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# The Textual Canons in Contract Cases: A Preliminary Study

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# THE TEXTUAL CANONS IN CONTRACT CASES: A PRELIMINARY STUDY

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This Essay is a first effort to explore how linguistic canons function in contract cases. Most lawyers know about *ejusdem generis*, *expressio unius*, and *noscitur a sociis* from their work in statutory interpretation, but no one has attempted any systematic inquiry into how these canons figure in contract interpretation. Looking at two jurisdictions' use of textual canons in contract cases over time and in careful detail, this Essay reports findings and offers preliminary conclusions, about the specific jurisdictions under review and more generally in a comparative vein, both inter-jurisdictionally and as compared to what we know about the same canons' use within practices of statutory interpretation.



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## INTRODUCTION

Most law students get their first real exposure to linguistic canons of interpretation in their legislation courses. Canons of interpretation are rules of thumb that can aid with reading authoritative legal texts. Irrespective of whether the canons are genuinely utilized to approximate the presumed intent of the authors of those texts,[1] they are nevertheless tools that adjudicators can use to derive textual meanings as part of an interpretive regime. Few scholars or lawyers believe they are applied consistently enough to be reliable in predicting case outcomes,[2] but they form a set of guideposts and folk wisdom for discerning the legal meaning of texts.[3] As textualism has gained ascendency as a common method of statutory interpretation[4]—focusing more on statutory text than on legislative history or purposes—textual canons seem especially important

1. *See generally* 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 (2013).

2. *E.g.*, 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, 401–06 (1950) (demonstrating that every canonical "thrust" can have a counter-canonical "parry"); FRANK C. NEWMAN & STANLEY S. SURREY, LEGISLATION: CASES AND MATERIALS 654 (1955) ("[Canons] are useful only as facades, which for an occasional judge may add lustre to an argument persuasive for other reasons.").

3. *See, e.g.*, Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 489 (2015) (emphasizing that the canons have a place in the interpretive toolkit but are not outcome determinative).

4. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("We are all textualists."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) ("[W]e are all textualists in an important sense."); Elena Kagan, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg [https://perma.cc/6HMD727M] (asserting that "w[e are] all textualists now"); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018) (emphasizing the influence of textualism in the judiciary); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 (2020) ("[T]extualism has in recent decades gained considerable prominence within the federal judiciary."). Justice Kagan, in Part III of her recent dissent in *West Virginia v. EPA*, casts doubt on her earlier remarks about the Court's textualism. 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it.").

for lawyers to master.[5] Thus, the canons of *expressio unius*,[6] *ejusdem generis*,[7] and *noscitur a sociis*,[8] for example, continue to have salience in the field of statutory interpretation. Indeed, it would be professional malpractice not to teach them to future litigators.[9]

But there is far less study and teaching about how prevalent the textual canons are in finding the meaning of contracts in private law.[10] Should contract drafters and litigators be trained in them as well? In the same way? Since "contract interpretation remains the largest single source of contract litigation between business firms,"[11] it is a notable omission that there is so little work on how the canons are deployed, if at all, in contract adjudications. There are, to be sure, some contract-specific substantive canons of construction that are widely discussed and taught: Consider *contra proferentem*, instructing courts to construe ambiguities against a drafting party.[12] Or consider John Coyle's work

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5. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2148 (2002) ("The [textual] canons are beloved by textualists as vital tools for rendering statutory interpretation more determinate."); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 29 (2018) ("A judge [who] uses linguistic canons and dictionaries extensively but uses legislative history sparingly is more textualist than a judge who displays the opposite tendencies."); *see also id.* (suggesting that in cases where ideological stakes are low, canons "probably exert significant influence on decisions").

6. This canon holds that "the inclusion of one term or concept in text suggests the exclusion of opposite or alternative terms and concepts not mentioned." James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005).

7. This canon holds that "a general term is understood to reflect the class or type of objects identified in more specific terms as part of the same sentence or provision." *Id.*

8. This canon holds that courts should know words by their associates and interpret more comprehensive words in a series to be limited by the more specific and less comprehensive enumerated items. *See* WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 595–96, 1151 (6th ed. 2020).

9. *See* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 163 (2018) (reflecting on "affection" and "newfound enthusiasm" for canons).

10. For a canonical article, see Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964). A separate project could evaluate the use of the linguistic canons in connection with wills and trusts, or corporate bylaws. *See, e.g.*, *In re Robinson's Will*, 96 N.E. 925, 927 (N.Y. 1911) (using *ejusdem generis* in connection with a last will and testament at the Court of Appeals); *Am. Ctr. for Educ., Inc. v. Cavnar*, 102 Cal. Rptr. 575, 580–81 (Ct. App. 1972) (applying *expressio unius* to corporate bylaws).

11. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 (2010).

12. *See generally* Ethan J. Leib & Steve Thel, Contra Proferentem *and the Role of the Jury in Contract Interpretation*, 87 TEMPLE L. REV. 773, 773 (2015) ("*Contra*

unearthing canons of construction that apply specifically to forum selection clauses[13] or choice-of-law clauses[14] in contract litigation. Or consider the *Restatement (Second) of Contracts*, which directs that, "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred."[15] Yet the *Restatement* does not treat the textual canons like *expressio unius*, *ejusdem generis*, or *noscitur a sociis* at all.[16] This Essay, then, is an effort to start studying more systematically how the textual canons of interpretation figure in contract interpretation. Unlike a strain of scholarship that principally aims to engage in "comparative" work about statutory and contract interpretation,[17] what follows is a

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*proferentem* usually requires that an interpreter read an ambiguous contract provision against the drafter of that provision."); Joanna McCunn, *The* Contra Proferentem *Rule: Contract Law's Great Survivor*, 39 OXFORD J. LEGAL STUD. 483, 484 (2019).

13. John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791 (2019).

14. John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631 (2017).

15. RESTATEMENT (SECOND) OF CONTRACTS § 207 (Am. Law Inst. 1981). For a recent exploration of this canon, see Aditi Bagchi, *Interpreting Contracts in a Regulatory State*, 54 U.S.F. L. REV. 35 (2020).

16. This is not to say that there is no contemporary work making mention of the canons as components of contract interpretation. *See, e.g.,* Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73, 150–63 (1999) (listing these three textual canons with some support from caselaw as "'secondary' rules"); E. ALLAN FARNSWORTH, CONTRACTS 456–61 (4th ed. 2004) (listing the canons as "rules in aid of interpretation"); 11 WILLISTON ON CONTRACTS § 32:6 (4th ed. 2010) (listing *noscitur a sociis* as a "primary rule" of contract interpretation). Bryan Garner—a canon collator with the late Justice Scalia, *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)—makes one reference to *expressio unius*, *ejusdem generis*, and *noscitur a sociis* as a group in his contract drafting coursebook. *See* BRYAN A. GARNER, COURSEBOOK ON DRAFTING & EDITING CONTRACTS 556 (2020) (citing SCALIA & GARNER, *supra*, at 107, 195, 199). Although Garner's work with Scalia on statutory interpretation identifies all of the Latin versions of the canon, in the contract context Garner only calls *ejusdem generis* by its Latin name.

17. *See, e.g.*, Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667, 667–68 (1991) (examining "interpretation problems in some private law settings" and identifying "public law analogies"); James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 283–84 (1995); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 541, 547–48 (1983); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–17 (1984); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 708 (1992); Gillian K. Hadfield, *Incomplete Contracts and Statutes*, 12 INT'L REV. L. & ECON. 257, 258 (1992). For hesitation about the comparative work, see Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1167 (1998), and Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995).

preliminary empirical effort to discover more about textual canons of interpretation in contract law.

This Essay proceeds in three Parts. First, Part I explains the (relatively old-school) methods I utilized, highlighting their strengths and limitations. Part II reports on my results. Part III offers some further observations and draws some preliminary conclusions from my findings. In summary, this study supports at least the following propositions:

> (1) Jurisdictions seem to favor *ejusdem generis* over *expressio unius* in contract cases and prefer both of those canons to *noscitur a sociis* (a canon ranking that does not recur in non-contract cases);
> (2) Jurisdictions continue to debate whether the canons should be used principally to resolve ambiguities or whether they are relevant before a legal finding of ambiguity;
> (3) Across jurisdictions, there seems to be an increased incidence of courts discussing textual canons in contract cases in recent decades; and
> (4) It is rare that textual canons do their work standing alone; rather, contract cases that draw upon the textual canons routinely invoke other linguistic and substantive canons to resolve interpretive disputes in contract adjudications.

But, as I hope to show, there is much more to learn about the use of textual canons in contract cases – and how contract cases may track and depart from other kinds of cases where the state courts engage the linguistic canons.

## I. METHODS

Because I was interested in developing a trove of cases to study in some depth, I picked two jurisdictions with which I am well-acquainted and that are generally treated as differentiated contract regimes, one more formalist (New York) and one more contextualist and pragmatic (California).[18] As Geoff Miller explains:

> The differences between New York and California contract law turn out to align with the formalist-contextualist distinction in contract theory. New York judges are formalists. Especially in commercial cases, they have little tolerance for attempts to re-write contracts to make them fairer or more equitable, and they look to the written agreement as the definitive source of

18. *See generally* Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475 (2010) (comparing New York and California contract jurisprudence).

