* note 1. But see R.I. GEN. LAWS ANN. § 37-2.6-1 (West 2025) (signifying that while most laws specifically reference Israel, some are framed more generally as anti-boycott laws; for example, Rhode Island's statute is titled, "Anti-Discrimination in State Contracts Act" and does not expressly mention Israel but is substantially similar to state laws that specify Israel).

3. See JEWISH VIRTUAL LIBR., *supra* note 1; see also 40 ILL. COMP. STAT. ANN. 5/1-110.16 (West 2025) (illustrating that some state laws also require the state to divest from entities that boycott Israel, but this Article focuses on the written certification requirement imposed on individuals or entities that want to enter into a contract with the state, not the divestiture provisions).

4. Ark. Times LP v. Waldrup, 37 F.4th 1386, 1390 (8th Cir. 2022) (en banc).

5. Amawi, 373 F. Supp. 3d at 734.

6. Martin v. Wrigley, 540 F. Supp. 3d 1220, 1223 (N.D. Ga. 2021).

7. Koontz v. Watson, 283 F. Supp. 3d 1007, 1013 (D. Kan. 2018).

8. Amawi, 373 F. Supp. 3d at 732.

9. Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018).

10. In the documentary "Boycott," the owner of *Arkansas Times* stated, "we're not boycotting anyone. We're just saying you have no right to tell us what our speech should be. . . . It's a political act and one I choose not to take." BOYCOTT, YouTube, at 23:00–23:30 (RocoFimsVOD 2021). Professor Lawrence B. Glickman provides another example of someone challenging the constitutionality of an anti-BDS law "who does not participate in or support boycotts of Israel" when he filed an amicus brief about the role boycotts have played in American history. See Amicus Curiae Brief of Professor Lawrence Glickman in Support of Plaintiff-Appellees at 1, Amawi v. Paxton, 373 F. Supp. 3d 816 (2020) (No. 19-50384).

with a state, including members of the media, attorneys, and teachers.¹¹ Moreover, the issue here transcends anti-BDS laws. These laws are being used as templates for copycat legislation in other contexts, such as firearms and fossil fuels. Thus, the constitutionality of these laws has broad reaching implications.

Although these anti-BDS laws are not identical, they are similar. Most include a definition of what qualifies as a boycott of Israel. Take Arkansas's law for example. The definition section states that "'Boycott Israel' and 'boycott of Israel' means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner."¹² Other state laws include a similar residual phrase.¹³

All five cases involved claims that the respective state law violates the First Amendment. One of the key disputes was whether these laws involve speech at all. Some argue that these laws merely regulate economic conduct and therefore the First Amendment is not implicated.¹⁴ Others argue that the laws inextricably involve and violate the First Amendment.¹⁵ There is much to be said about these arguments, but this

11. Plaintiffs in most of these cases had early success in litigation. Subsequently, states amended their laws to exclude from coverage either individuals, small businesses, and/or contracts whose total value fell below a certain threshold. As a result of these amendments, appellate courts often found that the cases were moot, or the plaintiff settled and voluntarily dismissed the case. *See, e.g.,* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020) (preliminary injunction vacated because appeal was mooted after amendment that exempted sole proprietors from coverage of the law); *Jordahl*, 789 F. App'x. at 589 (similar); *Martin v. Chancellor for the Bd. of Regents*, No. 22-12827, 2023 WL 4131443, at *2 n.5 (11th Cir. June 22, 2023) (similar); *Koontz*, 283 F. Supp. 3d 1007 (the plaintiff voluntarily dismissed after statutory amendments made the law inapplicable to plaintiff); *After Court Defeat, Kansas Changes Law Aimed at Boycotts of Israel*, ACLU: PRESS RELEASES (June 29, 2018, at 18:00 ET), <https://www.aclu.org/press-releases/after-court-defeat-kansas-changes-law-aimed-boycotts-israel> [<https://perma.cc/JY85-3TJG>].

12. ARK. CODE ANN. § 25-1-502(1)(A)(i) (West 2025) (emphasis added).

13. *See infra* Part III for a discussion about the similarities and differences between the residual clauses in the various state anti-BDS laws.

14. *See, e.g.,* Brief for Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as Amici Curiae supporting Defendant-Appellees, *Arkansas Times LP v. Waldrip*, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378); Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112, 120 (2016) ("[W]here a federal law regulates boycott activity and the purpose of that law is a legitimate expression of national policy in the realm of foreign relations and commerce, and the law does not relate to the suppression of speech on substantive matters subject to constitutional protections, the First Amendment does not protect the boycott activity."); Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, and Will Be Again*, 74 ARK. L. REV. 607 (2022).

15. *See, e.g.,* Brief of Amici Curiae First Amendment Scholars in Support of Plaintiffs-Appellees at 15, *Amawi v. Paxton*, 48 F.4th 412 (5th Cir. 2019) (No. 19-50384); Osama Alkhawaja, *Anti-BDS Laws and the Politics of Political Boycotts*, 26 U. PENN. J.L. & SOC. CHANGE 211, 219 (2023) (stating that these laws reflect the "state's intent to silence a political

Article cabins that weighty and complicated constitutional question. Instead, the focus here is on a narrower issue within this larger conversation. Specifically, even if the “refusals to deal” and “terminating business activities” clauses do not involve First Amendment issues because they merely regulate economic conduct, do the residual clauses implicate the First Amendment? To the extent that the residual clauses potentially raise a First Amendment question, some have answered that this catch-all statutory language does not create a First Amendment problem.

Eugene Volokh, a stalwart freedom of expression scholar and advocate, contends that applying ejusdem generis, a semantic canon of statutory construction, avoids a First Amendment predicament.¹⁶ When a general phrase, such as “or other actions,” follows a list of specific items, the list of specific items is used to define the scope of that general phrase in the residual clause.¹⁷ An en banc panel of the Eighth Circuit Court of Appeals reached the same conclusion as Volokh when interpreting Arkansas’s anti-BDS law.¹⁸ To support his position, Volokh cited three U.S. Supreme Court cases in his essay titled *The First Amendment and Refusals to Deal*. For purposes of this Article, I assume *arguendo* that the more specific clauses (“refusals to deal” or “terminating business activities”) involve mere economic conduct and not speech. Even with this assumption, ejusdem generis does not neatly resolve all First Amendment tension created by the residual clause in at least some of the anti-BDS laws.

Part I provides background on statutory interpretation generally and ejusdem generis specifically. Ejusdem generis has a centuries-old pedigree. Whether and how to apply ejusdem generis remains a contentious issue. When done right, deciding whether and how to apply ejusdem requires at least some textualist and purposivist analysis. Both textualists and purposivists agree that courts must consider context when

viewpoint”); Brian Hauss, *The Right to Boycott as a Right of Assembly*, 54 U. PAC. L. REV. 646, 648 (2023).

16. See Eugene Volokh, *The First Amendment and Refusals to Deal*, 54 U. PAC. L. REV. 732, 743–45 (2023). Volokh’s essay is part of a symposium issue published by the University of the Pacific Law Review in 2023 titled, *Symposium: Israel, Palestine & The First Amendment*. The full symposium issue is available here: <https://scholarlycommons.pacific.edu/uoplawreview/vol54/iss4/> [<https://perma.cc/BL4F-L6GU>]. Volokh has discussed these cases and ejusdem generis in another First Amendment context. See Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(C)(2)*, 1 J. FREE SPEECH L. 175, 175–76 (2021) (explaining that ejusdem generis can be used to limit the scope of the residual phrase “or otherwise objectionable” to types of content that interactive computer service providers can remove under § 230’s immunity protections).

17. *Fischer v. United States*, 603 U.S. 480, 487 (2024); *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 218 (2024).

18. See *Arkansas Times LP v. Waldrup*, 37 F.4th 1386, 1393 (8th Cir. 2022) (en banc).

interpreting statutes, although there is disagreement about what context counts. Thus, despite the differences between textualism and purposivism, there is a growing trend toward finding common ground between the two, which this Article embraces.

Part II analyzes the three cases¹⁹ that Volokh cited in his essay to support applying ejusdem generis to anti-BDS laws and the four Supreme Court cases²⁰ from the October 2023 Term that engage with the canon. Analysis of the three cases cited in Volokh's essay show their limited usefulness in supporting the application of ejusdem generis. Indeed, two of those cases are examples of when not to apply ejusdem generis and the third case shows that one cannot simply invoke the canon but must consider context before deciding whether to apply it to a particular statute. The four cases from the October 2023 Term that discuss ejusdem generis show that the canon is alive and well at the Court today. The Court continues to follow a precedent (cited by Volokh) that improperly applied ejusdem generis to limit the scope of a residual clause in the Federal Arbitration Act.²¹ Application of ejusdem generis remains a highly contested issue as recent U.S. Supreme Court cases illustrate. Two cases involve vigorous dissents critiquing the respective majority opinions' use of the canon. Justice Barrett's dissent in *Fischer v. United States* stated that the majority engaged in "textual backflips" when applying ejusdem generis to narrow the scope of a federal obstruction statute.²² Justice Kavanaugh's dissent in *Harrington v. Purdue Pharma L.P.* stated the majority's "ejusdem generis argument rests on quicksand" where it uses the canon to identify the common denominator to limit the scope of a bankruptcy code provision.²³

Part III continues the conversation that Volokh and the en banc Eighth Circuit began by focusing on anti-BDS laws that include enacted legislative findings, a statutory definition of "boycott," and/or a provision that expressly excludes speech from their coverage. Limiting the analysis to only statutory text does not conclusively answer whether ejusdem generis can be properly applied to these laws, but it advances the conversation by showing that ejusdem generis cannot be applied in a universal fashion to all these laws. Variations in the statutory definitions of "boycott" and statements in enacted legislative findings suggest that at

19. *Wash. State Dep't of Soc. & Health Servs. v. Estate of Keffler*, 537 U.S. 371 (2003); *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117 (1991).

20. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024); *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024); *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204 (2024); *Fischer v. United States*, 603 U.S. 480 (2024).

21. *See Cir. City*, 532 U.S. at 115–16; *see discussion infra* Part II.A.

22. *Fischer*, 603 U.S. at 506 (Barrett, J., dissenting).

23. *Harrington*, 603 U.S. 204 at 227 (Kavanaugh, J., dissenting).

least some of these the laws cover more than mere economic conduct and raise free speech questions. In other instances, however, applying ejusdem generis may be proper because some statutes limit the scope of the laws by explicitly excluding free speech from their coverage or because of subtle but material differences in the statutory definition of “boycott.” In any case, a statute-by-statute analysis is necessary to determine whether to apply ejusdem generis. Context beyond the statutory text may be a necessary part of that analysis. Finally, the implications of this analysis extend beyond the BDS Israel movement; copycat legislation is arising in other contexts, such as laws that prohibit boycotts against fossil fuels and firearms by persons or entities that seek to do business with a state.²⁴ Thus, this Article is relevant to anyone interested in the intersection between statutory interpretation and free speech.

I. THE CONTINUUM OF STATUTORY INTERPRETATION: TEXTUALISM AND PURPOSIVISM

Legislation is often a reaction to some “mischief” in society.²⁵ Sometimes, legislation itself is the mischief, and judges are there to limit its damage.²⁶ In any case, courts are required to determine what legislation means. This process is contested and difficult because words, phrases, and statutes are often (or always) incapable of providing a singular meaning.²⁷ To assist in this interpretive task, methods and tools of statutory interpretation can help bring some clarity and predictability to what a statute means.

Today, the two dominant approaches of statutory interpretation are textualism and purposivism.²⁸ Vastly oversimplifying this ongoing conversation, “textualism is a formalist theory that focuses on the ordinary meaning of a statute’s text and prides itself on its ability to cabin

24. See Conclusion, *infra*.

25. *Heydon’s Case* (1584), 76 Eng. Rep. 637; 3 Co. Rep. 7a (Exch.). For recent commentary on the mischief rule, see Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

26. See Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562 (1992) (“Over a century ago, British jurist Sir Frederick Pollock wrote that canons ‘cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.’”).

27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) (“Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea[.]”); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (In recognizing that the meaning of the word “income” may vary between its use in the Constitution and its use in a particular statute, Justice Holmes wrote that a “word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”).

28. VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 9 (2016).

judicial discretion through the use of neutral, objective interpretive tools.”²⁹ “[P]urposivism seeks to identify Congress’s Policy goal or aim and to select the statutory reading that best fulfills that goal or aim.”³⁰

For some time, textualism and purposivism were perceived as a dichotomy. More recently, however, both textualists and purposivists have refined the debate as more of a continuum than a dichotomy.³¹ Richard Fallon identified three symmetries between the two methods of statutory interpretation, all of which illustrate the “irreducible roles of values and judgment within both” camps.³² John Manning believes that “textualism and purposivism do in fact share more conceptual common ground than textualists ([himself] included) have sometimes emphasized.”³³ Through empirical and doctrinal analysis Anita Krishnakumar contends that self-identifying textualists are engaged in what she dubs “backdoor purposivism,” although she explicitly disclaims that Justices using this approach do so for “nefarious reasons.”³⁴ What she means is something similar to Fallon. One cannot escape the role of values and judgments in statutory interpretation, but sometimes this reality is masked when Justices reject explicit exploration of statutory purpose.

Jonathan Malot expressly calls us to put the “textualism-purposivism debate behind us, acknowledge areas of agreement as well as disagreement . . . and engage in a more productive dialogue regarding the narrow differences that remain.”³⁵ Textualists and purposivists agree that

29. Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1330 (2020).

30. *Id.* at 1278 n.9.

31. *Id.* at 1343 (“[S]cholars should consider reconceptualizing the theoretical approaches taken by the Justices as falling along a continuum, with some Justices closer to the textualist end, others closer to the purposivist end, and still others falling in between.”).

32. Richard H. Fallon Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation and the Irreducible Roles of Values and Judgment Within Both*, 99 CORN. L. REV. 685, 686–96 (2014). The three symmetries between textualists and purposivists are: (1) “interpretive dissonance”; (2) the role of context in interpretation; and (3) the search for reasonableness. *Id.* at 696. Fallon describes interpretative dissonance as follows:

Interpretive dissonance arises from a felt experience of discordance between what might be thought of as a statute’s first-blush meaning—what its words, construed relatively acontextually, would seem to require—and an interpreter’s immediate, equally provisional expectations concerning what well-written legislation by either an actual or a reasonable legislature would likely direct. Looking at what a statute at first blush seems to prescribe, the interpreter responds by wondering whether the first-blush meaning is correct.

Id. at 688–89.

33. John F. Manning, *What Divides Textualists from Purposivists?*, 60 COLUM. L. REV. 70, 75 (2006).

34. Krishnakumar, *supra* note 29, at 1335.

35. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

statutory interpretation inevitably requires consideration of context, “really, who doesn’t?”³⁶ The rub, however, is determining what context counts.³⁷

A. *The Role of Context in Statutory Interpretation*

Within textualism, commentators have been “remarkably unclear” on which context counts.³⁸ Manning believes the focus should be on semantic context as opposed to policy context.³⁹ Kavanaugh⁴⁰ advocates for a rather vague approach to statutory interpretation. In what appears to be a nod to Justice Scalia and Brian Garner’s “fair reading” method,⁴¹

36. *Yates v. United States*, 574 U.S. 528, 555 (2015) (Kagan, J., dissenting); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37 (Amy Gutmann ed., 1997) (stating that “context is everything” in textualist interpretation); See Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1033 (2023) (“The question is not – and has never been – whether interpreters should look to context but rather which context they should consider.”); Manning, *supra* note 33, at 110 (“Textualists of course believe that language has meaning only in context.”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2145 (2016) (stating then Judge Kavanaugh’s support for context as an essential component to statutory interpretation); NOURSE, *supra* note 28, at 8 (In *Misreading Law, Misreading Democracy*, Victoria Nourse similarly states her support for context from a purposivist perspective, finding that “[w]ithout legislative context, statutory texts can become entirely arbitrary.”); Richard Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (stating that statutory interpretation without context is “impossible”); *Fischer v. United States*, 603 U.S. 480, 486 (2024) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (stating that statutory interpretation requires consideration of the “‘specific context’” of a statutory provision as well as the “‘broader context of the statute as a whole.’”).

37. See Joseph Kimble, *Ejusdem Generis: What Is It Good For?*, 100 JUDICATURE 49, 51 (2016) (“The trouble lies in the word *context*.”) (emphasis in original).

