DICTIONARY DIVING IN THE COURTS: A SHAKY GRAB FOR ORDINARY MEANING

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Rummaging through dictionaries for the meaning of contested words in court cases is a bad practice. I will defend that assertion later in this article. But first I'll illustrate, using the Michigan Supreme Court as an example, how the use of dictionaries soars when textualist judges are in control. Dictionaries, after all, are "a main (perhaps *the* main) tool of interpretation used by textualists."[1] So I'm confident that you would see similar results for any court dominated by textualists.

In fact, I suspect that you would see steeply higher numbers in almost all courts, as less doctrinaire judges, in reaction to textualism's influence, are drawn into playing the dictionary game.[2] Regrettably but understandably, that's what happened for two decades on the Michigan Supreme Court.

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1. BRIAN G. SLOCUM, ORDINARY MEANING 23 (2016); *see also* Hayes v. Neshewat, 729 N.W.2d 488, 500 (Mich. 2007) (Markman, J., concurring) (commending dictionaries as "an essential tool in the interpretive process").

2. *See* John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 497 fig.1, 498, 505 fig.5, 507, 511 fig.9 (2014) (showing from data that use of dictionaries by conservative and liberal justices began to increase markedly in the mid-1980s, "around the time Justice Scalia arrived at the court," and theorizing that his personal and intellectual force, together with his colleagues' desire to avoid his criticism, led them "to cite dictionaries when interpreting statutes").

I. THE HEAD-SHAKING DATA

Professed textualists began their ascent onto the Michigan Supreme Court in the late 1990s. The Republican governor, John Engler, had three successive appointments to the Court, one in 1997 and two in 1999, and a fourth justice was nominated by the Republican Party and elected in 1998.[3] As a new millennium dawned and through the next 20 years (except for a short time in 2010), Republican-appointed justices or those nominated to run by the Republican Party formed the majority. That remained true until 2020, when a fourth Democratic nominee was elected.[4]

Now for the data. I had research assistants search every Michigan case since 1845 for citations to a dictionary in both majority and minority opinions (not orders). They searched for citations to both legal and general (lay) dictionaries, but I've decided to concentrate in this article on general dictionaries. Any case that cited a general dictionary at least once is counted in the numbers below.

From 1845 through 1984, the Michigan Supreme Court decided 39,803 cases—an average of 284 a year. Interestingly, the yearly totals peaked in the decade from 1925 through 1934 and began to decline after that. Since the Michigan Court of Appeals was created in 1963, the Supreme Court has, not surprisingly, decided increasingly fewer cases.

I asked my research assistants to organize those 140 years in ten-year periods—a somewhat arbitrary scheme. In the entire 140 years, the Supreme Court cited a general dictionary in 178 cases. So given 39,803 total cases, that's about .4%, or 4 in every 1,000 cases.

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3. Clifford Taylor (1997), Robert Young (1999), Stephen Markman (1999), and Maura Corrigan (1998); for some expressions of their textualism and empirical evidence of their ideological judging, see Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000–2015*, 62 WAYNE L. REV. 347, 347–54 (2017).

4. For the Court's current composition, see *Michigan Supreme Court*, WIKIPEDIA, https://en.wikipedia.org/wiki/Michigan_Supreme_Court [https://perma.cc/7MFD-ZR3R].

The highest ten-year period was 1975 through 1984, when the Court ticked up to 20 cases per 1,000, or 2 every 100. Still a small number.

Things started to change in the ten years from 1985 through 1994, as textual methods began to make themselves felt in decision-making. Justice Scalia, the preeminent textualist, was appointed to the United States Supreme Court in 1986, and scholars were writing about "the new textualism" and "Justice Scalia's textualism."[5] It's impossible, of course, to draw direct correlations with what was happening in the Michigan Supreme Court, nor is it necessary: the fact is that textualism was in the air. And in those ten years, the Court cited general dictionaries in 51 of the 679 cases, which is 7.5%, or approaching 8 per 100 cases.

As noted earlier, four self-proclaimed textualists were appointed to the Court by the Republican governor between 1996 and 2000—and the dictionary numbers took another jump. From 1995 through 2004: 779 cases were decided and 110 with a citation or citations to general dictionaries, or 14 per 100 cases. That's almost double what it was in the previous ten years.

Then the flood. In the next ten years, through 2014: 429 cases and 170 with one or more dictionary citations, or 39.6 per 100 cases. That's 40% of cases. Recall that in its first 140 years the Court totaled 4 dictionary citations per *1,000*. And to point out the obvious, not every case involves statutory construction, or even the meaning of words.

In the five years from 2015 through 2019, the Court let up somewhat: 46 out of 146 cases, or just over 31%. The moderate turnaround is encouraging and perhaps bodes well for the future, but 31% is still remarkably high.

On the next page is a bar graph showing this surge.

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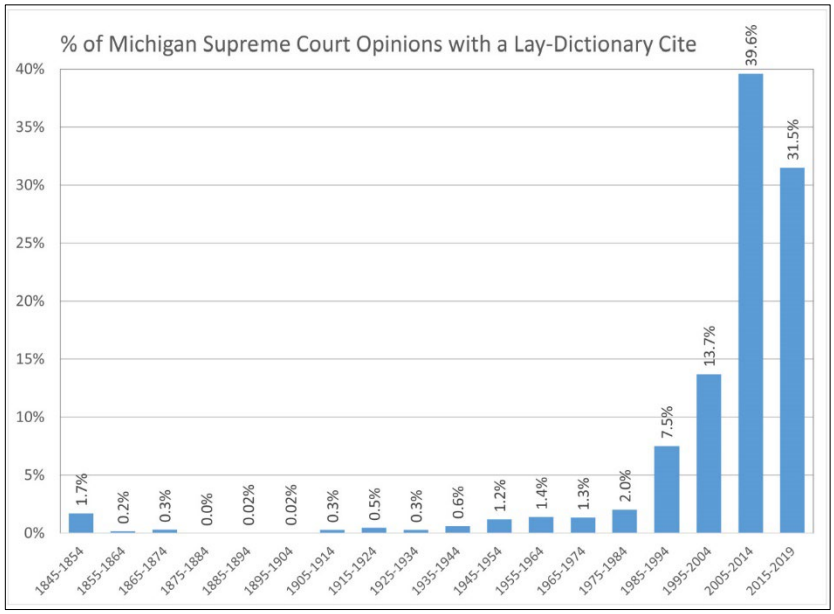
5. *See, e.g.*, William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); John Polich, Note, *The Ambiguity of Plain Meaning:* Smith v. United States *and the New Textualism*, 68 S. CAL. L. REV. 259 (1994); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).



Three last observations about the data.

First, in a search this extensive and with numbers this large, we can't be sure that the numbers are perfectly accurate. But missing a case or a dictionary reference here and there would count for little. The big picture of the link between textualism and resort to dictionaries is unmistakably clear.

Second, my research assistants collected the same information for published Michigan Court of Appeals decisions. After some reflection, I decided not to include them. But the news—good news, in my opinion—is that they have been citing general dictionaries at a dramatically lower rate. From 2005 through 2014, for instance, when the Supreme Court was citing at a 40% clip, the Court of Appeals was at only 4%.

Finally, for what it's worth, the Supreme Court's dictionary of choice has changed over time. From 1995 through 2015, it was, by far, *Random House Webster's College Dictionary*. (Incidentally, the word *Webster's*

was added to the 1991 edition.[6]) It was cited 203 times in those 20 years. The next closest was *The American Heritage Dictionary*, at 45 citations. In fact, the total for *Random House Webster's* was more than the combined total for all other general dictionaries.

Was that a good choice? Maybe not. Probably the leading textualist treatise, *Reading Law: The Interpretation of Legal Texts*, by Justice Scalia and lexicographer Bryan Garner, lists by time periods the dictionaries that "are the most useful and authoritative for the English language generally."[7] For 2001 to the present, there are eight. *Random House Webster's College Dictionary* is not among them. What is among them is *Merriam-Webster's Collegiate Dictionary*. And guess what? After those two decades in which *Random House Webster's College Dictionary* was the (strongly) preferred choice, from 2015 through 2019 the Supreme Court shifted toward *Merriam-Webster's Collegiate*. It was cited 34 times out of 92 total, and *Random House Webster's* just 18 times.

Perhaps this shift is a good thing, given that *Merriam-Webster's Collegiate* is among the authoritative eight in *Reading Law*. But was this a deliberate decision? If the shift was not deliberate and happened more or less by chance, then we are reminded of the arbitrariness of all this dictionary diving. If the shift was deliberate, were attorneys made aware? And how, exactly, should they deal with it?

In the end, the same criticism that, after an exhaustive study, has been leveled at the United States Supreme Court can be leveled at the Michigan Supreme Court: it has "steadfastly refused to adhere to any set of preferences, much less announce . . . a principled basis

6. Frank Abate, *Random House Webster's College Dictionary (Review)*, 13 J. DICTIONARY SOC'Y N. AM. 153, 153 (1991), https://muse.jhu.edu/article/456757/pdf [https://perma.cc/T98T-Q48K].

7. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 419–23 (2012).

for its dictionary selections."[8] So one glaring problem is disorderliness and subjectivity—the lack of any guidance on which dictionary or dictionaries to use, and why, and how, and at what point in the analytical process. In the five-year period before 2020, six different general dictionaries were each cited in four or more different cases.

Dictionaries may be minimally useful for setting out *possible* meanings[9]—although English speakers will often perceive on their own any differences that may be significant. In short, the part played by dictionaries in decision-making should be fairly limited.

II. THE COURT'S FREEWHEELING APPROACH

Let's look at some sample cases under different categories. Other cases could have been added under most of the categories.

The idea is to illustrate the vicissitudes of "jurisprudence by dictionary"[10]—its arbitrariness and, too often, its narrowness. In each case, the majority and minority were at odds either on definitions or on a definition's import or significance.

I will not discuss any legal arguments apart from the use of dictionaries. Obviously, the cases did not turn *only* on dictionary "analysis," and my "Comment" after each case reflects mainly on that analysis—not so much on which side may have been right in the end. But in general, the dictionaries in these cases served as more than a mere starting point. They were used to lend weight to one conclusion or another.

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8. 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, 568 (2013).

9. *See, e.g.*, People v. Wood, 954 N.W.2d 494, 499–501 (Mich. 2020) (starting with dictionary definitions of "juror" and going on to discuss commonsense distinctions, precedent, comparable statutes, and purpose).

10. An expression used by Judge Douglas Shapiro, concurring in TruGreen Ltd. P'ship v. Dep't of Treasury, 955 N.W.2d 529, 540 (Mich. Ct. App. 2020).

A. Cherry-Picking #1: Using Different Definitions from the Same Dictionary

The case (decided by order): *People v. LaFountain*.[11] The facts: The defendant operated a methamphetamine laboratory in her home, where firearms were in plain view in one of the bedrooms. The question: Did her case fall under a sentencing provision for an offense that "involves the possession, placement, or use of a firearm"?[12] The majority answered yes.[13]

The majority cited a definition of *involve* from *The Merriam-Webster Dictionary* (which is based on *Merriam-Webster's Collegiate Dictionary*): "to have as part of itself: INCLUDE."[14] The majority said this definition "seems to be more consistently cited in dictionaries . . . and thus seems to be the *most ordinary* understanding of the word 'involve.'"[15] The dissent noted that *The Merriam-Webster Dictionary* gives many different meanings and that one of them—"to relate closely: CONNECT"—"accords with the ordinary meaning of 'involves.'"[16]

Comment: Both sides invoke "ordinary meaning," but the majority invokes "most ordinary." The uncertainty about what "ordinary meaning" means is explored later in this article.[17]

B. Cherry-Picking #2: Seizing on One Piece of a Definition Instead of Another Piece

The case: *People v. Harris*.[18] The facts: During an internal investigation, police officers made false statements about their conduct during a public encounter.