> interpretation. California judges, on the other hand, more willingly reform or reject contracts in the service of morality or public policy; they place less emphasis on the written agreement of the parties and seek instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity, and substantial justice.[19]

Owing to the literature on statutory interpretation, it was reasonable to hypothesize that more formalist jurisdictions might have more interest in using the textual canons, so I was interested in whether New York and California would look similar. Further studies might select jurisdictions further apart from a political or ideological perspective. Since textualism within statutory interpretation is often associated with a more conservative legal philosophy, it might be productive to study a jurisdiction in which Republicans dominate the courts. Choosing a more conservative jurisdiction would allow one to evaluate whether the overall effects of textualism as a theory of statutory interpretation generate any impact on practices of contract interpretation.[20] Although this study was not calibrated to assess the interface between political ideology and linguistic canon usage, selecting two different jurisdictions with different contract jurisprudences seemed important for garnering wider learning in the subject.

After selecting the relevant jurisdictions, I ran searches to cull any use of the Latin names of three linguistic canons—*expressio unius*,[21] *ejusdem generis*, and *noscitur a sociis*—in any Westlaw-reported contract case in California and New York state courts. I used Westlaw's Key Number System to identify contract cases, specifically, within those results. Although this led to an over-inclusive case selection—some contract cases involved the use of these canons in connection with a related statute in the case—it generated a usable database of relevant cases. Once I read every Westlaw result, I was able to further remove statutory interpretation cases or cases that applied the canons to instruments like wills or corporate charters. This process of case

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19. *Id.* at 1478.

20. In New York, although contract interpretation leans formalist at the New York Court of Appeals, its statutory interpretation jurisprudence remains firmly intentionalist and/or purposivist rather than textualist. *See, e.g.*, *Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3d 612, 618–20 (N.Y. Ct. App. 2022) (embracing "history and purpose" as guidance in a very non-textualist opinion about of statutory interpretation). I am exploring this interesting configuration of interpretive regimes in a forthcoming paper. *See* Ethan J. Leib, Interpretive Divergence Between Statutory and Contract Interpretation: A Case Study in the New York Court of Appeals (Oct. 27, 2022) (unpublished manuscript) (on file with author).

21. Because this canon is sometimes referred to as "*inclusio unius*" by courts, I ran that as a search term and included those hits under "*expressio unius*."

selection led to a trove of fifty-three New York cases and twenty-four California cases. The spotty coverage of trial-level courts in California is contained in a peripheral database and only dates back to 2000 in Westlaw and Lexis; therefore, although I read the few cases from the Superior Court in California that cited the canons in contract interpretation within Westlaw's and Lexis's reporting systems on background,[22] I did not include them in my primary trove of cases for fear of over-sampling post-2000 usages. Reading all the cases from the Westlaw hits and following their internal citations on the relevant maxims of interpretation allowed me to supplement the trove by five cases in the New York database[23] and six cases in the California database.[24] These cases were clearly sources of law for the cases Westlaw returned but were not digested by the database in a way that enabled them to be "hits" using my original culling method. I included a case in my trove even if the court ultimately rejected the application of the canon or if the

22. *See EHM Prods. v. Starline Tours of Hollywood, Inc.*, No. BS 164473, 2017 Cal. Super. LEXIS 13617, at *7–8 (Jan. 23, 2017) (rejecting an *ejusdem generis* reading of an indemnification clause); *Won Long Young v. CEP Am., LLC*, No. CGC-16-554619, 2018 Cal. Super. LEXIS 6856, at *16–18 (July 25, 2018) (rejecting an *expressio unius* reading of an arbitration clause); *Greenfield LLC v. Kandeel*, No. BC548794, 2017 WL 10701868, at *6 (Cal. Super. June 6, 2017) ("Assuming the *ejusdem generis* canon applies to contract interpretation as well as statutory interpretation, it still does not do the work that JPMorgan wishes it to do."); *Riverbed Tech. Inc. v. Scottish Equity Partners LLP*, No. CGC-12-525496, 2016 WL 9052888, at *17 (Cal. Super. Jan. 25, 2016) (rejecting an *expressio unius* reading); *TBG Danco Ins. Servs. Corp. v. Hyder*, No. BC561618, 2016 WL 2766464, at *5 (Cal. Super. Feb. 24, 2016) (considering an *ejusdem generis* reading but finding the contract ultimately ambiguous).

23. *See Woodmere Acad. v. Steinberg*, 363 N.E.2d 1169, 1172–73 (N.Y. 1977) (using *inclusio unius* in charitable subscription case at the Court of Appeals); *Bers v. Erie R. Co.*, 122 N.E. 456, 457 (N.Y. 1919) (using *ejusdem generis* in a bill of lading case at the Court of Appeals); *Nat'l Football League v. Vigilant Ins. Co.*, 824 N.Y.S.2d 72, 75–76 (App. Div. 2006) (drawing on *ejusdem generis* and *noscitur a sociis* in an insurance policy interpretation at the Appellate Division); *Traylor v. Crucible Steel Co. of Am.*, 183 N.Y.S. 181, 183 (N.Y. App. Div. 1920) (using *ejusdem generis* in a force majeure clause interpretation at the Appellate Division); *Thaddeus Davids Co. v. Hoffmann-La Roche Chem. Works*, 166 N.Y.S. 179. 181 (App. Div. 1917) (same).

24. *See White v. W. Title Ins. Co.*, 710 P.2d 309, 314 n.4 (Cal. 1985) (confirming that *expressio unius* applies to contract interpretation in an insurance case); *Stephenson v. Drever*, 947 P.2d 1301, 1305 (Cal. 1997) (using *expressio unius* in a "buy-sell" agreement giving a corporation a right of repurchase of stock from a former employee); *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 9 (Ct. App. 1989) (using *ejusdem generis* to interpret a retainer agreement with an arbitration clause); *Waranch v. Gulf Ins. Co.*, 266 Cal. Rptr. 827, 829 (Ct. App. 1990) (invoking *ejusdem generis* in an insurance policy dispute); *Mirpad, LLC v. California Ins. Guarantee Assn.*, 34 Cal. Rptr. 3d 136, 146 (Ct. App. 2005) (same); *Titan Corp. v. Aetna Cas. & Sur. Co.*, 27 Cal. Rptr. 2d 476, 486 & n.14 (Ct. App. 1994) (same).

discussion of the canon occurred only in a concurrence or dissent.[25] No case appeared both at a lower level court and an appellate court.

A few notes of caution: First, focusing on state cases and excluding all federal cases from my study obviously provides only a limited sample of canon usage in contract cases. Many high-stakes contract cases end up in federal court on account of diversity jurisdiction. Still, because contract law is principally state law—and describing the contract law of a jurisdiction should generally be focused on the state courts—it is appropriate to limit the trove to state cases.[26]

Second caveat: using the Latin names of the canons to capture the cases for my database could lead to a somewhat misleading picture. The canons of interpretation have commonsensical formulations in ordinary English— "words are known by their associates," "the expression of one thing excludes another" —so my trove of cases might therefore be under-inclusive. Still, because the commonsense versions of these canons are much harder to search for reliably, my more basic effort to track the Latin canons seemed sound for the purposes of this exploratory study.

Third, it is possible that the three canons I focus upon here may not be the most widely used textual canons of interpretation. In statutory interpretation, for example, there is at least some reason to think that the "anti-redundancy" canon (or "rule against surplusage"), is more common than the others I study here: a fifteen-year analysis between 2000 and 2015 in the federal courts produced 4291 hits on that canon compared to 991 for *expressio unius*, 458 for *ejusdem generis*, and 296 for *noscitur a sociis*.[27] And there are many other canons with statutory

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25. Only one time in each state database did a canon discussion occur *only* in the dissent. *See Dimino v. Dimino*, 459 N.Y.S.2d 164, 168 (App. Div. 1983) (Hancock & Doerr, JJ., dissenting) (appealing to both *expressio unius* and *ejusdem generis* as features of New York law); *Nat'l Ins. Underwriters v. Carter*, 551 P.2d 362, 374 (Cal. 1976) (Tobriner, J., concurring and dissenting) (noting that linguistic maxims of construction like *expressio unius* cannot defeat more significant policies under California law in insurance agreements).

26. When I am asked to consult on New York contract law for litigating parties domestically and internationally, there is remarkably little understanding among lawyers that the federal courts are not reliable reporters of state contract law and do not have authority to develop or shape a state's contract law. To be sure, state courts do sometimes take notice of federal cases and incorporate them into the corpus of state contract law. But formally speaking, a federal contract case applying state contract law is not free to change a state's contract jurisprudence and is, more importantly, not an authoritative statement of state contract law. Of course, practically rather than formally, the federal courts—whether because of class actions there or otherwise—do elaborate much state contract law which can have an ultimate effect on the direction of state contract jurisprudence. *See generally* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020) (considering how the common law gets elaborated in more contemporary contexts).

27. John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 653 n.94, 654 n.97 (2016).

and contract corollaries that might be worth studying, as well, such as favoring specific provisions over general provisions.[28] One could also study directly whether the growth in dictionary usage in statutory interpretation[29] has affected contract interpretation. Still, I built a database of cases that were relatively reliable to collate—and only after capturing the cases with the three main linguistic canons did I evaluate whether other canons were utilized within the trove of caselaw I collected. I report co-occurrences with other canons in my findings below.