38. Grove, *supra* note 36, at 1075 (identifying at least four types of context that textualists use: (1) semantic context; (2) social context; (3) social and linguistic context; and (4) full context); see also WILLIAM D. POPKIN, *STATUTORY INTERPRETATION: A PRAGMATIC APPROACH* 550–51 (2018) (“The Court’s decision [in *Rowland v. California Men’s Colony*, 506 U.S. 194 (1993)] is puzzling because, despite what it said about looking only at internal context . . . it relied in part on practical concerns . . .”).

39. Manning, *supra* note 33, at 91 (explaining the difference between semantic and policy context and that “[t]extualists give primacy to the *semantic* context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words. Purposivists give precedence to *policy* context—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy.”) (emphasis in original).

40. This Article uses the formal title for a Judge or Justice the first time that Judge or Justice is mentioned in each Part of this Article. For stylistic and efficiency purposes, subsequent mentions of that individual are simply by last name.

41. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 33 (2012) (“The interpretive approach we endorse is that of the ‘fair reading’: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.”).

Kavanaugh seeks to find the “*best reading*” of the statute.⁴² His approach involves analysis of three factors, including “the context of the whole statute,” but he provides little explanation of what that whole context entails.⁴³ In *Fischer v. United States*, the Court explained that the broader context of interpreting a statute involved consideration of other provisions of the criminal code and the specific context involved consideration of the impetus for the legislation.⁴⁴

Scalia and Garner use the word context in different ways depending on . . . well, context.⁴⁵ Generally, they appear to focus on linguistic and textualist context. But when they discuss caveats to ejusdem generis, they state that there are times when context will show that “the canon will not be dispositive.”⁴⁶ Joseph Kimble believes that Scalia and Garner’s discussion of context as a reason not to apply ejusdem generis cannot be limited to “purely linguistic or textual context . . . [because] [t]hey seem to be talking about the situational context, the meaning in light of the circumstances.”⁴⁷ Victoria Nourse calls this “canon textualism.”⁴⁸

Although textualists consider various types of context, legislative history is one aspect of context that they generally refuse to consider.⁴⁹ For example, Kavanaugh rejects Congressional committee reports because they are not “authoritative”⁵⁰ but that does not seem like a sound justification for wholesale exclusion of committee reports. Even if they are not authoritative, they very well might be relevant. Indeed, according to an empirical study of congressional staffers, this omission may be a mistake. A survey of 137 congressional staffers concluded that “legislative history was emphatically viewed by almost all of our respondents—Republicans and Democrats, majority and minority—as the *most important* drafting and interpretive tool apart from text.”⁵¹ Even though textualists will generally not consider “legislative history,” they often consider “statutory history.” Krishnakumar defines statutory history as prior drafts of a statute, distinguishing it from other types of

42. Kavanaugh, *supra* note 36, at 2121.

43. *Id.* at 2145. The other two factors are “the words themselves” and “any other applicable semantic canons.” *Id.*

44. See *Fischer v. United States*, 603 U.S. 480, 491–94 (2024).

45. Kimble, *supra* note 37, at 51.

46. SCALIA & GARNER, *supra* note 41, at 212.

47. Kimble, *supra* note 37, at 51.

48. NOURSE, *supra* note 28, at 124 (“Although textualists insist that they look at ‘context,’ the use of canons calls this into question.”); see Part I.B, *infra* for more on canon textualism.

49. See Grove, *supra* note 36, at 1075 (“Textualists appear to agree that legislative history is typically *not* part of the relevant context.”). But see *Fischer*, 603 U.S. at 491–92 for an example where textualists use legislative history to interpret a statute.

50. Kavanaugh, *supra* note 36, at 2124.

51. 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, 965 (2013).

legislative history, such as committee reports and congressional testimony.⁵² But even textualists sometimes consider legislative history, as the Court did in its 2024 opinion, *Fischer v. United States*.⁵³

Purposivists are more open to including legislative history as part of their statutory interpretation process. Multiple commentators believe that legislative history is helpful, “especially committee reports and the floor statements of the sponsors.”⁵⁴ Legislative history, however, is best used as “merely a corroborative factor, rather than a definitive trump card in the interpretive analysis.”⁵⁵ While there are longstanding and ongoing debates about what role legislative history ought to play in statutory interpretation, many textualists and purposivists believe that canons of statutory construction are useful tools in determining what a statute means.

B. Canons of Statutory Interpretation Generally

There are at least two types of canons: substantive and semantic.⁵⁶ Sometimes they are referred to by different names.⁵⁷ Substantive canons provide “normative presumptions” and do not depend on an inquiry into

52. Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 270 (2022). Almost a century ago, Max Radin also recognized that courts will consider “statutory history” as dubbed by Krishnakumar, but he referred to prior drafts of statutes as “legislative history.” Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 n.21 (1930) (“The ‘legislative history’ of a statute is taken to mean the successive forms in which the statute is found from the first draft presented until its final passage.”).

53. *Fischer*, 603 U.S. at 492 (citing a Senate Report to identify the specific context giving rise to a criminal statute).

54. See, e.g., Posner, *supra* note 36, at 818; Krishnakumar, *supra* note 29, at 1337 (“[C]ommittee or conference-committee reports [] do not lend themselves to cherry-picking as easily as statements made by individual legislators or testimony provided by interested parties with competing views.”).

55. Krishnakumar, *supra* note 29, at 1337.

56. Some identify a third type of canon, those that Congress implicitly or explicitly adopts for courts to use. Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 543 (1998). Some Congressionally adopted canons appear in 1 U.S.C. §§ 1–6. Others reject dividing the canons into different types because their similarities outweigh their differences. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992).

57. Semantic canons are sometimes referred to as linguistic or textual canons. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Court of Appeals*, 131 HARV. L. REV. 1298, 1330 (2018). Other times they are referred to as descriptive canons. Ross, *supra* note 26, at 563. And yet other times they are referred to as language canons. Krishnakumar, *supra* note 29, at 1280 n.14. Regardless of the moniker, they “involve predictions as to what the legislature must have meant, or probably meant[.]” Ross, *supra* note 26, at 563. Substantive canons, on the other hand, are sometimes referred to as normative canons. See Ross, *supra* note 26, at 565; Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine*, 76 ADMIN. L. REV. 817, 821 (2024).

what Congress intended.⁵⁸ Instead, substantive canons reflect judicial policy preferences.⁵⁹ An example of a substantive canon is the rule of lenity, which instructs that an ambiguous criminal statute should be interpreted to the benefit of the defendant.⁶⁰ Semantic canons, on the other hand, exist for the very purpose of seeking to understand what Congress meant.⁶¹ This Article focuses on the semantic canon, *eiusdem generis*.

Although support for the canons of statutory construction exists across the textualist-purposivist continuum, it is not universal. Judge Posner has questioned the usefulness of canons, stating that “most of the canons are just plain wrong.”⁶² Then-Judge Kavanaugh wrote that many of the semantic canons should be tossed aside.⁶³ Perhaps, however, the critique of canons is better directed at how they are used rather than the canons themselves.⁶⁴ The *Circuit City* majority’s application of *eiusdem generis* may be such an example (where the critique is better directed at the use of the canon in that context, rather than the canon itself).⁶⁵ Despite some calls to reduce or eliminate canons, their use in deciding cases has a long and continuing history, including four Supreme Court cases in the October 2023 Term that engage with *eiusdem generis*.⁶⁶

Courts have turned to canons of statutory construction to interpret the meaning of statutes since the 16th century.⁶⁷ For example, court use of *eiusdem generis* extends at least as far back as 1596.⁶⁸ One justification for using canons of construction, particularly the semantic canons, is that they help constrain judges from injecting their own policy preferences

58. Gluck & Posner, *supra* note 57, at 1330.

59. Ross, *supra* note 26, at 563.

60. SCALIA & GARNER, *supra* note 41, at 296.

61. See Kavanaugh, *supra* note 36, at 2159–60 (“Semantic canons are generally designed to reflect the meaning that people, including Members of Congress, ordinarily intend to communicate with their choice of words.”); Ross, *supra* note 26, at 563 (“A judge deploying a descriptive canon is attempting to act as an agent to effectuate congressional intent.”); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 202 (2d ed. 2013) (canons help “decode” the meaning of a statute).

62. Posner, *supra* note 36, at 806.

63. See Kavanaugh, *supra* note 36, at 2161 (“I would consider tossing the *eiusdem generis* canon into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation.”).

64. See R.N. Graham, *In Defence of Maxims*, 22 STATUTE L. REV. 45, 66 (2001) (“Almost every argument against the use of maxims should be aimed at the users of maxims rather than maxims themselves.”).

65. See *infra* Part II.A.

66. See *infra* Part II.D.

67. Mank, *supra* note 56, at 542.

68. SCALIA & GARNER, *supra* note 41, at 200 n.2 (citing Archbishop of Canterbury’s Case (1596) 76 Eng. Rep. 519, 2 Co. Rep. 46 a); Mank, *supra* note 56, at 542.

into the process of statutory interpretation. Whether canons of interpretation are helpful in constraining judges in this way is contested.

Karl Llewellyn famously described rules generally as “pretty playthings”⁶⁹ and as to canons specifically, he provided a “thrust” and “parry” for several canons of construction.⁷⁰ According to Llewellyn, for every canon of statutory construction that says X, there is another canon that says the opposite.⁷¹ Commentators agree that Llewellyn’s essay “derides time-honored canons,”⁷² that it is a “devastating critique”⁷³ of the canons, and that he “demolished” the canons as tools of construction in a “powerful” article.⁷⁴ That said, Llewellyn did not reject the canons altogether. Instead, he sought to show that they cannot be properly used without first identifying a statutory purpose.⁷⁵ Llewellyn’s view aligns with purposivist scholarship on how to apply the canons.⁷⁶

69. KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 14 (2d ed. 1951). This alliterative phrase caused some to critique Llewellyn as a cynic or an extreme rules skeptic. According to Frederick Schauer, however, such a view misunderstands Llewellyn and “does not even survive a full reading of *The Bramble Bush*, let alone the entire corpus of Llewellyn’s work.” Frederick Schauer, *Editor’s Introduction to KARL LLEWELLYN, THE THEORY OF RULES* 1 (Frederick Schauer ed., 2011). Several parts of *The Bramble Bush* support Schauer’s more generous understanding of Llewellyn’s respect for the role that rules play in law. *E.g.*, LLEWELLYN, *THE BRAMBLE BUSH*, *supra*, at 12 (“rules *alone*, mere forms of words, are worthless”), 23 (“the work of business counsel is impossible” if the lawyer merely knows the rules or law), 76 (“rules and results both will need attention”), 90 (“We look at our highest courts and find their *words* a long way from their *doing*. In their own work we find that we can trust their rules part way, but part way only.”). In the foreword to the second edition of *The Bramble Bush*, Llewellyn himself indirectly clarified his position and referred to “unhappy words” in *The Bramble Bush* that have been misconstrued in ways that were “painful to [him].” KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 10 (2d ed. 1951). The sentence that Llewellyn directly referred to as “unhappy words” did not include the “pretty playthings” phrase: “*What these officials do about disputes is, to my mind, the law itself.*” *Id.* at 8. But Llewellyn includes a footnote when he reaches the “pretty playthings” discussion, indirectly suggesting he believed that “unhappy words” encompassed this phrase as well. *Id.* at 14–15. That said, those who view Llewellyn as a rather extreme skeptic when it comes to canons of statutory construction specifically, as opposed to rules generally, seem well-founded in their view.

70. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–05 (1950).

71. *Id.* at 401 (“[T]here are two opposing canons on almost every point.”).

72. SCALIA & GARNER, *supra* note 41, at 59.

73. Ross, *supra* note 26, at 561.

74. NOURSE, *supra* note 29, at 124.

75. Ross, *supra* note 26, at 561–62.

76. *See, e.g.*, NOURSE, *supra* note 29, at 104 (canons of statutory construction are “part of a more pluralistic interpretive enterprise, in which the text, purpose, and legislative context are all consulted to find ‘convergent meaning.’”). Legislative evidence must be consulted before applying the canons. NOURSE, *supra* note 29, at 104

Textualists, such as Scalia and Garner, often rely on canons and exclude evidence of legislative intent.⁷⁷ Nourse refers to this approach as canon textualism.⁷⁸ She describes it as a “form of textualism seeking to supplant legislative evidence with canons of construction.”⁷⁹ This exclusion is a mistake because canons by themselves cannot provide definitive answers.⁸⁰ Instead, they play a useful role in statutory interpretation, but only as part of a more “pluralistic interpretive enterprise” that considers legislative evidence first.⁸¹

While Scalia and Garner believe the canons constrain judges, other commentators believe that most canons not only fail to constrain judges, but actually allow judges to create the illusion of constraint.⁸² For example, an empirical study of 632 workplace cases at the Supreme Court reported that Justices on both sides of ideological spectrum use canons in ways that align with their policy preferences.⁸³ That study also found that liberal Justices more often combine the use of canons with other tools of statutory construction whereas textualists rarely do.⁸⁴ Thus, the study concluded that “canons are regularly used in an instrumental if not ideologically conscious manner”⁸⁵ in “ways that are hostile to

77. NOURSE, *supra* note 29, at 104 (“Justice Scalia and Garner . . . seek to supplant legislative evidence with canons.”). Nourse questions textualists’ commitment to context precisely because of their heavy or exclusive reliance on canons. NOURSE, *supra* note 29, at 124 (“Although textualists insist that they look at ‘context,’ the use of canons calls this into question.”).

78. NOURSE, *supra* note 29, at 104. Although Nourse is critical of canon textualism, she praises Scalia and Garner for calling attention to the study of legislation. NOURSE, *supra* note 29, at 3.

79. NOURSE, *supra* note 29, at 106. Decades earlier, Llewellyn made a similar point when explaining the ease with which the semantic canons can be used to contradict congressional intent. See Ross, *supra* note 26, at 578 (“As for descriptive canons, Llewellyn deftly illustrated how courts can easily abuse them to frustrate congressional policy preferences.”).

80. See Graham, *supra* note 64, at 70 (“maxims are not rigid rules but rather tools that raise and evaluate interpretive possibilities”); LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 138 (2d ed. 2013) (“*Ejusdem generis*, like all the linguistic canons of construction, is not an iron-clad rule, but rather is a guide to meaning.”).

81. NOURSE, *supra* note 29, at 104; see also SCALIA & GARNER, *supra* note 41, at 212 (“[L]ike other canons, *ejusdem generis* is not a rule of law but one of various factors to be considered in the interpretation of a text.”).

82. Posner, *supra* note 36, at 816 (“Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained.”); Krishnakumar, *supra* note 29, at 1342 (“[T]he aura of neutrality currently associated with the canons in particular tends to mask the work that normative preferences and judicial discretion play in textualist Justices’ statutory interpretations.”).

83. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 105 (2005) (The use of language canons “in majority opinions by both conservative Justices and liberal Justices has produced results remarkably consistent with their respective ideological preferences.”).

84. *Id.* at 5.

85. *Id.* at 6.

considerations of legislative purpose or intent”⁸⁶; that the formalist claim that canons constrain judges is at best questionable⁸⁷; and that while they may be useful, “they should hardly be esteemed as a first among equals.”⁸⁸ The *Circuit City* majority’s use of ejusdem generis nicely illustrates these findings and the authors of that study agree.⁸⁹

C. The Canon of Ejusdem Generis

Most of the anti-BDS laws include a definition of what qualifies as a boycott of Israel. Take Arkansas’s law for example, where the definition section states that “‘Boycott Israel’ and ‘boycott of Israel’ means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner.”⁹⁰ Other state laws include a similar catch-all phrase to the one used in the Arkansas law.⁹¹ When statutes include a residual clause like the Arkansas law, the scope of that clause must be determined. A common tool of statutory construction for making that determination is ejusdem generis. Simply put, the proper application of ejusdem generis requires at least some textualism and some purposivism.

Ejusdem generis is an “ancient interpretive principle”⁹² that translates to “of the same kind or class.”⁹³ It has been referred to as a “subset”⁹⁴ or a “special form”⁹⁵ of another canon, *noscitur a sociis*, which means that a word or phrase “is known by its associates.”⁹⁶ “The idea is simply that a general phrase can be given a more focused meaning by the terms linked to it.”⁹⁷ A classic example of ejusdem generis involves the sale of a farm with animals: “S contracts to sell B his farm together with the ‘cattle, hogs, and other animals.’ This would probably not include S’s favorite

86. *Id.* at 111.

87. *Id.* at 7.

88. *Id.* at 112.

89. *Id.* at 87; see *infra* Part II.A.

90. ARK. CODE ANN. § 25-1-502(1)(A)(i) (2019) (emphasis added).

91. See *infra* Part III.

92. *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 217 (2024).