11. 844 N.W.2d 5 (Mich. 2014) (mem.).
12. *Id.* at 5.
13. *Id.*
14. *Id.* at 6.
15. *Id.* (emphasis added).
16. *Id.* at 9 (Viviano, J., dissenting).
17. *See infra* text accompanying notes 191–92, 201–20.
18. 885 N.W.2d 832 (Mich. 2016).

The question: Did their statements fall under a statute protecting them from criminal prosecution if they gave an "involuntary statement"—defined as "information provided . . . under threat of dismissal"?[19] In brief, were the officers' false statements "information"? The majority said yes.[20]

The majority trotted out three definitions of *information* from three dictionaries.[21] All three used *knowledge*. For example, this one from *The Shorter Oxford English Dictionary*: "[k]nowledge or facts communicated about a particular subject, event, etc.; intelligence, news."[22] The majority said, "The dissent focuses . . . on 'knowledge,' but 'intelligence' . . . can be false."[23] The majority also said that empirical data from the *Corpus of Contemporary American English* shows that *information* is often collocated with *accurate* or with *false* or *inaccurate*—suggesting that "the unmodified word 'information' can describe *either* true or false statements."[24]

The partial dissent did indeed focus on the *knowledge* part of dictionary definitions and on a further definition of *knowledge* from *Random House Webster's College Dictionary*: "acquaintance with facts, *truths*, or principles."[25] And lies do not impart any information "within the commonly understood meaning of that word."[26] Lies defeat the purpose of the statute—to encourage truthful information about police misconduct in exchange for immunity.

Comment: Ask yourself how a legal reader would normally define *information* in the context of an immunity statute. An officer gets immunity for lying? Do you need a dictionary? Does common sense have any

19. *Id.* at 837.

20. *Id.*

21. *Id.* at 838.

22. *Id.* at 838 & n.24.

23. *Id.* at 838 & n.26 (citing RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2003)).

24. *Id.* at 839 & n.33.

25. *Id.* at 849 (Markman, J., concurring in part and dissenting in part).

26. *Id.* (quoting from the Court of Appeals opinion).

role to play? In this instance, the majority's argument from the *Corpus of Contemporary American English* is unpersuasive. Of course, *information* is often used with *false* or *inaccurate*—as in "his false information led investigators on a wild-goose chase." Context and clarity sometimes require specificity. The question is how the word *information*, unqualified, would normally be understood in this context.[27] Both sides claimed that plain language was on their side—an old story.[28]

C. Cherry-Picking #3: Using Definitions from Different Dictionaries

The case: *People v. Laidler*.[29] The facts: Two perpetrators broke into a home, and one of them, while climbing in the window, was shot and killed by the homeowner. The question: Does "victim" include a co-perpetrator under sentencing guidelines that assess points for "injury to a victim"?[30] The majority answered yes.[31]

The majority cited *Random House Webster's College Dictionary*, which defines *victim* as "a person who suffers from a[n] . . . injurious action or agency."[32] In the context of a criminal-sentencing statute, then, the appropriate definition is "any person who is harmed by the defendant's criminal actions."[33]

The dissent noted that under the majority's broad interpretation of *victim*, a defendant could be assessed

27. *See* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1320 (2017) ("We can speak of false or inaccurate information, but when we just use the word [*information*] alone, we typically mean to describe an accurate account of facts.") (commenting on People v. Harris, 844 N.W.2d 5 (Mich. 2014)).

28. Searching Westlaw for "plain language" in Michigan Supreme Court opinions from 2000 through 2019 produces 515 cases, most of which use the term multiple times, of course.

29. 817 N.W.2d 517 (Mich. 2012).

30. *Id.* at 520.

31. *Id.* at 526.

32. *Id.* at 523.

33. *Id.*

additional points for injuring himself during the commission of his own crime. Instead, given the distinction made throughout the statute between *victim* and *offender*, the appropriate definition for *victim* is this one from *The American Heritage Dictionary*: "'[s]omeone who is put to death or subjected to torture or suffering *by another*,' i.e., the offender."[34]

Comment: It's almost always possible to find a definition to support your view of the right result. This third category of cherry-picking, by the way, is no doubt the most common of the three.[35]

D. Applying the Same Definition from the Same Dictionary Differently

The case (decided by order): *Drouillard v. American Alternative Insurance Corp*.[36] The facts: Drywall fell from a truck bed and landed in the road. Shortly thereafter, an ambulance collided with the drywall. The question: Did the truck cause an object, the drywall, to "hit" the ambulance, as required for uninsured-motorist coverage?[37] The majority answered yes.[38]

The majority cited *Merriam-Webster's Collegiate Dictionary* for the definition that *hit* means "come in contact with <the ball [hit] the window>."[39] It criticized the dissent for "reframe[ing] the issue as a theoretical

34. *Id.* at 528 (Cavanagh, J., dissenting).

35. Some additional cases: Thiel v. Goyings, 939 N.W.2d 152 (Mich. 2019); People v. Duncan, 835 N.W.2d 399 (Mich. 2013); People v. Rapp, 821 N.W.2d 452 (Mich. 2012); Krohn v. Home-Owners Ins. Co., 802 N.W.2d 281 (Mich. 2011); Mich. Educ. Ass'n v. Sec'y of State, 801 N.W.2d 35 (Mich. 2011); Liberty Hill Hous. Corp. v. City of Livonia, 746 N.W.2d 282 (Mich. 2008); Omdahl v. W. Iron Cnty. Bd. of Educ., 733 N.W.2d 380 (Mich. 2007); People v. Robinson, 715 N.W.2d 44 (Mich. 2006); People v. Yamat, 714 N.W.2d 335 (Mich. 2006); Sington v. Chrysler Corp., 648 N.W.2d 624 (Mich. 2002); *In re* Hathaway, 630 N.W.2d 850 (Mich. 2001); Herald Co. v. City of Bay City, 614 N.W.2d 873 (Mich. 2000).

36. 929 N.W.2d 777 (Mich. 2019) (mem.).

37. *Id.* at 778–79.

38. *Id.*

39. *Id.* at 778.

semantic one."[40] The dissent, using the same definition and example, said that we do not normally describe a stationary object like a window as having hit a ball.[41]

Comment: The majority used a definition that, in the abstract, fit the case: the drywall "came in contact with" the ambulance. This happens all too often—a dry, mechanical application of a definition. The dissent, in my view, was right on the dictionary point: a window does not hit a ball, or a tree hit a car, or the ground hit a falling apple. But we don't need a dictionary to tell us that: any English speaker knows it to be true.[42] The dissent cited the *Corpus of Contemporary American English* to confirm (if confirmation were even needed) our common understanding: in 1,900 examples of the verb *hit* in actual usage, less than 1% of the examples "could even arguably be interpreted as communicating that a stationary object can 'hit' something else."[43]

E. Generalizing from Several Dictionary Definitions Without Applying Any One of Them

The case: *McCormick v. Carrier*.[44] The facts: The defendant's foot was run over by a truck at work, fracturing his ankle. About 17 months later, after two surgeries, an effort to return to work, and varying medical assessments, he returned to work permanently. The question: Did the plaintiff's injury affect his "general ability to lead his . . . normal life," as required for a "serious impairment of a body function" under the no-fault insurance act?[45] The majority said yes.[46]

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40. *Id.*

41. *Id.* at 780 (Markman, J., dissenting).

42. *Cf.* Higbie v. Higbie, 11 N.W.2d 248, 254 (Mich. 1943) ("We do not have to refer to a dictionary, nor to a certified public accountant, for a connotation of these words. Every person of ordinary intelligence is familiar with and knows the exact meaning to be accorded them.").

43. *Drouillard*, 929 N.W.2d at 781–82 (Markman, J., dissenting).

44. 795 N.W.2d 517 (Mich. 2010).

45. *Id.* at 526.

46. *Id.* at 539.

In analyzing *general*, the majority relied on several definitions from *The American Heritage Dictionary*, including "Being usually the case."[47] The majority concluded that the definitions "more or less convey the same meaning: that 'general' does not refer to only one . . . particular part of a thing, but, at least some parts of it."[48] So the injury must affect "some of the person's capacity to live in his or her normal manner of living."[49] The statute does not expressly speak to how long the impairment must last or require an inquiry into its effect on the person's entire life.

The dissent criticized the majority's generalizing about *general*: "the definition that the majority itself relies upon does not even include 'some,' but instead indicates that 'general' means 'whole,' 'every,' 'majority,' 'prevalent,' 'usually,' 'in most instances,' 'not limited,' and 'main features.'"[50] (The dissent meant the majority's "definitions," not "definition.") In effect, despite its protestations to the contrary, the majority held that "temporal considerations are wholly or largely irrelevant."[51]

Comment: The case is a contentious tangle of conflicting precedent, complex issues, and (frankly) ideological leanings. As elsewhere in these case summaries, my focus is on the use of dictionaries, not on which side had the better legal argument. And in that regard, the majority's use of *The American Heritage Dictionary* is open to question.

Taking all issues and the footnotes into account, the majority cited *The American Heritage Dictionary* 15 times, *Webster's Third New International Dictionary* 5 times, *Random House Webster's Unabridged Dictionary* 3 times, *Merriam-Webster Online Dictionary* once, and *Webster's New International Dictionary* once.[52] That's

47. *Id.* at 529.
48. *Id.*
49. *Id.* at 530.
50. *Id.* at 555 (Markman, J., dissenting).
51. *Id.* at 559.
52. *See id.* at 527–34.

five dictionaries and a total of 25 citations. Also, the majority opinion used the term *plain language* 20 times, no less, and *plain text* 3 times. I suspect that the opinion's author was turning the tables to make a point: he was a well-known critic of textualism as a cover for activism.[53]

F. Combining Separate Definitions

The case: *In re Estate of Erwin*.[54] The facts: A wife had moved out of the home and not lived with her husband for 35 years, but they had never divorced before he died. He did provide financial support, and they had some kind of ongoing relationship during those years. The question: Under an estate statute, a surviving spouse does not include someone who is "'willfully absent' from the decedent for more than one year."[55] Does that disqualify the wife? The majority said no.[56]

The majority cited two dictionaries to conclude that "'absent' could mean that someone is missing, not present, or, alternatively, that a person is exhibiting inattentiveness toward another."[57] Reading the statute together with related provisions, the majority concluded that *absent* refers to "complete physical *and* emotional absence."[58]

The dissent cut to the heart of it: "By knitting together . . . disparate definitions, the majority creates its own definition, effectively choosing 'all of the above,' instead of choosing the contextually appropriate meaning."[59] (The phrase "contextually appropriate ordinary meaning" appears in the Scalia and Garner treatise.[60])

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53. *Id.* at 534 ("[A]ctivism comes in all guises, including so-called textualism.") (quoting Kreiner v. Fischer, 683 N.W.2d 611, 638 (Mich. 2004) (Cavanagh, J., dissenting)).