Finally, a caveat that applies to all caselaw studies that rely on databases like Westlaw: I am limited by what is reported to them and by their algorithms. Furthermore, I relied on Westlaw's Key Number System to find contract cases (though for each contract case in my trove, I read the case and made sure it used a canon in connection with contract interpretation rather than interpretation of another kind of legal text). Thus, it is possible that there are contract interpretation cases in my jurisdictions of choice that simply were not reported or digested by Westlaw as contract cases. I sought to control for this problem in part by adding to my database any cases that were cited by the cases Westlaw did deliver that also discussed or used the linguistic canons in contract interpretation decisions.[30] This process led to a handful of additions to each state trove but I cannot be certain I captured all the relevant cases.

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28. For the contract version, see Rowley, *supra* note 16, at 156–57. For the statutory version, see *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524–26 (1989); and *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444–45 (1987). New York codifies the statutory version at N.Y. STAT. LAW § 238 (McKinney 2022).

29. *See generally* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

30. For those who have never thought about the way our research methods can limit "thinkable thoughts" or constrain and shape the law, see, for example, Daniel Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 LAW LIBR. J. 229 (2007); F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563 (2002); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673 (2000); Joseph A. Custer, *The Universe of Thinkable Thoughts Versus the Facts of Empirical Research*, 102 LAW LIBR. J. 251 (2010); Susan Nevelow Hart, *The Case for Curation: The Relevance of Digest and Citator Results in Westlaw and Lexis*, 32 LEGAL REF. SERVS. Q. 13 (2013); and Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307 (2006). I am very grateful to Todd Melnick, Fordham's librarian, for helping me better understand the information infrastructure of legal research and how it works upon our work.

## II. FINDINGS

### *A. New York*

#### 1. SUMMARY TOTALS

Within the New York cases, *ejusdem generis* was a relatively popular linguistic canon. Of the fifty-eight cases that discussed or cited to any canon, thirty-nine discussed *ejusdem generis*, while only eight discussed *noscitur a sociis*. Eighteen discussed *expressio* (or *inclusio*) *unius*. These counts amount to greater than fifty-eight because some cases discuss more than one canon. The totals are notable because in a recent count of statutory interpretation cases in the federal courts, *expressio* (or *inclusio*) *unius* is discussed more than twice as often as *ejusdem generis*; this pattern is essentially reversed in the contract cases in New York.[31] Moreover, there was very limited use of *noscitur a sociis* in the New York database. Indeed, two of the *noscitur a sociis* discussions in courts rejected its application.[32]

#### 2. IS AMBIGUITY NECESSARY TO FIRE A CANON?

There is some tension in the case authorities about whether courts need to find a threshold ambiguity in order to utilize one of the linguistic canons. For example, in *Marsh v. Adams*,[33] a court was asked to interpret a restrictive covenant limiting anyone to

> build upon or use any of the lots or property . . . described . . . for any private or livery stable, railroad depot, slaughter house, tallow chandlery, smith shop, forge, furnace, nail or other iron foundry, or any manufactory for the making of glass, glue, varnish, vitriol, turpentine or oil, or for tanning, dressing or keeping of skins, or hides or leather, or any theatre, opera house, brewery, distillery, molasses or sugar refinery, lager beer or concert saloon, or any mode or sort of business whatever, nor any apartment house, flats or tenement house, hotel, hospital or asylum.[34]

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31. Golden, *supra* note 27, at 654 n.97.

32. *See Shionogi Inc. v. Andrx Labs, LLC*, 132 N.Y.S.3d 419, 420 (App. Div. 2020) (rejecting a *noscitur a sociis* reading); *Marsh v. Adams*, 12 N.Y.S.2d 691, 693 (Sup. Ct. 1939) ("The doctrine of *noscitur a sociis* . . .has no application to the situation here presented.").

33. 12 N.Y.S.2d 691 (Sup. Ct. 1939).

34. *Id.* at 693.

In rejecting the use of *noscitur a sociis* and *ejusdem generis* (and implicitly *expressio unius*, too), the court concluded that a non-profit school was also an improper use as "any mode or sort of business whatever."[35] Yet, it also held that the two listed canons "may be resorted to only where there is ambiguity in an instrument obscuring true intention."[36] Other cases are less clear that a threshold ambiguity determination must be made to trigger canon use but still look to use the canons to clear up ambiguities.[37]

Several other cases, however, cut the other way—and I conclude the weight of authority is actually on the other side—allowing invocations of textual canons before a court finds ambiguity. For example, in *Uribe v. Merchants Bank of New York*,[38] the New York Court of Appeals considered a safety deposit box rental agreement that included "valuable papers" as permissible items to keep in the box, along with "jewelry," "securities," and "precious metals."[39] In giving the term "valuable papers" a limited interpretation through the use of linguistic canons and ultimately reading the contract to exclude permission to store cash that was received for the jewels that had been in the box, the court found the contract "unambiguous."[40] In *Lend Lease (U.S.) Construction LMB, Inc. v. Zurich American Insurance Co.*,[41] the appellate division also

35. *Id.* at 693–94.

36. *Id.* at 692. *Accord Stewart v. Barber*, 43 N.Y.S.2d 560, 562 (Sup. Ct. 1943) (holding that *ejusdem generis* can only be applied to ambiguous agreements); *Davitian v. Peerless Photo-Engraving Co.,* 106 N.Y.S.2d 111, 114 (Sup. Ct. 1951) (holding that *ejusdem generis* is employed as an aid only in cases of "palpable ambiguity"); *see also Dunn Auto Parts, Inc. v. Wells*, 155 N.Y.S.3d 507, 509–10 (App. Div. 2021) (considering *expressio unius* only after making a determination of ambiguity).

37. *See Finucane v. Standard Acc. Ins. Co.,* 171 N.Y.S. 1018 (App. Div. 1918) (using *noscitur a sociis* in conjunction with *contra proferentem* to limit an exclusion in an accident policy); *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 815 N.Y.S.2d 507 (App. Div. 2006) (utilizing *ejusdem generis* in conjunction with *contra proferentem* to limit an insurance policy exclusion); *Dimino v. Dimino*, 459 N.Y.S.2d 164 (App. Div. 1983) (utilizing *contra proferentem* to avoid applying *expressio unius* and *ejusdem generis*, which the dissent would have used to find a plain meaning instead). The canons do not always resolve relevant ambiguities, however. *See Camperlino v. Bargabos*, 946 N.Y.S.2d 814 (App. Div. 2012) (interpreting a release's language to remain ambiguous even after the application of *ejusdem generis*); *Eden Music Corp. v. Times Square Music Publ'ns Co.*, 514 N.Y.S.2d 3 (App. Div. 1987) (finding *expressio unius* relevant but only in service of one reasonable reading that a trial is required to resolve). And courts can also find the primary purpose of the contract to trump a canon-supported textual meaning, particularly in the *expressio unius* context. *See Niagara Frontier Trans. Auth. v. Euro-United Corp.*, 757 N.Y.S.2d 174 (App. Div. 2003) (rejecting an *inclusio unius* reading in favor of a textual reading supported by a purposive analysis).

38. 693 N.E.2d 740 (N.Y. 1998).

39. *Id.* at 742.

40. *Id.* at 742–43.

41. 22 N.Y.S.3d 24 (App. Div. 2015).

seemed willing to apply *ejusdem generis* to an insurance contract prior to applying the canon of *contra proferentem*, triggered only upon a finding of ambiguity.[42] Even the dissent in *Lend Lease* was willing to apply both *ejusdem generis* and *noscitur a sociis* in its reading of the unambiguous meaning of the relevant insurance policy.[43] This was the more common way courts used canons in New York: to generate meaning without first making threshold determinations about ambiguity.[44]

### 3. TYPICAL APPLICATIONS IN NEW YORK

The interpretation of insurance policies and policy exclusions was a typical fact pattern leading to the discussion of a canon. Seven such insurance cases appeared in the database. In six of them, the linguistic canon was discussed alongside the general substantive canon (often applicable in insurance cases) that ambiguities ought to be construed against the drafter of the policy.[45] But the *contra proferentem* canon recurred alongside the linguistic canons even when the court was not hearing an insurance case.[46]

Also common—recurring six times in the New York trove—were cases about the interpretation of *force majeure* clauses in which a court was finding the best reading of a provision where a party claimed to be excused from its performance.[47] One related case (in a fact pattern that can be expected to be important in years to come) discussed whether

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42. *Id.* at 28–29, 31.

43. *Id.* at 36–37.

44. *See Popkin v. Sec. Mut. Ins. Co. of N.Y.*, 367 N.Y.S.2d 492 (App. Div. 1975) (interpreting a flood exclusion in an insurance policy using *noscitur a sociis* and *ejusdem generis*); *Air Liquide Large Indus. U.S. LP v. Praxair, Inc.*, 826 N.Y.S.2d 219 (App. Div. 2006) (crediting a *noscitur a sociis* reading without finding ambiguity first); *Realtime Data, LLC v. Melone*, 961 N.Y.S.2d 275 (App. Div. 2013) (finding an *expressio unius* reading of an employment agreement to be valid without first finding an ambiguity).

45. *See Popkin,* 367 N.Y.S.2d at 495–96; *Finucane v. Standard Acc. Ins. Co.*, 171 N.Y.S. 1018, 1020–21 (App. Div. 1918); *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 815 N.Y.S.2d 507, 510–12 (App. Div. 2006); *Nat'l Football League v. Vigilant Ins. Co.*, 824 N.Y.S.2d 72, 75, 77 (App. Div. 2006); *Lend Lease (U.S.) Constr. LMB Inc. v. Zurich Am. Ins. Co.*, 22 N.Y.S.3d 24, 28–29 (App. Div. 2015); *Kula v. State Farm Fire & Cas. Co.*, 628 N.Y.S.2d 988, 990–91 (App. Div. 1995); *Colyer v. N. Am. Acc. Ins. Co.*, 230 N.Y.S. 473, 476–77 (Sup. Ct. 1928).