93. SCALIA & GARNER, *supra* note 41, at 428.

94. JELLUM, *supra* note 80, at 136.

95. Graham, *supra* note 64, at 51.

96. SCALIA & GARNER, *supra* note 41, at 434 (“A canon of construction holding that the meaning of an unclear word or phrase, especially one in a list, should be determined by the words immediately surrounding it.”); *Fischer v. United States*, 603 U.S. 480, 481 (2024) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)) (“[N]oscitur a sociis teaches that a word is ‘given more precise content by the neighboring words with which it is associated.’”).

97. *Fischer*, 603 U.S. at 488.

housedog but might include a few sheep that S was raising for the market.”⁹⁸

There is a debate whether ejusdem generis applies if the general phrase precedes the list of specific items. One commentator has referred to this dynamic as the “other side of ejusdem generis.”⁹⁹ Some argue that it “makes no sense” to limit the application of ejusdem generis to instances where the general language follows the specific list of items because the canon applies “with equal force regardless of the order in which the general and specific words are arranged.”¹⁰⁰ Others reject this approach, arguing that starting with the general term followed by specific items serves a different function: “[f]ollowing] the general term with specifics can serve the function of making doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics.”¹⁰¹ Additionally, there is a related canon, reverse ejusdem generis: “[t]his canon states that when a statute includes a list of terms and a catch-all phrase, the terms in the list are limited to those that are consistent with the catch-all phrase.”¹⁰² Jay Wexler provides the following illustration: “the phrase ‘iguanas, tortoises, rattlesnakes, and other land reptiles’ would likely exclude marine iguanas” because the scope of the residual clause is limited to *land* reptiles.¹⁰³ Reverse ejusdem generis plays a role in interpreting some of the anti-BDS laws.¹⁰⁴

98. Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853 (1964).

99. See Gregory R. Englert, *The Other Side of Ejusdem Generis*, 11 SCRIBES J. LEGAL WRITING 51, 51 (2007).

100. Graham, *supra* note 64, at 55–56; see also NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2025).

101. SCALIA & GARNER, *supra* note 41, at 204; see Fischer, 603 U.S. at 481 (describing ejusdem generis as “a general or collective term *at the end of a list* of specific items is typically controlled and defined by reference to those specific classes items that *precede* it”) (emphasis added); see also *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 217–18 (2024).

102. Jay Wexler, *Fun with Reverse Ejusdem Generis*, 105 MINN. L. REV. 1, 2 (2020).

103. *Id.*

104. Without explicitly referring to “reverse ejusdem generis,” Justice Barrett’s *Fischer* dissent invoked this concept when contesting the majority’s use of ejusdem generis to limit the scope of an obstruction statute:

Indeed, Congress could have looked to 18 U.S.C. § 1505 as a model. That statute makes it a crime to “willfully withhol[d], misrepresen[t], remov[e] from any place, concea[l], cove[r] up, destro[y], mutilat[e], alte[r], or by other means falsify[] any documentary material, answers to written interrogatories, or oral testimony” with the intent to obstruct “any civil investigative demand.” § 1505 (emphasis added).

Fischer v. United States, 603 U.S. Slip op. at 10, n.2 (Barrett, J., dissenting). See discussion *infra* Part III.

Llewellyn included ejusdem generis in his thrust-and-parry list of opposing canons, although a more accurate description might be that the parry is a limitation on the use of ejusdem generis, not a contradiction. He wrote that ejusdem generis “is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended.”¹⁰⁵ Some argue that the canon should be used only in cases of uncertainty.¹⁰⁶ But that viewpoint is not universal.¹⁰⁷ In any case, ejusdem generis should not contradict legislative intent.¹⁰⁸

Some reject the use of ejusdem generis altogether or at least severely limit its use. Almost 100 years ago, Max Radin wrote critically about two canons, *expressio unius est exclusio alterius* and ejusdem generis.¹⁰⁹ Radin’s analysis of the *expressio unius* canon is relevant to understanding his perspective on ejusdem generis. *Expressio unius est exclusio alterius* translates to the “expression of one thing is the exclusion of another.”¹¹⁰ First, Radin wrote that *expressio unius* is in “direct contradiction to the habits of speech of most persons” and thus does not serve the purpose of a semantic canon to reflect the ordinary meaning that a person intended to communicate.¹¹¹ Then he stated that ejusdem generis “has a little greater foundation in logic and in ordinary habits of speech” and thus is also of very limited use to serve the purpose of a semantic canon.¹¹² More recently, then-Judge Kavanaugh’s preliminary thoughts on ejusdem generis echoed Max Radin’s view.¹¹³

One reason for opposing ejusdem generis is its indeterminacy. Courts are required to identify a common denominator between the specific items listed to define the scope of the residual clause. Identifying a

105. Llewellyn, *supra* note 70, at 405.

106. *United States v. Alpers*, 338 U.S. 680, 683 (1950) (“The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.”); *see also* SCALIA & GARNER, *supra* note 41, at 206 (acknowledging the existence of this objection).

107. JELLUM, *supra* note 80, at 138 (“If ejusdem generis is only applied when ambiguity is found, the canon should never be appropriate. Judges who refuse to apply the linguistic canons in the absence of ambiguity are simply wrong.”).

108. *Alpers*, 338 U.S. at 683 (Ejusdem generis “may not be used to defeat the obvious purpose of legislation”); *see also* SCALIA & GARNER, *supra* note 41, at 206 (“[T]he interpreter’s mission should not be to divine the *ignis fatuus* known as ‘drafter’s intention,’ but instead to determine what the drafter has actually said.”).

109. Radin, *supra* note 52, at 873.

110. SCALIA & GARNER, *supra* note 41, at 428.

111. Radin, *supra* note 52, at 873.

112. Radin, *supra* note 52, at 873; *see also* JELLUM, *supra* note 80, at 137 (“Like the other linguistic canons, this canon does not reflect the reality of legal drafting: Legislatures use catch-alls not to limit lists but to broaden lists; if the legislature wished the list to stay narrow, then the legislature could simply leave the list alone.”).

113. *See* Kavanaugh, *supra* note 36, at 2161.

common denominator is “inescapably purposive.”¹¹⁴ As Kavanaugh wrote in his *Harrington v. Purdue Pharma L.P.* dissent: “When courts face a statute with a catchall, it is black-letter law that courts must try to discern the common thread by examining the ‘evident purpose’ of the statute.”¹¹⁵ Sometimes identifying that purpose is “difficult to discern.”¹¹⁶ Often, if not always, there is more than one reasonable common denominator.¹¹⁷ *Harrington* provides a recent example of this fact.¹¹⁸ Sometimes the Court is unclear just what it identifies as the common denominator, as the dissent in *Fischer v. United States* contended when critiquing the majority’s use of the canon.¹¹⁹ Perhaps the indeterminacy of this canon can actually be a benefit rather than a flaw because it invites interpreters to consider other external sources to better understand the statutory text’s residual clause. At the same time, that indeterminacy results in contentious disputes as two cases from the Court’s October 2023 Term illustrate. Thus, there is reason to be cautious, if not skeptical, in using ejusdem generis to interpret residual clauses of statutes.

Nonetheless, many find value in ejusdem generis, including Scalia and Garner. Generally, they view the canons as a way to constrain the policy preferences of judges.¹²⁰ In support of ejusdem generis specifically, they cite Radin’s article. They wrote that the “redoubtable Max Radin suggested that the canon has *some* ‘foundation in logic and in ordinary habits of speech.’”¹²¹ But Scalia and Garner are at least overstating, if not misinterpreting, Radin’s view on the usefulness of ejusdem generis. What Radin actually wrote was ejusdem generis “has *a little greater foundation* [than the expression unius canon] in logic and in ordinary habits of speech.”¹²² As one commentator put it, Radin appears to have been “damning ejusdem with faint praise.”¹²³ Specifically, because Radin believed that expressio unius is in “direct contradiction to the habits of speech of most persons,”¹²⁴ his description of ejusdem generis as having “a little greater foundation” really meant its value was

114. Krishnakumar, *supra* note 29, at 1311.

115. *Harrington*, 603 U.S. at 266 (Kavanaugh, J., dissenting) (citing SCALIA & GARNER, *supra* note 41, at 208).

116. *Id.* at 218 (“In some circumstances, it may be difficult to discern what a statute’s specific listed items share in common.”).

117. Graham, *supra* note 64, at 51 (“The most important [limit is] that ejusdem generis can rarely (or perhaps never) indicate the precise boundaries of a genus that it creates.”).

118. See *infra* Part II.D.

119. *Fischer v. United States*, 603 U.S. 480, 514 (2024) (Barrett, J., dissenting) (“While the Court insists that (c)(1) limits (c)(2), it cannot seem to settle on the ‘common attribute’ in the first subsection that cabins the second.”).

120. SCALIA & GARNER, *supra* note 41, at 15–18.

121. SCALIA & GARNER, *supra* note 41, at 211 (emphasis added).

122. Radin, *supra* note 52, at 874 (emphasis added).

123. Kimble, *supra* note 37, at 50.

124. Radin, *supra* note 52, at 873.

a “little more than none at all.”¹²⁵ Moreover, Radin also wrote that because ejusdem generis is only somewhat more useful than expressio unius which is in “direct contradiction to the habits of speech of most persons,” ejusdem generis “is of limited importance in discovering the determinates covered by the statute.”¹²⁶ Other commentators are not as dismissive of the usefulness of this canon.

Ejusdem generis and noscitur a sociis are “important and valuable tools”¹²⁷ in statutory interpretation, but not because they are “neutral, objective guides to the one inevitably correct construction of a statutory term.”¹²⁸ Rather, they are “useful as an exercise in *constructing* a common denominator and, in so doing, speculating about Congress’s organizing purpose.”¹²⁹ Gluck and Bressman’s empirical study that surveyed 137 congressional staffers found that seventy-one percent understood that the underlying concept of ejusdem generis “often or always” applied to statutory interpretation, even though sixty-five percent did not know it by name.¹³⁰ Others also find value in ejusdem generis.¹³¹

According to Krishnakumar, textualists on the Roberts Court “regularly used” both ejusdem generis and noscitur a sociis.¹³² Indeed, in the October 2023 Term, the Court invoked ejusdem generis in four cases.¹³³ Krishnakumar’s finding is relevant because these canons seem inconsistent with a fundamental justification of textualism: that textualism constrains judges from injecting their own policy preferences.¹³⁴ To illustrate her point, she discusses one case where the

125. Kimble, *supra* note 37, at 50.

126. Radin, *supra* note 52, at 874.

127. *Id.* at 1348; *see also Fischer*, 603 U.S. at 509 (Barrett, J., dissenting) (“These canons are valuable tools.”).

128. Krishnakumar, *supra* note 29, at 1335.

129. Krishnakumar, *supra* note 29, at 1335.

130. Gluck & Bressman, *supra* note 51, at 933; Graham, *supra* note 64, at 68 (“In choosing legislative language, drafters will do so with an awareness of the maxims.”). Perhaps Gluck and Bressman’s empirical study provides one response to Posner’s 1983 claim that “[t]here is no evidence that members of Congress, or their assistants who do the actual drafting, know the code or that if they know, they pay attention to it.” Posner, *supra* note 36, at 806. Or perhaps things have changed. *See* Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) (“When I was in Congress, the only ‘canons’ we talked about were the ones the Pentagon bought that could not shoot straight.”).

131. *See, e.g.,* Wexler, *supra* note 102, at 1–2.

132. Krishnakumar, *supra* note 29, at 1305.

133. *See infra* Part II.D.

134. *See* Krishnakumar, *supra* note 29, at 1306 (stating that these two canons “by their nature confer significant discretion on judges and virtually require judicial identification of a statutory purpose,” *id.* at 1313 (“Indeed, the very task of articulating a common denominator is an exercise in searching for—and perhaps manufacturing—statutory purpose. Further, it is an exercise that leaves significant discretion in judges’ hands: judges are free to decide what common feature they think does, or should, connect the items in the list, to articulate that feature at whatever level of generality they deem appropriate, and to assert that the feature they identify is the one Congress

defendant's argument, the majority's decision, and Justice Scalia's dissent all applied *eiusdem generis* differently because each of them identified a different common denominator.¹³⁵ She continues by noting that purposivist Justices also have similar freedom to find different common denominators when applying *eiusdem generis*, but it is less problematic because they are more transparent in seeking to identify statutory purpose and they use the canons as one part of a more inclusive process of statutory interpretation.¹³⁶

Krishnakumar critiques a textualist approach of *eiusdem generis* because it “may create even *more* space for judicial discretion than do traditional tools of purposive analysis.”¹³⁷ It does so by relying on “extrapolations from the statute's text that are often based on judges' personal intuitions,” especially when the canon serves as the “*exclusive*” evidence of legislative intent.¹³⁸ In other words, textualists' approach to using *eiusdem generis* as the primary or sole tool to interpret statutory text is more problematic than a judicious use of legislative history.¹³⁹ Moreover, this type of “canon textualism” risks decisions where the Court claims that the text “inexorably dictates” the outcome “without acknowledging that there may be more than one plausible purpose or intent that could be inferred from the structure.”¹⁴⁰ As discussed in Part II.A below, *Circuit City* illustrates Krishnakumar's point.

II. EJUSDEM GENERIS AT THE UNITED STATES SUPREME COURT

A July 2024 Westlaw search in the United States Supreme Court database for “*eiusdem generis*” resulted in 120 cases dating back to 1819,

had in mind when it wrote the statute. This is precisely the kind of discretionary free-for-all that textualists complain attends purposivist judges' efforts to identify statutory purpose through traditional purposive tools such as legislative history and preambles: by articulating a broad, general connecting thread, a textualist judge can ensure that a statute is given a wide reach (or vice versa), just as a purposivist judge can ensure that a statute is given a broad or narrow reach by articulating a statutory purpose at a high or low level of generality.”).

135. Krishnakumar, *supra* note 29, at 1308–09 (discussing *James v. United States*, 550 U.S. 192 (2007)). The *noscitur a sociis* canon has also been inconsistently applied. *E.g.*, POPKIN, *supra* note 38, at 133 n.2 (showing inconsistent application by Justice Stevens in two cases).

136. Krishnakumar, *supra* note 29, at 1309–10.

137. Krishnakumar, *supra* note 29, at 1331; Graham, *supra* note 64, at 56 (“Perhaps the most important of these criticisms flows from the highly subjective manner in which *eiusdem generis* can sometimes be applied.”).

138. Krishnakumar, *supra* note 29, at 1331–32.

139. See Krishnakumar, *supra* note 29, at 1331–33, 1339 (“Thus, a formalist emphasis on the enacted text often winds up privileging judicial inferences and guesswork that did not go through bicameralism and presentment and that—unlike legislative history—bear no direct connection to the process by which the statute was enacted.”).

140. Krishnakumar, *supra* note 29, at 1343–44.

including four cases decided by the Court in the October 2023 Term.¹⁴¹ A comprehensive analysis of the Court's use of this canon very well may shed more light on its application to the anti-BDS laws and certainly could provide more insight as to whether then-Judge Kavanaugh is correct that ejusdem generis should be tossed "into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation."¹⁴² The scope of this Part, however, is limited to the three cases cited in Volokh's symposium essay and the four cases the Court decided in the October 2023 Term because the purpose here is to continue the conversation, not to end it.

Two conclusions result from a close analysis of these three cases cited in Volokh's essay. First, two of the cases serve as examples of when not to apply ejusdem generis, *Circuit City Stores, Inc. v. Adams*¹⁴³ and *Norfolk and Western Railway Co. v. American Train Dispatchers' Association*.¹⁴⁴ Second, the other case, *Washington State Department of Social and Health Services v. Guardian Estate of Keffler*,¹⁴⁵ shows the Court looking to external evidence to support its application of ejusdem generis in that context, as opposed to applying it in a canon textualist manner where the canon does all the work. Thus, two of the cases that Volokh cites as support for applying ejusdem generis to the anti-BDS laws are not particularly persuasive, and the third shows that other context ought to be considered before determining the propriety of applying the canon to a particular statute. This finding is relevant because a canon textualist approach to these laws may improperly prevent an analysis of the First Amendment implications raised by at least some of these laws.

The four cases decided by the Court in the October 2023 Term collectively show that ejusdem generis remains alive and well at the Court. They also establish three other points. First, one case simply cited *Circuit City* to confirm that its application of ejusdem generis to interpret an exemption in the Federal Arbitration Act remains good law.¹⁴⁶ Another case claimed that it need not apply ejusdem generis, but a close reading suggests that the court applied it anyway.¹⁴⁷ Finally, the other two cases show that deciding how to apply ejusdem generis remains contentious, as illustrated by vigorous dissents in each of the cases.¹⁴⁸

141. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024); *Muldraw v. City of St. Louis*, 601 U.S. 346 (2024); *Fischer v. United States*, 603 U.S. 480 (2024); *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204 (2024).