54. 921 N.W.2d 308 (Mich. 2018).

55. *Id.* at 310.

56. *Id.* at 321.

57. *Id.* at 312.

58. *Id.* at 318 (emphasis added).

59. *Id.* at 325–26 (Viviano, J., dissenting).

60. SCALIA & GARNER, *supra* note 7, at 70.

No dictionary—or none that the dissent's author could find—combines the two definitions into one.

Comment: Not much to say here. If a dictionary had three definitions, could they be joined into independent tests, or requirements? Four definitions?

G. Defining Side Terms, Not the Central Term

The case: *Petipren v. Jaskowski*.[61] The facts: During a summer festival, the chief of police arrested a band member after receiving complaints about offensive music. The question: Under a governmental-immunity statute, an "executive official" has absolute immunity from tort liability "if he or she is acting within the scope of his or her . . . executive authority."[62] Was the police chief acting within his "executive authority"?[63] Yes, according to the majority.[64]

The majority defined the words *scope* and *authority* and concluded: "Taken together, the words indicate that a highest appointive executive official's scope of authority consists of the extent or range of his or her delegated executive power."[65] The dissent homed in on *executive*: "having administrative or managerial responsibility," from *Merriam-Webster's Collegiate Dictionary*.[66] Because the chief was doing what an ordinary police officer does, he was not acting within his high-level *executive* authority.

Comment: Would the majority have reached the same result if the word *executive* had not appeared before *authority*? If so, what does *executive* add?

But never mind that. Instead ask yourself why the majority defined *scope* and *authority* but not *executive*. In my view, the resort to dictionaries was—once again—gratuitous. The case presented multiple consid-

61. 833 N.W.2d 247 (Mich. 2013).
62. *Id.* at 254.
63. *Id.* at 255.
64. *Id.* at 259–60.
65. *Id.* at 256.
66. *Id.* at 269 (Cavanagh, J., dissenting).

erations and a hard call, but definitions contributed nothing.

H. Defining the Simplest of Words

The case: *Robinson v. City of Detroit*.[67] The facts: In each of two consolidated cases, persons inside a car were injured when the car crashed following a police chase. The question: Governmental employees have statutory immunity from liability if, among other things, their conduct "does not amount to gross negligence that is the proximate cause of the injury or damage."[68] Was the officers' pursuit "the proximate cause" of the injuries in these cases?[69]

No, said the majority.[70] It cited, as the dissent in an earlier case had, this definition from *Random House Webster's College Dictionary*: *The* signifies "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article *a* or *an*) . . . ."[71] So, the majority asserted, "it is clear that the phrase 'the proximate cause' contemplates *one* cause."[72] And borrowing language from a 1913 case, the majority concluded: "The *one* most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles."[73] The majority added the word *one* to the original 1913 language.

The dissent criticized the majority for equating "the proximate cause" with "the *sole* proximate cause."[74] According to long-established Michigan law, "there may be

67. 613 N.W.2d 307 (Mich. 2000).
68. *Id.* at 317.
69. *Id.*
70. *Id.* at 319.
71. *Id.* (quoted case omitted).
72. *Id.*
73. *Id.* (emphasis added).
74. *Id.* at 328–29 (Kelly, J., concurring in part and dissenting in part).

two or more concurrent and directly cooperative and efficient proximate causes of an injury."[75]

Comment: For the record, *the* is just one of many everyday words for which the post-2000 Court has resorted to dictionaries. Some others: *already*,[76] e*ach*,[77] *fee*,[78] *gift*,[79] *keep*,[80] *maintain*,[81] *question* (noun),[82] and *tip*.[83]

At any rate, the majority in *Robinson* did, in effect, perform a sleight of hand: it imported the word *one* into *the proximate cause*. Consider an example: "The proximate cause of my fall was a steep descent and loose rock." Nothing in *the* requires a single "most immediate" cause.

Here, as elsewhere, the dictionary's analytical value was illusory.

I. Favoring a Dictionary Definition over an Exception Created by Case Law

The case: *Spectrum Health Hospitals v. Farm Bureau Mutual Insurance Co.* (involving consolidated cases).[84] The facts: A family member who had been forbidden to drive his father's vehicle did so anyway and was injured in an accident. The question: Had the vehicle been "taken unlawfully" under the no-fault act, barring

75. *Id.* at 330.

76. City of Coldwater v. Consumers Energy Co., 895 N.W.2d 154, 163 (Mich. 2017).

77. Twp. of Casco v. Sec'y of State, 701 N.W.2d 102, 117 (Mich. 2005) (Young, J., concurring in part and dissenting in part).

78. Sands Appliance Servs., Inc. v. Wilson, 615 N.W.2d 241, 247 (Mich. 2000).

79. *Id.*

80. People v. Thompson, 730 N.W.2d 708, 712 (Mich. 2007).

81. *Id.*

82. People v. White, 828 N.W.2d 329, 335 (Mich. 2013).

83. *Sands Appliance Servs., Inc.*, 615 N.W.2d at 247.

84. 821 N.W.2d 117 (Mich. 2012).

the driver from receiving no-fault benefits?[85] The majority said yes.[86]

The majority, dutifully searching for "plain and ordinary meaning,"[87] took its definition of *unlawful* from *Random House Webster's College Dictionary*: "not lawful; contrary to law; illegal."[88] And the driver had violated two so-called joyriding statutes. The majority overruled a line of cases that created a joyriding exception to the no-fault statute.[89]

The dissent noted the grounds for the exception: the no-fault statute derived from a provision in a model act, but with the word *converter*—someone who steals, a thief—replaced with the idea of someone who "unlawfully" takes.[90] The legislature was simplifying a term of art without intending to change its meaning.

Comment: The dictionary is used to help supplant established case law that was based on plausible legislative history. So it goes with textualism. Incidentally, what is the difference between "plain meaning" and "ordinary meaning"? Are they two different things?[91]

J. Favoring a Dictionary Definition over a Presumption Created by Case Law

The case: *Griffith ex rel. Griffith v. State Farm Mutual Automobile Insurance Co.*[92] The facts: Douglas Griffith suffered a severe brain injury in a motor-vehicle accident, leaving him disabled. He received hospital and nursing-home care before returning home. The question: Was he entitled to reimbursement for his food costs at home under the no-fault act, which requires the insurer to pay "benefits for accidental bodily

85. *Id.* at 124.
86. *Id.* at 136.
87. *Id.* at 125.
88. *Id.* at 125 & n.22.
89. *Id.* at 129–35.
90. *Id.* at 137–39 (Cavanagh, J., dissenting).
91. *See infra* text accompanying notes 191–92 (discussing that question).
92. 697 N.W.2d 895 (Mich. 2005).

injury" arising out of the use of a motor vehicle?[93] Not according to the majority.[94]

The majority cited three definitions of *for* from *Random House Webster's College Dictionary* and asserted that the word "implies a causal connection."[95] Because Griffith's diet was no different from an uninjured person's, the costs were not "related in any way to his injuries."[96] Similarly, under a related provision requiring that the expenses be "reasonably necessary . . . for an injured person's care, recovery, or rehabilitation," the food costs were not necessary for his care because of the accident.[97] His dietary needs had not changed. An institutional setting would be different: a patient "is required to eat 'hospital food.'"[98]

The dissent characterized these conclusions as "extraordinary."[99] The author cited a fourth definition from *Random House Webster's College Dictionary*—"by reason of"—and said that the word *for* "has many nuances" in English.[100] The broad statutory language did not comport with requiring that an injury arise directly from the accident. What's more, the majority opinion "flies in the face of our time-honored determination to liberally construe the no-fault act for the benefit of the insured."[101]

Comment: This same majority of justices has not hesitated to apply a principle of *narrow* construction to a plaintiff's disadvantage.[102] As for the ordinary meaning of terms that courts (incorrectly) interpret to require but-for causation, see pages 251–52. The majority,

93. *Id.* at 898.
94. *Id.* at 906.
95. *Id.* at 901 & n.6.
96. *Id.* at 901.
97. *Id.* at 901–03.
98. *Id.* at 904.
99. *Id.* at 907 (Kelly, J., dissenting).
100. *Id.* at 908.
101. *Id.*
102. *See, e.g.*, Nawrocki v. Macomb Cnty. Rd. Comm'n, 615 N.W.2d 702, 711 (Mich. 2000) (narrowly construing an exception to governmental immunity).

interpreting the word *for*, refers to expenses that "are necessary *because of* the accident."[103]

K. Digging into Dictionary Definitions While Ignoring Statutory Purpose

The case: *People v. Rea*.[104] The facts: The defendant, while intoxicated, was arrested as he started to back his car down the upper part of his driveway. The question: Was he illegally operating his car in a place "generally accessible to motor vehicles"?[105] The majority said yes.[106] The majority went with *Merriam-Webster's Collegiate Dictionary*: *generally* means "as a rule: USUALLY," and *accessible* means "capable of being reached."[107] Together, they mean "usually capable of being reached."[108] The dissent went with this definition of *generally* from *Webster's New World College Dictionary*: "to or by most people; widely; popularly; extensively."[109] That the statute, too, uses the plural *vehicles* also "suggest[s] a certain volume of use is required."[110] And another statute defines a *private driveway* as one "not . . . *normally used* by the public."[111]

Comment: Not a word about statutory purpose. Isn't it to prevent harm to others by drunk drivers? You might argue that it's also to prevent drivers from harming themselves in a collision. So driveway collisions with another car, or with a tree, are within the evils to be remedied?

Now consider textualism's indulgence in unnecessary and didactic exposition. The majority puts forward, with citations, the following propositions:

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103. *Griffith*, 697 N.W.2d at 903 (emphasis added).
104. 902 N.W.2d 362 (Mich. 2017).
105. *Id.* at 364.
106. *Id.* at 369.
107. *Id.* at 365.
108. *Id.* at 366.
109. *Id.* at 375 (McCormack, J., dissenting).
110. *Id.*
111. *Id.* at 376 (citing MICH. COMP. LAWS § 257.44(1)).

- "The word 'generally' is an adverb that modifies the adjective 'accessible.'"[112]
- "The phrase 'generally accessible' modifies the preceding noun phrase 'other place.'"[113]
- "[T]he phrase 'to motor vehicles' . . . is an adverbial prepositional phrase that modifies 'generally accessible.'"[114]
- "'Or' is . . . a disjunctive term, used to indicate . . . an alternative."[115]

Did we need these high-school grammar lessons to explain that the issue is whether the driveway is "generally accessible" to motor vehicles?

Finally, the majority opinion offers the usual incantations of *plain language* and *plain and ordinary meaning*.[116] The dissent manages to make a strong argument without them.

L. Digging into Dictionary Definitions While Ignoring Legislative History

The case: *People v. Hardy*.[117] The facts (in two consolidated cases): The defendant in one case pointed and racked a shotgun at the victim before a carjacking. The defendant in the other case struck his robbery victims on the head with a sawed-off shotgun. The question: Were the defendants properly assessed points under a sentencing statute that lists treating a victim with "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense"?[118] The majority said that the last item—the *conduct designed* language—applied.[119]

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112. *Id.* at 365.
113. *Id.* at 366.
114. *Id.*
115. *Id.* at 367.
116. *Id.* at 364, 366.
117. 835 N.W.2d 340 (Mich. 2013).
118. *Id.* at 345.
119. *Id.* at 347–49.