46. *E.g.*, *Dimino v. Dimino*, 459 N.Y.S.2d 164, 165–66 (App. Div. 1983); *Forward Indus., Inc. v. Rolm of N.Y. Corp.*, 506 N.Y.S.2d 453, 453–55 (App. Div. 1986); *Uribe v. Merchs. Bank of N.Y.*, 693 N.E.2d 740, 742–43 (1998).

47. *See Thaddeus Davids Co. v. Hoffmann-LaRoche Chem. Works*, 166 N.Y.S. 179 (App. Div. 1917); *Traylor v. Crucible Steel Co. of Am.*, 183 N.Y.S. 181 (App. Div. 1920); *Krulewitch v. Nat'l Importing & Trading Co.*, 186 N.Y.S. 838 (App. Div. 1921); *Rolm of N.Y. Corp.*, 506 N.Y.S.2d 453; *Kel Kim Corp. v. Cent. Mkts., Inc.*, 516 N.Y.S.2d 806 (App. Div. 1987); *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242 (App. Div. 2007);

COVID-19 counts as a "fire, destruction, related demolition, or similar catastrophe" to define a triggering event permitting one party to a deal to recover from the other.[48]

Additionally, exculpatory clauses that immunize or minimize a party's liability or other contracts for release accounted for six cases.[49] In these contexts (as in some others), "strict construction" canons—directing courts to give limited readings of contract language in particular transactional environments—often worked in tandem with the linguistic canons to arrive at a meaning.[50] These findings suggest that linguistic canons in contract cases often function in conjunction with substantive canons that are doing some of the work of nudging a textual meaning in one direction or another. Since context in combination with common sense is often going to help a court determine whether a linguistic canon ought to determine the ultimate legal meaning of a contract, it is not surprising that courts will want additional context to help them decide if a textual canon is applicable (especially since the weight of authority in New York is that a court need not find ambiguity before considering a canon-based reading of a contract). That is some modest evidence, perhaps, against the idea that New York courts are drawing upon the textual canons to avoid more comprehensively contextual or purposive readings of contracts. Substantive canons, it seems, work in the shadows, nudging textual canons even in this mostly formalist jurisdiction.

Perhaps it is not especially surprising that these categories of cases (insurance, *force majeure*, exculpatory clauses) are typical ones for the application of the linguistic canons: they are routinely transactional environments that contain provisions with lengthy lists, contoured with general and specific language. These are exactly the contexts where one might expect to see courts using this suite of canons to derive meaning.

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48. *In the Matter of Crystal Run Galleria LLC v. Town of Wallkill*, 141 N.Y.S.3d 274 (Sup. Ct. 2021).

49. *See Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504 (N.Y. 1994) (limitation on liability clause); *Colton v. N.Y. Hosp.*, 414 N.Y.S.2d 866 (Sup. Ct. 1979) (contract for release and discharge of claims construed as a covenant not to sue); *Forward Indus.*, 506 N.Y.S.2d 453 ("no-damage-for-delay" provision); *Boll v. Sharp & Dohme, Inc.*, 121 N.Y.S.2d 20 (App. Div. 1953) (a general release); *Camperlino v. Bargabos*, 946 N.Y.S.2d 814 (App. Div. 2012) (a general release); *Kagan v. HMC-N.Y., Inc.*, 939 N.Y.S.2d 384 (App. Div. 2012) (contract clause eliminating traditional fiduciary duties).

50. *See Boll*, 121 N.Y.S.2d at 22 (applying *esdusdem generis* and finding that "contracts breaking down common law liability and relieving persons from just penalties for their negligent and improper conduct are not to be favored and should not be given an enforcement beyond that demanded by their strict construction."); *Fishman v. Town of Islip*, 189 N.Y.S.2d 979, 981 (Sup. Ct. 1959) (applying *esjudem generis* while holding "[r]estrictive covenants must be construed most strictly against those seeking to enforce them"); *Quadrant Structured Prod. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014) (applying *expressio unius* in context where the court also used a canon that no-action clauses in a trust indenture must be strictly construed).

Still, this finding is instructive to contract drafters, keeping them aware that when they draft insurance policies, *force majeure* clauses, or exculpatory clauses and releases, they should be especially mindful of how *ejusdem generis* might operate to produce a potentially unintended meaning. *Noscitur a sociis* and *expressio unius* are also important for such drafters to consider, though somewhat less robustly.

Finally, not only did substantive strict construction canons and *contra proferentem* co-occur with the linguistic canons, but there were also other textual tools of interpretation that tended to appear frequently in the New York database. Particularly, the canon that specific terms control general terms co-occurred with the linguistic canons[51]—as did the invocation of dictionary definitions.[52] Once a court is focused on text to generate meanings, it makes sense that it would draw from a larger arsenal of meaning-making tools, whether from other textual canons or dictionaries.

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51. *See Isaacs v. Westchester Wood Works, Inc.*, 718 N.Y.S.2d 338, 339 (App. Div. 2000) (giving precedence to a "specific clause for arbitration" over a "general clause for exclusive jurisdiction of the courts"); *Beaver Eng'g & Contracting Co. v. City of New York*, 183 N.Y.S.2d 386, 389 (App. Div. 1920); *Lend Lease (U.S.) Constr. LMB, Inc. v. Zurich Am. Ins. Co.*, 22 N.Y.S.3d 24, 30 (App. Div. 2015); *Bd. of Ed. of Lakeland Cent. Sch. Dist. of Shrub Oak v. Barni*, 401 N.E.2d 912, 913–14 (N.Y. 1979). Admittedly, certain specifications of the *ejusdem generis* canon—in which a general term is limited by the related, specific terms—may sound comparable to the canon that specific terms control general terms; courts do not always see much daylight between them.

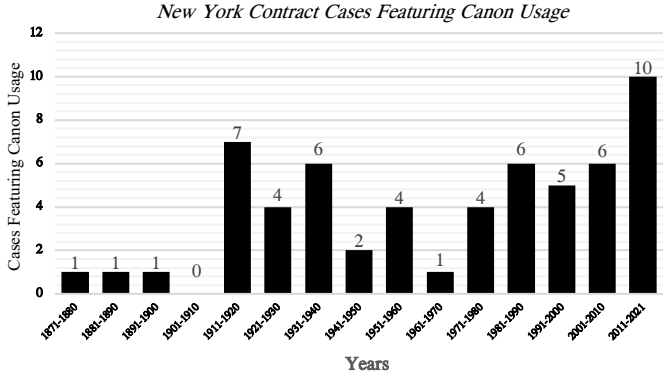
52. *See Lend Lease*, 22 N.Y.S.3d 24, 29–30 (App. Div. 2015) (first citing *Incidental*, BLACK'S LAW DICTIONARY (10th ed. 2014); then citing *Incidental*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011); and then citing *Incidental*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incidental [https://perma.cc/X47S-88T7] (last visited Oct. 9, 2022)); *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 815 N.Y.S.2d 507, 510 (App. Div. 2006) (citing *Settle, Shift*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993)); *Dimino v. Dimino*, 459 N.Y.S.2d 164, 166 (App. Div. 1983) (first citing *Transfer, Sell*, WEBSTER'S NEW WORLD DICTIONARY (2d coll. ed. 1970); then citing *Transfer, Sell*, BLACK'S LAW DICTIONARY (4th ed. 1968); and then *Also*, THE AMERICAN HERITAGE DICTIONARY (New College ed. 1976)); *Surlak v. Surlak*, 466 N.Y.S.2d 461, 466 (App. Div. 1983) (citing *Alimony*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)); *Popkin v. Sec. Mut. Ins. Co. of N.Y.*, 367 N.Y.S.2d 492, 495 (App. Div. 1975) (citing *Flood*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1962)); *Stewart v. Barber*, 43 N.Y.S.2d 560, 562–63 (Sup. Ct. 1943) (referencing two dictionaries to define the term "occupation"); *Colyer v. N. Am. Acc. Ins. Co.*, 230 N.Y.S. 473, 475 (Sup. Ct. 1928) (referencing two dictionaries' definition of "automobile" in decision to exclude motorcycles from insured's policy); *C. Ludwig Baumann & Co., Brooklyn v. Manwit Corp.*, 207 N.Y.S. 437, 439 (App. Div. 1925) (referencing a dictionary to define the term "furniture").

### 4. NEW YORK CANON USAGE OVER TIME?

In light of the size of the database (and the difficulty of getting reliable numbers on trends in contract litigation's role in the general docket),[53] it would not be sound to draw firm conclusions about the trajectory of cases over time. Moreover, one would want to know a lot more about Westlaw reporting practices over time to draw firm conclusions. Nonetheless, the figure below offers a window into a potential pattern in the New York contract cases.