142. Kavanaugh, *supra* note 36, at 2161.

143. 532 U.S. 105 (2001).

144. 499 U.S. 117 (1991).

145. 537 U.S. 371 (2003).

146. *See Bissonnette*, 601 U.S. at 253.

147. *See Muldraw v. City of St. Louis*, 601 U.S. 346 (2024).

148. *See Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204, 268 (2024); *Fischer v. United States*, 603 U.S. 480, 518 (2024) (Barrett, J., dissenting).

A. Circuit City Stores, Inc. v. Adams

Textualists cite the *Circuit City* majority decision as an example of the proper application of ejusdem generis,¹⁴⁹ but a close analysis of the case shows the opposite. *Circuit City* exemplifies Nourse's "canon textualism" descriptor. Ejusdem generis was improperly used to defeat the purpose of an exemption in the Federal Arbitration Act (FAA) and to support the majority's preference for arbitration.¹⁵⁰ To put it mildly, *Circuit City* "offers a cautionary tale for those unwilling to try to understand the legislative record."¹⁵¹ Or, in the stronger words of Justice Stevens's *Circuit City* dissent, the majority played "ostrich to the substantial history" behind the language of the FAA and thus reasoned in a "vacuum."¹⁵² *Circuit City* is the wrong case to support applying ejusdem generis to any statute.¹⁵³

An employee at Circuit City, a now-defunct big box consumer electronics store, sued the company for employment discrimination. When the company moved for arbitration, the employee argued that the FAA did not apply to employment contracts. Section 2 of the Act states that it applies to maritime transactions and contracts "evidencing a transaction involving commerce."¹⁵⁴ Section 1, however, exempts certain contracts from its coverage: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁵⁵ In *Circuit City*, the employee argued that the residual phrase "or any other class of workers . . ." referred to all employment contracts.¹⁵⁶ Thus, this case required the Court to identify the common denominator between seamen and railroad employees in order to determine the scope of the residual

149. Manning, *supra* note 33, at 89 n.68 ("Judges who tend to favor textualism also understand that canons do not mechanically decide cases and that judges must be sensitive to the way a reasonable user of language would use a particular canon in context."); SCALIA & GARNER, *supra* note 41, at 200.

150. Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Interpretation, Stare Decisis and a Proposal for Change*, 53 ALA. L. REV. 789, 884 (2002) ("[T]he Court gave the FAA the interpretation that was most consistent with the Court's preference for arbitration.").

151. James J. Brudney & Ethan J. Leib, "Any", 49 BYU L. REV. 465, 493 (2023).

152. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 128 (2001) (Stevens, J., dissenting).

153. Although a unanimous Court approvingly cited *Circuit City* in its 2024 decision, *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 252, 255, sometimes the Court can be unanimously wrong. *See, e.g., Dale Carpenter, Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217 (2006) (critiquing the Court's unanimous opinion in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006)).

154. 9 U.S.C. § 2.

155. 9 U.S.C. § 1.

156. *Cir. City*, 532 U.S. at 114 (Stevens, J., dissenting).

clause, “any other class of workers engaged in foreign or interstate commerce.”¹⁵⁷

In a 5–4 decision, with two dissents, the Court held that “any other class of workers” was limited to transportation workers.¹⁵⁸ To reach this conclusion, the Court predominantly relied on ejusdem generis.¹⁵⁹ Moreover, it refused to engage with the FAA’s legislative history discussed in Justice Stevens’s dissent and a contemporaneous Ninth Circuit case, *Craft v. Campbell Soup Co.*, that rejected applying ejusdem generis to this FAA exemption.¹⁶⁰ That legislative history provides context illustrating why the exemption was added to the FAA.

Early in the opinion, the Court stated that its analysis of the residual phrase was the “better interpretation.”¹⁶¹ It also conceded that “[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction.”¹⁶² Despite these statements, the thrust of the opinion is that the Court had no choice but to reach the result that it did based on the text of the statute. The majority claimed that the plaintiff’s argument could not succeed because section 1 imposes an “insurmountable textual obstacle”¹⁶³ and that its holding was “directed by the text”¹⁶⁴ It also claimed that the text of section 1 “calls for the application of the maxim ejusdem generis,”¹⁶⁵ “forecloses the construction”¹⁶⁶ advocated by the plaintiff, and “precludes interpreting”¹⁶⁷ section 1 to exempt all employment contracts. The Ninth Circuit’s *Craft* dissent made similarly strong statements indicating that the court’s hands were tied by the FAA’s text.¹⁶⁸ The *Circuit City* majority’s certitude is primarily ipse dixit, not reasoned analysis. Moreover, using ejusdem generis as the beginning and the end of the

157. *Id.* at 112.

158. *Id.* at 114.

159. *Id.*

160. In May 1999, *Circuit City* was pending before the Ninth Circuit. That month, the Ninth Circuit held that § 1 of the FAA exempted all contracts of employment. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1092 (9th Cir. 1999). In December 1999, the Ninth Circuit issued a short per curiam opinion in favor of the *Circuit City* employee holding that its *Craft* decision controlled. *Cir. City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071–72 (1999) (per curiam).

161. *Cir. City*, 532 U.S. at 109.

162. *Id.* at 115.

163. *Id.* at 114.

164. *Id.* at 119.

165. *Id.* at 114.

166. *Id.* at 119.

167. *Id.*

168. The *Craft* dissent wrote that the “plain language” of § 1 “dictates” that the exemption is limited to transportation workers. To hold otherwise means that the exemption in § 1 would be “drained of all meaning.” See *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999).

analysis is an incomplete analysis of the statutory exemption.¹⁶⁹ Both of the *Circuit City* dissents show that the majority's use of ejusdem generis to hold that the FAA's exclusion was limited to transportation workers is at the very least contestable and most likely that it overrode the congressional purpose in including the section 1 exemption in the first place.¹⁷⁰

The majority claimed that it would be "pointless" to specify that seamen and railroad employees were exempt if all employment contracts were exempt.¹⁷¹ Thus, the text "calls for" applying ejusdem generis.¹⁷² But the majority is wrong for at least two reasons. First, legislative history shows that the exemption was added to overcome an objection to the bill by organized labor.¹⁷³ Second, most employment contracts were not within the limited scope of the Commerce Clause when the FAA was passed in 1925.¹⁷⁴

Although the majority conceded that a canon of construction is often countered by another one, it did not engage with Justice Souter's dissent, where he provided a counter canon. Souter offered *ex abundanti cautela* ("out of an abundance of caution") as a canon that might explain the exemption in section 1.¹⁷⁵ Congress included the exemption in section 1 out of abundance of caution, not to limit the exemption to transportation workers. The legislative history provided in Justice Stevens's dissent shows that including the exemption of seamen and railroad employees was to make it clear that they were outside the scope of the statute, not to limit the exemption only to transportation employees.¹⁷⁶ In other words, "Congress was preoccupied with making doubly sure" that the only type of workers squarely within the scope of the Commerce Clause power in 1925 were not swept within this new procedural statute.¹⁷⁷ The *Circuit*

169. See Graham, *supra* note 64, at 68 (Canons "should never end an interpretive inquiry, they should add depth to an interpretive inquiry that takes into account all possible sources of legislative meaning.").

170. The Ninth Circuit's *Craft* majority opinion makes similar arguments. See *Craft*, 177 F.3d at 1094.

171. See *Cir. City*, 532 U.S. at 113.

172. *Id.*

173. *Id.*

174. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 105–06 (2006).

175. See *Cir. City*, 532 U.S. at 140 (Souter, J., dissenting). This canon does not appear in Antonin Scalia and Bryan A. Garner's *Reading Law: The Interpretation of Legal Texts* or in *Black's Law Dictionary* and there is some debate about what qualifies as a canon. "Ultimately, judges decide what is a canon." Mank, *supra* note 56, at 543.

176. See *Cir. City*, 532 U.S. at 140 (Souter, J., dissenting).

177. *United States v. Alpers*, 338 U.S. 684 (1950). *Alpers* provides an example where the Court rejected application of ejusdem generis. Congress amended a statute that prohibited the shipment of obscene materials in interstate commerce. *Id.* at 682. Previously, it applied to a variety of written or printed material "or other matter of indecent character." *Id.* The 1920 amendment

City majority should have afforded more weight to these arguments because they shed light on what Congress meant when considering the legislation.¹⁷⁸

When Congress was considering the FAA, organized labor objected, including the president of the International Seamen's Union of America.¹⁷⁹ The objection was that labor would be forced into arbitration because (1) they lacked meaningful choice, and (2) that arbitration would be unfavorable to their interests. Supporters of the bill responded in at least two ways. First, they asserted that labor's objection was unfounded because the bill was not intended to refer to "labor disputes at all."¹⁸⁰ Margaret Moses provides a detailed history illustrating the intended and limited scope of the FAA.¹⁸¹ Second, the bill was amended to assuage this unfounded concern by including the exemption. Then-Secretary-of-Commerce, Herbert Hoover, offered language for the exemption that is nearly identical to the language enacted in section 1.¹⁸² The only change was trivial as Congress flipped the words "foreign" and "interstate."¹⁸³ After this revision to section 1, organized labor no longer objected to the bill because it was now (ostensibly) clear that the FAA did not apply to labor disputes.¹⁸⁴

By refusing to even consider this legislative history, the *Circuit City* majority fulfilled the "original—and originally unfounded—fears of organized labor,"¹⁸⁵ and it avoided addressing the obvious context: "no one in 1925—not the drafters, the Secretary of Commerce, organized labor, nor members of Congress—believed that the FAA applied to employment contracts."¹⁸⁶ The majority missed an opportunity to consider the "sobering check of independent, external clues."¹⁸⁷ Thus, a reasonable critique of the majority opinion is that its interpretation is

added "motion picture film." *Id.* The defendant was charged with shipping obscene phonograph records. *Id.* at 683. He argued that ejusdem generis limited "or other matter of indecent character" to items that could be read or seen. *Id.* The Court rejected application of the canon, reasoning that the growing role of motion picture films during World War I was a serious concern and Congress sought to make "doubly sure" that the statute covered them. *Id.* at 683–84. In other words, Congress was making "doubly sure" that the statute applied to an emerging technology. *Id.* One might say that Congress was acting in an abundance of caution to cover this new technology.

178. See Posner, *supra* note 36, at 817 ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

179. *Cir. City*, 532 U.S. at 126–27 (Stevens, J., dissenting).

180. *Id.* at 127 (quoting the ABA Committee chairman who drafted the bill).

181. See generally Moses, *supra* note 174, at 101–13.

182. Moses, *supra* note 174, at 105–06.

183. Moses, *supra* note 174, at 106, n.47.

184. Moses, *supra* note 174, at 126–27.

185. *Cir. City*, 532 U.S. at 129 (Stevens, J., dissenting).

186. Moses, *supra* note 174, at 147.

187. Krishnakumar, *supra* note 29, at 1344.

consistent with its preference for arbitration, but inconsistent with legislative intent, and that it misapplied ejusdem generis to that end.¹⁸⁸ As convincing as this legislative history is, it was not the only context available to Justices who generally refuse to consider legislative history.

Another factor weighing against the application of ejusdem generis in *Circuit City* is how the scope of the Commerce Clause expanded over time. In 1925, the scope of the Commerce Clause power was much narrower than it is today. At that time, most employment contracts were generally not within the scope of the Commerce Clause. Only “employees who actually transported people or goods in interstate commerce” fell within the scope of the Commerce Clause.¹⁸⁹ As the Ninth Circuit put it in *Craft*: “Under these circumstances, when Congress drafted section 2, that section could only apply to those employees [who actually transported people or goods in interstate commerce because at that time the Commerce Clause generally did not apply to employment contracts]. Section 1, however, exempts those very same employees from the scope of the FAA.”¹⁹⁰ Thus, when Congress drafted the FAA in 1925, the Act did not apply to any labor or employment contracts.”¹⁹¹

Indeed, to reach the opposite conclusion as the *Circuit City* majority did, requires an interpretation of the FAA that imputes on the 1925 Congress the ability to predict the future expansion of the Commerce Clause power where the vast majority of employment contracts fell within its scope; and then decide to exempt the one class of workers that would have been within its scope when the Act was passed. The Ninth Circuit rejected this argument in *Craft*¹⁹² and one commentator described it as “illogical, if not irrational.”¹⁹³ As Souter noted, the exemption was added in an abundance of caution.¹⁹⁴ Thus, the historical context of the Commerce Clause also supports the legislative history of the FAA

188. See Graham, *supra* note 64, at 56 (“The genus lies in the eyes of the beholder, and a court’s own cultural bias may shine through where ejusdem generis is applied.”).

189. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999).

190. *Id.* at 1087.

191. *Id.*

192. In *Craft*, Campbell Soup made the same argument. The Ninth Circuit rejected this fanciful argument:

Campbell Soup’s interpretation of the FAA would require us to hold that Congress intended to *include* some employment contracts within the scope of the FAA *prospectively*, even though it *initially excluded* all employment contracts. That approach attributes to Congress the ability to foresee the New Deal’s expansion of the Commerce Clause. We refuse to adopt such an interpretation without any indication that Congress actually had such a counterintuitive intent.

177 F.3d at 1088.

193. Moses, *supra* note 174, at 150.

194. *Cir. City*, 532 U.S. at 140 (Souter, J., dissenting).

showing that the sponsors never intended it to apply to “labor disputes at all.”¹⁹⁵ It also helps show that ejusdem generis was misapplied in *Circuit City*.

Unlike the legislative history discussed in Stevens’s dissent, and Souter’s invocation of a counter canon, the majority did engage with the Commerce Clause argument to a degree.¹⁹⁶ The majority conceded that the argument was “not insubstantial.”¹⁹⁷ But rather than wrestle with how to factor in this historical context, the majority pivoted to drawing a questionable delineation between similar phrases in sections 1 and 2 of the FAA to overcome this not insubstantial argument. Section 2 refers to contracts “involving commerce” whereas section 1 refers to contracts where workers are “engaged in” commerce.

The Court explained that the phrase “involving commerce” meant Congress intended to exercise the full power of the Commerce Clause.¹⁹⁸ But the “plain meaning” of the phrase “engaged in” commerce was a term of art and narrower than “involving commerce.”¹⁹⁹ Although the Court conceded that the phrase “engaged in” commerce did not become a term of art until sometime after the enactment of the FAA, it concluded that it would be unwise not to retroactively apply it to the FAA because otherwise one would be ignoring “the reason why the formulation became a term of art in the first place.”²⁰⁰ It seems like a stretch to claim that the Court’s conclusion is simply the “plain meaning” of the phrase “engaged in” commerce. The Court’s analysis here is confusing and unconvincing. It is also incomplete for at least two reasons. First, Campbell Soup made the same argument in *Craft*. The Ninth Circuit rejected the argument, relying in part on a law review article that found “there is no support in either the law of the period or the history of the Act” for such an interpretation of the phrase “engaged in” commerce.²⁰¹

Second, Congress’s invocation of the Commerce Clause as the source of power for the FAA very well may have been a “fall-back position,” with the primary source of power being Congress’s ability to pass a mere procedural act that applied to federal court procedures.²⁰² In other words, the FAA could be understood as a statute that merely provided courts

195. *Cir. City*, 532 U.S. at 127 (Stevens, J., dissenting).

196. *Id.* at 105, 119.

197. *Id.*

198. *Id.* at 115 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)).

199. *Id.* at 118.

200. *Id.* at 117–18.

201. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1093 (9th Cir. 1999). (quoting Matthew W. Finkin, “Workers Contracts” Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LABOR L. 282, 294 (1996)).

202. Moses, *supra* note 174, at 110 (describing the language in a House Report that stated: “The remedy is founded also upon the Federal control over interstate commerce and over admiralty.”).

with the procedural power to enforce commercial and admiralty contracts that required arbitration; and its invocation of the Commerce Clause as the source of power was not the primary source of law that Congress relied upon when considering the bill.