The majority pulled definitions for *designed*, *substantial*, and *increase* to come up with "conduct . . . intended to make a victim's fear or anxiety greater by a considerable amount."[120] More important, it said that the *or* before *excessive brutality* separated the *conduct designed* item from the other three, giving it an independent meaning.[121]

The dissent relied heavily on legislative history. An earlier version of the statute included *terrorism* and defined it in exactly the same terms as the *conduct designed* language.[122] After 9/11, the sentencing provisions were amended, and terrorism became a separate provision with its own definition.[123] The previous definition was simply inserted after *sadism, torture, or excessive brutality*, preceded by a second *or*.[124] The dissent argued that the new *or* should therefore "be given little weight" and that the *conduct designed* language should be interpreted in light of the other three items.[125] Like those items, it was formerly used to describe egregious conduct—terrorism.[126]

Comment: The legislative history is compelling. Thus does this case bring the interpretive question into stark relief: does legislative history matter if the isolated wording, on the face of it, seems clear? As for the dictionary definitions, they were pointless. *Substantial* means a "considerable amount."[127] *Increase* means "to make greater."[128] Not very edifying.

120. *Id.* at 345.
121. *Id.* at 346.
122. *Id.* at 350–51 (Cavanagh, J., concurring in part and dissenting in part).
123. *Id.* at 351–52.
124. *See id.*
125. *Id.* at 353.
126. *Id.*
127. *Id.* at 345 (majority opinion).
128. *Id.*

M. Using a Dictionary Definition to Expand a Statute

The case: *People v. Garrison*.[129] The facts: The defendant stole snowmobiles and trailers from vacation homes. While the case was pending, the owners traveled back and forth from their primary homes to secure their stolen property and attend a restitution hearing. The question: Under a restitution statute that requires sentencing courts to order "full restitution," were the owners entitled to travel costs?[130]

The majority said yes, citing a definition of *full* from *Random House Webster's College Dictionary*: "complete; entire; maximum."[131] But, said the dissent, the statute already sets out specific and detailed requirements—totaling 1,066 words for a crime relating to property.[132] What was the point of all that? The dissent cited the canon *expressio unius est exclusio alterius*—"to express one thing is to exclude the other."[133]

Comment: The majority responded that the long list of specifics was to "prevent courts from overlooking common types of losses."[134] But the statute uses this formulation three times: "the order of restitution shall require [that] the defendant . . . ."[135] Why the mandatory language if all the specifics were merely reminders of common losses that typically figure into "full restitution"? Why not *may* instead of *shall*? Or if the specifics were required parts of "full restitution," but not necessarily all of it, why not "the order of restitution shall include a requirement that the defendant . . . ."? Or even just add a provision: "Full restitution is not limited to the required payments in subdivisions . . . ."?

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129. 852 N.W.2d 45 (Mich. 2014).
130. *Id.* at 47–48.
131. *Id.* at 48 & n.18.
132. *Id.* at 52 (Markman, J., dissenting).
133. *Id.* at 56.
134. *Id.* at 49 (majority opinion).
135. MICH. COMP. LAWS § 780.766(3), (4), (24).

N. Inventing Differences Between Dictionary Definitions

The case: *People v. Bruce*.[136] The facts: The defendants were federal border-patrol agents operating with state officers as part of a joint task force. The federal agents were charged with the common-law offense of misconduct in office. The question: Were the agents "public officers," as required for a conviction under Michigan case law?[137] The majority said yes.[138]

As one of five elements for holding a public office, someone must have "duties [that are] defined, directly or impliedly, by the Legislature or through legislative authority."[139] The majority cited *Random House Webster's College Dictionary* in arguing that "[a] 'duty' is commonly understood to be 'something that one is expected or required to do by moral or legal obligation.'"[140] Here, the agents had the same obligations as other members of the joint task force, since a statute, Michigan Compiled Laws § 764.15d, allows federal law-enforcement officers to enforce Michigan law "to the same extent as a state or local officer."[141]

One of the dissents said that the *Random House Webster's* definition was too broad: "a much more apt definition in this context is 'an action or task required by a person's position or occupation.'"[142] And the statute authorizing federal officers to enforce state law does not prescribe any required duty or duties.

Comment: There is precious little difference between the two dictionary definitions. Basically, the dispute was over whether, to qualify as a "public officer," a person needed to have any specified or defined duties.

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136. 939 N.W.2d 188 (Mich. 2019).

137. *Id.* at 190–92.

138. *Id.* at 199.

139. *Id.* at 192 (citation omitted).

140. *Id.* at 195.

141. *Id.* at 194.

142. *Id.* at 208 (Viviano, J., dissenting) (citing *Duty*, DICTIONARY.COM, https://www.dictionary.com/browse/duty?s=t [https://perma.cc/6RRH-2DQA]).

As a second dissent noted, the statute granted the federal agents powers, but no obligations.[143]

O. Ignoring Definitions from the Leading Unabridged Dictionaries

The case: *Twichel v. MIC General Insurance Corp.*[144] The facts: The buyer of a pickup truck was killed while driving without insurance. The title to the truck had not been transferred because the buyer still owed the seller half the purchase price. At the time of the fatal accident, the buyer was living with his grandfather, who had an insurance policy that, under Michigan law, potentially provided benefits to a relative residing in the same household.[145] The question: Did the buyer "own" the car and thus fall under a policy exclusion for uninsured-motorist coverage?[146]

He did, the majority said.[147] It relied on definitions from two abridged dictionaries and one unabridged,[148] *Webster's Encyclopedic Unabridged Dictionary of the English Language*, which is based on *The Random House Dictionary of the English Language*.[149] "[Those] dictionary definitions indicate[] that *possession*, *control*, and *dominion* are among the primary features of ownership."[150] In particular, *Webster's Encyclopedic Unabridged* "list[s] various definitions of 'owned,' such as . . . 'having full claim, authority, power, dominion, etc.'"[151]

The dissent cited the definitions of *owner* from *Webster's Third New International Dictionary, Una-*

143. *Id.* at 200 (McCormack, C.J., dissenting).
144. 676 N.W.2d 616 (Mich. 2004).
145. *Id.* at 618.
146. *Id.* at 618–19.
147. *Id.* at 622.
148. *See id.*
149. So stated on the copyright page. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (Deluxe ed., 1994).
150. *Twichel*, 676 N.W.2d at 622.
151. *Id.*

bridged (1966): "one that has the legal or rightful title whether the possessor or not"; and *The Oxford English Dictionary* (2d ed. 1991): "one who has the rightful claim or title to a thing (though he may not be in possession)."[152] So ownership "appear[s] to involve more than mere possession, dominion, and control."[153] At the least, the term *owner* is ambiguous and should be construed against the insurer.

Comment: This case would fit under category C above—"using definitions from different dictionaries"—but it deserves its own category. Unabridged dictionaries are, of course, more complete than abridged dictionaries, and any lexicographer will tell you that no unabridged dictionary is more highly regarded than the *OED* (especially) and *Webster's Third* (though it's getting outdated). Both had a definition that favored deciding for the buyer. Both were ignored. This decision vividly illustrates the Court's strong disinclination over the last two decades to ever conclude that contested language is ambiguous.[154]

III. THE LINGUISTIC SHAKINESS OF IT ALL

There's a problem even more fundamental than courts' excessive and unsystematic use of dictionaries: they are inherently weak authority for what a contested word means in context. The question is whether they deserve much weight at all. Let's count the reasons why not.

A. Legislative Drafters Themselves Do Not Often Consult Dictionaries

Start with congressional drafters. In a survey of 137 drafters conducted by Abbe Gluck and Lisa Schultz

152. *Id.* at 623–24 (Cavanagh, J., concurring in part and dissenting in part).

153. *Id.* at 624.

154. *See infra* text accompanying note 199 (setting out the Court's narrow test for ambiguity).

Bressman, more than 50% said they never or rarely use dictionaries when drafting; only 15% use them always or often.[155] The question about dictionaries, by the way, was only one of 83 questions about drafting and interpretation.[156]

With help from the National Conference of State Legislatures, I tried to replicate the drafting question for state legislative drafters. The NCSL office sent a link to a SurveyMonkey questionnaire to the directors of drafting offices in most states, asking them to share it with appropriate staff. The question: "When you draft legislation, how often do you consult an ordinary general dictionary?" I provided the same possible answers as Gluck and Bressman: "always," "often," "sometimes," "rarely," and "never." Forty-one drafters responded. Of these, 41% said "never" or "rarely"—somewhat lower than in the Gluck-Bressman survey. Only 10% said "often"—also a somewhat lower figure. On the whole, the results were similar.

If drafters don't use general dictionaries, why should courts? In my survey, 46% said they "sometimes" use them. But there's no way to ever know whether a term in dispute was one that the drafter looked up. And even if a judge did know, so what?

Gluck and Bressman, with the United States Supreme Court in mind, surmise that justices may consider dictionaries "a proxy for the 'ordinary meaning' that the Court thinks that Congress intends or that the public understands."[157] Yet "that explanation . . . depends on other empirical evidence that is shaky at best and that . . . theorists have done little work to confirm."[158]

Correct. Read on.

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155. 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, 938 & n.111 (2013).

156. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, 65 STAN. L. REV. app. at 22–44 (2013), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/01/Gluck_Bressman_65_Stan._L._Rev._Methods_ Appendix.pdf [https://perma.cc/A28Z-7BVZ].

157. Gluck & Bressman, *supra* note 155, at 938 (citation omitted).

158. *Id.* at 938–39 (citations omitted).

B. Dictionary Editors Themselves Disapprove of Judges' Relying on Dictionaries to Resolve Disputes over Meaning

I asked several dictionary editors to comment on the first opinion below.

- Jesse Sheidlower, former editor at large of *The Oxford English Dictionary*: "I think that it's probably wrong, in almost all situations, to use a dictionary in the courtroom. . . . Dictionary definitions are written with a lot of things in mind, but rigorously circumscribing the exact meaning and connotations of terms is usually not one of them."[159]
- Kory Stamper, former associate editor at Merriam-Webster: "I absolutely agree. Courts conveniently forget that, while dictionaries strive for total objectivity, they are human documents and objectivity is impossible. . . . [I]t's unwise to assume that a general dictionary of English can be taken to be a disinterested, comprehensive, and fully objective source of a word's plain meaning."[160]
- Steve Kleinedler, former executive editor, *The American Heritage Dictionary* (which, sadly, is no longer being maintained): "I agree with Jesse. Courts should hire [or permit] expert linguists to do analysis of corpus evidence."[161]
- Joe Pickett, former executive editor, *The American Heritage Dictionary*: "I'm inclined to agree with Jesse Sheidlower (if I understand him correctly) that the definitions in a

159. Quoted in Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES, June 13, 2011, https://www.nytimes.com/2011/06/14/us/14bar.html?r=0 [https://perma.cc/2WKU-66BJ].