**Figure 1**

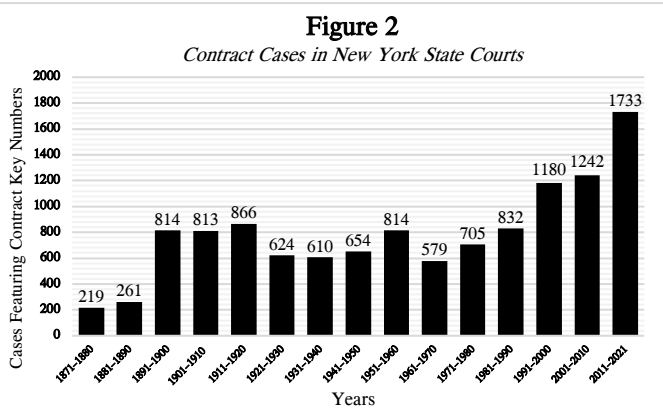
*New York Contract Cases Featuring Canon Usage*




To estimate the "denominator" of contract cases in the New York docket from 1871 to 2021, I surveyed the contents of Westlaw's database by counting all appellate cases with the relevant contract Key Numbers over this period, with the following results:

**Figure 2**

*Contract Cases in New York State Courts*




53. For some efforts to track the contract litigation docket, see Brent D. Boyea & Paul Brace, *Revisiting the Business of State Supreme Courts in the 21st Century*, 18 J. EMP. LEGAL STUD. 684, 692 tbl.2 (2021) (finding a general increase in contract litigation in the state courts comparing 1940–70 with 1995–2010); and Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577.

One might think the simplest explanation for a recent growth of canon discussions in the contract caselaw is just contract *docket* growth. Although it is true that the highest case count for canon usage (ten cases) in the most recent period is correlated with the largest number of cases altogether (1,733 cases), there is still a substantial set of canon cases within the 1931 to 1940 period (six cases), where there is somewhat less contract litigation in New York (610 cases). And although the early years of modest canon usage tracks very small denominators of cases in the Westlaw database, the docket nearly quadruples between 1881 and 1890 (261 cases) and 1891 to 1900 (814 cases) with no growth in canon usage until a decade later. So, although it would be foolish to discount the docket denominator as a potential partial explanation for recent growth of attention to textual canons in the New York courts, it would also be premature to attribute all the trends in canon usage to total numbers of contract cases in the Westlaw database.

Here are two precatory observations about the trends in canon usage in New York. First, one might hypothesize that the New York courts of the 1960s were not very formalistic in contract interpretation and were accordingly not very drawn to textual canons—even though such reasoning had plenty of support in earlier (and later) decades. There were reasonably full dockets of contract litigation in the 1960s, but little canon usage. Second, there was modest growth in the use of canons in the 1980s as compared with the four preceding decades; the greatest engagement with textual canons in New York courts occurs most recently. There is no way to isolate a cause for these findings with the methods of this study but the data is consistent with a growth of interest in formalist modalities of interpretation[54] and a growing familiarity with canons of interpretation as law school curricula continue to embrace regular training in statutory interpretation where the canons are often studied.[55] One would have to be very circumspect here, however, because the contract docket from which the canon cases were drawn also experienced meaningful growth in these decades, as well.[56]

54. On linking the growth of textualism to the New Right in the 1980s, see Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 853 (2013) (reviewing SCALIA & GARNER, *supra* note 16).

55. *See generally* Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166 (2008) (arguing for the addition of a "freestanding 'Legislation and Regulation' course" to first-year law students' curricula).

56. Another potential hypothesis could be that canon growth tracks growth in the insurance docket, in particular.

### *B. California*

#### 1. SUMMARY TOTALS

Within the California contract cases, *ejusdem generis* was also the most popular of the three linguistic canons. Of the thirty cases that discussed any of the three canons, seventeen discussed *ejusdem generis*, ten discussed *expressio unius*, and only four discussed *noscitur a sociis*. This is still a departure from the overwhelming popularity of *expressio unius* in the statutory interpretation context among these three linguistic canons.[57] Similar to New York courts, California courts do not often invoke *noscitur a sociis* in contract cases. Of the thirty cases in which the California courts considered a canon, in seven courts found a way to reject or resist canon application.[58]

#### 2. IS AMBIGUITY NECESSARY TO FIRE A CANON?

As in New York, the California cases are not fully settled on whether a contract must be deemed ambiguous before applying a linguistic canon. There are certainly cases within the California database that appeal to a linguistic canon without a threshold determination that the contract language is ambiguous. For example, in *Nygård, Inc. v. Uusi-Kerttula*,[59] the California Court of Appeal was explicit: "Plaintiffs assert that *ejusdem generis* does not apply where contract language is unambiguous, and thus that it has no application here. We do not agree."[60] Two years later, a case relied on *Nygård* to apply *ejusdem generis* to an exculpatory clause to limit its reach without a clear finding of ambiguity.[61] And two years after that, the California Court of Appeal read a contract using *expressio unius* as part of its "plain meaning"

57. Golden, *supra* note 27, at 654 n.97.

58. Perhaps it is also worth noting that all five of the Superior Court cases I found drawing upon the canons since 2000, *supra* note 22, ultimately did not find the canon-supported reading persuasive. *See EHM Prods., Inc. v. Starline Tours of Hollywood, Inc.*, No. BS164473, 2017 Cal. Super. LEXIS 13617, at *8 (Jan. 23, 2017); *Won Long Young v. CEP Am., LLC*, No. CGC-16-554619, 2018 Cal. Super. LEXIS 6856, at *16 (Jul. 25, 2018); *Greenfield LLC v. Kandeel*, 2017 WL 10701868, at *18 (Cal. Super. Ct. Jul. 18, 2017); *Riverbed Tech., Inc. v. Scottish Equity Partners LLP*, No. CGC-12-525496, 2016 WL 9052888, at *17 (Cal. Super. Ct. Jan. 25, 2016); *TBG Danco Ins. Servs. Corp. v. Hyder*, No. BC561618, 2016 WL 2766464, at *5 (Cal. Super. Ct. Feb. 24, 2016).

59. 72 Cal. Rptr. 3d. 210 (Ct. App. 2008).

60. *Id.* at 223 n.5.

61. *See Huverserian v. Catalina Scuba Luv, Inc.*, 110 Cal. Rptr. 3d 112, 116 (Ct. App. 2010).

analysis to confirm what it took to be an unambiguous reading.[62] In 2017, the Supreme Court of California even "down-cited" *Nygård* in its own use of *ejusdem generis* without first establishing that the provision was ambiguous.[63]

Still, there is also authority on the other side in the California cases: the maxims of interpretation are sometimes said to be "employed as an interpretive aid only when the language in the contract . . . is ambiguous."[64] Sometimes California courts take this approach to promote other substantive policies—like construing contracts against their drafters—and can do so more cleanly only after reaching a determination of ambiguity.[65]

### 3. TYPICAL APPLICATIONS IN CALIFORNIA

Insurance cases were also quite prominent in the trove of California cases, accounting for eleven of the thirty cases.[66] Two more cases were about the interpretation of an exculpatory clause[67] or release of claims.[68] *Force majeure* clauses did not appear in the California database, however. This latter fact is otherwise consistent with California law, since California does not tend to use catch-all language in *force majeure* clauses to limit their applicability, as New York does. Therefore, it makes sense that the canons would not be routinely drawn upon within

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62. *See PV Little Italy, LLC. v. MetroWork Condo. Ass'n*, 148 Cal. Rptr. 3d 168, 184–85 (Ct. App. 2012).

63. *See Mountain Air Enters. v. Sundowner Towers, LLC*, 398 P.3d 556, 562–63 (Cal. 2017).

64. *Pfeifer v. Countrywide Home Loans, Inc.*, 150 Cal. Rptr. 3d 673, 694 (Ct. App. 2012). *Accord In re Tobacco Cases I*, 186 Cal. Rptr. 3d 313, 318 (Ct. App. 2010) (affirming that *ejusdem generis* is used only when a contract is ambiguous); *Ortega Rock Quarry v. Golden Eagle Ins. Corp.*, 46 Cal. Rptr. 3d 517, 525–26 (Ct. App. 2006) (finding an insurance contract unambiguous so refusing to use *ejusdem generis*).

65. *See Steven v. Fid. & Cas. Co. of N.Y.*, 377 P.2d 284, 288 (Cal. 1962); *Nat'l Ins. Underwriters v. Carter*, 551 P.2d 362, 371 (Cal. 1976) (Tobriner, J., concurring and dissenting).

66. *White v. W. Title Ins. Co.*, 710 P.2d 309 (Cal. 1985); *Nat'l Ins. Underwriters*, 551 P.2d 362; *Steven*, 377 P.2d 284; *Parman v. Am. Nat. Fire Ins. Co.*, No. C034737, 2002 WL 32689 (Cal. Ct. App. Jan. 11, 2002); *Ortega Rock Quarry*, 46 Cal. Rptr. 3d 517; *Martin Marietta Corp. v. Ins. Co. N. Am.*, 47 Cal. Rptr. 2d 670 (Ct. App. 1995); *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 120 Cal. Rptr. 3d 713 (Ct. App. 2011); *Mez Indus., Inc. v. Pac. Nat'l Ins. Co.*, 90 Cal. Rptr. 2d 71 (Ct. App. 1999); *Waranch v. Gulf Ins. Co.*, 266 Cal. Rptr. 827 (Ct. App. 1990); *Mirpad, LLC v. Cal. Ins. Guar. Ass'n.*, 34 Cal. Rptr. 3d 136 (Ct. App. 2005); *Titan Corp. v. Aetna Cas. & Sur. Co.*, 27 Cal. Rptr. 2d 476 (Ct. App. 1994).