Yet another factor that weighs against the majority's heavy reliance on ejusdem generis are dictionary definitions at the time of the FAA's enactment. Recall, section 2 describes contracts "evidencing a transaction involving commerce," a phrase that is not defined in the FAA. The scope of the Commerce Clause power as understood in 1925 helps provide context for understanding the term commerce as used in the FAA. As to the term "transaction," a 1939 dictionary defined it as a "business deal" or "an act involving buying or selling."²⁰³ Employment relationships were "not commonly referred to as a 'business deal.'"²⁰⁴ Additionally, by 1939, people were no longer bought and sold. Thus, even though the majority frowned upon resorting to legislative history, other external contextual evidence, such as the scope of the Commerce Clause power in 1925 and dictionary definitions, suggest that its primary focus on ejusdem generis is at least contestable, if not wrong. This other contextual evidence certainly shows that the mere text of the statute does not serve as an "insurmountable obstacle" that "calls for" applying ejusdem generis.

Even though the majority opinion centers on a textual analysis and ejusdem generis, it does venture into a brief policy analysis. The Court identifies several "real benefits" of arbitration, including avoiding the high cost of litigation, difficult choice of law questions, and the necessity of bifurcation.²⁰⁵ It also notes that the FAA is merely a procedural act that does not limit substantive rights.²⁰⁶ There are at least three problems with this policy analysis. First, this policy analysis is derived from the judicial gloss that the Court has put on the FAA, not the statute itself, and that gloss is inconsistent with the purpose of the FAA.²⁰⁷ Justice Souter wrote

203. *Craft*, 177 F.3d at 1085 (quoting *Transaction*, WEBSTER'S INT'L DICTIONARY 2688 (2d ed. unabridged 1939)).

204. *Id.*

205. *See Cir. City*, 532 U.S. at 122; *Transaction*, WEBSTER'S INT'L DICTIONARY 2688 (2d ed. unabridged 1939).

206. *See Cir. City*, 532 U.S. at 122.

207. Pittman, *supra* note 150, at 887 ("The Court's judicial economy rationale in support of arbitration is contrary to Congress's intent which, unlike the Court's intent, does not favor arbitration over court adjudication, and which through section 1's exclusion sought to exempt from the FAA's coverage all employees whose work affects interstate commerce."); Moses, *supra* note 174, at 99 (This "simple procedural statute . . . has become unrecognizable . . . as a result of judicial construction . . . [and it] imposes itself on a far greater proportion of our citizens than was ever envisioned in 1925."); Brudney & Ditslear, *supra* note 83, at 87 ("[I]t seems impossible to view the majority's linguistic analysis as so obviously correct that it renders irrelevant any consideration of legislative intent. By ignoring legislative history, the majority has accomplished the exact opposite of what the enacting Congress intended.").

that the Court was “standing on its own shoulders.”²⁰⁸ Moses described the Court’s FAA jurisprudence as a “house of cards that has almost no resemblance to the structure envisioned by the original statute.”²⁰⁹ Second, although the text of the FAA does not take away substantive rights, the judicial gloss the Court has added to it has eroded substantive rights.²¹⁰ Third, the Court’s policy analysis is incomplete. It recognizes the benefits of arbitration but fails to consider the costs. Indeed, organized labor’s objection to the FAA was based on some of these costs. They were concerned that employees would be subject to unfair arbitral proceedings because of unequal bargaining power and that any “agreement” to arbitrate would not truly be voluntary.²¹¹ It does not take much imagination to see that the plaintiff employee in *Circuit City* did not truly consent to the arbitration clause. Had the majority taken the legislative history, or at least the costs of arbitration into account, it would have at least had to reconcile with the competing interests and concerns that drove labor’s objection to the Act in 1925. The anti-BDS laws certification requirements raise similar questions about the voluntariness of those agreements. Are they “voluntary” in a meaningful way or will some contractors agree to them because they are dependent on the income from their state contracts?²¹²

1. Applying Scalia & Garner’s Fair Reading Method to *Circuit City*

Unless Justice Scalia’s approach to statutory interpretation changed after *Circuit City*, *Reading Law* suggests that his choice to join the majority opinion is somewhat puzzling.²¹³ Scalia and Garner advocated

208. *Cir. City*, 532 U.S. at 132.

209. Moses, *supra* note 174, at 113.

210. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052, 3087 (2015).

211. See *Cir. City*, 532 U.S. at 126 n.5 (quoting president of the International Seamen’s Union of America) (“With the growing hunger in modern society, there will be but few that will be able to resist.”).

212. Of course, this problem of meaningful consent is pervasive in contract law and has been for some time. See, e.g., F. Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013); NANCY KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* (2019); *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 402 F. Supp. 3d 767, 789 (N.D. Cal. 2019) (“California law requires the Court to pretend that users actually read Facebook’s contractual language before clicking their acceptance, even though we all know virtually none of them did. Constrained by this fiction, the Court must analyze the relevant contractual language to assess whether the users ‘agreed’ to the terms of service.”). While concerns about meaningful consent are widespread, they take on added importance if they limit the freedom of expression of a party, even more so when the government discriminates based on content or viewpoint.

213. It is certainly possible that his position changed or at least was further developed or refined. See, e.g., Grove, *supra* note 36, at 1070–75 (explaining that Scalia originally suggested a

for the “fair reading” method of statutory interpretation. “The interpretive approach we endorse is that of the ‘fair reading’: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.”²¹⁴ Under the “fair reading” approach -that seeks to understand the text at the time it was written- there are at least two reasons to find that the FAA exemption applied to all workers, not just transportation workers.

First, the scope of the Commerce Clause power was much narrower in 1925. The *Circuit City* majority conceded this point, noting that the argument was “not insubstantial.”²¹⁵ Second, as the dissents show, the legislative history sheds light on why that exemption was added in the first place.²¹⁶ While Justice Scalia would have ignored the legislative history, his fair reading method explicitly calls for understanding the text at the time it was issued.²¹⁷ Surely this includes Congress’s and the Court’s narrower understanding of the Commerce Clause at that time, which did not include most employment contracts.

Another part of *Reading Law* calls into question Justice Scalia’s decision to join the *Circuit City* majority. When Scalia and Garner discuss caveats to ejusdem generis, they state that there are times when context will show that “the canon will not be dispositive”²¹⁸ because ejusdem generis is “not a rule of law but one of various factors to be considered in the interpretation of a text.”²¹⁹ *Circuit City* essentially makes application of ejusdem generis dispositive, only paying “lip service” to other considerations.²²⁰ If those circumstances include the legislative history giving rise to the exemption, then it seems rather clear that the exemption was included to assuage an objection to the FAA from labor. That said, it does not appear that Scalia had any second thoughts on the application of ejusdem generis in *Circuit City* because he and Garner cite that case as an example of its application and do not provide any critique of it.²²¹

Had the 1925 Congress been prescient enough to understand Scalia’s approach to statutory interpretation, they could have drafted the statutory

return to the plain meaning rule, but that he and other textualists “quickly abandoned any such argument”).

214. SCALIA & GARNER, *supra* note 41, at 33.

215. *Cir. City*, 532 U.S. at 119.

216. *Cir. City*, 532 U.S. at 124–29 (Stevens, J., dissenting).

217. SCALIA & GARNER, *supra* note 41, at 33.

218. SCALIA & GARNER, *supra* note 41, at 212.

219. SCALIA & GARNER, *supra* note 41, at 212.

220. I say essentially because the Court does spend a brief part of the opinion discussing the differences between “in commerce” and “engaged in commerce.” As another commentator put it, however, the Court merely “paid lip service” to the legislative history. Pittman, *supra* note 150, at 885.

221. SCALIA & GARNER, *supra* note 41, at 200.

text in a way to avoid the result in *Circuit City* without requiring the Court to resort to legislative history. Recall that Scalia and Garner reject applying ejusdem generis when the general phrase precedes the specific items. They believe that the purpose of this structure is to make “doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics.”²²² So, if Congress drafted the exemption as “nothing herein contained shall apply to contracts of employment of any class of workers engaged in foreign or interstate commerce, including seamen or railroad employees,” then Scalia likely would have found that Congress was merely making “doubly sure” that the class of employees most likely subject to the interstate commerce clause would be protected by the exemption along with all other employees. This different outcome illustrates the indeterminacy of ejusdem generis as well as how the linguistic structure of a statutory phrase could be outcome determinative.

2. *Circuit City* Conclusion

Canons, including ejusdem generis, are a “fallback” tool of interpretation and should not be used when they would contradict the meaning of a statute.²²³ But the majority “turns this practice upside down, using ejusdem generis to establish that the text is so clear that legislative history is irrelevant.”²²⁴ Justice Souter’s critique of the *Circuit City* majority echoes what Max Radin wrote almost a century ago: “in most cases when courts say that a statute is plain and therefore needs no interpretation, they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation.”²²⁵ Radin’s perspective aligns with Nourse’s position that “plain meaning is a conclusion, not a method.”²²⁶

Had the *Circuit City* majority taken a more pluralistic approach to its analysis, ejusdem generis could have played a meaningful role in understanding what “any other workers” meant to Congress in 1925. Krishnakumar does not engage in a deep analysis of *Circuit City*, but she does cite it as a case that illustrates the “inherent discretion and purposive analysis entailed in applying the ejusdem generis canon.”²²⁷ Moreover,

222. SCALIA & GARNER, *supra* note 41, at 204.

223. *Cir. City*, 532 U.S. at 138 (Souter, J., dissenting) (“Like many interpretive canons, however, *ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside.”); Llewellyn, *supra* note 70, at 405 (Ejusdem generis “is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended.”).

224. *Cir. City*, 532 U.S. at 138 n.2 (Souter, J., dissenting).

225. Radin, *supra* note 52, at 869.

226. NOURSE, *supra* note 28, at 5.

227. Krishnakumar, *supra* note 29, at 1309 n.119.

Circuit City provides support for her position that the canon can be useful to identify the proper common denominator when the analysis begins with legislative evidence.²²⁸ The common denominator was not “transportation” workers. Rather, the common denominator was that they were workers in interstate commerce and Congress was likely making “doubly sure” that employment contracts were not covered in order to overcome labor’s objection to the FAA.²²⁹

Ultimately, *Circuit City*’s best contribution to the discussion of ejusdem generis is that it exemplifies how ignoring extrinsic evidence when interpreting the meaning of statutory language can result in defeating the actual legislative intent. Justice Stevens’s *Circuit City* dissent made this very point when he quoted former Israel Supreme Court Justice Aharon Barak: “the ‘minimalist’ judge ‘who holds that the purpose of the statute may be learned only from its language has more discretion than the judge ‘who will seek guidance from every reliable source.’”²³⁰ Or in Justice Stevens’ own words: “A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.”²³¹

Commentators agree that the *Circuit City* majority is not a faithful textualist reading but is an example of the Court ignoring relevant context to reach its preferred outcome.²³² This conclusion, however, does not mean the case has no role in analysis of future applications of the canon. According to Llewellyn, “there is as much, almost, to learn from the poor reasoning as from the good.”²³³ Thus, the lesson from *Circuit City* for interpreting any statute with a catch-call clause following a list of specific items, including the anti-BDS laws, is that a canon textualist approach to ejusdem generis can defeat the purpose of the law. Such a result is inconsistent with the purpose of semantic canons, which is to ascertain

228. See Krishnakumar, *supra* note 29, at 1310 (“In other words, when the purposivist Justices identify a common denominator connecting the words in a statutory list, they often do so in light of a legislative purpose or intent that *they have already identified* through other interpretive resources, whereas the textualist and textualist-leaning Justices are more likely to rely on the language canons alone.”).

229. Moses, *supra* note 174, at 148.

230. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) (quoting AHARON BARAK, JUDICIAL DISCRETION 62 (Y. Kaufmann trans., 1989)).

231. *Id.*

232. See, e.g., Moses, *supra* note 174, at 150 (“By disconnecting the text of the statute from the purpose of the amendment intended to exclude workers, the Court freed itself to make a decision based on its policy preference rather than ascertaining the meaning Congress intended when it adopted the language excluding workers.”); Brudney & Ditslear, *supra* note 83, at 88 (“Under all these circumstances, the putatively neutral interpretive approach followed in *Circuit City* seems an especially stark instance of judicial policymaking.”).

233. LLEWELLYN, *supra* note 69, at 83.

legislative intent. In short, ejusdem generis ought not be used in isolation: other context must be considered in the interpretive process. The next case does precisely that.

B. Washington State Department of Social and Health Services v.
Guardian Estate of Keffler

While there is much to say about *Circuit City*, *Washington State Department of Social and Health Services v. Guardian Estate of Keffler* tells a much simpler story. The lesson from *Estate of Keffler* is that ejusdem generis can be a useful tool of statutory interpretation when the court considers other evidence before applying the canon.²³⁴ Two years after Justice Souter dissented in *Circuit City*, he wrote for a unanimous Court using ejusdem generis to limit the scope of a residual clause.

Estate of Keffler addressed whether the State of Washington could reimburse itself for expenses paid to care for children in foster care with funds from their Social Security benefits.²³⁵ The Social Security Act provision at issue protected these benefits from “execution, levy, attachment, or other legal process.”²³⁶ The Court acknowledged that “in the abstract” the state uses “legal process” for reimbursement by appointing the Department of Social and Health Services as a representative payee and by making claims for reimbursement to the state treasurer.²³⁷ But the Court continued its analysis by applying ejusdem generis (and *noscitur a sociis*) to determine that the statute “uses the term ‘other legal process’ far more restrictively.”²³⁸ Specifically, “other legal process” as used in the statute “at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism” similar to the specific terms that precede the residual clause, “execution, levy, [and] attachment.”²³⁹

At first glance, *Estate of Keffler* does support Volokh’s position that “or other actions” in the anti-BDS laws should be limited by the specific phrases that precede it—“refusals to deal” and “terminating business activities”—to actions that do not include speech. And unlike *Circuit City*, *Estate of Keffler* has not been roundly criticized for its use of ejusdem generis.²⁴⁰ But *Estate of Keffler* does more than simply apply ejusdem generis as the beginning and end of its analysis.

234. Wash. State Dep’t of Soc. & Health Servs. v. Est. of Keffler, 537 U.S. 371 (2003).

235. *Id.*

236. 42 U.S.C.S. § 407(a) (LexisNexis, LEXIS through Pub. L. No. 119-69).

237. *Est. of Keffler*, 537 U.S. at 384.

238. *Id.*

239. *Id.* at 385.

240. Using Westlaw, 43 law review articles, notes, etc. cite *Estate of Keffler* and use the phrase “ejusdem generis.” None of them critique the Court’s use of that canon in this case. (results on file with author) (last search May 16, 2024).

Unlike the *Circuit City* majority that did not consider external evidence, *Estate of Keffler* did just that. Specifically, it relied on definitions of “legal process” in the Social Security Administration’s Program Operations Manual System (POMS). POMS defined “legal process” as “the means by which a court (or agency or official authorized by law) compels compliance with its demand; generally, it is a court order.”²⁴¹ The Court quoted another section of POMS that also supported its conclusion that “other legal process” referred to a judicial or quasi-judicial process.²⁴² Thus, *Estate of Keffler* instructs that applying ejusdem generis to limit “other actions” in the anti-BDS laws to exclude speech requires investigation into context beyond the mere text of the statute. One cannot simply invoke a semantic canon and be done with it.

C. *Norfolk and Western Railway Co. v. American Train Dispatchers’ Ass’n*²⁴³

Norfolk and Western Railway Co. v. American Train Dispatchers’ Ass’n is the third case cited in Volokh’s essay, but it is not discussed. This case is not particularly helpful for the position that ejusdem generis should be used to limit the scope of “other actions” to exclude speech in the anti-BDS laws. *Norfolk* is either an example of: (1) when to reject application of ejusdem generis to limit the scope of a residual phrase; (2) when it’s not necessary to apply the canon at all; or (3) why the canon ought to be tossed aside. In any case, it is not an example that provides strong support for applying ejusdem generis, at least in isolation without further context.

Norfolk involved two consolidated cases where the Interstate Commerce Commission approved railway mergers and exempted them from collective bargaining agreements. Two unions sued objecting to this exemption. The statute at issue stated that a “carrier in an approved consolidation ‘is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction. . . .’”²⁴⁴ The unions claimed that “all other law” did not apply to collective bargaining agreements. In a 7–2 opinion, the Court rejected this interpretation by recognizing that “[b]y itself, the phrase ‘all other law’ indicates no limitation.”²⁴⁵ Thus, the Court needed further context to interpret this residual phrase. The *Norfolk* Court’s conclusion is consistent with a recent article by James Brudney and Ethan J. Leib titled, “Any.”²⁴⁶

241. *Est. of Keffeler*, 537 U.S. at 385 (quoting POMS GN 02410.001 (2002)).

242. *Id.* (quoting POMS GN 02410.200).

243. *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117 (1991).