160. Email from Kory Stamper to author (Aug. 26, 2021) (on file with author).

161. Email from Steve Kleinedler to author (Aug. 14, 2020) (on file with author).

> dictionary should not be determinant in coming to a legal decision. . . . Most definitions are written to account for as many instances of usage as possible . . . . The goal is to give the reader an overarching sense of the range of a word's meaning, and then to let the reader come to a decision. . . . 'Generally accessible' means what, exactly?[162] Isn't that what the judge must determine? I don't see how a dictionary can help determine which vehicles fall into this category."[163]

- Ammon Shea, author, editor at Merriam-Webster: "The first problem is what is meant by 'ordinary meaning.' This is not a term that is common among lexicographers, and there is no consensus of practice in . . . how polysemous (multi-sense) entries are formatted. The most common practice now . . . is to order the senses . . . with the most common one first. However, this should not be equated with 'ordinary.' . . . Regardless of whether the entries are arranged chronologically or otherwise, there really is no 'ordinary' meaning for most words. There are tens of thousands of words which manage to balance multiple senses at once. . . . I don't know that I can tell you what would be the best way of dealing with this issue, but . . . dictionaries are a poor tool for trying to do so."[164]

In fairness, one editor had a different view:

- John Morse, former president and publisher, Merriam-Webster: "[W]hile I am a great admirer of Jesse Scheidlower, . . . I would say that [lexicographers] very much have in mind 'rigorously circumscribing exact meanings and connotations of terms.' . . . I have no reason to believe that [courts] would be ill-served 'in almost all situations' by a well-

162. Reacting to the *Rea* case, *supra* text accompanying notes 104–11.

163. Email from Joe Pickett to author (Aug. 13, 2020) (on file with author).

164. Email from Ammon Shea to author (Aug. 20, 2020) (on file with author).

> prepared unabridged dictionary. And I am under the impression that courts generally favor an unabridged dictionary. . . . However, I would agree [with Learned Hand] that 'sympathetic and imaginative discovery is the surest guide' to understanding the purpose or object of a statute."[165]

Regardless, though, of whether lexicographers do or do not try to rigorously circumscribe meaning, the result, the dictionary itself, creates peril for judicial interpretation:

> Dictionaries assume[166] that each word has exactly as many senses as are listed, with each sense being "mutually exclusive and [having] clear boundaries." This "offers the comforting prospect of certainty to linguistic inquirers"—an apparently complete menu of each word's possible meanings, from which the user can simply select the one appropriate to the situation at hand.[167]

The dictionary can make difficult choices that depend on context look easier than they are.

C. Dictionary Definitions Can Vary Depending on the Definer

The first thing to say about dictionary-making is that it involves as much art as science, and probably more. In her lively book on the subject,[168] Kory Stamper describes the multitude of considerations and efforts that go into collecting words, deciding whether to include them, and defining them. She acknowledges that corpora, those online full-text sources of all kinds of

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165. Email from John Morse (Sept. 2, 2020) (on file with author) (quoting, in the last sentence, Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).

166. Or "give the impression"?

167. Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. REV. 1359, 1365 & n.12 (2017) (quoting B.T. SUE ATKINS & MICHAEL RUNDELL, THE OXFORD GUIDE TO PRACTICAL LEXICOGRAPHY 272 (2008)).

168. KORY STAMPER, WORD BY WORD: THE SECRET LIFE OF DICTIONARIES (2017).

writing, have been a boon to lexicographers. But, she says, "they can't compete with a real-life person trawling through a magazine or a web article . . . . [A]ll the data in the world is useless unless you can find someone to parse and interpret it."[169]

Dictionaries, then, are products of human judgment. Presumably those judgments are *generally* sound and offer *guidance* on meaning. On the one hand, the Michigan Supreme Court has explicitly recognized that limitation: "The dictionary is but one data point; it guides our analysis, but it does not by itself settle it."[170] On the other hand, this acknowledgment that dictionaries are "but one" source of decision-making rings hollow in the face of their prominence in the Court's jurisprudence since 2000 and the justices' incessant picking through and scrutinizing definitions in a manner akin to biblical exegesis.

At any rate, Kory Stamper describes two kinds of lexicographers:

> Lexicographers tend to fall into two categories when it comes to writing definitions: lumpers and splitters. Lumpers are definers who tend to write broad definitions that can cover several more minor variations on that meaning; splitters are people who tend to write discrete definitions for each of those minor variations.[171]

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169. *Id.* at 82; *see also* Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993) ("[W]e commonly ignore the fact that someone sat there and wrote the dictionary which is on our desk and we speak as though . . . [the] lexicographer got all the definitions 'right' in some sense that defies analysis."). But for a view that computerized corpora of the kind that appear in the COLLINS COBUILD ADVANCED LEARNER'S DICTIONARY offer advantages over relying on individually gathered citations, see Goldfarb, *supra* note 167, at 1370–78.

170. *In re Estate of Erwin*, 921 N.W.2d at 318.

171. STAMPER, *supra* note 168, at 119; *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 819 (2018) ("There is no agreed-upon formula for sense division—some lexicographers make very fine-grained distinctions between senses (they are sometimes called *splitters*), while others tend to make broader, more coarse-grained distinctions (they are sometimes called *lumpers*).") (citation omitted).

This seems to me a salient point of distinction. Recall the case of *People v. Laidler*.[172] A homeowner shot one of two persons who were breaking into his home. Was the injured coperpetrator a "victim" under the relevant sentencing guidelines?

The majority looked to *Random House Webster's College Dictionary*, which contains three definitions: "(1) a person who suffers from a destructive or injurious action or agency: *war victims*. (2) a person who is deceived or cheated. (3) a living being sacrificed in religious rites."[173] The majority chose definition 1: the coperpetrator did indeed suffer from injurious action and thus was a victim. No matter that he suffered at the hands of the intended victim of the crime.

The minority went to *The American Heritage Dictionary*, which contains five definitions:

> 1. Someone who is put to death or subjected to torture or suffering by another. 2. A living creature slain and offered as a sacrifice to a deity or as part of a religious rite. 3. One who is harmed by or made to suffer from an act, circumstance, agency, or condition: *victims of war*. 4. A person who suffers injury, loss, or death as a result of a voluntary undertaking: *a victim of his own scheming*. 5. A person who is tricked, swindled, or taken advantage of: a dupe.[174]

Now watch. Definitions 2 and 3 in *Random House Webster's* match 5 and 2 in *American Heritage*. But 1 in *Random House Webster's* gets split into three senses in *American Heritage*: 1, 3, and 4. Both 1 and 4 involve human agency, but in 1 the agent is someone other than the person injured—that is, *another* person—whereas in 4 the agent is the person himself or herself who is injured "as a result of a voluntary undertaking." The majority could have relied on 4 (rather than 1 in *Random House Webster's*) to say that the coperpetrator

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172. *See supra* text accompanying notes 29–34.

173. *Victim*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (rev. ed. 1980).

174. *Victim*, AMERICAN HERITAGE DICTIONARY (1981).

was a victim. The minority did in fact rely on 1 in *American Heritage* to add force to its argument that, in the criminal context, this other person must be the person against whom the crime was directed, not the criminal perpetrator. Finally, note that either side could have cited definition 3 in *American Heritage*, although the example, *victims of war*, favors the minority's position.

That dictionaries vary markedly is not news, by the way, although *Laidler* offers a vivid case example. Neal Goldfarb has written about "the problem . . . that dictionaries differ in how they identify and carve up the different senses of a polysemous word."[175] He states that "[s]uch differences should not exist if, as many lawyers and judges seem to believe, the word senses given in dictionaries are abstract entities that have some kind of independent existence"[176]—apart from their linguistic context.

Two simple lessons here. The definer makes a difference. And as we continue to see, you can find what you want in the dictionary superstore.

D. All the Meanings in a Dictionary Are, to Some Extent, Ordinary Meanings

Put aside the variables and constraints involved in constructing definitions:

- As we just saw, lexicographers differ in their approaches: some tend to be lumpers, some splitters. Any dictionary will reflect both of them, and the approach—the definer's style—can offer subtly different choices.
- Lexicographers face any number of practical realities: "what sources do you have access to; how big is the dictionary you're writing; who is the intended audience of the dictionary; how long can you dawdle over a definition before the production editor comes by

175. Goldfarb, *supra* note 167, at 1391.
176. *Id.* at 1392.

your desk in a lather and asks for your work now, now, now?"[177]

- Dictionaries are somewhat outdated even when they're published. "Because of the inevitable time delay between collection of citations and publication of a dictionary, dictionaries must lag behind current use."[178] And the lag is magnified as the years pass between the publication date and the effective date of a statute in question. The eleventh and latest edition of the popular *Merriam-Webster's Collegiate Dictionary* was published in 2003. For a statute passed in, say, 2018, it is 15-plus years out of date. What's more, without further research, we cannot be sure whether a later edition modified an earlier definition or just copied it.[179]
- Paper dictionaries have limited space. "Space constraints affect not only the number of entries, but also the number of definitions for each entry and the length of each definition."[180] Again, all these will vary from one dictionary to the next, but any dictionary "may well exclude meanings that are quite ordinary although less common."[181]

But never mind all that. What about the definitions that *do* appear? Kory Stamper says that to gain entry into a dictionary, a new word must meet three criteria: "widespread, sustained, and meaningful use."[182] The same goes for a new sense of a word: "before you can

177. STAMPER, *supra* note 168, at 101.

178. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 287 (1998).

179. *See* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1615 n.201 (1994) (book review) ("Not only are dictionaries unreliable as evidence of new but accepted usage, but they are also likely to preserve usages that have become archaic without necessarily so indicating."); Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2189 (2003) ("Lexicographers, new and old alike, rely heavily on earlier dictionaries for content.") (citations omitted).

180. Aprill, *supra* note 178, at 295.

181. *Id.* at 297.

182. STAMPER, *supra* note 168, at 101.

know that there's a new sense of a word to be entered, or a new word, you have to read the collected evidence for it [in the written citation files] and determine if that marked use is covered by the existing entry."[183]

In short, any meaning that appears in the dictionary is, in the editors' judgment, in widespread written use and has staying power. The meaning can legitimately be called *ordinary* in various contexts.

Let me add that Scalia and Garner's *Reading Law* acknowledges that "[m]any words have more than one ordinary meaning."[184] But, the authors go on to say, "a thoroughly fluent reader can reliably tell in the vast majority of instances from contextual and idiomatic clues which of several possible senses a word or phrase bears."[185] That may be true in everyday life: the authors give the example of various meanings of *check* and *kite* and say that "no ordinary speaker of the language could even pretend to misunderstand" the meaning of *He checked the kite carefully before flying it*.[186] The authors' proposition is, I think, far less true in appellate cases, which rarely present such obvious choices between meanings.

E. Considerable Uncertainty Attends the Vocabulary that Judges Use When They Turn to Dictionaries—in Particular, the Terms Plain *and* Ordinary *and* Ambiguous

The mantras seem simple enough:

> [W]e give undefined statutory terms their plain and ordinary meanings.[187]

183. *Id.*
184. SCALIA & GARNER, *supra* note 7, at 70.
185. *Id.*
186. *Id.* at 71.
187. Koontz v. Ameritech Servs., Inc., 645 N.W.2d 34, 39 (Mich. 2002).