67. *Huverserian v. Catalina Scuba Luv, Inc.*, 110 Cal. Rptr. 3d 112, 113 (Ct. App. 2010).

68. *Grove v. Metz Baking Co.*, No. A086904, 2003 WL 21186397, at *1 (Ct. App. May 20, 2003).

California contract law in these domains.[69] But insurance companies and purchasers of insurance in California probably ought to be thinking about the linguistic canons as they construct and review their policies.

As a general matter, until 1990 California opted to prefer a substantive canon associated with insurance contracts similar to *contra proferentem* over the linguistic canons.[70] After 1990, however, California courts tended to emphasize the objectively reasonable expectations of the insured and found linguistic canons somewhat more useful in determining the scope of coverage and exclusions from coverage.[71] This difference is traceable to *AIU Insurance Co. v. Superior Court*:[72]

> Prior to the decision in *AIU Ins. Co.*, the rule of construction was much more liberal. If *any* ambiguity existed in an insurer-drafted policy, it was to be construed in favor of the insured, and an ambiguity could be demonstrated if the meaning of the disputed term or phrase as advocated by the insured was semantically permissible. Since *AIU Ins. Co.*[,] . . . the emphasis is on *context* and the *objectively* reasonable expectations of the insured.[73]

Notably, in the California database, seven cases explored the canons in connection with deeds and covenants with respect to land (as in *Marsh v. Adams* in New York above), where lists, catch-all clauses, and multiple instruments called for an assessment of the applicability of a

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69. *See Covid-19: Force Majeure & Related Contract Defenses in Selected States*, BLOOMBERG L., https://www.bloomberglaw.com/product/health/document/X5ODQ4TO000000 [https://perma.cc/5MVQ-FKRC] (last visited Oct. 11, 2022) ( "'Catch-all' Force Majeure language may apply to Force Majeure events that were not foreseeable at the time of contracting. . . .[And is n]ot construed as narrowly as some other states (e.g., NY).").

70. *See, e.g.*, *White*, 710 P.2d at 313, 314 n.4 (relegating *expressio unius* to a footnote after articulating that ambiguities will be "resolved against the . . . insurer-draftsman" and that "exclusionary clauses are interpreted narrowly against the insurer"); *Nat'l Ins. Underwriters*, 551 P.2d at 374 (Tobriner, J., concurring and dissenting) (noting that linguistic maxims of construction like *expressio unius* cannot defeat "the basic rule that the insurance contract should be interpreted against the draftsman"); *Steven*, 377 P.2d at 288, 290 (preferring "fundamental considerations of policy" about construing ambiguities against the insurers to "legalistic" concepts like *expressio unius*).

71. *E.g.*, *Mez Indus., Inc.*, 90 Cal. Rptr. 2d at 733 (using *ejusdem generis* to construe an insurance contract); *Mirpad*, 34 Cal. Rptr. 3d at 146–48 (focusing on the fact that the insured's expectations were not objectively reasonable, crediting an *ejusdem generis* reading); *Titan Corp.*, 27 Cal. Rptr. 2d at 486–87 (focusing on the fact that the insured's expectations were not objectively reasonable, crediting an *ejusdem generis* reading).

72. 799 P.2d 1253, 1264–65 (Cal. 1990).

73. 90 Cal. Rptr. 2d at 729 n.11 (citations omitted).

linguistic canon.[74] Lawyers and contract drafters in California that are working in land transactions would be well-advised to get more familiar with how these canons might frustrate a client's transactional intent.

In the California database, as in the New York database, there was also regular co-occurrence with the linguistic "specific controls the general" canon[75] and the use of dictionaries (with a strong preference for *Black's Law Dictionary* and *Webster's Third New World Dictionary*).[76]

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74. *See Eisen v. Tavangarian*, 248 Cal. Rptr. 3d 744, 760 (Ct. App. 2019) (adopting a *noscitur a sociis* reading of a CC&R agreement); *PV Little Italy, LLC. v. MetroWork Condo. Ass'n*, 148 Cal. Rptr. 3d 168, 184–85 (Ct. App. 2012) (adopting an *expressio unius* reading of various conveyance instruments in a condo development); *Seid Pak Sing v. Barker*, 240 P. 765, 772 (Cal. 1925) (considering a *noscitur a sociis* reading of a lease agreement); *Pfeifer v. Countrywide Home Loans, Inc.*, 150 Cal. Rptr. 3d 673, 694 (Ct. App. 2012) (considering and rejecting an *ejusdem generis* reading of a deed of trust that would have made foreclosure easier); *Bader v. Coale*, 119 P.2d 763, 765 (Cal. Ct. App. 1941) (crediting the use of *ejusdem generis* to an enumeration of uses of land prohibited by deed); *McNee v. Harold Hensgen & Assocs.*, 3 Cal. Rptr. 377, 379–80 (Ct. App. 1960) (considering and rejecting an *expressio unius* reading of a land purchase agreement); *Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 398 P.3d 556, 562–63 (Cal. 2017) (crediting an *ejusdem generis* reading of an attorney's fee provision in a complex real estate purchase transaction).

75. *See Nat'l Ins. Underwriters v. Carter*, 551 P.2d 362, 365 (Cal. 1976) (en banc) ("[I]n accordance with well established [sic] rules of construction we will conclude that it is also true that this general definitional provision must yield to the specific and unambiguous limitation found in the latter part of the policy which explicitly confines coverage . . . ."). "In an insurance policy, specific provisions rather than general provisions govern the insurance contract relating to a particular subject, even though the general provision, standing alone, would be broad enough to include the subject to which the more specific provision relates." *Ortega Rock Quarry v. Golden Eagle Ins. Corp.*, 46 Cal. Rptr. 3d 517, 526 (Ct. App. 2006) ("Particular expressions qualify those which are general.") (quoting CAL. CIV. CODE § 3534 (West 2022)).

76. *See Mez Indus., Inc. v. Pac. Nat'l Ins. Co.*, 90 Cal. Rptr. 2d 721, 734 (Ct. App. 1999) (citing *Title*, BLACK'S LAW DICTIONARY (5th ed. 1979)); *Parman v. Am. Nat'l Fire Ins. Co.*, No. C034737, 2002 WL 32689, at *5 (Cal. Ct. App. Jan. 11, 2002) (citing *Movement*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981)); *Martin Marietta Corp. v. Ins. Co. of N. Am.*, 47 Cal. Rptr. 2d 670, 683 (Ct. App. 1995) (citing *Occupancy*, BLACK'S LAW DICTIONARY (6th ed. 1990)); *Waranch v. Gulf Ins. Co.*, 266 Cal. Rptr. 827, 828–29 (Ct. App. 1990) (first quoting *Nichols v. Great Am. Ins. Co.*, 215 Cal. Rptr. 416, 421 (Ct. App. 1985); and then citing *Occupancy*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)); *In re Tobacco Cases I*, 111 Cal. Rptr. 3d 313, 317–20 (Ct. App. 2010) (citing *Hero*, *Unnatural*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) and invoking the definitions to defeat a tobacco company's *ejusdem generis* reading of its settlement agreement not to use cartoons in its advertisements); *Eisen v. Tavangarian*, 248 Cal. Rptr. 3d 744, 759–60 (Ct. App. 2019) (citing *Outbuildings*, BLACK'S LAW DICTIONARY (5th ed. 1979) and utilizing the definition in a *noscitur a sociis* reading); *Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 398 P.3d 556, 565 (Cal. 2017) (citing *Alleged*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) and invoking the definition in connection with an *ejusdem generis* reading of an attorney's fee provision in a contract); *see also Mirpad, LLC v. Cal. Ins. Guarantee Ass'n*, 34 Cal. Rptr. 3d 136, 146 (Ct. App. 2005) (citing *Premise*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985) and limiting the definition with an *ejusdem generis* reading of an insurance contract); *Bader v. Coale*, 119 P.2d 763, 765 (Cal. Ct.

There was also mention of what a case termed the "same meaning rule:" "Words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another,"[77] a canon that can have interaction effects with *ejusdem generis* and *noscitur a sociis*.

Substantive efforts to read certain kinds of agreements strictly also co-occurred with the linguistic canons,[78] as did clear statement rules, requiring some types of agreements to be especially clear to be enforceable.[79] So, too, did substantive canons such as not construing contracts "in a manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity."[80] Thus, although

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App. 1941) (first citing *Like*, *Character*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) and then citing *Like Character*, WORDS AND PHRASES (perm. ed. 1940) to invoke the definitions in connection with an *ejusdem generis* reading to determine the meaning of the catch-all term "like character").

77. *Mirpad*, 34 Cal. Rptr. 3d at 144 (quoting *Caminetti v. Pac. Mut. Life Ins. Co.*, 139 P.2d 908, 915 (Cal. 1943)). This canon applies to statutes, too. *See* WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *supra* note 8, at 1154.

78. *See, e.g.*, *Eisen*, 248 Cal. Rptr. 3d at 753 ("[R]estrictive covenants are construed strictly against the person seeking to enforce them . . . .") (quoting *White v. Dorfman*, 172 Cal. Rptr. 326, 329 (Ct. App. 1981)); *Steven v. Fid. & Cas. Co. of N.Y.*, 377 P.2d 284, 296–97 (Cal. 1962) (en banc) (explaining that contracts of adhesion warrant strict judicial scrutiny); *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 10 (Ct. App. 1989) (explaining that fee arrangements between attorneys and clients will be strictly scrutinized for unfairness) (quoting *Hawk v. State Bar of Cal.*, 754 P.2d 1096, 1101 (Cal. 1988) (en banc)); *Parman*, 2002 WL 32689, at *3 ("[T]he moving party's papers are strictly construed . . . .").