244. *Id.* at 119 (1991) (quoting 49 U.S.C. § 11341(a)).

245. *Id.* at 129.

246. James J. Brudney & Ethan J. Leib, “Any,” 49 B.Y.U. L. REV. 465 (2023).

Brudney and Leib contend that the meaning of the word “any” in a statute has a “function,” not a definition.²⁴⁷ The Court made a similar point in *Fischer v. United States* when analyzing the word “otherwise” in a federal obstruction statute.²⁴⁸ The function of these words in a statute cannot be understood without context.²⁴⁹ The authors suggest creating an “any” canon to help guide statutory interpretation.²⁵⁰ They focus on the word “any” because it is the word that most often appears in statutes, but their analysis could apply to other words like “every” and “all.”²⁵¹ As to ejusdem generis, they make two points. First, “any” and ejusdem generis debates are often inextricably linked.²⁵² Second, choosing whether to apply ejusdem generis “probably requires a threshold investigation into the legislative plan or scheme.”²⁵³ Both the *Norfolk* majority and dissent considered different types of contexts and reached opposite conclusions regarding the appropriateness or necessity of applying ejusdem generis to determine the scope of “all other law.”²⁵⁴

The majority conceded that “on first impression” ejusdem generis might limit the scope of “all other law” to not include collective-bargaining agreements.²⁵⁵ But they continued that the “whole context dictates a different conclusion.”²⁵⁶ Without invoking it by name, the Court’s analysis, ultimately, reflects the canon that Justice Souter cited in *Circuit City, ex abundanti cautela*. Congress specifically included antitrust to make doubly sure such laws would not apply to railway mergers under the Interstate Commerce Act.²⁵⁷ Further, the Court reasoned, that the inclusion of “State and municipal law” shows that the

247. *Id.* at 507.

248. *Fischer v. United States*, 603 U.S. 480, 481 (2024) (“[T]he word ‘otherwise’ is not by itself sufficient to demonstrate that the [preceding] examples do not limit the scope of the clause.”) (cleaned up).

249. See Brudney & Leib, *supra* note 246, at 509 (“One important lesson is that when it comes to ‘any’ in a statutory scheme, context is more than an external constraint on the word’s scope; it is essential to determining that word’s use or function in the scheme.”).

250. Brudney & Leib, *supra* note 246, at 470 (“‘[A]ny’ is an invitation to look for signals about its scope in a wide set of sources that include linguistic canons, substantive canons, and statutory plans or schemes.”).

251. Brudney & Leib, *supra* note 246, at 466 n.1.

252. Brudney & Leib, *supra* note 246, at 490 (“[D]ebates about ‘any’ often go hand-in-hand with arguments about the application of the linguistic canon of *ejusdem generis* (and sometimes its sister canon, *noscitur a sociis*).”).

253. Brudney & Leib, *supra* note 246, at 510.

254. See *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117 (1991).

255. *Id.* at 129.

256. *Id.*

257. See *id.* (“[B]ecause ‘[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored,’ Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a).”) (citation omitted).

exemption applied to laws outside of the antitrust context, including other federal laws, even though “federal law” was not explicitly mentioned in the statute.²⁵⁸ So long as the exemption was “necessary to . . . carry out” the merger, then “*all law*” “means what it says.”²⁵⁹ Later in the opinion, the majority clarified that “all law” did not actually mean every single law, just those laws whose exemption was necessary to complete the ICC-approved merger.²⁶⁰ The majority determined that overriding the two collective-bargaining agreements allowed under the Railway Labor Act was necessary to carry out the merger.²⁶¹ The dissent was not convinced.

While the majority focused on what it called the “whole context” to reach its holding, the dissent focused on the text and legislative history of the exemption. It began by noting that the exemption arose from the Transportation Act of 1920, with only slight word changes in two subsequent amendments. The dissent quoted a Conference Report from 1920 to establish that “all other law” was limited to laws similar to the federal antitrust law.²⁶² It is believed that this conclusion could be reached either “[w]ith or without the *ejusdem generis* canon.”²⁶³ Like the majority, the dissent also made an implicit abundance of caution argument. It noted that U.S. law holds private contracts in high regard and that “there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the antitrust laws.”²⁶⁴ Therefore, it refused to adopt the majority’s “late-blooming interpretation of a seventy-one-year-old immunity statute.”²⁶⁵

D. *Ejusdem Generis* at the Court in the October 2023 Term

In the October 2023 Term, the Court discussed *ejusdem generis* in four cases. These cases show that *ejusdem generis* remains alive and well at the Court today. They also show that the Justices continue to dispute over how to apply this canon.

Like *Circuit City, Bisonnette v. LePage Bakeries Park Street, LLC*, required the Court to interpret how to apply the exemption in section 1 of the FAA. In a unanimous decision, the Court held that the exemption

258. *Id.*

259. *Id.*

260. *Id.* at 134.

261. *Id.* at 132.

262. *Id.* at 137 (“[A]s both an application of the *ejusdem generis* canon and an examination of the legislative history show, the purpose of the exemption was to relieve the carriers ‘from the operation of the antitrust and other restrictive or prohibitory laws.’ H.R. Conf. Rep. No. 650, 66th Cong., 2d Sess., 64 (1920) (emphasis added).”).

263. *Id.* at 136.

264. *Id.* at 139.

265. *Id.* at 143.

applies to the type of worker, not the type of employer.²⁶⁶ Someone can qualify as a transportation worker, even if they do not work for a company whose primary purpose is transportation.²⁶⁷ In reaching this decision, the Court reaffirmed its belief that *Circuit City* properly applied ejusdem generis to limit the scope of the exemption to only transportation workers, not all employees.²⁶⁸ The Court explained that the plaintiff in *Circuit City* “failed to account for ejusdem generis, the familiar canon of statutory construction.”²⁶⁹ But lawyers often fail to account for canons of construction²⁷⁰ and “ordinary citizens” are even less likely to consider them.²⁷¹ The main relevance of *Bissonnette* is that *Circuit City* remains good law, despite being roundly criticized.

In *Muldrow v. City of St. Louis, Missouri*, the Court stated that it need not apply the canon and thereby “avoid[s] ejusdem generis problems.”²⁷² But that analysis is questionable because it seems that the Court is applying ejusdem generis even though it explicitly states that it is not applying it. In *Muldrow*, the Court considered whether transferring an employee to another unit based on sex would qualify as “otherwise” discriminating against her in violation of Title VII.²⁷³ The lower court held that the transfer did not violate Title VII because it was not a “significant” harm, and that “significant” harm was the common denominator among the specific items and limited the scope of the residual clause.²⁷⁴ The Court rejected the “significant” harm requirement, finding instead that the “shared trait” was discrimination based on an “employment action.”²⁷⁵ It seems the Court still engaged in an ejusdem generis analysis by identifying a “shared trait” or common denominator, even though it said it was not doing so. The main relevance of this case is that even when the Court says it is not applying ejusdem generis, it sometimes appears to do so.

266. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024).

267. *Id.* at 252.

268. *Id.*

269. *Id.*

270. In 1983, Judge Posner highlighted that there was a long-standing complaint about the lack of focus on legislative interpretation in law school. Posner, *supra* note 36, at 800 (“It has been almost fifty years since James Landis complained that academic lawyers did not study legislation in a scientific (i.e., rigorous, systematic) spirit, and the situation is unchanged.”). In 2016, Victoria Nourse made a similar point. NOURSE, *supra* note 28, at 1 (“Legislation should rank as the first of all law courses, but it is often merely optional and left to students’ whim.”).

271. *Yates v. United States*, 574 U.S. 528, 566 n.6 (Kagan, J., dissenting) (“[W]hen an ordinary citizen seeks notice of a statute’s scope, he is more likely to focus on the plain text than (as the plurality would have it) on . . . the *noscitur* and *ejusdem* canons.”).

272. *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346, 357–58 (2024).

273. *Id.*

274. *Id.*

275. *Id.*

The other two cases show how to apply *ejusdem generis* remains a contentious issue, as illustrated through vigorous dissents in each case that critique how the respective majority opinions applied the canon. In a 6–3 decision, the majority in *Fischer v. United States* applied *ejusdem generis* to limit the scope of an obstruction statute.²⁷⁶ The *Fischer* majority held that the residual clause in a separate subsection of a criminal statute was limited to records, documents, or other tangible items and could not be broadly applied to any act of obstruction.²⁷⁷ In dissent, Justice Barrett wrote that the majority engaged in “textual backflips”²⁷⁸ to narrow the scope of the obstruction statute and that applying *ejusdem generis* and *noscitur a sociis* to do so was “like using a hammer to pound in a screw—it looks like it might work, but using it botches the job.”²⁷⁹

In a 5–4 decision, the majority in *Harrington v. Purdue Pharma L.P.* applied *ejusdem generis* to limit the scope of a bankruptcy code provision.²⁸⁰ The *Harrington* majority identified the common denominator as discharge of claims against a *debtor* and thus, discharge of claims against a *non-debtor* required that non-debtor’s consent.²⁸¹ The *Harrington* dissent, however, identified the common denominator as “preserv[ing] the estate and ensur[ing] fair and equitable recovery for creditors in the face of collective action problems.”²⁸² In *Harrington*, Justice Kavanaugh states that the majority’s “*ejusdem generis* argument rests on quicksand.”²⁸³ The main relevance of *Fischer* and *Harrington* is that the proper application of *ejusdem generis* remains a contentious issue, and the critique of the canon as being indeterminate still rings true today.

E. Case Summary Conclusion

“The doctrine of *ejusdem generis* is almost universally accepted, but naturally, there is a great diversity in its application.”²⁸⁴ Collectively, the three cases cited in Volokh’s essay do not provide much help in establishing why *ejusdem generis* should apply to the anti-BDS laws. The most helpful of the three cases is *Estate of Keffler*, but the main lesson from that case is that the unanimous Court relied on external evidence to justify the application of *ejusdem generis*. *Norfolk* is at best a mixed bag that sheds more confusion than light and at worst shows why *ejusdem*

276. *Fischer v. United States*, 603 U.S. 480 (2024).

277. *Id.* at 485–92.

278. *Id.* at 506 (Barrett, J., dissenting).

279. *Id.* at 509.

280. 603 U.S. 204, 226–27 (2024).

281. *Id.* at 218.

282. *Id.* at 268 (Kavanaugh, J., dissenting).

283. *Id.* at 266 (Kavanaugh, J., dissenting).

284. R. deJ. R., Note, *Statutory Construction. Doctrine of Ejusdem Generis*, 17 VA. L. REV. 511, 513 (1931).

generis should not be applied to a broadly worded residual clause.²⁸⁵ Finally, *Circuit City* is “a high water mark of statutory misinterpretation”²⁸⁶ where the majority turned the practice of using canons “upside down, using ejusdem generis to establish that the text is so clear that legislative history is irrelevant.”²⁸⁷ As to the four October 2023 Term cases that discussed ejusdem generis, they show that ejusdem generis remains an active part of the Court’s interpretive process and that its application remains as contentious as ever, regardless of whether one is more of a textualist or a purposivist.

To be sure, these cases do not conclusively show that ejusdem generis should not be applied to the anti-BDS laws. What they do show, however, is that one should not simply invoke ejusdem generis as the beginning and end of the analysis because the canon by itself cannot definitively identify the common denominator that connects the specific phrases to then determine the scope of the residual clause.²⁸⁸ At best, ejusdem generis simply shows the interpretive possibilities.²⁸⁹ One must look at the context of the statute to determine whether ejusdem generis properly effectuates the statutory intent. Indeed, Volokh and Adam Candeub did precisely that in another essay when determining whether to apply ejusdem generis to limit the scope of the residual phrase “or otherwise objectionable” in analyzing the immunity provided by section 230 of the Communications Decency Act.²⁹⁰ Analysis below suggests that ejusdem generis cannot be universally applied to all anti-BDS laws. Instead, a statute-by-statute analysis is required to make this determination, and that analysis requires considering what then-Judge Kavanaugh called the whole context of the statute.

III. THE PROPRIETY OF APPLYING EJUSDEM GENERIS TO ANTI-BDS LAWS

“Ejusdem generis cannot be applied in a vacuum[.]”²⁹¹ Courts “must consider the circumstances surrounding enactment” of a law to determine whether applying this semantic serves its purpose: effecting the

285. Unlike the statute in *Norfolk*, Arkansas’s law does not include the word “any” or “all,” but that does not mean the statute should be more narrowly construed. Radin goes even further: “There is no case in which the words ‘other’ or ‘any other’ are used or applied, in which the same result could not have been reached if these words were absent.” Radin, *supra* note 52, at 874. North Carolina’s anti-BDS law omits the word “other” and simply refers to “taking actions.” N.C. Gen. Stat. § 147-86.80. For Radin, this is a distinction without a difference.

286. Moses, *supra* note 174, at 146.

287. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 139 n.2 (2001).

288. Graham, *supra* note 64, at 51.

289. Graham, *supra* note 64, at 52.

290. Candeub & Volokh, *supra* note 16, at 176.

291. *Cernuda v. Heavy*, 720 F. Supp. 1544, 1550 n.12 (S.D. Fla. 1989).

legislative intent.²⁹² The Court did precisely that when interpreting the scope of a federal obstruction statute in 2024. In holding that the residual clause was limited to obstruction of records, documents, or other tangible items, the *Fischer* Court made that determination “in light of the history of the provision.”²⁹³ Specifically, that statutory amendment was in response to the “Enron disaster, not some further flung set of dangers.”²⁹⁴ Thus, interpreting the scope of the residual clauses in the anti-BDS laws, like all other laws, requires context.

At least one court and one commentator find that applying ejusdem generis to limit the scope of the residual clause in anti-BDS laws avoids any First Amendment tension.²⁹⁵ They simply look to the specific clauses—i.e., “refusals to deal” and “terminating business”—that precede the residual clause. Assuming arguendo that these specific clauses do not implicate speech, this approach finds some support in the Court’s 2024 5–4 opinion, *Harrington v. Purdue Pharma L.P.*²⁹⁶ But as the *Harrington* dissent notes, the majority failed to follow “black-letter law” by not “looking at the ‘evident purpose’ of the statute in order to discern a common thread.”²⁹⁷ Put another way, if one merely looks at the preceding specific clauses and applies ejusdem generis without more context, then that is an example of canon textualism. Canon textualism is problematic because sometimes it results in an interpretation of a statute that contradicts the meaning of the statute. If so, the First Amendment tension cannot be avoided by applying ejusdem generis because semantic canons are used to determine the meaning of a statute, not to change it.

To avoid being distracted by the intractable debate about what role, if any, legislative history should play in statutory interpretation, this Part focuses on the statutory text of anti-BDS laws to move the conversation forward by focusing on common ground for purposivists and textualists alike. Specifically, the focus is on anti-BDS laws that include a statutory definition of boycott, those that include enacted legislative findings, and/or those that expressly exclude speech or other laws from their coverage. Statutory definitions and enacted legislative findings provide common ground for statutory interpretation regardless of where one falls on the textualist-purposivist continuum. Almost all of them include a statutory definition of what qualifies as a boycott. Although not all anti-

292. *Id.*

293. *Fischer v. United States*, 603 U.S. 480, 481 (2024).

294. *Id.* at 498.

295. *Volokh, supra* note 16; *Arkansas Times*, 988 F.3d 453 (8th Cir. 2021).

296. *See Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 218 (2024) (“[W]e know to look to the statute’s preceding specific paragraphs as the relevant ‘context’ here because paragraph (6) tells us so.”).

297. *Id.* at 260 (Kavanaugh, J., dissenting) (citing SCALIA & GARNER, *supra* note 41, at 208; WILLIAM ESKRIDGE, *INTERPRETING LAW* 78 (2016)).

BDS laws include enacted legislative findings, enough do include them to allow this analysis. Finally, some include provisions that explicitly exclude speech from their coverage. This textual analysis results in two conclusions.