And:

> None of the listed terms is statutorily defined, so we begin by consulting a dictionary.[188]

And:

> Because the proper role of the judiciary is to interpret and not write the law, courts simply lack the authority to venture beyond the unambiguous text of a statute.[189]

Such seemingly innocuous words: *plain*, *ordinary*, *ambiguous*. But they do raise questions.

First, though, note what's going on here. Many, if not most, contested statutory and contractual terms are not defined.[190] So the starting point is said to be a dictionary. Look for the plain and ordinary meaning. And if there's no ambiguity—the meaning is clear in context—case closed.

The trouble starts with *plain*. Does it mean (1) "ordinary, normal" or (2) "obvious, clear, unambiguous"?[191] Scholars tend to agree that the term is best equated with (2)—and hence with the plain-meaning rule, which forecloses nontextual considerations.[192]

This rule has been criticized as "simplistic," "unprincipled," "impressionistic," and a "substitute[] for

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188. Hillsdale Cnty. Senior Servs. v. City of Hillsdale, 832 N.W.2d 728, 732 (Mich. 2013).

189. *Koontz*, 645 N.W.2d at 39.

190. See the 15 cases analyzed earlier, as well as those in notes 76–83.

191. *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 545 (2017) (noting that "the word 'plain' is (ironically) itself ambiguous"); Cunningham et al., *supra* note 179, at 1563–64 ("[T]he phrase 'plain meaning' itself presents interpretive difficulties"—because it "is sometimes invoked to indicate that the meaning of a provision is 'clear' and 'unambiguous'" but at other times is "about ordinary rather than unambiguous meaning.") (citation omitted).

192. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 33 (2016) ("'Plain meaning' ought to be reserved for a judicial declaration that there is a clear legal meaning for the provision in question . . . ."); SLOCUM, *supra* note 1, at 25 ("[T]he plain meaning rule refers to a lack of ambiguity in the text.") (citation omitted); *see also* SCALIA & GARNER, *supra* note 7, at 436 (describing the plain-meaning rule as "the doctrine that if the text of a statute is unambiguous, it should be applied by its terms without recourse to . . . any . . . matter extraneous to the text").

careful analysis."[193] William Baude and Ryan Doerfler explain in detail why it "makes little sense [to have] a blanket prohibition against considering pertinent non-textual information if statutory language is 'clear.'"[194]

And then there are serious questions about the whole notion of *ambiguity*. How reliable are judgments about whether the meaning is clear, and what does it take to qualify? In a study involving contracts, "both judges and laypeople exhibited . . . an exaggerated sense of how many people agreed with their [interpretations]."[195] In another study, law students were asked to predict whether other readers, ordinary readers, would find a statute ambiguous: 55% said yes, 45% no.[196] But when asked whether they themselves found the statute ambiguous, students with strong policy preferences "tend[ed] to say that the statute is unambiguous, or that only one reading of it is plausible."[197] So they split on how clear it would be to others and were affected by bias on how clear it was to them.

What's more, judges themselves have significantly varying opinions on the degree of clarity required to declare language unambiguous. One former judge on the D.C. Circuit surveyed his colleagues. A few apply something like a 90–10 rule—the interpretation needs to be at least 90% clear, or there's ambiguity; he applies a 65–35 rule; others appear to accept a 55–45 rule.[198]

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193. SLOCUM, *supra* note 1, at 24 (citations omitted).

194. Baude & Doerfler, *supra* note 191, at 547.

195. Lawrence Solan, Terri Rosenblatt & Daniel Osheron, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1270 (2008).

196. Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 272 (2010).

197. *Id.* at 259.

198. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016) (book review); *see also* Matthew J. Hertko, *Statutory Interpretation in Illinois: Abandoning the Plain Meaning Rule for an Extratextual Approach*, 2005 U. ILL. L. REV. 377, 386 ("Jurisdictions adhering to the plain meaning rule have not developed a consistent and inclusive definition of ambiguity, and thus the line-drawing . . . [is] arbitrary and unguided . . . ."); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 794 (2010) ("[T]he determination of ambiguity

Michigan is even more extreme: ambiguity exists only if language is "equally susceptible" of more than one meaning.[199] Of course, that never happens. And even in jurisdictions without Michigan's impossibly narrow test, judges seem reluctant to concede that more than one ordinary meaning is plausible. Perhaps they don't have such a high threshold (90% clarity) after all. Or perhaps they overrate how clear the language is, as studies tend to show.

Giving great weight to a dictionary, as Michigan decisions so often do,[200] implicates all these criticisms: a judge can easily find a definition to support a preformed judgment, think it the doubtlessly clear meaning, and cut short or cut out arguments that are not strictly textual. Although a judge can do all that without turning to dictionaries, plucking out a definition lends a superficial legitimacy to the enterprise, and it sets off a battle of the dictionaries.

F. Even the Idea of Ordinary Meaning Is Unsettled

Let's assume that the ordinary-meaning rule (as opposed to the plain-meaning rule) is widely accepted and valid—as it seems to be.[201] Some commentators are not on board.[202] But for our consideration of dictionaries, we will forgo that debate and note some questions about what *ordinary meaning* means.

Thomas Lee and Stephen Mouritsen observe:

> The case law embraces a startlingly broad range of senses of ordinary meaning. When judges speak of

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by the judiciary is entirely standardless and discretionary. The definitions of ambiguity used by courts are themselves vague, ambiguous, and unhelpful.").

199. Mayor of Lansing v. Mich. Pub. Serv. Comm'n, 680 N.W.2d 840, 847 (Mich. 2004).

200. *See infra* text accompanying notes 222–24.

201. *See, e.g.*, ESKRIDGE, *supra* note 192, at 35 ("There are excellent reasons for the primacy of the ordinary meaning rule."); Solan & Gales, *supra* note 27, at 1316 ("Scholars and judges from across the political spectrum routinely apply the ordinary meaning canon.") (citations omitted).

202. *See* Lee & Mouritsen, *supra* note 171, at 793–94 (briefly summarizing some scholars' objections).

> ordinary meaning, they often seem to be speaking to a question of relative frequency—as in a point on the following continuum: possible → common → most frequent → exclusive.[203]

Plain meaning (in the sense of "obvious" or "clear") would then "be more than most frequent. It would be nearly exclusive."[204] So courts are not always clear or consistent in their understanding of the *ordinary* part of the rule.

The *meaning* part is also troublesome. According to Stefan Gries and Brian Slocum, "courts often erroneously treat definitions as if they set forth necessary and sufficient conditions of category membership."[205] Thus, a broad definition of *vehicle*, such as "a means of carrying or transporting something,"[206] might technically include a shopping cart or a toy wagon. Modern theory looks to how closely a sense or an object resembles a prototypical sense or example.[207] Lee and Mouritsen regard this prototype analysis as "a fifth notion of ordinary" (besides the four points on a continuum) that judges sometimes seem to have in mind.[208] "Under this approach, the ordinary (prototype) sense of *vehicle* would be the one that is most 'vehicle-like' . . . ."[209]

We are left, then, to wonder: does *ordinary meaning* mean "the most frequent in the given linguistic context"? Does it mean "close to a prototype"? And what

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203. *See id.* at 800; *see also* ESKRIDGE, *supra* note 192, at 82 ("[O]rdinary meaning is a *continuum*, and not an on-off switch."); Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 284 & nn.44–45 (2021) (discussing three United States Supreme Court cases in which the justices use a variety of supposed equivalents for *ordinary meaning*, including *normally understood as*, *common . . . meaning*, a use that's *more than occasional*[], *primary* sense, *an accepted meaning*, and the sense *most naturally understood in context*).

204. Lee & Mouritsen, *supra* note 171, at 800.

205. Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1438 (2017).

206. *Vehicle*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003, 24th prtg. 2020).

207. *See* SLOCUM, *supra* note 1, at 224–32.

208. Lee & Mouritsen, *supra* note 171, at 801.

209. *Id.* at 802.

higher standard does *plain* or *clear* or *unambiguous* suggest? Close to exclusive, as Lee and Mouritsen posit? Prototypical?

This all probably sounds abstract and academic, but it would be good if judges occasionally acknowledged these subtleties—instead of just pronouncing that such-and-such is *the* ordinary meaning. Every once in a while, you do see something that could be said to tacitly recognize the variations on *ordinary meaning*. In *LaFountain*,[210] the majority referred to "most ordinary understanding."[211] On the frequency continuum, that's probably equivalent to "most frequent," implicitly relegating the competing meaning to "common" or "possible." In *Laidler*,[212] the dissent argued that in the context of a sentencing statute, the "most applicable, commonly understood definition" of *victim* applies to someone who is harmed by a wrongdoer, not by the target of the crime.[213] Again, we see the language of "most . . . commonly understood," but I'd submit that the author had in mind a prototype victim and found a definition to fit. Finally, the Michigan Supreme Court has not yet wrestled with the difference between *(most) ordinary/common* and *plain/clear/unambiguous*—let alone retreated from its outlier position that ambiguity requires equally plausible, or ordinary, meanings.[214]

As for finding ordinary meaning, judges commonly use at least four methods: (1) native-speaker intuition, (2) dictionaries, (3) linguistic canons of construction, and (4) corpus linguistics. Intuition can be wrong—the product of false-consensus bias—and needs to be carefully and honestly measured against all other considerations. Dictionaries are a free-for-all. (If you are

210. *See supra* text accompanying notes 11–16.

211. *LaFountain*, 844 N.W.2d at 6.

212. *See supra* text accompanying notes 29–34.

213. *Laidler*, 817 N.W.2d at 528 (Cavanagh, J., dissenting).

214. *But see* Griffin v. Swartz Ambulance Serv., 947 N.W.2d 826, 832–34 (Mich. 2020) (Viviano, J., dissenting from denial of leave to appeal) (quoting the Michigan standard for ambiguity, suggesting that the Court should review whether it is "too stringent," and discussing the difficulty of determining the right degree or measure of ambiguity).

not convinced yet, I'll make a last pass in this section, item I.) The many canons of construction have been examined in any number of articles, but in brief, their reliability varies considerably, is open to debate, and is mostly untested;[215] and because they are such an eclectic and sometimes conflicting mix, picking one or the other often leads judges to different conclusions.[216] Finally, corpus linguistics, according to its proponents, offers empirical evidence about the frequency and prototypicality of a term's senses in context.[217] But proponents caution that corpus linguistics cannot help with syntactic questions of what modifies what in a sentence[218] and that even in cases of lexical ambiguity it should be only "something of a last resort," when "we cannot reject one of the parties' definitions based on the structure or context of the statute."[219]

A last, and important, point—one that qualifies all of this section. Lee and Mouritsen emphasize that ordinary meaning should not be equated simply with a term's most frequently used sense:

> [A] complete theory of ordinary meaning requires us to take into account *not only* the comparative frequency of different senses, but also the context of an utterance [including the syntactic, semantic, and pragmatic context in which an utterance oc-

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215. William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 539–40 (2013) (book review) ("[Scalia and Garner, in *Reading Law*] think that almost all the 'valid canons' are ones that anyone having common sense . . . would recognize and follow. Yet they produce not one scintilla of evidence that this is the case . . . . [T]he 'valid canons,' from a legislative point of view, are not the text-based canons lauded by Scalia and Garner, but are instead the canons that Scalia and Garner associate with unacceptable purposive, pragmatic, or dynamic interpretation.").