79. *See Lawrence*, 256 Cal. Rptr. at 10 (requiring arbitration agreements to allow parties to "fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto") (quoting *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 101 Cal. Rptr. 347, 351 (Ct. App. 1972)); *Mirpad*, 34 Cal. Rptr. 3d at 147–48 (explaining that technical meanings of words should only be used in construction when clearly intended); *Steven*, 377 P.2d at 295 ("In standardized contracts . . . which are made by parties of unequal bargaining strength, the California courts have long been disinclined to effectuate clauses of limitation of liability which are unclear, unexpected, inconspicuous or unconscionable."); *Huverserian v. Catalina Scuba Luv, Inc.*, 110 Cal. Rptr. 3d 112, 115 (Ct. App. 2010) (holding that exculpatory releases "must be clear, unambiguous, and explicit") (quoting *Cohen v. Five Brooks Stable*, 72 Cal. Rptr. 3d 471, 478 (Ct. App. 2008)); *In re Andres' Estate*, 14 P.2d 566, 567 (Ct. App. 1932) ("It is well established [] that in order to bar a family allowance [in a separation agreement] the intention to waive the right must be clear and explicit, and that any uncertainty in the language of the agreement will be resolved in favor of the right."); *see also Greenfield LLC v. Kandeel*, No. BC548794, 2017 WL 10701868, at *15 (Cal. Super. Ct. June 6, 2017) ("Additionally, [a] written release may exculpate a tortfeasor from future negligence or misconduct. To be effective, such a release *must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.*") (quoting *Eriksson v. Nunnink*, 183 Cal. Rptr. 3d 234, 246 (Ct. App. 2015)) (internal quotation marks omitted).

80. *Grove v. Metz Baking Co.*, No. A086904, 2003 WL 21186397, at *4 (Cal. Ct. App. May 20, 2003) (quoting *People v. Parmar*, 104 Cal. Rptr. 2d 31, 46 (Ct. App. 2001)).

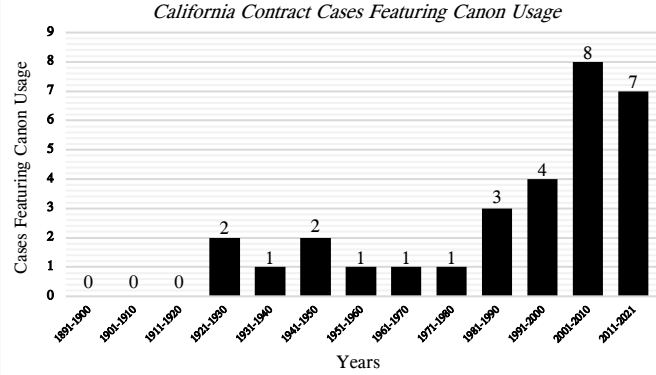
the textual canons are clearly part of California contract doctrine as they are in New York, the promotion of policies through substantive canons seems important in determining when a canon will be found outcome-determinative and when it will be rejected in favor of a different interpretation that vindicates some other public policy agenda. That is more or less what one probably would have expected from California contract jurisprudence.

### 4. CALIFORNIA CANON USAGE OVER TIME?

With all the relevant caveats applicable here,[81] this is what engagement with the linguistic canons looks like over time in California:

**Figure 3**

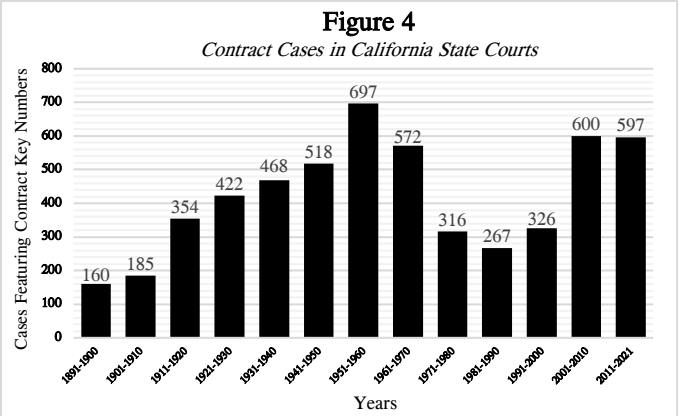
*California Contract Cases Featuring Canon Usage*




Thus, in California, there also seems to be a growth in consideration of canons in recent decades, though the growth since 2000 is more pronounced. Looking for the rough estimate for a denominator of contract cases in California produced the following case counts:

**Figure 4**

*Contract Cases in California State Courts*




81. *See supra* Section II.A.4.

Given these docket estimates for contract cases in California, it is harder to attribute the engagement with the canons to mere growth in the contract docket: the 1950s and 1960s have the same contract dockets as the 2000s and the 2010s, but there is clearly more canon engagement in the more recent decades.[82] However, it is worth acknowledging that four of the seven *rejections* of canon-supported readings occurred between 2006 and 2011.[83] The Superior Court cases I reviewed on background all rejected canon-based readings, too,[84] suggesting that although it looks like there is an uptick in the recognition of canons in contract interpretation in the jurisdiction, there is also real resistance by California courts in accepting these linguistic tools when other policies and context, whether intrinsic or extrinsic to the transactions under review, lend credence to readings in tension with the reading a relevant canon would support. So it might be that although more lawyers are making judges address the canons, they remain a relatively small driver of decisions about contract interpretation, particularly in California. Still, to the extent there is more awareness within the courts that the canons can apply to contract interpretation, contract litigators and drafters would be well served by studying them and mastering how they might apply to a litigation or transaction.

## III. DISCUSSION

The contract law regimes of New York and California both recognize three linguistic canons of interpretation as a part of their jurisprudences: *expressio unius*, *ejusdem generis*, and *noscitur a sociis*. That much seems clear. Moreover, in both jurisdictions, *ejusdem generis* is more commonly discussed than *expressio unius*, which is itself more commonly invoked than *noscitur a sociis*.[85] Although the California trove reveals somewhat more resistance to the application of canons in favor of other contextual and policy-based determinations of meaning, as one might have predicted from New York's and California's general approaches to contract interpretation,[86] contract lawyers and drafters could benefit from devoting more attention to the canons in either

82. Another way to render this is to look at the percentage of contract cases in California in which canons are discussed. Plotting it that way reveals clearly increased engagement over time, with an uptick in the 1980s.

83. *See Ortega Rock Quarry v. Golden Eagle Ins. Corp.*, 46 Cal. Rptr. 3d 517, 525–26, 532 (Ct. App. 2006); *In re Tobacco Cases I*, 111 Cal. Rptr. 3d 313, 317–20 (Ct. App. 2010); *Huong Que, Inc. v. Luu*, 58 Cal. Rptr. 3d 527, 536 (Ct. App. 2007); *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 120 Cal. Rptr. 3d 713, 740–41 (Ct. App. 2011).

84. *See* cases cited *supra* note 22.

85. *See* discussion *supra* Sections II.A.1, II.B.1.

86. *See* Miller, *supra* note 18, at 1478.

jurisdiction (though it is also plausible to see the low numbers of cases and feel like one might be able to get by without full mastery!). The canons appear to be especially relevant for insurance policies and exculpatory clauses and releases in both jurisdictions. In New York, the interpretation of *force majeure* clauses triggered canon-based reasoning with at least some regularity.[87] In California, land transactions seemed somewhat important in the development of its canon jurisprudence.[88] Although the methods of study here cannot support firm comparative conclusions between New York and California, especially about trends over time, both states still show some recent growth in their engagement with the linguistic canons in their contract interpretation decisions.[89] In light of recent attention the canons have enjoyed in the public law discourse—which makes them salient to the profession[90]—it would not be terribly surprising for the hints about growth garnered from this study of the private law of contract to be vindicated with other methods of case counting across a broader range of jurisdictions.

Looking more broadly at New York's and California's engagement with the canons in all types of cases (excluding the contract cases I studied in depth), New York drew on the canons in 1,046 cases and California drew on the canons in 1,290 cases.[91] This suggests, on balance, that contract interpretation is probably a small fraction of the total usage of the textual canons in the courts. But a look at these canon invocations over time in both New York and California suggests that the trends within contract law track more general trends in discussion and citation of the textual canons within the relevant jurisdictions outside of contract law.

87. *See* discussion *supra* Section II.A.3.

88. *See supra* Section I.

89. *See* discussion *supra* Sections II.A.4, II.B.4.

90. *See generally* SCALIA & GARNER, *supra* note 16 (discussing principles of interpretation).