First, one size does not fit all. While the anti-BDS laws are quite similar, they are not identical and some of these differences may be material in deciding whether to apply *ejusdem generis*. There are some anti-BDS laws where considering only enacted legislative findings and statutory definitions show that First Amendment implications are more likely to exist and thereby weigh against applying *ejusdem generis* to limit the scope of the residual clause. There are other anti-BDS laws that include language that may be more amenable to applying *ejusdem generis* to limit the scope of the residual clause because the First Amendment implications are less obvious or, in some instances, expressly excluded. In these latter instances, the canon of constitutional avoidance (by itself or in combination with *ejusdem generis*) may counsel in favor of interpreting the statute to avoid any First Amendment problem.²⁹⁸

298. The doctrine of constitutional avoidance comes into play only when a statute is ambiguous. *See* *United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021). In those instances, “[c]ourts should indeed construe statutes ‘to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score.’” *Id.* at 328–29. Moreover, “[i]t bears emphasis that even if the Government’s reading were not the best one, the interpretation is at least ‘fairly possible’—so the canon of constitutional avoidance would still counsel us to adopt it.” *United States v. Hansen*, 599 U.S. 762, 781 (2023). Thus, “[w]hen legislation and the Constitution brush up against each other, our task is to seek harmony, not to manufacture conflict.” *Id.* Indeed, this was the approach that the dissent took in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

In *Holder*, the Court held that plaintiffs violated a federal statute that prohibited providing “material support or resources” to entities designated as “foreign terrorist organizations,” even though those activities were limited to teaching about non-violent, lawful advocacy methods for effecting political change. In part, the *Holder* dissent reasoned that the “principle of constitutional avoidance demands” an interpretation of the statute that excludes such activities from its scope. *Id.* at 60. Perhaps the *Holder* dissent’s analysis is applicable to at least some of these state anti-BDS laws.

That said, “[c]onstitutional avoidance is not a license to rewrite Congress’s work to say whatever the Constitution needs it to say in a given situation.” *Seila L. LLC v. Consumer Fin. Protec. Bureau*, 591 U.S. 197, 230 (2020). As Justice Stevens explained in a concurring opinion:

The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute. If that were permissible, then the power of judicial review of legislation could be made unnecessary, for whenever the application of a statute would have potential inconsistency with the Constitution, we could merely opine that the statute did not cover the conduct in question because it would be discomforting or even absurd to think that Congress intended to act in an unconstitutional manner. The utter circularity of this approach explains why it has never been our rule.

Second, confining the contextual analysis of these laws solely to the enacted text likely does not provide a determinate answer. Instead, other contexts may be necessary to consider in this analysis. One reason for this conclusion is that some anti-BDS laws seem either internally consistent or at least cut both ways as to whether they cover speech. Another more general reason is Israel Supreme Court Justice Aharon Barak's caution that "the 'minimalist' judge 'who holds that the purpose of the statute may be learned only from its language has more discretion than the judge 'who will seek guidance from every reliable source.'"²⁹⁹ Thus, this Article continues the analysis, it does not end it because the focus is solely on enacted text. On a statute-by-statute basis, a more detailed analysis beyond the enacted legislative findings and statutory definitions for each specific statute is the logical next step in this process.

The anti-BDS laws in at least five states provide examples where it appears that *eiusdem generis* should not be applied because the enacted legislative findings show that the laws likely cover more than mere economic conduct: Arkansas, Indiana, New York, Pennsylvania, and West Virginia. The Eighth Circuit's en banc opinion in *Arkansas Times* is a helpful starting place because the court applied *eiusdem generis* to uphold Arkansas's anti-BDS law and because the majority made a telling concession in its analysis.

Circuit City clearly exemplifies the application of *eiusdem generis* in a way that contradicts what Congress meant.³⁰⁰ Although not as clear, there is at least a reasonable argument that the application of *eiusdem generis* by the en banc Eighth Circuit opinion in *Arkansas Times* is subject to that same critique. Arkansas's law provides the following definition: "'Boycott Israel' and 'boycott of Israel' means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner."³⁰¹ Although Arkansas does not include the word "any" like the FAA, this is not a material difference.³⁰²

Pub. Citizen v. United States Dep't of Just., 491 U.S. 440, 481 (1989) (Stevens, J., concurring).

As illustrated in Part III of this Article, there are some anti-BDS laws that seem to prohibit speech when considering solely enacted legislative findings and statutory definitions of boycott. If correct, then there are at least some instances where neither the canon of constitutional avoidance nor *eiusdem generis* can resolve the First Amendment tension. But again, this Article focuses solely on enacted legislative findings and statutory definitions as a way to continue a conversation that Volokh flagged, not to end it. Further research on a statute-by-statute basis is necessary for a full analysis of these issues.

299. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) (quoting AHARON BARAK, JUDICIAL DISCRETION 62 (Y. Kaufmann trans., 1989)).

300. See *supra* Part II.A.

301. ARK. CODE ANN. § 25-1-502(1)(A)(i) (2025) (emphasis added).

302. See Radin, *supra* note 52, at 874.

Arkansas's anti-BDS law includes six enacted legislative findings.³⁰³ The first five could reasonably be viewed as limited to economic conduct and thus not raising free speech concerns, a point that is assumed arguendo in this Article. The sixth finding, however, cannot be so neatly cabined. Quoting from the policy section of an unenacted federal bill, Arkansas's sixth enacted legislative finding states:

Arkansas seeks to act to implement the United States Congress's announced policy of "examining a company's *promotion* or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that *support or promote* actions to boycott, divest from, or sanction Israel."³⁰⁴

An enacted legislative finding that prohibits "support[ing] or promot[ing]" boycotts could reasonably be read to regulate speech. Indeed, the *Arkansas Times* majority conceded that this finding "suggests a broader purpose" than merely regulating economic conduct.³⁰⁵ Even though the majority made this concession, they quickly dismiss it in an unconvincing manner. First, the majority wrote that "this language is borrowed from Congress."³⁰⁶ It's unclear why a decision by the Arkansas legislature to "borrow[]" language from an unenacted federal bill justifies ignoring that language when deciding whether the residual clause implicates speech. Then, the majority contends that "even if [this provision] supports Arkansas Times's interpretation, it is outweighed by other findings, which evidence a purely economic purpose."³⁰⁷ Again, this argument makes little sense. One cannot wash away an enacted legislative finding simply because other findings might not touch upon speech. Essentially, the majority converted legislative findings into a balancing test to avoid the potential First Amendment issues raised by one of the six findings. The sole dissenting judge in this en banc decision

303. ARK. CODE ANN. § 25-1-501(1)–(6) (2025).

304. ARK. CODE ANN. § 25-1-501(6) (2025) (emphasis added) (quoting H.R. 825, 114th Cong. (2015)). A somewhat similar provision has been enacted by Congress, but it does not include language regarding "promotion" or "support" that more clearly raises First Amendment questions. See 19 U.S.C. § 4452(b)(4)) (Congress "opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel.").

305. *Ark. Times LP v. Waldrup*, 37 F.4th 1386, 1394 n.2 (8th Cir. 2022) (en banc).

306. *Id.*

307. *Id.*

makes a similar critique.³⁰⁸ At least one enacted legislative finding leans against applying ejusdem generis to this law because such application seems to override the Arkansas legislature's intent that the law applies to more than mere economic conduct.

Against this backdrop, it appears that the majority applied ejusdem generis in a way that subjects it to a similar criticism that the *Circuit City* majority faced. Recall, *Circuit City* used ejusdem generis to avoid even considering legislative history and most likely override the intent of Congress in passing the FAA. Similarly, the *Arkansas Times* majority applied this canon "before conducting a close reading of the Act as a whole to determine the legislative intent."³⁰⁹ In a rather conclusory fashion, the majority states that the canon applies to limit the scope of "other actions" to economic conduct. Like the dissents in *Circuit City*, the dissent in *Arkansas Times* objected to the use of the canon because it was being used improperly to "defeat legislative intent and purpose."³¹⁰ Specifically, if one looks at the whole act, including the sixth enacted legislative finding, the Arkansas legislature intended "to include more than purely commercial conduct."³¹¹

Arkansas is not alone in including enacted legislative findings that extend beyond mere economic conduct. Like Arkansas's law, the stated purpose of Pennsylvania's law includes "promoting trade and commercial activities and to discourage policies that disregard that interest."³¹² People often promote, support, or discourage someone or something through speech. Oklahoma's enacted legislative findings are primarily focused on economic considerations, but they also state that the "public policy of the United States" is to "oppose such boycotts."³¹³

New York's Executive Order includes language that makes it even harder to view its law as limited to mere economic conduct. The Executive Order states that it "will not permit its investment activity to further the BDS campaign in any way, shape or form, whether directly or indirectly."³¹⁴ Further, that Order defines "Boycott, divestment, or sanctions activity targeting Israel" to include activities that "promote others to engage" in such activity.³¹⁵

308. *Id.* at 1396–97 (Kelly, J., dissenting) (stating that the court's decision to "balance" the legislative findings and determine that the sixth is "outweighed by the other findings" reads out one of the legislature's explicit purposes in enacting the statute).

309. *Id.* at 1395 (Kelly, J., dissenting).

310. *Id.* at 1397 (Kelly, J., dissenting) (quoting *Seiz Co. v. Ark. State Highway & Transp. Dep't*, 324 S.W.3d 336, 342 (Ark. 2009)).

311. *Id.* at 1397–98 (Kelly, J., dissenting).

312. 62 PA. STAT. AND CONS. STAT. ANN. § 3602 (2025) (emphasis added).

313. OKLA. STAT. tit. 74, § 582(A) (2025) (emphasis added).

314. N.Y. Exec. Order No. 157 (2016) (emphasis added).

315. *Id.* (emphasis added).

Indiana's law also mentions the "promotion of activities to boycott,"³¹⁶ but goes further than the laws in Arkansas and Pennsylvania. The enacted legislative findings in Indiana's anti-BDS law state that a purpose of the law is to respond to efforts seeking to "delegitimize Israel's existence" and "demonize the Jewish state."³¹⁷ Speech is most likely swept up in delegitimizing and demonizing. According to Merriam-Webster, to delegitimize is "to diminish or destroy the legitimacy, prestige, or authority of"³¹⁸ and to demonize is "to portray (someone or something) as evil or as worthy of contempt or blame."³¹⁹ While it is too strong to state that speech is the only means of demonizing or delegitimizing someone or something, speech often plays a central role in such efforts. Indeed, the first example Merriam-Webster offers to illustrate demonizing is a quote from an editorial characterizing the purpose of a Congressional hearing.³²⁰ While Indiana's enacted legislative findings do not incontrovertibly show that the law covers speech, they do show the ejusdem generis ought not to be applied without further inquiry into the meaning of the law because demonizing and delegitimizing someone or something is often done with speech.

Finally, perhaps West Virginia's enacted legislative findings provides the strongest case for finding that one purpose of the law is to curtail speech. West Virginia's law states that boycotts have "served as a vehicle for *spreading* anti-Semitism and *advocating* for the elimination of the Jewish State of Israel."³²¹ Further, "The State of West Virginia has an *economic and a humanitarian obligation to denounce* and reject the Boycott, Divestment, and Sanctions Movement against Israel, and to prevent the state or any of its instrumentalities from contracting with companies that *engage in* the movement."³²² Now, one could explain that these enacted findings merely provide the purpose of the laws, but that they do not define the scope of what the laws prohibit, which is narrower and does not cover speech. That may be a reasonable explanation, but it is not the only reasonable explanation. Another reasonable, but not

316. IND. CODE § 5-10.2-11-1(7) (2025).

317. IND. CODE § 5-10.2-11-1(4)(A)–(B) (2025).

318. *Delegitimize*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/delegitimize> [<https://perma.cc/3RW6-AFG9>] (last visited Feb. 24, 2026).

319. *Demonize*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/demonize> [<https://perma.cc/DK6P-CM45>] (last visited Feb. 24, 2026).

320. *See id.*; John M. Broder, *Demonizing the I.R.S.; Is an Overhaul Needed, or Just Less Posturing*, N.Y. TIMES (Sep. 20, 1997), <https://www.nytimes.com/1997/09/20/business/demonizing-the-irs-is-an-overhaul-needed-or-just-less-posturing.html> [<https://perma.cc/M3Q8-QKC5>] ("But the Senate hearings have a broader purpose than exposing I.R.S. sins. They are a central element in a campaign by Congressional Republicans to demonize the tax agency, already the least loved of all Government bureaucracies.").

321. W. VA. CODE § 5A-3-63(a)(2) (2025) (emphasis added).

322. W. VA. CODE § 5A-3-63(a)(3) (2025) (emphasis added).

dispositive, explanation is that the enacted findings in Arkansas's, Indiana's, New York's, Pennsylvania's, and West Virginia's laws suggest that the scope of these laws extends beyond mere economic conduct. If so, then that cuts against applying *ejusdem generis* because doing so would contradict the intent of the legislature as expressed through enacted legislative findings.

At the other end of the spectrum are laws like Minnesota's, North Dakota's, and Tennessee's that include statutory language explicitly excluding First Amendment activity from their scope. Minnesota's law states that it "does not prohibit a vendor from engaging in free speech or expression protected under the First Amendment of the United States Constitution or the Constitution of the state of Minnesota."³²³ Similarly, Tennessee's law states that it "does not diminish or infringe upon a right protected under the constitution of this state or the First Amendment to the Constitution of the United States."³²⁴ North Dakota's definition of "Israel boycott" states that "expressive activity . . . may not be considered evidence of a boycott of Israel."³²⁵ These statutory provisions that expressly exclude speech from their coverage provide strong, albeit not conclusive, evidence for applying *ejusdem generis* to limit the scope of the residual clause.³²⁶ Anti-BDS laws in some other states do not specifically mention the First Amendment but generally state that they are not intended to contradict other applicable law. Pennsylvania is one such state and therefore complicates the analysis regarding what the statute means when one of its enacted purposes is to "promot[e] trade."³²⁷

323. MINN. STAT. § 3.226(3) (2025).

324. TENN. CODE ANN. § 49-6-312(b)(1) (2025).

325. N.D. CENT. CODE § 54-06-41(3) (2025).

326. In addition to identifying the canon of constitutional avoidance as a basis to interpret a federal statute prohibiting "material support" to entities designated as "foreign terrorist organizations," to exclude speech-related activity from its scope, the *Holder* dissent also reasoned that the statute had a similar provision as the anti-BDS laws in Minnesota, North Dakota, and Tennessee. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 59–60 (2010) (Breyer, J., dissenting) ("[T]he statute itself says: 'Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.' § 2339B(i).").

327. 62 PA. CONS. STAT. § 3604 (2025) ("Notwithstanding any other provision of law . . ."). Other states have statutes including similar language. *See* MICH. COMP. LAWS § 18.1261(15)(b)(iii) (2025) ("Boycott does not include . . . [c]onduct necessary to comply with applicable law in the person's home jurisdiction."); N.J. STAT. ANN. § 52:18A-89.14(a) ("Notwithstanding any other provision of law to the contrary . . ."); S.C. CODE ANN. § 11-35-5300(B)(1)(c) (2025) ("'Boycott' does not include . . . conduct necessary to comply with applicable law in the business's home jurisdiction."). Other states have similar language but limit it to statutory and common law. This specificity is most likely because of the reasonable presumption that statutes cannot violate constitutional law, and the purpose of these clauses was to identify which statute or common law rules took precedence. Indiana is one such state. IND. CODE § 5-10.2-11-23 (2025) (" . . . the system shall be exempt from any conflicting statutory or

Thus, there are specific statutes where the statute itself or through application of ejusdem generis would support limiting the residual phrase “or other actions” to exclude speech from its coverage.

Also at the other end of the spectrum are laws where reverse ejusdem generis may play a role in limiting the scope of the residual clause to not cover speech. Recall, reverse ejusdem generis is where language in the residual clause itself helps limit the scope of the law. Wexler provided this example: “the phrase ‘iguanas, tortoises, rattlesnakes, and other land reptiles’ would likely exclude marine iguanas” because the scope of the residual clause is limited to *land* reptiles.³²⁸ Anti-BDS laws in Alabama, Pennsylvania, North Dakota, New Hampshire, South Carolina, South Dakota, and Rhode Island contain language in their respective residual clauses that could lead to the conclusion that speech is not within the scope of the residual clause, assuming, as this Article does, that “refusals to deal” and “terminating business” clauses do not implicate speech.

The statutory definitions of “Boycott” under Alabama’s, Pennsylvania’s, South Carolina’s, and Rhode Island’s respective anti-BDS laws all contain the exact same residual clause: “or otherwise refuse to deal with.”³²⁹ Just like “land” reptiles in the residual clause of Wexler’s example limits the type of reptiles covered by that hypothetical, including “refusals to deal” in the residual clause of these four state laws could be used to limit the scope of these laws to exclude speech. North Dakota’s statute and New Hampshire’s Executive Order both define “boycott Israel” as “engaging in refusals to deal, terminating business activities, or other *similar commercial* actions . . .”³³⁰ “Similar commercial” action does the same work as “refusals to deal.” These definitions are distinguishable from other state’s laws that do not cabin the scope of the residual clause. For example, the statutory definition in Arkansas’s law does not limit the residual clause to “commercial” actions, but more generally refers to “other” actions.³³¹ Thus, it is conceivable that reverse ejusdem generis may be properly applied when the state laws have more precise residual clauses and thereby establish that such laws do not cover speech.