216. *See id.* at 536 ("In any complex case, there will be several canons on every side of the issue, and the unscrupulous judge will have many cherries to pick under the approach favored by Scalia and Garner. . . . Moreover, even the most scrupulous of judges will be tempted to pick some cherries when the case raises issues of large public moment . . . ."). For cases illustrating this competing-canons point, see *id.* at 545–48; *infra* text accompanying notes 248–55.

217. Goldfarb, *supra* note 167, at 1378–87; Lee & Mouritsen, *supra* note 171, at 836–52.

218. Lee & Mouritsen, *supra* note 171, at 871–72.

219. *Id.* at 872 (citation omitted).

> curs], its historical usage and the speech community in which it was uttered.[220]

The mention of context takes us forward.

G. Dictionaries Are Not a Reliable Indicator of the Ordinary Meaning of Isolated Terms

Textualists will say that they consider context and purpose:

> Of course, words are given meaning by their context, and context includes the purpose of the text. . . . But . . . the purpose must be defined precisely, [through] a clear indication in the text[, and] as concretely as possible . . . . [A] highly generalized purpose is not relevant to genuine textual interpretation.[221]

A few responses come to mind. First, as Scalia and Garner would probably concede, these are fairly vague standards and highly debatable in practice. What does it mean to define purpose precisely and concretely, as opposed to generally or abstractly? Second, how often do texts themselves clearly or expressly set out or even suggest a certain purpose? Third and most important, judges don't usually make these kinds of distinctions. Rather, judges too often fasten on a dictionary definition, pronounce it the clear or ordinary meaning, and support their pronouncement with other arguments.

Several of the cases discussed earlier will go to show that. Take *Drouillard v. American Alternative Insurance Corp.*,[222] in which the question was whether drywall that had fallen from a truck "hit" an ambulance. Analysis started with the mantras:

> Where a term is not defined in the [insurance] policy, it is accorded its commonly understood meaning. In determining what a typical layperson would

220. Lee & Mouritsen, *supra* note 203, at 344 (quoting one of the authors' earlier publications) (emphasis and second brackets in original).

221. SCALIA & GARNER, *supra* note 7, at 56–57.

222. *See supra* text accompanying notes 36–41.

> understand a particular term to mean, it is customary to turn to dictionary definitions.[223]

The Court took a broad dictionary definition of *hit*—"come into contact with"—and concluded that the drywall hit the ambulance. The dissent said that English speakers don't normally speak of stationary objects "hitting" something else. There was some discussion of a second use of *hit* in the policy, but essentially the dispute turned on how the definition applied to the facts.

Besides in *Drouillard*, dictionaries had an outsize influence in *People v. LaFountain*, *People v. Laidler*, *McCormick v. Carrier*, *Petipren v. Jaskowski*, *Robinson v. City of Detroit*, *Griffith ex rel. Griffith*, and *Twichel v. MIC General Insurance Corp.*[224]

The point is that judges often do ground their decisions on dictionary definitions, if not primarily, then heavily. This practice is unreliable.

Consider a detailed study by Professor Kevin Tobia.[225] He conducted a series of experiments to assess how well dictionary definitions and data from corpus linguistics accord with ordinary meaning. The experiments involved thousands of judges, law students, and laypeople.

In one experiment, the author asked 96 judges to decide whether 25 objects, everything from a bus to a canoe to a toy car, fit within the category *vehicle*. The judges were randomly divided into three groups: those applying the "concept" of *vehicle* (their own understanding), those applying a dictionary definition, and those applying corpus data. For many of the examples, "dic-

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223. *Drouillard*, 929 N.W.2d at 777–78 (citations omitted).

224. *See supra* pp. 215–33, items A, C, E, G, H, J, O. For more examples: *Rapp*, 821 N.W.2d at 458–59 (regarding "interrupt" and "disrupt"); *Krohn*, 802 N.W.2d at 290 (regarding "reasonably necessary"); Brackett v. Focus Hope, Inc., 753 N.W.2d 207, 211 (Mich. 2008) (regarding "intentional and willful"); *Liberty Hill Hous. Corp.*, 746 N.W.2d at 289-90 (regarding "occupied"); Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514, 519–20 (Mich. 2007) (regarding "specific" and "authorize"); Cain v. Waste Mgmt., Inc., 697 N.W.2d 130, 135–36 (Mich. 2005) (regarding "loss"); *Mayor of Lansing*, 680 N.W.2d at 844 (regarding "subject to"); *Koontz*, 645 N.W.2d at 41 (regarding "liquidation").

225. Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020).

tionary methods did not consistently reflect [the judges'] ordinary judgments about category membership."[226]

The author replicated this experiment with a large sample of laypeople. He used *vehicle* and nine other terms, such as *carry*, *labor*, *tangible object*, *weapon*, and *clothing*. Again, he asked whether 25 objects fit within the categories. And again, "the verdicts delivered by dictionary use and legal corpus linguistics use often depart dramatically from each other and from the verdict delivered by ordinary judgment of language meaning."[227]

All the data in the article is a challenge to process, but the author's conclusion is striking: using a dictionary (or corpus data) *alone* produces error in an average of 20 to 35% of cases.[228] That's the average difference between the participants' own judgment about categorizing concepts and their judgment given a dictionary definition.

Now, the study has been criticized for not providing an interpretive context or the right kind of interpretive context,[229] as well as for not indicating "how the respondent was to decide on the breadth of the classification of 'vehicle,'" that is, not indicating what sense of *ordinary meaning* to apply (see the previous section).[230] But it is instructive nonetheless to the extent that courts rely on definitions in the abstract or have a loose view of ordinary meaning.

That's one study. Now consider another, by Professor James Macleod.[231] The author put to the test a se-

226. *Id.* at 764.

227. *Id.*

228. *Id.* at 773–76.

229. Neal Goldfarb, Varieties of Ordinary Meaning: Comments on Kevin P. Tobia, "Testing Ordinary Meaning" 10–12 (Nov. 12, 2020) (unpublished manuscript), https://ssrn.com/abstract=3553016 [https://perma.cc/V95X-ZCMJ]; Lee & Mouritsen, *supra* note 203, at 326–28.

230. Lee & Mouritsen, *supra* note 203, at 323–24. For Tobia's response, see Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE (Mar. 5, 2021), https://lawreviewblog.uchicago.edu/2021/03/05/tobia-corpus/ [https://perma.cc/V95X-ZCMJ].

231. James Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019).

ries of United States Supreme Court decisions—including *Gross v. FLB Financial Services*[232] and *Burrage v. United States*[233]—holding that the ordinary meanings of the terms *because of* and *results from* entail but-for causation. Thus, in *Gross*, the plaintiff could not show that he had been dismissed "because of" his age by showing that his age was a motivating factor; it had to be a but-for cause, a necessary cause, of the result. Likewise in *Burrage*: a drug buyer had taken multiple drugs before he died, so experts could not say that his death had "result[ed] from" the heroin he bought from the defendant. The author of this study describes the Court majorities as "[a]rmed with dictionaries, thought experiments, intuition-pumping examples from everyday speech, and common sense."[234]

He surveyed, online, nearly 1,500 jury-eligible participants, giving them short vignettes modeled on *Gross* and *Burrage* (and one other case involving *because of*). The result:

> [M]ost people do *not* interpret common causal phrases to imply but-for causation . . . . In fact, . . . most people *would* say that the drug user's death "resulted from" his use of the drug at issue, even if he still would have died from other drugs without it. And most people *would* say that an employer who fires an employee for multiple reasons, only one of which is unlawful, fired the employee "because of" the unlawful reason . . . .[235]

The author goes on to argue for the value—to litigants, courts, and scholars—of conducting similar controlled experiments to "shed light on further areas of dispute in law and legal theory."[236]

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232. 557 U.S. 167 (2009).

233. 571 U.S. 204 (2014).

234. Macleod, *supra* note 231, at 958.

235. *Id.* at 962.

236. *Id.* at 1012; *see also* Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 462–63 (2021) (discussing with general approval the use of empirical surveys). For an even more recent empirical study by Professor Macleod involving the "because of sex" issue in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—and concluding that the justices used

There are many more dictionary-driven cases that scholars, using one method or another, have denounced as wrongly decided. One of the most notorious is *Muscarello v. United States*,[237] in which the majority concluded that driving to the site of a drug deal with a gun locked in the glove compartment constituted "carrying" a firearm. Using a corpus-based analysis, Neal Goldfarb concluded that "the pattern [*human*] *carry* [*object*] is seldom used to refer to events in which the object is carried in a vehicle . . . ."[238] Another well-known target of criticism is *Smith v. United States*.[239] The majority, interpreting the phrase *uses or carries a firearm*, decided that the defendant had "used" a firearm when he traded it for drugs. But Craig Hoffman analyzed similar syntactic patterns in what he called the "Linguistic Method"—and concluded that "one 'uses a firearm' within the meaning of the full phrase 'uses or carries a firearm' when he uses it as a weapon."[240]

H. Textualists Have a Constricted View of "Context" in Trying to Discern Meaning

As noted in the previous section, textualists purport to consider context and purpose. But their view of context is limited to the purely verbal, or linguistic, context.

In *Reading Law*, the authors list a number of "contextual canons."[241] These all have to do with the rela-

different conceptions of "ordinary meaning"—see James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1 (2021).

237. 524 U.S. 125 (1998).

238. Goldfarb, *supra* note 167, at 1407; *see also* Stephen Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1951–66 (also concluding that the majority was incorrect, using a somewhat different corpus analysis).

239. 508 U.S. 223 (1993).

240. Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to Dictionaries When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 437 (2003).

241. SCALIA & GARNER, *supra* note 7, at 167–239.

tionship of the textual pieces of a statute or related statutes:

> Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts.[242]

These contextual canons include the "whole-text canon," the "presumption of consistent usage," the "surplusage canon," and the "harmonious-reading canon"—all of them confined to the interplay of words.[243]

And the contextual canons follow two other groups that are purely linguistic—the "semantic canons" and the "syntactic canons."[244]

The trouble is that a full understanding of meaning is broader. In another of his articles on corpus linguistics, Stephen Mouritsen has a section on "Semantic, Syntactic, and Pragmatic Context." He says:

> Context can encompass both verbal and non-verbal aspects of communication. . . . [A]n evidence-based approach to meaning should look for ways to incorporate information about pragmatic context—which may include the physical or social setting of an utterance or other information that is not encoded in the words themselves.[245]

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242. *Id.* at 167.

243. *Id.* at 167–82.

244. *Id.* at 69–166.

245. Stephen C. Mouritsen, *Contract Interpretation with Corpus Linguistics*, 94 WASH. L. REV. 1337, 1354, 1357–58 (2019) (citing, for the first quoted sentence, Alessandro Duranti & Charles Goodwin, *Rethinking Context: An Introduction*, *in* RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON 6–9 (Alessandro Duranti & Charles Goodwin eds., 1992)); *see also* Sonpal, *supra* note 179, at 2201 ("The meaning of a word can vary depending on the immediate linguistic context and the larger, social context."); Lee & Mouritsen, *supra* note 171, at 816 ("Real human beings do not derive meaning from dictionary definitions and rules of grammar alone. Everyone takes nonsemantic context—pragmatics—into account in deriving meaning from language.") (citations omitted); Macleod, *supra* note 236, at 72–78 (discussing various kinds of extratextual information that ordinary readers treat as relevant to interpretive tasks).