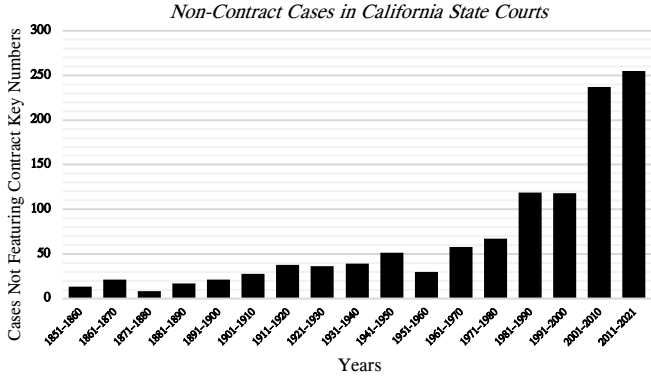
91. These figures are for any reference to the linguistic canons I studied here in the relevant states, with the contract interpretation cases removed from the count. Although I was chiefly interested in how state courts deployed canons in statutory interpretation, the Westlaw Key Number System inadequately isolates statutory interpretation cases for my purposes. Accordingly, this window into canon usage is for all non-contract cases. I did not attempt to remove any will, trust, or corporate charter cases, which all likely appear in these counts. However, most of these cases are statutory, regulatory, or constitutional interpretation cases within public law.

**Figure 5**

*Non-Contract Cases in New York State Courts*


**Figure 6**

*Non-Contract Cases in California State Courts*




This evidence further reinforces that the use of the canons in contract law more or less tracks such engagement outside of contract law, a non-obvious link, given that a jurisdiction's statutory interpretation jurisprudence and its interest in linguistic tools in determining the meaning of statutes or regulations does not necessarily carry over to its contract jurisprudence. In California especially, the pattern clearly shows more interest in the canons over time, similar to the use of textual canons in contract law.[92] In New York, too, the general pattern outside of contract law looks similar to the trend within contracts. Looking at the canon invocations in a more fine-grained manner, however, tells a slightly different story.

92. It is unlikely that growth in canon invocation is a result of general docket growth since case filings and dispositions in the relevant courts in California trended downward in the last decade. *See generally* JUDICIAL COUNCIL OF CAL., 2021 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2010–11 THROUGH 2019–20 (2021), https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf.

**Figure 7**

*Non-Contract Cases in New York State Courts*

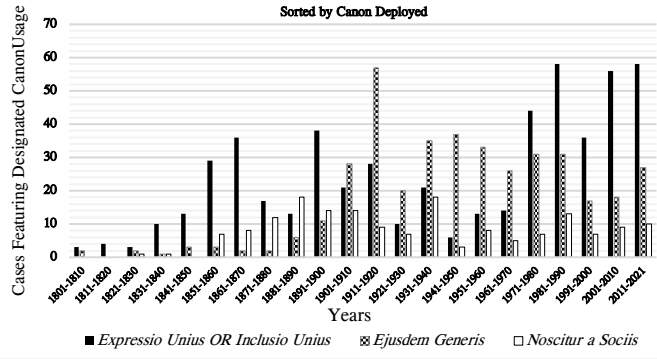
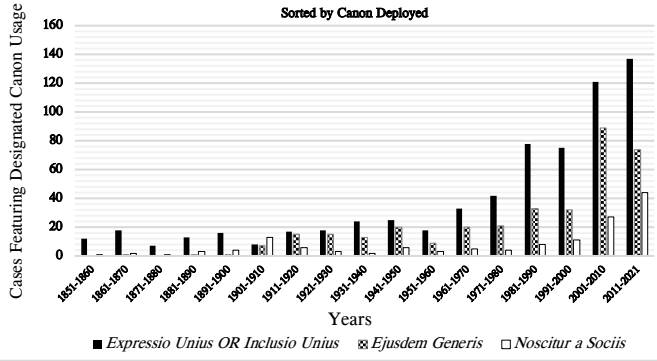



**Figure 8**

*Non-Contract Cases in California State Courts*




Broken down canon-by-canon, it is easier to see that California trends essentially the same way for each canon but that in New York, *expressio unius* shows a pattern of recent growth, while *ejusdem generis* and *noscitur a sociis* are mostly flat over time. That makes New York courts' growing interest in *ejusdem generis* in *contract interpretation* even more notable. Further investigation is required to better understand the renewed use of *expressio unius* in non-contract cases, a canon less prominent in New York contract law.

Outside of the world of contract law, when broken down canon-by-canon, New York registers 531 cases that invoke *expressio unius*, 392 cases that invoke *ejusdem generis*, and 171 cases that invoke *noscitur a sociis*. In California, 662 cases invoke *expressio unius*, 351 invoke *ejusdem generis*, and 143 cases invoke *noscitur a sociis.* Thus, in both New York and California contract cases, *ejusdem generis* is discussed more regularly than the other two canons; yet in both jurisdictions, *expressio unius* is the most routinely cited outside of contract cases.

This last observation points the way to the kinds of inquiries this preliminary study can help develop and refine for future research. Beyond investigating more jurisdictions to chart empirical patterns and developing a better sense of how trends in statutory interpretation affect

(if at all) contract interpretation decisions, there are also theoretical questions this exploration puts on the proverbial table. For example, the seeming relative importance of *ejusdem generis* in contract cases and the seeming relative importance of *expressio unius* in non-contract cases invites more theoretical interrogation about how, even within the suite of linguistic canons that are often considered together, some canons may be especially probative within contract law, even if they are less so outside of contract law. Indeed, seeing the dynamics of *expressio unius* pulling apart from *ejusdem generis* in the contract cases—even as discussion seems to be increasing outside of contract—enables us to tease apart how different linguistic canons can be brought to bear upon different legal instruments. The menu of textual canons, it turns out, does not apply in the same way to all texts, and textualisms in contract interpretation might find different textual canons useful than textualisms in other domains (whether in private or public law).

There is, perhaps, something intuitive here, that the empirical sketch of canon usage in this study reveals: because contract is at least in part about the will and intent of the parties,[93] the textual canons that seek to approximate intent are more likely to be relevant in ascertaining the meaning of the relevant legal text in contract interpretation. This could explain why *ejusdem generis* is reasonably "popular" in contract cases, whereas *expressio unius* seems less likely to produce an answer to what the relevant parties willed in their transaction. By contrast, when a court is aiming to be textualist about other legal instruments like statutes or ordinances, where objective meaning for third parties can be more central than the will of the drafters, the linguistic canons less focused on intent might gain traction. Perhaps this is why *expressio unius* gets more attention outside the contract domain: as a rule, it can seem less tied to approximating intent,[94] so it might be a tool attractive to textualist courts

93. Obviously, interpretation will come up empty-handed in some range of cases or it will seem inappropriate in a set of cases in which we know consumers never really assented meaningfully to terms. In such cases, courts may resort to "construction," giving up on what the parties willed to pursue a substantive norm sanctioned by the law. *But see* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017) (discussing how *Raffles v. Wichelhaus* (1864), 159 Eng. Rep. 375, demonstrates a reliance on substantive rules rather than subjective communicative content through a quirky example in which a court refused contractual enforcement because the subjective understandings of each party's intention were misaligned). Still, across the cases I studied, interpretation and construction frequently interacted—even during the primary activity of determining the parties' intentions. *Cf.* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103 (2021) (arguing that the firm distinction between interpretation and construction collapses in cases focused on statutory and constitutional interpretation and involving technical legal language).

94. *See* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 274–77, 281–82 (2019) (arguing that statutory interpretation should orient itself away from assuming a speaker seeking to convey conversational content).

more comfortable with using canons to pursue objective meanings rather than the will or intent of drafters.[95]

The idea that different sets of *substantive* canons can interact differently in different sets of cases seems reasonable enough,[96] but that some *linguistic* canons might have more significance within contract than outside it is a counterintuitive notion that can now be supported by the work of this preliminary study. Although the methods used here cannot produce certain conclusions, they facilitate the project of generating plausible hypotheses that can be further tested and theoretically developed in future work.

## CONCLUSION

This first deep dive into the role textual canons play in contract interpretation was mostly exploratory. It revealed that at least in New York and California, the linguistic canons of *ejusdem generis*, *expressio unius*, and *noscitur a sociis* are valid principles of interpretation in the common law of contract. The evidence indicates increased attention to the canons since 1980 and suggests *ejusdem generis* is the most likely of the three to be discussed in connection with a contract case (which is different from non-contract contexts, where *expressio unius* gets more attention). Furthermore, the findings show that insurance policy interpretation is probably the prototypical contract type for the application of the textual canons, with exculpatory clauses and releases also being central to canon jurisprudence. The textual canons also get considered side-by-side with substantive canons that affect whether a court is willing to accept a textual-canon-supported reading of a contract. In New York, where *force majeure* clauses are read especially narrowly, the application of canons is particularly salient. And in California, where contract law tends to be more contextual and policy-driven than New York's preference for formalism, there is evidence of resistance to general canon-supported readings.

But there is a lot more to learn. Because it seems that canon developments occur largely outside the domain of contract interpretation in the jurisdictions at the center of this study, more research is necessary to determine if canon applications outside of contract have a gravitational pull on contract law. Some evidence suggests that more generalized attention to the textual canons outside of contract law could be buoying

95. An early trans-substantive study of *expressio unius* in Wisconsin found that, although the canon applied to private contracts, the overwhelming number of applications were in public law and applied to statutes, constitutions, and charters. *See* Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191, 191–95 (1931).

96. *See, e.g.*, T. Leigh Anenson & Jennifer K. Gershberg, *Clashing Canons and the Contract Clause*, 54 U. MICH. J.L. REFORM 147, 153–59 (2020).

attention within contract law, but the dominance of *ejusdem generis* within contract (while *expressio unius* dominates outside contract) suggests that different domains of interpretation could be developing slightly different trajectories for the individual canons at the center of this exploration. This study sets the stage for further research opportunities—both internal to contract and comparative with domains of interpretation outside contract—in the years to come.

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