Other state laws have language like “otherwise refusal to deal with,” but the reverse ejusdem generis cannot be as neatly applied. Illinois’s law defines “Boycott Israel” to include actions that “otherwise limit

common law obligations . . .”). Iowa’s law has language similar to Indiana’s law. *See* IOWA CODE § 12J.7 (2025).

328. Wexler, *supra* note 102, at 2.

329. ALA. CODE § 41-16-5(a)(1) (2025); 62 PA. CONS. STAT. § 3603 (2025); R.I. GEN. LAWS § 37-2.6-2(a)(1) (2025); S.C. CODE ANN. § 11-35-5300(A) (2025).

330. N.D. CENT. CODE § 56-04-41(1) (2025) (emphasis added); N.H. Exec. Order No. 2023-05 (2023) (emphasis added).

331. ARK. CODE ANN. § 25-1-502(1)(A)(i) (2025) (emphasis added).

commercial relations.”³³² Indiana, New York, Utah, and West Virginia have the same or similar residual clauses.³³³ South Dakota’s Executive Order contains the same residual clause, but perhaps make an even stronger case for interpreting the law to not cover speech by adding the word “conduct” to modify the specific clauses that precede it.³³⁴ Actions that “limit” commercial relations could reasonably be interpreted as confined to mere economic conduct and thereby not raise First Amendment issues. To that end, such statutory language could be contrasted with the residual clause in Michigan’s law that broadly defines boycott as “otherwise *engage* with a person.”³³⁵ But it is also conceivable that one could “limit” commercial relations through advocacy.

Take Indiana’s law, for example. Not only do Indiana’s enacted legislative findings seek to counter efforts to “demonize” or “delegitimize” Israel, its definition of “boycott, divest from, or sanction Israel” is broader than many anti-BDS laws and could reasonably encompass speech. Boycotting under Indiana’s law “. . . means action or inaction that (1) *further*s; (2) *coordinate*s with; or (3) acquiesces in an *effort* by another person to penalize, inflict economic harm on, or otherwise limit commercial relations with the Jewish state of Israel or businesses that are based in the Jewish state of Israel or territories controlled by the Jewish state of Israel. . . .”³³⁶ Speech is likely swept up in that definition, as well as the enacted legislative findings. Together, these parts of the statute suggest that “or otherwise limit commercial relations” is broader than mere economic conduct. Or perhaps the reverse is true: the residual clause in Indiana’s definition of boycott helps cabin “demonize” and “delegitimize” and other parts of the definition of boycott to exclude speech from the scope of the law through application of reverse *eiusdem generis*.³³⁷ Thus, Indiana is another example, alongside Pennsylvania’s law, where the language of the statute by itself does not lead to a single conclusion as to the scope of the residual clause. Other contexts beyond the enacted legislative findings and statutory definition may shed more light on whether the residual clause excludes speech.

332. 40 ILL. COMP. STAT. 5/1-110.16(a) (2022).

333. IND. CODE § 5-10.2-11-3 (2025) (“or otherwise limit commercial relations”); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (“or otherwise limit commercial relations”); UTAH CODE ANN. § 63G-27-102 (1) (West 2023) (“or limiting commercial relations”); W. VA. CODE ANN. § 5A-3-63 (West 2022) (“or otherwise limit commercial relations”).

334. S.D. Exec. Order No. 2020-01 (2020) (“‘Boycott of Israel’ or ‘BDS Movement’ means engaging in *conduct* of refusing to deal, terminating business activities . . . or otherwise limit commercial relations . . .”) (emphasis added).

335. MICH. COMP. LAWS § 18.1261(15)(b) (2025) (emphasis added).

336. IND. CODE § 5-10.2-11-3 (2025) (emphasis added).

337. *Id.*

Then there are laws like New Jersey's and Maryland's that include language which might also favor applying ejusdem generis to limit the scope of the residual clause. New Jersey's law describes BDS as "encouragement of boycotts" but does not prohibit such encouragement. It only prohibits actual boycotts.³³⁸ Maryland's Executive Order explicitly excludes actions that are "not commercial in nature."³³⁹ Unlike the FAA, Maryland's law literally "calls for" limiting the scope of "other actions" to things like the specific phrases preceding the residual clause. While this language does not answer the larger First Amendment question about anti-boycott laws, it does make a stronger case for applying ejusdem generis to limit "other actions" to commercial conduct.

Other anti-BDS laws leave room for debate as to whether to apply ejusdem generis. For example, Iowa's enacted legislative findings are less overt than legislative findings in other states but could suggest that the law extends beyond economic conduct.³⁴⁰ Iowa's law states that it "does not support boycotts and related tactics . . . of economic warfare" and distinguishes between a "refus[al] to engage in commerce with Israel and boycott[ing] Israel."³⁴¹ Iowa's law includes a definition section, but it does not define boycott.³⁴² Under Iowa's law, does "boycott" extend beyond a "refus[al] to engage in commerce" such that "boycott" implicates speech? Even if a "boycott" does not involve speech, does the phrase "related tactics" involve speech? Again, more context is necessary.

A close look at the language of these laws shows that while they are similar, they are not the same. Some of these differences may be material when it comes to deciding whether applying the semantic canon of ejusdem generis reflects the meaning of the statute that the respective legislatures intended. New York's Executive Order "will not permit its own investment activity to further the BDS *campaign in any way, shape or form, whether directly or indirectly*."³⁴³ Indiana's law may also be an example where ejusdem generis might contradict the legislative intent because its enacted legislative findings include the purpose of countering efforts to "demonize" or "delegitimize" Israel and its broad definition of boycott. (Then again, its residual clause may suggest application of reverse ejusdem generis to limit the scope of that clause to exclude speech.) At the very least, these findings suggest applying ejusdem generis to limit the scope of these residual clauses to exclude speech may not reflect the meaning of the law.

338. N.J. STAT. ANN. § 52:18A-89.14 (a), (e) (West 2016).

339. MD. CODE REGS. 01.01.2017.25(A)(1)(i) (2017).

340. IOWA CODE § 12J.1 (2025).

341. *Id.*

342. IOWA CODE § 12J.2 (2025).

343. N.Y. Exec. Order No. 157 (2016) (emphasis added).

On the other hand, applying *ejusdem generis* to Minnesota's and Tennessee's laws may be appropriate because of their respective statutory provisions explicitly excluding First Amendment activity from their scope.³⁴⁴ Then there are laws, like Pennsylvania's and Indiana's, where the statutory text provides mixed messages. Pennsylvania's enacted legislative findings state that one purpose is "promoting" trade relations with Israel, suggesting the law is broader than mere economic conduct. But applying reverse *ejusdem generis* to the residual suggests that the law is limited to mere economic conduct because that clause defines boycott, in part, to mean "otherwise refuse to deal with." In sum, whether applying *ejusdem generis* to limit the scope of residual clauses in the anti-BDS laws honors the legislative intent cannot be decided on a universal basis and likely cannot be decided solely by enacted statutory text. Other external clues may provide guidance in this interpretive endeavor, but that analysis is beyond the scope of this Article.³⁴⁵

CONCLUSION

One cannot simply invoke *ejusdem generis* to avoid any First Amendment tension with the residual clauses in the anti-BDS laws. Instead, one must look at a larger context to determine the propriety of applying that canon, just like the Court did in *Fischer*³⁴⁶ and *Estate of Keffler*, and just like Volokh and Candeub did when analyzing a residual clause in section 230 of the Communications Decency Act. By starting this analysis with a close look at enacted legislative findings, statutory definitions of "boycott," and express statutory exclusions of speech from the scope of coverage, I provide a common starting ground for textualists and purposivists alike.

Some of the enacted legislative findings, such as Arkansas's, Indiana's, and Pennsylvania's, demonstrate that using *ejusdem generis* to limit the scope of the residual clause without a further contextual investigation could very well contradict the meaning of those laws,

344. TENN. CODE ANN. § 49-6-312(b)(1) (2025).

345. At least one court considered the legislative history of an anti-BDS law and determined that the "legislative history reveals that its goal is to undermine the message of those participating in a boycott of Israel. This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel." *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018). The *Koontz* court's support for its conclusion is rather cursory and lacks citations, but some support for that conclusion can be found in the legislative history, some of which is cited in the Complaint. Compl. ¶¶ 13–15, *Koontz v. Watson*, No. 17-cv-4099 (D. Kan. Oct. 11, 2017). The available legislative history for the Kansas law is here: https://www.kslegislature.org/li_2018/b2017_18/measures/HB2409/testimony/ [<https://perma.cc/2AT5-L6WK>] (last visited June 27, 2024).

346. See *Fischer v. United States*, 603 U.S. 480, 498 (2024) (The statutory section at issue "was enacted to address the Enron disaster . . . We therefore decline to adopt the Government's interpretation, which is inconsistent with the context from which the statute arose.") (cleaned up).

similar to what happened in *Circuit City*. On the other hand, there may be a stronger case for applying ejusdem generis to limit the scope of residual clauses in other states. New Jersey's law prohibits boycotts but not "encouragement" of boycotts. This statutory limitation could be used to support applying ejusdem generis because allowing for "encouragement" of boycotts appears to exclude speech from the scope of the law. Then there are laws like Minnesota's and Tennessee's that make an even stronger case for applying ejusdem generis because they expressly state that free speech protected under the First Amendment is not limited under their laws.

All this analysis might be for naught if these laws inherently implicate the First Amendment because boycotting, including "refusals to deal" and "terminating business," necessarily involves speech.³⁴⁷ But this larger and highly contested question is set aside here. Regardless of the answer to that larger question, there are at least three reasons why close attention to the residual clauses and application of the ejusdem generis canon in these statutes is meaningful and timely.

First, even though these thirty-eight state laws are very similar, their language is not identical. It would be painting with too broad a brush to reach a universal conclusion. Instead, each statute must be individually analyzed to determine the propriety of applying ejusdem generis to avoid potential First Amendment issues. Thus, this analysis shows that when model legislation works its way into several states' laws, subtle differences in the final legislative text can result in material differences in interpretation. For this reason, the analysis of the anti-BDS laws here is simply a case study for a more general point: even very similar laws based on model legislation require a statute-by-statute analysis.

Second, the anti-BDS laws may very well implicate the First Amendment, even if the "refusals to deal" and "terminating business" clauses do not prohibit speech. As one court noted in applying ejusdem generis to interpret the federal Trading with the Enemy Act, "not far beneath the surface of [the statute's] language lies a constitutional principle central to American life and law: the First Amendment."³⁴⁸ The same may very well be true here. To the extent that these laws (or at least some of them) limit speech, then a "bedrock principle underlying the First Amendment" is in play.³⁴⁹ Specifically, the "Government may not prohibit the expression of an idea because society finds the idea

347. *But see Fischer*, 603 U.S. at 480, n.1 ("That our answer to the narrow question presented in *Begay* [*v. United States*, 553 U.S. 137 (2008)] did not resolve a broader constitutional defect in the statute says little about whether the reasoning of *Begay* is relevant here.").

348. *Cernuda v. Heavy*, 720 F. Supp. 1544, 1554 (S.D. Fla. 1989). (holding that art from Cuba qualified as "informational materials" under the Trading With the Enemy Act and requiring that the seized property be returned).

349. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

disagreeable.”³⁵⁰ If some of these laws prohibit speech, then they do so in a content-based and likely viewpoint-based manner, both of which raise serious First Amendment concerns.³⁵¹

Third, the relevance of this statutory analysis transcends anti-BDS laws and the Israel-Palestine conflict. In November 2022, the American Legislative Exchange Council (ALEC) proposed model legislation titled “Eliminate Political Boycotts Act.”³⁵² ALEC subsequently replaced the word “political” with “economic.”³⁵³ If adopted by a state, this copycat legislation could apply to a host of issues that have nothing to do with Israel-Palestine. For example, the model bill prohibits a state from entering into a contract with a company that engages in an economic boycott of another company because that other company: (1) engages in fossil fuel-based energy, timber, mining, or agricultural industries; (2) engages in the firearms industry; (3) does not meet environmental standards, “in particular to eliminate, reduce, offset, or disclose greenhouse gas emissions;” (4) does not commit to incorporating protection for “characteristics protected in this state under [state civil rights statute]” in its corporate board, employment or compensation structure; (5) “does not commit to facilitate access to abortion, sex or gender change, or transgender surgery;” or (6) “[insert additional state specific boycotting criteria].”³⁵⁴ Some states have already enacted such

350. *Id.*; see also *Chiles v. Salazar*, slip op. p. 14 (2026) (The First Amendment “secures, even and especially, the right to voice dissenting views.”) (emphasis added).

351. See *Chiles*, slip op. p. 9 (“Viewpoint discrimination, as we have put it, represents an egregious form of content regulation, and governments in this country must nearly always abstain from it.”) (cleaned up).

352. Chris McGreal, *Rightwing Group Pushing US States for Law Blocking ‘Political Boycott’ of Firms*, *GUARDIAN* (Nov. 11, 2022), <https://www.theguardian.com/us-news/2022/nov/11/alec-anti-political-boycott-state-legislation> [<https://perma.cc/LUH8-DSB7>]; *The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions*, *HARV. L. SCH. F. ON CORPORATE GOVERNANCE* (Feb. 27, 2023), <https://corpgov.law.harvard.edu/2023/02/27/the-liability-trap-why-the-alec-anti-esg-bills-create-a-legal-quagmire-for-fiduciaries-connected-with-public-pensions/#39b> [<https://perma.cc/C52W-EPUV>].

353. Nate Orbach, *U.S. Anti-Boycott Laws Could Take a Draconian Turn. But the Fight is Not Over*, +972 MAG. (Mar. 1, 2023, at 03:00 EST), <https://www.972mag.com/anti-boycott-arkansas-times-aclu/> [<https://perma.cc/3V88-N57K>]. The model bill is available at The Heritage Foundation website. *Eliminate Economic Boycotts Act*, THE HERITAGE FOUND., <https://www.heritage.org/article/eliminate-economic-boycotts-act> [<http://perma.cc/V7W4-ALC4>] (last visited June 27, 2024).

354. *Eliminate Economic Boycotts Act*, THE HERITAGE FOUND., <https://www.heritage.org/article/eliminate-economic-boycotts-act> [<http://perma.cc/V7W4-ALC4>] (last visited June 28, 2024). To be sure, the model legislation limits its application to exclude companies of less than 10 employees and contracts below a certain dollar threshold. But to the extent that these laws implicate speech, such limitations do not dispositively erase any First Amendment considerations. See, e.g., *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 347 (2010) (“[T]he First Amendment does not

legislation. For example, Alabama’s “Economic Boycotts” act is almost verbatim to items 1–5 above, and Utah’s “Public Contract Boycott Restrictions” act is almost verbatim to items 1–3 and 5.³⁵⁵ In short, regardless of one’s view on the BDS movement and the Israel-Palestine conflict, these anti-boycott laws deserve close attention because they could be a harbinger for government censorship in a wide range of other contexts.

allow political speech restrictions based on a speaker’s corporate identity.”); Hunter Pearl, *Political Nonexpenditures: “Defunding Boycotts” as Pure Speech*, 45 HARV. J.L. & PUB. POL’Y 703, 705 (2022) (“The Court’s views on speech that developed in the campaign finance cases and *Janus* directly apply in the boycott context.”); cf. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (a statute that applied only to “instruments of mass communication” was facially underinclusive and thus “raised serious doubts” as to whether it served its intended purpose to protect privacy). Analysis of this issue, however, is beyond the scope of this Article.

355. ALA. CODE § 41-16-160(2) (1975); UTAH CODE ANN. § 63G-27-102(3)(a-d) (1953). Other states that have enacted legislation include that includes some components of the ALEC model bill. E.g., ARK. CODE ANN. § 25-1-1102 (“Prohibition on contracting with entities that boycott energy, fossil fuel, firearms, and ammunition industries.”); TEX. GOV’T CODE ANN. ch. 809 et seq. (West 2025) (“Prohibition on Investment in Financial Companies that Boycott Certain Energy Companies.”). For a table that tracks these developments, see Laura Friedman, *Israel-Focused Anti-Boycott Legislations – A Template for Targeting Protest on Other Issues*, FOUND. FOR MIDDLE EAST PEACE (Jan. 9, 2023) (table last updated June 27, 2023), <https://fmep.org/resource/israel-anti-boycott-laws-as-template-for-quashing-free-speech-on-other-issues/> [https://perma.cc/YBK5-2Q9W].