Below, I offer examples that demonstrate the value of extratextual analysis, three from the United States Supreme Court and three from the Michigan Supreme Court. I have used the first three before.

In *Barnhart v. Thomas*,[246] Justice Scalia used the hypothetical below to illustrate the so-called doctrine (or canon) of the last antecedent:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged.[247]

Surely Justice Scalia was right. But ask yourself how you arrive at that conclusion: because the trailing modifier *that damages the house* modifies only the last (the immediately preceding) item, or because you know that no parent wants their son to throw a party while they're gone?

In *United States v. Hayes*,[248] the Court was faced with a drafting muddle involving syntactic ambiguity over what a statutory phrase modified. The case is too complicated to briefly summarize here, but the majority invoked four canons and the minority three. The majority also invoked what those justices said was the statute's "manifest purpose":[249] to ban possession of firearms by persons convicted of domestic abuse under a state statute.

Intrigued by *Hayes*, I conducted a small, informal survey of legal readers, experienced professors who teach legal research, writing, and analysis. I asked them to name the majority's strongest and second-

246. 540 U.S. 20 (2003). For an extended discussion of the last-antecedent canon, see Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart*, Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5, 5–28 (2014–2015).

247. *Barnhart*, 540 U.S. at 27.

248. 555 U.S. 415 (2009).

249. *Id.* at 427.

strongest argument, from among four that were purely textual and two that were nontextual—including Congress's "manifest purpose." Under a simple point system (2 points for strongest, 1 for second strongest), the "manifest purpose" argument received twice as many points as any of the textual arguments. In fact, it received as many points as all of them put together.[250]

In *Yates v. United States*,[251] a fishing-boat operator had caught undersized fish in violation of a federal regulation and ordered a crew member to throw the catch overboard. The issue was whether doing so violated a statute against destroying or concealing "any record, document, or tangible object with the intent to impede" a federal investigation.[252] Justice Kagan, dissenting, argued ordinary meaning (among other things): a fish certainly meets a dictionary definition of *tangible object*.[253] But the majority argued, along with other textual points, the *ejusdem generis* canon: a fish is not like a record or a document.[254] The majority also emphasized that "[t]he Sarbanes–Oxley Act [which the statute was part of], all agree, was prompted by . . . revelations that [Enron's] outside auditor . . . had systematically destroyed potentially incriminating documents."[255] Obviously, destroying illegal fish was not an act of financial fraud.

Now, the statute's inclusion within the Sarbanes–Oxley Act implicates the whole-text canon; it is not extratextual. But the dissent consulted legislative history, observing that the statute "began its life in a separate bill," was enacted "to close [a] yawning gap" in current

250. *See* Joseph Kimble, *The Value of Intuition in Judging: A Case Study*, 57 CT. REV. 34, 35 (2021).

251. 574 U.S. 528 (2015).

252. *Id.*

253. *Id.* at 553–54 (Kagan, J., dissenting).

254. *Id.* at 529. For a discussion of the canon (and *Yates*), see generally Joseph Kimble, *Ejusdem Generis: What Is It Good For?*, 100 JUDICATURE 48 (2016).

255. *Yates*, 574 U.S. at 535–36.

law, and thus should be read broadly.[256] Justice Scalia joined the dissent, three years after writing that "the use of legislative history to find 'purpose' in a statute is a legal fiction that provides great potential for manipulation and distortion."[257]

Of course, a justice cannot write separately to disclaim some piece of every opinion they join. And nobody follows their own prescriptions all the time. But textualists might be surprised by how often they don't.

Recent scholarship makes that point. From an extensive study of United States Supreme Court opinions, Anita Krishnakumer concludes that textualist judges "have been using pragmatic reasoning, as well as traditional textual canons, . . . to impute a specific intent or policy goal to Congress"; that they invoked practical consequences "entirely external to the statutory text" in over 30% of the opinions they wrote; and that they sometimes relied on "their own personal views about a statute's sensibility or their own judgment calls about what a statutory provision is designed to achieve."[258]

Now a glimpse back at three Michigan cases.

- *People v. Harris*.[259] Common sense tells us that "information" in an immunity statute doesn't include deliberately untrue information.
- *Drouillard v. American Alternative Insurance Corp*.[260] Our experience as native English speakers tells us that we do not normally say that a stationary object "hit" a moving object.

256. *Id.* at 557 (Kagan, J., dissenting) (citing S. REP. NO. 107-146, at 2, 11 (2002)).

257. SCALIA & GARNER, *supra* note 7, at 376.

258. Anita S. Krishnakumer, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1276, 1320, 1329 (2020); *cf.* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 534–35, 558 (1992) ("[T]he need to understand context and purpose is inherent in language itself . . . . In this sense, reliance on practical reason is not so much desirable as necessary. . . . [I]n hard cases—by definition—the ability of rules to dictate results straightforwardly has been exhausted . . . .").

259. *See supra* text accompanying notes 18–27.

260. *See supra* text accompanying notes 36–43.

- *People v. Rea.*[261] The "manifest purpose" (to use those words again) of a drunk-driving statute is to prevent harm caused on roadways, not while backing up in one's own driveway.

Textualists blinker themselves. They put out of bounds, or claim to, extratextual considerations that form part of the pragmatic context for deciding on meaning: legislative history,[262] common sense, reasoned intuition, practical consequences. All of these can be manipulated. So can textualism.[263]

I. Most Scholarly Commentary Is Scathing

What follows is just a sampling. Obviously, the quotations cannot do justice to the authors' full research and analysis.

- "[J]ust as medical science has progressed since the days of leech treatments, the science of linguistics has progressed since the time that scholars believed that dictionaries held the key to sentence meaning. Dictionaries simply are not capable of explaining complex linguistic phenomena, but they are seductive. . . . [R]ather than relying reflexively on dictionaries, judges (and all lawyers) should be encouraged to rely on their linguistic intuitions and to employ Linguistic Method [parsing the sentence to explore the syntactic relationships among its constituents] when faced with indeterminate texts."[264]

261. *See supra* text accompanying notes 104–16.

262. For a summary of reasons to consider legislative history, see Kimble, *supra* note 246, at 38–40.

263. *See id.* at 30–35 (summarizing six empirical studies showing a strong ideological tilt in Justice Scalia's opinions); Kimble, *supra* note 3, at 348–52, 378–94 (surveying and coding 81(!) overrulings in 15 years, 96% of which were ideologically conservative).

264. Hoffman, *supra* note 240, at 401–02.

- "[T]extualists are selective and inconsistent in when and how they use dictionary definitions. . . . [R]esort to legislative history can constrain judicial discretion[,] and . . . plain meaning, rather than constraining judicial interpretation, permits judges to freely decree the meaning of statutory language. . . . [Dictionaries'] purpose of giving readers and speakers approximate meanings of words so that they begin to understand the meaning of the word in context makes dictionaries ill-suited for determining the meaning of a particular word in a particular statute."[265]
- "Without a consistent method, a judge has almost unbridled discretion in deciding which dictionary and which definition to rely on. . . . Yet new textualists rely on a 'solid textual anchor' to restrict a judge's discretion in interpreting a statute. The unrestricted discretion and subjective decisions involved in choosing a dictionary and definition are contrary to the methods and goals of the new textualism."[266]
- "If [a] meaning appears in the dictionary, then it may be presumed that the meaning is, at the very least, a possible interpretation of a given word. At this point, the utility of the dictionary is at an end; parties with equally plausible meanings must look elsewhere to determine which contested meaning should control. . . . In contrast to this modest role . . . , judges have increasingly sought to employ dictionaries for persuasive ends."[267]
- "By turning to the dictionary, judges either blunt their linguistic intuitions about correct usage or mask their biases through formalist semantics, primarily because they already *know* the meaning or meanings of

265. Aprill, *supra* note 178, at 281, 331, 334 (citation omitted).
266. Sonpal, *supra* note 179, at 2200–01 (citations omitted).
267. Mouritsen, *supra* note 238, at 1923, 1924.

the words they look up. . . . [I]f judges combined the idea of intuitive word understandings and the well-understood process of legal reasoning through analogy, there would be a system acceptable to the legal community and more true to linguistics."[268]

- "[C]iting to dictionaries creates a sort of optical illusion, conveying the existence of certainty—or 'plainness'—when appearance may be all there is. . . . Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back."[269]
- "Another fiction indulged in by the textualist is that Congress writes and votes on statutes with a dictionary at its side. . . . [T]extualism seems to include the unarticulated assumption that Congress *intends* that its words will be analyzed according to their strict dictionary definitions. The textualist may be doing exactly what he accuses the intentionalist of doing: attributing to the legislature as a whole a particular intent or goal."[270]
- "At times, the use of dictionaries by the [United States Supreme] Court to shore up or rationalize holdings begins to border on the bizarre. During the period of this study [1989 through 1998], dictionary definitions have been provided for 'any,' 'attorney,' 'carry,' 'coal,' 'have,' 'medical,' 'nurse,' 'or,' and

268. Jacob Weinstein, Note, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649, 651, 674 (2005).

269. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 72 (1994).

270. Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320–21 (1990) (citation omitted).

'try.' (For the record, there were no definitions of the word 'is.')"[271]

- "The same arguments about manipulability and arbitrariness that textualists use to attack the examination of legislative history can . . . be applied to dictionaries. . . . Subjectivity may be an ineradicable component of the interpretive process; the point is that the use of dictionaries cannot eliminate this element, and may even exacerbate it. . . . [D]ictionaries can mask fundamental arbitrariness with the appearance of rationality and make the subjectivity of judicial decisions even more difficult to confront."[272]
- The conclusions from perhaps the most exhaustive and cited study: the United States Supreme Court's use of dictionaries is "strikingly ad hoc and subjective"; the justices tend "to cherry-pick definitions that support results reached on other grounds"; "the image of dictionary usage as . . . authoritative is little more than a mirage"; "dictionaries add at most modest value to the interpretive enterprise"; and "the Court has failed to engage with interested legal audiences who have expressed skepticism regarding [its] dictionary practices."[273]

The same goes for the Supreme Court of Michigan—emphatically.

I have argued for what I call "universalism" in judging.[274] Why should any analytical point be off the table? Why shouldn't advocates be able to argue legislative history, expressed or apparent purpose, all forms of context (verbal and nonverbal), corpus linguistics, prac-

271. John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 L. LIBR. J. 427, 433 (2002) (citations omitted).

272. Harv. L. Rev., Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1446 (1994) (citations omitted).

273. Brudney & Baum, *supra* note 8, at 483, 491, 492, 493, 578.

274. *See* Joseph Kimble, Nielsen v. Preap*, The Futility of Strict Textualism, and the Case for Universalism in Judging*, 20 SCRIBES J. LEGAL WRITING 51 (2021–2022).

tical consequences, and reasoned intuition? Why can't we ask judges to honestly weigh the value of each one?

The point of this article has been to add force to calls for the demotion of dictionaries as a textualist tool. They are greatly overrated and overemphasized. Rarely, if ever, should they be an opinion's primary source of argument. It's time for courts' obsession with them to end.